



September 19, 2018

Warren Buffet, Chairman, President, and CEO
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Subject: BNSF Yard Lighting in Richmond, CA

Dear Mr. Buffet:

I am requesting your assistance in persuading BNSF to modify rail yard lighting in Richmond CA to conform to Richmond's exterior lighting standards that prohibit lighting that causes glare and spillover outside the premises at which it is installed. Such conformance would also address widely accepted standards for protecting public health and safety as well as wildlife and the environment.

I understand that Burlington Northern Santa Fe, LLC is the parent company of the BNSF Railway (formerly the Burlington Northern and Santa Fe Railway) and that the company is an indirect, wholly owned subsidiary of Berkshire Hathaway, which is controlled by you.

For years, Richmond's Zoning Ordinance included the following:

15.04.840.040 Lighting and Glare Standards. All lighting, reflective surfaces or any other sources of illumination shall be utilized in a manner which produces no glare on public streets or on any other parcel. Lights shall be shielded at lot lines so as not to be directly visible from an adjoining residential district.

In 2016, Richmond adopted a new Zoning Code¹ that included an entire section, 15.04.604, on outdoor lighting that provided detailed restrictions on outdoor lighting, the purpose of which is to "control outdoor lighting in order to maintain adequate visibility and safety, conserve energy, and protect against direct glare and excessive lighting."

On July 10, 2018, the City Council amended the Public Nuisance Ordinance to "define excessive and glaring lighting as a nuisance."²

Sometime in the late spring or early summer of 2018, BNSF added additional masts and replaced the previously existing yellowish HPS or metal halide lamps in their Point Richmond yards with unshielded

¹ <https://www.ci.richmond.ca.us/3379/Zoning-Ordinance>

² 19-18 N.S. <http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/8918>

LED fixtures on extremely high masts. The color of the LED lights is clearly above the 3000 K upper limit recommended by the American Medical Association (AMA)³ and probably on the 4000K to 5000K range or greater. According to the AMA, these lights cause many problems and have been the subject of hundreds of complaints about glare, spillover, light trespass, and wasted energy.

The first is discomfort and glare. Because LED light is so concentrated and has high blue content, it can cause severe glare, resulting in pupillary constriction in the eyes. Blue light scatters more in the human eye than the longer wavelengths of yellow and red, and sufficient levels can [damage the retina](#). This can cause problems seeing clearly for safe driving or walking at night.⁴

The type of lighting in the BNSF train yards can also interrupt [normal circadian physiology](#) leading to [serious health consequences](#) and interruption of sleep.⁵

Bright electric lighting can also [adversely affect wildlife](#)⁶ by, for example, disturbing migratory patterns of birds and some aquatic animals which nest on shore.

On August 17, 2018, BNSF was served with a Notice of Violation and Demand to Abate for the new train yard lights, and on September 18, 2018, BNSF was issued the first citations for the lights.

Don Maddy, Executive Director of State and Government Affairs for BNSF responded to the Notice of Violation and Demand to Abate on August 31, 2018, claiming justification of the lighting based on safety and citing 29 C.F.R. 1926.56.

Nothing is more important to BNSF than safety. As a leader in railroad safety, we recognize a safe and secure railroad network is essential to our nation's future and important to all our stakeholders. To ensure the safety of our employees as well as to maintain compliance with federal safety regulations, BNSF recently installed LED lights in Richmond Yard and its automotive facility. See 29 C.F.R. § 1926.56.

LED lights were selected to provide our employees with the safety benefits attained from excellent visibility throughout our yards. With LED lights we achieve a safe operating environment at a much lower rate of energy consumption coupled with a corresponding reduction in greenhouse gas emissions.

Then, Mr. Maddy proceeded to assert that any City regulation of BNSF lighting is preempted by federal law:

Our desire to cooperate is balanced by recognition that BNSF is a federally regulated common carrier freight railroad, and the Richmond Yard and our Automotive Facility are an integral part of BNSF's interstate rail system and transportation services. Under the ICC Termination Act (ICCTA),

³ <http://theconversation.com/american-medical-association-warns-of-health-and-safety-problems-from-white-led-streetlights-61191>

⁴ <http://theconversation.com/american-medical-association-warns-of-health-and-safety-problems-from-white-led-streetlights-61191>

⁵ <https://theconversation.com/are-we-sleep-deprived-or-just-darkness-deprived-49412>

⁶ <https://www.sciencedirect.com/science/article/pii/S0169534715001603>

49 U.S.C. Sec. 10501(b), the federal Surface Transportation Board (STB) has exclusive jurisdiction over railroad operations and facilities. State and local agencies do not have jurisdiction under state or local laws to require railroads to submit to state or local requirements as a condition of improving the railroads' interstate facilities.

Congress and our federal and state courts have long recognized the preemptive effect of STB jurisdiction over railroad facilities construction, acquisition and operations. See e.g., *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *Flynn v. Burlington Northern S.F. Corp.*, 98 F.Supp.2d 1186 (E.D. Wash. 2000); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D. Minn. 1998). As such, any citations issued by Richmond would be preempted by federal law and unenforceable.

Mr. Maddy also offered to cooperate in a solution:

Despite this unambiguous federal regulation, BNSF nonetheless strives to work cooperatively with local jurisdictions to address their concerns and the concerns of our neighbors. In that spirit, we offer to continue meeting with the City to discuss the lighting of our yards.

