



I Hear That Train A'comin': Municipal Legal Issues Involving Railroads

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**I Hear that Train a Comin':
The Local Regulation of Interstate Railroads**

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I hear the train a comin'
It's rolling round the bend
And I ain't seen the sunshine since I don't know when
I'm stuck in Folsom prison, and time keeps draggin' on
But that train keeps a rollin' on down to San Antone

--Johnny Cash

Folsom Prison Blues

Well I hear my train a comin'
Hear my train a comin'
Well, I wait around the train station
Waitin' for that train
Waitin' for the train, yeah
Take me home, yeah
From this lonesome place

--Jimi Hendrix

I Hear My Train A Comin'

I. PREFACE

The intent of this paper is to demystify some of the unique issues that municipal attorneys encounter in trying to interface with the railroad industry and explain 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. Adding to this, of course, is the very fascinating history of the railroad, particularly in light of its dominant influence in the political, historical, and legal 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, railroads quickly overtook water-borne cargo vessels as a means of transportation and communication, only to be largely replaced, in the mid-20th century, by trucks and highways. Railroads have passed through a number of boom and bust cycles, depending upon the varying needs of the economy to move goods to the interior of the country. The development of domestic coal and oil resources in the last few decades have resulted in increased freight traffic, as well as sparked controversy related to safety concerns and global warming. This exacerbated the sometimes tenuous relationship that freight railroads have with the localities through which they pass, due to concerns regarding rail accidents and the potential release of toxic materials, not to mention opposition to the use of fossil fuels. At the same time, concerns with traffic congestion and global warming have sparked renewed interest in passenger rail service, particularly 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 early railroad development, seeking the significant economic benefits that railroad service would bring. In many instances, this led many different levels of government to undertake what, from the current perspective, appear to be improper roles in financing private enterprise. Railroads were given large tracts of land (in the West, these were often in a checkerboard pattern of alternate sections) and even provided with outright financial subsidies to construct new lines. And, as some of those investments turned

sour, laws were changed to improve the government's ability to recover its investment in such undertakings.¹

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, certainly with 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 serving in positions of leadership. This influence eventually led to the institution of progressive political mechanisms, 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), (Pub. L. No. 49-104, 24 Stat. 379) 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 rate transparency and 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 purposes.

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, (Pub. L. No. 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 the railroad industry. 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 structure is particularly relevant to the ability of local governments to control rail properties.

¹ See Railroads & American Law, James W. Ely, Jr., University Press of Kansas (2001), pp. 43-58.

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 were 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 a now independent administrative agency, the Surface Transportation Board.³ 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, conclusively preempting many areas in which state and local governments might attempt to exercise control over railroads. Thus, while the federal government has reduced its control of railroad operations, it has also made 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, 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 (Pub. L. No. 94–210, 90 Stat. 31), followed by the Staggers Rail Act in 1980 (Pub. L. No. 96–448, 94 Stat. 1895) (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, but it also exercises oversight of railroad extensions and abandonments. In many matters involving preemption issues, the STB issues “declaratory orders” to resolve disputes and clarify the extent of its regulatory powers.

b. Federal Railroad Administration

The Federal Railroad Administration (FRA) was created by the Department of Transportation Act of 1966 (Pub. L. No. 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 state public utilities commissions, the FRA attempts to ensure that the national railroad system is operated in a safe and efficient manner. Acting pursuant to a Congressional mandate, it has adopted a Final Rule, discussed in more detail below, which allows localities to ban the sounding of train horns within “quiet zones.”

³ The STB was initially part of the Department of Transportation.

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. In recent years, there has been some tension between the CPUC and FRA as the CPUC has sought to exert more control over safety issues, which has sometimes raised issues regarding preemption.

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.

2. Interstate Commerce Commission Termination Act

Although it ended the reign of the ICC over the rail industry, ICCTA also established, at 49 USC §10501, a very clear standard regarding the jurisdiction of the ICC’s successor agency, the STB:

(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.

The extent of this regulatory scope is at center of almost all issues regarding the preemption of local control over interstate railroads.

3. Federal Railroad Safety Act

A similarly broad scope of control is contained in the Federal Railroad Safety Act (49 USC §20101 et seq.):

§20106-

(a) National Uniformity of Regulation—

(1) 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.

(2) 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 –

(A) is necessary to eliminate or reduce an essentially local hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

The STB and the courts have protected the plenary nature of the federal scheme of rail safety regulations in order to promote uniformity and ensure an efficiently-operating railroad system.

4. Concurrent Jurisdiction of the STB and Federal Courts

The STB and the Courts have concurrent jurisdiction over interstate rail matters. 14500 Limited LLC, STB Finance Docket No. 35788, (served June 5, 2014)⁴; 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, the STB will generally decline to exercise jurisdiction over a matter that is already pending in a federal court, although it will provide advisory opinions if requested by a court. Maumee & W. R.R. Corp., STB Finance Docket No. 34354, (served Mar. 3, 2004).

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

⁴ References to decisions of the Surface Transportation Board can be found through the STB's website, and can be searched by putting the type of matter (usually FD for "Finance Docket") and the number of the proceeding in the appropriate place in the search function. The search function on the STB website can be accessed here: <https://prod.stb.gov/search-stb-records/>

... 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.]

During its existence, the STB has assiduously sought to preserve its control over the railroad industry in order to promote uniformity in the regulation of railroads.

D. The Types of Federal Pre-emption

While the "pervasive and comprehensive" scheme of federal control pre-empts many aspects of potential local regulation, its application is not always automatic. The STB views pre-emption claims as being either "categorical" (where conflicting regulations are *per se* preempted) or "as applied" (where the determination of pre-emption depends upon a fact-specific analysis). An example of a categorical preemption would occur if a state or local government sought to control the rates of a railroad, or to determine whether or not it could operate. An "as applied" analysis would be needed if the regulation was claimed to unreasonably burden a railroad.

Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, or abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Thus, state and local permitting or preclearance requirements, including building permits and zoning ordinances are categorically preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations. *Id.* at 1031; CSX Transp., Inc.—Pet. for Declaratory Order, STB Finance Docket 34662, slip op. at 8-10 (served Mar. 14, 2005), pet. for recon. denied (served May 3, 2005).

Even where categorical preemption does not apply, state and local actions may be preempted "as applied"—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc). The Board analyzes the facts and circumstances of the case to determine whether the action is preempted as applied. E. Ala. Ry.—Pet. for Declaratory Order, STB Finance Docket 35583, slip op. at 4 (served Mar. 9, 2012).

(Thomas Tubbs, et al. – Petition for Declaratory Order, STB Finance Docket 35792, served 10/31/2014.)

