

NOTES

AN END TO QUIET NEIGHBORHOODS OR IMPROVED PUBLIC SAFETY: THE COLLISION COURSE BETWEEN LOCAL TRAIN WHISTLE BANS AND THE SWIFT RAIL DEVELOPMENT ACT

INTRODUCTION

In November 1994, President Clinton signed the Swift Rail Development Act of 1994¹ (Swift Rail Act) which authorized activities for the implementation of high-speed rail transportation. The Swift Rail Act permits the Secretary of Transportation (Secretary) to provide funding to states or public agencies that are eligible for high-speed rail activities. The Secretary may also provide financial assistance to develop technology related to high-speed rail service, and the Swift Rail Act directs the Secretary to establish a pilot program for an emergency notification system available to the public in order to notify rail carriers of potential safety problems at highway-rail grade crossings.²

The subject of this Note concerns § 20153 of the Swift Rail Act, entitled, "Audible warnings at highway-rail grade crossings."³ This provision of the Swift Rail Act

1. Pub. L. No. 103-440, 108 Stat. 4615 (codified as amended in scattered sections of 49 U.S.C.A. (West Supp. 1995)). This Act is cited in some materials as the "High-Speed Rail Development Act." However, the author has chosen to use the designation "Swift Rail Development Act" in this Note.

2. A "highway-rail grade crossing" is defined in 49 U.S.C.A. § 20153(a)(1) (West Supp. 1995) as "includ[ing] any street or highway crossing over a line of railroad at grade."

3. 49 U.S.C.A. § 20153 reads:

(a) Definitions.—As used in this section—

(1) the term "highway-rail grade crossing" includes any street or highway crossing over a line of railroad at grade;

(2) the term "locomotive horn" refers to a train-borne audible warning device meeting standards specified by the Secretary of Transportation; and

(3) the term "supplementary safety measure" refers to a safety system or procedure, provided by the appropriate traffic control authority or law enforcement authority responsible for safety at the highway-rail grade crossing, that is determined by the Secretary to be an effective substitute for the locomotive horn in the prevention of highway-rail casualties. A traffic control arrangement that prevents careless movement over the crossing (e.g., as where adequate median barriers prevent movement around crossing gates extending over the full width of the lanes in the particular direction of travel), and that conforms to standards prescribed by the Secretary under this subsec-

directs the Secretary to prescribe regulations that require the sounding of locomotive horns (train whistles) at highway-rail grade crossings by November 1996. This section also includes a provision that permits the Secretary to provide exemptions from the

tion, shall be deemed to constitute a supplementary safety measure. The following do not, individually or in combination, constitute supplementary safety measures within the meaning of this subsection: standard traffic control devices or arrangements such as reflectorized crossbucks, stop signs, flashing lights, flashing lights with gates that do not completely block travel over the line of railroad, or traffic signals.

(b) Requirement.—The Secretary of Transportation shall prescribe regulations requiring that a locomotive horn shall be sounded while each train is approaching and entering upon each public highway-rail grade crossing.

(c) Exception.—(1) In issuing such regulations, the Secretary may except from the requirement to sound the locomotive horn any categories or rail operation or categories of highway-rail grade crossings (by train speed or other factors specified by regulation)—

(A) that the Secretary determines not to present a significant risk with respect to loss of life or serious personal injury;

(B) for which use of the locomotive horn as a warning measure is impractical; or

(C) for which, in the judgment of the Secretary, supplementary safety measures fully compensate for the absence of the warning provided by the locomotive horn.

(2) In order to provide for safety and the quiet of communities affected by train operations, the Secretary may specify in such regulations that any supplementary safety measures must be applied to all high-way rail grade crossings within a specified distance along the railroad in order to be excepted from the requirement of this section.

(d) Application for waiver or exemption.—Notwithstanding any other provision of this subchapter, the Secretary may not entertain an application for waiver or exemption of the regulations issued under this section unless such application shall have been submitted jointly by the railroad carrier owning, or controlling operations over, the crossing and by the appropriate traffic control authority or law enforcement authority. The Secretary shall not grant any such application unless, in the judgment of the Secretary, the application demonstrates that the safety of highway users will not be diminished.

(e) Development of supplementary safety measures.—(1) In order to promote the quiet of communities affected by rail operations and the development of innovative safety measures at highway-rail grade crossings, the Secretary may, in connection with demonstration of proposed new supplementary safety measures, order railroad carriers operating over one or more crossings to cease temporarily the sounding of locomotive horns at such crossings. Any such measures shall have been subject to testing and evaluation and deemed necessary by the Secretary prior to actual use in lieu of the locomotive horn.

(2) The Secretary may include in regulations issued under this subsection special procedure for approval of new supplementary safety measures meeting the requirements of subsection (c)(1) of this section following successful demonstration of those measures.

(f) Specific rules.—The Secretary may, by regulation, provide that the following crossings over railroad lines shall be subject, in whole or in part, to the regulations required under this section:

(1) Private highway-rail grade crossings.

(2) Pedestrian crossings.

(3) Crossings utilized primarily by nonmotorized vehicles and other special vehicles.

Regulations issued under this subsection shall not apply to any location where persons are not authorized to cross the railroad.

(g) Issuance.—The Secretary shall issue regulations required by this section pertaining to categories of highway-rail grade crossings that in the judgment of the Secretary pose the greatest safety hazard to rail and highway users not later than 24 months following the date of enactment of this section. The Secretary shall issue regulations pertaining to any other categories of crossings not later than 48 months following the date of enactment of this section.

(h) Impact of regulations.—The Secretary shall include in regulations prescribed under this section a concise statement of the impact of such regulations with respect to the operation of section 20106 of this title (national uniformity of regulation).

same. The requirement for train whistles has put municipalities on a collision course with the railroads and the Federal Railroad Administration (FRA).

In an effort to maintain peace and quiet, numerous communities across the country have banned train whistle-blowing, in many cases, for several decades.⁴ These bans generally prohibit whistle-blowing at rail-grade crossings in certain districts or neighborhoods and are often limited to a ban during nighttime hours. Currently, there are 227 cities in 27 states with whistle bans in effect.⁵ Illinois has by far the largest number of whistle bans, and only two are located outside of the Chicago area.⁶ Once the Secretary issues regulations as directed by the Swift Rail Act, the existing local ordinances will be preempted, and absent any exemption from the Secretary, railroads will be required to sound whistles at all highway-rail grade crossings.

