

WHO IS RESPONSIBLE?

In 1877, the United States Supreme Court addressed the relative duties of railroads and motorists at grade crossings in the case of *Continental Improvement Company v. Stead*, 95 U.S. 161, 5 Otto 161, 24 L.Ed. 403 (1877). Our highest court described the responsibilities of the motoring public and the railroad industry as being “mutual and reciprocal.” The Court indicated that members of the motoring public would be required to exercise reasonable care to detect and avoid trains at grade crossings, and that the railroad was obligated to give reasonable and timely warning of a train’s approach.

Despite continued efforts by the rail industry to limit their own duties, the United States Supreme Court held fast with its approach to railroad grade crossings responsibilities as a question of fact for the jury. *Grand Trunk Ry. of Canada v. Ives*, 144 U.S. 408, 12 S.Ct. 679, 36 L.Ed. 485 (1892). In that case, the Court stated:

There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms ‘ordinary care,’ ‘reasonable prudence,’ and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has regulated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

The Supreme Court did muddy the water somewhat in the infamous decision of *B. & O. Railway Company v. Goodman*, 275 U.S. 66, 48 S.Ct. 24, 72 L.Ed. 167, 56 A.L.R. 645 (1927). In that case, the court announced in dicta the duty of a traveler to stop and exit his vehicle at a grade crossing to determine the presence of an oncoming train. Fortunately, the dicta in *Goodman* was soon clarified by Justice Cardozo in the eloquent opinion delivered in *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 54 S.Ct. 580, 78 L.Ed. 1149, 91 A.L.R. 1049 (1934). Cardozo refused to impose an artificial legal standard upon drivers approaching a

crossing with obstructions to visibility. On that issue, Cardozo wrote:

In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night... Pokora made his crossing in the daytime, but like the traveler by night he used the faculties available to one in his position... A jury, but not the court, might say that with faculties thus limited he should have found some other means of assuring himself of safety before venturing to cross. The crossing was a frequented highway in a populous city. Behind him was a line of other cars, making ready to follow him. To some extent, at least, there was assurance in the thought that the defendant would not run its train at such a time and place without sounding bell or whistle... Indeed, the statutory signals did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision... All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men.

Cardozo makes it clear that juries must assess fault on a case by case basis, and thus limited any precedential effect of the dicta in *Goodman*. Despite the express limitation on the precedential value of the *Goodman* case, there was a line of authority developed after *Goodman* which required a motorist to stop prior to traversing a railroad crossing. These cases follow what is known as the "Pennsylvania Rule." *Brenner v. Philadelphia & Reading Ry. Co.*, 262 Pa. 307, 105 Atl. 283, 2 A.L.R. 759 (1918). The "Pennsylvania Rule" appears to still have life in other jurisdictions as recently as the summer of 1998. See *Ridgeway v. CSX*, 1998 W.L. 432164 (Ala.).

A contrasting line of authority is known as the "dangerous trap doctrine." This doctrine was adopted by the Louisiana Court of Appeals in *Bertrand v. Missouri Pacific Railroad Company*, 160 So.2d 19 (La.App. 1964). The doctrine provides:

[I]f a [railroad] crossing is unusually dangerous because the view of the motorist is so obstructed as to require that he place himself in a position of peril dangerously near the tracks, before he has a view of the oncoming train, the railroad company will be held liable, unless it can show that it took unusual precautions, such as reducing the speed of the train, or increasing its warnings and providing signaling devices, etc. The theory of this doctrine is that the railroad may not rely upon the duty of the motorist to stop and look, if the physical circumstances are such that stopping and looking will do the motorist no good.

The dangerous trap doctrine was also approved by the Nebraska Supreme Court in *Anderson v. Union Pacific R. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988) and again in *Crewdson v. Burlington Northern R. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

Since the United States Supreme Court initially established “mutual and reciprocal” responsibilities at grade crossings, those basic responsibilities of railroads and the motoring public have not changed. They are very simple: Motorists must yield to trains at grade crossings. Railroads must let motorists know a train is approaching the grade crossing. Despite the fundamental simplicity of these duties, our country continues to be plagued by needless death and injury at grade crossings. One hundred and thirty (130) years after our United States Supreme Court articulated the mutual responsibilities of the motoring public and railroads, there is still an organized effort by the rail industry to escape its duty. In 1989, the industry created a special executive committee on grade crossing litigation for the purpose of establishing “preemption” as the omnipotent defense that would crush all common law claims brought against railroads. However, the United States Supreme Court was not exceedingly impressed with the all-encompassing “preemption” defense. In *Easterwood v. CSX Transportation, Inc.*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 2d 387, (1993); the court preempted claims based upon speed and defined certain limited situations where preemption may apply to active warning devices.

Since *Easterwood*, we have a fairly well established concept that the federal government, local road authority, railroads, and motorists all have varying degrees of responsibility which cannot be ignored. The *Easterwood* court recognized these joint responsibilities. An analysis of the duties of these other interested parties will follow.

OTHER INTERESTED PARTIES - FEDERAL GOVERNMENT

The Federal Government initially began its involvement with railroad grade crossing safety issues in 1910. The government required reporting of accidents that occurred at grade crossings as a part of the Accident Reports Act of 1910. A few years later the government made funds available on a 50-50 cost-splitting basis through enactment of the Federal-Aid Road Act of 1916. Those funds were available for crossing safety improvements on rural roads.

The National Industrial Recovery Act of 1933 provided federal funds for grade crossing safety improvements without requiring any matching funds from the railroads. An excellent discussion by the U.S. Supreme Court of this new federal money for railroad grade crossing safety is contained in the case of *Nashville, C. and St. Louis Railway v. Walters*, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935). The court discussed crossing safety in terms of a public interest and nationwide issue. During the first half of the twentieth century, federal funds for grade crossing safety were limited and sporadic. However, public awareness of unreasonably dangerous conditions at grade crossings caused changes in the 1950's and 60's. Death tolls continued at a staggering rate, and the rail industry was obviously not responding to safety concerns at grade crossings. Incomplete records of the Interstate Commerce Commission (which is now called the Surface Transportation Board) indicate that at least 1,000 - 2,200 people have died at railroad grade crossings annually during the first 75 years of this century.

Even before 1950, studies recognized the indisputable advantage of active warning devices at grade crossings. In 1949, a comprehensive study of the effect of automatic gates established that the hazard to the motoring public at grade crossings could be reduced 80% to 90% by the installation of gates at crossings previously protected only by a standard crossbuck.¹ During the 1960's, there were a number of studies which confirmed the effectiveness of active warning devices.² All these studies confirmed that 80% to 90% of the fatalities at grade crossings could be avoided with active warning systems.

