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BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

BURLINGTON NORTHERN RAILROAD )  
COMPANY, )

Petitioner )

vs. )

FERNDAL, WASHINGTON )

Respondent. )  
..... )

DOCKET NO. TR-940330

In the matter of the Petitioner of the )  
WASHINGTON STATE DEPARTMENT )  
OF TRANSPORTATION, BURLINGTON )  
NORTHERN RAILROAD COMPANY, )  
and THE NATIONAL RAILROAD )  
PASSENGER CORPORATION for )  
Modification of Order Regulating the )  
Speed of Passenger Trains in Ferndale, )  
Washington )  
..... )

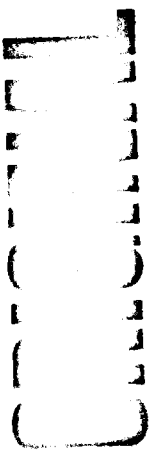
DOCKET NO. TR-940308

PETITIONERS' BRIEF

BACKGROUND

Petitioners Washington State Department of Transportation (WSDOT), Burlington Northern Railroad Company (Burlington Northern), and the National Rail Passenger Corporation (Amtrak) have requested the following passenger train speed increases within the City of Ferndale:

MILEPOST	EXISTING	PROPOSED
MP 105.12 - MP 105.8	50 m.p.h.	70 m.p.h.
MP 106.2 - MP 107.8	50 m.p.h.	79 m.p.h.





1 H.REP. NO. 91-1194, 91 CONG. 2nd Sess., Reprinted in U.S. Code Cong. Adm. News,  
2 4104, 4110 (1970).<sup>1</sup>

3 In order to carry out this goal of uniformity, Congress included in the FRSA an  
4 express preemption provision:

5 The Congress declares that laws, rules, regulations, orders, and  
6 standards relating to railroad safety shall be nationally uniform to the  
7 extent practicable. A state may adopt or continue to enforce any law,  
8 rule, regulation, order or standard relating to railroad safety until  
9 such time as the Secretary has adopted any rule, regulation, order,  
10 or standard covering the subject matter of such state requirement.

11 45 U.S.C. § 434.

12 To effectuate its total preemptive intent over railroad safety matters, Congress  
13 empowered the Secretary of Transportation to promulgate rules and regulations relating to  
14 railroad safety. 45 U.S.C. § 431. The Secretary of Transportation, through the Federal  
15 Railroad Administration (FRA), has set forth regulations relating to rail safety, including  
16 train speed. 47 C.F.R. § 200 et. seq.

17 a. Preemption - Train Speed

18 The maximum allowable operating speed is determined by the classification of  
19 track on which the train travels. 49 C.F.R. 213.9. That regulation sets the maximum  
20 allowable operating speeds in miles per hour as follows:

	The maximum allowable operating speed for freight trains is:	The maximum allowable operating speed for passenger trains is:
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	100	110

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27 <sup>1</sup> State law requires that the Washington Utilities and Transportation Commission (WUTC)  
28 establish speeds which are commensurate with the hazards presented and in the practical  
operation of trains. RCW 81.48.040

1  
2 The track within the City of Ferndale's limits is Class 4 track, with an FRA  
3 maximum allowable operating speed of 80 m.p.h. for passenger trains. Therefore, given  
4 the preemptive effect of federal law, there is no authority for any state regulation  
5 conflicting with the limits set by the FRA.<sup>2</sup>  
6

7 b. Recent decisions have upheld the federal preemption of  
8 train speeds.

9 In CSX Transportation Inc. v. Easterwood, 113 S. Ct. 1732, 1993 the Court held  
10 that state law claims alleging excessive train speed are preempted by federal law. Id.  
11 113 S. Ct. at 1743. In response to the argument that conditions posed by grade crossings  
12 presented a "local safety hazard" exception to 45 U.S.C. § 434, the Court responded:

13 ...§ 213.9 (a) should be understood as covering the subject  
14 matter of train speed with respect to track conditions,  
15 including the conditions posed by grade  
16 crossings....Respondents contrary view [of the "local safety  
17 hazard" exception to 45 U.S.C. § 434] would completely  
18 deprive the Secretary of the power to preempt state common  
19 law, a power clearly conferred by § 434.

