

1990

# Lewis Duncan, Patrick Duncan v. Union Pacific Railroad Company; The State of Utah; Paul Kleinman : Brief of Appellee

Utah Supreme Court

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## Recommended Citation

Brief of Appellee, *Lewis Duncan, Patrick Duncan v. Union Pacific Railroad Company; The State of Utah; Paul Kleinman*, No. 900233.00 (Utah Supreme Court, 1990).

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BRIEF

900233

IN THE SUPREME COURT OF THE STATE OF UTAH

LEWIS DUNCAN, individually	)	
and as personal representative	)	
of the Estate of PATRICK	)	
DUNCAN, deceased, et al.,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Case No. 900233
	)	
UNION PACIFIC RAILROAD	)	
COMPANY, a corporation; THE	)	
STATE OF UTAH; PAUL KLEINMAN;	)	
and DOES 1 through 100,	)	
inclusive,	)	
	)	
Defendants/Appellees.	)	

BRIEF OF APPELLEES  
UNION PACIFIC RAILROAD COMPANY AND PAUL KLEINMAN

Appeal from the Decision of the  
Utah Court of Appeals

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Union Pacific Railroad Company  
and Paul Kleinman

FILED

DEC 18 1990

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UNION PACIFIC RAILROAD COMPANY AND PAUL KLEINMAN

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### **PLAINTIFFS**

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Estate of Patrick Duncan, deceased  
JASON P. DUNCAN, a minor by and through his Guardian ad Litem  
ALICE DUNCAN  
NORREN DUNCAN  
MICHAEL DUNCAN  
TIM DUNCAN  
KEVIN DUNCAN  
BRIEN DUNCAN  
MICHELLE BOWERS, individually and as personal representative to  
the Estate of Jeffrey Bowers, deceased  
JUDSON BOWERS  
FLORENCE HANSON  
SHELLY BOWERS  
SHERRY BOWERS  
MONICA HENWOOD, individually and as personal representative of  
the Estate of Ramon Henwood, deceased  
PHYLLIS HENWOOD  
OWEN HENWOOD

### **DEFENDANTS**

UNION PACIFIC RAILROAD COMPANY, a corporation  
PAUL KLEINMAN  
THE STATE OF UTAH  
DOES 1 through 100, inclusive



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### JURISDICTION OF COURT

Defendants, Union Pacific Railroad Company ("Union Pacific") and Paul Kleinman, hereinafter sometimes referred to jointly as "Union Pacific" agree with plaintiffs' jurisdictional statement.

### STATEMENT OF ISSUES

Union Pacific accepts plaintiffs' statement of the issues.

### DETERMINATIVE STATUTES, RULES AND REGULATIONS

Section 54-4-14, et seq., U.C.A. (1990).

23 U.S.C. § 101, et seq. (Highway Safety Act.)

23 U.S.C. § 409.

45 U.S.C. § 421, et seq. (Rail Safety Act).

23 C.F.R. Parts 646, 655(f), 924

23 C.F.R. § 1204.4

Manual on Uniform Traffic Control Devices (MUTCD).

For the sake of brevity portions of the above statutes and regulations and relevant provisions from the MUTCD are set forth in full in the Addendum, as provided for in Rules 24(a)(6) and (f), Utah Rules of Appellate Procedure.

### STATEMENT OF THE CASE

#### Nature of the Case

Union Pacific accepts plaintiffs' statement of the nature of the case.



### Course of Proceedings Below

Union Pacific takes exception to and/or supplements plaintiffs' statement of the course of the proceedings below as follows:

1. Discovery - By their statements at p. 3 of their brief, plaintiffs would have the court believe that they were actively engaged in conducting discovery. To the contrary, it is important to note that after filing the Complaint in May 1984, plaintiffs conducted no discovery until they filed a set of Interrogatories and Request for Production of Documents in February 1986, nearly two years later. It was not until the State and Union Pacific filed their motions for summary judgment in December 1986 and February 1987, respectively, that plaintiffs made any further efforts at discovery by filing another set of Interrogatories in March 1987. Such was the full extent of plaintiffs' efforts at discovery (no depositions were taken) by the time defendants filed their Motions for Summary Judgment.

2. Substance Abuse Issue - Defendants produced evidence (police reports, toxicology reports and affidavit of Dr. Michael A. Peat) (R. 436, 426, 423, 421, 372, 324-321) of ingestion of marijuana and impairment of driving capacity by the driver, Patrick Duncan, prior to and/or at the time of the accident, and intended to rely on such evidence, in part, to argue that Duncan's negligence was the sole cause of the accident. Prior to the hearing on defendants' motions,

plaintiffs filed affidavits from a medical doctor, Charles Becker, which, while not denying the ingestion of marijuana by Duncan and some resulting degree of impairment, raised an issue of fact as to whether Duncan was "impaired in any substantial manner" (emphasis added) at the time of the accident. Accordingly, defendants did not argue Duncan's alleged driving impairment as the cause of the accident at the hearing on the motions, and it was not so considered by the District Court. (R. 485.)

3. Extra Hazardous Crossing Issue - In the courts below Union Pacific relied primarily upon photographs (R. 370, 364, 339-337), to argue that the crossing was not more than ordinarily hazardous as a matter of law. Except in rebuttal to plaintiffs' misstatements of the evidence, Union Pacific did not rely on the affidavits of the Utah Department of Transportation ("UDOT") surveillance team submitted by the State, largely because much of the information contained therein and the exhibits attached thereto are inadmissible pursuant to 23 U.S.C. § 409.

4. The Crommelin Affidavit - Plaintiffs' only evidence to counter what the physical facts showed concerning the wide-open nature of the crossing, was a single affidavit from an expert witness named Robert Crommelin (R. 00191); however, the District Court considered and then disregarded the Crommelin

Affidavit on the grounds that it was premised upon erroneous and inadmissible facts. (R. 481-479).

5. District Court Decision - The Court not only held that Union Pacific had no duty to improve the warning devices because of state law preemption, it also specifically and separately ruled that as a matter of law Union Pacific had no duty because the crossing was not more than ordinarily hazardous at the time of the accident. (R. 479-478.)

6. Court of Appeals Decision - The Court of Appeals did not agree, as against Union Pacific, that "plaintiffs had stated a prima facie case of negligence, . . . ." To the contrary, the court specifically found "that plaintiffs failed to show negligence in operating the train or in entrusting its operation to Kleinman." The court also fully understood that the Crommelin Affidavit was plaintiffs' only evidence of negligence on the extra hazardous crossing issue, that the District Court had concluded that the affidavit should be disregarded on foundational grounds, and that the Court had additionally ruled that even if the affidavit were considered, the case should still be dismissed on its merits. It was because of this understanding, and in order to address the merits of the issue, that the Court of Appeals opted to take "Crommelin's opinion at face value." By doing so, the Court was hardly agreeing that plaintiffs had stated a prima facie case of negligence against Union Pacific. The court was just finding a way to address the

merits of the issue by agreeing, arguendo, that the affidavit had created a question of material fact.

#### STATEMENT OF FACTS

Union Pacific makes the following corrections and additions to plaintiff's Statement of Facts which Union Pacific believes to be incomplete and/or inaccurate in several material respects.

##### The Accident

1. The investigating Utah Highway Patrol Trooper, Terry C. Smith, reported that the weather was "clear or cloudy," rather than "raining" or "foggy." (R. 373, 431.) Plaintiffs' statement at page 5 of their brief, that the "weather was cloudy with a light rain falling," is incorrect. Neither should it be taken to imply that visibility, or the lack thereof (other than that which is incident to nighttime hours) was a factor in causing the accident. The only evidence (other than Trooper Smith's testimony) concerning visibility, is from Engineer Kleinman who testified that he had no difficulty in observing automobile traffic, including the plaintiffs' car, approach the crossing. (R. 450-449.) There is no support in the record for plaintiffs' contention that it was raining or that weather created visibility problems.

2. Neither is there any evidentiary support for the contention that Patrick Duncan was unfamiliar with the crossing. There is nothing in the record to indicate how long Duncan had

been living in Utah, nor whether he had ever driven over the crossing before.

3. The only eyewitnesses to the collision were the train crew members. Engineer Kleinman's unchallenged testimony is that the train was travelling 40 m.p.h., 20 m.p.h. under the maximum speed allowed for the track and 10 m.p.h. under the maximum speed allowed for the train; the train's whistle and bell were sounding; and the train's double-sealed beam headlights (two headlights) and a flashing yellow strobe light on top of the leading engine were operating. Kleinman observed the automobile for approximately one-quarter mile prior to reaching the crossing. He believed that the automobile could stop for the crossing. At the point where he first realized that the automobile was not going to stop, the train was so close to the crossing that it was not possible to avoid the accident. (R. 451-448.)

4. The train's signal devices (whistle, bell, headlights, strobe light) were manufactured and installed to perform at levels which substantially exceeded the standard set by the Federal Railroad Administration ("FRA") in 49 C.F.R. § 229.125, et seq. Significantly, the candle power of the engine's headlight was three times more powerful than that which is required by the FRA standard (600,000 candle power versus 200,000 candle power). (R. 447-446.)

5. There is evidence that the automobile's AM/FM stereo and tape deck was turned up to a high decibel level. According to Trooper Smith's incident report, the volume knob was "adjusted to approximately three-quarters of the way to full volume" at the time he inspected the car following the accident. (R. 434, 429.)

6. Neither Trooper Smith nor Tooele County Deputy Sheriff Dennis Andrews, an expert accident reconstructionist who also investigated the accident, could find evidence that the automobile left skid marks. (R. 373, 335.) Based upon such evidence, the evidence indicating the tremendous force with which the automobile and train collided (Incident Report, beginning at R. 429), and Engineer Kleinman's testimony concerning his observation of the automobile's approach to the crossing (R. 451), the conclusion seems inescapable that plaintiffs made little if any effort to stop for the train.

#### The Railroad Crossing

1. The uncomplicated, unobstructed, and rural nature of the crossing is best exemplified by the photographs taken following the accident (R. 370, 337-339), and the aerial photograph attached to the Affidavit of Joseph F. Varoz. (R. 365.) These photographs clearly show a total absence of any obstructions to view as well as any other factors which might have confused or distracted plaintiffs and prevented them from

perceiving the existence and location of the crossing and the train's hazardous proximity thereto.

2. The open, greater than 90° nature of the crossing angle (approximately 136°) (R. 367) should have made it easier for plaintiffs to observe the train. Plaintiffs should have been able to view the train's approach in their peripheral vision with little or no need to turn their heads.

3. Reflectorized railroad crossbuck signs were in place at the crossing. A reflectorized railroad crossing advance warning sign was also located on Droubay Road, approximately 305 feet south of the crossing (R. 410.), in accordance with the distance standards set forth at §§ 8B-3 and 2C-3 of the Manual on Uniform Traffic Control Devices. (R. 250-249, 480, Appendix.)

4. The investigation of Trooper Smith and Deputy Sheriff Andrews shows how plainly visible the warning signs, the crossing location and the approaching train were from a substantial distance away. (R. 373, 335). As stated in Trooper Smith's incident report (R. 435):

Testing was conducted on 13 and 14 day of April, 1983. Testing was done with and without trains present. Driving at dark with no moon and stars partially covered by clouds. At 3/4's mile the yellow crossing sign is plainly visible. The two white crossing signs are visible but appear to be round. At 1/2 mile all signs are clearly visible. These tests were done with vehicle lights on low beam. Time was approximately 20:30 hours. With headlights on, high beam, signs are clearly visible from a mile back from the intersection.

Test No. 2: Terrain

I drove up and down Droubay Bay Road to see if there was any place in the road that would obstruct the view of the train. There is one mound of dirt at 400 feet from the intersection to the east of the roadway. I drove slowly toward the intersection as the train approached from the east. At no point in time was the train out of view. Even at the highest portion of the mound of dirt. Test 14 April 1983, 1:00 a.m.

5. As acknowledged by plaintiffs at pp. 6-7 of their brief, Union Pacific brought to the attention of Tooele County authorities in September 1979 the possibility that warning devices at the crossing may need to be improved at sometime in the future if and when the county widened Droubay Road and generated an increase in traffic over the crossing. Union Pacific suggested that the County share this concern with the State. (R. 232.) However, as pointed out at p. 9 of plaintiffs' brief, the road was not widened by Tooele County until sometime after the accident occurred.

6. As shown by the affidavits and exhibits submitted by the State and plaintiffs (R. 363-351, 313-309, 307-296, 176), the crossing was inspected by UDOT in November 1981. The inspection revealed no hazards then existing which indicated improvement of the crossing warning devices was in order. The inspection report dated November 10, 1981, specifically states "No sight dist. restrictions." (R. 302.) The inspection team did recommend, based upon a predicted future significant increase in vehicular traffic, that upgrading take place "at such time as federal funding became available." (R. 305, 312.) Specifically,



only 100 cars per day were using the crossing as of the November 1981 inspection (R. 176); however, based upon information received from Tooele County, the inspection team projected that 1,500 vehicles per day were "expected" to use the crossing in the future. (R. 176, 305, 312, 359.) This projection had not, however, come to fruition by the time the accident occurred. UDOT reviewed the issue again in June 1982 and consciously decided against making the crossing a "high priority." (R. 352, 351, 358.) According to UDOT and Federal Highway Administration ("FHWA") officials, the crossing was not ranked high enough on the State's "Hazard Index," which was the priority ranking system being used then, to warrant making any improvements at that time (R. 356-357, 317-315). UDOT made another inspection on June 3, 1983, some seven weeks after the accident. This inspection determined that daily usage (at least on the day of the count) was up to only 580 vehicles per day, far short of the 1500 vehicles per day projected in 1981. (R. 301.)

7. In early 1983, just prior to the accident, federal authorities approved a new formula for prioritizing crossings for crossing warning improvements. This new formula gave greater weight to the actual accident experience at a given crossing. Following the June 1983 inspection, using the new formula and including the statistics from the accident in question, UDOT determined the Droubay Road crossing was qualified

for federal funding, and the improvements were recommended and eventually installed. (R. 318-315, 358-359.)

8. Review of reports for the three prior accidents at the crossing show that none of them have "similar" circumstances. In the first accident, on November 11, 1980 (R. 221, 220), the automobile was travelling in the opposite direction creating a much more difficult angle for observation of the approaching train; however, the driver was able to see the train in time to "stop just short of the train tracks." The train apparently nicked the bumper of the vehicle and no injuries resulted. In the second accident, on March 29, 1981 (R. 219, 218), the automobile was also travelling in the opposite direction and, additionally, the police officer reported the accident was caused "due to poor visibility because of a heavy snow storm." (R. 218.) In the third accident, on October 24, 1981, (R. 217, 216), the automobile stalled and stopped on the track directly in front of the train.

9. Plaintiffs incorrectly imply, without reference to any support in the record, that Union Pacific paid for the costs of the subsequently installed warning device improvements. To the contrary, consistent with federal guidelines [see, e.g., 23 C.F.R. § 646.210(b)(1)] (Addendum), governmental authorities paid the complete cost with Union Pacific assuming the continuing maintenance expenses, which traditionally far exceed installation costs. The portion of the record to which plaintiffs refer (R.

303, 298-299) merely indicates the fact that Union Pacific forces, under UDOT's direction, did the actual construction work. The costs of such installation, both for materials and labor, were either paid for up front or reimbursed later by or through UDOT.

#### SUMMARY OF ARGUMENTS

##### **POINT I:**

It is the public policy of federal and state governments that responsibility for regulating the installation and modification of warning devices at public railroad crossings be lodged exclusively with the state. Thus, both federal and state laws preempt negligence lawsuits against railroads for failing to install or modify such devices. Such a holding does not alter the railroads' common law duty of reasonable care with respect to matters under their control. The Court of Appeals decision in this respect is in harmony with Utah statutory and case law, and is supported by the majority of recent decisions from other jurisdictions.

##### **POINT II:**

The crossing in question is located in a rural area, is totally unobstructed and has none of the confusing or complicating features normally found in extrahazardous crossings. It was appropriate, therefore, for the District Court, based upon its examination of the nature of the crossing itself, to rule as a matter of law that it was not more than ordinarily hazardous.

Union Pacific had no duty, therefore, to take additional precautions to reduce the risks at the crossing with respect to approaching motorists.

Furthermore, the Crommelin Affidavit was fundamentally flawed in that it relied for its conclusion on misinformation and inadmissible evidence. The affidavit, therefore, was not persuasive in raising a general issue of material fact concerning the extrahazardous crossing issue.

**POINT III:**

It would be inappropriate to burden Union Pacific with a duty for which it has no corresponding right to control and implement, and where it has no expertise in prioritizing crossings and obtains no benefit from projects which install or improve crossing warning devices. Public policy considerations support the dispositions of plaintiffs' claim thus far.

**ARGUMENT**

**POINT I. THE COURT OF APPEALS DID NOT ERROR IN ASSESSING UNION PACIFIC'S DUTIES TO IMPROVE WARNING DEVICES AT PUBLIC RAILROAD CROSSINGS.**

**A. Utah Law Vests Exclusive Jurisdiction In State Agencies For Regulating the Travel of Motorists at Public Railroad Crossings.**

Union Pacific could not have been negligent in failing to improve the warning devices at the crossing because it had no authority or duty to install or modify such devices. Governmental agencies have the exclusive authority over public

roads and over the signs and warning devices placed on those roads.

1. The Statutory Framework.

The Utah Legislature (and the Courts) has divided responsibility for safety at public railroad crossings among involved parties. Railroads are statutorily required to provide crossing surfaces that are in a proper state of repair so that they can be safely driven over [§ 10-7-26, et seq.; § 56-1-11; Denkers v. Southern Pacific Co., 52 Utah 18, 171 P. 999 (1918); Van Wagoner v. Union Pacific R.R., 112 Utah 189, 186 P.2d 293 (1947)]; have their trains sound bells or whistles when approaching public crossings (§ 56-1-14); and cooperate with governmental agencies in investigating the safety of crossings and in the installation and maintenance of whatever crossing warning systems UDOT deems necessary and approves for construction. (§ 54-4-14, et seq.)(Addendum.) Additionally, as explained by the Court of Appeals in this case (790 P.2d at 599) (Addendum), railroads have the common law duty to take such reasonable steps as would be within their authority to alleviate hazards at crossings, such as by removing obstructions to view on their right of way or reducing train speed. Gleave v. Denver & Rio Grande W. R.R. Co., 749 P.2d 660 (Utah App. 1988). Adjacent property owners are required to remove vegetation or other obstructions to view or which otherwise constitute a

"traffic hazard," (§ 41-6-19); motorists are responsible to recognize the train's right of way, and take special precautions when approaching and stopping at railroad crossings. (§§ 41-6-46, 41-6-93, 41-6-95, and 41-6-97.) UDOT has been delegated the responsibility for regulating the safe travel of motorists on roads and highways, including those which pass over and across railroad tracks. § 54-4-14, et seq.; Gleave v. Denver & Rio Grande W. R.R. Co., supra. at 664.

A series of Utah statutes has established the exclusive authority of UDOT to decide on and install traffic control devices at public railroad crossings, subject only to review by the Public Service Commission of Utah ("PSCU"). Under § 54-4-14, state authorities are specifically charged with the overall, exclusive responsibility to regulate the installation of warning devices at public grade crossings. Under § 54-4-15(1), a crossing cannot be built "without the permission of the Department of Transportation having first been secured," and UDOT "shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe." Furthermore, § 54-4-15(2) provides that UDOT "shall have the power to determine and prescribe the manner . . . of . . . protection of each crossing . . . and to alter or abolish any such crossing . . . ." Under § 54-4-15(4), the PSCU "shall retain exclusive jurisdiction for the resolution of any dispute

upon petition by any person aggrieved by any action of [UDOT]" taken pursuant to § 54-4-15. Moreover, Section 54-4-15.3 provides that UDOT "shall apportion the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in § 54-4-15.1 between the railroad or street railroad and the public agency involved." Section 54-4-15 separately requires UDOT to provide in its annual budget for the cost of installing signals or other safety devices at railroad crossings.

## **2. The Legislative History.**

In 1917, the Utah Legislature enacted the forerunner of the current § 54-4-14, et seq., under which the predecessor of the PSCU was granted "the exclusive power to determine and prescribe the manner . . . and the terms of installation, operation, maintenance, use and protection . . . of each crossing of a public road or a highway." Laws of Utah, 1917, § 47-4-14. This court has held that this language means just what it says in The Denver & Rio Grande Western R.R. v. Public Utilities Commission of Utah, 51 Utah 623, 172 P. 479 (1918); and Provo City v. Department of Business Regulation, et al., 118 Utah 1, 218 P.2d 675 (1950). On both of these occasions, the court held that the power of the designated state agency to "determine and prescribe" railroad crossings was exclusive.

Section 54-4-14, et seq., was amended in 1975 in conjunction with the creation of UDOT, which assumed most of the

PSCU's duties regarding railroad crossing safety. The amendment substituted references to UDOT for the prior references in the statutes to the PSCU. Subsection (4) in § 54-4-15 was added to retain ultimate supervisory jurisdiction in the PSCU to review the actions of UDOT. As a result, a single state agency no longer had "exclusive" power over crossing safety -- two agencies now shared that power. Therefore, Legislature had to delete the word "exclusive" as it referred to UDOT's authority. However, the State (UDOT and the PSCU together) still retains exclusive jurisdiction over the installation of traffic signs and control devices on public roads at railroad crossings, and a private party, such as a railroad, has no more right to change the traffic warning devices on such roads than it would to change any other regulatory signs on any other public highways.

### **3. Interpretation by Utah Courts.**

Although the Utah Supreme Court has not interpreted these statutes since the 1975 Amendment, there has been a considerable amount of Utah litigation on this issue. State and federal trial court judges and now the Utah Court of Appeals, have uniformly interpreted Utah law to preclude railroads and local governments from having any authority or duty to install initially or modify traffic warning devices at public railroad crossings. In addition to Judge Hansen's decision in this case, see, e.g., the Order of Judge Dennis Frederick in Anderson v. Whittle v. Denver & Rio Grande Western R.R., Civ. No. C 81-3189



(3rd Dist. Ct., March 1987)(R. 161); the Order of Judge David K. Winder in Harsin v. Denver & Rio Grande Western R.R., Civ. No. C 83-0993W (D. Utah, January 1985)(R.157); the Order of Judge Aldin J. Anderson in Bellon v. Denver & Rio Grande Western R.R., Civ. No. C 83-088A (D. Utah, Sept. 1984)(R. 152); and the Order of Chief Judge Bruce S. Jenkins in Denver & Rio Grande Western R.R. v. West Jordan Municipal Court, Civ. No. C 81-0344J (D. Utah, May 1982). (R. 150.) As stated in Gleave:

UDOT is statutorily empowered to 'provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings,' . . . and to apportion costs of such projects among public and private entities. . . . the government alone must consistently regulate safety devices at railroad crossings, determine which devices at which crossings should be recommended for federal funding, rank crossings in order of need for upgrading in light of limited funds for that purpose, and apportion signal installation costs between public and private entities. As a practical matter, the private sector cannot perform these functions. Accordingly, we hold that the regulation of public safety needs and the evaluation, installation, maintenance and improvement of safety signals or devices at railroad crossings is a governmental function. . . .

(Citations omitted), 749 P.2d at 667-68.

**4. The Vesting of Exclusive Authority in State Agencies Serves the Important Purpose of Establishing Uniformity Throughout the State.**

Presumably, in the early days of railroading when only horse drawn vehicles and early "horseless carriages" crossed over railroad tracks, the railroads themselves installed whatever signs they chose at crossings. One can safely assume the

crossing protection signs of that era offered little consistency to the highway traveler but, of course, the speed and range of highway travel was substantially different from what it is today.

In Utah, as elsewhere, government has become increasingly involved in the regulation of highway traffic as the number and speed of vehicles increased. The legislature's decision to reserve to state agencies the exclusive authority over railroad crossing protection establishes efficiency as well as uniformity in safety regulation. The purpose of any traffic control system is to promote safety while preserving efficiency of traffic flow. The goals of safety and efficiency are, to some extent, inherently conflicting. For example, if the speed limit on interstate highways were reduced from 55 to 25 m.p.h., there would no doubt be a reduction in accidents, but the reduction in traffic flow efficiency would be drastic. The balance between safety and efficiency would be upset.

In order to strike an acceptable balance between safety and efficiency at railroad crossings, an entity with traffic regulation expertise and decision making authority must have an overview of the safety requirements and traffic flow needs of both the communities and the railroad companies involved. If railroad companies had decision making authority, they would undoubtedly close as many railroad-highway grade crossings as possible so as to prevent potential hazards. This would not, of course, serve the interest of the community residents who want to

avoid detours and other impediments to their free travel. The Utah state agencies that have been given exclusive authority over railroad crossing protection are uniquely qualified to make the necessary traffic control decisions.

