



# RAILROAD QUIET ZONES

How do we get there from “hear”?

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Born and raised in Midland, Texas; an honor graduate of Lee High School (but did not meet either of the George Bushes who resided there then).

Did undergraduate work at the Massachusetts Institute of Technology and the University of Texas at Austin where he received a bachelor's degree in government in 1973. Was involved in the Texas Public Interest Research Group where he participated in a study of dangerous toys in the marketplace and was co-chair of the group.

Received a J.D. from The University of Texas School of Law in Austin, Texas, in 1976 where he participated in the Criminal Justice Project and the Texas International Law Journal with a case note on general average.

While looking for work and waiting for Bar Exam results, volunteered for the honorable William M. Taylor, United States District Judge for the Northern District of Texas.

In 1977, he went to work for the City of Irving as an Assistant City Attorney acting as prosecutor for ordinance violations and Class C Misdemeanors.

In 1978, he began a two year stint as a Special Agent with the Federal Bureau of Investigation in the Jackson, Mississippi Field Office where he investigated civil rights complaints among other duties.

In 1980, he returned to the Office of the City Attorney for the City of Irving where he is now the Acting City Attorney. Principal practice areas include real estate, civil service, and human relations law. Mr. Anderson has served on the Administrative Board of the Irving Supplemental Benefit Plan which provides pension disability and death benefits to City of Irving employees and is currently the Chair of such Board. In addition, Mr. Anderson also chairs the Voluntary Employee Benefit Association trust which administers a fund which augments retirees health insurance premiums.

Mr. Anderson serves on the Board of Directors for the Texas City Attorneys Association, which is an affiliate of the Texas Municipal League.

## RAILROAD QUIET ZONES

Unlike current plans to construct new rail lines in transportation corridors far from city centers, most existing rail lines tend to run through the heart of the cities which they serve. Thus most cities have at least one, but often many more at-grade crossings for the rail lines located within the city's boundaries. The rail lines and crossings also tend to be located in proximity to residences and businesses, and so any change in the method that trains use to navigate street and highway crossings tend to affect a large number of people.

Such widespread effect was certainly the case when Congress passed legislation to mandate that trains sound horns prior to entering such at-grade crossings, 49 U.S.C.A. § 20153. This became, literally, a wake-up call to citizens as to how many trains were actually passing through town (with horns required to be at a level of 96 to 110 db, 100 ft forward of locomotive, per 49 C.F.R. § 229.129), but, until recently, there was not much to do about this rather intrusive noise.

This paper will attempt in a modest way to address some of the legal concerns surrounding railroad crossings in general and Quiet Zones in particular. Specifically, the following points will be addressed:

- General Railroad Crossing Liability Concerns
- Establishing a Quiet Zone—Process
- Establishing a Quiet Zone—Substantive Steps
- Semi-Quiet Zones
- Evaluating Alternatives

In addition, within the paper, I will provide such material as links to the web site for the Federal Railroad Administration (“FRA”) and, at the end, a copy of the transmittal letter from the City of Irving requesting such a zone.

### General Railroad Crossing Liability Concerns

Liability considerations will arise anytime there is a collision between a train and a smaller vehicle (which is just about everything else). Due to the great disparity in size and in weight (even with 18 wheelers), the smaller vehicle almost always sustains massive damage with correspondingly severe injuries to the vehicle occupants. In the opinion of this writer, railroads may be even less sympathetic defendants than municipalities, and this would lead to a natural desire on the part of railroads to avoid liability wherever possible.

Railroad crossings are generally under the ownership and control of the railroad owning the tracks, and maintenance is the responsibility of railroad Kansas City Southern Ry. Co. v. Leatherwood, 519 S.W.2d 533 (Tex. Civ. App.—Beaumont, 1975, ref'd n.r.e.) and not the city which owns or maintains the streets. Under normal circumstances, no special equipment is required to be installed. In extra hazardous circumstances which are outside of normal (slope, grade, etc.), additional equipment is required to be installed to give warnings and render the intersection safer for the public to use. Like cities, railroads are required to maintain any safety equipment at the risk of liability for failure to so maintain, Osuna v. Southern Pacific R.R., 641 S.W.2d 229 (Tex. 1982), see also Sec. 71.002(c), Tex. Civ. P. & Rem. Code.<sup>1</sup>

Where there are statutory duties to perform a safety function, such as sounding a horn before entering an intersection, it has long been settled that failure to do so by a railroad can constitute negligence per se, Missouri, K. & T. Ry. Co. of Texas v. Cardena, 22 Tex. Civ. App. 300, 54 S.W. 312, (Tex. Civ. App. 1899, no writ). Texas does have a

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<sup>1</sup> § 71.002.(c), Tex. Civ. P. & Rem. Code provides:

*(c) A person is liable for damages arising from an injury that causes an individual's death if:*

*(1) the person is a proprietor, owner, charterer, or hirer of an industrial or public utility plant or of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers; and*

*(2) the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.*

statutory requirement that trains approaching an intersection from a quarter of a mile distant sound a horn, Section 471.006, Texas Transportation Code, and subsection (c) of that section specifically states that a railroad is liable for failing to sound the warning devices required.