20 Id. 113 S. Ct. at 1743.

21 Following the Easterwood decision, various plaintiffs have attempted to  
22 demonstrate the existence of a "specific, individual hazard", generally without success.  
23 Armstrong v. ATSF Railway Company, 844 F. Supp. 1152 (WD Tex. 1994) holds a high  
24 vehicular traffic crossing as not a "specific, individual hazard". A similar result was  
25 reached with respect to a 20 ft. high embankment obstructing the view in Emery v.  
26 Southern Railway Company, 866 S.W. 2nd, 557 (Tenn. App. 1993). High volume of  
27 vehicular traffic, shipment of hazardous materials, restricted sight distances and accident  
28 history were all held "not specific, individual hazards," in Bowman v. Norfolk Southern  
Corp., 832 F. Supp. 1014 (D.S.C. 1993).

<sup>2</sup> See National Railroad Passenger Association v. City of Everett

U.S. District Court, Western District of Washington,  
C-89-834R (Copy attached).

1           The clear thrust of the law is that train speed limits are a matter of federal  
2 regulation, necessarily preempted from state regulation. Under these circumstances,  
3 there can be no state regulation of train speeds in a manner which conflicts with federal  
4 law and regulations.

5           **2.     Grade Crossing Closure**

6           Petitioner's are seeking closure of the Thornton Road crossing so that an extended  
7 siding track may be constructed. The siding track extension is necessary in order to  
8 accommodate freight trains while the passenger trains, operating at higher speeds, pass  
9 on the main line track.

10           State law requires a hearing before this Commission when any party wishes to  
11 close a grade crossing. RCW 81.53.060. Notwithstanding state law, federal law  
12 preempts any state action denying the request for closure of the Thornton Road crossing,  
13 because such a denial would create an undue burden on interstate commerce in violation  
14 of the Commerce Clause, Article I, Section 8, of the United States Constitution and the  
15 Supremacy Clause, Article VI, Section 2. See also U.P.R.R. Co. v. City of Las Vegas, 747  
16 F.Supp. 1402 (D. Nev. 1989).

17           Congress has preempted the entire field of regulation of railroad safety. Donelon  
18 v. New Orleans Term. Co., 474 F.2d 1108 (5th Cir. 1973), cert denied, 414 U.S. 855, 94  
19 S.Ct. 957. As stated specifically in the Federal Rail Safety Act, 45 U.S.C. § 434:

20           "The Congress declares that laws, rules, regulations,  
21 orders, and standards relating to railroad safety shall be  
22 nationally uniform to the extent practicable. A State may  
23 adopt or continue in force, any law, rule, regulation, order or  
24 standard relating to railroad safety until such time as the  
25 Secretary has adopted a rule, regulation, order or standard  
26 covering the subject matter of such State requirement. A  
27 State may adopt or continue in force an additional or more  
28 stringent law, rule, regulation, order, or standard relating to  
railroad safety when necessary to eliminate or reduce an  
essentially local safety hazard, and when not incompatible

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with any federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.”  
(Emphasis added)

Denial of the request to close the Thornton Road crossing is preempted by federal law since there is no distinctly local safety hazard upon which to base any such denial; to deny the request would be incompatible with federal laws and regulations; and denial of the crossing closure would be an undue burden on interstate commerce.

Denial of the request for closure would place an undue burden on interstate commerce by acting as a virtual injunction not only to the construction of the siding but likewise to implementation of the entire project. Without the extended siding, Amtrak would be unable to meet its time goals and the entire rail passenger project would be unfeasible.

The objective of Congress throughout the federal regulatory scheme is uniform regulation. Conrail v. City of Dover, 450 F.Supp. 966 (D.Del. 1978). Congress intended to avoid a hodgepodge of conditions under which interstate and international commerce simply could not be conducted. Federal law and the requirements of interstate commerce necessitate that the Thornton Road crossing be closed.