Railroad companies also lack the engineering expertise and overview of community traffic flow needs required to make decisions about what traffic control devices should be installed at railroad crossings. The UDOT has the necessary expertise to make those decisions. In doing so, UDOT considers a variety of factual data not even available to railroad companies, including highway speed limits, the density of vehicular traffic, the density of pedestrian traffic, and the desired traffic flow patterns. (See, Affidavit of Ross D. Wilson with attachments, R. 362-353.) For these reasons, as well as for the purposes of safety and efficiency, the exclusive authority for determining what traffic control devices will be installed at railroad crossings has been vested in UDOT, subject to PSCU review.

Since state agencies have exclusive authority over the installation of railroad crossing protection devices, it necessarily follows that Union Pacific had neither the authority nor the duty to install any such devices at the crossing in question.

**B. Plaintiffs Misinterpret the Court of Appeals' Decisions in the Gleave and Duncan Cases.**

A close reading of the Court of Appeals decisions in the Gleave and Duncan cases clearly shows that the decisions are in harmony on the issue of the respective responsibilities of state agencies and railroads with respect to crossing safety.

Both cases specifically reaffirmed the long standing common law duty that railroads are required to take the actions of a reasonable man in alleviating such hazards at railroad crossings as are within their power and authority to remove. Gleave specifically identified the wild vegetation which the railroad allowed to grow on its right of way to the point where it obstructed the motorist's view, and reducing train speed, as the type of hazards the railroad could alleviate. (Gleave, 749 P.2d at 664.) The court acknowledged the existence of this duty in Duncan, but pointed out that "there is nothing to indicate what could have made Union Pacific's right of way any safer to motorists crossing Droubay Road." (Duncan, 790 P.2d at 599.) Indeed, plaintiffs make no such suggestions in this regard anywhere in their brief. In fact, there were no railroad created or controlled obstructions either on or off the right of way, and the train was travelling 20 miles per hour under the speed limit. Accordingly, it is incorrect for plaintiffs to assert that Duncan insulates railroads "from any concerns of negligence for unsafe conditions at crossings . . . ," or that the Court of Appeals has in any way changed Utah law in this respect. Railroads have

always been and continue to be subject to the reasonable man standard with respect to those hazards over which they have control or responsibility.

**C. Plaintiffs Misinterpret the Meaning and Application § 56-1-11.**

Plaintiffs apparently interpret § 56-1-11 as imposing on railroads a duty to install and improve warning devices at crossings, and in doing so argue that the statute is, therefore, inconsistent with the statutory scheme set forth at § 54-4-14 et seq., as interpreted by the Court of Appeals.

Plaintiffs misunderstand the meaning and application of § 56-1-11. This Court has discussed the application of this statute to a railroad's duty in crossing accident cases in Denkers v. Southern Pacific Co., 52 Utah 18, 171 p. 999 (1918), and Van Wagoner v. Union Pacific R.R., 112 Utah 189, 186 P.2d 293 (1947). In both cases the statute was discussed and applied in terms of the railroad's responsibilities to maintain the crossing surface in a "good and sufficient" state of repair so that travellers can pass safely thereover. There were no discussions that it imposed a duty to signalize crossings.

Indeed, there are no Utah decisions which interpret the statute as placing a duty upon railroads to install or improve warning devices at railroad crossings. That responsibility was specifically addressed and delegated to the State in § 54-4-14, et seq. Section 56-1-11, as part of the statutory scheme enacted by the legislature to delegate safety responsibilities at

railroad crossings, gives to railroads the responsibility to maintain a "good and sufficient" crossing surface. It does not impose a duty to construct warning devices. Consequently, there is no "potential inconsistency" between this statute and § 54-4-14, et seq.

**D. Federal Enactments are Supportive of the Court of Appeals Decision.**

The federal Rail Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421, et seq., covers all areas of railroad safety. Of the numerous areas of railroad safety addressed by the Act, only one area is afforded specific treatment and that is the area relating to the problem of railroad grade crossing safety, to which a specific section of the Act is devoted. In 45 U.S.C. § 433(a), the Secretary was required to study and report to Congress on the problem of protecting railroad grade crossings, and at the same time, he was required (under § 433(b)) to undertake a coordinated study towards solving the grade crossing problem, not only under his FRSA authority, but also under his authority pursuant to other federal laws dealing with highway traffic, safety, and construction, thus bringing into play the provisions of the federal Highway Safety Act (23 U.S.C. § 101, et seq.), various sections of which directly require the states (not the railroads) to survey and identify those crossings which require automatic warning devices.

When the Secretary filed his mandated report to Congress on the solution of the grade crossing problem, Congress then amended (in 1973) the federal Highway Safety Act so as to require the states (not the railroads) to conduct and maintain a survey of all grade crossings to identify those in need of protective devices and to implement a schedule of projects to accomplish the same. (See, e.g. 23 U.S.C. §§ 130 and 152.)

Conditioning the distribution of federal highway funding on the state's compliance therewith, the Secretary then issued appropriate orders, standards and regulations requiring the states to adopt various plans for implementation of projects to increase grade crossing safety. This federal regulatory scheme incorporated the requirement that any determination of need for grade crossing warning devices be made on the basis of an engineering judgment by the public authorities having jurisdiction over the roadway at the crossing.

Pursuant to his statutory authority to condition the grant of federal highway funding for the states (23 U.S.C. § 402; 23 C.F.R. § 1251.2), the Secretary issued regulations (23 C.F.R. § 655.601[a])(Addendum) which adopted the "Manual on Uniform Traffic Control Devices for Streets and Highways" as the "national standard for all traffic control devices installed on any street, highway . . . open to public travel . . ." (23 C.F.R. § 655.603[a])(Addendum). More specifically, it is the standard for rail-highway grade crossing improvements pursuant to 23

C.F.R. § 646.214(b)(Addendum). Part VIII of the MUTCD is devoted to "traffic control systems for railroad-highway crossings," and is specific in its requirement that the state authorities (not railroads) are responsible for surveying and making the determination of need for upgrading protection at all rail-highway grade crossings. (See, e.g., §§ 8A-1 and 8D-1 (Addendum), which specifically state that the determination of need and selection of warning devices at a grade crossing is to be "made by the public agency having jurisdictional authority.")

The national MUTCD (or a state's version, which must be in substantial conformity therewith)(See, e.g., § 41-6-20 UCA) is required under 23 C.F.R. § 655.603 (Addendum). The same section also requires [in Subsection (d)] the states to adopt the program provided for in Highway Safety Program Standard No. 13 (as contained in 23 C.F.R. § 1204.4) which in turn requires that the states "analyze potentially hazardous locations, such as . . . railroad grade crossings and develop appropriate countermeasures." Similarly, 23 C.F.R. § 924.9 (Addendum) details multiple requirements and standards involved in state planning for the identification of hazardous grade crossings, as well as state programs for improvement projects for their elimination. Other subsections of Part 924 detail the requirements for the implementation and evaluation components of the safety program, as well as the requirements for annual reporting to the Federal Department of Transportation. Moreover,



under 23 C.F.R. § 646.210 (Addendum), the Secretary has specifically determined that "[p]rojects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required share of the costs."

Finally, any doubts as to the preemptive shifting of duty and responsibility to public agencies for improving grade crossing safety were removed in 1987, when Congress exercised its preemptive authority so as to protect the grade crossing data and other information gathered by the states, by amending the Highway Safety Act with the addition of 23 U.S.C. § 409 (Addendum), which precludes the use, in both federal and state courts, of such data compiled for use by the states in complying with the requirements of the various highway safety acts. Its enactment demonstrates that Congress fully appreciated the fact that the federal laws and regulations required the states to gather such data in order to determine whether and to what extent grade crossings were in need of additional warnings. To ensure that responsibility was carried out fully, and without fear of lawsuits, Congress enacted that statutory prohibition in order to protect the reports and data upon which the states make their required determinations.

**E. Recent Case Law Supports the Public Agency Preemption Argument.**

Virtually all recent cases which address the issue of the duty to regulate grade crossing warning devices hold that public agencies, and not railroads, are responsible to determine

the need for and direct the installation of such devices. For instance, in Sisk v. The National R.R. Passenger Corp., 657 F. Supp. 861 (D. Kan. 1986), the court stated as follows:

Then, in the 1970s, Congress, recognizing a need for uniform safety standards, enacted the Railroad Safety Act which imposed nationwide standards, reserving authority to the states for further regulation only under special circumstances. In conjunction with railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads and increased funding to the federal aid program.

647 F. Supp. at 863. See, also, Easterwood v. CSX, 742 F. Supp. 676 (N.D. Ga. 1990); Tiley v. B. & O. R. Co. (Miami County Court of Common Pleas 1990)(copy attached in Addendum); Nixon v. Burlington Northern Ry. (D. Mont. 1988) (copy attached in Addendum); Singer v. Southern Railway Co. (N.C. Sup. Ct. 1989) (copy attached in Addendum); Flynn v. Howard (D.C.N.D. 1989) (copy attached in Addendum); Armijo v. ATSF (D. N. Mex. 1990) (copy attached in Addendum); Carpenter v. Conrail (Ohio Ct. of Common Pleas 1990)(copy attached in Addendum); Case v. Norfolk & Western (Ohio Court of Common Pleas 1990) (copy attached in Addendum); Mahoney v. CSX (N.D. Ga. 1990) (copy attached in Addendum); Kalthoff v. Burlington Northern (D. Minn. 1990) (copy attached in Addendum); Baughman v. Conrail (Mich. App. 1990) (copy attached in Addendum).

The only two federal appellate cases which have considered the question whether the federal grade crossing

regulations preempt state law claims against railroads which are predicated upon negligence in selecting or providing additional highway warning devices have reached opposite conclusions. The decision of now-Justice Kennedy in Marshall v. Burlington Northern, 720 F.2d 1149, 1154 (9th Cir. 1983) held that preemption occurred when the state authorities approved the level of protection at the crossing, whereas in Karl v. Burlington Northern, 880 F.2d 68, 76 (8th Cir. 1989), the court ruled there was no such preemption under such circumstances.

An analysis of the Karl decision clearly shows it to be aberrational, as it ignores not only the preemption under the express terms of the FRSA (when the Secretary issues regulations covering the subject matter), but also the express intent of Congress in enacting the FRSA. A careful analysis of Karl clearly demonstrates that:

(a) It is the only federal circuit decision which holds that where the Secretary has issued regulations, they are not preemptive under the FRSA;

(b) Its citation of Marshall as authority for the proposition that the FRSA "did not occupy the field of railroad safety governance" demonstrates its basic misunderstanding of the Marshall holding. The cited portion of Marshall merely held that the FRSA did not affect existing preemptive federal railroad laws (e.g., the Boiler Inspection Act). In point of fact, Marshall

held the FRSA was preemptive as to grade crossing warning devices when the state agency makes the determination as to what level of protection is required for the crossing. (720 F.2d at 1154.) Since the Karl crossing warnings had been improved by the local agency (as Karl noted at 880 F.2d at 76), Karl stands in direct conflict with Marshall's holding as to grade crossing preemption under the FRSA.

(c) Karl's comment on the absence of any "case law or legislative history to support the theory that Congress intended to completely occupy the field of railroad safety governance," is surprising, as it demonstrates that the court completely overlooked the express provisions of the FRSA, whether considered in general, or considered with specific reference to grade crossing safety. Moreover, its statement that "Neither circumstance [expressed or implied preemption] is present in this case" ignores the express preemption provision of the FRSA, as well as the several expressions of Congressional intent contained in the legislative history of the FRSA.

Accordingly, with the exception of Karl (which we submit is an aberration in the case law), recent decisions uniformly hold that damage suits under state law which seek recovery on the theory of railroad negligence in failing to

install adequate grade crossing warning devices are preempted by federal and/or state law.

Therefore, Union Pacific submits that because the prior state law basis for plaintiffs' claim that Union Pacific was negligent in failing to provide additional warning devices has been preempted by federal and state laws, which by statute and regulation vest that duty in the state, plaintiffs' claim is not actionable against the Railroad.

**F. The State of Utah, In Conformity With the Federal Requirements, Has Effectuated a Shift of the Duty to Provide Grade Crossing Warnings From the Railroad to the Public Authorities.**

As shown above, the State of Utah, in conformity with federal requirements, has enacted laws concerning the determination of need for warning devices at railroad grade crossings, requiring the public authorities with jurisdiction of the roadway (and not the railroad) to make such determination. Not only do these laws conform with and complement the federal requirements, they constitute a statutory confirmation by the legislative branch, binding upon the courts, that such legal duty has been allocated to the appropriate public authorities.

Moreover, UDOT has acknowledged its duty, as evidenced by the affidavits of the UDOT officials submitted by the State in the District Court proceedings. Such officials confirm that the state receives federal highway funding provided to the states pursuant to the Highway Safety Act. They acknowledge that UDOT

performs the duties required of the state to survey railroad crossings, identify those crossings which require protective devices and implement a schedule for the installation of such devices, as required under federal law. Such affidavits likewise show that the State of Utah, in accordance with § 41-6-20, has adopted the Manual on Uniform Traffic Control Devices to determine the type of warning devices to be used at railroad grade crossings, and the MUTCD expressly delegates to the public agencies having jurisdiction over the roadway the duty to make the determination as to the adequacy of warning devices at any railroad grade crossing.

In this situation, numerous courts, recognizing the shift or assumption of duty pursuant to similar state statutes enacted in response to the federal requirements, have held that railroads cannot be liable for failing to upgrade or add additional warning devices at railroad crossings. Callis v. Long Island R. Co., 372 F.2d 422 (2nd Cir. 1967), cert. denied, 389 U.S. 827 (1967); Herold v. Burlington Northern R. Co., 761 F.2d 1241 (8th Cir. 1985); McNiff v. Missouri Pacific R. Co., 560 S.W.2d 46 (Mo. App. 1977); South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980); Harrison v. Grand Trunk W. R. Co., 413 N.W.2d 429 (Mich. App. 1987); Edington v. Grand Trunk W. R Co., 418 N.E.2d 415 (Mich. App. 1987).

In McNiff, a wrongful death action arising from a railroad crossing collision, the court approved as a correct

statement of law, the following instruction which was given to the jury:

The court further instructs the jury . . . that only the Missouri Public Service Commission has the exclusive authority to indicate when and where crossing gates should be installed and erected and it is the exclusive responsibility and exclusive authority of the Missouri Public Service Commission to make that determination.

560 S.W.2d at 48.

A similar issue faced the North Dakota Supreme Court in South v. National R.R. Corp., supra., in which the court approved the following instruction regarding the railroad's duty to install additional crossing protection:

You are instructed that the court finds as a matter of law that the mere fact that Barrett Street intersects the railroad does not raise any duty whatsoever on the part of the railroad or any of the defendants to take upon themselves the responsibility for installing flagmen, gates, electric or automatic crossing signals, stop signs, advanced railroad warning signs, modification of the crossing in any manner, or a closure thereof. You are instructed that the court finds as a matter of law that, with the exception of the obligation upon the railroad to install and maintain crossbucks, only the Public Service Commission of the State of North Dakota can find a crossing extra hazardous or unusually dangerous to life and property requiring additional protection beyond the crossbuck.

290 N.W.2d at 826-827.

In a more recent case, Herold v. Burlington Northern, Inc., supra., the 8th Circuit implicitly upheld the South decision. In Herold, one of the contentions on appeal was that the U.S. District Court erred in allowing certain expert testimony regarding automatic crossing signals. The railroad

argued that from the testimony, the jury might have been given the impression that the defendant railroad had a duty to employ automatic signals. The court rejected the argument by noting the jury instructions expressly declared that the railroad had no obligation to install any safety devices other than a crossbuck; that only the state authorities could authorize additional safety devices, and thus the jury could not hold the railroad liable for negligence in failing to modify or close the crossing.

Other courts have similarly interpreted various state statutes which provide that the state, and not the railroad, shall determine the need for warning devices at railroad grade crossings. In Harrison v. Grand Trunk W. R.R. Co., supra., the court, relying upon state statute, held that the railroad could not be liable for its failure to install additional warning devices where there were no outstanding orders by a public authority to do so. The court further noted that the railroad could not erect additional warning devices without permission by the state.

The U.S. District Court, Northern District of Ohio, reached the same conclusion in Nice v. Pennsylvania Railroad Co., 168 F. Supp. 641 (1959) and held that the railroad had no duty to install automatic signal crossing devices or flagmen at a crossing in the absence of an order from the Public Utilities Commission.



Thus, it is clear that the statutory scheme set forth at § 54-4-14, et seq., vesting in UDOT the decision as to the need for warning devices at railroad crossings, like those of the various other states in the cases discussed above, confirms that which is required under federal law and places the legal duty in the state to make such decision so as to preempt actions against railroads for failure to select and install such devices.

**POINT II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO UNION PACIFIC ON THE ISSUE OF WHETHER THE CROSSING WAS MORE THAN ORDINARILY HAZARDOUS.**

**A. The District Court was Correct in Ruling as a Matter of Law that the Crossing was not Extrahazardous.**

If the crossing was not more than ordinarily hazardous as of the date the accident happened, no duty existed to take added precautions such as by installing automatic flashing lights and/or gates.

This Court has provided guidance for determining whether a crossing is extrahazardous. In Bridges v. Union Pacific R.R., 488 P.2d 738 (1971), followed in Hobbs v. Denver & Rio Grande Western R.R., 677 P.2d 1128 (1984), the court stated that if there are: (1) obstructions to view; (2) heavy vehicular traffic; and (3) "other conditions" which make the existing protection devices "inadequate to warn the public of the danger," then a more than ordinarily hazardous crossing may be present which may require the taking of additional precautionary measures.

The kinds of obstructions, traffic problems and "other conditions" which might render a crossing extrahazardous are described in earlier cases decided by this Court. For example, in Pippy v. Oregon Short Line R.R., 11 P.2d 305 (1932), and Toomer's Estate v. Union Pacific R.R., 239 P.2d 163 (1951), the crossings were found to be more than ordinarily hazardous because (1) the railroads had created obstructions to view of the oncoming trains on an adjacent track right up next to the crossing; (2) there were electrical signals present at the crossings which the drivers relied upon and which failed to work; (3) the trains were speeding greatly in excess of a city-imposed speed limit; (4) there was excessive noise being emitted by adjacent railroad operations which tended to drown out any warning signals being emitted by the oncoming train; and (5) there were other circumstances which the courts held tended to confuse the motorist into thinking it was safe to cross when it was not, or made it impossible for the drivers to safely make such a determination.

Obviously none of these factors or confusing circumstances are present in this case. It is undisputed that the crossing was located in wide open country rather than in a city or a populated area; that there were no obstructions to view of any kind; that the train was not speeding and there were no speed ordinances or restrictions violated; that the location of the trackage and the approach of the train were readily

observable from a substantial distance away from the crossing; and that the projected increase in vehicular traffic never occurred. In short, there was absolutely nothing

"in the configuration of the land, or in the structures in the vicinity, or in the nature or amount of travel on the highway, or in other conditions, which render[ed] the warning devices employed at the [crossing] inadequate to warn [the occupants of the accident vehicle] of the danger."

Bridges, 488 P.2d at 739.

The determination of whether a crossing is extrahazardous is, in the appropriate case, initially for the Court to make as a matter of law. As state in Bridges, at p. 739, the Court may "authorize" a jury to consider the extrahazardous crossing issue only after it first determines that there is probative, admissible evidence showing the existence of such a crossing. If the Court concludes that there is no such evidence, it may rule that the crossing is not more than ordinarily hazardous as a matter of law. This appears to be the accepted rule which is followed in a number of jurisdictions, e.g., Lerner v. Seaboard Coastline R.R., 594 F. Supp. 963 (S.D.N.Y. 1984); Sargent v. Southern Pacific Transportation Co., 504 P.2d 729 (Ore. 1972); Walker v. Kansas City Southern Ry. Co., 674 F.2d 1130, 1133 (5th Cir. 1982; Richards v. Southern Pacific Transportation Co., 666 F.2d 99 (5th Cir. 1982); Missouri Pacific R.R. v. Cooper, 563 S.W.2d 233 (Texas 1978); Seaboard Coastline R.R. v. Sheffield, 194 S.E.2d 484 (Ga. 1972); Still v. Hampton &

Branchville R.R., 189 S.E.2d 15 (S.C. 1972); Chicago, Rock Island & Pacific R.R. V. Gray, 453 S.W.2d 54 (Ark. 1970); Poole v. Southern Ry. Co., 150 S.E.2d 175 (S.C. 1967); Hammarmeister v. Illinois Central R.R., 117 N.W.2d 463 (Iowa 1962); Carlson v. Southern Pacific Co., 346 P.2d 381 (Ore. 1959); and Union Pacific R.R. v. Snyder, 220 F.2d 388, 390-1 (10th Cir. 1955) (applying Colorado law).

Accordingly, it was proper for the District Court, after reviewing the evidence and based upon its own evaluation of the crossing itself, to rule as a matter of law that reasonable minds could not differ that the crossing was not more than ordinarily hazardous. As stated by the Court at pp. 10-11 of its Memorandum Decision (R. 479-478).

"While any railroad crossing can be hazardous, it is hard to imagine a crossing that presents a smaller hazard than the one in question before the Court.

**B. The Crommelin Affidavit Does Not Raise Any Genuine Issue of Material Fact.**

The Crommelin Affidavit cannot be considered as probative evidence because it relies upon misstated and inadmissible facts in reaching the conclusion that the crossing was extrahazardous, to wit:

**1. Volume of Vehicular Traffic.**

The first and apparently most critical fact relied upon by Crommelin is that "field study reports" (the UDOT surveillance reports) show that "as many as 1,500 vehicles traversed the

railroad crossing per day" (R. 189). This is a serious distortion of the facts. As explained in detail under defendants' Statement of Facts, the UDOT records clearly show that the 1,500 vehicles per day number was only an "expected" or anticipated increase which never materialized. The actual count that Crommelin should have relied upon was closer to 580 vehicles per day, or nearly two-thirds less than the figure used in arriving at this conclusion.

## **2. Placement of the Advance Warning Sign.**

As explained in Union Pacific's Statement of Facts, Crommelin's interpretation of the MUTCD erroneously represents the Manual as mandating that the advance warning sign should have been placed 750 feet away from the crossing instead of the 305 feet where it was actually located. A simple reading of the MUTCD's applicable sections (§§ 8B-3 and 2C-3)(Addendum) clearly shows that 750 feet is only a suggested distance and that the actual distance may appropriately be less as long as such lesser distance allows the driver enough time and distance to react and, if necessary, maneuver. The stopping tests performed by Trooper Smith and Newell Knight clearly show that the lesser distance of 305 feet was more than adequate for such purposes. Accordingly, the sign was not misplaced or placed in violation of any federal standard, and it was incorrect for Crommelin to so state and to rely upon such an incorrect assumption as a basis for his conclusion.

In any event, as noted by the District Court at p. 9 of its Memorandum Decision (R. 450), placement of the sign at 305 feet as opposed to 750 feet could not possibly have been a proximate cause of the accident, since the undisputed facts show that plaintiffs totally ignored the warning signs which were clearly and readily noticeable at a distance of up to one mile away from the crossing. Plaintiffs offer no explanation of how placement of the sign an additional 445 feet away from the crossing would have made any difference with respect to how the accident vehicle was operated as it approached the crossing.

**3. Other Accidents at the Crossing.**

As also explained above, and as can be readily concluded from even a cursory review of the accident reports, the prior "similar" accidents at the crossing are, in fact, totally dissimilar in their material aspects. Accordingly, if Crommelin's conclusion was based in any material degree on such an erroneous assumption, the conclusion is without proper foundation and, therefore, inadmissible.

**4. Inadmissibility of UDOT Surveillance Report Pursuant to 23 U.S.C. § 409.**

In addition to the above-mentioned misstatement of foundational facts, the affidavit also improperly relies upon evidence which is statutorily inadmissible pursuant to 23 U.S.C. § 409 (Addendum).

The obvious public policy intent of 23 U.S.C. § 409 is to promote candor between governmental officials and railroads regarding applications submitted by state and local governments for federal funds to enhance safety at railroad grade crossings. If state and local highway officials and railroads must be concerned that statements which they make and which can be used in making applications for federal funds to upgrade crossings, or in supporting data, will be used against them, either as direct evidence or by way of an expert's opinion, as admissions in civil damage suits based upon accidents at such crossings, such officials will be inhibited in making any such statements or applications or in preparing the underlying data used by the federal officials in passing upon such applications.

Obviously, the rationale underlying 23 U.S.C. § 409 is the same as that behind other evidentiary "privileges," such as the privilege set forth in Rule 407, Utah Rules of Evidence, which precludes the admission of evidence of post-accident remedial measures in personal injury cases, lest the remedial measure be deemed an admission that the pre-accident, conduct, product or condition was negligent or unsafe.

Plaintiff may argue that § 409 does not exclude use of the evidence by an expert witness. For the above same reasons, Union Pacific submits that use of the phrase "for any purpose" in 23 U.S.C. § 409 ought to be held to refer to use of such reports by an expert in formulating his opinion as well as to use of the

reports as direct evidence. In view of the clear remedial purpose for which the 23 U.S.C. § 409 was enacted, it doesn't make sense to allow a party to get into evidence through the "back door" of an expert's opinion what the statute prohibits from coming in as direct, factual evidence. The public policy arguments against admissibility are just as valid in the former case as in the latter.