The railroads' primary concerns are safety and uniform application of railroad operations. In light of past problems and in anticipation of future high-speed rail service, the railroads' concerns are well founded. Accidents involving trains and motor vehicles are eleven times more likely to result in a fatality than those accidents between two motor vehicles.⁷ The FRA estimates that highway-rail grade crossing accidents claim 600 lives each year and result in injury to 2,400 persons.⁸ Two studies conducted by the FRA indicate that train whistle bans contribute significantly to the number of accidents each year.⁹

This Note explores the effects of whistle bans and federal preemption of local bans by the Swift Rail Act. Part I examines the legislative history of the Swift Rail Act and federal preemption of local statutes and ordinances. Part II discusses the railroads' position and examines two reports issued by the Department of Transportation (DOT) that study the effect of train whistle bans. Part III addresses local concerns related to federal preemption of whistle bans. Finally, Part IV concludes with some suggestions relevant to the Secretary's soon-to-be prescribed regulations.

I. THE SWIFT RAIL DEVELOPMENT ACT OF 1994

A. Legislative History

The Swift Rail Act, named after one of its sponsors, was a combination of two rail bills. It incorporated a watered-down version of the High Speed Rail Development Act of 1993¹⁰ (H.R. 1919), a bill which stalled because of funding, and the Federal

4. For example, South Bend, Indiana, has had a whistle ban ordinance (SOUTH BEND, IND., MUNICIPAL CODE §§ 15-3 and 15-3.1) in effect since 1979 enacted under authority of I.C. § 8-6-4-1.

5. FED. R.R. ADMIN., U.S. DEP'T. OF TRANSP., *NATIONWIDE STUDY OF TRAIN WHISTLE BANS* IV (1995) [hereinafter *NATIONAL STUDY*].

6. Tamara Kerrill, *Whistle Law Steams Suburbs*, CHI. SUN-TIMES, Sept. 25, 1995, at 6. Those cities in the Chicago area with whistle bans include: Chicago, Bensenville, Berwyn, Brookfield, Chicago Heights, Deerfield, Des Plaines, Downers Grove, Elmwood Park, Franklin Park, Glenview, Golf, Grayslake, Highland Park, Hinsdale, Lagrange, Lake Forest, Melrose Park, Morton Grove, Naperville, Niles, Northbrook, Prairie View, River Forest, River Grove, Riverside, Roselle, Rosemont, Round Lake, Western Springs, Westmont, Wheeling and Wood Dale. *Id.*

7. *NATIONAL STUDY*, *supra* note 5, at 2.

8. *Id.*

9. Both studies will be discussed more thoroughly in Part II of this Note.

10. H.R. 1919, 103d Cong., 1st Sess. (1993).

Railroad Safety Authorization Act of 1994 (H.R. 4545).¹¹ Both the 1993 rail development bill and the Swift Rail Act were sponsored by Representative Al Swift of Washington and Representative John Dingell of Michigan.¹² The 1993 rail development legislation amended the Railroad Revitalization and Regulatory Reform Act of 1976¹³ and was intended to further development of high-speed rail transportation.¹⁴

The 1993 bill stalled after full committee markup when it became apparent that Congress would not provide the necessary funding and, among other problems, several states expressed opposition to certain provisions related to labor benefits.¹⁵ Therefore, the rail development provision of the Swift Rail Act was a scaled back version of H.R. 1919's "very ambitious legislation which would have provided substantial funding for high-speed rail corridor implementation and technology development."¹⁶ However, according to Committee Chairman Dingell, "Given available resources, this is the best we can do at this time."¹⁷

The Federal Railroad Safety Authorization Act of 1994 was introduced by Swift on June 8, 1994.¹⁸ The purpose of H.R. 4545 was to amend the Federal Railroad Safety Act of 1970¹⁹ (FRSA) and authorize safety-related activities of the Federal Railroad Administration through September of 1998.²⁰ Included in H.R. 4545 were provisions related to track safety, bridge displacement detection systems and reporting requirements.²¹ This bill passed the House unanimously in August 1994.²²

After H.R. 1919 stalled, Swift, Chair of the House Transportation Subcommittee; Dingell, Chair of the House Energy and Commerce Committee; and Representative Lynn Schenk (California), with input from the Department of Transportation and the FRA, produced H.R. 4867.²³ This bill provided federal financing assistance to the states for high-speed rail corridor planning and technology improvements.²⁴ Although, admittedly, "a very different bill" from the 1993 rail development legislation, H.R. 4867 nonetheless made an attempt toward the "ultimate goal [of] construction of a safe, fast, efficient, and environmentally sound high-speed rail transportation system."²⁵ On August 16, 1994, the House passed H.R. 4867 with a vote of 281-103.²⁶

11. H.R. 4545, 103d Cong., 2d Sess. (1994). *See also* 140 CONG. REC. H11,167 (daily ed. Oct. 6, 1994).

12. H.R. REP. NO. 882, 103d Cong., 2d Sess. (1994). The 1993 Act was also introduced by twelve other Members of Congress. The 1994 Act was co-sponsored by Representatives Al Swift of Washington, John Dingell of Michigan and Lynn Schenk of California [hereinafter Swift, Dingell and Schenk].

13. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended at 45 U.S.C. §§ 801-855).

14. H.R. REP. NO. 882.

15. 140 CONG. REC. E1645 (daily ed. Aug. 4, 1994) (remarks of Rep. Schenk).

16. 140 CONG. REC. H8429 (daily ed. Aug. 16, 1994) (remarks of Rep. Swift). The Congressional Budget Office estimated that the 1993 version would have required more than \$1 billion for research, development and assistance to the States. By contrast, the 1994 version required \$184 million for corridor planning and technology development. *See also* H.R. REP. NO. 692, 103d Cong., 2d Sess. (1995).

17. 140 CONG. REC. H8429 (daily ed. Aug. 16, 1994).

18. H.R. REP. NO. 882.

19. 45 U.S.C. § 434, *repealed by* Pub. L. No. 103-272, § 87(b), 108 Stat. 1379 (1994).

20. H.R. REP. NO. 882.

21. *Id.*

22. *Id.*

23. High Speed Rail Development Act of 1994, H.R. 4867, 103d Cong., 2d Sess. (1994).

24. H.R. REP. NO. 882.

25. 140 CONG. REC. H8429 (daily ed. Aug. 16, 1994) (remarks of Rep. Schenk).

