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AZ CORP COMMISSION
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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

7 IN THE MATTER OF THE APPLICATION
8 OF THE CITY OF FLAGSTAFF TO
9 UPGRADE EXISTING RAILROAD
10 CROSSING OF THE BNSF RAILWAY
11 COMPANY AT STEVES BOULEVARD
AND FANNING DRIVE IN THE CITY OF
12 FLAGSTAFF, COCONINO COUNTY,
ARIZONA DOT CROSSING NOS. 025099J
AND 025129Y

DOCKET NO. RR-02635B-09-0075

**BNSF RAILWAY COMPANY'S BRIEF IN
RESPONSE TO MAY 9, 2009
PROCEDURAL ORDER**

INTRODUCTION

15 Pursuant to the May 7, 2009 Procedural Order, BNSF Railway Company ("BNSF")
16 hereby submits this Brief in the above-captioned matter. The Procedural Order poses four
17 specific questions to the parties concerning safety considerations at three public highway-rail
18 grade crossings located in Flagstaff, Arizona – all of which will be located within a quiet zone¹
19 established by the City of Flagstaff ("City"): public crossings at Beaver Street, San Francisco
20 Street and Enterprise Ave. In addition to responding to each of the specific questions posed in the
21 procedural order, BNSF will also address the role of federal, state and local agencies, and
22 railroads, concerning the: (i) installation of wayside horns at public highway-rail grade crossings,
23 (ii) creation of quiet zones pursuant to 49 CFR parts 222 and 229, and (iii) consideration and
24

25 ¹ The quiet zone will also cover two additional public highway-rail crossings at Steves Boulevard
26 and Fanning Drive. The City of Flagstaff intends to utilize wayside horns at each of these two crossings.

1 implementation of safety measures at public highway-rail grade crossings that are located within
2 those quiet zones. BNSF is hopeful that the discussion herein is informative, and allows the
3 Arizona Corporation Commission (“Commission”) to not only find that the issues raised by this
4 proceeding are preempted by federal law, but to also recognize that the federal regulatory scheme
5 regarding the use of locomotive horns at public highway-rail grade crossings is fashioned to
6 protect the public interest.

7 DISCUSSION

8 I. The Use of Wayside Horns in Lieu of Locomotive Horns at Public Highway-Rail 9 Crossings is Governed by Federal Law.

10 A. Background

11 In 1994, Congress passed 49 U.S.C. Sec. 20153 [“Audible Warnings at Highway-Rail
12 Grade Crossings”], mandating the use of locomotive horns at public highway-rail grade crossings
13 nationwide. This law was passed to address safety concerns over an increased number of motor
14 vehicle accidents where local municipalities had, by local ordinance, created quiet zones.
15 49 U.S.C. Sec. 20153(b) provides that “The Secretary of Transportation shall prescribe
16 regulations requiring that a locomotive horn shall be sounded while each train is approaching and
17 entering upon each public highway rail grade crossing.” Section 20153(c) allows the Secretary of
18 Transportation to determine any exceptions to the requirement found in Section 20153(b), and
19 upon what conditions such exceptions will be allowed. This authority has been delegated to the
20 Federal Railway Administration (“FRA”) pursuant to 49 CFR 1.49. One of the exceptions to the
21 requirement of sounding a locomotive horn when approaching a public highway-rail crossing is
22 the use of a wayside horn. FRA regulations governing the installation and use of wayside horns
23 are set forth in 49 CFR part 222 and 229. The FRA has determined that a wayside horn will be
24 considered a one-to-one substitute for the locomotive horn.²

25 ² “Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
26 80 (April 27, 2005), p. 21845.