The Crommelin Affidavit relies, albeit erroneously, upon the UDOT reports in concluding that the crossing is extrahazardous. There is no question that the UDOT reports reflect the results of an investigation which was undertaken to determine the appropriateness and feasibility of installing additional crossing warning devices through use of available federal funding. Accordingly, neither the reports nor any of the data contained therein can be relied upon either by way of evidence or argument, by plaintiffs in support of their contention, that the crossing was extrahazardous and/or that Union Pacific was negligence in not upgrading the crossing warning devices.

**POINT III. PLAINTIFFS MISUNDERSTAND THE PUBLIC POLICY AND  
LEGISLATIVE CONSIDERATIONS INVOLVED IN THIS CASE.**

A. It is axiomatic "public policy" that not all damages caused by the act of another have, or even should have, a remedy, and that "accidents frequently occur, the consequences of



which the sufferer must bear alone." 74 Am.Jur.2d Torts, § 13. Accordingly, for instance, the law recognizes unavoidable accidents; a claimant is required to prove the elements of his cause of action -- the mere showing of damages is not enough to warrant recovery; and the State of Utah may not be sued without its consent.

The fact that this tragic accident occurred and that plaintiffs have undeniably suffered damages obviously does not by itself make them legally "worthy" to recover. In fact, the passengers' heirs have not been denied recovery for their loss, since they earlier pursued their remedy against Patrick Duncan's Estate, obtaining a substantial six figure settlement. Union Pacific submits that "public policy" considerations support completely the disposition of this case thus far.

B. Plaintiffs argue that the Legislature did not intend § 54-4-14, et seq., to "abrogate the common law duties imposed upon railroads to make and maintain safe crossings" (plaintiffs' brief, p. 10). To the contrary, § 68-3-2 U.C.A. (1986), specifically states otherwise:

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of the state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. . . .

C. Plaintiffs ignore the practicalities which a policy in defining the railroad's duty must take into consideration: Can you give a party a duty without the corresponding right to control and implement? That is precisely the dilemma the railroads would be placed in should the court adopt the argument that Union Pacific had a duty to signalize the crossing but no authority to implement that responsibility.

D. On the other hand, if plaintiffs are arguing that Union Pacific has the power to actually make changes in crossing warning devices, regardless of the State's position, they are also at the same time arguing for defeat of the very system of uniform traffic regulation by UDOT which they admit is the declared policy of this State.

E. Union Pacific submits it would be bad public policy to burden railroads with the duty of accurately predicting accidents at crossings (the primary basis for prioritizing crossings for upgrading), and/or the duty of subsidizing the cost of constructing warning device improvements at such crossings. If the state is unable to always prioritize accurately, why should the railroads, with less expertise and knowledge in the area, be held to a higher standard? Additionally, plaintiffs overlook the official findings of the Secretary of Transportation (23 C.F.R. § 696.210) that railroads do not benefit from such upgrading projects, thus they should not have to bear the burden

of paying for them, especially since they already bear the greater expense of paying for the ongoing maintenance costs.

F. It is good public policy to impose a duty upon railroads to operate trains and maintain rights of way safely, and upon UDOT a duty to protect and regulate traffic at railroad crossings. This is so because railroads have expertise in train operations and UDOT in traffic control, not visa versa; because uniformity of traffic regulation is fostered thereby; and because the limited funding that is available is thereby prioritized to offer the greatest benefit to the public by being assigned to the crossings which need the most attention.

#### CONCLUSION

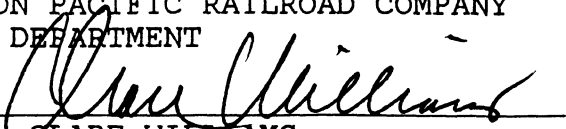
For the reasons stated above, the decision of the Court of Appeals should be affirmed on the grounds that:

1. The Droubay Road crossing was not extrahazardous, as a matter of law; therefore, Union Pacific had no duty to install additional or different warning devices at the crossing; and

2. Union Pacific had no duty to install additional or different warning devices because such responsibility is lodged exclusively with the State of Utah pursuant to § 54-4-14, et seq., and plaintiffs' claims of negligence against Union Pacific for failing to make such installations or changes are thereby preempted by both state and federal laws.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of December,  
1990.

UNION PACIFIC RAILROAD COMPANY  
LAW DEPARTMENT

By   
J. CLARE WILLIAMS  
Attorney for Appellee  
406 West First South  
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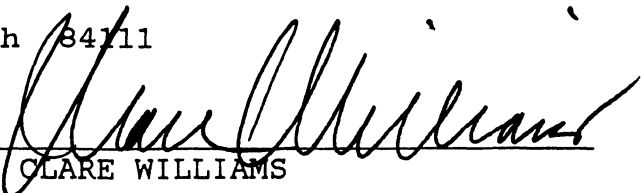
CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of December, 1990,  
I delivered via United States mail, postage prepaid, Brief of  
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J. CLARE WILLIAMS

## STATUTES

(3) Whenever the department shall find that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the department may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

(4) The commission shall retain exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section.

**History:** L. 1917, ch. 47, art. 4, § 14; C.L. 1917, § 4811; R.S. 1933, 76-4-15; L. 1939, ch. 84, § 1; C. 1943, 76-4-15; L. 1975 (1st S.S.), ch. 9, § 17.

**Cross-References.** — Change of grades and crossings, § 10-8-34.

Cities, power to regulate tracks, § 10-8-33.  
Fences, cattle guards and street crossings, § 10-8-35.  
Flagmen, grade crossings and drains, § 10-8-36.

#### **54-4-15.1. Signals or devices at grade crossings — Duty of transportation department to provide.**

The Department of Transportation so as to promote the public safety shall as prescribed in this act provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings on public highways or roads over the tracks of any railroad or street railroad corporation in the state.

**History:** L. 1973, ch. 118, § 1; 1975 (1st S.S.), ch. 9, § 18.

**Meaning of "this act".** — The term "this

act," referred to in this section, means L. 1973, ch. 118, §§ 1 through 4, which appear at §§ 54-4-15.1 through 54-4-15.4.

#### **54-4-15.2. Signals or devices at grade crossings — Funds for payment of costs.**

The funds provided by the state for purposes of this act shall be used in conjunction with other available moneys, including those received from federal sources, to pay all or part of the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in § 54-4-15.1 at any grade crossing of a public highway or any road over the tracks of any railroad or street railroad corporation in this state.

**History:** L. 1973, ch. 118, § 2.

**Meaning of "this act".** — See note under this catchline following § 54-4-15.1.

#### **54-4-15.3. Signals or devices at grade crossings — Apportionment of costs by transportation department — Liability of cities, towns and counties — Claims for payment of costs.**

## STATUTES

### **54-4-14. Safety regulation.**

The commission shall have power, by general or special orders, rules or regulations, or otherwise, to require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances including interlocking and other protective devices at grade crossings or junctions, and block or other system of signaling, and to establish uniform or other standards of construction and equipment, and to require the performance of any other acts which the health or safety of its employees, passengers, customers or the public may demand, provided, however, that the department of transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

History: L. 1917, ch. 47, art. 4, § 13; C.L. 1917, § 4810; R.S. 1933 & C. 1943, 76-4-14; L. 1975 (1st S.S.), ch. 9, § 16.

Cross-References. — Transportation department, § 63-49-1 et seq

Department of Transportation Act. — The Department of Transportation Act, referred to in this section, is located mainly at §§ 63-49-1 through 63-49-15

### **54-4-15. Grade crossings — Transportation department — Commission — Regulation.**

(1) No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the Department of Transportation having first been secured; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The department shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

(2) The department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school buses and motor vehicles carrying passengers for hire, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

The Department of Transportation, in accordance with the provisions of § 54-4-15, shall apportion the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in § 54-4-15.1 between the railroad or street railroad and the public agency involved. Unless otherwise ordered by the department, the liability of cities, towns and counties to pay the share of maintenance cost assigned to the local agencies by the department shall be limited to the funds provided under this act. Payment of any moneys from the funds provided shall be made on the basis of verified claims filed with the Department of Transportation by the railroad or street railroad corporation responsible for the physical installation, maintenance, reconstruction or improvement of the signal or device.

History: L. 1973, ch. 118, § 3; 1975 (1st S.S.), ch. 9, § 19.

Meaning of "this act". — See note under this catchline following § 54-4-15.1.

#### **54-4-15.4. Signals or devices at grade crossings — Transportation department to provide costs in annual budget.**

The Department of Transportation shall provide in its annual budget for the costs to be incurred under this act.

History: L. 1973, ch. 118, § 4; 1975 (1st S.S.), ch. 9, § 20.

Meaning of "this act". — See note under same catchline following § 54-4-15.1.



## NOTES OF DECISIONS

Costs of construction 1  
Ferries 2

F.2d 424, certiorari denied 109 S.Ct. 790,  
102 L.Ed.2d 782.

### 1. Costs of construction

Insurance proceeds and interest to which state had title and which state transferred to Federal Highway Administration to obtain federal emergency relief funds to reconstruct bridge were "cost of construction" within meaning of statute allowing state to collect tolls up to amount necessary to recoup state's contribution toward cost of construction of federally funded bridge. *Clallam County v. Department of Transp., of State of Wash.*, C.A.9 (Wash.) 1988, 849

### 2. Ferries

The establishment of ferries across streams and on navigable waters, for normal transportation purposes as distinguished from sightseeing, amusement and the like, is not a matter of purely private right and function, but is a public function permitted only by the consent, express or implied, of sovereign authority. *U.S. v. Washington Toll Bridge Authority*, D.C.Wash.1960, 190 F.Supp. 95, reversed on other grounds 307 F.2d 330, certiorari denied 83 S.Ct. 724, 372 U.S. 911, 9 L.Ed.2d 71.

## § 130. Railway-highway crossings

(a) Except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the

railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State highway department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

**(d) Survey and schedule of projects.**—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

**(e) Funds for protective devices.**—At least  $\frac{1}{2}$  of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

**(f) Apportionment.**—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

**(g) Annual report.**—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to

implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway<sup>1</sup> crossings program.

(h) **Use of funds for matching.**—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159.)

<sup>1</sup> So in original. Probably should be "railroad-highway".

#### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1958 Act. Senate Report No. 1928, see 1958 U.S.Code Cong. and Adm.News, p. 3942.

1987 Act. Senate Report No. 100-4 and House Conference Report No. 100-27, see 1987 U.S.Code Cong. and Adm.News, p. 66.

#### Amendments

1987 Amendment. Subsecs. (d) to (h). Pub.L. 100-17 added subsecs. (d) to (h).

#### Demonstration Project, Railroad-Highway Crossings; Inclusion of Projects at Terre Haute, Indiana

Pub.L. 94-387, Title I, § 101, Aug. 14, 1976, 90 Stat. 1176, provided in part: "That section 163 of Public Law 93-87 [set out as a note under this section] is hereby amended to include projects at Terre Haute, Indiana".

#### Demonstration Project, Railroad-Highway Crossings; Reports to President and Congress; Appropriations Authorization; Highway Safety Study; Report to Congress

Pub.L. 93-87, Title I, § 163, Aug. 13, 1973, 87 Stat. 280, as amended by Pub.L. 93-643, § 104, Jan. 4, 1975, 88 Stat. 2282; Pub.L. 94-280, Title I, § 140(a)-(e), May 5, 1976, 90 Stat. 444; Pub.L. 95-599, Title I, § 134(a)-(c), Nov. 6, 1978, 92 Stat. 2709; Pub.L. 96-470, Title II, § 209(b), Oct. 19, 1980, 94 Stat. 2245; Pub.L. 97-424, Title I, § 151, Jan. 6, 1983, 96 Stat. 2132; Pub.L. 100-17, Title I, §§ 133(c)(3), 148, Apr. 2, 1987, 101 Stat. 172, 181; Pub.L. 100-202, § 101(d) [Title III, § 346], Dec. 22, 1987, 101 Stat. 1329-358, 1329-388, provided that:

"(a) (1) The Secretary of Transportation shall enter into such arrangements

by Pub.L. 100-17, Title I, § 125(a), Apr. 2, 1987, 101 Stat. 166.

**LIBRARY REFERENCES****American Digest System**

Highway funds, see Highways ¶99¼.

Power and duty to maintain and repair, see Bridges ¶21(1).

**Encyclopedias**

Federal aid for highways, see C.J.S. Highways § 176.

Power and duty to maintain and repair, see C.J.S. Bridges §§ 35 to 42.

**WESTLAW ELECTRONIC RESEARCH**

Highways cases: 200k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

**§ 152. Hazard elimination program**

(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(b) The Secretary may approve as a project under this section any highway safety improvement project.

(c) Funds authorized to carry out this section shall be available for expenditure on any public road (other than a highway on the Interstate System).

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be apportioned to the States as provided in section 402(c) of this title. Such funds shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b)(1), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by highway safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement highway safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

(Added Pub. L. 93-87, Title II, § 209(a), Aug. 13, 1973, 87 Stat. 286, and amended Pub. L. 94-280, Title I, § 131, May 5, 1976, 90 Stat. 441; Pub. L. 95-599, Title I, § 168(a), Nov. 6, 1978, 92 Stat. 2722; Pub. L. 96-106, § 10(b), Nov. 9, 1979, 93 Stat. 798; Pub. L. 97-375, Title II, § 210(b), Dec. 21, 1982, 96 Stat. 1826; Pub. L. 97-424, Title I, § 125, Jan. 6, 1983, 96 Stat. 2113; Pub.L. 100-17, Title I, § 133(b)(12), Apr. 2, 1987, 101 Stat. 172.)

#### HISTORICAL AND STATUTORY NOTES

##### Revision Notes and Legislative Reports

**1973 Act.** House Report No. 93-118 and Senate Conference Report No. 93-355, see 1973 U.S.Code Cong. and Adm.News, p. 1859.

**1976 Act.** House Report No. 94-716 and House Conference Report No. 94-1017, see 1976 U.S.Code Cong. and Adm.News, p. 798.

**1978 Act.** House Report No. 95-1485 and House Conference Report No. 95-1797, see 1978 U.S.Code Cong. and Adm.News, p. 6575.

**1979 Act.** Senate Report No. 96-333, see 1979 U.S.Code Cong. and Adm.News, p. 1813.

**1982 Act.** House Report No. 97-804, see 1982 U.S.Code Cong. and Adm.News, p. 3435.

**1983 Act.** House Report No. 97-555 and House Conference Report 97-987, see 1982 U.S.Code Cong. and Adm.News, p. 3639.

**1987 Act.** Senate Report No. 100-4 and House Conference Report No. 100-27, see 1987 U.S.Code Cong. and Adm.News, p. 66.

##### Amendments

**1987 Amendment.** Subsec. (g). Pub.L. 100-17 substituted "the Committee on Environment and Public Works of the Senate and the Committee on Public

**§ 409. Admission as evidence of certain reports and surveys**

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying<sup>1</sup> evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170.)

<sup>1</sup> Probably should have a comma inserted.

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports** 100-27, see 1987 U.S.Code Cong. and 1987 Act. Senate Report No. 100-4 Adm.News, p. 66.  
and House Conference Report No.

**LIBRARY REFERENCES****American Digest System**

Power to regulate or prohibit, see Automobiles ¶5(1) to 6.

**Encyclopedias**

Power to regulate or prohibit, see C.J.S. Motor Vehicles §§ 14 to 25.

**WESTLAW ELECTRONIC RESEARCH**

Automobiles cases: 48ak [add key number]

See, also, WESTLAW guide following the Explanation pages of this volume.

**§ 410. Drunk driving prevention programs**

(a) **General authority.**—Subject to the provisions of this section and to the extent provided in advance in appropriation Acts, the Secretary shall make basic and supplemental grants to those States which adopt and implement drunk driving prevention programs which include measures described in this section to improve the effectiveness of the enforcement of laws the purpose of which are to discourage individuals from operating motor vehicles while under the influence of alcohol. Such grants may only be used by recipient States to implement and enforce such programs.

(b) **Maintenance of effort.**—No grant may be made to a State under this section in any fiscal year unless such State enters into such agreements with the Secretary as the Secretary may require to ensure that such State will maintain its aggregate expenditures from all other sources for drunk driving prevention programs at or above

## 45 § 432

which the employer has its principal executive office, or for the District of Columbia, to compel the Secretary to issue an order under this section. The failure of the Secretary to seek relief under subsection (a) of this section shall be reviewed solely under the standards of section 706 of Title 5.

(Pub.L. 91-458, Title II, § 203, Oct. 16, 1970, 84 Stat. 972; Pub.L. 96-423, § 3, Oct. 10, 1980, 94 Stat. 1811.)

### Historical Note

**1980 Amendment.** Pub.L. 96-423 designated existing provisions as subsecs. (a) and (b), substituted references to unsafe conditions or practices or combinations of unsafe conditions or practices or both for former references to facilities or pieces of equipment in unsafe condition in subsec. (a) as so designated, and added subsecs. (c), (d), and (e).

**Effective Date of 1980 Amendment.** Amendment by Pub.L. 96-423 effective Oct.

10, 1980, see section 17(a) of Pub.L. 96-423, set out as a note under section 431 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-458, see 1970 U.S. Code Cong. and Adm. News, p. 4104. See, also, Pub.L. 96-423, 1980 U.S. Code Cong. and Adm. News, p. 3830.

### Code of Federal Regulations

Rules of practice—Federal Railroad Administration, see 49 CFR 211.1 et seq.

Special notice and emergency order procedures—Railroad track, locomotive and equipment, see 49 CFR 216.1 et seq.

### Notes of Decisions

#### Construction with other laws 1 Standards and procedures for relief 2

##### 1. Construction with other laws

In light of the legislative history of the 1980 amendments to this section, practical interpretation of the broad phrase "conditions or practices," the need for flexibility in response to life-threatening emergency situations, and the lack of conflict between the exercise of the Secretary of Transportation's emergency powers under this section and the United States attorney's enforcement of the Hours of Service Act, section 62 of this title, the Secretary's emergency powers under this section to abate unsafe conditions or practices extend to emergency situations involving a hazard of death or injury to persons with respect to sleeping quarters for employees, even though the prescriptions of the Service Act, section 62 of this title, with respect to crew sleeping accommodations

are enforceable only by the United States attorney. *United Transp. Union v. Lewis*, C.A. Ala.1983, 699 F.2d 1109.

##### 2. Standards and procedures for relief

Order of Administrator of the Federal Railroad Administration placing 30-mile-per-hour speed limit on all trains carrying hazardous materials over railroad's tracks, requiring that railroad double the frequency of track inspections, and directing that railroad inspect on foot all of track over which it transported hazardous material violated due process clause of U.S.C.A. Const. Amend. 5 because of its failure to specify the precise corrective steps which railroad had to take to eliminate unsafe condition in its trackage and thus obtain relief from order, and violated provision of this section requiring that such an order relate solely to a facility or piece of equipment in unsafe condition. *Louisville & N.R. Co. v. Sullivan*, D.C.D.C.1979, 471 F.Supp. 469.

## § 433. Grade crossings and railroad rights-of-way; comprehensive study and recommendations of means of elimination and protection

(a) The Secretary shall submit to the President for transmittal to the Congress, within one year after October 16, 1970, a comprehensive study of the problem of eliminating and protecting railroad grade crossings, including a study of measures to protect pedestrians in densely populated areas along railroad rights-of-way, together with his recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic costs of any program proposed as a result of such study.

(b) In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, as well as measures to protect pedestrians in densely populated areas along railroad rights-of-way.

(Pub.L. 91-458, Title II, § 204, Oct. 16, 1970, 84 Stat. 972.)

**Historical Note**

**Legislative History.** For legislative history and purpose of Pub.L. 91-458, see 1970 U.S. Code Cong. and Adm. News, p. 4104.

**Code of Federal Regulations**

Special notice and emergency order procedures—Railroad track, locomotive and equipment, see 49 CFR 216.1 et seq.

**Library References**

Railroads ¶239 et seq.  
C.J.S. Railroads § 432.

**§ 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation**

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. 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. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety 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.

(Pub.L. 91-458, Title II, § 205, Oct. 16, 1970, 84 Stat. 972.)

**Historical Note**

**Legislative History.** For legislative history and purpose of Pub.L. 91-458, see 1970 U.S. Code Cong. and Adm. News, p. 4104.

**Cross References**

Promulgation of rules, regulations, orders, and standards, see section 431 of this title.

**Code of Federal Regulations**

Special notice and emergency order procedures—Railroad track, locomotive and equipment, see 49 CFR 216.1 et seq.  
State safety participation regulations, see 49 CFR 212.1 et seq.



## REGULATIONS

(2) Reconstruction of existing grade separations; and

(3) Grade crossing improvements.

(b) Other railroad-highway projects are those which use railroad properties or involve adjustments to railroad facilities required by highway construction but do not involve the elimination of hazards of railroad-highway crossings. Also included are adjustments to facilities that are jointly owned or used by railroad and utility companies.

#### § 646.208 Funding.

(a) Federal-aid funding for projects which involve the elimination of hazards of railroad-highway crossings may, at the option of the State, be provided through one of the following alternative methods, within the qualifications prescribed for each:

(1) "G" funding, as provided by 23 U.S.C. 120(d) and 130;

(2) Regular pro rata sharing as provided by 23 U.S.C. 120(a) and 120(c); and

(3) Funding authorized by 23 U.S.C. 405 and section 203 of the Highway Safety Act of 1973.

(b) The adjustment of railroad facilities which does not involve the elimination of hazards of railroad-highway crossings may be funded through regular pro rata sharing, as provided by 23 U.S.C. 120 (a) and (c).

#### § 646.210 Classification of projects and railroad share of the cost.

(a) State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.

(b) Pursuant to 23 U.S.C. 130(b), and 49 CFR 1.48:

(1) Projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs.

(2) Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State

or its political subdivision to share in the costs.

(3) On projects for the elimination of existing grade crossings at which active warning devices are in place or ordered to be installed by a State regulatory agency, the railroad share of the project costs shall be 5 percent.

(4) On projects for the elimination of existing grade crossings at which active warning devices are not in place and have not been ordered installed by a State regulatory agency, or on projects which do not eliminate an existing crossing, there shall be no required railroad share of the project cost.

(c) The required railroad share of the cost under § 646.210(b)(3) shall be based on the costs for preliminary engineering, right-of-way and construction within the limits described below:

(1) Where a grade crossing is eliminated by grade separation, the structure and approaches required to transition to a theoretical highway profile which would have been constructed if there were no railroad present, for the number of lanes on the existing highway and in accordance with the current design standards of the State highway agency.

(2) Where another facility, such as a highway or waterway, requiring a bridge structure is located within the limits of a grade separation project, the estimated cost of a theoretical structure and approaches as described in § 646.210(c)(1) to eliminate the railroad-highway grade crossing without considering the presence of the waterway or other highway.

(3) Where a grade crossing is eliminated by railroad or highway relocation, the actual cost of the relocation project, the estimated cost of the relocation project, or the estimated cost of a structure and approaches as described in § 646.210(c)(1), whichever is less.

(d) Railroads may voluntarily contribute a greater share of project costs than is required. Also, other parties may voluntarily assume the railroad's share.

## § 646.212

23 CFR Ch. I (4-1-90 Edition)

### § 646.212 Federal share.

(a) *General.* (1) Federal funds are not eligible to participate in costs incurred solely for the benefit of the railroad.

(2) At grade separations Federal funds are eligible to participate in costs to provide space for more tracks than are in place when the railroad establishes to the satisfaction of the State highway agency and FHWA that it has a definite demand and plans for installation of the additional tracks within a reasonable time.

(3) The Federal share of the cost of a grade separation project shall be based on the cost to provide horizontal and/or vertical clearances used by the railroad in its normal practice subject to limitations as shown in the Appendix or as required by a State regulatory agency.

(b) *"G" Funds.* (1) The Federal share of the cost of a "G" funded project may be up to 100 percent of the cost of preliminary engineering and construction and 75 percent of the cost of right-of-way and property damage, except that the Federal share shall be reduced by the amount of any required railroad share of the cost.

(2) Projects for the elimination of hazards of railroad-highway crossings, either by crossing elimination, improvement, or the reconstruction of existing grade separations, as described in § 646.206(a) are eligible for "G" funding subject to the following limitations:

(i) For a new or reconstructed grade separation, the entire structure or structures and necessary highway and railroad approaches to accommodate both vehicular and pedestrian traffic.

(ii) Where another facility, such as a highway or waterway requiring a bridge structure, is located within the limits of a grade separation project, the estimated cost and limits of work for a theoretical structure and necessary approaches as in § 646.212 (b) (2) (i) without considering the presence of the waterway or other highway.

(iii) For railroad or highway relocation the actual cost of the relocation project or the estimated cost of a theoretical structure and necessary approaches to eliminate the grade

crossing(s) as in § 646.212(b) (2) (i), whichever is less.

