

1990

Lewis Duncan, individually and as personal representative of the Estate of Patrick Duncan, deceased, et al. v. Union Pacific Railroad Company, a corporation, The State of Utah, Paul Kleinman, and Does 1-100, inclusive : Response to Petition for Rehearing

Utah Supreme Court

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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.

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

Defendants/Appellees,

Case No. 900233

UNION PACIFIC RAILROAD COMPANY'S  
AND PAUL KLEINMAN'S  
ANSWER TO PETITION FOR REHEARING

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UTAH

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DUNCAN, deceased, et al.,	)	
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UNION PACIFIC RAILROAD	)	
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## ARGUMENT

### POINT I.

#### Plaintiffs Misstate the Facts

Plaintiffs, at page 4 of their Petition, seriously misstate the facts concerning UDOT's evaluation and recommendation regarding the Droubay Road crossing. Plaintiffs would have the Court believe that UDOT found the crossing warning devices inadequate in November, 1981 and, based upon such findings, recommended installation of automatic signals and then failed to follow through on such recommendation. This simply is not the case. To the contrary, UDOT's November, 1981 inspection revealed no hazards then existing which justified upgrading the warning devices. The inspection report dated November 10, 1981, specifically states: "No sight dist. restrictions." (R.302). However, 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 prediction, however, did not come true as determined by

ongoing monitoring of the crossing by UDOT. 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 "hazardous 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 useage was up to only 580 vehicles per day, far short of the 1500 vehicles per day erroneously projected in 1981. (R.301). In short, UDOT did not fail to implement a decision to install automatic signals at the crossing. UDOT monitored the crossing and simply determined that the actual vehicle count did not justify installation of automatic signals. Accordingly, there is no evidenciary basis for arguing that UDOT was negligent in failing to implement it's earlier recommendation. UDOT simply changed it's recommendation because of a change in the facts regarding the vehicle count.

Plaintiffs also distort the facts by implying, at page 7, that the accident happened "through no fault of their own;" that "hazardous conditions" existed at the crossing; and that UDOT and/or Union Pacific were negligent in causing

the accident. These are totally unsupported allegations without any foundation in the record. To the contrary, Judge Hanson observed at p. 2 of his "Memorandum Decision," that "there was no evidence to support the plaintiffs' claims that the Railroad operated the train in a negligent manner (R. 487); and at pp. 10-11, that:

"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." (R.479-478).

Furthermore, there is no evidence or finding that plaintiffs decedents were free of fault in causing the accident. The issues of the negligence of the driver, Patrick Duncan, and the role played by the drugs and alcohol were not argued to or addressed by the trial court or on appeal. Accordingly, it is inappropriate for plaintiffs to conclude that their decedents were without fault in causing the accident and to then argue based upon such a bare assertion, that "laudatory tort theories and public policy concerns" which legitimately support recovery by fault-free injured persons against negligent tort feasers also support their cause here.

## **POINT II.**

### **Plaintiffs Misstate the Law**

It is incorrect for plaintiffs to argue, at p. 8, that this Court's decision in this case "relieved railroads from traditional duties to answer for damages arising out of

hazardous railroad crossings." That statement is erroneous for at least two reasons:

First, nothing in the Court's decision relieves railroads from their "traditional" duties of using due care in appropriately operating train warning devices (whistle, bell and lights), in operating the train at a reasonable speed, in the train crew maintaining a reasonable lookout, in maintaining the physical structure of the crossing so that automobiles can have a reasonably smooth and unobstructed drive over the tracks, and in not creating obstructions to view at the crossing with respect to matters over which railroads have control (e.g., vegetation on the right of way).