E. The Parties that Can Claim Pre-emption

While carriers who operate railroads in interstate commerce are clearly included among the parties who may assert pre-emption, questions often arise with regard to related parties, such as affiliated companies, customers, and others who seek to take advantage of the protection from local control that pre-emption can provide. To qualify for pre-emption protection, the activity must constitute transportation by rail, by or on behalf

of, an STB carrier. Tri-State Brick and Stone Petition for Declaratory Order, STB Finance Docket 34824 (served Dec. 11, 2007). Parties that cannot claim pre-emption include mere tenants of a railroad (Florida East Coast Ry. v. City of Palm Beach, 110 F. Supp.2d 1367 (S.D. Fla. 2000)), customers of a railroad (Valero Refining Company – Petition for Declaratory Order, STB Finance Docket 36036 (served Sept. 20, 2016); SEA-3, Inc.-Petition for Declaratory Order, STB Finance Docket 35853 (served March 17, 2015); Hi-Tech Transportation v. NJ, 382 F.3d 295 (3d Cir. 2004)), and landowners crossed by a rail line (JGB Properties, LLC-Petition for Declaratory Order, STB Finance Docket 35817 (served May 22, 2015)).

Particular issues have arisen with trans-loading facilities, which transfer cargo between different modes of transportation. These activities, particularly when they involve toxics or other undesirable materials, are often not welcomed by local jurisdictions. The STB has held that when trans-loading is performed by the railroad or by an agent of the railroad, regulation is preempted. The City of Alexandria, Virginia-Petition for Declaratory Order, STB Finance Docket 35157 (served Feb. 17, 2009); Grafton & Upton Railroad Company – Petition for Declaratory Order, STB Finance Docket 35752 (served Sept. 17, 2014). But when the trans-loader was totally independent of the railroad, its activities could be regulated. (Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Finance Docket 35057 (served Feb. 1, 2008); Hi-Tech Transportation v. NJ, 382 F.3d 295 (3d Cir. 2004).)

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.” (Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co. (1981) 450 U.S. 311, 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.⁵ (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 be evidence of an intent to abandon an

⁵ An informal process is sometimes employed to effect a temporary cessation of rail traffic. If, for example, a bridge is damaged and service cannot operate, a railroad will “embargo” the line until the bridge can be repaired. During the period of the embargo, it is relieved of the obligation to move freight at the request of shippers.

easement interest, under California law normally more is required to effect a legal abandonment of the easement interest. (See Cal. Civil Code Section 887.050.)

When a railroad is seeking to abandon a line, it must file a proceeding with the STB and a thorough environmental and historical review is conducted 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 overseen by STB staff, pursuant to regulations published at 49 CFR Part 1105. One 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 (served 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). Following the ruling in *Preseault*, the courts have found that the federal government, by preempting state easement abandonment law in allowing trail use to occur following removal of the tracks, may thereby cause a taking, for which compensation can be sought from the federal government in the U.S. Court of Claims. There have also been cases filed claiming that trail use of active rights-of-way held in easement may exceed the scope of those easement rights and seeking compensation from the railroad owner. (See *Hernandez et al. v Sonoma-Marin Area Rail Transit District*, U.S. District Court, Northern District of California Case No. 21-cv-01782-DMR, filed March 15, 2021)

2. Jurisdiction over Spurs/Sidetracks

One area of concern for local agencies is the control of spurs and sidetracks. These fall into a regulatory “no man’s land,” 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. Thus, railroads have substantial leeway in how they use the lines, but are nevertheless protected from local interference.

IV. LOCAL REGULATION OF RAILROAD OPERATIONS

Given the “pervasive and comprehensive” nature of federal regulation, 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.) The court noted that “[G]iven the broad language of 10501(b)(2), (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between ‘economic’ and ‘environmental’ regulation begins to blur. For if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” (Id.) 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 often convince judges to refer the matter to the STB due to the court’s lack of familiarity with the subject matter. (For example, see City of Encinitas v. N. San Diego County Transit Dev. Bd., 2002 U.S. Dist. LEXIS 28531, p. 1)

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 (such as those of agencies protected by intergovernmental immunity), a city would normally have legal authority to regulate the land use, environmental and building matters through its police power. However, that power does not extend to the approval of the construction of interstate 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), a decision 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). This authority extends to the construction of “improvements” and “ancillary” facilities that, under §10906, do not require formal STB approval, but nonetheless are an integral part of the railroad’s interstate operations. (See Grafton &

Upton Railroad—Petition for Declaratory Order, STB Finance Docket 35779 (served Jan. 27, 2014).

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 “[c]ourt 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:

[S]tate 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 railroad⁶, the Board noted the potential application of federal environmental regulations:

⁶ “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

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.

Some more recent decisions have confirmed the difference in the preemption analysis between uniform environmental protections and measures that either specifically target railroads or would interfere with their "constructing, acquiring, operating, abandoning, or discontinuing a line." In Humboldt Baykeeper etc. v. Union Pacific Railroad Company (2010 LEXIS 52182) the application of the Clean Water Act was upheld against operating railroads, while in American Association of Railroads v. South Coast Air Quality Management District (62 F.3d 1094, (2010)) the Ninth Circuit Court of Appeals voided a local air pollution regulatory district's rule that was specifically directed at the idling of railroad locomotives.

Another case exploring the nature of permissible local regulation was 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. A further example is the Ridgefield Park case, in which the New Jersey Supreme Court found that

Woodbridge, NJ et al. v. Consolidated Rail Corporation, Inc., STB Finance Docket No. 42053 (STB served Dec. 1, 2000), at 5 (Woodbridge)."

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. (Ridgefield Park [Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000).) The court specifically noted that the railroad was exempt from all local zoning controls. (750 A.2d at 57.) 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).

Significantly, local government cannot regulate decisions regarding the closure of stations or the routing of trains containing hazardous materials, even near the U.S. Capitol. CSX Transportation, Inc.—Petition for a Declaratory Order, STB Finance Docket 34662 (served March 14, 2005). Nor can they regulation how long trains can block street crossings. (See People v Burlington Northern Santa Fe Railroad 209 Cal.App.4th 1513 (2012); State v. Norfolk Southern 107 N.E.3d 468 (Ind. 2018).)

B. State and Local Environmental Review of Railroad Projects

Recently, legal disputes have arisen regarding the application of state laws that require the review of the environmental impacts of project. As might be expected, a number of these have involved the California Environmental Quality Act (CEQA). The holding in Auburn and related cases have made it clear that the attempted regulation of railroads through the environmental process is pre-empted. A case specifically dealing with CEQA and the review of a private rail project arose in Desertxpress Enterprises, LLC—Petition for Declaratory Order (STB Finance Docket 34914, served on June 27, 2007), in which the STB held that, with regard to a project that proposed to construct a high speed rail line between Victorville, CA and Las Vegas, NV, "state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted."

Interesting issues have arisen with regard to rail projects in California being undertaken by governmental entities. The project undertaken by the California High-Speed Rail Authority (CAHSRA) was the subject of a series of CEQA challenges brought by a coalition of groups, including the Town of Atherton as lead party. For the first time on appeal in one of those cases, CAHSRA raised the claim that federal law preempts citizen suits to enforce CEQA, citing an STB ruling it had sought (California High-Speed Rail Authority—Construction Exemption—in Merced, Madera and Fresno Counties, CAL FD 35724 (served April 18, 2013)). However, the court ruled that, rather than regulating a railroad, the state in this instance was acting as a "market participant," and not as a regulator, in controlling its subsidiary agency by requiring CEQA compliance. (Town of Atherton v. CAHSA (2014) 228 Cal.App.4th 314, 334-343. ("Atherton"))

The issue was later raised in a case involving the North Coast Railroad Authority, an agency formed to operate a freight line running from the Bay Area to the coast of Northern California. (Friends of the Eel River v. NCRA (2017) 3 Cal.5th 677.) Environmental groups, concerned about potential impacts to a 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 chose to rescind 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 the case for review.