(iv) Grade crossing improvements in the vicinity of the crossing and related work, including construction or reconstruction of the approaches as necessary to provide an acceptable transition to existing or improved highway gradients and alignments, and advance warning devices.

[40 FR 16059, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 53 FR 32218, Aug. 24, 1988]

### § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice, subject to approval by FHWA.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) "Adequate warning devices", under § 646.214(b) (2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982]

#### § 646.216 General procedures.

(a) *General.* Unless specifically modified herein, applicable Federal-aid procedures govern projects undertaken pursuant to this subpart.

(b) *Preliminary engineering and engineering services.* (1) As mutually agreed to by the State highway agency and railroad, and subject to the provisions of § 646.216(b)(2), preliminary engineering work on railroad-highway projects may be accomplished by one of the following methods:

(i) The State or railroad's engineering forces;

(ii) An engineering consultant selected by the State after consultation with the railroad, and with the State administering the contract; or

(iii) An engineering consultant selected by the railroad, with the approval of the State and with the railroad administering the contract.

(2) Where a railroad is not adequately staffed, Federal-aid funds may participate in the amounts paid to engineering consultants and others for required services, provided such amounts are not based on a percentage of the cost of construction, either under contracts for individual projects or under existing written continuing contracts where such work is regularly performed for the railroad in its own work under such contracts at reasonable costs.

(c) *Rights-of-way.* (1) Acquisition of right-of-way by a State highway agency on behalf of a railroad or acquisition of nonoperating real property from a railroad shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.) and applicable FHWA right-of-way procedures in 23 CFR, Chapter I, Subchapter H. On projects for the elimination of hazards of railroad-highway crossings by the relocation of railroads, acquisition or replacement right-of-way by a railroad shall be in accordance with 42 U.S.C. 4601 et seq.

(2) Where buildings and other depreciable structures of the railroad (such as signal towers, passenger stations, depots, and other buildings, and equipment housings) which are integral to operation of railroad traffic are wholly or partly affected by a highway project, the costs of work necessary to functionally restore such facilities are eligible for participation. However, when replacement of such facilities is necessary, credits shall be made to the cost of the project for:

(i) Accrued depreciation, which is that amount based on the ratio between the period of actual length of service and total life expectancy applied to the original cost.

(ii) Additions or improvements which provide higher quality or increased service capability of the facilities.

**Subpart E—[Reserved]**

**Subpart F—Traffic Control Devices on Federal-Aid and Other Streets and Highways**

**SOURCE:** 48 FR 46776, Oct. 14, 1983, unless otherwise noted.

**§ 655.601 Purpose.**

To prescribe the policies and procedures of the Federal Highway Administration (FHWA) to obtain basic uniformity of traffic control devices on all streets and highways in accordance with the following references that are approved by the FHWA for application on Federal-aid projects:

(a) *Manual on Uniform Traffic Control Devices for Streets and Highways*, FHWA, 1988, as of March 1989. (This publication is incorporated by reference and is on file at the Office of the Federal Register in Washington, DC. It may be purchased from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, DC 20402 and has Stock No. 050-001-81001-8. It is available for inspection and copying as prescribed in 49 CFR Part 7, Appendix D).

(b) *Standard Alphabets for Highway Signs*, FHWA, 1966 Edition, Reprinted May 1972. (This publication is incorporated by reference and is on file at the Office of the Federal Register in Washington, DC. This document is available for inspection and copying as provided in 49 CFR Part 7, Appendix D).

(c) *Traffic Surveillance and Control*, FHWA, 23 CFR Part 655, Subpart D.

(d) *Motorist Aid Systems*, FHWA, 23 CFR Part 655, Subpart G.

(e) *Pavement Marking Demonstration Program*, FHWA, 23 CFR Part 920.

[51 FR 16834, May 7, 1986, as amended at 53 FR 8626, Mar. 16, 1988; 54 FR 3004, Jan. 23, 1989; 55 FR 2374, Jan. 24, 1990]

**§ 655.602 Definitions.**

The terms used herein are defined in accordance with definitions and usages contained in the MUTCD and 23 U.S.C. 101(a).

**§ 655.603 Standards.**

(a) *National MUTCD*. The MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C 109(d) and 402(a). The national MUTCD is specifically approved by the FHWA for application on any highway project in which Federal highway funds participate and on projects in federally administered areas where a Federal department or agency controls the highway or supervises the traffic operations.

(b) *State or other Federal MUTCD*. (1) Where State or other Federal agency MUTCDs or supplements are required, they shall be in substantial conformance with the national MUTCD. Changes to the national MUTCD issued by the FHWA shall be adopted by the States or other Federal agencies within 2 years of issuance. The FHWA Regional Administrator has been delegated the authority to approve State MUTCDs and supplements.

(2) The Direct Federal Program Administrator has been delegated the authority to approve other Federal agency MUTCDs with the concurrence of the Office of Traffic Operations. States and other Federal agencies are encouraged to adopt the national MUTCD as their official Manual on Uniform Traffic Control Devices.

(c) *Color specifications*. Color determinations and specifications of sign and pavement marking materials shall conform to requirements of the FHWA Color Tolerance Charts.<sup>2</sup> An alternate method of determining the color of retroreflective sign material is provided in the Appendix.

(d) *Compliance*—(1) *Existing highways*. Each State, in cooperation with its political subdivisions, and Federal agencies shall have a program as required by Highway Safety Program Standard Number 13, Traffic Engineering Services (23 CFR 1204.4)

<sup>2</sup>Available for inspection from the Office of Traffic Operations, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590.

which shall include provisions for the systematic upgrading of substandard traffic control devices and for the installation of needed devices to achieve conformity with the MUTCD.

(2) *New or reconstructed highways.* Federal-aid projects for the construction, reconstruction, resurfacing, restoration, or rehabilitation of streets and highways shall not be opened to the public for unrestricted use until all appropriate traffic control devices, either temporary or permanent, are installed and functioning properly. Both temporary and permanent devices shall conform to the MUTCD.

(3) *Construction area activities.* All traffic control devices installed in construction areas using Federal-aid funds shall conform to the MUTCD. Traffic control plans for handling traffic and pedestrians in construction zones and for protection of workers shall conform to the requirements of 23 CFR Part 630, Subpart J, Traffic Safety in Highway and Street Work Zones.

(4) *MUTCD changes.* The FHWA may establish target dates for achieving compliance with changes to specific devices in the MUTCD.

(e) *Specific information signs.* Standards for specific information signs are contained in the MUTCD.

[48 FR 46776, Oct. 14, 1983, as amended at 51 FR 16834, May 7, 1986]

#### § 655.604 Achieving basic uniformity.

(a) *Programs.* Programs for the orderly and systematic upgrading of existing traffic control devices or the installation of needed traffic control devices on or off the Federal-aid system should be based on inventories made in accordance with 23 CFR 1204.4, Highway Safety Program Standards. These inventories provide the information necessary for programming traffic control device upgrading projects.

(b) *Inventory.* An inventory of all traffic control devices is required by Highway Safety Program Standard Number 13, Traffic Engineering Services (23 CFR 1204.4). Highway planning and research funds and highway related safety grant program funds may be used in statewide or system-wide studies or inventories. Also, met-

ropolitan planning (PL) funds may be used in urbanized areas provided the activity is included in an approved unified work program.

#### § 655.605 Project procedures.

(a) *Federal-aid highways.* Federal-aid projects involving the installation of traffic control devices shall follow procedures as established in 23 CFR Part 630, Subpart A, Federal-Aid Programs Approval and Project Authorization. Simplified and timesaving procedures are to be used to the extent permitted by existing policy.

(b) *Off-system highways.* Certain federally funded programs are available for installation of traffic control devices on streets and highways that are not on the Federal-aid system. The procedures used in these programs may vary from project to project but, essentially, the guidelines set forth herein should be used.

#### § 655.606 Higher cost materials.

The use of signing, pavement marking, and signal materials (or equipment) having distinctive performance characteristics, but costing more than other materials (or equipment) commonly used may be approved by the FHWA Division Administrator when the specific use proposed is considered to be in the public interest.

#### § 655.607 Funding.

(a) *Federal-aid highways.* (1) Funds apportioned or allocated under 23 U.S.C. 104(b) are eligible to participate in projects to install traffic control devices in accordance with the MUTCD on newly constructed, reconstructed, resurfaced, restored, or rehabilitated highways, or on existing highways when this work is classified as construction in accordance with 23 U.S.C. 101(a). Federal-aid highway funds for eligible pavement markings and traffic control signalization may amount to 100 percent of the construction cost. Federal-aid highway funds apportioned or allocated under other sections of 23 U.S.C. are eligible for participation in improvements conforming to the MUTCD in accordance with the provisions of applicable program regulations and directives.

[48 FR 44066, Sept. 26, 1983]

**§ 924.9 Planning.**

(a) The planning component of the highway safety improvement program shall incorporate:

(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential;

(3) A process for conducting engineering studies of hazardous locations, sections, and elements to develop highway safety improvement projects as defined in 23 U.S.C. 101(a); and

(4) A process for establishing priorities for implementing highway safety improvement projects, considering:

(i) The potential reduction in the number and/or severity of accidents,

(ii) The cost of the projects and the resources available,

(iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula,

(iv) Onsite inspection of public grade crossings,

(v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials, and

(vi) Other criteria as appropriate in each State.

(b) In planning a program of safety improvement projects at railroad-highway grade crossings, special emphasis shall be given to the legislative requirement that all public crossings be provided with standard signing.

(c) The planning component of the highway safety improvement program may be financed with funds made available through 23 U.S.C. 402, 307(c), and, where applicable, 104(f).

**§ 924.11 Implementation.**

(a) The implementation component of the highway safety improvement program in each State shall include a

process for scheduling and implementing safety improvement projects in accordance with (1) the procedures set forth in 23 CFR Part 630, Subpart A (Federal-Aid Program Approval and Project Authorization) and (2) the priorities developed in accordance with § 924.9. The States are encouraged to utilize the timesaving procedures incorporated in FHWA directives for the minor type of work normal to highway safety improvement projects.

(b) Funds apportioned under 23 U.S.C. 152, Hazard Elimination Program, are to be used to implement highway safety improvement projects on any public road other than Interstate.

(c) Funds apportioned under section 203(b) of the Highway Safety Act of 1973, as amended, Rail-Highway Crossings, are to be used to implement railroad-highway grade crossing safety projects on any public road. At least 50 percent of the funds apportioned under section 203(b) must be made available for the installation of grade crossing protective devices. The railroad share, if any, of the cost of grade crossing improvements shall be determined in accordance with 23 CFR Part 646, Subpart B (Railroad-Highway Projects).

(d) Highway safety improvement projects may be implemented on the Federal-aid system with funds apportioned under 23 U.S.C. 104(b), and with funds apportioned under section 104(b)(1) of the Federal-Aid Highway Act of 1978 and section 103(a) of the Highway Improvement Act of 1982, if excess to Interstate System needs.

(e) Funds apportioned under 23 U.S.C. 219, Safer Off-System Roads, may be used to implement highway safety improvement projects on public roads which are not on a Federal-aid system.

(f) Major safety defects on bridges, including related approach improvements, may be corrected as part of a bridge rehabilitation project on any public road with funds apportioned under 23 U.S.C. 144, if such project is considered eligible under 23 CFR Part 650, Subpart D (Special Bridge Replacement Program).



# **MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES**

**FOR STREETS AND HIGHWAYS**

**THIS EDITION DEVELOPED WITH THE COOPERATION OF  
THE NATIONAL ADVISORY COMMITTEE  
ON UNIFORM TRAFFIC CONTROL DEVICES**

**American Association of State Highway & Transportation Officials  
Institute of Transportation Engineers  
National Committee on Uniform Traffic Laws and Ordinances  
National Association of Counties  
National League of Cities  
National Association of Governors' Highway Safety  
Representatives  
International Association of Chiefs of Police, Inc.  
National Electrical Manufacturers Association  
American Road and Transportation Builders' Association  
International Bridge, Tunnel & Turnpike Association**



**U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION  
1978**



yellow background. There are specific exceptions to this rule, some of which are noted in the following sections. The allowance of these exceptions shall not be construed as permitting deviations from the standard messages where standard messages are applicable.

All warning signs having significance during the hours of darkness shall have a fully reflectorized background or be illuminated.

The standard size for each warning sign prescribed herein is shown with the illustration accompanying the specification. Where conditions of speed, volume, or special hazard require greater visibility or emphasis, larger signs should be used, with symbol or legend enlarged approximately in proportion to outside dimensions. Sign sizes for various type facilities can be found in Standard Highway Signs.\*

To carry proper emphasis among large signs for other purposes, all warning signs on expressways should be not less than 36 × 36 inches.

To permit the use of standard dies and templates the outside dimensions of warning sign should ordinarily be in multiples of 6 inches. Letter heights should be rounded to the nearest inch that will best fit the plate used for legibility and appearance.

For use of educational plaques with symbol signs see section 2A-13.

### **2C-3 Placement of Warning Signs**

Warning signs shall be erected in accordance with the general requirements for sign position as described in Section 2A-21 to 29.

Since warning signs are primarily for the benefit of the driver who is unacquainted with the road, it is very important that care be given to the placement of such signs. Warning signs should provide adequate time for the driver to perceive, identify, decide, and perform any necessary maneuver. This total time to perceive and complete a reaction to a sign is the sum of the times necessary for Perception, Identification/understanding, Emotion/decisionmaking, and Volition/execution of decision, and is here referred to as the PIEV time. The PIEV time can vary from about 3 seconds for general warning signs to 10 seconds for high driver judgment condition warning signs. Table II-1 lists suggested minimum sign placement distances that may be used for three conditions:

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\* Available from GPO, see page ii.

TABLE II-1—A Guide For Advance Warning Sign Placement Distance<sup>1</sup>

Posted or 85 percentile speed MPH	Condition A—high judg- ment needed <sup>3</sup> (10 secs. PIEV)	General warning signs <sup>4</sup>					
		Condition B—Stop condition	Condition C—Deceleration condition to listed advisory speed—MPH (or desired speed at condition)				
			0	10	20	30	40
20 .....	<sup>5</sup> 175	( <sup>4</sup> )	( <sup>4</sup> )				
25 .....	250	( <sup>4</sup> )	<sup>2</sup> 100				
30 .....	325	<sup>1</sup> 100	150	<sup>1</sup> 100			
35 .....	400	150	200	175			
40 .....	475	225	275	250	<sup>1</sup> 175		
45 .....	550	300	350	300	250		
50 .....	625	375	425	400	325	<sup>1</sup> 225	
55 .....	700	450	500	475	400	300	
60 .....	775	550	575	550	500	400	<sup>1</sup> 300

Typical Signs for the Listed Conditions in Table II-1, Condition A—Merge, Right Lane Ends, etc.; Condition B—Cross Road, Stop Ahead, Signal Ahead, Ped-Xing, etc.; Condition C—Turn, Curve, Divided Road, Hill, Dip, etc.

<sup>1</sup> Distances shown are for level roadways. Corrections should be made for grades. If 48-inch signs are used, the legibility distance may be increased to 200 feet. This would allow reducing the above distance by 75 feet.

<sup>2</sup> In urban areas, a supplementary plate underneath the warning sign should be used specifying the distance to the condition if there is an in-between intersection which might confuse the motorist.

<sup>3</sup> Distance provides for 3-second PIEV, 125 feet Sign Legibility Distance, Braking Distance for Condition B and Comfortable Braking Distance for condition C as indicated in *A Policy on Geometric Design of Highways and Streets*, 1984, AASHTO, Figure II-13.

<sup>4</sup> No suggested minimum distance provided. At these speeds, sign location depends on physical conditions at site.

<sup>5</sup> Feet

II-4 (c)

Condition A—a higher driver judgment condition which requires the driver to use extra time in making and executing a decision because of a complex driving situation; i.e., lane changing, passing, or merging. Condition B—a condition in which the driver will likely be required to stop; and Condition C—a condition in which the driver will likely be required to decelerate to a specific speed. The table is provided as an aid for determining warning sign location. The values contained in the table are for guidance purposes and should be applied with engineering judgment. The placement of temporary warning signs used at highway construction and maintenance sites is covered in Part VI of this Manual and the suggested minimum sign placement distances given in Table II-1 may not apply to that group of signs.

Other miscellaneous warning signs that advise of potential hazards not related to a specific location may be installed in the most appropriate locations since they are not covered in Table II-1. These include DEER CROSSING and SOFT SHOULDER signs. Minimum spacing between warning signs with different messages normally should be based on the PIEV times for driver comprehension and reaction.

The effectiveness of the placement of any warning sign should be tested periodically under both day and night conditions. Figure 2-5 (page 2A-17) shows typical installations of standard warning signs.

#### 2C-4 Turn Sign (W1-1)

The Turn sign (W1-1R or 1L) is intended for use where engineering investigations of roadway, geometric, and operating conditions show the

## **Part VIII. TRAFFIC CONTROL SYSTEMS FOR RAILROAD — HIGHWAY GRADE CROSSINGS**

### **A. GENERAL**

#### **8A-1 Functions**

Traffic control systems for railroad-highway grade crossings include all signs, signals, markings, and illumination devices and their supports along highways approaching and at railroad crossings at grade. The function of these systems is to permit safe and efficient operation of rail and highway traffic over crossings. Traffic control devices shall be consistent with the design and application of the standards contained herein. For the purpose of installation, operation, and maintenance of devices constituting traffic control systems at railroad-highway grade crossings, it is recognized that any crossing of a public road and a railroad is situated on right-of-way available for the use of both highway traffic and railroad traffic on their respective roadways and tracks.

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

#### **8A-2 Use of Standard Devices**

The grade crossing traffic control devices, systems, and practices described herein are intended for use both in new installations and at locations where general replacement of present apparatus is made, consistent with Federal and State laws and regulations. To stimulate effective reaction of vehicle operators and pedestrians, these devices, systems, and practices utilize the five basic considerations: design, placement, operation, maintenance, and uniformity employed generally for traffic control devices and described fully in section 1A-2.

#### **8A-3 Uniform Provisions**

All signs used in grade crossing traffic control systems shall be reflectorized to show the same shape and color to an approaching motorist

both by day and by night. Reflectorization may be by one of the methods described in section 2A-18.

Normally, where the distance between tracks, measured along the highway, exceeds 100 feet, additional signs or other appropriate traffic control devices should be used.

No sign or signal shall be located in the center of an undivided roadway except in an island with barrier curbs installed in accordance with the general requirements of Part V with minimum clearance of 2 feet from the face of each curb.

Where it is practical, equipment housing should provide a lateral clearance of 30 feet from the roadway. Adequate clearance should also be provided from tracks in order to reduce the obstruction to motorists sight distance and to reduce the possibility of damage to the housed equipment.

#### **8A-4 Crossing Closure**

Any highway grade crossing for which there is not a demonstrated need should be closed.

#### **8A-5 Traffic Controls During Construction and Maintenance**

Traffic controls for street and highway construction and maintenance operations are discussed in Part VI of this manual. Similar traffic control methods should be used where highway traffic is affected by construction and maintenance at grade crossings.

Public and private agencies should meet to plan appropriate detours and necessary signing, marking, and flagging requirements for successful operations during the closing. Pertinent considerations include length of time for crossing to be closed, type of traffic affected, time of day, materials and techniques of repair. Inconvenience, delay, and accident potential to affected traffic should be minimized to the extent practical. Prior notice should be extended to affected public or private agencies before blockage or infringement on the free movement of vehicles or trains.

Construction or maintenance techniques should not extensively prolong the closing of the crossing. The width and riding quality of the roadway surface at a grade crossing should, as a minimum, be restored to correspond with the approaches to the crossing.

### 8B-3 Railroad Advance Warning Signs (W10-1, 2, 3, 4)

A Railroad Advance Warning (W10-1) sign shall be used on each roadway in advance of every grade crossing except:

1. On low-volume, low-speed roadways crossing minor spurs or other tracks that are infrequently used and which are flagged by train crews.
2. In the business districts of urban areas where active grade crossing traffic control devices are in use.
3. Where physical conditions do not permit even a partially effective display of the sign.

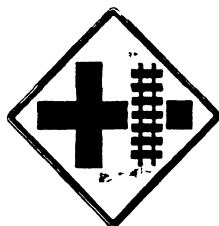
Placement of the sign shall generally be in accordance with Section 2C-3 and Sections 2A-21 to 2A-27, normally 750 feet or more in advance of the crossing in rural areas and 250 feet in advance of the crossing in urban areas, except that in a residential or business district where low speeds are prevalent, the signs may be placed a minimum distance of 100 feet from the crossing. On divided highways and one-way roads, it is desirable to erect an additional sign on the left side of the roadway.

The W10-2, 3, and 4 signs may be installed on highways that are parallel to railroads. The purpose of these signs is to warn a motorist making a turn that a railroad crossing is ahead. Where there is 100 feet or more between the railroad and the parallel highway, a W10-1 sign should be installed in advance of the railroad crossing and the W10-2, 3, or 4 signs on the parallel highway would not be necessary.

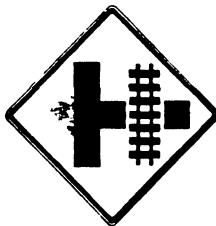
VIII-2 (e)



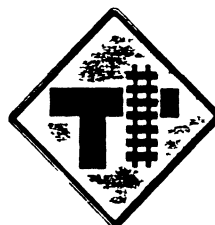
W10-1  
36" Diameter



W10-2  
30" x 30"



W10-3  
30" x 30"



W10-4  
30" x 30"

VIII-2 (c)

## **D. SYSTEMS AND DEVICES**

### **8D-1 Selection of Systems and Devices**

The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations.

Active grade crossing traffic control systems range from

1. post mounted flashing light signals to
2. automatic gates combined with
  - (a) post mounted flashing light signals,
  - (b) cantilever flashing light signals, or
  - (c) combination of the above

Any of the foregoing may or may not incorporate a bell.

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.

## CASES

,fornia court, where it found it was "dealing with a litigant who not only has previously failed to appear as ordered, but who up to this very time remains a fugitive from justice. Apparently, he is unwilling to respond to a court order with which he disagrees, but seeks to obtain on appeal" a more favorable result. *Tobin v. Casaus*, 128 Cal.App.2d 588, 275 P.2d 792, 795 (1954).

We therefore hold that appellant has 30 days from the date of the issuance of this opinion to bring herself within the process of the trial court. If appellant submits herself to the trial court, she should be allowed an opportunity to offer alternatives to the trial court to protect the judgment. Appellant may persuade the court it should hold the disputed judgment amount in trust until a resolution of this appeal on the merits. However, if appellant persists in secreting herself in violation of the trial court's orders, her appeal will be dismissed at the expiration of the 30-day period.

GARFF and ORME, JJ., concur.



Lewis DUNCAN, individually and as personal representative of the Estate of Patrick Duncan, deceased; Jason E. Duncan, a minor by and through his Guardian ad Litem; Alice Duncan; No-reen Duncan; Michael Duncan; Tim Duncan; Kevin Duncan; Brian Duncan; Michelle Bowers, individually and as personal representative of the Estate of Jeffrey and Nicole Bowers, deceased; Judson Bowers; Florence Hanson;

Shelly Bowers; Sherry Bowers; Monica Henwood, individually and as personal representative of the Estate of Ramon Henwood, deceased; Phyllis Henwood; and Owen Henwood, Plaintiffs and Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; The State of Utah; Paul Kleinman; and Does 1 through 100, inclusive, Defendants and Respondents.

No. 890291-CA.

Court of Appeals of Utah.

April 12, 1990.

Heirs of victims of train-automobile accident brought action against railroad, Department of Transportation and railroad engineer. The Third District Court, Tooele County, Timothy R. Hanson, J., entered summary judgment dismissing wrongful death action. Heirs appealed. The Court of Appeals, J. Robert Bullock, Senior District Judge, held that: (1) heirs failed to establish that either engineer or railroad were negligent, and (2) Department, having given at least some warning or control at railroad crossing, was governmentally immune in deciding whether to improve means of warning or control at crossing because of fiscal effects of decision.

Affirmed.

Jackson, J., filed a concurring opinion.

#### 1. Railroads ⇐348(1)

Evidence failed to support claim of heirs of accident victims that there was negligence in operation of train or entrusting its operation to engineer who was in charge at time of automobile-train collision.

#### 2. Railroads ⇐348(2)

Evidence did not support claim of heirs of accident victims that railroad negligently maintained railroad right-of-way at crossing with street where train-automobile collision occurred; there was nothing to indicate what could have made railroad's right-



of-way safer to motorist crossing since path of train was clearly visible to oncoming motorists.

### 3. Railroads ⇐303(1)

Railroad has tort duty to maintain its rights-of-way in condition safe to motorists who traverse them at established crossings.

### 4. Railroads ⇐303(1)

Railroad is required to take precautions to prevent injury to motorists crossing railroad right-of-way if reasonable person in railroad's position would take such precautions.