26. H.R. REP. NO. 882.

In the Senate, Senator J. James Exon of Nebraska offered a substitute amendment (S. 839) to Title I of H.R. 4867.²⁷ This amendment offered a "compromise that lengthen[ed] the horizon for high-speed rail deployment."²⁸ When H.R. 4867 returned to the House, the House concurred with the Senate's amended version and incorporated into Title II the entire text of H.R. 4545, the rail safety legislation that had passed the House unanimously in August 1994.²⁹ The amended House version of the 1994 rail development act added Title III which contained provisions for improved safety at highway-rail grade crossings, including the section on train whistles.³⁰

In his remarks before the House, Committee Chair Dingell noted:

Title III falls under the joint jurisdiction of the Committee on Energy and Commerce and the Committee on Public Works and Transportation. One important provision of this title directs the Secretary of Transportation to prescribe regulations requiring the use of locomotive train horns for safety at highway-rail grade crossings. Over 600 persons die at highway-rail crossings each year, despite the expenditures of Federal and State funds to improve warning systems. Locomotive horns have been proven effective as an element of a warning system. This provision allows for exemptions from horn use where it is not needed.³¹

On October 7, 1994, the House returned the amended version to the Senate.³² The legislation ultimately combined the amended version of the 1994 high speed rail bill and the 1994 rail safety legislation.³³ The Swift Rail Act was named after Representative Al Swift, in tribute to his years of service in one of his last legislative acts before retirement.³⁴ In his supporting comments, Senator Exon noted that the Swift Rail Act was "one of the most important pieces of safety legislation in the rail sector and the first comprehensive effort to reduce the number of deaths, accidents and injuries at grade crossings"³⁵ The Senate passed the final version on October 8, 1994.³⁶ On November 2, 1994, President Clinton signed H.R. 4867 into law as the Swift Rail Development Act of 1994.³⁷

27. 140 CONG. REC. S12,102 (daily ed. Aug. 18, 1994) (Exon Amendment No. 2570).

28. 140 CONG. REC. S12,128 (daily ed. Aug. 18, 1994) (remarks of Sen. Exon).

29. 140 CONG. REC. H11,165 (daily ed. Oct. 6, 1994) In the Senate, the rail safety legislation was S. 2132, entitled the Federal Rail Safety Authorization Act of 1994. Provisions from S. 2132 relating to rail-grade crossing safety were included in Title III of H.R. 4867. H.R. REP. NO. 882.

30. H.R. REP. NO. 882.

31. 140 CONG. REC. H11,165 (daily ed. Aug. 18, 1994) (remarks of Rep. Dingell).

32. H.R. REP. NO. 882.

33. *Id.*

34. 140 CONG. REC. S15,055 (daily ed. Oct. 8, 1994).

35. *Id.* (remarks of Sen. Exon).

36. H.R. REP. NO. 692, 103d Cong., 2d Sess. (1994).

37. Pub. L. No. 103-440, 108 Stat. 4615 (codified as amended in scattered sections of 49 U.S.C.A. (West Supp. 1995)).

B. Federal Preemption of Local Whistle Bans by 49 U.S.C. § 20153

Preemption of state and local law is provided in § 20106 of the Swift Rail Act which states:

§ 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation 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 when the law, regulation, or order—

- (1) is necessary to eliminate or reduce an essentially local safety hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.³⁸

Under § 20153, the Secretary is directed to issue regulations within twenty-four months following enactment for highway-rail grade crossings that are deemed to be the most dangerous and within forty-eight months for all other categories of crossings.³⁹ Therefore, the initial legal deadline for the Secretary is November 2, 1996, with final regulations to be issued by November 2, 1998. At the date of publication, the FRA was preparing a Notice of Proposed Rulemaking (NPRM) seeking public comment regarding train whistles at rail-grade crossings.⁴⁰

Section 20153 of the Swift Rail Act permits the Secretary to make exceptions to the train whistle requirement if the Secretary determines that a particular crossing does not present a "significant risk"; or if a train whistle would be impractical; or there are supplemental measures in place that compensate for the lack of a train whistle.⁴¹ In order to be exempted from the train whistle requirement, the railroad that owns or controls the crossing and the applicable traffic control or law enforcement authority must submit a joint application to the Secretary.⁴² The Secretary may grant the exception if "the application demonstrates that the safety of highway users will not be diminished."⁴³ In recognition of the need for quiet communities and to promote new technology, § 20153(e) allows the Secretary to order a temporary whistle ban at certain crossings in order to allow testing of new supplemental safety measures that could compensate for the absence of train whistles.⁴⁴

Although regulation by the Secretary is still pending, the railroads challenged local whistle bans under the preemption doctrine shortly after the Swift Rail Act became effective.

38. 49 U.S.C.A. § 20106 (West Supp. 1995).

39. 49 U.S.C.A. § 20153(g) (West Supp. 1995).

40. Unified Agenda, 60 Fed. Reg. 60,425, 60,426 (1995). This Note went to press in April 1996.

41. 49 U.S.C.A. § 20153(c)(A)-(C) (West Supp. 1995). See also *supra* note 3.

42. 49 U.S.C.A. § 20153(d) (West Supp. 1995).

43. *Id.* See also *supra* note 3.

44. 49 U.S.C.A. § 20153(e) (West Supp. 1995).

C. Test Case: *Civil City of South Bend, Indiana v. Consolidated Rail Corp.*⁴⁵

The cities of South Bend and Mishawaka, Indiana, have had train whistle bans in effect for several decades prior to enactment of the Swift Rail Act.⁴⁶ These ordinances generally prohibit train whistles from certain areas of the cities and affect twelve rail crossings in South Bend and twenty-six crossings in Mishawaka.⁴⁷ The cities impose fines up to \$2,500 for violations of these ordinances.⁴⁸

A short two months after the Swift Rail Act became law, Consolidated Rail Corporation (Conrail) followed by Grand Trunk Western Railroad, Corporation (Grand Trunk) and National Railroad Passenger Corporation (Amtrak) made corporate decisions to resume whistle blowing in the ban areas.⁴⁹ The cities filed an action in the federal district court seeking a permanent injunction to prevent the railroads from sounding train whistles and a declaratory judgment that federal law had not preempted the cities' whistle ban ordinances.⁵⁰

The railroads claimed that the local ordinances were preempted by a variety of federal laws and/or were invalid under the Commerce Clause.⁵¹ First, the railroads argued that, because § 20153 of the Swift Rail Act directed the Secretary to act, the local ordinances were preempted.⁵² They also contended that the ordinances were preempted by numerous other federal laws including: the Federal Railroad Safety Act of 1970;⁵³ regulations issued by the Secretary in the Code of Federal Regulations;⁵⁴ the Locomotive Boiler Inspection Act⁵⁵ (LBIA); the Federal Noise Control Act⁵⁶

45. *Civil City of South Bend, Indiana v. Consolidated Rail Corp.*, 880 F. Supp. 595 (N.D. Ind. 1995). The author served as Intern to Assistant City Attorney Jeffrey M. Jankowski and to Richard A. Nussbaum, II, Corporate Counsel for the City of South Bend, Department of Law in preparation for this case. Some of the background material for this section is from informal discussions with these attorneys.