Noting that NCRA had agreed to comply with CEQA as part of grant conditions for earlier projects, the court found no preemption to exist on the basis that state court rulings with

regard to a subsidiary state agency were not regulation but 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.” The court also stated that an injunctive CEQA action to stop the private firm from operating on the line would be preempted. That private firm unsuccessfully sought SCOTUS review of the decision, claiming its operations were impaired without the improvements.

C. 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.)

D. Condemnation of Railroad Property

Since railroads often create long barriers through cities, there is often a need for municipal facilities to cross the rail lines, either for streets or for utilities. In some cases, the existing right-of-way, particularly of an under-used line, presents an attractive opportunity to acquire right-of-way for public projects. However, many localities seeking to acquire rail

properties have run into the issue of preemption when a voluntary arrangement could not be reached with the railroad owning the line. For purpose of analysis, it is useful to separate such requests as being either "longitudinal" or "transverse" in nature. As they involve much less of an impact on rail operations and the future use of a line, transverse crossings are typically much easier to negotiate and, when necessary, condemn rights to construct. Longitudinal takes, in contrast, can raise significant issues regarding the present operation and future ability to expand a rail line. In one case, the STB provided a useful statement of this concept:

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 (served March 3, 2004)).

Examples of successful actions can also be found in Eastern Alabama Railway, LLC-Petition for Declaratory Order, FD 35583 (served Feb. 22, 2012) There are many examples of unsuccessful actions. 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); Norfolk Southern Railway Company Petition for A Declaratory Order, FD 35196 (served March 1, 2010).)

It should be noted, however, that courts have 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.

Actions seeking to condemn railroad properties are often either removed to federal court by the railroad or become the subject of a petition to the STB for a declaratory order. In some extreme cases, actions are sometimes filed with the STB seeking an "adverse abandonment" which would have the effect of closing the line against the wishes of the owner. One example occurred when the Napa River Flood Control District was unable to come to terms with the Napa Valley Wine Train regarding some property needed for the construction of flood control facilities. An action was filed with the STB seeking an adverse abandonment of the needed property and a settlement was soon reached for the voluntary acquisition of the needed land, resulting in the dismissal of the STB proceeding. (Napa Valley Wine Train—Adverse Abandonment—in Napa Valley, CA AB-582)

E. Franchises

Many railroads obtain franchises from local governments in order to cross or operate within public streets. In past times, long segments of urban streets were made available to railroads for the laying of tracks, often pursuant to such franchise agreements. However, cities have encountered significant obstacles when they have sought to enforce the terms of those agreements when the result would be the cessation of service on the line. An STB ruling involving a UP line in Salt Lake City, UT, provided that body's general views of how conflicts regarding franchises 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. 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 (CPUC or Commission) pursuant to Section 1201 et seq. of the Public Utilities Code: "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." Permission to construct a highway/rail crossing is obtained from the Commission by means of an application. Applications for crossings are governed by Rule 3.7 of the Commission's Rules of Practice and Procedure, which are available at this link:

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M209/K618/209618807.PDF> While the rules are not complicated, an application should be prepared in strict compliance with rule, and with input from the rail safety engineer that the Commission assigns to each County. For a map showing the various county assignments, see this link:

<https://www.cpuc.ca.gov/General.aspx?id=2180> . The support of the Commission's safety staff is a critical part of a successful application.

B. Grade Crossings and Grade Separations

When a roadway needs to cross a railroad, the options are either for it to go over, under, or across the line. The first two options are called "grade separations." At times, these involve the initial construction of a roadway so that it does not conflict with the rail line, although many times a grade separation is undertaken to expand a road, or where known safety issues arise, particularly due to increased traffic or to unique features of the crossing, such as oblique angles or unusual grades. However, particularly in rural areas, many crossings are at grade and present potential safety risks, particularly if trains or vehicle traffic operates at high speeds. For this reason, the Commission has a standard policy of discouraging or rejecting applications that would create new grade crossings. In some cases, an applicant can propose the closure of a current crossings in exchange for the approval of a new one.

When a City undertakes a grade-separation project, it usually requires the city to enter into a series of agreements with the host railroad. In addition to any property rights required, a typical "Construction and Maintenance Agreement" with the railroad will contain a host of terms regarding engineering design review, working procedures, and indemnity and insurance terms that can be quite daunting. I have attached at the end of this paper an example of Union Pacific's standard terms for a pedestrian bridge project. Railroad are not typically open to revising their standard forms and obtaining the attention of railroad staff and counsel can be challenging, as the railroad simply has more important concerns than the success of a particular municipal project. Without a viable threat of condemnation, cities are well-advised to be both persistent and patient when dealing with railroads.

C. Crossings are a Safety Issue

The primary public concern at railroad grade 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.

D. 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 for some distance before the crossing, in order 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.

E. Establishment of Quiet Zones

In 1994, Congress enacted Public Law 103-440 (108 Stat. 4615) which added section 20153 to title 49 of the United States Code and 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. The Final Rule was amended on August 17, 2006 and is codified at Title 49, Code of Federal Regulations, Part 222.

1. Supplemental Safety Measures and the Quiet Zone Risk Index

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. Although the cooperation of the railroad is essential for some of these measures that require interconnection with the railroad's signal systems, others, such as roadway medians or street closures, are often within the control of the local jurisdiction. In most cases, however, the locality seeking to establish the quiet zone pays for the installation of these improvements. All warning signals at such crossings are also required to have certain other features, such as constant warning time devices (where feasible) 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 unilateral action of the locality. Additionally, 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.

2. Alternate Safety Measures

In those instances in which it is not feasible to utilize SSM's, the quiet zone 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 the presence of these alternative measures, when applied to a crossing with particular traffic patterns, as well as the absence of train horns, creates a crossing that is as safe as it would have been if the crossing had not been modified and horn sounding was required. A very complicated formula is used in these situations to make that determination. This process does require the approval of the FRA and allows the affected rail carriers to participate in such a proceeding. Even if the necessary 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.

F. Legal Issues Relating to Quiet Zones

The federal rule is silent with regard to any process for force railroads to comply with requests of localities to construct any physical improvements needed 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 by refusing to make required modifications to their facilities, should such changes be necessary. This might include an unwillingness to install four-quadrant gates, for example. Moreover, the rule makers 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.

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 train horns, 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 stated only that the mere failure to sound the horn would not be the basis for a finding of liability. By so doing, the FRA essentially dismissed the concerns of both localities and the railroad industry, remarking:

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.

