

History of Responsibilities at Railroad Grade Crossings

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 traveling 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 crossing responsibilities as a question of fact for the jury in *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 confirm or preclude the possible 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 made 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:

if 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 thirty 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 negate 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 track speed limits but recognized common law exceptions to federally established speed limits. Trains must still brake to avoid an accident and slow for specific local hazards. These exceptions require a jury to make the same case-by-case analysis spoken of by Cardozo in his *Pokora v. Wabash* opinion. Pled correctly, the issues of failure to slow, failure to brake, failure to prepare for braking, and failure to instruct or train the railroad personnel concerning grade crossing safety matters will always create a question of fact for the jury. It must be remembered that the railroads lost the preemption argument in *Easterwood* concerning claims of inadequate warning devices (lights and gates). Additionally, any preemption based upon the federally approved speed limit is still subject to common law exceptions to the maximum allowable speed.

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 Courts steady course of maintaining the requirement for "mutual and reciprocal" duties of

the railroad at grade crossings. One hundred twenty-five 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 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 requires 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) which 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" before the public hearings. 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 in 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 safety 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?

The Ultimate Oxymoron: "FRA Crossing Safety Programs"

The Federal Railroad Administration has been in existence for over thirty years. Unfortunately, all regulations adopted by the FRA

promoting public safety at grade crossings can be exhaustively discussed in under thirty minutes. It seems that crossing safety is considered an unnecessary expense in the traditional FRA analysis. On the other hand, the following FRA and UDOT policy makers 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.
- Steve Ditmeyer, FRA Policy, BN RR
- Lev Peterson, FRA R&D, AAR
- Woody Price, FRA, CSX
- John Snow, DOT, President, CSX
- Marty Florentino, FRA, CSX
- Charlie Amos, FRA, AAR
- Tom 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:

Increased 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 cant 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 ABCs *PrimeTime Live* documented a 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.

The Public is Ready for Answers

There is little 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."

The February, 1998, *Readers Digest* featured a Special Report by Bob Trebilcock entitled "Americas 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 its 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 primary 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 *Readers 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 who would speak with him. In addition to studying the crossings referenced in his article, he visited many other 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 "**Whos 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.

During the preparation of this paper, disaster struck again. This time it was a passenger train. It is certain that many questions will be asked and some answers found in the four months between the submission of this paper and its presentation. It is certain that public awareness of rail safety issues will be heightened. Accordingly, some comment about this tragedy must be included at this point, even though the accident occurred only a few days ago and the comments are clearly premature.

The death of at least eleven passengers and injury to another one hundred, some critically, has focused the attention of the entire country on railroads and, more importantly, the safety of grade crossings. In Bourbonnais, Illinois, at 9:30 p.m. March 15, 1999, Amtraks "City of New Orleans" passenger train rammed into a truck loaded with steel bars at a grade crossing. The truck driver told investigators that he was trapped when the gates came down so late that he could not get his truck through the crossing.

An official for Illinois Central Railroad, which operates the section of the tracks involved, said only hours after the collision and before the investigation had even begun that he had every confidence the gates were working perfectly at the time of the collision. Also, before a formal investigation had even been initiated, Amtraks chairman charged that the truck driver was trying to dodge the crossing gates, thinking that the oncoming train was a slow-moving freight train rather than a faster passenger train.

The finger pointing has started all over again. In *USA Today* Wednesday, March 17, 1999, Jolene Molitoris, in her own inimitable way, is quoted as blaming U.S. citizens for trying to beat the trains just to save a few minutes on their drive. (see: <http://www.usatoday.com/news/ndstue10.htm>) Isn't it comforting to know that the chief bureaucrat entrusted with the health and safety of American citizens at grade crossings has prejudged our driving behavior at railroad crossings throughout America? Its odd that she has already assigned fault in this case despite the ongoing investigation which continues to uncover inconclusive evidence.

John Goglia, a member of the National Transportation Safety Board investigating the incident, reported that there were two boxcars loaded with steel parked on the adjacent track which may have contributed substantially to the severity of the accident as the lighter passenger cars bounced into them. The NTSB has not been willing to immediately call the driver a liar and assume his insanity. It appears they are interested in **facts**; an investigative concept somewhat foreign to the rail industry. Why were the boxcars parked near the crossing? Did the boxcars affect the proper functioning of the signal system? Did the moisture in the ballast from the recent snowfall affect the signal warning time? When did the train crew react? Why didnt the crossing have four quadrant gates? Why dont locomotives get a warning when there is a vehicle on the track between the gates? Why dont railroads monitor the operation of their signal installations? Why dont railroads spend any money on research and development in the area of grade crossing safety? Hopefully, the public will get some real answers and not be placated by the spin-doctoring of Operation Lifesaver and the rail industry.