### 5. Railroads ⇐303(1)

In determining what is reasonable under the circumstances for railroad crossing, every railroad crossing is hazardous but, since it is not practicable to eliminate all railroad crossings, simple existence of railroad crossing is not in itself a breach of duty of care.

### 6. Railroads ⇐303(1)

For railroad to be liable for crossing mishap, there must be something about railroad's right-of-way that creates hazard to motorist greater than hazard presented by simple fact that railroad and street intersect.

### 7. Railroads ⇐303(1)

Railroad is required to take every reasonable action to assure safety of motorist who can reasonably be expected to cross right-of-way and in determining what is reasonable under circumstances of specific case, trier of fact must ultimately weigh burden on railroad, and indirectly on public, of requiring added precautions, against benefits that would be derived by public at large from precautions.

### 8. Railroads ⇐307(2, 3)

It was not responsibility of railroad to place signs and devices on public road warning motorists of railroad crossing.

### 9. States ⇐112(1)

Governmental immunity shields sovereign policy making and discretion from state law damage claims by generally precluding damage liability for performance of

governmental function subject to certain statutorily enumerated waivers.

### 10. Automobiles ⇐277

Department of Transportation enjoyed governmental immunity from liability in action brought by heirs of train-automobile accident victims alleging that safety improvements at railroad crossing were inadequate. U.C.A.1953, 63-30-10.

### 11. Municipal Corporations ⇐724

Test for determining governmental immunity is whether activity under consideration is of such unique nature that it can only be performed by governmental agency or that it is essential to core of governmental activity, and under that test, court examines nature of activity itself, not identity of person performing activity.

### 12. Automobiles ⇐279

Government may be held liable in tort for failure to provide some effective warning or control for traffic at city intersection; however, duty to provide some effective warning or control must be distinguished from more than minimal maintenance and from enhancement of means of providing warning and control.

### 13. Automobiles ⇐279

#### Highways ⇐194

As long as warning or control signage of clear hazard is in existence and maintained enough to give it minimal effectiveness, government is not liable in tort for failure to better maintain or to enhance signage.

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Michael A. Katz (argued), Burbidge & Mitchell, Salt Lake City, for appellants.

J. Clare Williams (argued), Larry A. Gantenbein, Salt Lake City, for respondents Union Pacific R. Co. and Paul Kleinman.

Allan L. Larson (argued), Craig Barlow, Anne Swenson, Snow, Christensen & Martineau, Salt Lake City, R. Paul Van Dam, State Atty. Gen., Stephen J. Sorenson, Asst. Atty. Gen., Salt Lake City, for respondent State of Utah.

Before BENCH and JACKSON, JJ.,  
and BULLOCK,<sup>1</sup> Senior District Judge.

### OPINION

J. ROBERT BULLOCK, Senior District Judge.

Plaintiffs appeal from a summary judgment dismissing their wrongful death action arising out of a train-automobile collision. We affirm.

Droubay Road is a two-lane thoroughfare running north and south in rural Tooele County. At one point, it intersects the Union Pacific Railroad tracks at approximately a 43-degree angle on the north and a 136-degree angle on the south. Three roadside signs warn oncoming motorists of the crossing, one sign located about 300 feet from the crossing, and two on either side of the road 19 feet from the crossing. There are no flashing lights or mechanical devices at the crossing to warn of an approaching train, but nothing obstructs a motorist's view of the tracks for several thousand feet.

On the evening of April 9, 1983, at about 8:50 p.m., a Union Pacific train operated by Paul Kleinman struck an automobile and killed all four occupants of the vehicle at the Droubay Road crossing. There is no evidence to indicate that the train was negligently or improperly operated, and its headlight, warning bells, and whistles were activated well in advance of the crossing. The engineer, Kleinman, averred that he saw the car approach the crossing but believed that it would stop. When it became apparent that the car was not going to stop, it was too late for him to stop the train.

The Utah Department of Transportation (UDOT) periodically evaluated the Droubay Road crossing in planning the allocation of its resources, including federal funding, for state-wide highway improvements. Under the methods used at the time, the Droubay Road crossing did not rank high enough in

UDOT's prioritization of the State's railroad crossings to receive additional safety improvements, such as electrified lights and crossbars.

The heirs of the accident victims sued Union Pacific and engineer Kleinman for negligent operation of the train, negligent maintenance of the railroad right of way at the Droubay Road crossing, and for entrusting operation of the train to an allegedly unfit employee. The heirs also sued the State, claiming that the safety improvements at the crossing were inadequate. All of the defendants moved for summary judgment, and the district court granted their motions and dismissed the complaint. Plaintiffs appealed.

### CLAIMS AGAINST UNION PACIFIC

In defense against the motions for summary judgment, the plaintiffs filed an affidavit of one Robert Crommelin, a traffic safety engineer. In Crommelin's opinion, "the warning signs present at the crossing were clearly inadequate" and "the intersection [was] clearly 'extra hazardous.'" The district court, however, struck Crommelin's affidavit on the grounds that 23 U.S.C. § 409 (Supp.1989) forbade admission into evidence of the factual basis for Crommelin's conclusions, and Utah Rule of Civil Procedure 56(e) permits only affidavits which state "such facts as would be admissible in evidence[.]" Crommelin's opinion was based partly on information gained from UDOT's records of the Droubay Road crossing. To facilitate candor in administrative evaluations of highway safety hazards, 23 U.S.C. § 409 prevents a court from receiving records of such evaluations into evidence.<sup>2</sup> Therefore, under this federal statute, the documents from which Crommelin obtained a large part of the data used in reaching his conclusions were inadmissible.

On that basis, the district court struck Crommelin's affidavit. However, the dis-

1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp.1989).

2. The legislative purpose of section 409 can be gleaned from H.Conf.Rep. No. 100-27, 104th Cong. 1st Sess. 172-173, reprinted in 1987 U.S. Code Cong. & Admin.News 66, 156-57.

strict court also ruled that, even if the affidavit were considered, the case should be dismissed on its merits. Faced with these alternative grounds for the same result, we choose on appeal in this case to rest our decision on the merits. We will thus take Crommelin's opinion at face value.

[1] Even if Crommelin's affidavit is considered, plaintiffs did not show that Union Pacific breached any duty of care in the collision at the Droubay Road crossing. Plaintiffs alleged negligence in the operation of the train by Kleinman and, through *respondeat superior*, by Union Pacific, as well as negligence by Union Pacific in employing an unfit train operator and in maintaining its right of way. Plaintiffs also sought punitive damages from Union Pacific for willful and reckless conduct. Plaintiffs introduced no evidence to show that the train was negligently operated, much less that the collision was willfully and recklessly caused, and no evidence to show that Kleinman was unfit to operate the train. Kleinman avers that he operated the train properly. Of course, Kleinman's testimony is biased, and there are no known witnesses surviving the crash other than Union Pacific employees. Nevertheless, lacking *any* evidence to the contrary, we conclude that plaintiffs failed to show negligence in operating the train or in entrusting its operation to Kleinman.<sup>3</sup>

[2] The only claim against Union Pacific on which evidence was introduced was the claim for negligent maintenance of the railroad right of way, which is supported, from plaintiffs' point of view, by Crommelin's affidavit. We therefore proceed to consider this claim.

[3] It is settled that a railroad has a tort duty to maintain its rights of way in a

condition safe to motorists who traverse them at established crossings.<sup>4</sup> However, there seems to be a lack of clarity about the standard of care required of the railroad in the observance of this duty, and this apparent lack of clarity has led to some criticism of the Utah standard of care as it was understood.<sup>5</sup> Since we must apply a standard of care in determining whether Union Pacific breached its duty, we attempt to state clearly the extent to which a railroad must make its right of way safe for motorists to cross.

[4] The confusion concerning the standard of care centers in the meaning of the words "more than ordinarily hazardous," which were used in applying the standard of care in two Utah cases, *Bridges v. Union Pacific R.R. Co.*, 26 Utah 2d 281, 488 P.2d 738 (1971), and *English v. Southern Pacific Co.*, 13 Utah 407, 45 P. 47 (1896). These words were never intended to impose a standard of care higher than ordinary care, the degree of care exercised by a reasonable person under the circumstances.<sup>6</sup> Thus, the railroad is required to take precautions to prevent injury to crossing motorists if a reasonable person in the railroad's position would take such precautions.<sup>7</sup>

[5, 6] In determining what is reasonable under the circumstances of a railroad crossing, it is obvious that every railroad crossing is hazardous, but, since it is not practicable to eliminate all railroad crossings, the simple existence of a railroad crossing is not in itself a breach of a duty of care. Much of everyday life presents hazards; driving or walking along a street are hazardous, and so are stairs, electricity, and many other things, but we tolerate those hazards because of the impracticability of eliminating them. In determining

3. See *Ron Case Roofing & Asphalt Paving Co. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989); *Creekview Apartments v. State Farm Ins. Co.*, 771 P.2d 693, 695 (Utah Ct.App.1989).

4. *Gleave v. Denver & Rio Grande W. R.R. Co.*, 749 P.2d 660, 662-64 (Utah Ct.App.1988).

5. *Wilde v. Denver & Rio Grande W.R.R. Co.*, No. C-83-149J, slip op. at 16, 1985 WL17370 (D.Ut. April 3, 1985).

6. *English*, 45 P. at 50.

7. See *Meese v. Brigham Young Univ.*, 639 P.2d 720 (Utah 1981); *Whitman v. W.T. Grant Co.*, 16 Utah 2d 81, 395 P.2d 918 (1964); *Restatement (Second) of Torts* § 283 (1965).

whether a mishap involving one of those hazards is tortious, the question is not whether a hazard existed, but rather whether, under prevailing community standards, the defendant should bear the responsibility to discover and ameliorate a hazard, in light of the practicability of doing so and the costs and benefits to society of requiring the defendant so to act.<sup>8</sup> In the case of railroad crossings, the cost of eliminating the hazard, such as by installing overpasses at all railroad crossings, including rural ones, does not warrant a duty of care so rigorous that simply having a railroad cross a street is tortious. Rather, for a railroad to be liable for a crossing mishap, there must be something about the railroad's right of way that creates a hazard to motorists greater than the hazard presented by the simple fact that the railroad and the street intersect.

[7] In determining what is reasonable to require of a railroad in its tort liability for crossings, it would thus be error to hold that the railroad right of way cannot cross a street. However, for such a crossing, the railroad is required to take every reasonable action to assure the safety of motorists who can reasonably be expected to cross the right of way. In determining what is reasonable under the circumstances of a specific case, the trier of fact must ultimately weigh the burden on the railroad, and indirectly on the public, of requiring added precautions, against the benefits that would be derived by the public at large from such precautions. For example, in the *Gleave* case,<sup>9</sup> wild vegetation on the right of way obscured oncoming trains from motorists at the crossing. The cost of removing or maintaining the vegetation was minimal compared to the enormous benefit to the public of being able to see an approaching train at a frequent crossing.

The imposition of a tort duty on the railroad to remove or maintain the vegetation was therefore clearly correct.

[8] In this case, there is nothing to indicate what could have made Union Pacific's right of way safer to motorists crossing on Droubay Road. The path of the train is clearly visible to oncoming motorists. Plaintiffs suggest that Union Pacific should have placed warning signs and devices on Droubay Road, including automatic gates blocking traffic on the Road from crossing the tracks when a train was approaching. It is not, however, the responsibility of the railroad to place signs and devices on the public road. The railroad must maintain its own right of way, but it is not under any duty to place signs or devices on the public road.

The design and maintenance of state roads and the control of traffic on state roads are UDOT's responsibilities and prerogatives.<sup>10</sup> At common law, this responsibility at railroad crossings was shared with the railroad.<sup>11</sup> Thus, in *English*, the railroad was found liable for failing to flag motorists on an intersecting city street. Since *English*, however, UDOT has been established, and the Legislature invested UDOT with "power to determine and prescribe the manner . . . of . . . protection of each crossing."<sup>12</sup> Although that responsibility in no way reduces the railroad's responsibility to maintain its right of way,<sup>13</sup> it would nevertheless, under ordinary circumstances, place the railroad in the role of meddler, trespasser, or usurper if the railroad were to put signs on the public road or forbid traffic on the public road from crossing its right of way. Union Pacific therefore had no duty to place signs or roadblocking devices on Droubay Road,

8. See *Erickson v. Walgreen Drug Co.*, 120 Utah 31, 232 P.2d 210, 31 A.L.R.2d 177 (1951); *Wagoner v. Waterslide, Inc.*, 744 P.2d 1012, 1013 (Utah App.1987).

9. *Gleave v. Denver & Rio Grande W. R.R. Co.*, 749 P.2d 660, 662-64 (Utah 1988).

10. Utah Code Ann. § 54-4-15.1 (1990).

11. Although we hold that the railroad does not have authority or responsibility to place signs or roadblocks on the public road, we note that the cost of protecting users of the public road continues to be shared with the railroad pursuant to Utah Code Ann. § 54-4-15.3 (1990).

12. Utah Code Ann. § 54-4-15(2) (1990).

13. *Gleave*, 749 P.2d at 664.

and it is not liable in tort for its failure to do so.

#### CLAIMS AGAINST UDOT

[9,10] Governmental immunity is UDOT's principal defense<sup>14</sup> against plaintiffs. Governmental immunity shields sovereign policy-making and discretion from state-law damage claims by generally precluding damage liability for performance of a governmental function, subject to certain statutorily enumerated waivers.<sup>15</sup>

Resolution of the governmental immunity question in this case is controlled by *Gleave*, which held that UDOT was governmentally immune in determining the precise method to be used in warning persons on a public road approaching a railroad crossing. We follow *Gleave*, and hold that UDOT is immune in this case. We add, however, a few comments to address the particular arguments of counsel in this case.

[11] Plaintiffs cite *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982) in an attempt to avoid governmental immunity. In *Bowen*, the Utah Supreme Court reversed a summary judgment in favor of Riverton in a tort action. *Bowen* asserted that a stop sign at a busy Riverton intersection was lying on the ground as Bowen and another vehicle collided in the intersection.

14. We logically do not reach the affirmative defense of governmental immunity without first determining or presuming that a plaintiff has established a prima facie case. See *Ferree v. State of Utah*, 784 P.2d 149 (Utah 1989). However, while UDOT's prima facie liability was perhaps implicitly presumed in the district court's reasoning, the district court did not expressly review plaintiffs' prima facie claim against UDOT. We are reluctant to delve into an issue on which the trial court has not expressly ruled, for the reasons explained in *Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 654 (Utah 1988). Therefore, we choose to rest our decision on governmental immunity and presume for purposes of argument (but do not hold) that the plaintiffs have stated a prima facie case of negligence by UDOT. See *Kirk v. State of Utah*, 784 P.2d 1255 (Utah App.1989).

15. See *Utah Code Ann.* § 63-30-10 (1989).

The scope of the governmental immunity issue in this case is limited. Plaintiffs have not sued any governmental personnel, and therefore, the

Bowen came after the pathbreaking *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980), but did not cite *Standiford* or refer to its test for "governmental function," the threshold of governmental immunity analysis. *Standiford* held that the test for determining governmental immunity is "whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." *Standiford*, 605 P.2d at 1236-37. Under this test, we examine the nature of the activity itself, not the identity of the person performing the activity. In this case, for example, the activity in question consists of designing and maintaining a road. It would make the analysis tautological to define the activity as designing and maintaining a *public* or *governmental* road.<sup>16</sup>

As Judge Jackson points out in his separate concurring opinion, the absence in *Bowen* of a reference to *Standiford* could simply be a result of the procedural posture of the *Bowen* case. Possibly the only issues before the court in *Bowen* were the elements of *Bowen's* prima facie case, and the court did not reach the issue of governmental immunity because it is a defense, rather than an element of the prima facie case. However, *Bowen's* emphasis on Riv-

immunity of officials is not in issue, nor have plaintiffs raised constitutional arguments such as those considered in *Condemann v. University Hospital*, 775 P.2d 348 (Utah 1989).

16. In adopting its test for governmental function, *Standiford* renounced the earlier governmental/proprietary distinction because of inconsistencies that had developed over the course of its application.

Like the *Standiford* test, the governmental/proprietary distinction was originally meant to restrict the application of governmental immunity. However, in time, the governmental/proprietary analysis degenerated from real thought of its meaning to simple categorization of the activity in question as involving a golf course, a park, a hospital, etc. To some extent, the same consequences can result from a facile categorization approach under the *Standiford* test. We therefore decline to make an entry in a laundry list of governmental functions *per se*, eliminating all thought in future cases of the basic test established in *Standiford*.

erton's duty to maintain streets becomes rather disingenuous lip service if Riverton had a viable defense of governmental immunity against all liability based on that duty. While procedurally it is important to observe the distinction between plaintiff's prima facie case and defendant's defenses, in a more basic sense, what is ultimately important is the scope of governmental responsibility, which, in a well-pleaded case, is a function both of prima facie liability and available defenses. It would also seem to be a waste of resources to reverse and remand *Bowen* for a trial on the negligence question if there was no way for *Bowen* to recover due to governmental immunity.

[12, 13] *Bowen's* emphasis on the government's duty in tort to assure safe streets is entirely consistent with *Standiford*, if we accept the premise that the decision whether to exert any control at all over intersecting traffic is not a governmental function giving rise to immunity from tort liability. In other words, the government may be held liable in tort to provide some effective warning or control for traffic at a city intersection. However, the duty to provide some effective warning or control must be distinguished from more than minimal maintenance and from enhancement of the means of providing warning and control. The case of *Richards v. Leavitt*, 716 P.2d 276 (Utah 1985) (per curiam) required compliance with the notice requirements of governmental immunity for a claim based on allegedly inadequate maintenance of a stop sign. From a comparison of *Bowen* and *Richards* and in light of *Gleave*, we conclude that as long as warning or control signage of a clear hazard is in existence and maintained enough to give it minimal effectiveness, the

government is not liable in tort for its failure to better maintain or to enhance the signage. If the signage has some cognizable effect in warning or controlling traffic at a clear hazard, its maintenance and improvement are governmental functions for which the government is immune from suit in Utah courts.

Highway maintenance and improvement are predominately<sup>17</sup> fiscal matters. Every highway could probably be made safer by further expenditures, but we will not hold UDOT (and implicitly, the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements. As we pointed out in *Gleave*, and as UDOT emphasizes here, there are hundreds of unelectrified railroad crossings in Utah, and it is not fiscally feasible to equip them all with the best possible means of assuring traffic safety. Rather, UDOT prioritizes the crossings in allocating the limited funds available for crossing improvements. The role of the judiciary in that prioritization and allocation process is strictly limited. In a case seeking judicial review of that administrative process, we would exercise our reviewing function with deference to the administrative agency under the "arbitrary and capricious" standard. However, in a tort action such as this, the deference to a governmental function is absolute unless waived, and we do not review it at all under tort principles.

In this case, we are not presented with a lack of any effective control of traffic, since there are three signs on Droubay Road where it approaches the railroad. The basis asserted here for recovery against UDOT is its failure to *better* warn

17. Not every governmental activity that affects the public fisc is a governmental function. Clearly nongovernmental functions, such as providing utility services or recreation, or serving process, may be financed in part by funds obtained through governmental revenue exactions, and liability incurred in performing those functions will be satisfied out of the public treasury. See *Schultz v. Conger*, 755 P.2d 165 (Utah 1988); *Dalton v. Salt Lake Suburban Sanitary Dist.*, 676 P.2d 399 (Utah 1984); *Thomas v. Clearfield City*, 642 P.2d 737 (Utah 1982); *Johnson v. Salt Lake City Corp.*, 629 P.2d 432 (Utah

1981). However, the sources of funds to conduct the activity or to pay an eventual judgment do not determine whether the activity in question is a governmental function. In this case, disregarding the fact that the funds for railroad crossings may derive in part from public sources, we are nevertheless left with an overridingly fiscal question: How much to spend on each railroad crossing that could be improved. We believe that the governmental budgeting and spending involved in deciding how to improve the safety of railroad crossings suffice to make that decision a governmental function.

and control traffic at the crossing. Since we have concluded that UDOT is immune for its failure to do more than minimal warning and control, we hold that plaintiffs cannot recover against UDOT or the State.

### CONCLUSION

We therefore hold in this case that, even considering the Crommelin affidavit and considering the evidence in the light most favorable to the plaintiffs, they failed to show any negligence by Union Pacific in the design and maintenance of its right of way. Union Pacific is not responsible for controlling traffic on state roads, and the state, having given at least some warning or control at this railroad crossing, is governmentally immune in deciding whether to improve the means of warning or control at the crossing because of the fiscal effects of such a decision.

Thus, these plaintiffs have not shown negligence by the railroad in the accident at this crossing, where the oncoming train was clearly visible from a lengthy distance on the road toward the crossing, and the train was not shown to have been negligently operated. Signs notified approaching drivers of the crossing, but UDOT is not liable for not having expended more funds in making more extensive safety improvements that might have prevented the accident. The net effect of this holding is that if the railroad's right of way does not negligently obscure an oncoming train, the train is properly operated, and if some visible warning sign age is present on the public road, then the plaintiff is not entitled to relief in tort for an injury at the crossing. We do not consider this outcome to be harsh or unjust, although any tragedy in which life is lost or impaired is regrettable, whatever the cause.

The dismissal of the plaintiffs' case is affirmed.

BENCH, J., concurs.

JACKSON, Judge (concurring):

Although I concur in the result reached by the majority and in most of its analysis, I write separately to disassociate myself

from the faulty analysis of the governmental immunity issue. Contrary to the majority's characterization, *supra* at 6, UDOT's general activity in this case does not consist of "designing and maintaining a road." It consists of the installation and improvement of traffic safety devices and signs at railroad crossings. As for the specific, purportedly negligent act by UDOT, plaintiffs in this case alleged that UDOT negligently failed to install a different, presumably safer, kind of traffic warning device at a railroad crossing. The same claims were raised by the plaintiff in *Gleave v. Denver & Rio Grande W.R.*, 749 P.2d 660 (Utah Ct.App.), *cert. denied*, 765 P.2d 1278 (1988). As the majority recognizes, the outcome in this case is controlled by *Gleave*, in which we held that (1) UDOT's general activity in evaluating, installing, maintaining, and improving safety signals or devices at railroad crossings is a governmental function within Utah Code Ann. § 63-30-3 (1986) under the test set forth in *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980); and (2) the specific act of UDOT which the plaintiff claimed was negligent, i.e., the failure to upgrade safety devices at a particular railroad crossing, arose out of the exercise of a discretionary function, under the test in *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49, 51 (Utah 1983), for which immunity had not been waived by Utah Code Ann. § 63-30-10(1)(a) (1986).

The majority appears unaware of the two-step analysis—used, for example, in *Gleave* and *Rocky Mt. Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1989)—that is necessary to resolve a governmental immunity claim in which the parties contest whether, even if the general activity is a governmental function, the allegedly negligent act arose out of the exercise of a "discretionary function" under section 63-30-10(1). If the general activity under consideration is not a governmental function within the meaning of section 63-30-3, then there is no immunity. If the general activity is a governmental function, then the *Little* test must be applied to determine if the specific, allegedly negligent act or omission is purely discretionary under sec-

tion 63-30-10(1)(a). If it is purely discretionary, then immunity has not been waived by section 63-30-10(1)(a). If it is not purely discretionary, then immunity has been waived by section 63-30-10(1).

The failure to appreciate the difference between these two distinct inquiries apparently underlies the majority's confusing attempt to harmonize the results in *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982) and *Richards v. Leavitt*, 716 P.2d 276 (Utah 1985) (per curiam) with *Standiford* and *Gleave*. Governmental immunity was not even an issue in *Bowen*, a case involving the allegedly negligent failure of the city to maintain a stop sign that had been knocked down, so it is not really surprising that no mention was made of *Standiford*. It is the substance of the issues actually raised and of the tacit assumptions made in *Bowen*, not the case's procedural posture, that is important. The summary judgment in favor of the city, which the supreme court reversed in *Bowen*, had been granted on the basis that the city was not negligent as a matter of law on the undisputed facts; the summary judgment was not granted on the basis of any immunity. The first unspoken assumption in *Bowen*, which was subsequently the express holding in *Leavitt*, 716 P.2d at 279, is that the maintenance and repair of traffic signs is a governmental function. *Leavitt*, which also involved a municipality's failure to maintain a traffic control device at a highway intersection, addressed another issue not raised in *Bowen*, i.e., whether immunity for the exercise of that governmental function had been statutorily waived. The court in *Bowen* tacitly assumed that it had, or the summary judgment in favor of the municipality could have been affirmed on the alternate ground of immunity. The *Leavitt* court concluded that the immunity provided to the city by section 63-30-3 for its activities in maintaining traffic control devices had been expressly waived by section 63-30-8 "for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon." Relying

on its prior decision in *Bigelow v. Ingersoll*, 618 P.2d 50 (Utah 1980), decided two years before *Bowen*, the *Leavitt* court reaffirmed that the express waiver of immunity in section 63-30-8 is not subject to the section 63-30-10(1)(a) discretionary function exception to the waiver of immunity. The court thus read section 63-30-8 as expressing the legislature's view that an act or omission in the exercise of a governmental function that created a "defective, unsafe, or dangerous condition" on a public way could *never* involve activity at the basic policy-making level for which immunity is preserved by section 63-30-10(1)(a).