The author has yet to discern any trends in the willingness of freight railroads to cooperate with the establishment of quiet zones. A municipality considering establishing a quiet zone may want to consult with other cities served by the same railroad to learn of their experience in working with the particular railroad.

Example of Union Pacific Crossing Agreement Exhibits

EXHIBIT B

To Pedestrian Bridge Crossing Agreement

Cover Sheet for the
General Terms and Conditions

EXHIBIT B

TO PEDESTRIAN BRIDGE CROSSING AGREEMENT

GENERAL TERMS AND CONDITIONS

SECTION 1 - CONDITIONS AND COVENANTS

- A. The Railroad makes no covenant or warranty of title for quiet possession or against encumbrances. The Licensee shall not use or permit use of the Crossing Area for any purposes other than those described in this Agreement. Without limiting the foregoing, the Licensee shall not use or permit use of the Crossing Area for railroad purposes, or for gas, oil or gasoline pipe lines. Any lines constructed on the Railroad's property by or under authority of the Licensee for the purpose of conveying electric power or communications incidental to the Licensee's use of the property for highway purposes shall be constructed in accordance with specifications and requirements of the Railroad, and in such manner as not adversely to affect communication or signal lines of the Railroad or its licensees now or hereafter located upon said property. No nonparty shall be admitted by the Licensee to use or occupy any part of the Railroad's property without the Railroad's written consent. Nothing herein shall obligate the Railroad to give such consent.
- B. The right hereby granted is subject to any existing encumbrances and rights (whether public or private), recorded or unrecorded, and also to any renewals thereof. The Licensee shall not damage, destroy or interfere with the property or rights of nonparties in, upon or relating to the Railroad's property, unless the Licensee at its own expense settles with and obtains releases from such nonparties.
- C. The Railroad reserves the right to use and to grant to others the right to use the Crossing Area for any purpose not inconsistent with the right hereby granted, including, but not by way of limitation, the right to construct, reconstruct, maintain, operate, repair, alter, renew and replace tracks, facilities and appurtenances on the property and the right to cross the Crossing Area with all kinds of equipment. The Railroad further reserves the right to attach signal, communication or power lines to the Bridge, provided that such attachments shall comply with Licensee's specifications and will not interfere with the Licensee's use of the Crossing Area.
- D. So far as it lawfully may do so, the Licensee will assume, bear and pay all taxes and assessments of whatsoever nature or kind (whether general, local or special) levied or assessed upon or against the Bridge.
- E. If any property or rights other than the right hereby granted are necessary for the construction, maintenance and use of the Bridge and its appurtenances, or for the performance of any work in connection with the Project, the Licensee will acquire all such other property and rights at its own expense and without expense to the Railroad.

SECTION 2 - CONSTRUCTION OF BRIDGE

- A. The Licensee, at its expense, will apply for and obtain all public authority required by law, ordinance, rule or regulation for the Project, and will furnish the Railroad upon request with satisfactory evidence that such authority has been obtained.
- B. Except as may be otherwise specifically provided herein, the Licensee, at its expense, will furnish all necessary labor, material and equipment, and shall construct and complete the Bridge and all appurtenances thereof. The appurtenances shall include, without limitation, all necessary and proper drainage facilities, guard rails or barriers, and right of way fences as designated by the Railroad.

Upon completion of the Project, the Licensee shall remove from the Railroad's property all temporary structures and false work, and will leave the Crossing Area in a condition satisfactory to the Railroad.

- C. All construction work of the Licensee upon the Railroad's property (including, but not limited to, construction of the Bridge and all appurtenances and all related and incidental work) shall be performed and completed in a manner satisfactory to the Assistant Vice President Engineering-Design of the Railroad or his authorized representative and in compliance with the Plans, the Railroad's Minimum Coordination Requirements set forth in **Exhibit C** and other guidelines furnished by the Railroad.
- D. All construction work of the Licensee shall be performed diligently and completed within a reasonable time. No part of the Project shall be suspended, discontinued or unduly delayed without the Railroad's written consent, and subject to such reasonable conditions as the Railroad may specify. It is understood that the Railroad's tracks at and in the vicinity of the work will be in constant or frequent use during progress of the work and that movement or stoppage of trains, engines or cars may cause delays in the work of the Licensee. The Licensee hereby assumes the risk of any such delays and agrees that no claims for damages on account of any delay shall be made against the Railroad by the Licensee and/or the Contractor.

SECTION 3 - INJURY AND DAMAGE TO PROPERTY

If the Licensee, in the performance of any work contemplated by this Agreement or by the failure to do or perform anything for which the Licensee is responsible under the provisions of this Agreement, shall injure, damage or destroy any property of the Railroad or of any other person lawfully occupying or using the property of the Railroad, such property shall be replaced or repaired by the Licensee at the Licensee's own expense, or by the Railroad at the expense of the Licensee, and to the satisfaction of the Railroad's Assistant Vice President Engineering-Design.

SECTION 4 - RAILROAD MAY USE CONTRACTORS TO PERFORM WORK

The Railroad may contract for the performance of any of its work by other than railroad forces. The Railroad shall notify the Licensee of the contract price within ninety (90) days after it is awarded. Unless the Railroad's work is to be performed on a fixed price basis, the Licensee shall reimburse the Railroad for the amount of the contract.

SECTION 5 - MAINTENANCE AND REPAIRS

- A. The Licensee, at its expense, shall maintain, repair and renew, or cause to be maintained, repaired and renewed, the entire Bridge, including, but not limited to, the superstructure, substructure, piers, abutments, walls, approaches and all backfill, grading and drainage required by reason of the Bridge, as well as all graffiti removal or over-painting involving the Bridge.
- B. The Railroad, at its expense, will maintain, repair and renew, or cause to be maintained, repaired and renewed, the rails, ties, ballast and communication and signal facilities owned by the Railroad beneath the Bridge.

SECTION 6 - SAFETY MEASURES; PROTECTION OF RAILROAD COMPANY OPERATIONS

It is understood and recognized that safety and continuity of the Railroad's operations and communications are of the utmost importance; and in order that the same may be adequately safeguarded, protected and assured, and in order that accidents may be prevented and avoided, it is agreed with respect to all of said work of the Licensee that the work will be performed in a safe manner and in conformity with the following standards:

- A. **Definitions.** All references in this Agreement to the Licensee shall also include the Contractor and their respective officers, agents and employees, and others acting under its or their authority; and all references in this Agreement to work of the Licensee shall include work both within and outside of the Railroad's property.
- B. **Entry on to Railroad's Property by Licensee.** If the Licensee's employees need to enter Railroad's property in order to perform an inspection of the Bridge, minor maintenance or other activities, the Licensee shall first provide at least ten (10) working days advance notice to the Railroad Representative. With respect to such entry on to Railroad's property, the Licensee, to the extent permitted by law, agrees to release, defend and indemnify the Railroad from and against any loss, damage, injury, liability, claim, cost or expense incurred by any person including, without limitation, the Licensee's employees, or damage to any property or equipment (collectively the "Loss") that arises from the presence or activities of Licensee's employees on Railroad's property, except to the extent that any Loss is caused by the sole direct negligence of Railroad.
- C. **Flagging.**
- (i) If the Licensee's employees need to enter Railroad's property as provided in Paragraph B above, the Licensee agrees to notify the Railroad Representative at least thirty (30) working days in advance of proposed performance of any work by Licensee in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such thirty (30) day notice, the Railroad Representative will determine and inform Licensee whether a flagman need be present and whether Licensee needs to implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by Railroad, Railroad will bill Licensee for such expenses incurred by Railroad. If Railroad performs any flagging, or other special protective or safety measures are performed by Railroad, Licensee agrees that Licensee is not relieved of any of its responsibilities or liabilities set forth in this Agreement.
- (ii) The rate of pay per hour for each flagman will be the prevailing hourly rate in effect for an eight-hour day for the class of flagmen used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health and welfare, supplemental sickness, Railroad Retirement and unemployment compensation, supplemental pension, Employees Liability and Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect at the time the work is performed. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays, and two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized governmental agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, Licensee shall pay on the basis of the new rates and charges.
- (iii) Reimbursement to Railroad will be required covering the full eight-hour day during which any flagman is furnished, unless the flagman can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by the flagman following the flagman's assignment to work on the project for which Railroad is required to pay the flagman and which could not reasonably be avoided by Railroad by assignment of such flagman to other work, even though Licensee may not be working during such time. When it becomes necessary for Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements,

Licensee must provide Railroad a minimum of five (5) days notice prior to the cessation of the need for a flagman. If five (5) days notice of cessation is not given, Licensee will still be required to pay flagging charges for the five (5) day notice period required by union agreement to be given to the employee, even though flagging is not required for that period. An additional thirty (30) days notice must then be given to Railroad if flagging services are needed again after such five day cessation notice has been given to Railroad.

- D. **Compliance With Laws.** The Licensee shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work. The Licensee shall use only such methods as are consistent with safety, both as concerns the Licensee, the Licensee's agents and employees, the officers, agents, employees and property of the Railroad and the public in general. The Licensee (without limiting the generality of the foregoing) shall comply with all applicable state and federal occupational safety and health acts and regulations. All Federal Railroad Administration regulations shall be followed when work is performed on the Railroad's premises. If any failure by the Licensee to comply with any such laws, regulations, and enactments, shall result in any fine, penalty, cost or charge being assessed, imposed or charged against the Railroad, the Licensee shall reimburse and, to the extent it may lawfully do so, indemnify the Railroad for any such fine, penalty, cost, or charge, including without limitation attorney's fees, court costs and expenses. The Licensee further agrees in the event of any such action, upon notice thereof being provided by the Railroad, to defend such action free of cost, charge, or expense to the Railroad.
- E. **No Interference or Delays.** The Licensee shall not do, suffer or permit anything which will or may obstruct, endanger, interfere with, hinder or delay maintenance or operation of the Railroad's tracks or facilities, or any communication or signal lines, installations or any appurtenances thereof, or the operations of others lawfully occupying or using the Railroad's property or facilities.
- F. **Supervision.** The Licensee, at its own expense, shall adequately police and supervise all work to be performed by the Licensee, and shall not inflict injury to persons or damage to property for the safety of whom or of which the Railroad may be responsible, or to property of the Railroad. The responsibility of the Licensee for safe conduct and adequate policing and supervision of the Project shall not be lessened or otherwise affected by the Railroad's approval of plans and specifications, or by the Railroad's collaboration in performance of any work, or by the presence at the work site of the Railroad's representatives, or by compliance by the Licensee with any requests or recommendations made by such representatives. If a representative of the Railroad is assigned to the Project, the Licensee will give due consideration to suggestions and recommendations made by such representative for the safety and protection of the Railroad's property and operations.
- G. **Suspension of Work.** If at any time the Licensee's engineers or the Vice President-Engineering Services of the Railroad or their respective representatives shall be of the opinion that any work of the Licensee is being or is about to be done or prosecuted without due regard and precaution for safety and security, the Licensee shall immediately suspend the work until suitable, adequate and proper protective measures are adopted and provided.
- H. **Removal of Debris.** The Licensee shall not cause, suffer or permit material or debris to be deposited or cast upon, or to slide or fall upon any property or facilities of the Railroad; and any such material and debris shall be promptly removed from the Railroad's property by the Licensee at the Licensee's own expense or by the Railroad at the expense of the Licensee. The Licensee shall not cause, suffer or permit any snow to be plowed or cast upon the Railroad's property during snow removal from the Crossing Area.
- I. **Explosives.** The Licensee shall not discharge any explosives on or in the vicinity of the Railroad's property without the prior consent of the Railroad's Vice President-Engineering Services, which shall not be given if, in the sole discretion of the Railroad's Vice President-Engineering Services, such discharge would be dangerous or would interfere with the Railroad's property or facilities. For the purposes hereof, the "vicinity of the Railroad's property" shall be deemed to be any place on the Railroad's property or in such close proximity to the Railroad's property that the discharge of

explosives could cause injury to the Railroad's employees or other persons, or cause damage to or interference with the facilities or operations on the Railroad's property. The Railroad reserves the right to impose such conditions, restrictions or limitations on the transportation, handling, storage, security and use of explosives as the Railroad, in the Railroad's sole discretion, may deem to be necessary, desirable or appropriate.

- J. **Excavation**. The Licensee shall not excavate from existing slopes nor construct new slopes which are excessive and may create hazards of slides or falling rock, or impair or endanger the clearance between existing or new slopes and the tracks of the Railroad. The Licensee shall not do or cause to be done any work which will or may disturb the stability of any area or adversely affect the Railroad's tracks or facilities. The Licensee, at its own expense, shall install and maintain adequate shoring and cribbing for all excavation and/or trenching performed by the Licensee in connection with construction, maintenance or other work. The shoring and cribbing shall be constructed and maintained with materials and in a manner approved by the Railroad's Assistant Vice President Engineering-Design to withstand all stresses likely to be encountered, including any stresses resulting from vibrations caused by the Railroad's operations in the vicinity.
- K. **Drainage**. The Licensee, at the Licensee's own expense, shall provide and maintain suitable facilities for draining the Bridge and its appurtenances, and shall not suffer or permit drainage water therefrom to flow or collect upon property of the Railroad. The Licensee, at the Licensee's own expense, shall provide adequate passageway for the waters of any streams, bodies of water and drainage facilities (either natural or artificial, and including water from the Railroad's culvert and drainage facilities), so that said waters may not, because of any facilities or work of the Licensee, be impeded, obstructed, diverted or caused to back up, overflow or damage the property of the Railroad or any part thereof, or property of others. The Licensee shall not obstruct or interfere with existing ditches or drainage facilities.
- L. **Notice**. Before commencing any work, the Licensee shall provide the advance notice that is required under the Contractor's Right of Entry Agreement.
- M. **Fiber Optic Cables**. Fiber optic cable systems may be buried on the Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Licensee shall telephone the Railroad during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried anywhere on the Railroad's premises to be used by the Licensee. If it is, Licensee will telephone the telecommunications company(ies) involved, arrange for a cable locator, and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on the Railroad's premises.