Second, it is the legislature which "relieved" the railroads of a duty to evaluate and signalize extra hazardous crossings, not the Court. The Court simply confirmed the public policy decisions made earlier by the legislature which established an orderly statutory scheme for assigning responsibilities for safety at railroad crossings. Furthermore, the legislature's decision to place exclusive responsibility for evaluating and signaling railroad crossings with UDOT is now fully supported by federal enactments [Federal Rail Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 et seq. and Highway Safety Act, 23 U.S.C. § 401 et seq.], and federal court decisions. In the

closely analogous case of Hatfield v. Burlington Northern R. Co., 958 F.2d 320 (10th Cir. 1992) (copy attached as Exhibit "A"), decided after submission of the briefs in this case, the Tenth Circuit specifically ruled that:

1. Section 434 of the FRSA expressly preempts state law regarding the adequacy of railroad crossing warning devices;
2. The preemption occurred upon the Federal Highway Administration adopting the Manual on Uniform Traffic Control Devices ("MUTCD"), which set nationally uniform standards for evaluating and signalizing railroad crossings;
3. The federal government has delegated to state agencies the exclusive responsibility to evaluate and install warning devices at railroad crossings, in accordance with MUTCD standards<sup>1</sup>; and,
4. Railroads have been absolved from complying with duties imposed by state (statutory or common) law regarding safety devices at railroad crossings.

Thus, Utah's statutory scheme which assigned exclusive responsibility to evaluate and signalize railroad crossings to UDOT is in harmony with federal requirements, and this Court's decision in Duncan is therefore correct.

Plaintiffs also misstate the law, at p. 8, regarding the Railroad's obligation to pay the costs of installing

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<sup>1</sup>Utah has statutorily adopted the MUTCD as the state standard for traffic control devices at U.C.A. § 41-6-20.



automatic warning devices. Preemptive federal regulations [23 C.F.R. § 646.210(a) and (b)(1)] state that:

"(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."

(emphasis added). Thus, consistent with federal guidelines, governmental authorities (federal and local agencies) paid the complete cost of the subsequently installed warning device improvements at the Droubay crossing, with Union Pacific assuming the continuing maintenance expenses. These ongoing expenses traditionally far exceed installation costs.

Plaintiffs erroneously state, at p. 9, that "there is absolutely no reason the state's duty [to evaluate the need for and install automatic devices] precludes the railroad from having a concurrent duty." Federal and state statutory schemes (FRSA and § 54-4-14 et seq.) delegate exclusive responsibility for this function to UDOT (and the Public Service Commission on appeal) and leave no room whatsoever for any part of this responsibility to be delegated to or assumed by the Railroad. Indeed, any such duty which might be imposed statutorily or by the courts would run contrary

to and be preempted by the FRSA as interpreted in Hatfield. Indeed, the Tenth Circuit ruled that the specific language of paragraph 8D-1 of the MUTCD:

" . . .effectively prohibits a railroad from acting on its own to select and install a safety device,. . .moreover, it absolves the railroad of any independent duty regarding grade crossing safety devices."

958 F.2d at 323.

Plaintiffs also misinterpret § 56-1-11. That section does not and should not be interpreted to impose a duty upon railroads to signalize crossings. As discussed at pp. 22-23 of defendants' brief on appeal, prior decisions of this Court indicate that the "good and sufficient crossings" language of § 56-1-11 delegates to railroads the responsibility to maintain a crossing surface which allows motorists to make a reasonably smooth and obstruction free drive over a railroad crossing, not a duty to construct warning devices. There are no decisions which support plaintiffs' interpretation. In fact, it would be inappropriate to interpret this statute as argued by plaintiffs since to do so would place it in direct conflict with § 54-4-14, et seq., and the federal statutory preemption imposed by the FRSA.

Plaintiffs misstate the effect of Utah Court of Appeals' holding in Gleave v. Denver & Rio Grande W. R. Co., 749 P.2d 660 (Utah Ct. App. 1988) and this Court's ruling in

Duncan. The holdings in these two cases are not inconsistent in any way. Indeed, the decisions are totally consistent with each other and with state and federal statutory enactments and federal case law, as earlier explained. Gleave and Duncan are in total harmony in stating that railroads have no duty with respect to the function of evaluating or installing automatic warning devices at railroad crossings. The cases are also in total agreement in stating that in spite of being relieved of this responsibility, railroads continue to have duties to operate their trains with reasonable care and to remove visual obstructions at crossings over which they have control, such as obstructions on their rights of way. Defendants submit that such rulings and standards of care are simple to understand and apply by trial courts and counsel.

