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## **Vermont Legislative Research Shop**

### **Private Rail Crossing Liability**

A private rail crossing is typically defined as any crossing on a roadway that is not open to the public. These crossings are necessary to access land that is not accessible using a public crossing. According to the Missouri Department of Transportation, "Private crossings are usually intended for the exclusive use of the adjoining property owner and the property owner's family, employees, residential, farm, recreation/cultural, industrial or commercial activities."<sup>1</sup> Private crossings include farm crossings, industrial crossings, residential access crossings, and temporary crossings. There were 97,306 private crossings in the United States in 2005.<sup>2</sup>

Private railway crossings are not federally regulated and state regulations are inconsistent. In fact, in 2002 twenty-seven states did not have laws about the establishment and regulation of private crossings. In the absence of legislation, the use of private crossings is negotiated between the landowner and the railroad.<sup>3</sup> Due to the lack of national policy, most private crossings are not up-to-date and are dangerous.<sup>4</sup>

### **Liability Issues**

Private crossings are established as a result of an agreement between the railroad and the landowner. All examples of these agreements found by the researchers require the landowner to have Railroad Protective Liability (RRPL) insurance. RRPL insurance is usually purchased by contractors working within a railroad's right of way to protect the railroad, but railroads may also require that it be purchased by landowners using a private crossing. Because RRPL is intended for short-term construction projects rather than long-term crossing agreements, the

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<sup>1</sup> Missouri Department of Transportation, FAQs: Rail. Retrieved 7 April 2009 from

<http://www.modot.org/othertransportation/rail/faq.htm>

<sup>2</sup> U.S. Dept. of Transportation, Federal Highway Administration, *Railroad-Highway Grade Crossing Handbook*, 2<sup>nd</sup> ed., August 2007, p. 191. Retrieved 26 Mar 2009 from <http://www.fra.dot.gov/us/content/1779>.

<sup>3</sup> L. Stephen Jennings, *Compilation Of State Laws And Regulations Affecting Highway-Rail Grade Crossings*, 4<sup>th</sup> ed., U.S. Dept. of Transportation, Federal Highway Administration, 16 October 2002. Retrieved 26 Mar 2009 from <http://www.fra.dot.gov/us/content/806>.

<sup>4</sup> See Private Highway-Rail Grade Crossing Safety Research and Inquiry report. Retrieved 4/9/09 from [http://www.fra.dot.gov/downloads/safety/privatexingsafetyresearchinquiry\\_061008.pdf](http://www.fra.dot.gov/downloads/safety/privatexingsafetyresearchinquiry_061008.pdf).

policies are very expensive (\$2,500 to \$5,000 annually) and do not guarantee renewal.<sup>5</sup> Additionally, “The railroads do not always have the legal right to require private crossing holders to obtain liability insurance. This right depends on the contract or agreement between the railroads and the private holders, and it is not easy to get these types of liability policies.”<sup>6</sup> Disputes between the private crossing owner and the railroad tend to be both expensive and time-consuming due to the complicated process of solving disputes. The following is a brief summary of the liability issues surrounding private crossings:

The primary difference between public and private grade crossings is roadway ownership, which affects the obligations and indemnification of the parties involved in the crossing activity. At a private crossing, roadway design and maintenance are usually the responsibility of the private entity that owns the roadway. The private entity may enter into a contractual agreement with the railroad(s) regarding the liability for any casualty incurred at the crossing due to any lack of specified maintenance. Not all private crossings are covered by contractual agreements. In many cases, the owner of the private roadway is unknown.<sup>7</sup>

Due to the inconsistencies in regulation, liability can become problematic when crossings change use from their original purpose. In Vermont, for example, some railroad crossings that were originally built as farm crossings have changed purpose as land use has changed, becoming more heavily used private crossings, or even public crossings. This is problematic if the use no longer reflects the agreement that was negotiated by the landowner and the railroad, as the liability of the railroad may increase under the new use.<sup>8</sup>

The greatest safety concern is that no single agency or government regulates all aspects of private crossings. A safety recommendation by the National Transportation Safety Board explains the concern: “Contracts governing private crossings often do not specify responsibility for all factors that could affect crossing safety. Because of the distribution of safety responsibilities for private crossings, some important safety factors are not addressed by any agency.” Existing agreements and regulations are insufficient to ensure the absolute safety of private crossings.

An issue of particular concern in Vermont and other rural states is the large number of public roads that have fallen out of frequent use. Railroad crossings that occur on these ancient Rights of Way pose a different liability challenge, as they are not technically private crossings.

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<sup>5</sup> Peter Yankowski, Vermont Insurance Division, “Draft Discussion Paper for Farm Crossing Liability Issues”.