SECTION 7 - INTERIM WARNING DEVICES

If at anytime it is determined by a competent authority, by the Licensee, or by agreement between the parties, that new or improved train activated warning devices should be installed at the Crossing Area, the Licensee shall install adequate temporary warning devices or signs and impose appropriate vehicular control measures to protect the motoring public until the construction or reconstruction of the Bridge has been completed.

SECTION 8 - OTHER RAILROADS

All protective and indemnifying provisions of this Agreement shall inure to the benefit of the Railroad and any other railroad company lawfully using the Railroad's property or facilities.

SECTION 9 - BOOKS AND RECORDS

The books, papers, records and accounts of Railroad, so far as they relate to the items of expense for the materials to be provided by Railroad under this Project, or are associated with the work to be performed by Railroad under this Project, shall be open to inspection and audit at Railroad's offices in Omaha, Nebraska, during normal business hours by the agents and authorized representatives of Licensee for a period of three (3) years following the date of Railroad's last billing sent to Licensee.

SECTION 10 - MODIFICATION - ENTIRE AGREEMENT

No waiver, modification or amendment of this Agreement shall be of any force or effect unless made in writing, signed by the Licensee and the Railroad and specifying with particularity the nature and extent of such waiver, modification or amendment. Any waiver by the Railroad of any default by the Licensee shall not affect or impair any right arising from any subsequent default. This Agreement and Exhibits attached hereto and made a part hereof constitute the entire understanding between the Licensee and the Railroad and cancel and supersede any prior negotiations, understandings or agreements, whether written or oral, with respect to the work or any part thereof.

EXHIBIT C

To New Pedestrian Bridge Crossing Agreement

Cover Sheet for the
Railroad's Coordination Requirements

EXHIBIT C

TO NEW PEDESTRIAN BRIDGE CROSSING AGREEMENT

RAILROAD COORDINATION REQUIREMENTS

A.

1.01 DEFINITIONS

Agreement:	Agreement that has been signed, or will be signed, between Railroad and Agency covering the construction and maintenance of the Project.
Agency:	
AREMA:	American Railway Engineering and Maintenance-of-way Association
Contractor:	The contractor or contractors hired by the Agency to perform any project work on any portion of Railroad's property and shall also include the Contractor's subcontractors and the Contractor's and subcontractor's respective employees, officers and agents, and others acting under its or their authority.
MUTCD:	Manual on Uniform Traffic Control Devices
Project:	
Railroad:	Union Pacific Railroad Company
Railroad Project Representative:	Railroad's Manager of Industry and Public Projects for this Project (see Section 1.03)
Railroad MTM Representative:	Railroad's Manager of Track Maintenance for this Project (see Section 1.03)
Requirements:	The Railroad Coordination Requirements set forth in this Exhibit.

1.02 DESCRIPTION

This Project includes construction work within Railroad's right-of-way. These Requirements describe coordination with the Railroad when work by the Contractor will be performed upon, over or under the Railroad right-of-way or may impact current or future Railroad operations. The Contractor will coordinate with the Railroad while performing the work outlined in this Agreement and shall afford the same cooperation with the Railroad as it does with the Agency. All submittals and work shall be completed in compliance with these Requirements, Railroad guidelines and requirements, AREMA recommendations and/or as directed by the Railroad Local Representative and/or the Railroad MTM Representative.

1.03 UPRR CONTACTS

The Railroad Project Representative for this project is:

For Railroad flagging services and track work, contact the following Railroad MTM Representative:

1.04 PLANS / SPECIFICATIONS

The plans and specifications for this Project, affecting the Railroad, are subject to the written approval by the Railroad. Changes in the plans made after the execution of the Agreement

and/or the awarding of the Project to the Contractor are subject to the prior review and written approval of the Agency and the Railroad. No construction work shall commence until final stamped plans and/or changes to final stamped plans have been reviewed and approved by the Railroad in writing. The Railroad's review and approval of the Agency's and/or Contractor's plans in no way relieves the Agency and Contractor from their responsibilities, obligations and/or liabilities under this Agreement, Agency's agreement with the Contractor for the Project and/or in the separate Contractor's Right of Entry Agreement referenced in Section 1.08. Railroad's approval will be given with the understanding that the Railroad makes no representations or warranty as to the validity, accuracy, legal compliance or completeness of Agency's and/or Contractor's plans and that any reliance by the Agency or the Contractor with respect to such plans is at the risk of the Agency and the Contractor.

1.05 UTILITIES AND FIBER OPTICS

- A. All installations shall be constructed in accordance with current AREMA recommendations and Railroad specifications and requirements. Railroad general guidelines and the required application forms for utility installations can be found on the Railroad website at <http://www.uprr.com/reus/pipeline/install.shtml>.
- B. It shall be the responsibility of the Contractor, at its expense, to make arrangements directly with utility companies involving the protection, encasement, reinforcement, relocation, replacement, removing or abandonment in place of non-railroad facilities affected by the Project. Railroad has no obligation to supply additional Railroad property for non-railroad facilities affected by this Project, nor does the Railroad have any obligation to permit Non-Railroad facilities to be abandoned in place or relocated on Railroad's property. Any facility and/or utility that crosses Railroad right of way must be covered under an agreement with the Railroad including, without limitation, any relocations of an existing facility and/or utility.
- C. Any longitudinal fiber optic lines on Railroad right of way shall be treated as Railroad facilities. Project design may need to be altered to accommodate such facilities.
- D. Any fiber optic relocations or protections that are required due to this Project will be at the Agency's expense.

1.06 GENERAL

- B. It is essential that the proposed construction shall be performed without interference to Railroad operations and in compliance with all applicable Railroad and Federal Railroad Administration rules and regulations. The Railroad shall be reimbursed by the Contractor or Agency for train delay costs and lost revenue claims due to any delays or interruption of train operations resulting from the Contractor's construction or other activities.
- C. Track protection is required for all work equipment (including rubber tired equipment) operating within 25 feet from nearest rail. All work shall be designed and executed outside the temporary construction clearance envelope defined in Section 1.12.
- D. The Contractor is also advised that new facilities within the Project may be scheduled to be built by the Railroad and that certain Contractor's activities cannot proceed until that work is complete. The Contractor shall be aware of the limits of responsibilities, allow sufficient time in the schedule for that work to be accomplished and shall coordinate its efforts with the Railroad.