46. The whistle bans had been in effect since 1979 except for a brief period in 1991 and 1992. In 1991, the railroads began blowing their whistles for a short period of time and the cities sought a permanent injunction against same. The federal district court refused the cities' request for an injunction. While the cities were waiting to appeal the district court order, the Indiana legislature repealed local authority over train whistles. In 1993, the Indiana statute was amended and once again the state granted local regulation of train whistles to the cities. *South Bend*, 880 F. Supp. at 599.

47. SOUTH BEND, IND., MUNICIPAL CODE §§ 15-3 and 15-3.1; MISHAWAKA, IND., ORDINANCE NO. 74-82. The cities' statutory authority for local regulation of train whistles derived from Indiana Code § 8-6-4-1. Data on affected crossings compiled by Dean Tinkel, Claims Adjuster for the City of South Bend.

48. SOUTH BEND, IND., MUNICIPAL CODE §§ 15-3 and 15-3.1; MISHAWAKA, IND., ORDINANCE NO. 74-82.

49. Marti Goodlad Heline, *Cities File Amended Anti-Train Whistle Lawsuit*, SOUTH BEND TRIB., Feb. 3, 1995, at B2.

50. *Civil City of South Bend, Indiana v. Consolidated Rail Corp.*, 880 F. Supp. 595 (N.D. Ind. 1995).

51. *Id.* at 602.

52. *Id.* at 600.

53. 45 U.S.C. § 434, *repealed* by Pub. L. No. 103-272, § 87(b), 108 Stat. 1379 (1994).

54. 49 C.F.R. §§ 217.7, 217.11 (1994). These regulations require the railroads to keep their operating rules on file with the Federal Railroad Administration and to periodically provide instruction to railroad employees on how these rules should be followed. Furthermore, 49 C.F.R. § 229.129 (1994) requires locomotives to have an audible warning device on the forward locomotive and sets minimum sound levels.

55. 45 U.S.C. § 23. The LBIA creates uniform inspection and regulation of locomotive equipment, including the design, construction and material for locomotive equipment.

56. 42 U.S.C.A. §§ 4901-4918 (West Supp. 1995). The FNCA directs the Environmental Protec-

(FNCA); and the Commerce Clause.⁵⁷ The cities argued that there was no existing federal law to preempt the local ordinances.⁵⁸ Judge Robert Miller of the United States District Court for the Northern District of Indiana granted the cities' request for declaratory judgment but denied the cities' request for a permanent injunction.⁵⁹

The court reasoned that, until the Secretary issued regulations concerning the sounding of train whistles at highway-rail grade crossings, § 20153 of the Swift Rail Act did not preempt local ordinances.⁶⁰ The court also found that the other federal provisions relied upon by the railroads did not preempt local ordinances because the operating regulations cited from the Code of Federal Regulations did not have the force of law and the FRA neither approved nor adopted such operating rules.⁶¹ Further, the court held that because the ordinances "neither limit[ed] nor expand[ed] the type of equipment with which locomotives are required to be equipped,"⁶² the LBIA and FNCA did not preempt the local whistle bans.⁶³ Finally, the court found that the cities' ordinances were not invalid under the Commerce Clause because the ordinances were "even-handed . . . and favor[ed] neither state nor local interests."⁶⁴

In conclusion, the court stated, "Although regulations ultimately promulgated under the High-Speed Rail Act eventually may preempt the cities' ordinances, nothing in the present federal law preempts these ordinances."⁶⁵ While the Swift Rail Act permits local authorities to enact more stringent regulations to require whistles, local officials justifiably fear that once the Secretary issues regulations for highway-rail grade crossings, local whistle bans will be preempted and their peaceful, quiet communities will be shattered by train whistles night and day.

II. THE RAILROADS' POSITION: TRAIN WHISTLES SAVE LIVES

Historically, train whistles were a means of communication before trains were equipped with two-way radios. Using a system of long and short blasts, this "horn talk" warned train crews when to go, back up or hit the brakes.⁶⁶ Today, train whis-

tion Agency to establish standards for railroad noise emissions.

57. U.S. CONST. art. I, § 8, cl. 3.

58. *South Bend*, 880 F. Supp. at 598.

59. *Id.* at 597.

60. *Id.* at 603.

61. *Id.* at 601.

62. *Id.* (citing *Southern Pac. Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807 (9th Cir. 1993)).

63. The court relied on the reasoning of *Southern Pacific* cited by the cities, a case nearly on-point with *South Bend*. In *Southern Pacific*, the railroad sought to enjoin enforcement of an Oregon statute and Public Utility Commission rules which banned train whistles under certain conditions. *Southern Pacific*, 9 F.3d at 809. The Oregon court had deferred submission of the case pending the United States Supreme Court decision in *CSX Transp. Inc. v. Easterwood*, 113 S. Ct. 1732 (1993), which held that regulations adopted by the Secretary of Transportation under the FRSA did not preempt requirements imposed by state common law negligence. *CSX Transp.*, S. Ct. at 1739-40.

64. *South Bend*, 880 F. Supp. at 602. This is the test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Judge Miller found that the ordinances served the public interest of preserving the "peace and repose" of its citizens and that there was minimal effect on interstate commerce. *South Bend*, 880 F. Supp. at 603.

65. *South Bend*, 880 F. Supp. at 603.

66. Bill Briggs, *Train Talk Whistles Speak Language of Their Own*, DENV. POST, Sept. 27, 1995, at G01.

tles are still a means of communication in railyards and used as warning devices during operation.

The railroads argue that train whistles are necessary warning devices that save lives, often providing the only indication to motorists of an approaching train.⁶⁷ A 100-car train traveling at 30 miles per hour takes nearly one-half mile (2,640 feet) to stop and increases to one and one-third miles (7,040 feet) for a train traveling 50 miles per hour.⁶⁸ This compares to a distance of 150 feet required for the average car traveling at 50 miles per hour.⁶⁹ The average freight locomotive weighs approximately 140-200 tons; adding 100 train cars increases the weight to nearly 10,000 tons while the average passenger car weighs one to two tons.⁷⁰ Clearly, a passenger car is no match for a train.