Retrieved 31 Mar 2009 from

[http://www.bishca.state.vt.us/InsurDiv/public\\_notices/publicnotices\\_insurediv.htm](http://www.bishca.state.vt.us/InsurDiv/public_notices/publicnotices_insurediv.htm)

<sup>6</sup> Steven M. Peck, Anya A. Carroll, and Miriam Kloeppel, “Private Highway-Rail Grade Crossing Safety Research and Inquiry”, Office of Research and Development, Federal Railroad Administration, May 2008. Retrieved 9 April 2009 from [http://www.fra.dot.gov/downloads/safety/privatexingsafetyresearch\\_inquiry\\_061008.pdf](http://www.fra.dot.gov/downloads/safety/privatexingsafetyresearch_inquiry_061008.pdf)

<sup>7</sup> Jim Hall, “Safety Recommendation,” 27 August 1999, National Transportation Safety Board. Retrieved 14 April 2009 from <http://www.nts.gov/Recs/letters/1999/>

<sup>8</sup> Peck et al., 2008

Rights of Way in many states are managed by the state Department of Transportation, which may provide an avenue through which crossings could be negotiated.<sup>9</sup>

### **Railroad Company Actions**

BNSF Railway, a nationwide railroad company, has a clearly articulated policy of crossing consolidation. The goal of the company is to reduce the number of crossings, both public and private, in order to improve safety. Disused and redundant crossings are actively being closed by BNSF. Additionally, this policy applies particularly to private crossings: "During 2007, there were 127 requests for new private crossing permits. Only 14 new crossings were installed – and six of those were temporary for construction purposes."<sup>10</sup> In short, it is generally against railway company interests to install new private crossings.

What follows is an example of the liability and insurance terms of a private crossing agreement used by Reading Blue Mountain & Northern Railroad Company in Pennsylvania:

#### **10. LIABILITY**

Licensee hereby releases and will protect, defend, indemnify, and save harmless Railroad from and against all claims, liabilities, demands, actions at law and equity (including without limitation claims and actions under the Federal Employers' Liability Act), judgments, settlements, losses, damages, and expenses of every character whatsoever (hereinafter collectively referred to as "Claims") for injury or death of any person or persons whomsoever and for damage to or loss or destruction of property of any kind by whomsoever owned, caused by, resulting from, arising out of, or occurring in connection with the construction, maintenance, alteration, repair, relocation, renewal, removal, use or presence of the Crossing, or incidental to or appertaining thereto, and regardless of whether or not such injury or death or such damage to or loss or destruction of property are due to or chargeable to, in whole or in part, any alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation by Railroad.

#### **11. INSURANCE**

(a) Before Licensee may make use of the Crossing, Licensee shall, at its sole cost and expense procure and deliver to Railroad and thereafter maintain in effect during the term of this License public liability insurance, as well as contractual liability insurance covering all liabilities assumed by Licensee under Section 10 of this License, without exception or restriction of any kind. Said insurance shall be in limits of not less than **FIVE MILLION DOLLARS (\$5,000,000.00)** single limit, bodily injury, death and/or property damage whether of Licensee, Railroad, or others, and said insurance shall be in such companies and in such

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<sup>9</sup> For more information, see VLRS report "Right of Way Management" at <http://www.uvm.edu/~vlrs/Other/RightofWay.pdf>.

<sup>10</sup> BNSF Railway, "Grade Crossing Safety Brochure." Retrieved 21 April 2009 from [http://www.bnsf.com/communities/safety/grade\\_crossing.html](http://www.bnsf.com/communities/safety/grade_crossing.html).

form as shall be acceptable to Railroad. Said insurance shall be endorsed to provide that Railroad shall be notified in writing by the insurance company at least thirty (30) days in advance of any cancellation or charges which modify the coverage provided thereunder. The providing of such insurance shall not be deemed a limitation on the liability of Licensee as provided in this License, but shall be additional security therefor. Railroad shall be named as an additional insured on all insurance policies required under the terms of this agreement. (b) Railroad shall have the right to periodically conduct a review of the adequacy of the insurance requirements provided for in Section 11(a) and on (1) year intervals from the effective date of this License. In the event that Railroad should determine that the requirements of Section 11(a) no longer provide adequate protection to Railroad, at its sole option, may give Licensee notice ("Insurance Notice") that Licensee must immediately obtain such additional insurance as Railroad requires.<sup>11</sup>

This agreement is written to protect the railroad, and requires the landowner to purchase five million dollars of RRPL insurance.