1.07 RAILROAD OPERATIONS

- A. The Contractor shall be advised that trains and/or equipment should be expected on any

track, at any time, and in either direction. The Contractor shall communicate with the Railroad MTM Representative to improve the Contractor's understanding of Railroad traffic volume and operation at the Project site. The Contractor's bid shall be structured assuming intermittent track windows as defined in Section 1.07 C

- B. All Railroad tracks within and adjacent to the Project site are to be assumed as active and rail traffic over these facilities shall be maintained throughout the Project. Activities may include both through moves and switching moves to local customers. Railroad traffic and operations can occur continuously throughout the day and night on these tracks and shall be maintained at all times as defined herein. The Contractor shall coordinate and schedule the work so that construction activities do not interfere with Railroad's operations.
- C. Work windows for this Project shall be coordinated with the Agency or Contractor and the Railroad Project Representative and the Railroad MTM Representative. Types of work windows include Conditional Work Windows and Absolute Work Windows, as defined below:
 - 1. Conditional Work Window: A period of time in which Railroad's operations have priority over construction activities. When construction activities may occur on and adjacent to the railroad tracks within 25 feet of the nearest track, a Railroad flag person will be required. At the direction of the flag person, upon approach of a train and when trains are present on the tracks, the tracks must be cleared (i.e., no construction equipment, materials or personnel within 25 feet from the nearest active track or as directed by the Railroad MTM Representative). Conditional Work Windows are available for the project subject to Railroad's local operating unit review and approval.
 - 2. Absolute Work Window: A period of time in which construction activities are given priority over Railroad's operations. During this time the designated Railroad track(s) will be inactive for train movements and may be fouled by the Contractor. Before the end of an Absolute Work Window, all Railroad tracks and signals must be completely operational for normal train operations. Also, all Railroad, Public Utilities Commission and Federal Railroad Administration requirements, codes and regulations for operational tracks must be complied with. Should the operating tracks and/or signals be affected, the Railroad will perform inspections of the work prior to placing the affected track back into service. Railroad flag persons will be required for construction activities requiring an Absolute Work Window. **Absolute Work Windows will generally not be granted. Any request will require a detailed written explanation for Railroad review and approval.**

1.08 RIGHT OF ENTRY, ADVANCE NOTICE AND WORK STOPPAGES

- A. Prior to beginning any work within the Railroad right-of-way, the Contractor shall enter into an agreement with the Railroad in the form of the Contractor's Right of Entry Agreement, attached as Exhibit E, or latest version thereof provided by the Railroad. There is a fee for processing of the agreement which shall be borne by the Contractor. The right of entry agreement shall specify working time frames, flagging, inspection and insurance requirements and any other items specified by the Railroad.
- E.
- B. The Contractor shall give advance notice to the Railroad as required in the Contractor's Right of Entry Agreement before commencing work in connection with construction upon or over Railroad's right-of-way and shall observe the Railroad rules and regulations with respect thereto.
- F.
- C. All work upon the Railroad right-of-way shall be done at such times and in such a manner as not to interfere with or endanger the operations of the Railroad. Whenever work may affect the operations or safety of trains, the method of doing such work shall first be submitted to the Railroad MTM Representative for approval, but such approval shall not relieve the

Contractor from liability. Any work to be performed by the Contractor, which requires flagging service or inspection service, shall be deferred until the flagging protection required by the Railroad is available at the job site. See Section 1.21 for railroad flagging requirements.

- G.
- D. The Contractor shall make requests in writing to both the Railroad Project Representative and the Railroad MTM Representative for both Absolute and Conditional Work Windows, at least two weeks in advance of any work. The written request must include:
 - H.
 - I. 1. Description of work to be done.
 - J. 2. The days and hours that work will be performed.
 - K. 3. The exact location of the work and proximity to the tracks.
 - L. 4. The type of window and amount of time requested.
 - M. 5. The designated contact person for the Contractor.
 - N.
 - O. The Contractor shall provide a written confirmation notice to the Railroad MTM Representative at least fifteen (15) days prior to commencing work in connection with the approved work windows when work will be performed within **25 feet of any track center line**. All work shall be performed in accordance with previously approved work plans.
 - P.
 - E. Should a condition arise from, or in connection with, the work which requires immediate and unusual actions to be made to protect operations and property of the Railroad, the Contractor shall undertake such actions. If, in the judgment of the Railroad MTM Representative, such actions are insufficient, the Railroad MTM Representative may require or provide such actions as deemed necessary. In any event, such actions shall be at the Contractor's expense and without cost to the Railroad. The Railroad or Agency have the right to order the Contractor to temporarily cease operations in the event of an emergency or if, in the opinion of the Railroad MTM Representative, the Contractor's operations may inhibit the Railroads operations. In the event such an order is given, the Contractor shall immediately notify the Agency of the order.

Q.

1.09 INSURANCE

The Contractor shall not begin work within the Railroad's right-of-way until the Railroad has been furnished the insurance policies, binders, certificates and endorsements required by the Contractor's Right-of-Entry Agreement, and the Railroad Project Representative has advised the Agency that such insurance is in accordance with such Agreement. The required insurance shall be kept in full force and effect during the performance of work and thereafter until the Contractor removes all tools, equipment, and material from Railroad property and cleans the premises in a manner reasonably satisfactory to the Railroad.

1.10 RAILROAD SAFETY ORIENTATION

All personnel employed by the Agency, Contractor and all subcontractors must complete the Railroad's course "Orientation for Contractor's Safety" and be registered prior to working on Railroad property. This orientation is available at www.contractororientation.com. This course is required to be completed annually. The preceding training does not apply for longitudinal fiber optic installations.

1.11 COOPERATION

The Railroad shall cooperate with the Contractor in the scheduling of Project work with the understanding that Railroad's train operations at the job site shall have priority over the Contractor's activities.

1.12 CONSTRUCTION CLEARANCES

The Contractor shall abide by the twenty-one (21) foot temporary vertical construction clearance defined in section 4.4.1.1 and twelve (12) foot temporary horizontal construction clearance defined in section 4.4.1.2 of BNSF and UPRR Guidelines for Railroad Grade Separation Projects. It shall be the Contractor's responsibility to obtain such guidelines from the Agency or Railroad.

Reduced temporary construction clearances, which are less than construction clearances defined above, will require special review and approval by the Railroad.

Any proposed variance on the specified minimum clearances due to the Contractor's operations shall be submitted to the Railroad Project Representative through the Agency at least thirty (30) days in advance of the work. No work shall be undertaken until the variance is approved in writing by the Railroad Project Representative.

1.13 SUBMITTALS

- A. Construction submittals and Requests for Information (RFI) shall be submitted per Section 3.5 of BNSF and UPRR Guidelines for Railroad Grade Separation Projects.
- B. The minimum review times, as indicated in tables 3-1 and 3-2 of Section 3.5 of the BNSF and UPRR Guidelines for Railroad Grade Separation Projects, should be anticipated for review of all submittals. Guidelines for Railroad Grade Separation Projects, should be anticipated for review of all submittals. The details of the construction affecting the Railroad tracks and property, not already included in the contract plans, shall be submitted by the Agency to the Railroad Project Representative for the Railroad's review and written approval before such construction is undertaken. The Railroad shall not be liable to Agency, Contractor, and or any other person or entity if the Railroad's review exceeds a four-week review time.
- C. As Built Submittals shall be submitted per Section 3.6 of BNSF and UPRR Guidelines for Railroad Grade Separation Projects.

1.14 MAINTENANCE OF PROPER DRAINAGE AND DAMAGE TO RAILROAD FACILITIES

- A. The Contractor, at its expense, shall be required to maintain all ditches and drainage structures free of silt or other obstructions which may result from the Contractor's operations and to repair and restore any Railroad property, tracks and facilities of Railroad and/or its tenants.
- B. The Contractor must submit a proposed method of erosion control and have the method reviewed and approved by the Railroad prior to beginning any grading on the project site. Erosion control methods must comply with all applicable local, state and federal regulations.