The railroads primary position is that train whistles are necessary and that whistle bans undermine public safety by contributing to the number of accidents at highway-rail grade crossings each year. In support of this proposition, the railroads cite two studies.⁷¹

A. Florida's Train Whistle Ban: 1990 Study⁷²

The Federal Railroad Administration first examined the effect of train whistle bans after Florida passed a 1984 statute which authorized counties and municipalities to restrict train whistles along Florida's East Coast Railway Company's corridor (FEC).⁷³ The Florida law allowed local governments to ban train whistles between 10 p.m. and 6 a.m. at highway-rail crossings that were equipped with alternative warnings.⁷⁴ Eight counties and twelve cities banned whistles under the enabling legislation.⁷⁵ According to the FRA, in the five year period following, nighttime train accidents tripled along FEC highway-rail crossings with whistle bans.⁷⁶

During the 1990 House Appropriations Hearings, Representative William Lehman of Florida's 17th District questioned whether there was any data to support a correlation between crossing accidents and whistle bans.⁷⁷ The Florida Study was initiated as a response.⁷⁸ The FRA chose to study the FEC corridor because it was the most recent widespread whistle ban.⁷⁹ Of 600 highway-rail grade crossings along

67. NATIONAL STUDY, *supra* note 5, at 4, 7.

68. *Id.* at 2.

69. *Id.*

70. *Id.* at 2-3.

71. *Id.* at viii.

72. FED. R.R. ADMIN., U.S. DEP'T. OF TRANSP., FLORIDA'S TRAIN WHISTLE BAN (1990) [hereinafter FLORIDA STUDY].

73. Project Whistle Stop, Inc. lobbied the Florida State Legislature for the bans after an attempted national ban failed. See NATIONAL STUDY, *supra* note 5, at 4.

74. FLA. STAT. ch. 351.03(4)(a) (1984). Alternative warnings included flashing lights, bells, crossing gates and signs on the highway to warn motorists that whistles would not be sounded at night.

75. FLORIDA STUDY, *supra* note 72, at 2.

76. *Id.* at 1.

77. *Id.* at 3.

78. *Id.*

79. *Id.*

FEC's corridor, only eighty-nine were not subject to a ban by the end of 1989.⁸⁰ The FRA published the results of the Florida Study in April, 1990.

The Florida Study compared accident rates at the affected crossings before and after the whistle bans.⁸¹ Using a control group of crossings not impacted by the ordinances, the Florida Study attempted to identify any factors that would explain the dramatic increase in accidents during the period following the whistle ban.⁸² The results of the Florida Study were alarming. Comparing the number of accidents that occurred during a five year period before and a five year period after the whistle ban went into effect, there were 115 accidents reported during the bans compared to 39 accidents along the same corridor when no ban was in effect.⁸³ Using data from the control group, which had a 25 percent increase in accidents during the same time period, FRA projected that a 25 percent increase in accidents in the ban area would have resulted in a total of 49 accidents.⁸⁴ Since there were actually 115 accidents, this left 66 accidents unexplained. The FRA concluded that the unexplained accidents could only be attributed to the whistle bans.⁸⁵

Based on this data, the FRA determined that continuing the whistle bans created an emergency which involved "a hazard of death or injury" to persons.⁸⁶ On July 31, 1991, the FRA issued Emergency Order No. 15 which required FEC to sound train whistles at all public highway-rail grade crossings.⁸⁷ Recognizing that "the sound of a train whistle can be disturbing to people who live by highway-rail crossings," the FRA concluded that the accident record "mandate[d] FRA action despite the inconvenience to people living near the railroad right-of-way."⁸⁸ Following the Emergency Order, nighttime accidents declined 68.6 percent.⁸⁹

In response to comments, the FRA amended Emergency Order No. 15 on September 15, 1993.⁹⁰ The FRA relieved local jurisdictions from the whistle requirement if the jurisdiction adopted one or more remedial measures at certain highway-rail crossings in an established "quiet zone."⁹¹ These measures included: permanent closure of the crossing; nighttime closing of the crossing; installation of four-quadrant gates which fully block the crossing; installation of median barriers to prevent drivers

80. *Id.* at 2.

81. *Id.* at 3.

82. *Id.*

83. *Id.* at 10-11.

84. *Id.*

85. *Id.*

86. Emergency Order Requiring Use of Train Borne Audible Warning Devices, 56 Fed. Reg. 36,190 (1991) [hereinafter Emergency Order No. 15].

87. *Id.*

88. *Id.* at 36,193.

89. NATIONAL STUDY, *supra* note 5, at iii.

90. 58 Fed. Reg. 48,415 (1993) [hereinafter Amended Emergency Order]. Eight petitioners sought administrative review of Emergency Order No. 15. This included: the cities of Hollywood, Jupiter, North Miami Beach and West Palm Beach; Martin County; Project Whistle Stop; John A. Cavalier, Jr.; and Florida East Coast Railway Company.

91. A "quiet zone" was described in the Amended Emergency Order as, "A segment of railroad of not less than one-half mile (2,640 feet) in length on which all at-grade crossings are, in keeping with these specifications, closed during nighttime hours (10 P.M. to 6 A.M.), equipped with four-quadrant gates, equipped with gates with median barriers, or located where one-way streets are fully gated." *Id.* at 48,419.

from driving around lowered gates; and one-way pairing of adjacent streets with crossing gates modified to block approaching traffic.⁹²

B. Nationwide Study of Train Whistle Bans: 1995 Study

In consideration of future legislation concerning highway-rail grade crossings, the FRA conducted a nationwide study of whistle bans, issued in April 1995.⁹³ The National Study had two principal objectives: to determine how many crossings were subject to whistle bans beyond those on the FEC and whether the national crossings showed the same degree of safety risk demonstrated in the Florida Study.⁹⁴

The National Study was conducted in cooperation with the Association of American Railroads (AAR), an industry trade association.⁹⁵ The AAR requested member railroads to submit data on all state or local whistle bans.⁹⁶ The survey identified 2,122 crossings subject to whistle bans (excluding the 537 crossings previously examined in the Florida Study) representing 61 percent of the national total.⁹⁷ Of the 25 responding railroads, 17 reported operating over crossings subject to whistle bans and 94 percent of the bans were effective 24 hours per day.⁹⁸ The time frame of the National Study was 6.5 years, in contrast to the 5 year Florida Study. However, the National Study used the same five year accident prediction model as the Florida Study. FRA employed two analytical procedures: a direct comparison of empirical data and a comparison using the prediction model in the Florida Study.⁹⁹