In response to Mr, Maddy, I pointed out the following:

29 C.F.R Section 1926.56 deals with safe lighting levels; it does not prescribe how to achieve them. As an architect, I am well aware of outdoor industrial lighting designs that routinely achieve OSHA and building code mandated lighting levels that do not result in offsite glare and spillage. There is no question that this can be done.

I also know only too well the theory of federal preemption and STB jurisdiction, which we both know is murky (not unambiguous) at best. I don't think it has ever been tested with respect to yard lighting. I think we would both agree that BNSF probably has the authority to establish the level of lighting used in its yards, but I don't agree that BNSF has the right to cause dangerous and environmentally harmful glare to other properties, some of which may be a mile or more away from the source.

As of September 19, 2018, there has been no further progress towards a resolution, and on September 11, 2018, Mr. Maddy wrote:

As to proposed dates for our meeting to discuss lighting options, we're still working internally to reach alignment on the options prepared by our Environmental team. I'm hoping by the end of this week to send some proposed meeting dates.

Preemption is strong argument, but the yard lighting issue may be different. Read the following for context, but focus on this sentence from "Local Regulation of Interstate Railroads: What Part of Plenary Don't You Understand?"⁷

For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally is not preempted

⁷ https://www.cacities.org/getattachment/04f1750b-d65c-4c11-b931-1723dc4c7aae/5-2008_Spring_Conference_Michael_Conneran_The_Loca.aspx

Following is the entire discussion:

7IV. LOCAL REGULATORY ISSUES

Given the “pervasive and comprehensive” nature of federal control, it is not surprising that many efforts by municipalities to exert control over railroads have been less than successful. “One court noted that ‘it is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.’ *CSX Transp., Inc. v. Georgia Public Service Comm.*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Indeed, the language is ‘clear and broad,’ and it is apparent that the ‘ICCTA has preempted all state efforts to regulate rail transportation.’ *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000).” *Guckenberg v. Wisconsin Central Ltd. and Fox Valley & Western Ltd.*, 178 F.Supp.2d 954, 958 (E.D. Wisc., 2001) Perhaps the leading case in this regard is the Ninth Circuit’s decision in *City of Auburn v. Surface Transportation Board* 154 F.3d 1025 (9th Cir. 1998), in which the court considered a city’s appeal from an STB decision to permit a railroad to acquire and operate a rail line. In the appeal, the city argued that the intent of the ICCTA was only to preempt economic regulation by local government, while permitting local government to exercise local land use and environmental regulation. In rejecting that argument, the court found that “the congressional intent to preempt . . . state and local regulations of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it.” (Id. at 1031.) Challenges to local regulations often occur in the course of litigation filed by cities in state court, which railroads then remove to federal court, where they convince judges to refer the matter to the STB due to the court’s lack of jurisdiction over the matter.

Despite the seemingly comprehensive preemptive sweep of the ICCTA, there nevertheless remain some areas where Congress has not indicated a need to control specific aspects of rail operations: “state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety.” *Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for Declaratory Order* (STB Finance Docket 34354, served March 2, 2004). These specific powers will be noted in the following discussion of a variety of issues that have arisen between cities and railroads.

Local Control over the Construction and Operation of Rail Lines and Facilities With regard to almost all other potential projects that may be developed within a city’s limits (other than those of some governmental agencies protected by intergovernmental immunity), a city would normally have legal authority to exercise the land use, environmental and building regulation under its police powers. However, that power does not necessarily extend to the approval of the construction of rail lines and facilities. Under 49 USC 10501(b)(2), the STB has exclusive jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks and facilities, even if the tracks are located, or intended to be located entirely in one State.”

Citing the language of 10501(b), another court stated “[I]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” (*Friends of the Aquifer et al.* (STB Finance Docket No. 33966, served August 15, 2001.)) 8 In one STB decision, *Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA* (STB Finance Docket No. 33971, served May 1, 2001) the STB explained that “Court and

agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations.” The STB went on to explain the range of local issues affected by this preemption: Thus, state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. See Stampede Pass, [2 ICC 2d 330]; City of Auburn, 154 F.3d at 1029-31.[¶]

As the courts also have found in addressing the scope of section 10501(b), zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad’s interstate operations. Austell [Norfolk Southern Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997)]; Ridgefield Park[Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000)]. Moreover, in Ridgefield Park the court found that section 10501(b) precluded the state court from adjudicating common law nuisance claims involving noise and air pollution from a railroad maintenance facility because to do so would infringe on the Board’s exclusive jurisdiction over the location and operation of railroad facilities.

The STB then sought to explain the limited range in which local control was permissible.

This does not mean that all state and local regulations that affect railroads are preempted. As we stated in Stampede Pass, 2 S.T.B. at 337-38, and Riverdale I [Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999)], state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally is not preempted. Id. at 8-9; Flynn [Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000)]. While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government when it is undertaking an activity for which another entity would require a permit and to furnish its site plan to the local government. Ridgefield Park. [750 A.2d 57.]

In the past, BNSF has sought permits from the City of Richmond, for example, the Repair in Place Facility that was the subject of City of Richmond CEQA review, covered by the Negative Declaration EID92-17.

Mr. Buffet, I am asking you to intercede in this matter and to persuade BNSF to install a different lighting system in Richmond that is safe, protects public health and protects the environment.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Tom Butt', with a stylized flourish at the end.

Mayor Tom Butt
City of Richmond

cc: Gabriel Meyer, Surface Transportation Board, Gabriel.Meyer@stb.gov
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