1.15 SITE INSPECTIONS BY RAILROAD PROJECT REPRESENTATIVE, RAILROAD MTM REPRESENTATIVE OR RAILROAD'S CONTRACTOR

- A. In addition to the office reviews of construction submittals, site observations will be performed by the Railroad Project Representative, Railroad MTM Representative or Railroad's Contractor at significant points during construction per Section 4.11 of BNSF and UPRR Guidelines for Railroad Grade Separation Projects.
- B. Site inspections are not limited to the milestone events listed in the guidelines. Site visits to check the progress of work may be performed at any time throughout the construction process as deemed necessary by the Railroad.

- C. A detailed construction schedule, including the proposed temporary horizontal and vertical clearances and construction sequence for all work to be performed, shall be provided by the Contractor to the Agency for submittal to the Railroad's Project Representative for review and approval prior to commencement of work. This schedule shall also include the anticipated dates on which the above listed events will occur. This schedule shall be updated for all critical listed events as necessary but at least monthly so that site visits may be scheduled.

1.16 RAILROAD REPRESENTATIVES

- A. Railroad representatives, conductors, flag persons or watch persons will be provided by the Railroad at the expense of the Agency or Contractor (as stated elsewhere in these bid documents) to protect Railroad facilities, property and movements of its trains and engines. In general, the Railroad will furnish such personnel or other protective services as follows:
1. When any part of any equipment or object, such as erection or construction activities, is standing or being operated within 25 feet, measured horizontally from centerline, of any track on which trains may operate.
 2. For any excavation below the elevation of track subgrade when, in the opinion of the Railroad MTM Representative, the track or other Railroad facilities may be subject to settlement or movement.
 3. During any clearing, grubbing, excavation or grading in proximity to Railroad facilities which, in the opinion of the Railroad MTM Representative, may affect Railroad facilities or inhibit operations.
 4. During any Contractor's operations when, in the opinion of the Railroad MTM Representative, the Railroad facilities, including, but not limited to, tracks, buildings, signals, wire lines or pipe lines, may be endangered.
- B. The Contractor shall arrange with the Railroad Local Representative to provide the adequate number of flag persons to accomplish the work.

1.17 WALKWAYS REQUIRED

Parallel to the outer side of each exterior track of multiple operated track and on each side of single operated track, an unobstructed continuous space suitable for trainman's use in walking along trains, extending in width not less than twelve feet (12') perpendicular from centerline of track, shall be maintained. Any temporary impediments to walkways and track drainage encroachments or obstructions allowed during working hours must be covered, guarded and/or protected as soon as practical. Walkways with railings shall be constructed by the Contractor over open excavation areas when in close proximity of track, and railings shall not be closer than 9' perpendicular from the center line of tangent track or 9' - 6" horizontal from curved track.

1.18 COMMUNICATIONS AND SIGNAL LINES

If required, the Railroad, at Agency's expense, will rearrange its communications and signal lines, grade crossing warning devices, train signals, tracks and facilities that are in use and maintained by Railroad forces in connection with its operation. This work by the Railroad will be done by its own forces or by contractors under a continuing contract and may or may not be a part of the work under this contract.

1.19 TRAFFIC CONTROL

The Contractor's operations which control traffic across or around Railroad facilities shall be

coordinated with and approved by the Railroad MTM Representative and shall be in compliance with the MUTCD.

1.20 CONSTRUCTION EXCAVATIONS;CALL BEFORE YOU DIG NUMBER

- A. The Contractor shall be required to take special precautions and care in connection with excavating and shoring. Excavations for construction of footings, piers, columns, walls or other facilities that require shoring shall comply with requirements of OSHA, AREMA and Railroad "Guidelines for Temporary Shoring".
- B. In addition to calling the "811" number and/or the local "one call center", the Contractor shall call the Railroad's "Call Before Your Dig" number at least 48 hours prior to commencing work at 1-800-336-9193 during normal business hours (6:30 a.m. to 8:00 p.m. Central Standard Time, Monday through Friday, except holidays - also a 24 hour, 7 day a week number for emergency calls) to determine location of fiber optics. If a telecommunications system is buried anywhere on or near Railroad property, the Contractor will co-ordinate with the Railroad and the Telecommunication Company(ies) to arrange for relocation or other protection of the system prior to beginning any work on or near Railroad property. The determination of whether fiber optics will be affected by the Project shall be made during the initial design phase of the Project.
- C. The Railroad does not allow temporary at grade crossings unless absolutely necessary and there is no alternative route available to contractor to access the project site. Alternative plans should be considered to avoid crossing Railroad tracks at grade.

1.21 RAILROAD FLAGGING

Performance of any work by the Contractor in which person(s) or equipment will be within twenty-five (25) feet of any track, or that any object or equipment extension (such as, but not limited to, a crane boom) will reach within twenty-five (25) feet of any track, require railroad flagging services or other protective measures. The Contractor shall give an advance notice to the Railroad as required in the Contractor's Right of Entry Agreement before commencing any such work, allowing the Railroad to determine the need for flagging or other protective measures which ensure the safety of Railroad's operations, employees and equipment. Contractor shall comply with all other requirements regarding flagging services covered by the Contractor's Right of Entry Agreement. Any costs associated with failure to abide by these requirements will be borne by the Contractor.

The estimated pay rate for each flag person is \$Daily Flagging Fee per day for an 8-hour work day with time and one-half for overtime, Saturdays, Sundays; double time and one-half for holidays. Flagging rates are set by the Railroad and are subject to change due to, but not limited to, travel time, setup plus, per diem and rest time (if work is required at night).

1.22 CLEANING OF RIGHT-OF-WAY

The Contractor shall, upon completion of the work to be performed within the right-of-way and/or properties of the Railroad and adjacent to its tracks, wire lines and other facilities, promptly remove from the Railroad right-of-way all Contractor's tools, implements and other materials whether brought upon the right-of-way by the Contractor or any subcontractors employee or agent of Contractor or of any subcontractor, and leave the right-of-way in a clean and presentable condition to the satisfaction of the Railroad.

1.23 CONTRACTOR'S RESPONSIBILITY OF SUPERVISION

The Contractor, at its expense, shall adequately supervise all work to be performed by the Contractor. Such responsibility shall not be lessened or otherwise affected by Railroad's approval of plans and specifications, or by the presence at the work site of the Railroad Project Representative, Railroad MTM Representative or any other Railroad representative or Railroad contractor providing inspection services, or by the compliance by the Contractor with any requests or recommendations made by such representatives. The Contractor will give due consideration to suggestions and recommendations made by such representatives for the safety and protection of the Railroad's property and operations.

1.24 USE OF EXPLOSIVES AT PROJECT SITE PROHIBITED

The Contractor's use of explosives at the Project site is expressly prohibited unless authorized in advance in writing by the Railroad Project Representative.