

Railroad Franchise User Notes

The regulation of railroads, perhaps to the greatest extent of any class of franchisees, has been preempted by the federal government. While most state and federal utility regulations preserve a city's authority to regulate what physically occurs within its rights-of-way, two federal laws, the Interstate Commerce Commission Termination Act (ICCTA) and the Federal Railroad Safety Act of 1970 (FRSA), preempt nearly all aspects of railroad regulation.

ICCTA

The Washington State Supreme Court examined the breadth of ICCTA preemption in *City of Seattle v. Burlington Northern R. Co.*, 145 Wn.2d 661, 41 P.3d 1169 (2002). The Court found that “[t]he ICCTA placed with the [Surface Transportation Board (STB)] complete jurisdiction, to the exclusion of the states, over the regulations of railroad operations.” *Id.*, at 666 (quoting *Flynn v. Burlington N. Santa Fe Corp.*, 98 F.Supp.2d 1186, 1188 (E.D.Wash.2000)). Looking at the federal statutes, one can see the scope of the STB's granted of power. Its exclusive jurisdiction extends over a number of areas that are commonly reserved for local government for other classes of franchisees:

- (1) 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,

49 U.S.C. § 10501(b) (emphasis added).

The Ninth Circuit Court of Appeals found in *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (1998), that ICCTA's broad preemption also extends to environmental reviews of the above activities. This ruling makes state environmental laws, such as Washington's State Environmental Policy Act (SEPA), inapplicable to railroad activities.

FRSA

The Washington Supreme Court also found in *Burlington Northern* that “[t]he FRSA preempts local regulations that impact interstate and intrastate railroad safety.” *City of Seattle v. Burlington Northern R. Co.*, 145 Wn.2d 674. This leaves little room for local police power regulation of railroad franchisees:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt

or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added).

One example of a state regulation that fits within these constraints is the Oregon railroad whistle regulation examined by the Ninth Circuit Court of Appeals in *Southern Pacific Transp. Co. v. Public Utility Com'n of State of Or.*, 9 F.3d 807 (1993). Oregon's regulation allowed local jurisdictions to restrict the sounding of railroad whistles under certain circumstances. The Court found that the Oregon regulation was allowable because federal regulations only specified the volume of such whistles, not when and where they could be sounded. Had Oregon banned the sounding of railroad whistles outright, that action "arguably would defeat the purpose of the whistle capacity provisions of § 229, and likely would be found to conflict with the ... [FRSA]....". *Id.*, at 813.

State and Federal Statutes

Federal Statutes

- The Interstate Commerce Commission Termination Act of 1995 (ICCTA), Public Law 104-88, 109 Stat. 803, codified at 49 U.S.C. § 10101, et seq.
- The Federal Railroad Safety Act (FRSA), Public Law 91-458, codified at 45 USC §421 et seq.

Washington Statutes

- RCW 35.22.340, Streets -- Railroad franchises in, along, over and across.

Every city of the first class may by ordinance authorize the location, construction, and operation of railroads in, along, over, and across any highway, street, alley, or public place in the city for such term of years and upon such conditions as the city council may by ordinance prescribe notwithstanding any provisions of the city charter limiting the length of terms of franchises or requiring franchises to contain a provision granting the city the right to appropriate by purchase the property of any corporation receiving a franchise, license, privilege, or authority: PROVIDED, That this does not apply to street railroads nor to railroads operated in connection with street railroads in and along the streets of such city.

- RCW 35A.47.040, Franchises and permits -- Streets and public ways.

Every code city shall have authority to permit and regulate under such restrictions and conditions as it may set by charter or ordinance and to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for railroads and other routes and facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication, for gas, steam and liquid fuels, for water, sewer and other private and publicly owned and operated facilities for public service. The power hereby granted shall be in addition to the franchise authority granted by general law to cities.

No ordinance or resolution granting any franchise in a code city for any purpose shall be adopted or passed by the city's legislative body on the day of its introduction nor for five days thereafter, nor at any other than a regular meeting nor without first being submitted to the city attorney, nor without having been granted by the approving vote of at least a majority of the entire legislative body, nor without being published at least once in a newspaper of general circulation in the city before becoming effective.

The city council may require a bond in a reasonable amount for any person or corporation obtaining a franchise from the city conditioned upon the faithful performance of the conditions and terms of the franchise and providing a recovery on the bond in case of failure to perform the terms and conditions of the franchise.

A code city may exercise the authority hereby granted, notwithstanding a contrary limitation of any preexisting charter provision.

Regulatory Agencies

- the Federal Surface Transportation Board (STB)
- [General Franchise Form](#)