

1990

Lewis Duncan, individually and as personal  
representative of the Estate of PATRICK  
DUNCAN, deceased, et al, v. Union Pacific  
Railroad Company, the State of Utah, Paul  
Kleinman : Unknown

Utah Supreme Court

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Allan L. Larson; Craig L. Barlow; Anne Swensen; Snow, Christensen & Martineau; Stephen J. Sorensen; Assistant Attorney General; J. Clare Williams; Larry A Gatenbein; Attorneys for Appellees.

Michael A. Katz; Burbidge & Mitchell; Attorneys for Appellants.

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CKET NO.

STEVEN A. GOODSELL  
General Solicitor

J CLARE WILLIAMS  
DENNIS C FARLEY  
LARRY A GANTENBEIN  
General Attorneys

900233 UNION PACIFIC RAILROAD COMPANY

LAW DEPARTMENT



406 West 100 South  
Salt Lake City, UT 84101  
(801) 595-3226  
Fax (801) 595-3265

March 27, 1991

FILED

MAR 27 1991

Clerk, Supreme Court, Utah

Mr. Geoffrey J. Butler  
Clerk of the Court  
Utah Supreme Court  
332 State Capitol Building  
Salt Lake City, Utah 84114

Re: Lewis Duncan et al v. Union Pacific Railroad  
Company et al - Case No. 900233

Dear Mr. Butler:

In accordance with Rule 24(j), Utah Rules of Appellate Procedure, defendant Union Pacific Railroad Company hereby draws the Court's attention to a recent decision of the U.S. District Court, Northern District of Oklahoma, in Conner v. Missouri Pacific Railroad Company, Case No. 90-C-562-E. The decision was only filed on March 14, 1991, and, therefore, does not yet have a reporter system citation. Accordingly, a copy of the Court's decision is attached hereto.

The decision interprets the Federal Rail Safety Act of 1970, 45 USC § 421 et seq. regarding the issue of federal preemption of common law duties to install warning devices at railway crossings in light of a recent U.S. Supreme decision which reiterates in general the doctrine of federal preemption. The case pertains to the arguments set forth in Union Pacific's brief at pages 26-34.

Very truly yours,~

J. Clare Williams

JCW:k

cc: Michael A. Katz, Esq.  
Allan L. Larson, Esq.  
Stephen J. Sorensen, Esq.

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FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 14 1991

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

GARY DEAN CONNER,  
Plaintiff,

vs.

No. 90-C-562-E

MISSOURI PACIFIC RAILROAD  
COMPANY d/b/a UNION PACIFIC  
RAILROAD COMPANY, a foreign  
corporation,

Defendant.

O R D E R

This matter is before the Court on Defendant's Motion for Partial Summary Judgment and Defendant's Motion in Limine. Both motions pertain to Plaintiff's claim that Defendant is liable for the allegedly inadequate warning devices at the railroad crossing where the accident at issue occurred.

The gist of Defendant's argument is that the Federal Rail Safety Act of 1970, 45 U.S.C. §421 et seq. (FRSA), has pre-empted state statutory and common law duties relative to railway safety and, specifically, as it relates to warning devices at railway crossings. Therefore, Plaintiff's claim that Defendant is liable for inadequate warning devices at the crossing should be dismissed. And Defendant further argues that evidence regarding the adequacy of warning signals at the crossing should be deemed inadmissible pursuant to 23 U.S.C. §409, 45 U.S.C. §421 et seq., 23 U.S.C. §401 et seq. and 17 O.S. §86.

Plaintiff's response, in sum, is that: 1) there is no federal

pre-emption of Oklahoma's state and common law by FRSA; or 2) alternatively, pre-emption has not occurred where, as here, the Oklahoma Corporation Commission has not inspected the crossing at issue for the purpose of determining what warning signals would be adequate; or, finally, 3) the savings clause of 45 U.S.C. §434 is applicable to the crossing at issue, because it is a local safety hazard as to which state law continues in force. Finally, Plaintiff argues that as to Defendant's Motion in Limine, 23 U.S.C. §401 does not preclude the testimony of expert witnesses.