1 B. Federal Preemption

2 The Arizona Corporation Commission's ("Commission") authority over safety at public
3 highway-rail grade crossings is set forth in A.R.S. §§ 40-337 and 40-337.01. Pursuant to
4 Commission rule A.A.C. R14-5-104(B)(8), a locomotive approaching a public highway-rail grade
5 crossing must sound its horn or whistle at least ¼ of a mile until the crossing is reached.
6 However, 49 CFR part 222.7(a) ["What is this regulation's effect on State and local laws and
7 ordinances?"] provides that "Except as provided in paragraph (b) of this section, issuance of this
8 part *preempts* any State law, rule, regulation, or order governing the sounding of the locomotive
9 horn at public highway-rail grade crossings, in accordance with 49 U.S.C. 20106."

10 Where a state statute conflicts with, or frustrates, federal law, the former must give way.
11 U.S. Const. Art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68
12 L.Ed.2d, 576 (1981). Evidence of pre-emptive purpose is sought in the text and structure of the
13 statute at issue. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d
14 490 (1983). It is clear from the actual text contained in the FRA regulations that state laws
15 regarding the sounding of locomotive horns at public highway-rail grade crossings are preempted.
16 49 CFR part 222.7(a). The text in 49 CFR part 222.59 ["When May a Wayside Horn Be Used?"]
17 gives another indication of the FRA's intent to occupy the field on this issue.

18 According to 49 CFR part 222.59, a wayside horn conforming to the requirements of 49
19 CFR part 222, Appendix E, may be used in lieu of a locomotive horn at any highway-rail crossing
20 equipped with an active warning system that includes, at a minimum, flashing lights and
21 automatic gates. 49 CFR part 222.59(a)(1). When installed within a quiet zone, a wayside horn
22 at a highway-rail crossing is considered in the same manner as a crossing treated with a
23 Supplemental Safety Measure ("SSM"). 49 CFR part 222.59(a)(2). Whenever a wayside horn is
24 installed outside a quiet zone, the railroad or public authority installing the wayside horn must
25 provide at least 21-days written notice to all railroads operating over the highway-rail crossing,
26 the highway or traffic control authority or law enforcement authority having control over the

1 vehicular traffic at the crossing, the State agency responsible for highway road safety, and the
2 FRA's Associate Administrator ("AA"). 49 CFR part 222.59(c). Because the FRA has already
3 determined that a wayside horn shall be considered a one-to-one substitute for a locomotive horn,
4 any action by a state agency to regulate that use (i.e. place conditions on terms of use) would
5 attempt to address a subject matter already occupied by federal regulations. Consequently, BNSF
6 respectfully submits that the installation and use of wayside horns at public highway-rail grade
7 crossings does not require Commission approval.

8 It is not likely that preemption over the use of locomotive horns at public highway-rail
9 grade crossings (and the exceptions thereto) precludes the Commission from carrying out its
10 statutory authority over safety at such crossings, provided that: (i) there is no attempt to regulate
11 the use of locomotive and wayside horns, as already addressed herein, and (ii) the public crossing
12 is not located within a quiet zone, as discussed in more detail below.

13 **II. The Specific Issues Raised In the May 9, 2009, Procedural Order Are Governed by**
14 **Federal Law.**

15 A. Questions Presented in Procedural Order.

16 - **What changes are being made at these three crossings?**

17 According to the City of Flagstaff's February 17, 2009 application, the three public
18 highway-rail crossings will require additional signage and fencing. Application at 2. In addition,
19 upon the establishment of a quiet zone pursuant to 49 CFR parts 222 and 229, locomotives will
20 no longer be required to sound their horns upon approach of these crossings, even though
21 required by state rules and regulations.

22 - **Do these changes need to be approved by the Commission? If so, what is the**
23 **course of the Commission's authority? If not, why not?**

24 - **If trains cease sounding their horns at these three crossings, will the**
25 **crossings be safe for the public, with their existing safety equipment? If so,**
26 **what makes them safe, how was that determined, and by whom? If not, why**
not?

1 **- If the Commission determines that these three crossings will not be safe,**
2 **with their existing safety equipment, if trains cease sounding their horns at**
3 **the crossings, does the Commission have the authority to order that anything**
4 **be done to remedy that? If so, what is the source of the Commission's**
5 **authority, and what may the Commission order to remedy the situation? If**
6 **not, why not?**

7 The issues raised by these three questions are interrelated, and concern federal regulations
8 regarding the establishment of quiet zones (by local municipalities) which include public
9 highway-rail grade crossings. Because the FRA expressly intended to occupy the field over quiet
10 zone establishment and acceptable risk thresholds, the Commission does not have the authority to
11 approve or disapprove quiet zone areas in Arizona, or to address safety issues for public highway-
12 rail grade crossings located within quiet zones.

13 B. *Federal Preemption – Quiet Zones*

14 Issues concerning the establishment of quiet zones, and safety measures to be utilized at
15 public highway-rail grade crossings within quiet zones, are addressed by federal law. Although
16 the Commission has general state authority over safety at public highway-rail crossings pursuant
17 to A.R.S. §§ 40-337 and 40-337.01, the FRA has adopted a comprehensive set of rules and
18 regulations that address when a locomotive must sound its horn when approaching public
19 highway-rail crossings, and the exceptions thereto. The Commission, as well as railroads, can
20 play an important role in providing local communities with technical expertise in deciding
21 whether or not to establish quiet zones or utilize wayside horns, and under what safety
22 considerations as set forth in 49 CFR Part 222. But the FRA has specifically reserved the
23 authority to establish quiet zones, and determine acceptable quiet zone risk thresholds.

24 As previously indicated, 49 CFR part 222.7(a) provides that “Except as provided in
25 paragraph (b) of this section, issuance of this part *preempts* any State law, rule, regulation, or
26 order governing the sounding of the locomotive horn at public highway-rail grade crossings, in
27 accordance with 49 U.S.C. 20106.” This preemptive effect is extended to include issues
28 concerning safety at public highway-rail grade crossings located within quiet zones. As set forth

1 in 49 CFR part 222.7(d): “However, except for the SSMs and ASMs implemented at highway-rail
2 grade crossings described in §222.3(c) of this part, inclusion of SSMs and ASMs in this part *does*
3 *constitute federal preemption* of State law concerning the sounding of the locomotive horn *in*
4 *relation to the use of those measures.*” [Emphasis added]. 49 CFR part 222.7(d) demonstrates a
5 clear intent by the FRA to ‘occupy the field’ and pre-determine, using a complex set of data
6 matrixes and formulae, what federal safety requirements at public highway-rail grade crossings
7 are necessary for the establishment of a quiet zone.

8 A more detailed review of the applicable FRA regulations should clarify the roles that
9 federal, state and local authorities can play (in addition to railroads) in addressing related safety-
10 related issues.

11 C. Creation of Quiet Zones (49 CFR Part 222.39)

12 Under FRA regulations, quiet zones are established in one of two ways: (1) without
13 formal FRA approval, provided that certain pre-determined safety thresholds are met; or (2) upon
14 application to, and approval by, the FRA’s AA. In both instances, the public authority³ is
15 required to provide a Notice of Intent to affected railroads (BNSF), the state agency responsible
16 for highway and road safety (Arizona Department of Transportation), and the state agency
17 responsible for public highway-rail crossing safety (Commission). 49 CFR part 222.39.
18 According to the City’s application, such notice was provided on March 14, 2008. Application
19 at 2.

20 1. Public Authority Designation – No Formal Approval Necessary.

21 If the public authority can comply with at least one of the following three standards, then
22 no formal FRA approval is necessary to establish a quiet zone:

23
24 ³ A “Public authority” is defined as “the public entity responsible for traffic control or law
25 enforcement at the public highway-rail grade or pedestrian crossing.” 49 CFR Part 222.9. This
26 definition does not include entities responsible for safety at public highway-rail grade crossings.
“Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
80 (April 27, 2005), at 21855. In this case, the public authority is the City of Flagstaff.