Congress responded in 1970 by including language in the 1970 Rail Safety Act and the 1970 Highway Safety Act requiring the Secretary of Transportation to study safety problems at highway-rail crossings and report back to Congress with recommendations. The result of these requirements was a two-volume report to Congress. The first volume, filed November 1971, was entitled 'REPORT TO CONGRESS. RAILROAD-HIGHWAY SAFETY, PART 1: A COMPREHENSIVE STATEMENT OF THE PROBLEM'. This report confined itself to a detailed account concerning the extent of the safety problem at railroad grade crossings. The second portion of the report to Congress was filed in August of 1972 and entitled "REPORT TO CONGRESS. RAILROAD-HIGHWAY SAFETY, PART 2: RECOMMENDATIONS FOR RESOLVING THE PROBLEM". As a result of the two-part report, the Highway Safety Act of 1973, funded from the Highway Trust Fund, provided for federal money to be distributed to the states in a fashion similar to other highway funds. This arrangement established a national crossing inventory that was prepared in joint cooperation of states, federal government, and the railroad industry. An overall scheme requiring cooperation by the federal government, state government, and industry was evidenced by the cost-sharing formula established for improvement projects. This arrangement has been subject to minor modifications and additional legislative authorizations for continued funding, but still serves as the basis for current funding of public grade crossing projects.

LOCAL ROAD AUTHORITY

In the late 1960's and early 1970's, local road authorities became involuntarily involved in railroad grade crossing safety. Following the Highway Safety Act of 1966, the Secretary of Transportation mandated a uniform federal standard for traffic control devices. The promulgation of federal regulations mandating the use of the Manual Uniform Traffic Control Devices (MUTCD) forced participation by local road authorities. See 23 CFR 655.601-603 (39 FR 35650). The mandatory placement of an advance warning sign at railroad highway grade crossings pursuant to Part 8 of the

¹ Hedley, W.J., "The Achievement of Railroad Grade Crossing Protection." *AREA Proc.*, Vol. 50, pp. 849-864 (1949).

² McEachern, C., "A Study of Railroad Grade Crossing Protection in Houston." *Proc. Inst. Traffic Eng.*, pp. 168-172 (1960).; Thomas, R.B., "Results Accomplished by the Use of the Grade Crossing Protection Fund Established by the Illinois Legislature Beginning September 1, 1955, and Administered by the Illinois Commerce Commission." Illinois Commerce Comm. (1965) 13 pp.; Tarbet, T.V., "Improved Railroad Crossing Protection and Coordination of Traffic Signals with Train Movements." Los Angeles Dept. of Public Utilities and Transportation.; "Accident Reduction at Crossings Protected Under Crossing Protection Fund." California Public Utilities Comm., San Francisco (Aug. 26, 1965).; Schoppert, D.W., "Traffic Control and Roadway Elements: Their Relationship to Highway Safety." Automotive Safety Found., pp. 61-64 (1963).; Young, L.C., "Effectiveness of Automatic Crossing Gates in Southern California, 1954 Through 1963." California Public Utilities Comm., Los Angeles (Oct. 1, 1964) 3 pp.

MUTCD dragged the local road authorities into the grade crossing safety arena. In the *Easterwood* opinion, our Supreme Court recognized the joint responsibility of the local road authorities and railroads at grade crossings. Unfortunately, there has been no definitive guidance regarding the extent of participation required by a local road authority. A national standard specifically addressing the mutual responsibilities of railroads and local road authorities is absolutely necessary at this time. United States Supreme Court cases and state court cases over the last century and a half provide clarification and guidance on the “mutual and reciprocal” duties of motorists and railroads at crossings. Local road authorities are relatively new players in this arena. A review of case law from state to state before adoption of the MUTCD offers no real guidance for defining the responsibilities of local road authorities at crossings. A nationally uniform definition of their duties must be provided.

THE PUBLIC

There is not much question that the public is ready for change in the arena of railroad grade crossing safety. This public concern is not new - one hundred years ago the popular press recognized this needless loss of life by referring to the deaths at railroad grade crossings as “OUR RAILWAYS’ ANNUAL SLAUGHTER.”³

The February, 1998, *Reader’s Digest* featured a Special Report by Bob Trebilcock entitled “America’s Dangerous Railroad Crossings.” That report began as follows:

In America today, a train collides with a vehicle almost every two hours. There were 4054 such collisions in 1996, resulting in 415 deaths and 1554 injuries. Yet the media and general public take little notice. “since it’s usually just one or two lives at a time, it only captures local attention,” says Gary Long, a transportation engineering coordinator at the University of Florida.

After discussing several tragic crossing cases, including the Fox River Grove bus collision, the author asks: “WHAT ELSE CAN BE DONE?” His number one suggestion is as follows:

National standards need to be developed to determine which crossings are dangerous, and what steps are necessary to make them safe. While this sounds like common sense, efforts by the Federal Railroad Administration to explore national standards were suspended last August for “lack of data.”

It is difficult to comprehend how there can be any lack of data concerning the issue of railroad grade crossing safety. Bob Trebilcock studied the issue for an extended period of time before writing his *Reader’s Digest* feature. He took time to visit with members of the Association of American Railroads, the Federal Railroad Administration, and any executives in the railroad industry that would speak with him. In addition to studying the crossings contained in his article, he visited many other

³ Batting, Charles W., (1907); “Our Railways’ Annual Slaughter.”, *Van Nordan Magazine*, Jan 1907.