Mindful of the teachings of Celotex Corp. v. Catrett,<sup>1</sup> the Court has considered the arguments of the parties and reviewed the relevant law. The Court has also adopted the undisputed material facts as urged by the parties<sup>2</sup> with one exception: the Court finds that the issue of whether FRSA has pre-empted state statutory and common law concerning warning devices at railroad crossings is not a fact, disputed or otherwise, but an issue of law for the Court's determination.

Recently, the Supreme Court reiterated the Doctrine of Federal Pre-emption. English v. General Electric Co., \_\_\_\_\_ U.S. \_\_\_\_\_, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). The English court noted that pre-emption "fundamentally is a question of congressional intent," and can occur under one of three scenarios. Id. at 110

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<sup>1</sup>476 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

<sup>2</sup>See Brief in Support of Defendant's Motion for Partial Summary Judgment at 2-3; Plaintiff's Response to Defendant's Motion in Limine and Motion for Partial Summary Judgment with Brief Included at 1-2.

S.Ct. 2275. "First Congress can define explicitly the extent to which its enactments pre-empt state law ... and when Congress has made its intent known through explicit statutory language, the Court's task is an easy one." Id. "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Id. Here, Congressional intent is evinced when federal regulation pervades the field. "Finally, state law is pre-empted to the extent that it actually conflicts with federal law." Id.

The threshold question for this Court is whether the issue before it fits within any of the scenarios identified above. The Court finds that the express legislative purpose<sup>3</sup> and the explicit statutory language of the FRSA make it clear that Congress intended to supersede existing state statutory schemes in the regulation of railway crossing warning devices.

Next, the Court must determine when pre-emption under FRSA is triggered. 45 U.S.C. §434 provides, in relevant part, that

A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such state requirement.

The pivotal event, then, is the promulgation by the Secretary of the Department of Transportation of the requisite regulations and standards. The parties agree, and the Court concurs, that the

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<sup>3</sup>For an exposition of FRSA's legislative history, see 1970 U.S. Code Cong. and Admin. News at 4104.

event has taken place.<sup>4</sup> The fact that the Oklahoma Corporation Commission, as the relevant public authority, has made no determination or recommendation concerning the adequacy of the warning devices of the crossing at issue is not germane to the analysis. The Court therefore declines to adopt the reasoning of the Eighth Circuit in Karl v. Burlington Northern Railroad Company,<sup>5</sup> holding, *inter alia* that FRSA did not pre-empt state law on the issue; and the Ninth Circuit in Marshall v. Burlington Northern, Inc.,<sup>6</sup> holding, in part, that the event which triggers pre-emption in this arena is the determination by the local authority of the proper warning device for the particular crossing at issue.

Finally, the Court must consider whether the facts of this case present an exception to FRSA pre-emption under the savings clause of §434. The savings clause provides that

A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard when necessary to eliminate or reduce an essentially local safety hazard and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

Nothing in the record convinces the Court that the facts of this case fit within the very narrow exception to pre-emption carved out

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<sup>4</sup>See Defendant's Brief in Support of Motion for Partial Summary Judgment at 3, undisputed facts nos. 8, 9, 10; Plaintiff's Response to Defendant's Motion in Limine and Motion for Partial Summary Judgment with Brief Included.

<sup>5</sup>880 F.2d 68, 76 (8th Cir. 1989).

<sup>6</sup>720 F.2d 1149, 1154 (1983).


by the savings clause.

Accordingly, for the reasons set forth above, the Court finds that Defendant's Motion for Partial Summary Judgment should be granted. The Court further finds that Defendant's Motion in Limine is, therefore, moot.

IT IS THEREFORE ORDERED that Defendant's Motion for Partial Summary Judgment is granted.

IT IS FURTHER ORDERED that Defendant's Motion in Limine is denied as moot.

ORDERED this 13<sup>th</sup> day of March, 1991.

  
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JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE