

February 2011 Multi-State Performance Test

1. The test materials include an assignment memorandum from Lily Byron, Deputy County Counsel; notes of the meeting with James Wesson, Senior Engineer; a memorandum to the file regarding the meeting with the Plymouth Railroad representatives; and the full text of three cases, *Butte County v. 105,000 Square Feet of Land (Butte)*, *City of Elk Grove v. B&R Railroad (Elk Grove)*, and *Conroe County v. Atlantic Railroad Co. (Conroe)*. The assignment memorandum requests that the examinee draft a memorandum analyzing whether a condemnation action to acquire an easement for an at-grade crossing of Plymouth's railroad track would be preempted under the Interstate Commerce Commission Termination Act (ICCTA).

2. General observations: The test can generally be divided into four sections. The first section concerns a general discussion of preemption and the standards employed by courts in performing a preemption analysis. The second and third sections, respectively, discuss the two part test set forth in *Butte*: (1) whether the crossing would unreasonably interfere with railroad operations; and (2) whether the County's intended use would pose undue safety risks. The fourth section involves a discussion regarding Plymouth's claim for indemnification and its relevance, if any, to the preemption question.

Most examinees followed the call of the question by drafting a memorandum. In addition, most examinees discussed each part of the *Butte* two part test (operations and safety) separately. In many instances the indemnification discussion was included in the *Butte* analysis. This was an acceptable way to discuss that issue. As *Conroe* provides that courts are to determine whether preemption applies on a case-by-case basis, examinees were required to analyze the three cases in the library and apply the relevant facts and holdings in the cases to the current case. Many examinees performed this type of analysis. However, a number of examinees merely summarized the library cases and applied little or no analysis to the present case.

3. The first issue involves recognition and identification of the ICCTA preemption doctrine and discussion of the prohibition of state actions that undermine the ICCTA. It was in this section that most examinees chose to set forth the two-part *Butte* test for determining whether preemption was applicable. The better exams not only identified the standards, but also cited *Butte* as authority. Finally, it was also in this section that most examinees recognized that a preemption analysis is determined on a case-by-case basis.

4. Most examinees first addressed the issue of whether the County's proposed eminent domain action constitutes unreasonable interference with Plymouth's railroad operations. Most examinees cited *Conroe* as the one case that held that the proposed condemnation was preempted. Stronger papers went on to distinguish the facts in *Conroe* from the facts in the present case, by specifically addressing the fact that *Conroe* had a passing track and also involved loading and unloading of railcars, and by observing that none of these facts are present

in the current fact situation. The more complete exams also examined the discussion in *Conroe* regarding the prohibition of placing operating limitations on the railroad, such as those pertaining to train length, speed, or scheduling, and that the county cannot impose conditions that have the effect of requiring the railroad to undergo substantial capital improvements.

In this section, examinees also often discussed speed as an issue in the case for the first time. Many examinees noted that the frequency of the trains is far greater than that found in any of the library cases and/or that the Plymouth trains will be required to slow down when passing the crossing. Stronger memoranda discussed the fact that the County is contemplating installing a Quiet Zone, which will greatly cut back on the reduction in speed.

Maintenance was another topic of discussion regarding the issue of unreasonable interference. Many examinees noted that though Plymouth claims there will be increased maintenance, it fails to provide any specific claims or supporting facts. The stronger responses further concluded that maintenance will not be significantly increased and access will likely not be denied.

Finally, many examinees distinguished *Conroe* regarding feasible alternatives. In *Conroe* the court found there were feasible alternatives that would have avoided interfering with the passing track. In the present case, there are no similar feasible alternatives to the placement of the crossing.

5. Many examinees discussed the issue of undue safety in the next section of their memorandum. Again, as with the first issue, a number of exams noted that Plymouth does not identify any specific safety risks. Furthermore, stronger exams additionally noted and provided some meaningful discussion concerning the degree of risk involved. As with the first issue, differences between the facts in *Conroe* and the facts in the present case needed to be discussed since the *Conroe* court found there were undue safety risks. Examinees who addressed the fact that the present case does not involve double tracks or blind spots created by parked trains demonstrated an understanding of the distinction between the facts in *Conroe* and those presented in the present case.

Finally, the discussion of undue safety required some discussion regarding the specific equipment or function that would result from the area being designated a Quiet Zone. A clear understanding of this issue generally included a discussion of how the Quiet Zone alleviates safety concerns.

6. The last section of the memorandum includes a recognition and discussion of Plymouth's request for indemnification, although this discussion need not have been presented separately. Stronger papers cited *Elk Grove* for holding that indemnification involves allocation of risk and not the regulation of rail transportation, and concluded that indemnification was not relevant to the pre-emption analysis.