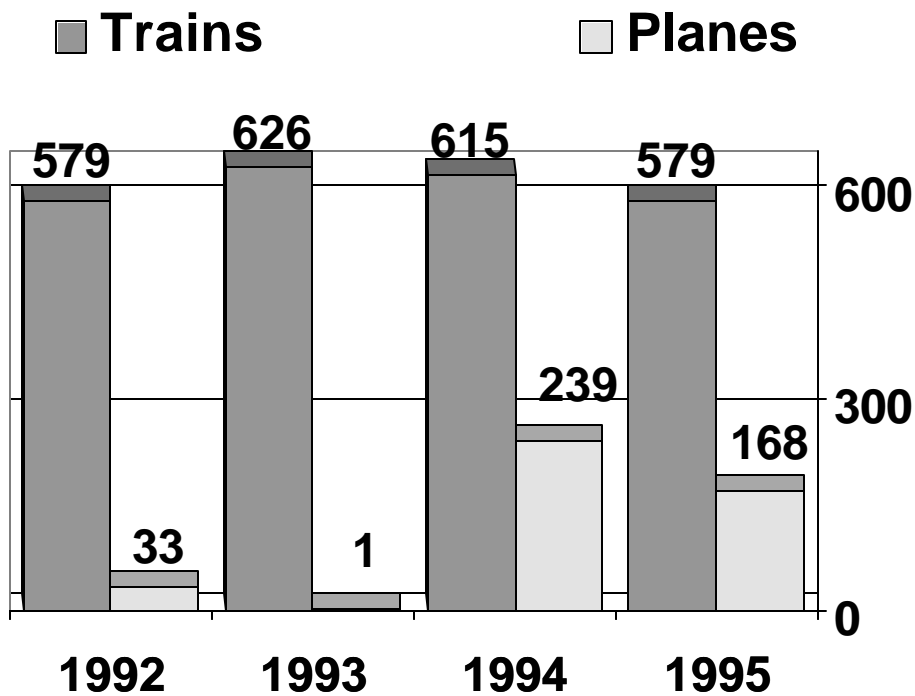
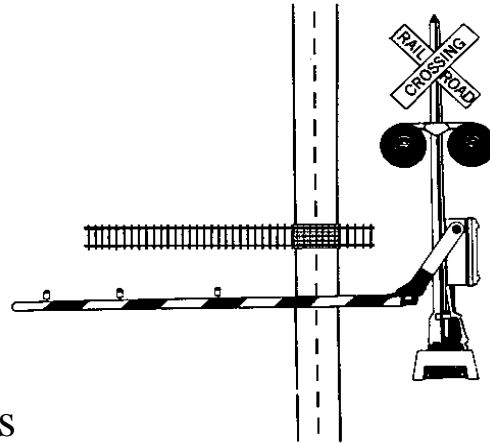
grade crossings and interviewed interested individuals about safety problems at grade crossings. Unfortunately, no one appeared to have any answers for the serious safety problem at grade crossings. The only uniformity discovered by Bob Trebilcock was a uniform denial of responsibility!

On April 20, 1997, the Kansas City Star ran a front page story called *Killer Crossings*. That article concerning railroad safety began with the question “**Who’s responsible**”. The Star staff writer, Joe Lambe, ran into the same problem encountered by Bob Trebilcock. There are no answers concerning the acceptance of responsibility for safety at railroad grade crossings. Everyone involved in the equation spends more time pointing their finger at the other interested parties than formulating an action plan. Figure 1 is an exhibit Lambe used in his article showing a comparison of fatalities from rail crossing accidents compared to fatalities from commercial airline accidents. At least five times more people are killed in grade crossing crashes than airline crashes in this country. We know how many safety precautions have been required at airports and aboard airplanes, but nothing even close to this effort has gone into grade crossing safety.

At the 1997 National Transportation Safety Board meetings in Jacksonville, Florida, there was extensive dialogue concerning passive grade crossing safety issues. At the close of the seminar, there was a suggestion that more studies were necessary concerning the issues presented. That suggestion was not well taken by some of the attendees. Similar calls to “study” the problem have been made in the 1960s, 1970s, 1980s and throughout the 1990s. Those who have participated in these decades of discussion know: **IT IS TIME FOR ACTION.**

Trains vs. Planes

The number of people killed in train crossing accidents in the United States was 5.4 times higher than that of commercial airline disasters from 1992 to 1995.



Trains: Total ('92-'95): 2,399

Planes: Total ('92-'95): 441

Sources: Federal Aviation Administration, Federal Railroad Administration
Figure 1

THE NEED FOR UNIFORMITY

The lack of uniformity concerning traffic control devices and safety practices at rail-highway grade crossings is obvious. An average motorist has absolutely no clue concerning the following issues:

1. Why don't all crossings have lights and gates?
2. Why do some crossings have flashing lights but no gates?
3. Who is responsible for making sure that crossings are appropriately marked?
4. Why do some crossings have crossbucks and stop signs while others do not?
5. Who handles complaints concerning dangerous conditions at rail-highway grade crossings?
6. How do I know the speed trains will be coming through any given crossing?
7. Why do so many crossings only have crossbucks as the traffic control sign?
8. Why do some crossings have no signs at all?
9. How far is the advanced warning sign supposed to be from the railroad track?
10. What is a safe speed to approach a crossing?
11. Who is responsible for making sure that a motorist can see an oncoming train?
12. Why are crossings which are open to the public sometimes called private crossings?

These are only a few of the questions that remain a mystery for the average motorist. In fact, experts in this field cannot even agree upon answers to most of these questions.

The preceding sections discussed parties who may be responsible for grade crossing safety. The one interested party conspicuously missing from those discussions is the motorist. That omission is intentional. The party most easily blamed in any crossing crash is the motorist. All too frequently the motorist cannot defend such accusations. The railroad industry and our government funds Operation Lifesaver to publicly blame the motorists for grade crossing tragedies. This railroad-conceived brainchild has provided plenty of information and misinformation about the motorists responsibilities at grade crossings. The millions of dollars spent by our government and the railroad industry is enough. This paper will not join the ranks of those who have ganged up to blame motorists. Before heaping any more responsibility on the motorist, it is time to consider the needs of an average motorist at a grade crossing. It is suggested that we should not impose the death penalty for normal driver behavior at crossings.

The University of Tennessee Transportation Center in Knoxville, Tennessee is completing a study on the lack of uniformity in state regulations and laws pertaining to grade crossings. As of October 1998, the study was not complete, but certain conclusions could be drawn from the data available from a majority of the states. That conclusion was obvious: there is no uniformity from state to state concerning issues of grade crossing safety, procedures for upgrading warning devices at grade crossings, accident reporting and procedures, basic responsibilities for traffic control devices, and other issues relating to the grade crossing environment and safety issues. Bart Jennings and Mohammad Qureshi are still compiling data to complete the study for the University of Tennessee Transportation Center, but available data already establishes a total lack of uniformity across the United States. These results should come as no surprise. In April of 1983, the United States Department of Transportation

published a survey entitled “Compilation of State Laws and Regulations On Matters Affecting Rail-Highway Crossings” (FHWA-TS-83-203). That survey shows a total lack of uniformity, subject to a few limited exceptions.

The final data available from the University of Tennessee Transportation Center should be very revealing on this subject when it is complete. However, the preliminary information is totally consistent with an average driver’s perception of grade crossing safety and the perception of those who have studied the issue. **WE NEED UNIFORMITY.** Don’t blame drivers until we provide the public with sufficient information and guidelines that create a reasonably safe crossing environment for normal driver behavior.

Below is a discussion concerning vegetation issues at railroad grade crossings. The question of vegetation at grade crossings has been selected because it was not one of the issues covered by the survey performed by the University of Tennessee Transportation Center and is a subject which exemplifies the disparity of treatment across the United States. Some states handle vegetation issues with legislation, others with administrative regulations, and others rely solely upon the common law.