The National Study reflected the findings in the Florida Study and showed that accident rates were lower when whistle bans were canceled.¹⁰⁰ The National Study also examined the circumstances of accidents to determine whether horn-sounding had an impact on accident rates.¹⁰¹ Most significant was the fact that 28 percent of the accidents were due to motorists driving around lowered gates and 22 percent involved motorists striking the side of the train.¹⁰² In contrast, these accidents accounted for 15 percent and 21 percent during non-ban periods.¹⁰³ Comparing empirical data for crossings subject to bans, the study found that there was an 84 percent greater frequency of accidents than at crossings without whistle bans.¹⁰⁴ Overall, accident rates declined 38 percent when the whistle bans were repealed or canceled as compared to the 68.6 percent decline in the Florida Study.¹⁰⁵ In summary, the FRA concluded that the

92. *Id.* at 48,419-48,420.

93. NATIONAL STUDY, *supra* note 5.

94. *Id.* at 11.

95. *Id.* at 10.

96. *Id.*

97. *Id.* at 12-17.

98. *Id.* at 12.

99. *Id.* at 12-17.

100. *Id.* at 48-50.

101. Factors in the National Study included the weather, time of day, whether the accident was due to faulty operation of the signal, whether the motorist drove around the gate and whether there was an obstructed view of the tracks. *Id.* at 45.

102. *Id.*

103. Percent of total accidents. Multiple circumstances possible, as noted in the National Study. *Id.* at 45 n.19.

104. *Id.* at 49.

105. *Id.* at 49-50.

similarity between the Florida Study and National Study "indicate that whistle bans, whether they are effective 24 hours or nighttime-only, increase the risk of accidents at crossings."¹⁰⁶

C. Railroad Safety in 1995: Operation Lifesaver and DOT's Safety Campaign

During the first half of 1995, the railroad industry's overall accident rate per million train-miles declined 11.5 percent with a 15 percent drop in the rail-grade crossing accident rate and a 13 percent decline in total rail-grade crossing accidents.¹⁰⁷ Nevertheless, the number of fatalities at highway-rail grade crossings increased 7 percent.¹⁰⁸ Edwin L. Harper, President and Chief Executive Officer of AAR, attributed the improved safety record to better equipment, facilities and communications.¹⁰⁹ However, Harper cautioned that the increased number of fatalities at crossings "underscores the need for programs like Operation Lifesaver, with its emphasis on the three E's — educating drivers, enforcing highway-rail grade crossing safety laws and properly engineering the crossings."¹¹⁰ In March 1995, Operation Lifesaver was joined by the Brotherhood of Locomotive Engineers in a concerted effort to educate the public on the fatal consequences of car-train and pedestrian-train accidents.¹¹¹

The DOT also launched a multimedia campaign in early 1995 entitled "Always Expect a Train" in order to educate the public on the dangers of highway-rail crossings and trespassing on tracks and railroad equipment.¹¹² According to Transportation Secretary Frederico Peña, over half of all crossing accidents occur because people ignore warning signs, bells, lights or gates and drive into the path of an on-coming train.¹¹³ The hope is that the media campaign will increase public awareness and thereby change public behavior. Involved in this effort are the FRA, the Federal Highway Administration, the Federal Transit Administration, the National Highway Traffic Safety Administration, AAR and Operation Lifesaver.¹¹⁴ The advertisements and public service announcements on radio and television show the perspective of locomotive engineers who suffer the emotional impact when they are unable to stop in time to prevent hitting a motorist or pedestrian.¹¹⁵

Hopefully, efforts such as Operation Lifesaver and the DOT safety campaign will result in a continued decline in rail accidents. However, in the opinion of AAR President Harper, "There is very little railroads can do to prevent these accidents . . . since

106. *Id.* at 50.

107. *First-Half 1995 Safety Results Surpass 1994 Rail Industry Record*, PR Newswire Ass'n., Oct. 9, 1995, available in LEXIS PRNEWS Library [hereinafter *1995 Safety Results*].

108. *Id.*

109. *Id.*

110. *Id.* A non-profit group dedicated to reducing highway-rail crossing accidents, Operation Lifesaver, Inc., strives to educate motorists that "you should NEVER try to beat" a train. *Id.*

111. Rupert Welch, *Rail Crossing Safety Campaign Begun by DOT, Industry Groups*, INSIDE DOT & TRANSP. WK., Mar. 10, 1995 [hereinafter *Safety Campaign*].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

they are almost always the fault of inattentive motorists, or trespassers who shouldn't be on rail property in the first place."¹¹⁶

III. LOCAL CONCERNS: TRAIN WHISTLES ARE A REGIONAL PROBLEM THAT DISRUPT PEACEFUL, QUIET COMMUNITIES

Although most local officials do not entirely discount the railroads' safety argument, the primary concern of many villages and municipalities is the daily disruption from train whistle noise. National regulation requiring whistles to be sounded at all rail-grade crossings, night and day, would preclude area officials from exercising any control over railroad noise in their communities. While the far-off sound of a train whistle may conjure up romantic images for some, for others train whistles lower property values and are a constant source of stress that disrupt daily life.

The simple fact is, trains are noisy. Measured in decibels, a "quiet" train operates at 70 decibels¹¹⁷ and a train whistle sounds at 105 decibels,¹¹⁸ the same as an airplane at takeoff.¹¹⁹ This is compared to normal conversation at 30 decibels or a noisy office at 60 decibels.¹²⁰ Scientists and psychologists have found that chronic exposure to this type of noise is unhealthy and "may cause high levels of chronic arousal—the physiological responses to anxiety that trigger suppression of the body's natural defenses to disease and leave one more susceptible to physical ailments of all kinds."¹²¹ This includes hypertension, hardening of the arteries, allergies and symptoms of arthritis.¹²²

Noise pollution has other adverse effects. Studies have shown that children who are exposed to chronic noise from subway trains, expressway traffic or jet planes "learn less and take longer to learn" than in quiet settings.¹²³ As one child-care provider near train tracks noted, "The noise [from trains] is so extremely loud that it affects your body . . . I've seen children fall to their knees and hold their hands over their ears and cry when the trains go by."¹²⁴ Adults are similarly affected with problems in making decisions and learning and may be more prone to accidents as a result of noise pollution.¹²⁵

Trains have been around for a long time. When railroad service began in the 1830s, the population of the United States was approximately fifteen million.¹²⁶ To-

116. 1995 *Safety Results*, *supra* note 107.