### Establishing a Quiet Zone—Process

Given the legal background that there are both state and Federal requirements for a train to sound a horn prior to a street crossing, a proper question to ask is how does a Quiet Zone get established where sounding the horn is not automatically required come into being from a legal standpoint? This can occur because the Federal statute previously referenced preempts the state statute in this regard. Such preemption is specifically recognized at 49 C.F.R. § 222.7. The Federal statute, which mandates the sounding of the horn, also has provisions for exceptions to such requirement.<sup>2</sup>

On June 24, 2005, the final rule on Quiet Zones and the removal of the requirement to sound a horn was adopted and placed in the Code of Federal Regulations, 49 C.F.R. § 222, which had the effect of providing a means by which municipalities can seek relief from the automatic sounding of railroad horns at intersections.

Under U.S.C.A. § 20153, applications for a waiver to the horn requirement shall be made jointly by the entity having control of the streets and the owner or operator of the railroad tracks. However, the FRA has provided a process whereby one party can seek a waiver to this joint filing agreement, 49 C.F.R. § 222.15(b).

<sup>2</sup> **(c) Exception.** (1) *In issuing such regulations, the Secretary may except from the requirement to sound the locomotive horn any categories of rail operations or categories of highway-rail grade crossings (by train speed or other factors specified by regulation)—*  
 (A) *that the Secretary determines not to present a significant risk with respect to loss of life or serious personal injury;*  
 (B) *for which use of the locomotive horn as a warning measure is impractical; or*  
 (C) *for which, in the judgment of the Secretary, supplementary safety measures fully compensate for the absence of the warning provided by the locomotive horn.*  
 (2) *In order to provide for safety and the quiet of communities affected by train operations, the Secretary may specify in such regulations that any supplementary safety measures must be applied to all highway-rail grade crossings within a specified distance along the railroad in order to be excepted from the requirement of this section.*

49 U.S.C.A. § 20153

The actual application process is controlled by 49 C.F.R. Pt. 222, App. C. At this time, there is also help provided on the web by the FRA in the form of a Quiet Zone Calculator at <http://www.fra.dot.gov/us/content/1337>. The information requested is somewhat technical in terms of calculating risk indices, but well within reach of many traffic engineers. The first four pages of the City of Irving's application is attached hereto to give some idea of what is involved.

It should be noted that in making the application, the entity will need to review and decide what additional safety measures it chooses to submit as part of its application. These options are discussed in the next section.

#### Establishing a Quiet Zone—Substantive Steps

In seeking a waiver of the horn blowing requirement from the FRA, a city will need to select a basis on which to request the waiver. This basis is essentially one which will not increase the number of accidents at a given crossing and is one chosen after due consideration to the following questions:

- What are the different bases which have been recognized by the FRA as a ground to establish a Quiet Zone?
- What crossing or crossings are sought for the Quiet Zone (understanding that a Quiet Zone must be at least one half mile in length<sup>3</sup>)?
- What is the city's budget in regard to improvements or other measures necessary for Quiet Zone approval?
- How much money is the city willing to commit to maintenance or other programs on an on-going basis once the Quiet Zone is approved and operational?
- What is the railroad's position on the Quiet Zone in general, and on such specifics as original equipment expense, maintenance, and indemnity?
- Is the location under consideration more suitable for a partial Quiet Zone where, for instance, the zone is only effective during certain times such as from 10:00 p.m. to 7:00 a.m.?

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<sup>3</sup> 49 C.F.R. § 222.35(a)1

Answers to the foregoing questions will aid in the final selection of the basis to ground the application. Bases are essentially divided into two groups. The first group is called Supplementary Safety Measures or SSMs. These consist of physical barriers for the most part, and are more described in 49 C.F.R. Pt. 222, App. A. The five identified in the Code of Federal Regulations are:

1. Temporary Closure of a Public Highway-Rail Grade Crossing
2. Four-Quadrant Gate System
3. Gates with Medians or Channelization Devices
4. One Way Street with Gate(s)
5. Permanent Closure of a Public Highway-Rail Grade Crossing

Exclusive use of SSMs at all crossings should generally be sufficient to reduce the Risk Index calculations set out in 49 C.F.R. Pt. 222, App. C to qualify for Quiet Zone designation on an almost automatic basis (see Section II of Appendix C).

There is a second class of measures which the FRA will consider in order to grant Quiet Zone status, and these are called Alternative Safety Measures, or ASMs. Use of these measures will involve an evaluation by the FRA before being granted and will be subject to annual reevaluation based on revised estimates of risk reduction of the measures employed on a nationwide basis. Nevertheless, these measures generally are much less capital intensive, and might be implemented fairly quickly if approval is obtained from the FRA. Under 49 C.F.R. Pt. 222, App. B, the following ASMs are listed:

1. Modified SSMs (SSMs which do not meet all of the requirements for the FRA).
2. Non-engineered ASMs such as:
  - Programmed Enforcement
  - Public Education and Awareness
  - Photo Enforcement
3. Engineered ASMs (things which improve geometrics such as sight distance).