DISCUSSION OF VEGETATION ISSUES

Determining who is responsible for controlling vegetation at or around grade crossings has been a source of much discussion and litigation. Where the obstruction to vision is created by vegetation growing on private property, the traditional common law rule that a property owner is not responsible for natural conditions of the land comes into conflict with the realities of modern industrial society. [*Prosser & Keaton, The Law of Torts*, (5th Ed, 1984) § 57 p. 391.] The traditional view that a private property owner has no obligation to cut or remove vision-obstructing vegetation from his property was recognized in the *Restatement Second of Torts* § 363.

For instance, in *Krotz v. CSX Corp.*, 115 App.Div.2d 310, 496 N.Y.S.2d 190, (4th Dept., 1985) the court held that there was no common-law duty imposed upon a private landowner to control the vegetation on his property for the benefit of users of a public highway in the wrongful death action of a motorist whose car collided with a train at a railroad crossing allegedly obscured by bushes.

The responsibilities of railroads to control vegetation at grade crossings have been treated differently than have the responsibilities of private citizens owning property adjacent to the rail-highway grade crossing. For discussion of how many states have handled the duties of railroads and adjacent landowners to remove vegetation at grade crossings, see 66 A.L.R. 4th 885.

In recent years, negligence claims against railroads for excessive vegetation at grade crossings have been defended with the standard shield of preemption. A leading case on this issue is *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987) wherein the court was asked to determine whether the Texas regulation regarding vegetation at railroad crossings was preempted by federal law. The 5th Circuit held that 49 C.F.R. 213.37 did not preempt the Texas

regulation concerning vegetation on railroad right-of-way property which is not “on the roadbed” or “immediately adjacent thereto.”

Later, in *Easterwood v. CSX*, 933 F.2d 1548 (11th Cir. 1991), the Eleventh Circuit applied the same reasoning in holding that the regulation at issue did not preempt claims regarding vegetation “near but not immediately adjacent to, the tracks,” as those areas were not within the scope of the regulation. 933 F.2d at 1554. (The vegetation issue was not raised before the United States Supreme Court in the well known 1993 *Easterwood* case.) Most courts follow the rule that only claims based on excessive vegetation on the roadbed or immediately adjacent thereto are preempted by federal law. Any claims based on vegetation outside of those areas will not be preempted.

Outlined below are statutes, administrative regulations and case law from several states which address vegetation at railroad crossings.

Alabama - - [49 C.F.R. 213.37 given preemptive effect for vegetation]

National Railroad Passenger Corporation v. H & P Incorporated, 949 F.Supp. 1556 (M.D.Ala. 1996).

State claims that Amtrak was negligent and wanton with regard to maintenance of vegetation on right-of-way were preempted by 49 C.F.R. 213.37.

See also *Borden v. CSX Transp., Inc.* 843 F.Supp. 1410 (M.D.Ala. 1993).

Arkansas - - [100 yards from center of roadway]

Arkansas Code of 1987 Annotated, 23-12-201 Maintenance of right-of-way free from obstructions—Penalty.

(a)(1) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways.

(a)(2) The maintenance of the right-of-way shall be for a distance of fifty feet (50’) on each side of the centerline between the rails for the maintenance with and for a distance of one hundred yards (100 yds,) on each side of the centerline from the public road or highway for the maintenance length.

- (b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each violation.

This section has not been preempted by federal law. *Missouri Pacific Railroad Co. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988) *cert. denied* 490 U.S. 1067, 109 S.Ct. 2067.

Georgia - - [15 day notice by county to railroad]

Code of Georgia, 46-8-128. Obstructions located at crossing; disrepair of crossing; removal of obstruction or repair of crossing by county upon failure of company to remove obstruction or repair crossing.

- (a) Whenever any railroad over which a crossing is required is obstructed or is not in good order at such crossing, a county commission or an agent of the public Service Commission where the crossing is located shall notify the nearest agent or employee of the company in writing to remove the obstruction or to put the crossing in proper order within 15 days from the date of such notice.

Indiana - - [1500 feet along the right of way]

Indiana Statutes Annotated 8-6-7.6-1 Unobstructed view at crossings.

Each railroad in the state of Indiana shall maintain each public crossing under its control in such a manner that the operator of any licensed motor vehicle has an unobstructed view for fifteen hundred (1500) feet in both directions along the railroad right-of-way subject only to terrain elevations or depressions, track curvature, or permanent improvements.

Kansas - - [right-of-way clear of unnecessary obstructions which interfere with motorists' visibility]

Kansas adopted the Federal "Track Safety Standards," 49 CFR Part 213, which became effective September, 1983. These standards are then specifically supplemented at Kansas Administrative Regulations, 82-5-8, which provides, in part:

- (c) The railroad shall keep its right-of-way clear, for a reasonable distance, of weeds and vegetation and other unnecessary obstructions including railroad cars, when the vegetation and obstructions may interfere with the visibility of approaching motor vehicles.

Louisiana - - [no preemption unless vegetation on or immediately adjacent to roadbed]

Southern Pacific Transportation Co. v. Builders Transport, 1993 WL 185620 (E.D.La.)

The Louisiana court followed *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987) and *Easterwood v. CSX*, 933 F.2d 1548 (11th Cir. 1991), holding that 49 C.F.R. 2213.37 preempts a state law negligence claim concerning vegetation on or immediately adjacent to the roadbed, but does not preempt a state law negligence claim concerning vegetation elsewhere in the railroad's right-of-way. 1993 WL 185620 at *6.

Minnesota - - [Railroad, road authority and abutting landowner bound by commission standard for visibility at public and private grade crossings]

Minnesota Statutes 219.384 Removal of dangerous obstructions

Subdivision 1. If a railroad company, road authority, or abutting property owner fails to control the growth of trees or vegetation or placement of structures or other obstructions on its right-of-way or property so as to interfere with the safety of the public traveling on a public or private grade crossing, the local governing body of the town or municipality where the grade crossing is located may, by notice, require the obstruction to be removed as necessary to provide an adequate view of oncoming trains at the crossings. The commissioner shall adopt rules establishing minimum standards for visibility at public and private grade crossings.

Subdivision 2. A railroad company, road authority, or property owner that fails to comply with this section within 30 days after being notified in writing is subject to a fine of \$50 for each day that the condition is uncorrected.

Mississippi - - [no preemption unless vegetation on or immediately adjacent to roadbed]

Carter v. CXS Transportation, Inc., 1994 WL 836281 (S.D.Miss.)

The presence of excessive vegetation on the side of the track "immediately adjacent to the roadbed" is addressed in 49 C.F.R. 213.37 and claims that such vegetation obscured the views of those involved in an accident are preempted. Other vegetation at crossings is not. *Easterwood v. CSX*, 933 F.2d 1548 (11th Cir. 1991), *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987) and *Borden v. CSX*, 843 F.Supp. 1410 (M.D.Ala. 1993) are cited as authority.