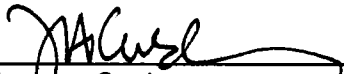
**CONCLUSION**

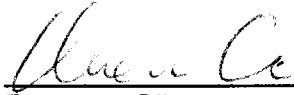
Federal law preempts contrary state regulation of train speed limits. Moreover, federal law prohibits state regulation of matters adversely affecting interstate commerce. For these reasons, Petitioners respectfully request the Commission grant the Petition for increased passenger train speed and closure of the Thornton Road crossing.

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DATED this 10<sup>th</sup> day of October, 1994.

KROSCHER & GIBSON

  
\_\_\_\_\_  
Jeanne Cushman  
Assistant Attorney General  
Washington State Department of  
Transportation

  
\_\_\_\_\_  
Rexanne Gibson  
Attorney for Defendant Burlington Northern  
Railroad Company

F

# United States District Court

WESTERN

DISTRICT OF

WASHINGTON

National Railroad Passenger Corporation,  
Plaintiff -

v.

## JUDGMENT IN A CIVIL CASE

The City of Everett,  
et al.,  
Defendants

CASE NUMBER: C89-834R

- Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment as to defendant City of Everett is GRANTED.

C 2 C, BUR

                     : Est

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4 October 1989  
Date

BRUCE RIFKIN

Clerk

*Elizabeth Tyree*  
\_\_\_\_\_  
(By) Deputy Clerk Elizabeth Tyree



OCT 9 1989

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NATIONAL RAILROAD PASSENGER )  
CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE CITY OF EVERETT and THE CITY )  
 OF VANCOUVER, )  
 )  
 Defendants. )

NO. C89-834R

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on plaintiff National  
Railroad Passenger Corporation's ("Amtrak") motion for summary  
judgment. Having reviewed the motion, together with all documents  
filed in support and in opposition, and having heard argument, the  
court finds and rules as follows:

I  
FACTUAL BACKGROUND

A. Federal Railroad Legislation.

In 1970, Congress enacted the Federal Railroad Passenger  
Service Act ("RPSA"), thereby authorizing the creation of Amtrak.

C to C, GJK

25

1 See 45 U.S.C. § 501-658. At about the same time, Congress enacted  
2 the Federal Railroad Safety and Hazardous Materials Transportation  
3 Act of 1970 ("FRSA"). 45 U.S.C. § 421-441. Pursuant to the FRSA,  
4 the Secretary of Transportation is charged with the duty to pre-  
5 scribe "rules, regulations, orders and standards for all areas of  
6 railroad safety." 45 U.S.C. § 431(a). The Secretary has delegated  
7 these responsibilities to the Administrator of the Federal Railroad  
8 Administration ("FRA"). See 49 C.F.R. § 1.49(M). Accordingly, the  
9 FRA has adopted numerous safety standards, including comprehensive  
10 regulations regarding the speed at which railroads can be safely  
11 operated. See 49 C.F.R. §§ 213.

12 In 1979, Congress amended the RPSA to provide a goal for  
13 Amtrak of systemwide average speeds of at least 55 m.p.h. See 45  
14 U.S.C. § 501a. In 1981, Congress again amended the RPSA to increase  
15 the systemwide goal to 60 m.p.h. See id. To achieve "high-speed  
16 intercity rail passenger service," Congress directed Amtrak to  
17 identify and eliminate local speed restrictions which affect its  
18 operations. See 45 U.S.C. § 656.

19 B. This Lawsuit.

20 Amtrak operates intercity rail passenger service in the State  
21 of Washington. Recently, Amtrak identified railroad speed restric-  
22 tions imposed by the cities of Seattle, Tacoma, Vancouver, and  
23 Everett. See, e.g., Everett Miscellaneous Regulation 46.32.300;  
24 V.M.C. 9.32.010. On February 28, 1989, Amtrak's Director-  
25 Intergovernmental Affairs wrote to the mayors of these cities seek-  
26 ing to eliminate, or limit the application of, the municipal speed

\* 1 restrictions. The cities of Seattle, Tacoma, and Vancouver agreed  
2 to modify their regulations to exempt Amtrak operations from their  
3 scope. Attempts to reach a similar agreement with Everett, however,  
4 were fruitless. Therefore, Amtrak initiated this action for declar-  
5 atory and injunctive relief.<sup>1</sup> Amtrak now moves for summary judgment  
6 as to these claims.

