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Federal Pre-Emption of Municipal Train Speed Ordinances

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G.S. 160A-195 authorizes cities to regulate the speed of trains within city limits. Two recent federal district court cases, one of which was decided in the Western District of North Carolina, and a decision of the Indiana Court of Appeals strongly suggest that this authorization may now have been pre-empted by regulations of the Federal Railroad Administration. At the very least, it appears that cities that have and wish to continue such ordinances should re-enact them, making the appropriate determination discussed below, and submit them to the State Utilities Commission as provided in G.S. 62-238.1.

The Federal Statute and Regulations

The National Railroad Safety Act, codified at 45 U.S.C. § 421 et seq., was enacted in 1970. Section 205 of that act, now codified at 45 U.S.C. § 434, declares that railroad safety rules are to be uniform nationally, subject to two exceptions. First, a state may adopt safety regulations or continue them in force until the Secretary of Transportation adopts a regulation on the same subject. And second, even after the Secretary has acted, a state may adopt or continue in force a regulation that is more stringent than the federal regulation if the state regulation (1) is "necessary to eliminate or reduce an essentially local safety hazard"; (2) is not incompatible with any federal law or regulation; and (3) does not create an undue burden on interstate commerce. In 1971 federal railroad speed regulations (codified at 49 C.F.R. part 213) were adopted pursuant to the Railroad Safety Act; these regulations establish six classes of track with different speed limits for each class. Therefore, as to railroad speed regulation, only the second exception is now available.

The Recent Decisions

The two recent federal cases are *Sisk v. National Railroad Passenger Corporation*, 647, F. Supp. 861 (D. Kan. 1986), and *Johnson v. Southern Railway Co.*, 654 F. Supp. 121 (W.D.N.C. 1987). (The second case involved Charlotte's train speed ordinance.) The third case is *Santini v. Consolidated Rail Corp.*, 505 N.E.2d 832 (Ind. App. 1987). Each case arose out of a collision between a train and either an automobile or an individual, with the victim or his survivors suing the railroad for damages. In each case the train in question was exceeding the speed limit established by local ordinance but was within the speed limit established by federal regulation. In each case the railroad successfully argued that the local ordinance was invalid because it was pre-empted by the federal regulations. The rationales in the cases are quite similar and should be looked at in detail.

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"State" action required. The pre-emption section of the National Railroad Safety Act, 45 U.S.C. § 434, permits a "State" to adopt more stringent regulations than the national rules. Although each left itself a slight escape route, both federal district courts essentially held that "State" means state government only, and that the federal statute does not permit such more stringent regulations to be adopted by local ordinance, even when that ordinance is authorized by state law.[1] (This issue was not raised in the Indiana case.) Thus, in North Carolina the General Assembly or the Utilities Commission must adopt the regulation, not a particular city.

In 1985, the General Assembly enacted G.S. 62-238.1, which expands the role of the Utilities Commission in regulating train speeds. G.S. 62-239 has long permitted the Commission to pre-empt municipal train speed ordinances on the petition of the affected railroad. The 1985 enactment seeks to facilitate that process by requiring that any train speed ordinance adopted after October 1, 1985, be filed with the Commission. The Commission then mails a copy of the ordinance to each affected railroad, and the ordinance does not become effective until 20 days after the railroads receive their copies. During that 20 days, the railroads may petition the Commission for relief from the ordinance. Although a court might still disagree, this increased role for the Utilities Commission provides an argument that it is the State, and not simply a local government, that is imposing the regulation. (Charlotte could not make this argument in full in the *Johnson* case because its ordinance had been adopted before October 1, 1985. Although the city did point to the Commission's long-held power to review ordinances, the court was not persuaded this power—unexercised—converted the ordinance to state action.) Therefore, if a city wishes to retain its train speed ordinance, its best hope of meeting the federal requirement of "State" action is to re-enact the ordinance and submit it to the Utilities Commission as required by G.S. 62-238.1.

Determination of local safety hazard. The district court in *Johnson*, after declaring that any modification of the federal regulation had to be made by the state government, assumed for purposes of further discussion that city action was permissible. But it then pointed out that the city had made no determination that the crossing at which the collision took place was a local safety hazard. (Recall that the federal statute permits exceptions "when necessary to eliminate or reduc an essentially local safety hazard.") The court seemed to approve certain city regulations that affected the mainline of the Southern Railway but thought it unreasonable to extend these regulations to all crossings in the city:

> But to paint with a broad brush and slow all trains on all tracks in the City of Charlotte whether protected by signals or other barriers is clearly burdensome on interstate commerce and does not come with [sic] the exceptions of Section 434.[2]

The lesson of this portion of the *Johnson* opinion is that a city should not simply adopt a train speed ordinance. Rather, it should do so only after the council (1) determines in some fashion that the crossings within the city affected by the ordinance are especially hazardous and therefore needful of more stringent regulation, and (2) enters that determination in the record. This requirement strongly suggests that citywide train speed ordinances may be inappropriate; that point is more clearly made in the Indiana case. There the court held that the local ordinance, which limited train speeds citywide, was not narrowly tailored to alleged hazards at the particular crossing at which the accident occurred. For that reason, the Indiana court held that the ordinance did not fit within the permitted exception of § 434 and was pre-empted. If a city decides to adopt a train speed ordinance for submission to the Utilities Commission, it should at the same time make the determination thought necessary by the *Johnson* court.

Conclusion

It should be emphasized that even if a city takes the steps outlined above—formally determining that certain local safety hazards exist and submitting the re-adopted ordinance to the Utilities Commission—the ordinance might not withstand attack. A court might still hold that the action was by local rather than by state government. But following this course appears to provide the only possible chance for such an ordinance to withstand attack. Existing ordinances adopted without taking these steps are almost certainly pre-empted and unenforceable.

1. The second conclusion of law of the *Johnson* court is that "the power of a state to continue in force laws, rules, regulations, orders or standards under [§ 434] may not be delegated to municipalities." 654 F. Supp. 121, at 124.

2. *Id.* at 123.

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