Unlike the plaintiffs in *Leavitt* and *Bigelow*, however, but exactly like the injured plaintiff and appellant railroad in *Gleave*, 749 P.2d at 667 & n. 6, the plaintiffs in this case have never pleaded or contended that the discretionary function analysis under section 63-30-10(1)(a) is unnecessary and irrelevant because the decedents' injuries resulted from an unsafe or dangerous condition on a road within the purview of section 63-30-8. Instead, they asked the trial court and us to overrule one of the two aforementioned holdings in *Gleave* and conclude either that (1) UDOT's evaluation, installation, maintenance, and improvement of safety signals or devices at railroad crossings is *not* a governmental function within section 63-30-3; or (2) UDOT's failure to install upgraded safety devices at the subject railroad crossing did *not* arise out of a section 63-30-10(1)(a) discretionary function.

Since my colleagues and I have unanimously declined the invitation to abandon *Gleave*, it is unfortunate that the majority adds confusion to an already difficult area of law in its flawed analysis of *Leavitt* and *Bowen*, which should be disregarded as dicta.





NOV 20 1987

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH

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LEWIS DUNCAN, individually and	:	MEMORANDUM DECISION
as personal representative of	:	
the Estate of PATRICK DUNCAN,	:	CIVIL NO. 84-146
deceased, et al.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
UNION PACIFIC RAILROAD COMPANY,	:	
a corporation, et al.,	:	
	:	
Defendants.	:	

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The above-referenced matter came before the Court for oral argument on November 12, 1987. Counsel for the various parties appeared and argued their respective positions. Prior to the oral argument, the parties had submitted Memoranda of Points and Authorities, as well as Affidavits and other documentary evidence addressing the issues raised in the various Motions. Following oral argument, the Court ruled from the bench on portions of the defendant Union Pacific Railroad's (hereinafter "Railroad") Motion for Summary Judgment. The remainder of the Motions were taken under advisement for further consideration of the issues raised. The Court has since argument, again reviewed the Memoranda of Points and Authorities, and other materials submitted, and being fully advised, enters the following Memorandum Decision.

MOTIONS PREVIOUSLY GRANTED

As indicated above, the Court granted a portion of the Railroad's Motion for Summary Judgment. From the bench, at the conclusion of oral argument, the Court determined that there was no evidence to support the plaintiffs' claim that the Railroad operated the train in a negligent manner. To the contrary, the only evidence presented went to the proposition that the train was operated in a reasonable, safe and prudent manner. In addition, there was no evidence offered by the plaintiffs that suggested that their claim that the engineer, co-defendant Kleinman, was incompetent. The only evidence before the Court is again to the contrary, and establishes that the defendant Kleinman was a competent and qualified engineer. Therefore, the Railroad and Kleinman's Motions for Summary Judgment on those issues were granted. There was also a Motion to Strike a portion of the plaintiffs' Brief that contained inappropriate comments. The plaintiff did not object, and the Motion was granted, and the word "murdered" in plaintiffs' Brief was stricken pursuant to Rule 12(f) of the Utah Rules of Civil Procedure.

PRELIMINARY STATEMENT OF FACTS

This case arises out of an automobile/train collision that occurred on April 9, 1983, at approximately 8:50 p.m. The collision took place at the crossing of the defendant's railroad tracks, and Droubay Road in a rural portion of Tooele County.

The train was operated by defendant Kleinman; a deceased, Patrick Duncan, operated the automobile and, in addition to the operator, the automobile contained three passengers. All four occupants of the automobile were killed as a result of the collision. It was dark at the time of the collision, and the weather was not a factor. The automobile's and the train's lights were lit. The train had in operation a dual headlight, and a strobe light, both exceeding federally mandated standards. Droubay Road crosses the railroad tracks at an oblique angle of approximately 136° in the direction that the automobile was planning on crossing the tracks. Considering the direction of the automobile and the train, the train was therefore approaching the crossing to the right front of the automobile. The defendant engineer, Kleinman, observed the automobile approaching the crossing for some substantial distance before the crossing, and assumed that the automobile would stop prior to reaching the crossing. By the time the defendant Kleinman was able to observe that the automobile was not going to stop, it was not possible to stop the train, or take other evasive action before the impact occurred. The required whistle and bells on the train were operating for the prescribed distance prior to the crossing. Other than railroad personnel on the train, there were no eyewitnesses to the collision that survived. Based upon the material submitted, there is no obstruction to the observation of an approaching

train for an automobile driver approaching, as was the Duncan automobile in this case for some substantial distance before the crossing (investigating officer's tests).

Plaintiffs' counsel orally argued that the terrain approaching the crossing was not flat as suggested by the defendants, but offered no support for that conclusion. The photos, submitted to show the terrain, suggests the contrary, and there is no genuine issue of material fact that is disputed on that point. The signing on the road preceding the crossing consisted of a traditional railroad crossing sign at approximately 305 feet in advance of the crossing. Unrefuted tests offered by the defendants show that the sign was visible at night, using automobile low beams for a distance of three-quarters of a mile. The white crossing sign at the crossing itself was also visible at that distance. An automobile traveling with high beams would be able to observe the signs in question a mile distant from the crossing. The automobile and the train collided front-to-front at the crossing. There is a disputed issue of fact regarding the effect of marijuana use by the deceased driver Duncan. For the purposes of this Motion, the Court accepts the proposition that the plaintiffs assert, to wit: that marijuana ingestion by the plaintiff driver had no effect on his ability to operate the vehicle in any fashion, and that his judgment was not impaired. At the time of the accident there

were no flashing signals at the crossing, nor crossing arms prohibiting the passage of vehicle traffic onto the crossing.

RAILROAD'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs claim that the Railroad was negligent in not installing additional warning lights or other devices at the crossing. Plaintiffs claim that the Railroad has a duty to install such devices concurrently with the State of Utah, and more particularly the Utah Department of Transportation (hereinafter referred to as "State" or "UDOT"). The Railroad denies this duty, and claims that the determination of need and the decision to install signing and other warnings is the sole and exclusive responsibility of the State. With that proposition the Court agrees. Utah statutes place the responsibility clearly upon the State for making the determination of what type of signing and when it should be installed on railroad crossings. This conclusion is true, even in the face of the 1975 amendment to Section 54-4-15, Utah Code Ann., 1953 as amended. The courts that have interpreted Section 54-4-15, as amended, have held and this Court finds those holdings persuasive, that no duty exists in law for the Railroad to independently, or concurrently with the State, install or maintain crossing signs, lights, and other traffic control devices at railroad crossings. There being no duty to sign or place signals at railroad crossings on the part

of the Railroad, the remainder of the Railroad's Motion for Summary Judgment should be and is hereby granted.

STATE OF UTAH'S MOTION FOR SUMMARY JUDGMENT

In considering the State's Motion for Summary Judgment, it must be considered in two phases. First, it must be determined if the State is entitled to immunity in this case, because of the State's claim that crossing, signing and signals are discretionary, and therefore governmental immunity is not waived and applies, and secondly, even if such activity is a discretionary function, is the State still liable because of the plaintiffs' claim that the crossing is extra hazardous.

The process used by UDOT personnel in making their inspection of railroad crossings in this state to determine what type of signs and signals should be used is a process requiring both the use of objective and subjective factors and considerations. It must first be determined whether or not a particular crossing requires more than just advance signing. If it is so determined, then it must be determined to apply for whatever federal funding is available. The crossing must also be rated by UDOT personnel and given a position on a priority listing for crossings for which federal funding has been requested throughout the state. In reaching a priority evaluation, the inspection team evaluates the potential hazards of the crossing compared to all others in the state. This

procedure is fully described in the State's Brief and supporting documents. The process is far beyond the perfunctory decisions that government officials may make on a day-in and day-out basis, which are not entitled to protection as discretionary decisions. The process of evaluation involved here embodies the classic elements of a discretionary function, to wit: balancing various needs of differing railroad crossings throughout the state, weighing competing interests for available funding, balancing potential risk versus dollar and manpower available. The Court finds that the decision to add additional signs or signals to this crossing, and when to do it was a discretionary function for which the State has not waived immunity under Section 63-30-10(1)(a), Utah Code Ann., 1953 as amended. Having determined that the State is entitled to immunity under the exception of a discretionary function, the Court declines to address the other two grounds for immunity asserted by the State.

The plaintiff also claims that even if a decision to install signs and signals is discretionary, the exemption does not apply, because the crossing is extra hazardous. While the Court is not necessarily convinced that the plaintiffs' proposition is a correct statement of the law, the Court is satisfied as a matter of law that the crossing in question does not fall into the category of extra hazardous. This conclusion is reached for two reasons. First, the plaintiffs' expert Affidavit upon which the

plaintiffs rely to establish their claim of an extra hazardous crossing is based upon inadmissible evidence and a flawed foundation. Secondly, and more important, the evidence presented clearly shows that this crossing does not fall into the type of crossing contemplated by the Supreme Court in defining extra hazardous crossings.

Plaintiffs have filed the Affidavit of Robert Crommelin in which Mr. Crommelin opines that based, at least in substantial part, on the inspection and surveillance reports of the State officials at UDOT, that the crossing is extra hazardous. That opinion is without foundation or basis when the report relied upon is removed from consideration, as it must be in this case. 23 U.S.C. 409 prohibits any court, state or federal, from receiving into evidence reports and other information such as UDOT surveillance reports. The policy reasons behind Congress's action is clear. It is to encourage the full and free exchange of information, and to encourage candid reports, conclusions and evaluations by governmental officials conducting inspections at railroad crossings and the like. Were the reports and other information admissible, inspection teams would be chilled in making accurate reports so as to insure that they were not hindsighted at a later time in liability actions by statements and evaluations contained in those reports. Plaintiffs' expert's conclusions are also based upon misinformation. Mr. Crommelin relies upon a "projected" traffic density of 1,500 vehicles per



day, when in actuality the density was at most 580 vehicles per day. The statement that the placement of the advance warning sign violated federal standards for distance is also misplaced. The federal statute does not mandate a specific distance, it provides a suggested distance. In any event, the placement of the sign could have no proximate effect upon the accident in any event. The driver either failed to see the sign, or ignored the sign, and it makes little difference if an operator does not see, or ignores a sign 305 feet from a railroad crossing, as opposed to not seeing or ignoring a sign that is 750 feet from a railroad crossing. A careful review of the Crommelin claim of "similar accidents" at the crossing further shows that his use of that basis for determining that this crossing is ultra hazardous is in error. The three prior accidents upon which he relies are not similar to the action in question at all. One involved a collision with a train where visibility was poor in a snowstorm. The others involved automobiles coming from the opposite direction, which substantially changes the angle at which the train approaches the intersection, as compared to the oncoming approaching car, and are otherwise substantially dissimilar. These differences were pointed out in defendant Railroad's Memoranda, dated May 26, 1987, and the Court has received no addition to Mr. Crommelin's Affidavit to suggest that his conclusions are or can be based upon proper foundations.

Considered as a whole, the opinion of Mr. Crommelin, because of the loss of its underpinnings, cannot be considered as raising a substantial or genuine material issue of fact on the issue of the crossing being extra hazardous or not.

More important than the lack of plaintiff raising a genuine issue of fact on the nature of the crossing by way of Mr. Crommelin's Affidavit, is the Court's evaluation through the photos and other documents submitted of the crossing itself. This crossing as a matter of law does not meet the Supreme Court test as outlined in Bridges v. Union Pacific Railroad Co., 488 P.2d 378 (Utah 1971). As noted by the Supreme Court in the Bridges case, there must be something unusual about the crossing. The photos and investigating officer's tests and observations all show that the surrounding land in the area of the automobile's approach is reasonably flat. It is flat, at least to the extent that the approaching train can be readily seen and observed by the driver of an approaching automobile. There are no buildings or other structures in the area to divert a driver's attention, or to otherwise confuse. There are no other lights or unusual noises to confuse or deceive an otherwise unsuspecting driver. In sum, there is nothing about this crossing that could provide notice to UDOT personnel that the warnings which were there at the time of the accident were not adequate to warn the public. While any railroad crossing can be hazardous, it is hard to

imagine a crossing that presents a smaller hazard than the one in question before the Court. The Court therefore determines that reasonably minds could not differ on whether or not this crossing is extra hazardous, and concludes as a matter of law that the crossing is not extra hazardous.

Based upon the foregoing, the State's Motion for Summary Judgment is equally well-taken as that of the Railroad, and should therefore be, and the same is hereby granted.

Counsel for the Railroad and Kleinman are requested to prepare an appropriate Order in accordance with this Memorandum Decision granting their Motion for Summary Judgment, and counsel for the State is likewise requested to prepare an Order granting the State's Motion for Summary Judgment in accordance with this Memorandum Decision, and submit the same to the Court for review and signature in accordance with the Local Rules of Practice.

Dated this 17 day of November, 1987.

LS/ J.R.H.  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE

MAILING CERTIFICATE


I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 18 day of November, 1987:

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236 State Capitol  
Salt Lake City, Utah 84114



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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

NANCY ARMIJO, as personal representative  
of the Estate of LUZ ARMIJO, deceased,

90 NOV 16 PM 3:47

Plaintiff,

vs.

No. CIV 89-293 SC

THE ATCHISON, TOPEKA & SANTA FE  
RAILWAY, COMPANY, a Delaware  
Corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

ENTERED ON DOCKET  
11-16-90

This matter is before the Court on:

1. Defendant's Motion for Partial Summary Judgment,
  2. Plaintiff's Motion in Limine Regarding Seat Belt Defense,
- and
3. Defendant's Motion to Exclude Conclusory Testimony of Plaintiff's Expert that Crossing was Extrahazardous.

The Court, having read the memoranda submitted by the parties, having examined the exhibits attached thereto and being apprised of the applicable law, reaches the following decisions for the reasons set forth below.

This is an action for wrongful death. On October 23, 1987, the Defendant operated a railroad train on its railway line through the North Gabaldon crossing in Belen, New Mexico, where a collision occurred between the train and a motor vehicle driven by Luz Armijo, the Plaintiff's Decedent. Plaintiff claims the death of Luz Armijo was the proximate result of the Defendant's negligent failure to provide adequate warnings at the crossing and

Defendant's negligent operation of its train. Defendant claims that Armijo's death was the proximate result of his own negligence and that it was not negligent in any manner in operating the train on the night of the accident. Defendant further claims that any state common law theory of negligence based on Defendant's duty to install warning devices at railroad crossings has been preempted by federal laws and regulations. This last contention is the subject of Defendant's motion for partial summary judgment which the Court will address first.

#### **I. Defendant's Motion for Partial Summary Judgment**

Defendant moves the Court for an order granting it partial summary judgment with respect to the Plaintiff's claims that Defendant had a duty to install additional warning devices at the railroad crossing at issue in this case. As grounds therefore, Defendant states that any state common law theory of negligence on the part of Defendant with regard to the installation of warning devices at railroad crossings has been preempted by federal laws and regulations. Plaintiff makes numerous arguments against preemption.

The following facts were submitted by Defendant in its Motion for Partial Summary Judgment as undisputed material facts. According to 56.1b. of the Rules of the United States District Court for the District of New Mexico, all material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted. Plaintiff in her Response Brief did not dispute any of Defendant's undisputed material facts.

Therefore, the Court will consider admitted the following material facts.

In 1970, the United States Congress enacted the Federal Rail Safety Act (FRSA) which expressly preempted state law as to the subject matter of any order, standard, or regulation relating to railroad safety issued by the Secretary of Transportation. 45 U.S.C. §§ 421-444. A specific section of the FRSA was devoted to railroad-highway grade crossing safety and required the Secretary of Transportation to report to Congress on procedures to be employed to develop safer grade crossings. 45 U.S.C. §433(a). In 1973, after the Secretary of Transportation filed his report with Congress, Congress amended the Federal Highway Safety Act to require the states to "conduct and systematically maintain" a list of railroad crossings requiring improved protective or warning devices. 23 U.S.C. §130(d). In addition, the states were required to "implement a schedule" for the construction and installation of improved railroad crossing protective devices. *Id.*

In 1983, pursuant to regulations promulgated by the Secretary of Transportation, the Federal Highway Administration adopted and approved the Manual on Uniform Traffic Control Devices (MUTCD) as the national standard for all traffic control devices. 23 C.F.R. § 655.603 (1990). Consistent with federal regulations, New Mexico adopted the MUTCD as the standard for traffic control devices in New Mexico. N.M.Stat.Ann. §66-7-101 (Repl. 1987). The MUTCD provides that "the determination of need and selection of devices at a grade crossing is made by the public agency with

jurisdictional authority." MUTCD, Part VIII at 8A-1. Furthermore, in 1975, the Secretary promulgated regulations mandating that "state laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects." 23 C.F.R. §646.210(a) (1990). The Secretary of Transportation determined that "projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required share of the costs." 23 C.F.R. §646.210(b)(1) (1990).

Pursuant to the provisions of the Highway Safety Act, in 1984 the State of New Mexico obtained a list of all railroad-highway grade crossings in the State, prepared by the federal Department of Transportation with input from the American Association of Railroads (hereinafter the DOT-AAR inventory), which listed all public railroad crossings in New Mexico based on the likelihood of an accident occurring at a particular crossing during a given year. Cisneros Deposition, p. 10.<sup>1</sup> In 1984, the North Gabaldon Road crossing was number 197 on the DOT-AAR inventory containing a total number of 900 public railroad-highway crossings located in New Mexico. Cisneros Deposition, Ex. 1. Having obtained the DOT-AAR inventory, the New Mexico State Highway Department (through the Railroad & Utilities Section), with federal assistance, prioritized and ranked the railroad crossings for warning device upgrading based on a number of factors calculated by the State. Cisneros

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<sup>1</sup> Lester Cisneros is the section head of the Railroad & Utilities Section of the New Mexico State Highway and Transportation Department.



Deposition, pp. 9, 10, 30. In July, 1984, the Railroads & Utilities Section completed its statewide study of the 900 railroad crossings listed in the DOT-AAR inventory. Cisneros Deposition, Ex. 2, p. 25. Also, in July, 1984, the Railroad & Utilities Section narrowed the DOT-AAR Inventory to a list of 22 (later amended to 27) projects that the Section concluded should be considered for Federal-Aid Safety Funding. *Id.* at 26-30. On July 27, 1984, the Railroad & Utilities Section diagnostic team submitted its list of the 22 projects to be submitted for approval by the Federal Highway Administration for federal railroad safety project funding. *Id.* at 25. The July, 1984 evaluation prepared by the Railroad & Utilities Section ranked the North Gabaldon Road crossing with a priority number of 14 and included the crossing in its 5 year plan. *Id.* at 27-30. This report included the specific evaluation that the type of warning device to be installed at the North Gabaldon Road railroad crossing was "flashers and gates." *Id.* at 29.

When the Railroad & Utilities Section determines that a particular railroad crossing is, by virtue of its ranking, the next to have its warning devices upgraded, it first informs the Federal Highway Administration and then informs the railroad (through a railroad representative on the diagnostic team) of that determination and requests a preliminary engineering report and construction cost estimate for installing the additional warning

signals. Cisneros Deposition, p. 30; San Miguel Affidavit, ¶6.<sup>2</sup> Requests for an engineering report are made by the Railroad & Utilities Section to the railroad-employee member of the diagnostic team to provide engineering advice in terms of railroad operations as to the installation of additional warning devices at particular railroad crossings. Cisneros Deposition, p. 30; San Miguel Affidavit, ¶¶5, 6; 23 C.F.R. §646.204(g) (1990); 23 C.F.R. §646.216(b)(i) (1990). As of October 23, 1987 (the date of the accident) the State of New Mexico had not requested a preliminary engineering report concerning upgrading the warning devices at the North Gabaldon Road crossing. San Miguel Affidavit, ¶6.

The State of New Mexico receives federal funding to upgrade warning devices at railroad crossings and presently upgrades about ten railroad crossings per year. Cisneros Deposition, p. 10. As of September 30, 1987, the Railroad & Utilities Section had completed seven of the 22 projects listed on the July, 1984 evaluation. Cisneros Deposition, Ex. 2, p. 20. One factor considered by the Railroad & Utilities Section in ranking and prioritizing railroad crossings for the upgrading of warning devices is whether previous collisions have occurred at a particular crossing. Cisneros Deposition, p. 13. Prior to October, 1987, there were no accidents at the North Gabaldon Road crossing. Cisneros Deposition, Ex. 1. In November 1987, following the accident, Mr. San Miguel was contacted by the State Railroad

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<sup>2</sup> Rudy San Miguel is an AT&SF employee and was a member of the State diagnostic team in 1987.

& Utilities Section. San Miguel Affidavit, ¶6. The Section requested that Defendant perform the preliminary engineering and prepare a construction cost estimate for upgrading the warning devices at the North Gabaldon Road crossing. Id.

A motion for summary judgment properly may be granted only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Houston v. National General Insurance Co.*, 317 F.2d 83 (10th Cir. 1987). Here, there appear to be no disputed facts. The issue before the Court is strictly a legal question. The issue is whether Plaintiff's claims that Defendant was negligent in failing to install additional warning devices at the North Gabaldon Road crossing are preempted by federal law.

State law is preempted under the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, in three circumstances. *English v. General Electric Company*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). "First, Congress can define explicitly the extent to which its enactments pre-empt state law." Id. This is the situation presently before the Court.<sup>3</sup> Congress included in the FRSA a broad preemption provision excluding the states from legislating in any area of railroad safety already covered by

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<sup>3</sup> The other two circumstances where state law is preempted are: 1) where state law is in a field that Congress intended the federal government occupy exclusively and 2) where a state law actually conflicts with a federal law. *English, supra*.

regulations adopted by the Secretary. **CSX Transportation, Inc. v. Public Utilities Commission of Ohio**, 701 F.Supp. 608, 609 (S.D. Ohio 1988), **aff'd**, 901 F.2d 497 (6th Cir. 1990). Section 434 reads:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. 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. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety 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 (emphasis added).

The scope of preemption under the FRSA has been broadly construed by the courts. **CSX Transportation** at 612-613 citing numerous cases. Section 434 expressly declares that a primary objective of the Act is the establishment of a nationally uniform system of regulation in the rail safety field. Thus, state adopted regulations, with the exception of those designated to eliminate an essentially local safety hazard, are permitted to continue in force only until such time as a federal regulation covering the same subject matter is promulgated. **National Association of Regulatory Utility Commissioners v. Coleman**, 542 F.2d 11, 13 (3rd Cir. 1976). The FRSA does not merely preempt those state laws which impair or are inconsistent with federal regulations. **Burlington Northern Railroad Company v. State of Montana**, 880 F.2d 1104, 1106 (9th Cir. 1989). It preempts all state regulations

aimed at the same safety concerns addressed by federal regulations.  
Id.

Therefore, if the Secretary acts with regard to the same subject matter as a state law, rule, regulation, order, or standard, unless the state law addresses an essentially local safety hazard, the state law is preempted. Several courts have dealt with the issue of whether federal regulations promulgated by the Secretary (as set forth in the undisputed material facts) have preempted state laws in the area of improvements at railroad-highway crossings. For example, the Federal District Court for the District of Kansas stated:

[I]n the 1970's, Congress, recognizing a need for uniform safety standards, enacted the Railroad Safety Act which imposed nationwide standards, reserving authority to the states for further regulation only under special circumstances. In conjunction with the national regulation of railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads and increased funding to the federal aid program.

**Sisk v. National Railroad Passenger Corp.**, 647 F.Supp. 861, 863 (D.Kan. 1986).

This Court is in agreement with those courts that have found that the federal regulations in this area have preempted state law. It is this Court's conclusion, that the Secretary has acted with regard to the installation of warning devices at railroad-highway crossings. The Secretary acted in this area with the promulgation of the procedures outlined in 23 C.F.R. §646.200 et seq. and with the adoption of the MUTCD as the national standard. The MUTCD specifically states that "the determination of need and selection

of devices at a grade crossing is made by the public agency with jurisdictional authority." MUTCD, Part VIII at 8A-1. "Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein." *Id.* By adopting this standard, the Secretary has effectively preempted any state law covering the same subject matter. The New Mexico law cited to this Court by Plaintiff predates the Secretary's action and addresses precisely the subject matter addressed by the MUTCD, that is, what entity is responsible for determining the need and selection of devices at railroad-highway crossings. As stated previously, the FRSA preempts all state regulations aimed at the same safety concerns addressed by the Secretary's regulations. *Burlington Northern Railroad Company v. State of Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989). Therefore, the Court finds that any New Mexico state common law or statutory law placing the duty of determining the need for and the selection of appropriate warning devices at railroad-highway crossings on the railroad is preempted by federal law. Federal law delegates to the public agency having jurisdictional authority, and not to the railroad, the responsibility and the authority for determining the need for and the selection of appropriate railroad-highway grade crossing signals.