Railroad Industry Position: Deny Responsibility

As incredible as it may seem, the railroad industry continues to maintain its position that railroads have no responsibility to expend railroad profits on public safety at railroad grade crossings. They are holding firm to this position despite the findings in *Easterwood*, which make it clear that railroads are still subject to the common law standards. Their attempt to have the FRA legitimize their position by adopting the *Easterwood* fix (FRA Docket No. RSGC-6) has also failed, but they refuse to change the way they do business. The industry is on a crash course with our court system. No funds are spent on research and development in the area of public safety at grade crossings. Crossings are no longer evaluated for hazardous conditions by the railroads. No consideration is given to the establishment of a program of upgrading crossing protection devices. Railroads continue to rely on government funding of lights and gate installations.

It is obvious that the railroad industry is in for some huge hits in punitive damage awards. The trend has already started, but there is still no change in railroad policy. Instead, the railroads are all sticking together. They refuse to break rank and admit public safety responsibilities. The Association of American Railroads has made the industry position clear: Railroads constitute a private industry and believe that public funds should be used to protect the public at railroad grade crossings.

Private Industry vs Public Responsibilities

There are four dominant freight railroads in the United States which in total account for about ninety-four percent of the more than \$33 billion of revenue earned annually by all freight railroads in this country.

The public nature of the private railroad system in this country was first addressed by a New York Appellate court in *Bloodgood v. The Mohawk & Hudson Railroad Co.*, 18 Wendell 9 (N.Y. 1837). In that case the court stated:

Because the legislature permitted the company to remunerate itself for the expense of constructing the road its private character is not established; it does not destroy the public nature of the road.

Adding to the public nature of railroad track structure was the granting of land by the federal and state governments for construction. According to the 1934 Report of the Federal Coordinator of Transportation (74th

Congress, 2nd Session, house Document No.394), between 1850 and 1872 the railroads received eighty-nine separate land grants from the federal government alone (excluding grants from states), totaling 130 million acres of land. Most of the land went to railroads in the western part of the country.

The public nature of freight railroads also extends to unique legislation. Scores of federal legislation have been enacted specifically for the railroad industry. Furthermore, railroads have their own retirement system (they are not under social security), their own unemployment -insurance and employee-liability systems. Some of the more notable unique railroad provisions are as follows:

1. Antitrust Immunity: The Interstate Commerce Act

Virtually all businesses in the United States are subject to the antitrust laws administered by the U.S. Justice Department except the railroad industry. The Interstate Commerce Act placed railroads under the jurisdiction of the Surface Transportation Board, previously known as the Interstate Commerce Commission. Railroad mergers have been approved in spite of opposition from the Justice Department.

2. Work-Stoppage Protection: Railroad Labor Act

Whereas other businesses in the U.S. are subject to the management-labor provisions of the Taft-Harley Act, railroads and airlines come under the Railway Labor Act, which provides for federal intervention in disputes. The result is often compulsory and binding arbitration, protecting both the industry and railroads from prolonged railroad strikes. Thus, since World War II, there have only been five nation-wide railroad strikes resulting in a total of about ten lost work days. [See Frank N. Wilner, *The Railway Labor Act & The Dilemma of Labor Relations* (Omaha, Nebraska: Simmons-Boardman Books, Inc.) April, 1991, p.76].

3. Bankruptcy Protection: Section 1168 of Bankruptcy Act

Unlike other industries, if railroads and airlines file for bankruptcy, their leased assets return to the lessors. (U.S. Code, Title II, USCA, Section No. 1168). The result of this asset protection is that the risk of leasing to railroads is

minimal, and the cost of borrowing is less to railroads because of the lower risk.

4. Direct Public Subsidies

At various times throughout their history, railroads have received public subsidies in the form of low-interest loans, guaranteed loans, and outright grants. Conrail was created out of bankrupt railroads during the 1970s with \$7 billion of public funds. For years, the U.S. Department of Transportation provided non-repayable grants to small railroads.

Furthermore, when the rail passenger operation (Amtrak) was created as a public entity, it relieved freight railroads of a losing business, provided rental payments for use of their track, and subsidized the retirement payments of Amtrak employees.

5. Exclusive Use of Track Structure

Other large capital-intensive industries such as telecommunications, natural gas pipelines, and electric utilities are being required to share their facilities with competitors. This publicity-required asset sharing is known as *unbundling* or in the case of electric utilities, *wheeling*. At this time, each railroad has exclusive use of its own track structure, thereby limiting competition.

Based on the above five examples, it is clear that railroads in this country benefit from their public nature. But these benefits are not provided in isolation. The railroads responsibilities are alluded to in the "National Transportation Policy", which originated as the preamble to the Transportation Act of 1940. Railroads are to provide "**safe**, adequate, economical, and efficient service." (emphasis added). Safety at grade crossings is not excluded from the railroads responsibility.

Conclusion

It is obvious that the railroads have no legal basis for their current position on public safety and no historical or logical basis for such a position. The reason for the current policy is very simple: **ECONOMICS**. To date it has been cheaper to pay claims for death and injury than to institute any policy for protection of the public at grade crossings.