117. William Barnhill, *You Overload! The 'People Pollution' Epidemic*, WASH. POST, Jan. 28, 1993, at C5. (There is conflicting information concerning decibel levels from specific sources. Therefore, this Note uses the levels most often cited.)

118. Mark A. Stein & Hugo Martin, *Horns of a Dilemma: Rail Officials Try to Figure Out How to Reduce Train Noise Levels*, L.A. TIMES, Nov. 23, 1992, at 1B1.

119. THE NEW YORK PUBLIC LIBRARY DESK REFERENCE 25 (2d ed. 1993). A 'decibel' is defined as "[a] unit of relative loudness. The smallest amount of change that can be detected by the human ear is one decibel. A 20-decibel sound is 10 times as loud as a 10-decibel sound; a 30-decibel sound is 100 times as loud." *Id.*

120. *Id.*

121. Barnhill, *supra* note 117, at C5.

122. *Id.*

123. *Id.*

124. Norman Draper, *Coon Rapids Folks Rail Against Noisy Trains*, MINNEAPOLIS-ST. PAUL STAR TRIB., Apr. 15, 1995, at 1B.

125. Barnhill, *supra* note 117, at C5.

126. NATIONAL STUDY, *supra* note 5, at 1.

day, the population has increased to nearly 250 million persons.¹²⁷ As urban areas expanded, it was inevitable that train tracks and residential areas would eventually overlap. One suburban Minnesota resident noted, "When I first moved here, we had about three trains a day. We loved it. But when you start getting 40 to 60 trains a day, love starts turning to hate really fast."¹²⁸

The increased train traffic is due to several factors. For instance, railroads have made concentrated efforts in the past few years to compete directly with the trucking industry and are now moving more freight around the country.¹²⁹ There are numerous advantages for businesses and the environment, with trains able to move "three to four times as much freight as trucks for every gallon of fuel burned."¹³⁰ However, the downside for persons living along the tracks is more freight trains. According to Burlington Northern spokesperson Gus Melonas (Seattle), another factor that has led to increased rail use is "a vibrant economy and the North American Free Trade Agreement, which opened the door to more trade with Mexico and Canada."¹³¹

In addition to freight trains, passenger commuter trains in and around urban areas add considerably to the increasing amount of rail traffic. A requirement by the Secretary for train whistles at all highway-rail grade crossings, combined with the increased rail traffic, would result in constant whistle sounding for many of those located near commuter lines. In Los Angeles, for example, a requirement for train whistles within a quarter mile of intersections would result in a horn sounding "26 times in 22 miles . . . [and] more than 100 times in nearly 114 miles for Metrolink."¹³² In the greater Chicago area, where there are currently the greatest number of whistle bans, this would mean that "'whistles would have to sound straight through from Bensenville all the way through DuPage'"¹³³ and from Aurora to Union Station.¹³⁴ Even a smaller town like Bellevue, Iowa, would be adversely affected. In this community of 2,239 people, 8 trains pass through 15 intersections each day.¹³⁵ According to Bellevue City Administrator Tom Roth, 8 trains would produce roughly 48 minutes of train whistling each day.¹³⁶

Opponents of a national requirement for train whistles argue that many of the accidents that the railroads cite in their studies might not be prevented by requiring whistles because people ignore warnings *including* train whistles.¹³⁷ Indeed, the

127. THE NEW YORK PUBLIC LIBRARY DESK REFERENCE 768 (2d ed. 1993).

128. Draper, *supra* note 124, at B1.

129. Peter Bradley, *Railroads Home In On Truck Freight*, 90 PURCHASING 100 (1990), available in 1990 WL 2,517,917.

130. *Id.*

131. Draper, *supra* note 124, at B1.

132. Stein & Martin, *supra* note 118, at 1B1.

133. Denise Linke, *Train Whistle Plan Called Ridiculous*, CHI. TRIB., Oct. 2, 1995, at 3 (citation omitted).

134. Hal Dardick, *Municipal Leaders Rail Against Train Whistle Law*, CHI. TRIB., Oct. 16, 1995, at 1. According to Metra commuter rail officials, there are 1,500 train movements during a 24 hour period in Illinois, 500 of which are commuter trains. Elmhurst, Illinois, has a freight train every 15 minutes during the nighttime hours. *Id.*

135. Jack Hovelson, *Alarm Over Whistles*, DES MOINES REG., Oct. 1, 1995, at 1.

136. *Id.*

137. See generally NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., RAIL-HIGHWAY CROSSING SAFETY: FATAL CRASH AND DEMOGRAPHIC DESCRIPTORS (1994). The author found further evidence to support this premise utilizing WESTLAW for the period of September 1, 1995 through October 20, 1995. There were fourteen news stories across the country of accidents in which a motorist or pedestrian ignored the train whistle as well as other warning devices including gates and

FRA's National Study (discussed previously) noted that signal failure had a negligible effect on accidents at highway-rail crossings and that a large percentage of accidents occurred when motorists drove around gates.¹³⁸ Even when a whistle is blown, motorists "with the car windows closed and the stereo blasting at 130 decibels" may not hear it.¹³⁹ Many believe that the government is trying to over-protect the public. Some, like Illinois state representative Cal Skinner argue, "The public does not want government to be a nanny. How much is society willing to bend over backwards in order to compensate for personal irresponsibility."¹⁴⁰

While the Swift Rail Act does allow the Secretary to make exceptions to the whistle requirement, many municipal officials are concerned that the alternatives required to circumvent the whistle requirement are too costly.¹⁴¹ Currently, there are five alternative safety measures that permit an exception to train whistles. They include: closing the crossing permanently or at night, one-way crossings alternated by street, gates plus median barriers and four-quadrant gates.¹⁴² However, four-quadrant gates cost approximately \$100,000 to \$200,000 to install.¹⁴³ For a community with five or more crossings, the cost to local government would exceed \$1 million. Although median barriers are less expensive, many streets are too narrow to accommodate them.¹⁴⁴ Because these are the only alternatives currently available, avoiding the whistle requirement would force municipalities to pay for these alternative measures, causing many local officials to call the Swift Rail Act an "unfunded federal mandate."¹⁴⁵

IV. CONCLUSION

It would be an understatement to say that there are no easy solutions to this problem. Clearly, the railroads' safety concerns are of national importance.¹⁴⁶ Local governments' concerns that train whistles disturb their citizens and disrupt their communities are equally valid. However, a national requirement for train whistles under § 20153 of the Swift Rail Act is not the best possible solution.