Missouri - - [250 feet from edge of crossing]

Missouri Statutes Annotated 389.655. Right-of-way to be cleared of weeds and brush to prevent fires, violation, damages and costs—public grade crossings to be clear of vegetation and undergrowth.

(2) It shall be the duty of every corporation or person owning or operating any railroad or branch thereof in this state to maintain the right-of-way at public grade crossings so that it will be reasonably clear of vegetation, undergrowth or other debris for a distance of 250 feet each way from the near edge of such crossings where such things would materially obscure approaching trains from the view of travelers on the highway.

O'Bannon v. Union Pacific, 960 F.Supp. 1411 (W.D.Mo. 1997)

Missouri statute imposing duty on railroads to control vegetation for distance of 250 feet from railroad crossings preempts any common-law tort action claiming that railroad has duty to control vegetation that is more than 250 feet from near edge of crossing.

As a matter of Missouri law, railroad has no duty to control vegetation growing 600 to 700 feet from railroad crossing.

New Hampshire - - [Department of Transportation may determine clearance at each crossing]

New Hampshire Statutes Annotated 373:18 Removal of Obstructions to View.

Whenever, after a hearing upon petition or upon its own motion, the department of transportation shall be of the opinion that the protection required by its order demands that the land adjacent to said crossing shall be cleared and kept clear of buildings, trees, brush or other obstructions, its order shall require the railroad corporation operating over the crossing to clear the land of such obstructions.

Ohio - - [600 feet or safe distance determined by public utilities commission]

Ohio Revised Code Annotated 4955.36

Every railroad company shall destroy or remove plants, trees, brush, or other obstructive vegetation upon its right-of-way at each intersection with a public road or highway, for a distance of six hundred feet (600') or a reasonably safe distance from the roadway of such public road or highway as shall be determined by the public utilities commission.

Hicks v. Consol. Rail Corp., 92 Ohio App.3d 636, 637 N.E.2d 19 (1993); jurisdictional motion allowed 68 Ohio St.3d 1436, 625 N.E.2d (1994); motion to certify denied 68 Ohio St.3d 1437, 625 N.E.2d 624 (1994); cause dismissed 69 Ohio St.2d 1492, 635 N.E.2d 381 (1994): If, from photos of accident sight, jury could reasonably have concluded that railroad crossing was so obstructed by trees and bushes that it was more dangerous than usual rural crossing, there was sufficient evidence on question of whether crossing was extrahazardous to permit that issue to go to jury in negligence action based on collision between train and automobile.

Elwell v. CSX Transp., 1996 WL 640035 (9th Dist. Ct. App., Lorain, 1996): A motorist's claim that obstructive vegetation prevented her from seeing the oncoming train until it was too late to avoid a collision is a fact issue to be determined by a jury.

South Carolina - - [mandatory inspection and reporting of inspections]

Code of Laws of South Carolina 1976 Annotated 58-17-1450. Railroad crossing safety requirements.

All railroad crossings on public highways must be inspected for conditions which unsafely obstruct a motorist's view of approaching trains . . . If the person inspecting a railroad crossing finds that the required crossbucks are not in place, properly in place or maintained, or finds that a motorist's view of approaching trains is unsafely obstructed by vegetation, growth, or objects not permanently affixed to realty which are within the right-of-way of the railway, the person inspecting the crossing must immediately notify the Deputy Director of Engineering within the Department of Transportation of the hazard.

Bowman v. Norfolk Southern Railway Co., 832 F.Supp. 1014 (Dist. S.C. 1993). Negligence claim relating to vegetation immediately on or adjacent to track was pre-empted but to extent that plaintiff's claim relates to vegetation on railroad's right of way near the tracks but beyond the area covered by federal regulation, claim not pre-empted.

Texas - - [250 from center of crossing right of way width to within two feet of fence]

Official Texas Administrative Code, through Jan. 1, 1998

(2)(b) No railroad corporation shall cause or allow trains, railway cars, or equipment to stand less than 250 feet from the centerline of any unprotected public grade crossing unless a closer distance cannot be avoided.

(2)(c) At unprotected public grade crossings, each railroad corporation shall control vegetation on its right-of-way (except for the roadbed and areas immediately adjacent thereto) for a distance of 250 feet from the centerline of said crossings so that vegetation does not block the vehicular highway traffic's view of approaching trains. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road. Where the subject right of way is fenced, this section shall be deemed complied with if vegetation is controlled up to two feet from said fence.

(2)(e) Railroad corporations shall have three months from the effective date of this section to bring their effected grade crossing rights-of-way into compliance with subsections (c) and (d) of this section.

(2)(f) A railroad corporation may apply for a variance from the requirements of subsections (c) and (d) of this section on a form to be prescribed by the Commission. Such application shall be governed by the general and special rules of practice and procedure before the railroad Commission of Texas, as they may be from time to time amended. The Commission may approve such application for good cause shown.

VEGETATION ISSUES: AUTHORITY TO REMOVE SIGHT OBSTRUCTIONS

Most states have nuisance laws which allow a private property owner to remove any nuisance that exists on the property of an adjacent land owner and creates a hazard or other risk of imminent danger to property or life. *Roberts, et al. v. C.V. Adams & Son*, 184 P.2d 634, 637 (Okla. 1947); *Pierce v. Casady*, 711 P.2d 766, 768 (Kan. 1985). Landowners are often allowed to abate a nuisance through self-remedy if necessary. *Beckman v. W.H. Metzger*, 299 P.2d 152, 154 (Okla. 1956). Many other states have statutory authority for removal of visual obstructions that create traffic hazards along roadways.

Railroads are able to take additional land for their own purposes through the power of eminent domain. For example, in *Steele v. Missouri Pacific R. Co.*, 659 P.2d 217, 219 (Kan. 1983) the railroad was allowed to take a strip of land 100 feet wide adjacent to its north right-of-way line for the construction of a “dust levee” to control dust buildup and snow drifts in and along its trackbed. Colorado allows railroads to “take as much more land as may be necessary for the proper construction and security of the railway.” *Buck v. Dist. Ct.*, 199 Colo. 344, 348, 608 P.2d 350 (1980).

Railroads already have the power to remove structures or vegetation from surrounding land which creates a hazard or other risk of imminent danger to property or life through their power of eminent domain. Although states may differ with regard to what requirements railroads must meet in order to exercise their power of eminent domain, it is implausible to believe any state would deny railroads the use of eminent domain for the purpose of public safety.

The various common law, statutory law, and regulatory law of the various states makes any uniform process for vegetation control very difficult. The fact that almost every state allows some type of procedure for removing sight obstructions clearly indicates a willingness to address the issue. However, lack of a uniform procedure causes serious application problems in the railroad grade crossing environment.

