

Vegetation Preemption Alert

By Robert L. Pottroff

History of Vegetation Issues

The determination of responsibility for the control of vegetation at or around grade crossings has been a source of much discussion and litigation. In cases 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 a discussion of how various 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.

Vegetation Regulation Alert

As I was looking through the Code of Federal Regulations on Westlaw a few months ago, I discovered a change in CFR 49 Part 213. The regulation dealing with vegetation control, previously limited to the clearance of railroad right-of-way to make railroad signs visible to train crews, has been amended. That amendment now specifically refers to grade crossings and becomes effective September, 1999.

My initial reading of this amendment caused me great concern. Previous court decisions that have not allowed this regulation to be used for preempting vegetation claims at grade crossing may now be in jeopardy. We've all seen briefs where the railroad attempts to raise preemption as a defense to any claims of inadequate vegetation control based upon the old regulation. The new regulation specifically mentions grade crossing and would more than likely change the rationale of many courts that have previously addressed the issue.

The following is a discussion of the proposed rule in the Federal Register: 62 FR 36138: 36144 (1997). This proposal was adopted as a modification of 49 CFR 213.37.

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The vegetation control requirements of Part 213 currently deal with fire hazards to bridges, visibility of railroad signs and signals, interference with normal trackside duties of employees, proper functioning of signal and communication lines, and the ability to inspect moving equipment ("roll by"

inspections). The regulation does not address the issue of motorists' ability to see warning devices at highway-rail crossings.

Since 1978, accidents and fatalities at highway-rail grade crossings have decreased dramatically due to engineering improvements at individual crossings, education of the public, and greater enforcement of highway traffic laws. Nevertheless, FRA finds that the present loss of life, injuries, and property damage are still unacceptable. In 1995, 579 people were killed, and 1,894 suffered serious injuries in grade crossing accidents. Highway-rail collisions are the number one cause of death in the entire railroad industry, far surpassing employee or passenger fatalities.

In lengthy discussions about vegetation at grade crossings, the Track Working Group found itself grappling with a very complex issue that cannot be resolved simply by requiring brush to be cut away from grade crossings. The Track Working Group considered a proposal which would have set sight distances for motorists approaching highway rail grade crossings. However, the group quickly realized that the issue requires the expertise of entities not represented on the Track Working Group or RSAC; e.g., state and federal highway designers, traffic engineers, as well as representatives of local jurisdictions with grade crossings. This notice, therefore, proposes only one addition to current requirements of railroads in maintaining vegetation. Under this proposal, railroads will be required also to clear vegetation away from signs and signals on railroad right-of-way at grade crossings. Because the scope of Part 213 limits vegetation requirements to railroad property, this proposal does not attempt to dictate standards for surrounding landowners. 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 the clearing of vegetation on railroad right-of-way at highway-rail grade crossings.

The RSAC views this proposed requirement as a first of several regulatory steps to reduce the inherent dangers of highway rail grade crossings. Along with the proposal for this additional requirement, the RSAC, following a recommendation by the Track Working Group, has requested that the FRA Administrator recommend that the Department of Transportation initiate a joint regulatory proceeding by FRA and the Federal Highway Administration to address vegetation maintenance and sight distances for motorists at grade crossings. Should the Department of

Transportation decide not to initiate such a regulatory project, FRA will then consider the next appropriate action which may include launching its own regulatory proceeding.

This proposal was adopted as a modification of 49 CFR 213.37. 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 the clearing of vegetation on railroad right-of-way at highway-rail grade crossings." That Rail Safety Advisory Committee language must be considered with the new regulation in order to prevent a new round of preemption defenses. It is clear that the Rail Safety Advisory Committee did not intend for this to preempt such claims; however, I am not certain that the Rail Safety Advisory Committee has the authority to bind the courts. Knowing railroads as I do, I would bet that this rule has been included specifically for the purpose of boosting the chances for success on their vegetation control preemption arguments. I find it very hard to believe that some benevolent motivation caused the railroad industry to propose a rule requiring that vegetation be removed from in front of crossbucks so that the public can see the crossbucks. The following are two recent cases dealing with vegetation issues. The first is *Carter v. CSX 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.

Secondly, a Missouri statute imposing duty on railroads to control vegetation for a distance of 250 feet from railroad crossings preempts any common-law tort action claiming that a railroad has duty to control vegetation that is more than 250 feet from the 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. O'Bannon v. Union Pacific, 960 F.Supp. 1411 (W.D.Mo. 1997)

This is a subject that needs to be discussed at our ATLA Winter Convention January 23-27, 1999, in San Antonio, Texas. My biggest fear is that the rail industry is going to take this new regulation that was adopted and specifically intended not to create preemption and misuse it. A review of the O'Bannon v. Union Pacific cited above can provide a good idea of how they're going to use it to argue with us.