7  
8 II  
9 DISCUSSION

10 In support of this motion, Amtrak argues that the Everett  
11 ordinance is preempted by the FRSA. In essence, Amtrack claims that  
12 Congress preempted all local regulations in the field of railroad  
13 safety. Everett opposes the motion, setting forth two arguments:  
14 (1) that the federal regulations should not be read to preempt speed  
15 regulations at grade crossings, and (2) that given the  
16 constitutional and statutory structure in the State of Washington,  
17 the Everett ordinance should constitute state action permitted under  
18 the FRSA. Everett's arguments are without merit.

19 Pursuant to the supremacy clause of the United States  
20 Constitution, when federal law conflicts with state or local law the  
21 federal law must control. See Article IV, Clause 2. In determining  
22 whether a federal law preempts state and local law in a particular

---

23  
24 <sup>1</sup> Amtrak originally brought this action against the cities of  
25 Everett and Vancouver. However, since Vancouver recently agreed to  
26 modify its speed ordinance, Amtrak has moved to drop Vancouver as a  
party defendant. See Rule 21 Motion filed on September 29, 1989.  
Accordingly, this Order does not address Amtrak's claims against  
Vancouver.

1 area, the essential inquiry is the intent of Congress in enacting  
2 the federal statute. See, e.g., Metropolitan Life Ins. Co. v.  
3 Massachusetts, 471 U.S. 724, 738 (1985). Preemption may be either  
4 express or implied, and "is compelled whether Congress' command is  
5 explicitly stated in the statute's language or implicitly contained  
6 in its structure and purpose." Jones v. Rath Packing Co., 430 U.S.  
7 519, 525 (1977).

8 Historically, state and local governments had the right to  
9 enact laws to promote safety in railroad operations, so long as  
10 these laws did not unduly burden interstate commerce. See, e.g.,  
11 Sisk v. National R.R. Passenger Corp., 647 F. Supp. 861 (D. Kan.  
12 1986). However, in enacting the FRSA, Congress attempted "to pro-  
13 mote safety in all areas of railroad operations." 45 U.S.C. § 421  
14 (emphasis added). To that end, Congress declared that

15 laws, rules, regulations, orders, and standards relating to  
16 railroad safety shall be nationally uniform to the extent  
17 practicable. A State may adopt or continue in force any law,  
18 rule, regulation, order, or standard relating to railroad  
19 safety until such time as the Secretary has adopted a rule,  
20 regulation, order, or standard covering the subject matter of  
21 such state requirement. A State may adopt or continue in  
force an additional or more stringent law, rule, regulation,  
order or standard relating to railroad safety when necessary  
to eliminate or reduce an essentially local safety hazard, and  
when not incompatible with any Federal law, rule, regulation,  
order or standard, and when not creating an undue burden on  
interstate commerce.

22 See 45 U.S.C. § 434 ("Section 434").<sup>2</sup>

23 \_\_\_\_\_  
24 <sup>2</sup> As noted in the legislative history:

25 To subject a carrier to enforcement before a number of  
26 different state administrative and judicial systems in  
several areas of operation could well result in an undue  
burden on interstate commerce. . . .

(continued...)

1           The FRSA clearly evinces Congress' preemptive intent with  
2 regard to the field of railroad safety. See, e.g., Marshall v.  
3 Burlington Northern, Inc., 720 F.2d 1149, 1153 (9th Cir. 1983);  
4 National Association of Regulatory Utility Commissioners v. Coleman,  
5 542 F.2d 11, 13 (3rd Cir. 1976); Donelon v. New Orleans Terminal  
6 Co., 474 F.2d 1108 (5th Cir. 1973); Consolidated Rail Corp. v.  
7 Smith, 664 F. Supp. 1228, 1236 (N.D. Ind. 1987). Therefore, the  
8 FRSA preempts all nonfederal safety regulations unless expressly  
9 authorized by the Section 434 exceptions. See, e.g., Consolidated  
10 Rail, 664 F. Supp. at 1236; Sisk v. National R.R. Passenger Corp.,  
11 647 F. Supp. 861, 863-65 (D. Kan. 1986).