The FRA has made a beginning by offering some alternative safety measures to train whistles. However, the cost of these alternatives prevents them from being a complete solution. While the Swift Rail Act does provide some funding for developing new technologies, the present levels are insufficient to provide relief in the near future—certainly not before the November 1996 deadline imposed by the Swift Rail Act. However, given the national need for a balanced budget, increased funding is unlikely.

flashing lights. On October 25, 1995, a commuter train hit a school bus which was stopped on the tracks in Fox River Grove, Illinois. Gary Washburn and Andrew Martin, *Commuter Train Hits School Bus; 5 Students Killed*, CHI. TRIB., Oct. 25, 1995, at 1. At the time this note was written, that accident was still under investigation.

138. NATIONAL STUDY, *supra* note 5, at 45.

139. David J. Knorr, *Safer LIRR Crossings*, NEWSDAY, Feb. 21, 1994, at 33.

140. Kerrill, *supra* note 6, at 6.

141. Interview with Jeffrey M. Jankowski, Deputy City Attorney, City of South Bend, Department of Law, in South Bend, Ind. (Feb. 7, 1996). See also Dardick, *supra* note 134.

142. See *supra* notes 84-85 and accompanying text.

143. Dardick, *supra* note 134, at 1.

144. *Id.*

145. *Id.*

146. This note does not address the issue of liability or negligence.

The best approach taken by the railroads thus far has been through their efforts to increase public awareness with DOT's safety campaign and programs such as Operation Lifesaver. The FRA has also taken commendable steps toward funding new technologies such as a \$6 million grant to the State of Michigan to develop and test a new train control system.¹⁴⁷ The Incremental Train Control System, developed by Harmon Industries, will use on-board communication devices that will activate highway-rail warning devices consistently, miles before a train approaches.¹⁴⁸ Improved reliability may result in increased motorist confidence in warnings at crossings, hopefully decreasing the number of drivers who ignore the current warning devices.¹⁴⁹

The Illinois Department of Transportation recently announced that it will begin testing a radio transmitting system that will warn school buses, ambulances and other similar type vehicles of approaching trains.¹⁵⁰ With this system, transmitters would be placed at certain highway-rail crossings that would trigger a warning signal in vehicles equipped with special receivers.¹⁵¹ The pilot program is expected to cost between \$500,000 and \$1 million but may help to prevent accidents such as the Fox River Grove, Illinois, school bus-train accident in which seven high school students were killed.¹⁵²

The railroads should also standardize the duration of sounding and decrease the decibel levels of existing train whistles. Decreasing the level and duration of whistles should not undermine their warning capacity and may provide some relief to nearby residents. At the same time, trains should slow down, especially commuter trains traveling within urban areas.¹⁵³

Local governments have also taken some positive steps. For example, a new Illinois law imposes a minimum fine of \$500 or 50 hours of community service on motorists or pedestrians who violate crossing laws.¹⁵⁴ However, more state and local governments need to take a similar approach and, more importantly, these laws need to be strictly enforced by local officials. Existing technology such as photo enforcement

147. News Release, FRA Awards Michigan \$6 Million for High-Speed Train Control System, D.O.T. Mar. 17, 1995, available in 1995 WL 112,071.

148. *Id.*

149. *Id.*

150. Ray Quintanilla, *IDOT to Test Rail Safety Device Signal to Warn Vehicles at Crossings*, CHI. TRIB., Feb. 7, 1996, at 1. See also Linke, *supra* note 133.

151. *Id.*

152. *Id.* Shortly after the Fox River Grove accident, Secretary of Transportation Frederico Peña formed the Grade Crossing Safety Task Force in order to improve safety at highway-rail crossings. Their report, published March 1, 1996, did not address the issue of train whistles. However, the Task Force identified five problem areas at highway-rail crossings: (1) inadequate coordination between traffic signals and rail crossing warnings; (2) insufficient space for motor vehicles between rail crossings and highway intersections; (3) "high profile" crossings where the drop between the road surface and railroad tracks may trap vehicles with low road clearance; (4) light-rail crossings which are utilized by motorized vehicles and pedestrians; and (5) insufficient instruction and information given to operators of oversized vehicles. U.S. DEP'T OF TRANSP., ACCIDENTS THAT SHOULDN'T HAPPEN: A REPORT OF THE GRADE SAFETY TASK FORCE TO SECRETARY FEDERICO PEÑA (1996).

153. In fact, the Village Board of Fox River Grove, Illinois, has been pressuring Metra transportation to reduce commuter train speed. According to Fox River Grove President Bill Yocius, "It is our feeling that a more valuable safety measure at crossings [than requiring train whistles] would be to reduce the speed of trains from 70 m.p.h. to 50 m.p.h. . . . On the morning of Oct. 25, a train whistle did blow, and it didn't seem to make a difference." Quoted in Sheridan Chaney, *Town Steps Up Attack on Train Speeds*, CHI. TRIB., Dec. 23, 1995, at 5.

154. ILL. ANN. STAT. ch. 625, para. 5/11-1201 (Smith-Hurd 1995) amended by 1995 Ill. Legis. Serv. 89-186 (West).

systems, which photograph violators and provide law enforcement officials with information such as license numbers and the time of violation, should be utilized at problem crossings whenever possible. Other options include adding rumble strips on the highway approach to a rail-grade crossing, improved lighting at rail intersections and the use of warning strobe lights either on the crossing gates themselves or in the highway approach such as those currently in use in some school crossing zones.

The proposed use of median barriers, one of the alternative safety measures suggested by the FRA, should also be modified in order to be a more practicable solution. The current proposals require concrete median barriers that are 2 to 3 feet high and 100 feet in length.¹⁵⁵ According to one deputy city attorney, "[a]sphalt barriers approximately one foot high and forty feet in length would be less costly and burdensome for the cities, while accomplishing the same thing."¹⁵⁶

Thus far, both the FRA and local officials have taken a restrictive approach—local authorities wish to ban train whistles and the FRA would like to ban the bans. However, the best solution is a joint effort by both sides that would increase safety and preserve our communities.

*Cheryl A. Greene**

155. NATIONAL STUDY, *supra* note 5, at 51-54.

156. Interview with Jeffrey M. Jankowski, Deputy City Attorney, City of South Bend, Department of Law, in South Bend, IN (Feb. 7, 1996).

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