PROPOSED UNIFORM APPLICATION OF ENGINEERING PRINCIPLES

Drivers have enough complex tasks to occupy their attention without adding uncertainty caused by lack of uniformity. The MUTCD has provided a uniform system of traffic control devices throughout the United States. A citizen of Tennessee can drive through Oregon and rely upon the uniformity of traffic control devices when making those split-second decisions necessary to safely operate a motor vehicle.

Unfortunately, no such uniformity exists in the railroad grade crossing environment. As an attorney working extensively in this field, I find it impossible to explain to a motorist what to expect at grade crossings from state to state. The average motorist has no way of telling what type of traffic control protection to expect at any railroad grade crossing. Flashing lights without gates that existed prior to 1970 are still in service throughout the United States. From the point of view of a motorist, it is difficult to determine why some crossings have lights and gates, others have lights only, and still other crossings have crossbucks.

After reviewing the legal requirements for grade crossing safety and reading numerous engineering studies, human factor analyses, and other scientific literature on the subject, it becomes obvious that we need uniformity from the driver's perspective. Before we ask drivers to take additional responsibility for safety at grade crossings, it is only fair to provide them with enough information to make intelligent driving decisions as they approach a grade crossing. In support of this concept, I offer the following:

A. CONTROLLED ACCESS HIGHWAYS

1. Controlled access highways are free from railroad grade crossings. An interstate user has the experience of traveling controlled access highways without any concern for grade crossing safety. Separation of controlled access highways has become a reality in the United States and allowed motorists the comfort of traveling those highways without the need to encounter grade crossing safety problems. It is this type of uniformity that needs to apply to the remainder of the roadways in the United States.

B. IMPROVED ROADS - ACTIVE WARNINGS

1. Improved roads (those roads made of concrete, asphalt or other such material) must be protected with active warning devices which include lights and gates. If the local road authority has seen fit to improve a road for heavier traffic volumes, higher speeds or any other reason justifying the cost of such improvement, then one could reasonably expect that the cost of improving grade crossings to include active warning devices should be a part of the improvement project. Drivers can easily identify an improved road from a gravel or dirt road. When traveling on an improved road, the motorist should have the right to believe that the traffic control devices on that roadway have also been improved by the local road authority. Uniform installation of lights and gates is economically feasible. It will also provide motorists with much needed uniformity. If there are exceptions to this rule, then the local road authority and railroad must make reasonable accommodations to protect motorists.
2. Passive crossings on improved roads have accounted for inordinately high accident and fatality rates. Low volume, low speed spur tracks protected by flaggers skew the national statistics, but a close look at available data will prove the high rates of injuries and deaths on improved roads with no active warning system. Any exceptions to the requirement for lights and gates must be limited. It is suggested that 20% of the crossings involving improved roads could qualify for some type of an exception to the rule requiring lights and gates. However, the number of

exceptions should be limited to no more than 20% of the crossings on improved roads and must still include some other form of active warning such as flaggers. Before an exception could be granted, the railroad and the local road authority would be required to establish an appropriate traffic control device which may include lights without gates, passive warning signs with supplemental hazard warnings and modified operating practices for the railroad such as restricted speed, flagmen or other similar safeguards. No exemptions should be granted until adequate operating practice modifications and appropriate warning devices have been agreed upon in writing by the local road authority and the railroad. Exceptions must then be approved by the Federal Highway Administration.

C. UNIMPROVED ROADS - PASSIVE CROSSINGS

1. Passive crossings must have appropriate sight distances as recommended in the Rail-Highway Grade Crossing Handbook. This handbook was originally printed in 1978. It contains “guidelines” which are purportedly “accepted nationwide.” Unfortunately, these guidelines are not applied nationwide. This handbook is not applied like the MUTCD. 49 C.F.R. 213.37 is the FRA regulation regarding vegetation control. That section should be amended as follows:

213.37 Vegetation.

Vegetation on railroad property which is in or immediately adjacent to roadbed shall be controlled so that it does not –

- (a) Become a fire hazard to track-carrying structures;
- (b) Obstruct visibility of railroad signs and signals:
 - (1) Along the right-of-way. ***Clearance along the right-of-way shall be in accordance with Chapter IV, Section D, of the Railroad Highway Grade Crossing Handbook., and***
 - (2) At highway-rail crossings. ***Clearance along the roadway shall be in accordance with Chapter IV, Section D, of the railroad Highway Grade Crossing Handbook.;*** (This paragraph (b)(2) is applicable September 21, 1999.)
- (c) Interfere with railroad employees performing normal trackside duties;
- (d) Prevent proper functioning of signal and communication lines; or
- (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.
- (f) ***Obstruct the motorists visibility of a train at passive grade crossings:***
 - (1) ***by maintaining clear sight triangles. Sight triangle dimensions shall be calculated in accordance with Chapter IV, Section D, of the Railroad-Highway Grade Crossing Handbook); or***
- (g) ***If the sight distances referred to in sections (b) and (f) can not be maintained, then additional signage which warns of the hazardous characteristics of the crossing and provides an advisory speed shall be mandatory. Sign placement shall be based on the alternatives established in Chapter 5 of Factors Influencing Safety at Highway-Rail Grade Crossings, National Cooperative Highway Research Program Report 50.***

NOTE: All italicized bold print is new language.

2. The above amendment may cause debate among local road authorities and railroads. However, there is nothing in this amendment that presents new concepts. The supplemental signing requirement and sight distance requirements are concepts over twenty-five (25) years old. It is time for them to become a standard rather than a toothless, universally ignored recommendation. Railroads and local road authorities will have to clear appropriate sight distances along the roadway, in the sight triangles adjacent to the roadway, and along the railroad tracks as required by the Rail-Highway Grade Crossing Handbook.

D. NATIONWIDE EASEMENT TO REMOVE VISIBILITY OBSTRUCTIONS

1. A nationwide easement should be established for the purpose of allowing sight triangles to be cleared in accordance with the Rail-Highway Grade Crossing Handbook. This easement probably provides no additional remedies than those that already exist in most states. However, it would allow railroads and local road authorities a uniform law under which they may jointly operate to provide appropriate sight distances at railroad grade crossings. The existence of one procedure available to railroads in all states make compliance much more probable.