While this Court believes that state law was preempted when the Secretary passed regulations dealing with the subject matter of warning devices at railroad-highway grade crossings as discussed above, the Court alternatively finds, that at the very least, under

the rationale of *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) the present negligence claim was entirely preempted as of July, 1984. Only two federal appellate courts have considered the question of whether federal grade crossing regulations preempt state law claims against railroads predicated upon negligence in selecting or providing additional warning devices. The Ninth Circuit in *Marshall* held that preemption occurs when the state authorities approve the level of protection at a crossing, whereas the Eighth Circuit in *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68, 76 (8th Cir. 1989) ruled there was no preemption. The Ninth Circuit in *Marshall* stated:

The Secretary, through the Federal Highway Administration, prescribed procedures to obtain uniformity in highway traffic control devices and adopted the Manual on Uniform Traffic Control Devices on Streets and Highways, see 23 C.F.R. §655.601 (1981), which also was adopted by Montana, see Mont.Code Ann. §61-8-202 (1981). The manual prescribes that the selection of devices at grade crossings and the approval for federal funds is to be made by local agencies with jurisdiction over the crossing. Thus, the Secretary has delegated federal authority to regulate grade crossings to local agencies.

*Marshall* at 1154.

The *Marshall* Court found that the FRSA preempts a state negligence claim when the responsible state agency has made a determination regarding the type of warning device to be installed at a crossing. *Id.* Therefore, the *Marshall* Court held that until a federal decision is reached through the local agency on the adequacy of the warning device at a particular crossing, the railroad's duty under applicable state law is not preempted. *Id.* If this Court follows the reasoning of the Ninth Circuit, the

federal decision in this case was made in 1984 when the State of New Mexico Railroad & Utilities Section made the determination, under the MUTCD, as to the type of warning devices to be installed at the North Gabaldon Road crossing. So, at the very least, under the Marshall rationale, the present negligence claim was entirely preempted as of July, 1984.<sup>4</sup>

Thus, the Court finds that the Secretary has acted in this case and state law is preempted. However, §434 of the FRSA has a savings clause under which states are permitted to adopt regulations to eliminate essentially local safety hazards, even if the Secretary has acted in a particular area of railroad safety. This section reads:

A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate

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<sup>4</sup> The Court does not find the Eighth Circuit's decision in *Karl* to be persuasive. The *Karl* Court did not discuss the express preemption provision in 45 U.S.C. §434. Rather, it focused on generally how state laws may be preempted if they actually conflict with an express or implied federal declaration, or if the state law is in a field that is so pervasively controlled by federal law that no room is left for state rulemaking. *Karl* at 76. The *Karl* Court found that neither circumstance was present in that case. *Id.* However, the *Karl* decision ignores the first circumstance (as discussed by the Supreme Court in *English*, *supra*) where state law is preempted, namely, when Congress defines explicitly the extent to which its enactment preempts state law. As explained in the body of this opinion, Congress explicitly defined the extent to which its enactment would preempt state law in §434 of the FRSA. In light of the express provision in §434, there is no need to determine whether state law in this case actually conflicts with the federal law or whether state law is preempted because it is in a field that Congress intended the federal government to occupy exclusively. The Court notes, however, that state law placing the duty to determine the need for and selection of warning devices at railroad-highway crossings on the railroad is in direct conflict with the MUTCD which places this duty on the public agency with jurisdictional authority.



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.

45 U.S.C. §434.

Plaintiff argues that the North Gabaldon Road crossing in question is an "essentially local safety hazard." The Court does not agree. This savings clause was designed to enable states to respond to local situations which are not statewide in character and not capable of being adequately encompassed within uniform national standards. *National Association of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976). The exception in §434 was not intended "to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter." H.R. Rep. No. 91-1194, reprinted in 1970 U.S. Code Cong. & Admin. News, 4104, 4116-4117. Plaintiff is asking this Court to find that the statewide common law duty of railroads to maintain a good and sufficient crossing falls within the local safety hazard exception of §434. However, based on the legislative history of §434, it is clear to the Court that statewide laws, such as the tort duty advanced by Plaintiff in this case, would not constitute a law relating to a "local safety hazard." Plaintiff is attempting to do exactly what the House Report specifically states that there is no intent to permit, namely, establishing a statewide standard (a statewide common law duty) "superimposed on national standards covering the same subject matter." The Court finds that the statewide system of tort law imposing a duty on a railroad to determine the need for, select and

install warning devices at railroad-highway crossings does not constitute a law relating to a "local safety hazard."

The Plaintiff next argues that if the Court finds that the Defendant's common law duty has been preempted, the preemptive effect of the federal acts is unconstitutional. Plaintiff argues the federal acts provide no right of redress to persons, such as Plaintiff, who are the victims of the negligence of railroads. She states this blanket eradication of the right of redress is violative of the equal protection and due process clauses of the Constitutions of the United States and New Mexico. Plaintiff states that if it is the sole responsibility of the New Mexico State Highway Department to erect appropriate warning devices at railroad crossings, then the sole remedy against the State falls under the New Mexico Tort Claims Act. The Plaintiff further argues that it is unlikely that there is any remedy to be had against the State because there is no waiver of sovereign immunity in this situation. Finally, the Plaintiff argues the application of the preemption doctrine in this case would effectively deprive this Plaintiff of any remedy because of the expiration of the statute of limitations against both the federal and state governments for negligent acts.

The Court agrees with Defendant's response to Plaintiff's arguments. Plaintiff has not been denied access to the courts or a right of recovery. First, the issue of whether Defendant negligently operated the train remains in this case regardless of the Court's finding on the preemption issue. Second, the New

Mexico Tort Claims Act does not explicitly retain sovereign immunity for claims in the nature of those being made in the present case. The Act does not specifically address a claim for liability based on the state's negligence in failing to properly prioritize the installation of additional warning devices at railroad-highway crossings. From the Court's cursory look at this issue, it appears that the State of New Mexico would probably not enjoy sovereign immunity for these claims.<sup>5</sup> Finally, the fact that the statute of limitations for a claim against the state or the responsible agency may have passed is not sufficient reason to hold preemption unconstitutional.

Finally, the Plaintiff argues that since this is a matter of first impression in the Tenth Circuit, judicial economy dictates denial of the motion. The Court does not agree with Plaintiff's contention. Judicial economy dictates that if the motion is proper, that is, if it meets the requirements of Rule 56, that it be granted. As the Defendant states, Rule 56 contemplates motions such as the present one as a means of streamlining trials.

Therefore, for the above reasons, Defendant's Motion for Partial Summary Judgment with respect to the Plaintiff's claims

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<sup>5</sup> Two cases are cited in the New Mexico Statutes Annotated that would seem to support a waiver of sovereign immunity in this particular situation. First, in *Blackburn v. State*, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982) the Court held where the Plaintiff's allegations, in large part, concern the placement of signals and signs, the State of New Mexico does not enjoy immunity for such decisions. Second, in *Grano v. Roadrunner Trucking, Inc.*, 99 N.M. 227, 656 P.2d 890 (Ct. App. 1982), cert. denied, 99 N.M. 358, 658 P.2d 433 (1983) the Court held that the absence of traffic controls is a condition of a highway and is, therefore, the subject of maintenance, and the state is not immune from liability.

that Defendant had a duty to install additional warning devices at the railroad-highway crossing at issue in this case will be granted.

## **II. Plaintiff's Motion in Limine Regarding Seat Belt Defense**

The Plaintiff requests that the Court exclude any evidence, argument, or inference to be adduced by the Defendant as to the alleged failure by the Plaintiff's Decedent to use a seat belt, and the consequences flowing therefrom. Defendant argues that N.M.Stat. Ann. §66-7-373B. (Supp. 1990) does not prohibit the jury from apportioning fault and damages as a consequence of Armijo's failure to use a seat belt and if it does, then the statute is unconstitutional as a violation of the separation of powers doctrine and the equal protection requirements of the United States and New Mexico Constitutions.

New Mexico law is clear on this issue. Section 66-7-373B. (Supp. 1990) states:

Failure to be secured by a child passenger restraint device or by a safety belt as required by the Safety Belt Use Act [66-7-370 to 66-7-373 NMSA 1978] shall not in any instance constitute fault or negligence and shall not limit or apportion damages (emphasis added).

The words of the statute clearly and unambiguously prohibit consideration of the violation of the Act as constituting negligence or negligence ~~per se~~, as well as using evidence of the failure to wear a seat belt to limit or apportion damages.

The Legislature was fully aware of the "seat belt defense" when it enacted this statute. The New Mexico Supreme Court had just recently overruled the "seat belt defense" created by the

Court of Appeals in *Thomas v. Henson*, 102 N.M. 417, 696 P.2d 1010 (Ct. App. 1984), *aff'd in part and rev'd in part*, 102 N.M. 326, 327, 695 P.2d 476 (1985), saying, "we believe that the creation of a 'seat belt defense' is a matter for the Legislature, not for the judiciary." This decision was handed down during the 37th Legislature which is the legislature that passed the "Safety Belt Use Act." Furthermore, an earlier draft of §66-7-373B. provided for admissibility of this type of evidence,<sup>6</sup> however, the bill which was enacted did not. Therefore, it is clear that the legislature made a conscious choice to preclude evidence of the failure to wear a seat belt to limit or apportion damages. The legislature undoubtedly concluded that seat belt use was desirable, and that although the enactment of a law providing for small fines would encourage people to wear seat belts, an injured plaintiff should nevertheless not be denied recovery when involved in a collision with a negligent tortfeasor.

In addition, the Court finds that Defendant's constitutional challenges to this statute are without merit. First, the Court

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<sup>6</sup> The earlier draft of §66-7-373B. which was rejected for the present provision states:

B. Evidence of a violation of Subsection A of Section 3 of the Safety Belt Use Act shall be admissible concerning mitigation of damages, apportionment of damages or comparative fault, with respect to any person who is involved in an accident while violating Subsection A of Section 3 of the Safety Belt Use Act and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. Such evidence may also be admissible on other issues as determined by the court.

notes that legislative acts are presumptively valid and will not be declared invalid unless the court is clearly satisfied that the legislature went outside the constitution in enacting them. **Richardson v. Carnegie Library Restaurant, Inc.**, 107 N.M. 688, 693, 763 P.2d 1153 (1988).

With regard to Defendant's separation of powers argument, the Court finds that §66-7-373B. is not, as the Defendant contends, a legislative enactment of a rule of evidence, but rather is the enactment of a substantive state policy. It is true as Defendant states that the New Mexico Constitution reposes the inherent power to regulate all pleading, practice and procedure affecting the judicial branch exclusively in the Supreme Court. **Miller & Associates, Ltd. v. Rainwater**, 102 N.M. 170, 171-172, 692 P.2d 1319 (1985). However, it is also true that the Courts should not invalidate substantive policy choices made by the legislature under the constitutional exercise of its police powers. **Southwest Community Health Services v. Smith**, 107 N.M. 196, 199, 755 P.2d 40 (1988). The Court finds it is clearly within the power of the legislature to determine whether or not to impose as a matter of State policy an obligation on its citizens to wear a seat belt and to establish the sanctions for non-conformity with that obligation.

The Court also finds that this statute does not violate the equal protection provisions of the United States and New Mexico Constitutions. Defendant argues that this statute creates a class of defendants who have the random misfortune of allegedly injuring a plaintiff who fails to exercise ordinary care by not wearing a

seat belt where in virtually any other instance of a plaintiff's failure to use ordinary care which leads to or contributes to the plaintiff's injury, evidence of the plaintiff's breach of duty would be considered by the jury in apportioning fault and damages. Defendant argues this classification works an injustice against included defendants by making them pay for damages caused entirely by the plaintiff's failure to exercise due care for his safety by failing to use an available seat belt. The problem with this argument is that a common law duty to wear a seat belt did not exist prior to the enactment of this statute and with the enactment of this statute the legislature specifically declined to make failure to wear a seat belt the basis for negligence or fault. Therefore, the statute does not affect the substantive rights of defendants or plaintiffs. In New Mexico, there never was a "seat belt defense" and there still is not a "seat belt defense."

Alternatively, even if this statute can be construed as creating statutory classifications, the Court finds that the equal protection test to be applied in this situation is the rational basis test because this legislation concerns social and economic issues and does not infringe on substantial or important rights nor involve sensitive classes.<sup>7</sup> Richardson at 697-698. Applying the rational basis test to this legislation, the Court finds that

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<sup>7</sup> Thus far, the only classifications afforded heightened scrutiny under the federal constitution are those based on gender or illegitimacy. The New Mexico Courts have also subjected legislatively created "damage caps" to intermediate scrutiny. *Trujillo v. City of Albuquerque*, N.M.Bar.Bull, Vol. 29, No. 43, p. 917 (1990).

§66-7-373B. is rationally related to a valid legislative purpose, namely, encouragement of seat belt use through a fine system, while preserving the right to compensation for injuries caused by negligent tortfeasors.

Therefore, for the above reasons, the Court will grant Plaintiff's Motion in Limine regarding the seat belt defense. Any evidence regarding Plaintiff's Decedent's failure to use a seat belt and the consequences thereof, will be excluded.

### **III. Defendant's Motion to Exclude Conclusory Testimony of Plaintiff's Expert that Crossing was Extrahazardous**

Defendant requests that Plaintiff's expert, Dr. Baerwald not be allowed to offer any testimony which reflects his conclusion that the characteristics of the crossing were such that the railroad was required, as a matter of law, to install additional signals. Because this Court granted Defendant's Motion for Partial Summary Judgment, Defendant's above request is moot. This Court has found, as a matter of law, that any prior state basis for Plaintiff's claims that Defendant was negligent in failing to provide additional warning devices at the North Gabaldon Road crossing have been preempted by federal law. Thus, the motion will be denied as moot, however, due to the disposition of the partial summary judgment motion, Dr. Baerwald will not be allowed to testify that the railroad, as a matter of law, was required to install additional signals.

Therefore,

**IT IS THE ORDER OF THE COURT** that Defendant's Motion for Partial Summary Judgment should be, and hereby is, GRANTED.

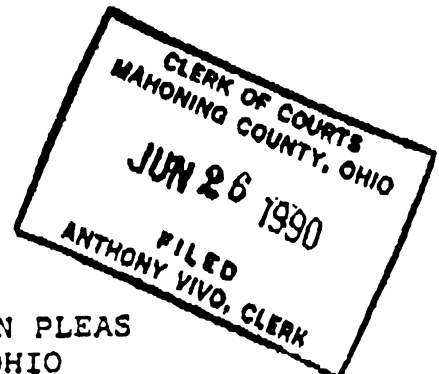


IT IS FURTHER ORDERED that Plaintiff's Motion in Limine Regarding Seat Belt Defense should be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Exclude Conclusory Testimony of Plaintiff's Expert that Crossing was Extrahazardous should be, and hereby is, DENIED as moot.

  
UNITED STATES DISTRICT JUDGE

PEH:jes  
88-10-1  
6/19/90



IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

GERALD CARPENTER, et al.,

Case No. 88-CV-1797

Plaintiffs,

Judge Jenkins

vs.

CONRAIL,

JUDGMENT ENTRY

Defendant.


This matter came on for hearing to the court upon a motion for summary judgment filed by defendant, Conrail, pursuant to Civ. R. 56, and upon the pleadings, the affidavits filed by the parties in support of and opposing the motion, and the briefs of the parties.

Upon due consideration of all the material submitted, the court finds as a matter of law that under the Federal Railroad Safety Act of 1970 (45 U.S.C. 421, et seq.) and the Federal Highway Safety Act of 1970 (23 U.S.C. 401, et seq.) and the federal laws, rules, regulations, orders and standards enacted pursuant thereto, that federal law delegates to the public agency having jurisdictional authority, and not to the railroad, the responsibility and the authority for determining the need for and the selection of appropriate railroad-highway grade

reference to determination of the need for and the selection of traffic control devices that are installed at railroad-highway crossings.

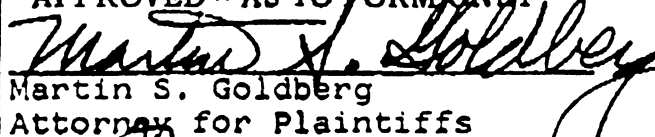
Since plaintiffs' claims are premised upon the railroad's alleged duty "to provide crossing gates and flashing signals to warn drivers" approaching the crossing, which the court finds is a duty delegated by federal law to the public agency having jurisdictional authority, the court finds that there is no genuine issue as to any material fact and defendant is entitled to judgment.

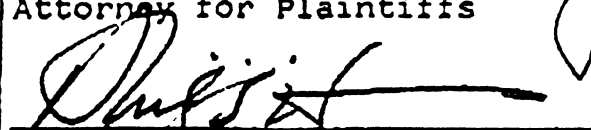
It is therefore ORDERED, ADJUDGED and DECREED that the defendant shall be and hereby is granted judgment as a matter of law.

  
Elwyn V. Jenkins, Judge

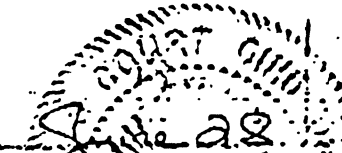
APPROVED BY:

APPROVED - AS TO FORM ONLY

  
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This is a true copy of the Court's Judgment  
Entered Filed in Case No. 222-1791  
Journal 250 Page 442  
ANTHONY VIVO, Clerk of Court

SANDUSKY COUNTY  
COMMON PLEAS COURT  
FILED

1990 JUL 30 AM 11:44

ALBERTA RATHBUN  
CLERK

IN THE COURT OF COMMON PLEAS OF SANDUSKY COUNTY, OHIO

Mildred G. Case, Administrator,  
et al.,

Plaintiffs,

vs.

Norfolk and Western Railway Co.,  
et al.,

Defendants.

) Case Nos. 86 CV 459  
) 86 CV 920

) JUDGE ROBERT V. FRANKLIN

) COURT'S ORDER RE: PREEMPTION

) Defendant Railway's Motion in Limine re Preemption is granted.

No damages are to be awarded and no evidence admitted regarding additional grade crossing warning devices.

With respect to the Defendant's Motion re: Preemption, this Court specifically finds as a matter of law that under the Federal Railroad Safety Act of 1970 (45 U.S.C. 421 et seq.) and the Federal Highway Safety Act of 1970 (23 U.S.C. 401 et seq.) and the federal laws, rules, regulations, orders and standards enacted pursuant thereto, that federal law delegates to the public agency having jurisdictional authority, and not to the railroad, the responsibility and the authority for determining the need for and the selection of appropriate railroad-highway grade crossing signals, and federal law has preempted state law with reference to determination of the need for and the selection of traffic control devices that are installed at railroad-highway crossings. Carpenter v. Conrail (June 26, 1990), Mahoning County C.P. No. 88-CV-1797, unreported.

IN THE COMMON PLEAS COURT OF MIAMI COUNTY, OHIO

TAMARA TILEY, as Executrix  
of the Estate of Charles  
Blodgett, Deceased, et al.,

CASE NO. 86-110

Plaintiffs,

JUDGE: JOSEPH B. GRIGSBY -  
BY ASSIGNMENT

v.

BALTIMORE & OHIO RAILROAD,  
COMPANY, et al.,

ORDER

Defendants.

The several motions in limine are, in consideration of the tentative and interlocutory nature of such rulings (see State v. Grubbs (1986), 28 Ohio St. 3d 199 and State v. Spahr (1976), 47 Ohio App. 2d 221), considered as follows:

1. Evidence of subsequent accidents at the intersection of the B & O Railroad and county road 25-A are considered not relevant to this case.

2. The testimony of Dr. Welty, a treating physician, will be admitted to the extent it is competent and relevant. Evidently this is testimony intended to substantiate the claimed emotional injuries of Mrs. Blodgett. Such testimony is admissible under Binns v. Fredendall (1987), 32 Ohio St. 3d 244. Of course his testimony cannot be used as a conduit for inadmissible hearsay and must be judged according to Articles VII and VIII of the Evidence Rules.

3. The motion to limit testimony concerning train speed appears to be well taken for it seems there is no issue as to a speed violation by the train and no duty in that regard violated by Defendant B & O Railroad.

4. The motion concerning warning devices appears to be directed at questions other than malfunctioning. The maintenance of the lights is a duty of the railroad. Any violation of a duty imposed upon the railroad by lawful authority would be relevant. The preemption of the Federal Railroad Safety Act of 1970 (FRSA) seems settled as a legal issue in light of CSX Transportation, Inc., et al. v. The Public Utilities Commission of Ohio, et al. (CA6, 1990), 901 F. 2d 497.

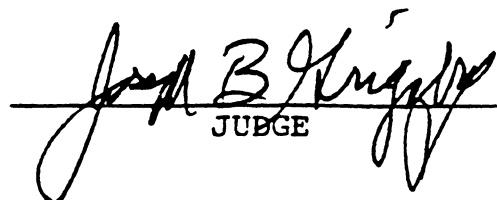
5. The motion concerning the obstruction of view goes to the question of the railroad's duty concerning further warning devices, which matter was discussed above. Assuming the view is obstructed by traffic going westerly, (extent?) what, if any, resulting duty is imposed upon any of the defendants? This motion (as in fact all these in limine motions) can best be answered when the court is more aware of the proposed evidence concerning its relevance to Mrs. Blodgett and the issues of duty and causation.

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JUDGE

Mr. James L. O'Connell, Esq.  
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STATE OF MICHIGAN  
COURT OF APPEALS

---

MICHAEL J. BAUGHMAN, as Personal  
Representative of the Estate of  
Santa Ramirez, deceased,

APR 25 1990

Plaintiff-Appellant,

v

No. 113816

CONSOLIDATED RAIL CORPORATION,

Defendant and Third-  
Party Plaintiff-Appellee,

v

JOSE V. RAMIREZ,

Third-Party Defendant.

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Before: Michael J. Kelly, P.J., and Wahls and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals from evidentiary rulings by the circuit court excluding the contents of files compiled by the Michigan Department of Transportation (MDOT).

Plaintiff's decedent was killed when the car in which she was a passenger was struck by a train coming through a railway crossing maintained and controlled by defendant Consolidated Rail Corporation. Plaintiff sued defendant for negligence, basing his claims upon the company's failure to maintain adequate warning devices or gates at the crossing to prevent accidents. In support of these claims, plaintiff attempted to present into evidence MDOT files regarding the crossing in order to establish a need for gates. Defendant moved to exclude the MDOT file from evidence, which the trial court granted, stating:

Well my impression is that the law and apparently administrative law has pretty much taken over this area with respect to what is reasonable or what should be done with respect to railroad crossings. And if the government and the railroad complies with those recommendations or the orders with respect to that that

there is very little room for common law negligence. So unless there is something else that comes out during the course of the trial about those reports and so on those would not be admitted.

Prior to trial, plaintiff stipulated to an order of dismissal on the grounds that, given the court's evidentiary rulings, plaintiff had no viable case against defendant Conrail. The court entered an order dismissing plaintiff's claims with prejudice.

On appeal, plaintiff argues that the circuit court erred in ruling that the contents of the MDOT files were not admissible. We disagree.

Plaintiff attempted to present the contents of the MDOT files to prove that defendants' railroad crossing required warning signals and gates, and that defendant was negligent in failing to install these devices. MCL 257.668(2); MSA 23.68(2) provides in relevant part:

The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department, county road commissions, the railroads, or local authorities.

The terms of this statute are clear and unambiguous, and preclude liability for failure to install warning devices unless so ordered by a public authority. Edington v Grand Trunk Western RR Co., 165 Mich App 163, 168-169; 418 NW2d 415 (1987), lv den 430 Mich 890 (1988). There was no order to install gates at the crossing in question prior to the accident, thus defendant cannot be held liable for negligence in failing to install gates or other warning devices. Plaintiff may not use the MDOT files to prove a theory of liability which is barred by the statute. The court properly excluded the files from evidence.

Plaintiff also argues that the court erred in holding that the blood alcohol content of the car's driver, third party defendant Jose Ramirez, was admissible at trial. We agree. The test results in question were obtained pursuant to the implied



consent statute, and therefore cannot be used in civil litigation. McNitt v Citco Drilling Co., 397 Mich 384, 388; 245 NW2d 18 (1976). Nevertheless, this error does not require reversal as it has no effect on plaintiff's inability to prove his claim against defendant Consolidated Rail Corp.

Affirmed.

/s/ Michael J. Kelly  
/s/ Myron H. Wahls  
/s/ David H. Sawyer

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

ROBERT MAHONY, as father and  
personal representative of Eve  
Mahony, in his own behalf and  
as next of kin and for the use  
and benefit of Eve Mahony's mother,  
Barbara Mahony,

Plaintiff,

v.

CIVIL ACTION  
4:88-cv-13-HLM

CSX TRANSPORTATION, INC.

Defendant.

ORDER

Both sides have moved the Court to reconsider portions of the summary judgment order decided February 6, 1990. CSX challenges this Court's determination that the evidence does not show a "federal decision" with regard to warning devices such that state law claims would be preempted by federal law, and Plaintiff challenges this Court's determination that a jury issue does not exist with regard to the proper speed of the train.