12           The Everett ordinance does not come within the ambit of these  
13 exceptions. First, as the Ninth Circuit has held, the FRSA preempts  
14 all railroad safety laws where the government has acted with respect  
15 to the same subject matter. See, e.g., Marshall, 720 F.2d at 1153.  
16 Given the expansive nature of federal regulation regarding railroad  
17 speed, Everett's claim that these regulations do not preempt local  
18 speed regulations at grade crossings is without merit.

19           Second, Section 434 authorizes certain regulations by state,  
20 but not local, governments. See, e.g., Consolidated Rail, 664 F.  
21 Supp. at 1237 (citing Donelon and several unreported cases).  
22 Therefore, the city of Everett does not appear to be in a position

23                           2(...continued)

24                           H.R. Rep. No. 91-1194, 91st Cong, 2d Sess., reprinted in 1970 U.S.  
25 Cong. & Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104,  
26 4110.

1 Therefore, the city of Everett does not appear to be in a position  
2 to rely on these exceptions. See, e.g., id. Seeking to avoid this  
3 conclusion, Everett argues that its ordinance should be considered  
4 state action within the meaning of the FRSA. In support, Everett  
5 emphasizes that, in the field of railroad safety, Washington law  
6 permits first class cities to act like state agencies. See  
7 Memorandum of Defendant Everett in Opposition to Plaintiff's Motion  
8 for Summary Judgment ("Memo in Opposition") at 4-5.

9 The court is not persuaded by this argument. First, Everett's  
10 interpretation is at odds with the language of Section 434. The  
11 statute does not contemplate regulation by ordinance; rather, it  
12 says a state may regulate, when permitted to regulate at all, by  
13 "law, rule, regulation, order or standard." Such language would  
14 ordinarily require the enactment of a statute by the legislature, or  
15 adoption of a rule, regulation, order or standard by a state ad-  
16 ministrative agency. See Consolidated Rail, 664 F. Supp. at 1237.  
17 This interpretation is supported by Congress' decision to make state  
18 regulatory agencies, not municipalities, a key part of the  
19 enforcement of the FRSA. See 45 U.S.C. § 435; 1970 U.S. Code Cong.  
20 & Admin. News 4108-12.<sup>3</sup>

21 <sup>3</sup> Noting that the Washington Utilities and Transportation  
22 Commission ("WUTC") does not have authority to regulate train speeds  
23 in charter cities, Everett protests that Amtrak's reading of the  
24 statute would allow it to "escape any responsibility for local  
25 safety hazards." Everett's Memo in Opposition at 5. This point is  
26 not relevant to the preemption inquiry. The fact that the WUTC does  
not have such jurisdiction does not alter Congress' decision to  
limit exceptions to its nationally uniform system of railroad safety  
regulation to state, and not local, action.

1           Moreover, in enacting the FRSA, Congress intended to ensure  
2 nationally uniform railroad safety laws. To ascribe local ordi-  
3 nances the force of state law in this context would be to permit  
4 widely variant and confusing safety ordinances enacted by a multi-  
5 tude of local governments. See, e.g., Sisk, 647 F. Supp. at 865.  
6 Such an interpretation is incompatible with the stated purpose of  
7 the FRSA. See 45 U.S.C. § 421.

8           While this court is sensitive to the concerns expressed by the  
9 city of Everett, Congress has concluded that local governments  
10 should not regulate in the field of railroad safety. Before  
11 displacing an improper speed restriction, however, Amtrak must  
12 consult each city that imposes such a restriction and evaluate  
13 "alternatives to such speed restriction taking into account the  
14 particular local safety hazard which is the basis for such  
15 restriction." 45 U.S.C. § 656(b). Amtrak has pledged that it will  
16 consult with Everett, and take account of its safety concerns,  
17 before increasing train speeds in and through the city.

18           THEREFORE, the Court GRANTS Amtrak's motion for summary judg-  
19 ment as to Everett.

20           DATED at Seattle, Washington this 2nd day of October, 1989.

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23 \_\_\_\_\_  
24 BARBARA J. ROTHSTEIN  
25 CHIEF UNITED STATES DISTRICT JUDGE  
26