E. JOINT AND SEVERAL LIABILITY

1. The railroads and local road authority should be jointly and severally liable for the abatement of sight obstructions at grade crossings. The ongoing battle of finger-pointing between railroads and local road authorities has become totally unworkable as an effort to maximize safety at grade crossings. Establishing joint and several liability for these two entities can only serve to motivate both to act in concert. Finger pointing would no longer be rewarded in a system based upon joint responsibility.
2. The Minnesota statutory scheme which includes a landowner's duty to clear sight obstruction should be incorporated into the joint and several liability portion of the nationwide easement provisions. An adjoining landowner should first be given the ability to clear any unnecessary obstruction from a sight triangle. In the event structural improvements on the property fall within the sight triangle, the landowner, local road authority, and railroad must then determine if the cost of removing that improvement exceeds the value obtained by its removal. In those instances where compensation to the local landowner would exceed the utility of increasing the sight triangle, supplemental warnings may be appropriate.
3. In the event the adjoining landowner does not cooperate with the local road authority and railroad, then any sight obstruction may be removed without permission of the adjoining

landowner and until such time as those obstructions are removed, the landowner would also be jointly and severally liable for any injuries that occur as a result of the impaired sight distance.

F. STOP SIGNS AND PRIVATE CROSSINGS

1. Stop signs should not be authorized as an effective method of traffic control at any public grade crossings. In the event a sight distance is not adequate, nor made adequate by supplemental signage, then active warning devices should be installed at the crossing. Stop signs at public crossings breed disrespect for traffic control devices and should be prohibited at public crossings.
2. Stop signs may be authorized for limited use at private crossings. Private crossings should have appropriate signage and be maintained to maximize visibility under exactly the same standards as public crossings. In order to assure cooperation, the railroad and private landowner should become jointly and severally liable for injuries resulting from inappropriate signage or sight obstructions at private crossings.
3. Any crossing that is open to the public should be considered a “public” crossing. “Private” crossings must be appropriately marked and access restricted before they can be treated any differently than a “public” crossing. Ownership of crossing is totally irrelevant to a motorist. The relevant inquiry is whether a crossing is “public” or restricted access. As such, all crossings must be considered public until such time as they are appropriately marked and protected as a “restricted access” crossing.

G. STANDARDIZED INDEPENDENT INVESTIGATION

Before analyzing investigative information from railroad grade crossing accidents, we must first consider the source. In July of 1988, the National Transportation Safety Board published a safety study concerning “Safety at Passive Grade Crossings.” In that study, sixty (60) crossing collisions were reviewed to determine causes. An interesting part of that analysis comes in the area of the investigators’ concept of adequate sight distances. A vast majority of the crossing collisions involving motorists approaching a grade crossing that had inadequate sight distances. Despite that fact, the National Transportation Safety Board concluded that most of the accidents in the study were the result of driver error. That conclusion has immediately sparked debate with traffic engineers who believe that inadequate sight distances are design defects and not driver error. It is almost certain that the railroads, Operation Lifesaver, and the Association of American Railroads will cite the new National Transportation Safety Board study as supporting their position that crossing accidents are caused primarily by driver error. However, that conclusion is totally fallacious. The conclusion can more properly be stated as follows:

“A vast majority of accidents involving the approach of a motor vehicle and train to a grade crossing at the same time involve inadequate sight distances.”

In an attempt to ensure a complete investigation of grade crossing accidents, the following is proposed:

1. The data event recorder (black box) should have all data extracted at the scene under the supervision of law enforcement. Law enforcement officers should read an advisory to the railroad personnel extracting data event recorder information. That advisory should instruct the individual responsible for the extraction that “intentional failure to extract data from the data event recorder is punishable by a fine, imprisonment, or both.” All data from the data event recorder should then be taken into custody of the law enforcement agency.
2. Statewide or regional transportation centers should be provided with playback machines, computer software, or other hardware and software necessary to conduct an independent analysis of data. Each state and/or group of states shall designate a railroad investigation specialist for their state or region. Those specialists will be trained in accident reconstruction and have a subspecialty of railroad accident investigation. They should also be qualified to evaluate data from event recorders.
3. Drug and alcohol testing of train crew should be authorized so that law enforcement officers may test the train crew under exactly the same standards used for testing members of the motoring public.
4. Each lead locomotive must contain on board an accident investigation packet to be immediately turned over to the law enforcement agency investigating the crossing accident. That packet would contain a 1-800 number for the investigator to call if assistance is requested. The packet would also include an investigation checklist which has been approved by state or regional railroad investigation specialist. The phone numbers for all state and regional railroad investigation specialists would be included on the checklist. The checklist will include an admonition to the local investigator that claims representatives and railroad police are railroad employees. As railroad employees they should be allowed to investigate the accident so long as their investigation is totally separate from the official law enforcement investigation of the accident and does not interfere with the law enforcement officer’s investigation of the accident. Any attempts by railroad employees to interfere with a law enforcement investigation of an accident should become a crime punishable by fine and/or imprisonment.

H. OPERATION LIFESAVER - CONTINGENT FUNDING

It must be remembered that Operation Lifesaver was created by the Union Pacific Railroad in 1974. As a brainchild of the Union Pacific Railroad, Operation Lifesaver came about as a direct response to federal legislation in the area of grade crossing safety in 1973. Any claims by Operation Lifesaver to accept credit for the safety record at grade crossing since the Federal Railroad Safety Act of 1973 are disingenuous. Operation Lifesaver has continuously stressed the motorists' duty at railroad grade crossings. Despite 25 years of existence, there has never been an attempt to tell the entire story concerning responsibilities of local road authorities and railroads at grade crossings. In the event Operation Lifesaver wishes to maintain funding from the federal government, the following changes must occur:

1. All educational programs of Operation Lifesaver must include a full disclosure of duties that railroads and local road authorities owe at grade crossings.
2. A 1-800 number should be posted at all railroad grade crossings in the United States (public or private). Operation Lifesaver's messages must contain information that the 1-800 number posted at each crossing should be utilized by the public anytime there are crossing safety issues. Those crossing safety issues can include reporting inappropriate actions or conditions caused by motorists, local road authorities, or railroads.
3. Operation Lifesaver's historical emphasis on enforcement of laws regulating conduct of motorists must be expanded to include enforcement of laws regulating railroads and local road authorities. The issue such as appropriate whistle sequences, visibility obstructions, dangerous operating practice, and other such information must be included in any Operation Lifesaver presentation.
4. The engineering concepts listed above should become a part of Operation Lifesaver's information programs. The motoring public should be instructed on this uniform system of grade crossing protection: Controlled access highways have no grade crossings. Improved roads have active warning devices or procedures. Passive crossings should have adequate sight distances and/or appropriate supplemental signage to assist the motorist in safely traversing a crossing.

THE ULTIMATE OXYMORON: "FRA CROSSING SAFETY PROGRAM"

The Federal Railroad Association has been in existence for over thirty (30) years. Unfortunately, all regulations adopted by the FRA promoting public safety at grade crossings can be thoroughly discussed in under thirty (30) minutes. It seems that crossing safety is considered as an unnecessary expense in the traditional FRA analysis. On the other hand, the following FRA employees have left the agency and have gone to work in the railroad industry:

- Alan Boyd, 1st Secretary of Transportation, President, ICG

- Carl Lyon, former FRA Administrator, ITEL
- John Ingram, former FRA Administrator, President, CRI&P
- Reg Whitman, former FRA Administrator, President, Katy RR
- Bob Blanchette, former FRA Administrator, now at the AAR
- Bill Loftus, Exec. Dir., FRA, President, Shortline Assn.
- Bruce Flohr, FRA, Regional Railroad Association
- Steve Ditmeyer, FRA Policy, BN RR
- Lev Peterson, FRA R&D, AAR, now retired
- Woody Price, FRA, CSX
- John Snow, DOT, President, CSX
- Marty Florentino, FRA, CSX
- Charlie Amos, FRA, AAR, now retired
- Simpson, Public Affairs, RPI
- Collin Pease, FRA, Springfield Terminal
- Susan Coughlin, Associate Administrator, FRA former Member-NTSB, husband was Chair of the House Subcommittee on Transportation Appropriations
- Drew Lewis, Secretary of DOT, CEO, UP RR
- Gil Carmichael, former FRA administrator, now CEO and President of Morrison Knudsen Rail.

Obviously railroads are more willing to spend money for ex-FRA personnel than for crossing safety. This type of spending is consistent with the observations noted by the *U.S. News & World Report* in its May 27, 1996 issue. In a special report entitled *‘Running Off the Rails,’* the authors noted the industry’s concerted efforts to avoid safety improvements. Those authors observed as follows:

[I]ncreased competition and pressure to cut costs have emboldened the railroad industry, which has contributed some \$8 million to members of Congress since 1988, to resist a host of regulatory reforms. As a result, at least a dozen recommended safety improvements that could have prevented scores of accidents have not been implemented. “These items can’t remain in rule-making forever,” says James Hall, chairman of the National Transportation Safety Board, which investigates serious rail accidents. “Clearly, the American taxpayers are not getting what they pay for in terms of safety.”

A three-month investigation by *U.S. News* and ABC’s “PrimeTime Live” documented system of shoddy and sometimes dishonest safety inspections, a pattern of decisions by regulators ignoring federal requirements on issues ranging from track safety to engineers’ working hours, and a network of patched-together safety-signal systems responsible for dozens of train accidents a year.

An industry dead set against safety improvements coupled with the FRA as its government watchdog has proven to be totally ineffective. One recent example of this ineffective union is the *“Easterwood Fix.”*

THE EASTERWOOD FIX

In 1993, the United States Supreme Court put an end to yet another railroad argument designed to avoid responsibility at grade crossings. In *Easterwood*, the Court made it clear that railroads do have a responsibility to provide safe crossings for the motoring public. The United States Department of Transportation actually filed an amicus brief in the *Easterwood* case. That brief made two points very clear:

1. Railroads must share the responsibility to select appropriate traffic control devices at grade crossings, and
2. Tort liability for failure to identify and remedy safety problems at grade crossings is consistent with the Congressional goal of improving grade crossing safety.

Following *Easterwood*, traffic engineers and other experts in the area of grade crossing safety applauded the United States Supreme Court's steady course of maintaining the requirement for "mutual and reciprocal" duties of the railroad at grade crossings. One hundred twenty-five (125) years after announcing this rule, the United States Supreme Court refused to relieve railroads of their responsibilities at grade crossings. In an incredible sequence of events following the *Easterwood* decision, the Federal Railroad Association sought to reverse the United States Supreme Court and one hundred twenty-five (125) years of well reasoned precedent through the stroke of a pen. In a letter dated March 2, 1995, the administrator of the FRA, Jolene M. Molitoris, documents her "promises" to "our many partners in the rail industry." Those promises included an attempt by the FRA to administratively change the law which required railroads to provide safe crossings for the motoring public. The FRA joined hands with its "partners" in the rail industry to commit a well orchestrated fraud on the American public by adopting a proposed rule (FRA Docket No. RSGC-6). That proposed rule professed to "prohibit railroads from unilaterally selecting and installing highway-rail grade crossing warning systems" at grade crossings. This proposal was made with the bold assertion that the proposal would "save more lives."

At the public hearings on the proposed rule, it was revealed that the administrator of the FRA had made promises to her "partners in the rail industry." Upon public disclosure of that information, the administrator stepped down as chairperson from the rule making proceedings. Eventually the proposed rule (known as the "*Easterwood Fix*") was defeated by overwhelming public opposition. However, the lessons learned by this process should not be forgotten. The FRA and the railroad industry work together. They consider themselves to be "partners." That partnership is obvious to any person familiar with their relationship. A working relationship between the FRA and the rail industry is critically important to many rail-related issues. The joint efforts of the Association of American Railroads and the FRA are beneficial to the advancement of railroad related interests and technology. However, the safety of the motoring public at grade crossings is a public issue, not a rail industry issue. The question is simple: Do we treat grade crossing safety as a railroad expense item or as a public safety issue?

RECENT VEGETATION REGULATION

Within the last few months, the FRA has adopted regulation which ostensibly seeks to protect the motoring public at grade crossings. Attached hereto is a copy of the proposed rule as it appeared in

the Federal Register (62 FR 36138, 36144). This proposal was adopted as a modification of 49 CFR 213.37. (That regulation has been discussed and reprinted in its entirety above.) The regulation does not include any of the language from the advisory committee suggesting that “the additional language is intended only to cover the clearing of vegetation at highway-rail grade crossings to provide adequate visibility of railroad signs and signals; it is not intended to cover or preempt state or local requirements for clearing of vegetation on railroad right-of-way at highway-rail grade crossings.” That advisory committee language must be considered with the new regulation in order to prevent a new round of preemption defenses similar to those discussed above, in the section entitled “DISCUSSION OF VEGETATION ISSUES.” In view of the last thirty (30) years, it is hard to believe that the FRA and rail industry have proposed this new rule based upon some benevolent motivation.

Railroad grade crossing safety should be in the exclusive jurisdiction of the Federal Highway Administration. Congress should immediately enact legislation that clarifies the preemptive effect of any regulations promulgated by the FRA. Regulations promulgated by the FRA should only create a presumption of preemption. That presumption would be limited to railroad “operations.” No issues involving crossing safety may be preempted by FRA regulation. In the event, that “negligent operations” is a theory of liability, the FRA regulation could be used as a defense that compliance with those regulations creates preemption. However, the presumption of preemption may be overcome if plaintiff can prove reasonable and cost effective operating practices which were available to the railroad at the time of the accident. The Federal Highway Administration needs to be our watchdog and the Railroad-Highway Grade Crossing Handbook needs to become its teeth! How can anybody seriously argue against a reliable watchdog, a complete public information program, and a uniform system for independent investigations?