1 (1) A quiet zone may be established by implementing, at every public highway-rail grade
2 crossing within the quiet zone, one or more SSMs identified in appendix A of this part.

3 (2) A quiet zone may be established if the Quiet Zone Risk Index is at, or below, the
4 Nationwide Significant Risk Threshold, as follows:

5 (i) If the Quiet Zone Risk Index is already at, or below, the Nationwide Significant
6 Risk Threshold without being reduced by implementation of SSMs; or

7 (ii) If SSMs are implemented which are sufficient to reduce the Quiet Zone Risk
8 Index to a level at, or below, the Nationwide Significant Risk Threshold.

9 (3) A quiet zone may be established if SSMs are implemented which are sufficient to
10 reduce the Quiet Zone Risk Index to a level at or below the Risk Index With Horns.

11 When read in conjunction with 49 CFR part 222.7(d), these regulations preempt state law in
12 relation to the use of such measures identified as necessary before the public authority can
13 establish a quiet zone by designation.⁴ It appears that the City has made such a designation based
14 on this regulation by its March 14, 2009 Notice of Intent.

15 2. Public Authority Application to the FRA – Approval Necessary.

16 When a quiet zone does not meet the federal standards for public authority designation
17 under 49 CFR part 222.39(a), the public authority must obtain the approval of the FRA's AA
18 pursuant to subpart (b), which generally includes the implementation of SSMs or Alternative
19 Safety Measures ("ASMs") at public highway-rail grade crossings located within the quiet zone.
20 The public authority must provide the AA with detailed technical information, in addition to a
21 summary of overall efforts to establish the quiet zone. This summary must include:

22 (b)(iv) – "...a statement describing efforts taken by the public
23 authority to address comments submitted by each railroad

24 ⁴ "Highway-rail grade crossing corridors that have a Quiet Zone Risk Index at or below the
25 Nationwide Significant Risk Threshold or the Risk Index With Horns have been deemed, by the
26 Administrator, to constitute a category of highway-rail grade crossings that do not present a
significant risk with respect to loss of life or serious personal injury or that fully compensate for
the absence of the warning provided by the locomotive horn." 70 Federal Register 80 (April 27,
2005), at 21845.

1 operating the public highway-rail grade crossings within the quiet
2 zone, the State agency responsible for highway and road safety,
3 and the State agency responsible for grade crossing safety in
4 response to the Notice of Intent. This statement shall also list any
objections to the proposed quiet zone that were raised by the
railroad(s) and State agencies.”

5 Clearly, the Commission (as the State agency responsible for grade crossing safety) is
6 given an opportunity to submit written comments to the Notice of Intent. Less clear is for what
7 purpose. In addressing the establishment of a 60-day comment period in the Final Rule
8 comments, the FRA explained that:

9 “Paragraph (b)(2), which has been added to the final rule,
10 establishes a 60-day comment period on the Notice of Intent. This
11 comment period was added in response to comments requesting
12 that the rule be revised to *provide opportunities for State agencies
13 and railroads to provide input during the quiet zone development
14 process.* Under paragraph (b)(2)(i), any party that receives a copy
15 of the Notice of Intent may submit information or comments about
the proposed quiet zone to the public authority during the 60-day
period after the date on which the Notice was mailed. *Even though
the public authority would be well advised to carefully consider
any thoughtful and well-reasoned comments received, FRA will not
require the public authority to take any action in response.”*⁵
[Emphasis added].

16 By not requiring the public authority to amend its application in response to any written
17 comments, the FRA has essentially limited the rules and regulations governing the sounding of
18 locomotive horns at public highway-rail crossings, and the exceptions thereto, to the applicable
19 federal regulations under 49 CFR parts 222 and 229.

20 The FRA’s occupation of the field does not mean that the Commission has no role in the
21 establishment of quiet zones. The Commission’s Railroad Safety Division (“Division”) can
22 provide technical assistance in the form of written comments in response to the Notice of Intent.
23 In addition, according to the City’s application, Division personnel did attend a May 2, 2006
24 onsite diagnostic assessment for all the crossings in the City’s proposed quiet zone, and received

25 _____
26 ⁵ “Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
80 (April 27, 2005), at 21846.

1 a revised "Quiet Zone/Wayside Horn Update December 2006" on January 22, 2007. Application
2 at 2. While 49 CFR part 222 does not preempt State administrative rules over alterations at
3 public crossings (i.e. technical specifications, reporting requirements), an assertion of jurisdiction
4 by the Commission to approve or disapprove a quiet zone, or establish safety measures at public
5 highway-rail grade crossings located within quiet zones, would frustrate the federal process, and
6 constitute an improper effort to take from the AA final authority to establish quiet zones within
7 Arizona, according to FRA rules and guidelines.

8 D. Larger Role for State Agencies

9 The Commission is not without recourse. In response to states' concerns over the scope
10 of the Final Rule, the FRA adopted regulations that implement a procedure to recognize
11 applicable state agencies seeking to play a larger role in the creation of quiet zones within their
12 jurisdictions. 49 CFR part 222.17 allows any state agency responsible for highway-rail grade
13 crossing safety, or highway and road safety, to become a recognized State agency upon approval
14 by the FRA's AA. Nothing in the Staff Report suggests that the Commission is a "recognized
15 State agency." However, even if it were a recognized State agency, the Commission's role would
16 be purely administrative. In addressing 49 CFR 222.17 in the Final Rule comments, the FRA
17 explained that:

18 "After considering these comments, FRA decided to create a
19 process by which State agencies who are interested in having a
20 greater role in quiet zone development can provide assistance to
21 FRA throughout the quiet zone development process. As
22 suggested by the North Carolina Department of Transportation,
23 recognized State agencies could serve as clearinghouses for
24 proposed quiet zones by coordinating quiet zone creation and
25 verifying local compliance with FRA regulations and State laws
26 and administrative rules. *However, as stated above, FRA does not
plan to delegate any authority to approve quiet zone applications
or to establish acceptable quiet zone risk thresholds.*" [Emphasis
added]⁶

6 "Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule," 70 Federal Register
80 (April 27, 2005), at 21857.

1 This evidence of intent provides further support for the argument that the Commission is
2 preempted from determining on its own accord that the supplemental and/or additional safety
3 measures required by the FRA at public highway-rail grade crossings within quiet zones are not
4 adequate.

5 **CONCLUSION**

6 BNSF does not seek to minimize the important role that the Commission and railroads
7 play in assisting local municipalities when they consider whether or not to establish quiet zones.
8 However, the FRA has adopted a comprehensive set of regulations and guidelines that govern the
9 use of locomotive horns or wayside horns at public highway-rail crossings, and the acceptable
10 SSMs or ASMs required in lieu thereof. Determining acceptable quiet zone risk thresholds
11 involves utilizing a complex set of risk indices contained in various appendices to the Final Rule.
12 Additionally, 49 CFR part 222, Appendix C, sets forth a comprehensive set of specific criteria
13 (including SSMs and ASMs) that must be present before a quiet zone can be established. BNSF
14 is confident that serious safety considerations were made by the FRA, in conjunction with input
15 from State agencies, when adopting the current regulations governing the use of locomotive horns
16 at public highway-rail grade crossings, and the exceptions thereto. Therefore continued
17 cooperation between the FRA, public authorities, railroad and state agency personnel to meet
18 these federal guidelines should continue to serve the public interest in the absence of specific
19 Commission approvals.

20 RESPECTFULLY SUBMITTED this 8th day of June, 2009.

21 FENNEMORE CRAIG, P.C.
22

23
24 By: 

25 Patrick J. Black
26 Attorneys for BNSF Railway Company, Inc.

1 **Original and 13 copies filed**
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