

legislative representative suggested that local communities should not be liable for accidents occurring at grade crossings within quiet zones established under the rule.

The North Carolina DOT suggested that communities pursuing quiet zones in their jurisdictions should enter into agreements with the relevant State and operating railroads agreeing to hold harmless the State and railroads for any accidents or injuries that occur as a direct result of these quiet zones. This same commenter emphasized that the communities implementing quiet zones should assume all of the risk associated with the quiet zones.

Commenters from the railroad industry strongly advocated that municipalities seeking the establishment of quiet zones under the rule should assume liability for all accidents that occur at crossings within the quiet zones. Citing the historical sounding of locomotive horns as a safety feature of railroads for the past century, the Florida East Coast Railway argued that if a community insists that it cease the sounding of the locomotive horns when traveling through its jurisdiction, then that community should be willing to accept the liability associated with the decision. The American Public Transportation Association projected that passage of a rule permitting quiet zones as proposed in the NPRM would probably lead to increased insurance premiums for railroads.

Another concern raised by several railroad industry participants, as well as an individual locomotive engineer, was the fact that State law often imposes liability on individual members of train crews and their employers when a train does not sound its horn at a highway-rail crossing and an accident occurs. These commenters contended that nothing in the NPRM would remove liability from individual train crew members or their employers for failure to sound the locomotive horn in the event of an accident in a quiet zone established pursuant to the rule. A representative of the Wisconsin Central System suggested that the rule should clearly state that failure to sound the locomotive horn in a FRA approved quiet zone could not serve as a basis for imposing civil liability on either the train crew or the employing railroad.

FRA appreciates the legitimate concern of the commenters regarding liability issues surrounding creation of quiet zones under this rule. We note that the proposed rule would have had the effect of relieving individual train crew members and their employers from liability for failure to sound the locomotive horn. The proposed rule

clearly provides that establishment of a quiet zone created no legal duty to sound the horn in emergency situations. Because the rule clearly covered the subject matter of such a duty, it would have prevented State laws imposing such a duty. FRA does not expect that lawsuits will never arise over collisions which may occur at crossings within quiet zones, nor should FRA attempt to prohibit such suits since the cause of such collision may in fact be due to factors other than the lack of an audible warning. However, this rule is intended to remove failure to sound the horn as a cause of action in such lawsuits involving crossings within a quiet zone. We expect that the courts will determine liability issues based on the facts of each case and after reviewing the nature of this rule and its Federal requirements.

We expect that courts, following *Norfolk Southern v. Shanklin*, 529 U.S. 344 (2000) and *CSX v. Easterwood*, 507 U.S. 658 (1993), will conclude that this regulation substantially subsumes the subject matter of whether trains must sound warning devices at highway-rail grade crossings and, therefore, preempts state law on that subject.

FRA perceives no reason why establishment of quiet zones under this rule should result in higher insurance premium costs for railroads. In fact, a quiet zone under this rule should be evaluated as much less of an underwriting risk than a current whistle ban.

12. Wayside Horn

During FRA's initial outreach process prior to issuing the NPRM, several commenters asked whether placement of a wayside horn (a horn at the crossing and directed at oncoming motorists) might be entertained as a supplementary safety measure. FRA also received comments in the docket and at the public hearings on this subject. It is apparent that there is interest in using such a device as an alternative means of providing an audible warning to the motorist of an approaching train.

A wayside horn system would typically consist of horns mounted on poles that are placed at the crossing. A horn would be directed towards each direction of oncoming vehicular traffic. The system would be activated by the same track circuits used to detect the train's approach for purposes of other automated warning devices at the crossing (flashing lights and gates) and would produce a sound similar to the horn signal given by an approaching train.

At FRA's direction, the Volpe National Transportation Systems Center

conducted an initial evaluation of two wayside horn installations at Gering, Nebraska in 1995 (*Field Evaluation of a Wayside Horn at a Highway-Railroad Grade Crossing*, Final Report, June 1998). This evaluation noted that use of the wayside horn in lieu of the train horn reduced net community noise impacts. The evaluation also showed a 52 percent reduction in the number of incidents in which motorists continued to drive over the crossing after the warning device's gate arms had started to descend as compared to the baseline data collected with the train horn sounding. There was no significant difference between train horns and wayside horns for motorists that drove around lowered gates. While the report indicated improved driver behavior with the wayside horn, the report also contains analysis that suggests questions regarding the effectiveness of that particular installation in alerting motorists that should be answered before implementing wayside horns as a substitute for train-borne horns. Further, this evaluation did not contain adequate data or analysis to permit a determination of whether a wayside horn could fully substitute for a train-borne audible warning and additional evaluations at other sites should be performed. The NPRM suggested three questions related to the effectiveness of the wayside horn:

1. Does the particular system provide the same quality of warning, determined by loudness at appropriate frequencies, within the motor vehicle while it is approaching the motorist's decision point?

2. As currently conceived, a single stationary horn cannot give the motorist a cue as to the direction of approach of the train or trains. To what extent does this lack of directionality detract from the effectiveness of the warning? Can wayside installation design be altered to compensate?

3. To what extent will the stationary horn suffer from the lack of credibility sometimes associated with automated warning devices, due to the fact that it is activated by the same means? Over what period of time may this problem arise, if at all?

Since the installation of the original wayside horn system in Gering, NE, several other communities have installed wayside horns. These sites include: Ames, Iowa, Parsons, Kansas, Wichita, Kansas and Richardson, Texas. Additionally, other communities have had temporary test installations of the wayside horns.

This topic generated a number of comments from various parties. Additionally, the departments of