### **State Actions for Crossing Safety**

#### **Maine**

In the 2008 legislative session, Maine established the "Railroad Crossing Information Council." The council consists of the Public Advocate and four other members: representatives of the railroad industry, the insurance industry, and the real estate industry, and one Maine resident who has never been employed by the railroad industry. The role of the council will be to provide information on and mediate disputes relating to private railroad crossings.<sup>12</sup>

#### **California**

In the state of California when a private crossing is viewed as being a public safety concern, the railroad and the owners of the private crossing will share liability for safety or any issues that arise. Private crossing tends to have less warning signs. Their usage may change over time and it is difficult for this to be documented. It is difficult for the California Public Utilities Commission to keep track of all of the private crossings. When a private crossing becomes a public safety concern, it must be reviewed. The state of California cannot require a private railroad crossing owner to purchase liability insurance. The determination of purchasing insurance is made by the contract or agreement between the railroad company and the private crossing owner. It is deemed necessary that since signage is so inconsistent in the state of California that some sort of standard is needed.<sup>13</sup>

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<sup>11</sup> Reading Blue Mountain & Northern Railroad Company, "License Agreement For Private Grade Crossing," January 2008. Retrieved 14 April 2009 from [http://www.readingnorthern.com/realestate/private\\_grade\\_license.pdf](http://www.readingnorthern.com/realestate/private_grade_license.pdf)

<sup>12</sup> Chapter 657 of the Acts of 2008, Maine Legislature. Retrieved 26 Mar 2009 from <http://janus.state.me.us/legis/ros/lom/LOM123rd/123S1/PUBLIC657.asp>

<sup>13</sup> Peck et al., 2008.

## Washington

During the 2009 session the Washington State Legislature passed HB 1081, which authorizes the creation of local improvement districts to fund the construction of railroad crossing protection devices.<sup>14</sup> Although the legislation is not specifically directed toward private crossings, it is particularly applicable to private crossing situations, where the state and railroad are not liable for providing crossing protection devices.<sup>15</sup>

### Terminology Changes in Canada

In 2002 Canada changed the terminology used to indicate public and private crossings. Canadian law now distinguishes between “unrestricted” crossings and “other than unrestricted” crossings. This is significant because crossings that would before have been called “private” are now in the category of unrestricted crossings, which includes:

a public grade crossing or grade crossing whose road, trail, pedestrian path, or bicycle path is one of the following: (a) maintained by an organization, such as public parks that include snowmobile and hiking trails; (b) owned by a commercial or industrial establishment, including a business operated from a residential or farm property, that is used in connection with the establishment by persons other than employees of the establishment; (c) serves three or more principal residences; (d) serves three or more seasonal residences, access to which is not controlled by a gate equipped with a lock; (e) a private road that connects two public roads; or (f) a private road maintained by a natural resource company, such as a company involved in forestry or mining activities.

This new designation is important because it increases railroad liability for crossings that occur on private roads and were previously termed “private,” but are frequently used by the public.<sup>16</sup>

### Farm Crossings and Livestock Liability Laws

According to a Vermont Insurance Division report on farm crossings, although farm crossings are a type of private crossing, they are limited only to agricultural use whereas private crossings in general can have a number of different uses. There are a large number of laws relating to liability of farmers and railroads with respect to livestock. Nineteen different states, including Vermont, have laws that require the railroad to build fences on either side of the right-of-way when the tracks pass through areas where livestock graze. The railroad is generally held liable for animals injured or killed on the tracks only if the fencing is not well built or maintained.

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<sup>14</sup> Press Release, WA House Democrats “House passes Wallace legislation to allow communities to address railroad crossing issues.” Retrieved 16 April 2009 from [http://housedemocrats.wa.gov/members/wallace/20090309\\_RailroadCrossingLegislation.asp](http://housedemocrats.wa.gov/members/wallace/20090309_RailroadCrossingLegislation.asp)

<sup>15</sup> For more information, see the bill text and analysis at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1081&year=2009>, accessed 22 April 2009.

<sup>16</sup> Peck et al., 2008. p. 35-36

Only Indiana has livestock laws that pertain specifically to the establishment and use of farm crossings.

## Indiana

In the state of Indiana a railroad is responsible for the death of livestock on railroad tracks. A farmer can claim a suit against any railroad whose train strikes livestock resulting in injury or death. A railroad company is not liable if the reason that the animal was on the tracks was one of the farmer's neglect. The company shall not be liable when the railroad is securely fenced off from livestock. Farmers who construct gates for farm crossings must keep them closed and secure at all times unless a prior agreement has been made with the railway. If the cattle are struck after crossing one of these gates, the railway and its operators are not liable unless it was deemed it was their negligence that leads to the injury or death of the animal.<sup>17</sup>

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Prepared by Hannah Fjeld and Jameson Halnon under the supervision of Professor Anthony Gierzynski on April 22, 2009.

**Disclaimer:** This report has been compiled by undergraduate students at the University of Vermont under the supervision of Professor Anthony Gierzynski. The material contained in the report does not reflect the official policy of the University of Vermont.

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<sup>17</sup> UVM Department of Animal Science, Database of Livestock Laws, Update December 2001. Reviewed by the American Association for Horsemanship safety. Retrieved 3/19/09 from [http://asci.uvm.edu/equine/law/fence/in\\_fnc.htm](http://asci.uvm.edu/equine/law/fence/in_fnc.htm)