### Semi-Quiet Zones

Sometimes it is not possible to get all the way to a Quiet Zone status for a particular crossing or set of crossings. Failure to achieve that goal may be due to any number of factors such as, but not limited to, fiscal limitations, too many intersections or perhaps a difficult railroad with which to negotiate. Fortunately, there are provisions which would breath life into the adage that half a loaf is better than none.

The first approach would be one which has been called a Partial Quiet Zone and is recognized at 49 C.F.R. Pt. 222, App. C, Sec. I, C. Essentially, this is an area which is quiet only during certain times, such as at nighttime. This can be achieved in a variety of ways such as closing the streets at crossings which you would like to have as quiet during the night. In another situation, there may be a closely spaced series of crossings in a neighborhood which seeks a nighttime Quiet Zone. If a city is not able to do all of the intersections with something like quad gates, then a Partial Quiet Zone could still be achieved by closing some streets during those hours and, for only installing SSM equipment on the intersections which need to stay open. The FRA requires that any intersections which remain open during the quiet period be studied and outfitted as normal Quiet Zone crossings.

Another alternative is Wayside Horns. These are still horns, but they are mounted at intersections and their sound is directed down the street where the crossing is located. This produces noise, but over a far smaller area due to the fact that the horn is not sounded a quarter of a mile from the intersection. Use of a Wayside Horn is treated as a substitution for a train horn by the FRA, 49 C.F.R. Pt. 22, App. C, Sec. I, B.

### Evaluating Alternatives

Particular answers to the foregoing questions may dictate or at least strongly suggest an approach to take in securing a Quiet Zone for a city. In a situation where there are both sufficient resources and strong desires to eliminate automatic horn sounding as

well as keep a major street open without delays for train crossings, then grade separation may be the answer. That approach eliminates the intersection. The same result is also reached if a street can be closed altogether at the crossing. Generally, this will require that an area be adequately served by other crossings which are near enough not to effect delivery of emergency services or pose too large an inconvenience on the residents and businesses in the area. One other consideration to keep in mind with a street closure at an existing crossing is that it may be a bargaining chip with the railroad if you want them to agree to a Quiet Zone or maintain other crossings.

SSMs have an advantage in that FRA approval is fairly well assured. The down side to SSMs tends to be the cost of installation and perhaps maintenance. Railroads will almost always want a city to pay the capital costs of any new equipment which is required, and almost always you will hear about the increased costs of maintenance. A current gated crossing only requires the railroad to maintain two gates. Upgrading to a quad gate system will double the expected amount of maintenance for a given crossing. Certainly, mechanical and electrical apparatus does not function indefinitely without maintenance, and because of the life safety aspect of this equipment, it is reasonable to expect a good deal of preventive maintenance before anything goes wrong. In addition, railroads will often ask for indemnity in exchange for taking on new equipment to maintain. Aside from Texas constitutional restrictions on such requests, and aside from the political repercussions of dedicating a tax to be set aside to pay an unspecified future damage, such a request might be a good indicator of a need to explore other options.

Of all the listed SSMs, the median is one of the most appealing. There is very little maintenance, and almost none of it is done by the railroad, depending on the location of the railroad right-of-way. The median must extend from within one (1) foot of the lowered gate<sup>4</sup> to a point 100 feet from the lowered gate and have a “non-traversable” curb. This length could be as little as 60 feet if there is a street intersection within 100 feet of the lowered gate arm. If there is sufficient space and the railroad already has an existing gate system, this method works very well. The downside could be that

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<sup>4</sup> 49 C.F.R. Pt. 222, App. A, A(1)f.

residents or businesses have driveways within the 100 foot median length. While these do not necessarily invalidate medians as an SSM, it may not be possible from an access or political standpoint to locate the median as would be required.

As previously mentioned, ASMs have to be evaluated by the FRA before being granted and are then annually reevaluated. Assuming that the FRA does grant Quiet Zone status on the basis of an ASM, it is important for a city to be fully committed to the measures it proposes in lieu of horn soundings. If the measure proposed by the city includes some ongoing responsibilities as would be the case with education or programmed law enforcement, it remains to be seen how the courts would treat a failure by the city to honor its commitments. Assuming a terrible collision, would the city be able to assert and win on its point that its failure to conduct a class is not a premises defect, meaning the city is covered by a sovereign immunity defense? On the other hand, would courts examine the whole Quiet Zone program and come to the conclusion that the intersection is dangerously defective without either a train horn or the city classes on train safety? If so, sovereign immunity might not be available to a city. Since a case has not yet arisen in this regard, this will remain an unanswered legal question. Of course, there is also a fairly significant public relations problem possible if a particularly gruesome accident can be reasonably attributed to the failure of a city to do what they have represented that they would do.