Speed

In the summary judgment order, the Court found that

the regulations permitted its train to be travelling through the intersection at 60 miles per hour, and that the undisputed evidence is that the train was travelling at 35 miles per hour.

In his motion to reconsider, Plaintiff contends that CSX is obligated to travel at a "reasonable" speed regardless of

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LUTHER D. THOMAS, Clerk  
By: V. Van *[Signature]*  
Deputy Clerk

the speed limit, and that there is a question of fact concerning the applicable speed limit.

As the Court made clear in its prior order, the "reasonableness" of the train's speed under Georgia law is preempted by the speed set by federal regulation. Federal law alone determines the "reasonable" rate of speed, even if a factual dispute exists concerning the proper speed limit.

The sole issue is whether the speed was within the limits set by those regulations. The parties do not dispute that the train was traveling at a speed of 35 miles per hour when Plaintiff's decedent was killed. What is disputed is the applicable speed limit for this particular grade crossing.

Plaintiff contends that his only burden on the speed limit issue is "to show some question of fact, or that the movant is incorrect as to the law alleged." Plaintiff interprets his burden too lightly. The Supreme Court has made clear that the nonmovant "must do more than simply show that there is some metaphysical doubt about material facts . . .

[T]he nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (footnote, citations, and emphasis omitted). In the instant case, therefore, Plaintiff must point to evidence showing that the train was exceeding the speed limit allowed by federal law.

Defendant claims that the track is "Class 4," which permits speeds up to 60 miles per hour. 49 C.F.R. § 213.9; see DeLong Aff. ¶ 4. Plaintiff has shown evidence that the track is "Class 3" due to curvature, which permits speeds up to 40 miles per hour. § 213.9; see Abercrombie Dep. at 37. Plaintiff shows further that the curve has been measured at 6 degrees. See Purvis Dep., Exh. A. The evidence of curvature, standing alone, is insufficient to show that the speed limit is below 35 miles per hour because Plaintiff has not pointed to evidence of the elevation of the outer rail. See 49 C.F.R. § 213, Appendix A (train speed limit is measured by the combination of degree of the curve and the elevation of the outer rail).

Plaintiff cites further to ¶ 11 of Hester's affidavit, submitted with Plaintiff's opposition to CSX's motion for summary judgment, which reads as follows:

Our report listed a speed limit for trains of 20mph. This information was obtained from the U.S. Department of Transportation Crossing Inventory, which is maintained as a part of my file. The information is provided to the U.S. Department of Transportation by the Railroad which sets its own timetable speeds.

The report, attached to CSX's motion to reconsider, does not state that 20 miles per hour is the speed limit; rather, it states that 30 trains crossed the intersection at a rate of 20 miles per hour. In a deposition of Plaintiff's expert Massie, however, Massie reviewed the inconsistency in the

report and stated that "from his research in the area," he understands that "the maximum allowable train speed over a crossing is given by that train speed."

The Court finds the evidence conflicting such that summary judgment cannot be entered as to the train's compliance with the federal speed limit. Although the Plaintiff has the burden of proof, there is some evidence from which a jury could find that the speed limit is 20 miles per hour and therefore that the train was speeding when it crossed the intersection at 35 miles per hour. CSX is, however, still entitled to judgment on the preemption issue: no evidence or argument based on Georgia law concerning the train's speed will be admissible at trial.

#### Warning Devices

CSX moves the Court to reconsider that portion of its summary judgment order that found the evidence inconclusive on preemption of the warning devices issue. Specifically, the Court found that

the inconsistencies in Hester's affidavits as to whether the DOT made a recommendation or a decision is critical to the preemption issue. On one hand, a "recommendation" concerning warning devices would not be tantamount to a "rule, regulation, order or standard," within the meaning of § 434, which would then be adopted by the Secretary, under 23 C.F.R. § 655.603(a), which would thereby preempt Plaintiffs' claim for common law negligence based on the lack of additional warning devices. On the other hand, a "decision" by the DOT would be such a "rule, regulation, order or standard," and would bar Plaintiffs' state law claim based on the need for warning devices.

The Court continued:

on the record as it is presently constituted, there is no clear indication that the State of Georgia has made a conclusive determination of the need for warning devices at the crossing in question. The Court therefore finds insufficient evidence that the subject matter has been preempted as a matter of law.

Pursuant to footnote 1 of the Court's prior order finding the DOT report itself to be admissible for the limited purpose of determining preemption, CSX has submitted a copy of the report. In pertinent part, the report reads as follows:

RECOMMENDATIONS, SUBJECT TO STATE-WIDE PRIORITY RANKING AND AVAILABILITY OF FUNDS, ARE AS FOLLOWS:

It is recommended that the crossing not be signalized at this time due to low ADT.

NE & SW Quadrants: Install automatic gates with flashing lights. Locate 15 ft. from track centerline (perpendicular) and 8 ft. from the pavement edge.

Required: Centerline, Symbolized pavement markers, and advance warning signs.

The report then recites that it is recommended by Wendell Hester and approved by Archie C. Burnham, Jr.

Although the report lists apparent inconsistent recommendations such that it is not clear which recommendation was approved, the preemption issue is not whether or not the federal government, through the state, has determined that warning devices are needed -- the issue is whether a decision was made. The record does not explain what position Burnham holds or what his "approval" meant. For example, if he is Hester's supervisor, his approval could be of Hester's

decision concerning the proper recommendation. Alternatively, his "approval" could be an acceptance by the state of the recommendation.

However, Hester's affidavit, submitted by Defendant in its reply brief, recites that after the recommendations were made, "the Railroad Highway-Grade Crossing Section [of the DOT] made a decision not to install automatic warning devices." This statement, read along with the actual report, reveals that a decision was made.

Plaintiff asks this Court for leave to depose Hester and Burnham should this Court find that reconsideration of the warning devices preemption issue is appropriate. The Court does not find that such further discovery is needed -- regardless of the basis for their decisions, the only significant fact for purposes of the preemption issue is that a decision was made.<sup>1</sup>

In sum, the undisputed evidence shows that a decision was made by the State which, under the law, is a "federal decision" that preempts Georgia law on the adequacy of the warning devices. CSX is therefore entitled to summary judgment on that issue such that no evidence or argument on

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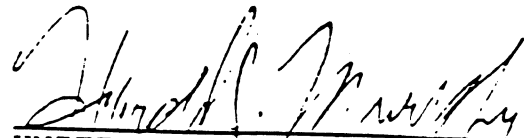
1

If Plaintiff believes that the testimonies of Hester and Burnham may be relevant for another purpose, they may depose those individuals by agreement with counsel for CSX or by leave of Court upon proper motion.

the adequacy of the warning devices based on Georgia law will be admissible at trial.

ACCORDINGLY, Plaintiff's motion for reconsideration is GRANTED IN PART and DENIED IN PART; Defendant's motion for reconsideration is GRANTED.

IT IS SO ORDERED, this the 11<sup>th</sup> day of April, 1990.

  
UNITED STATES DISTRICT JUDGE



REC'D. LAW DEPT.  
JUL 09 1990  
FORT WORTH

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

COPY

-----  
John Kalthoff, Trustee for the  
Estate of Julie Kalthoff,  
deceased,

Civil File No. 3-88-0353

Plaintiff,

v.

Burlington Northern Railroad  
Company,

Defendant and  
Third Party Plaintiff,

v.

Bud Morrow, as Personal Repre-  
sentative of the Estate of Benno  
Kalthoff, Deceased,

Third Party Defendant.  
-----

Joseph Kalthoff,

Civil File No. 3-88-0354

Plaintiff,

v.

Burlington Northern Railroad  
Company,

Defendant.  
-----

John Kalthoff, Trustee for the  
Estate of Jeffrey Kalthoff,  
deceased,

Civil File No. 3-88-0446

Plaintiff,

v.

Burlington Northern Railroad  
Company,

Defendant and  
Third Party Plaintiff,

v.

Bud Morrow, as Personal Repre-  
sentative of the Estate of  
Benno Kalthoff, Deceased,

Darrell Wolff, Trustee for the  
Heirs of Benno Kalthoff,  
deceased,

Civil File No. 3-88-0556

Plaintiff,

v.

Burlington Northern Railroad  
Company,

Defendant.  
-----

John Kalthoff, Trustee for the  
Estate of Margaret Kalthoff,  
deceased,

Civil File No. 3-88-0557

Plaintiff,

v.

Burlington Northern Railroad  
Company,

Defendant.  
-----

-----  
David J. Moskal, Esq., Schwebel, Goetz & Sieben, P.A.,  
5120 IDS Center, Minneapolis, MN 55402, Maclay R.  
Hyde, Esq., and Erik T. Salveson, Esq., Gray, Plant,  
Mooty & Bennett, P.A., 33 South Sixth Street, #3400,  
Minneapolis, MN 55402, for plaintiffs.

Ward D. Werner, Esq., Thomas W. Spence Law Office,  
Burlington Northern Railroad, Suite 600, Degree of  
Honor Building, 325 Cedar Street, St. Paul, MN 55101,  
for Burlington Northern Railroad.  
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#### MEMORANDUM AND ORDER

This matter is before the court upon defendant's motion for  
summary judgment challenging plaintiffs' negligence claims. For

the reasons set forth below, defendant's motion is granted in part and denied in part.

## I. FACTS

These five cases arise out of an accident in which defendant's train collided with the Kalthoffs' van, killing four of the five occupants and seriously injuring the fifth. Plaintiffs seek recovery for defendant's alleged negligence under a number of different theories. Specifically, plaintiffs claim that defendant was negligent in its operation of its train, negligent in failing to make the railroad crossing safe for motorists and negligent per se in failing to satisfy its statutory obligations in connection with the intersection.

Defendant's summary judgment motion challenges plaintiffs' claims on three grounds. First, defendant claims that federal regulation of railroads under the Federal Railroad Safety Act, 45 U.S.C. § 421 et seq., preempts any state statutory or common law duty to ensure that railroad crossings are safe. Second, defendant contends that plaintiffs' negligence per se claims must fail either because defendant complied fully with its duty, or because the statutory provisions cited by the plaintiffs impose no affirmative duty on the railroad. Finally, defendant argues that there is no authority under statute or common law that imposes on a railroad the duty to realign either railroad tracks or roadways that intersect at a sharp angle.

## II. Analysis

In deciding defendant's motion for summary judgment the court must apply the standards set forth in Fed. R. Civ. P. 56(c). The defendant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings, depositions, and affidavits which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In order to defeat the motion, plaintiffs must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The judge's function at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Id. at 249.

The Supreme Court has stated that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). The court must consider not only "the rights of persons asserting claims" but also "the rights of persons opposing such claims...to demonstrate, in the manner provided by the Rule, prior to trial, that the claims have no factual basis." Id. In this regard, the court must grant

summary judgment if, on the record before the court, no reasonable jury could find in favor of the nonmoving party. Anderson, 477 U.S. at 250.

A. Preemption

Defendant's preemption argument is undermined by the recent Eighth Circuit case of Karl v. Burlington Northern Railroad Co., 880 F.2d 68 (8th Cir. 1989). Karl is a railroad crossing case in which defendant argued, among other things, that federal law preempted common law negligence claims. In rejecting defendant's position, the court stated:

In general, state laws may be preempted if they actually conflict with an express or implied federal declaration, or if the state law is in a field that is so pervasively controlled by the federal law that no room is left for state rule making.... Neither circumstance is present in this case. First, nothing suggests that Karl was forced to choose whether to follow federal or state law, a traditional test of whether state and federal laws are in actual conflict.... Additionally, Burlington Northern can point to no case law or legislative history to support the theory that Congress intended to completely occupy the field of railroad safety governance.... We conclude that Karl's negligence claim is not preempted by federal law.Id. at 76 (citations omitted).

Defendant attempts to distinguish Karl on the grounds that the Iowa transportation authority made no decision with respect to the safety devices at the intersection. Defendant contrasts the actions of the Minnesota Department of Transportation, which approved the safety devices in place at the site of the Kalthoff accident. This distinction is unfounded because the Eighth Circuit in Karl specifically stated that "the local agency in

this case approved the warning devices...." Id. Whether the court's statement was actually true is not important. The court clearly assumed that a decision had been made when it rejected the preemption argument. This court is bound to apply the precedent of the Eighth Circuit, and therefore defendant's summary judgment motion for preemption is denied.

B. Negligence per se

Defendant next challenges plaintiffs' claims that defendant is per se negligent in failing to comply with Minn. Stat. §§ 219.06, 219.19, 219.20, and 219.567. Negligence per se results from the breach of a statutorily defined standard of conduct. This statutory standard replaces the ordinary negligence standard of the reasonable, prudent person's conduct in a similar situation. Seim v. Garavalia, 306 N.W.2d 806, 810 (Minn. 1981).

The only difference between a statutorily imposed duty of care and a duty of care under common law is that the duty imposed by statute is fixed, so its breach ordinarily constitutes conclusive evidence of negligence, or negligence per se, while the measure of legal duty in the absence of a statute is determined under common law principles.

Zerby v. Warren, 297 Minn. 134, 139, 210 N.W.2d 58, 62 (1973).  
See also Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W.2d 555 (1947).

Violation of a statute is negligence per se if the plaintiffs are members of the class of persons the statute was intended to protect, plaintiffs' injuries are those the statute

was intended to prevent, and violation of the statute is the proximate cause of the injury. Wildwood Mink Ranch v. United States, 218 F. Supp. 67, 71 (D. Minn. 1963); Johnson v. Farmers and Merchants State Bank, 320 N.W. 2d 892, 897 (Minn. 1982). Applying this test to plaintiffs' claims, the court concludes that plaintiffs have failed to establish defendant's per se negligence for violation of Minn. Stat. §§ 219.06, 219.17, 219.19, and 219.20, and defendant's motion for summary judgment on these claims is granted.

Minn. Stat. § 219.06 states that "[a] railroad company shall maintain, wherever its lines cross a public road, a proper and conspicuous sign indicating the crossing." It is clear from the record that the Clear Lake crossing was protected by standard cross buck signs. Plaintiffs admit this. Since defendant has complied with the statute, there can be no negligence per se because there has been no statutory violation.

Minn. Stat. § 219.17 provides that "[t]he commissioner by rule shall require that uniform warning signs be placed at grade crossings." As defendant correctly points out, under this statute, an affirmative duty is imposed upon the commissioner, not the railroad. Defendant cannot violate a statute which does not impose an obligation upon it. Thus defendant has not violated the statute and, absent such a violation, cannot be found negligent per se.

Minn. Stat. § 219.19 requires the commissioner to designate those crossings which require additional warning signs. Once

this designation has been made, the statute provides that "the road authority...shall furnish and maintain uniform signs in the appropriate places on the highway...." Here again, no affirmative duty is placed upon the railroad, but rather upon the commissioner and the road authority. Defendant cannot be found per se negligent where there is no statutorily imposed duty and thus no violation of the statute.

Minn. Stat. § 219.20 sets forth the procedure to be followed to have stop signs placed at a crossing:

On determining, after an investigation following a petition from a governmental agency...or on the commissioner's own motion, that stop signs should be installed at a crossing, the commissioner shall designate the crossing a stop crossing and shall notify the railway company.... The railway shall erect the uniform stop crossing signs....

The commissioner made no such designation for the Clear Lake crossing. As a result, no obligations were imposed upon the defendant. As stated above, defendant cannot be found per se negligent for failure to comply with a statute which imposes no duty upon it.

Defendant has also moved for summary judgment on plaintiffs' claim that defendant was negligent per se in failing to ring the bell or sound the whistle on the locomotive at least 80 rods in front of the crossing, as required by Minn. Stat. § 219.567. This statute imposes an affirmative duty upon defendant, and noncompliance, if proved, may establish a finding of negligence per se. Northern Pacific Railway Co. v. Haugan, 184 F.2d 472, 476 (8th Cir. 1950); Roth v. Swanson, 145 F.2d 262, 265 (8th Cir.



1944). Defendant supports its motion for summary judgment with the depositions of witnesses who were in a position to observe the train as it approached the crossing. Plaintiffs counters with similar evidence. This conflicting testimony creates a genuine issue of material fact. Therefore, defendant's motion for summary judgment on plaintiffs' claim that defendant was negligent per se in failing to comply with Minn. Stat. § 219.567 is denied.

Finally, defendant contends that it has no duty, either statutory or at common law, to realign a railroad crossing that forms an acute angle with the roadway. The question of whether the Clear Lake crossing was unsafe or hazardous is one of fact for the jury to determine. The angle of the crossing is one factor for the jury to consider in reaching its conclusion.

#### C. Other Motions

Also before this court is plaintiffs' motion for partial summary judgment seeking to strike the defense of contributory negligence. Defendant has withdrawn this defense with respect to the passengers in the Kalthoff's van. With respect to the driver, plaintiffs' motion is denied.

Defendant seeks bifurcation of the trial into damages and liability phases. Defendant claims that evidence relating to damages will have a prejudicial effect on liability issues. Bifurcation would not solve this problem because both the damages issue and the liability issue are supported by similar evidence.

Nor will bifurcation in this case contribute significantly to judicial economy. Bifurcation can result in more efficient litigation where a lengthy damage determination can potentially be avoided by litigating liability first. Here, the potential efficiency gains from bifurcation are minimal because neither the liability phase nor the damages phase of the litigation should be particularly complex or protracted. For these reasons, defendant's motion for bifurcation is denied.

D. Motion in Limine.

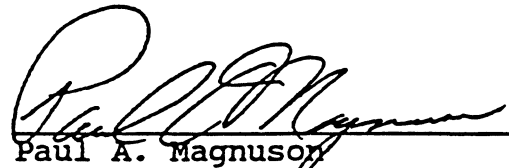
Defendant has filed a motion in limine to prevent introduction of evidence relating to the erection of a stop sign at the accident site following the accident. Evidence of subsequent remedial measures is inadmissible under Fed. R. Evid. 407. The purpose of this rule is to prevent the threat of admission of such evidence from discouraging and delaying the taking of necessary remedial measures. Therefore, defendant's motion in limine is granted.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's summary judgment motion challenging plaintiffs' claims on the basis of federal preemption is DENIED.
2. Defendant's summary judgment motion challenging plaintiffs' claims that defendant was negligent per se in violating Minn. Stat. §§ 219.06, 219.17, 219.19, and 219.20 is GRANTED.

3. Defendant's summary judgment motion challenging plaintiffs' claims that defendant was negligent per se in violating Minn. Stat. § 219.567 is DENIED.
4. Plaintiffs' motion for partial summary judgment motion seeking to strike the defense of contributory negligence is DENIED with respect to the driver of the van and DENIED as moot as to the passengers.
5. Defendant's motion for bifurcation of the trial is DENIED.
6. Defendant's motion in limine to exclude evidence of a stop sign erected after the accident is GRANTED.

Dated: July 2, 1990.

  
\_\_\_\_\_  
Paul A. Magnuson  
United States District Court Judge

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FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

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By *[Signature]*  
Clerk

MAXINE NIXON, DONALD NIXON, )  
DELANE NIXON, and DALLAS )  
NIXON, )  
Plaintiffs, ) CV 85-384-BLG-JFB  
vs. )  
BURLINGTON NORTHERN RAILROAD, ) MEMORANDUM OPINION  
a corporation, ) AND ORDER  
Defendant. )

Presently pending before the Court is defendant's Motion for Partial Summary Judgment. For the reasons stated below, defendant's motion is granted.

FACTS AND PROCEDURAL BACKGROUND

Darrell Nixon was killed when his automobile collided with a Burlington Northern train at a railroad crossing in Plevna, Montana. Maxine Nixon, the mother and only surviving parent of the deceased, filed this action alleging, among other things, that the defendant railroad failed to furnish proper warning signals or safeguards, or to otherwise adequately notify the decedent of the train's approach.

Defendant moves for partial summary judgment on plaintiff's claim as it relates to a failure to furnish proper warning signals or devices at the railroad crossing. Defendant

contends that federal statutes and regulations pertaining to the installation of crossing warning devices preempt any state statutory or common law duties it may have had with respect to the warning devices in use at the Plevna crossing at the time of the accident. Specifically, defendant argues that any state duties are preempted under the Railroad Safety Act, 45 U.S.C. §433, and the Highway Safety Act, 23 U.S.C. §401 et. sec., and regulations thereunder.

#### DISCUSSION

The Railroad Safety Act provides that "...[a] state may adopt or continue and 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 governing the subject matter of such State requirement...". 45 U.S.C. §434 (1976). The Ninth Circuit has construed that language to mean that the "Railroad Safety Act preempts only those state laws where the federal government has acted with respect to the same 'subject matter.'" Marshall v. Burlington Northern, Inc., 720 F.2d 1149, 1153 (9th Cir. 1983). The pertinent question here is whether state law is trying to regulate the same "subject matter" which is regulated by the Secretary. Id. at 1154.

This Court's determination of that issue is guided by the Ninth Circuit's decision in Marshall, which arose out of the District of Montana. In Marshall, the Court noted:

"The Railroad Safety Act requires the Secretary to study and develop solutions to problems associated with railroad grade crossings. 45 U.S.C. §433 (1976). The Highway Safety Act of 1966, Pub.L. No. 89-564, 80 Stat. 731 (1966) (as amended, codified at 23 U.S.C. §§401-404 (1982)), directs the Secretary to develop uniform standards and to approve state-designed highway safety programs that comply with them, which are then eligible to receive federal financial assistance. 23 U.S.C. §402 (1982). The Secretary, through the Federal Highway Administration, prescribed procedures to obtain uniformity in highway traffic control devices and adopted the Manual on Uniform Traffic Control Devices on Streets and Highways, see 23 C.F.R. §655.601 (1981), which also was adopted by Montana, see Mont.Code Ann. §61-8-202 (1981). The manual prescribes that the selection of devices at grade crossings and the approval for federal funds is to be made by local agencies with jurisdiction over the crossing. Thus, the Secretary has delegated federal authority to regulate grade crossings to local agencies.

Marshall, 720 F.2d at 1154. In that case, a federal decision, through the locality in charge of the crossing in question, had not been made regarding the type of warning device to be installed at the crossing. The Court therefore concluded that the railroad's duty under the applicable state law was not preempted. The same cannot be said in this case.

Defendant has shown, and plaintiff has not disputed, that on April 12, 1984, prior to the decedent's accident, an agreement was made between the State of Montana, acting through its Department of Highways, Fallon County, and defendant Burlington Northern, wherein the parties agreed to install flashing light signals with automatic gates at the Plevna crossing. (See, Exhibit C to defendant's Motion for Partial

Summary Judgment). This agreement was the result of an evaluation and determination by the State Department of Highways as to the type of crossing protection warranted, and was subsequently approved by the Federal Highway Administration. The determination by the State Highway Department constituted a federal decision, reached through the state agency, on the adequacy of the warning devices at the crossing. Once that determination was made, any applicable state common law or statutory duty upon defendant became void, as federally preempted.

Plaintiff argues against preemption on the ground that the Manual on Uniform Traffic Control Devices, adopted at 23 C.F.R. §655.601, provides that "the determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority." Plaintiff contends that the City of Plevna is the local agency with jurisdictional authority over its own streets and crossings, and that since it had not made an independent determination as to the type of signal needed, the state law is not preempted. This argument is not persuasive, as a review of the regulations promulgated under the Highway Safety Act clearly indicates that the state agency, in this case the Montana Highways Department, is the "local agency" contemplated in the Marshall decision. See, 23 C.F.R. §646.200, et. sec., and §924.100 et. sec. As correctly noted by defendant, it is state agencies to which the federal authority has been delegated, and "[w]here appropriate, the processes shall

be developed cooperatively with officials of the various units of local governments." 23 C.F.R. §924.700. The use of the term "local agency" in the Marshall decision, instead of "public agency", does not serve to transfer the authority so delegated from the state to the town or municipal level, as plaintiff would have this Court rule.

Furthermore, the undisputed record indicates that the members of the Plevna town council, acting for and on behalf of the town of Plevna, petitioned the State of Montana, Department of Highways, to install a flashing light signal with gates at the crossing in question. The record further shows that the town of Plevna agreed to share in the cost of repairing or replacing the signals installed pursuant to that request. Given the fact that the city of Plevna specifically requested the type of device which was eventually installed, and initiated the process which culminated in a determination by the state agency that a new signal was needed, it is clear that federal preemption applies in this case regardless of how one construes the term "local agency". As such, defendant cannot be found negligent under the applicable state law for failing to provide a more adequate warning device at the crossing in question.

Accordingly,

IT IS ORDERED that defendant's Motion for Partial Summary Judgment be and is hereby granted with respect to plaintiff's claim that defendant failed to provide an adequate warning device at the crossing in question. The Clerk is



directed not to enter judgment until all claims against all parties have been resolved, pursuant to Rule 54(b), F.R.Civ.P.

The Clerk is further directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 2<sup>nd</sup> day of April, 1988.

  
\_\_\_\_\_  
Chief Judge