Finally, defendants do not rely on the federal preemption argument except to the extent that it is fully supportive of Gleave's and Duncan's interpretation of § 54-14-14, et seq. as preempting the Railroad's common law duty regarding evaluating and signaling railroad crossings. Indeed, there is nothing here for federal law to preempt since the state is in full conformity with federal statutory requirements, as explained in Hatfield. Preemption would only occur if state law were interpreted to

impose such a duty on railroads which would be contrary to the requirements of the FRSA.

### CONCLUSION

When viewed in the light of the correctly stated facts and law, plaintiffs' arguments raise nothing new for the Court's consideration. The arguments are based upon faulty premises and should be rejected on this basis alone. The arguments also run counter to the stated rationale which underlies the decisions in both Duncan and Hatfield, of not wanting to circumvent the careful and orderly macro-view approach to addressing railroad crossing safety matters that has been structured by legislators and public agencies on both the state and national levels. As stated in Hatfield:


"Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization."

958 F.2d at 324.

Union Pacific submits that the Court's decision in Duncan is correct, that plaintiffs have provided no basis

for the Court to reconsider it's decision, and that plaintiff's petition should be denied.

DATED this 4<sup>th</sup> day of September, 1992.



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Attorney for Union Pacific  
Railroad Company and Robert  
Kleinman

**MAILING CERTIFICATE**

I hereby certify that on the 4<sup>th</sup> day of September, 1992, copies of the foregoing Answer to Petition for Rehearing were mailed, postage prepaid, to the following:

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A handwritten signature in cursive script, appearing to read "Paul Kleinman", is written over a horizontal line.

## Exhibit A

Robert E. HATFIELD,

Plaintiff-Appellee.

v.

BURLINGTON NORTHERN RAILROAD  
COMPANY, Defendant-Appellant.

No. 91-3158.

United States Court of Appeals.

Tenth Circuit.

March 6, 1992.

Truck driver brought action against railroad to recover for injuries caused by truck-train collision. Railroad moved for summary judgment on issue whether railroad was required to install active warning devices at cross. The United States District Court for the District of Kansas, 757 F.Supp. 1198, Patrick F. Kelly, Circuit Judge, held that date of Kansas Department of Transportation's approval of project to install signals at crossing was earliest possible date that federal law preempted railroad's common-law duty, denied the motion and railroad appealed. The Court of Appeals, John P. Moore, Circuit Judge, held that once the Secretary of Transportation adopted the Manual on Uniform Traffic Control Devices on Streets and Highways, state regulation of railroad grade crossings was preempted, even if there had been no determination as to what the specific device would be required for a given grade crossing.

Reversed and remanded.

### 1. Federal Courts ⇐766

Court of Appeals will apply de novo standard of review when considering a decision on summary judgment and will use the same standard applied in the district court.

### 2. Federal Courts ⇐766

If no genuine issue of material fact exists, Court of Appeals will determine if substantive law was correctly applied by

district court when it issued decision on summary judgment.

### 3. Railroads ⇐243, 307(3)

States ⇐18.21

Once the Secretary of Transportation adopted the Manual on Uniform Traffic Control Devices on Streets and Highways, state regulation of railroad grade crossings was preempted, even if there had been no determination as to what the specific device would be required for a given grade crossing; Manual contained federal standard for grade crossings. Federal Railroad Safety Act of 1970, §§ 101 et seq., 204(a, b), 205, 45 U.S.C.A. §§ 421 et seq., 433(a, b), 434.

Phillip R. Fields, Wichita, Kan., for defendant-appellant.

Timothy J. King (Terry S. Stephens, with him, on the briefs) of Stinson, Lasswell & Wilson, Wichita, Kan., for plaintiff-appellee.

Before McKAY and MOORE, Circuit Judges, and ALLEY, District Judge.\*

JOHN P. MOORE, Circuit Judge.

### I.

This is an interlocutory appeal under 28 U.S.C. § 1292(b) from a decision denying Burlington Northern Railroad Company's motion for partial summary judgment on the issue of whether Robert E. Hatfield's common law negligence claim arising from a grade crossing collision is preempted by the Federal Railroad Safety Act. The district court held preemption had not occurred. *Hatfield v. Burlington Northern R.R. Co.*, 757 F.Supp. 1198 (D.Kan.1991). We reach the opposite conclusion and reverse.

Plaintiff Hatfield filed a multi-claim complaint alleging the defendant Burlington Northern Railroad was negligent because, among other reasons, it did not install an active warning device at a grade crossing

Oklahoma, sitting by designation.

\* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of



Cite as 958 F.2d 320 (10th Cir. 1992)

where a truck he was driving collided with one of Burlington's trains. At the time of the collision, the crossing was marked only by a standard crossbuck sign. Burlington moved for partial summary judgment on this claim, contending it had been preempted by the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 et seq., and railroad safety rules, standards, and regulations adopted by the Secretary of Transportation.

The district court denied the motion. Analyzing the issue of preemption,<sup>1</sup> the court concluded Congress explicitly expressed an intent in FRSA § 434 to preempt the subject of adequate crossing warnings once the Secretary of Transportation has acted upon this subject,<sup>2</sup> but found no such action had occurred. Despite Burlington's argument that the Secretary took that action by adopting the Manual on Uniform Traffic Control Devices on Streets and Highways (MUTCD), the court held that preemption does not occur until a formal determination is made under the MUTCD of the exact type of warning device to be installed at the crossing. Following the district court's certification under 28 U.S.C. § 1292(b), this appeal was taken.

[1,2] We apply a de novo standard of review when considering a decision on summary judgment, *Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), cert. denied, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987), and we use the same standard applied in the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141,

143 (10th Cir.1988). If no genuine issue of material fact exists, we determine if the substantive law was correctly applied. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Because there are no disputed facts, the issue before us is ripe for summary determination.

## II.

[3] In 1970, with the adoption of FRSA, Congress required the Secretary of Transportation to study and develop solutions to problems associated with railroad grade crossings. 45 U.S.C. § 433(a) (1976). FRSA also directs the Secretary to address the grade crossing safety problem under his authority over highway traffic and safety. 45 U.S.C. § 433(b) (1976). Under the Highway Safety Act, 23 U.S.C. §§ 401-404 (1982), the Secretary has the responsibility to develop uniform standards and to approve state-designed highway safety programs as a condition precedent to the receipt by the state of federal highway funds. Through the Federal Highway Administration, the Secretary prescribed procedures to obtain uniformity in highway traffic control devices and adopted the MUTCD. 23 C.F.R. § 655.601 (1981).<sup>3</sup>

With this background, we begin our analysis by agreeing with the district court that § 434 of FRSA states an express preemption of state law. We also agree preemption does not occur until the Secretary adopts a rule, regulation, or standard covering the subject matter of the state law.

*or standard relating to railroad safety until such time as the Secretary [of Transportation] 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.

45 U.S.C. § 434 (emphasis added).

1. State law is preempted under the Supremacy Clause of the United States Constitution in three circumstances. *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). First, Congress can define explicitly the extent to which its enactments preempt state law. *Id.* Second, a pervasive scheme of federal regulation may indicate congressional intent to occupy an entire field. Third, state law is preempted to the extent it actually conflicts with federal law. *Id.*

2. Section 434 states in part:

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,*

3. Kansas has specifically adopted the MUTCD standards at Kan.Stat. Ann. § 8-2003 and Kan.Admin.Reg. 82-7-4(c) (1989).

Thus, we must determine whether any of the standards adopted by the Secretary cover the subject matter of the duty to install active warning devices at railroad crossings where unusually dangerous conditions exist.<sup>4</sup>

### III.

While this court has not addressed the question, it has arisen in other courts with mixed results. In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir.1983), the court said:

The [MUTCD] prescribes that the selection of devices at grade crossing 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.

The locality in charge of the crossing in question has made no determination under the manual regarding the type of warning device to be installed at the crossing. Until a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing, the railroad's duty under applicable state law to maintain a "good and safe" crossing ... is not preempted.

Following *Marshall*, in *Nixon v. Burlington Northern R.R.*, No. CV 85-384-BLG-JFB, 1988 WL 215409 (D.Mont. May 2, 1988), the court found preemption because, prior to the incident in litigation, the State of Montana made an agreement with the railroad to install flashing light signals with automatic gates at the crossing where the incident occurred. In *Smith v. Norfolk & Western Ry. Co.*, 776 F.Supp. 1335 (N.D.Ind.1991), the court applied *Marshall*

and granted partial summary judgment because prior to plaintiff's accident, the local agency determined the necessary safety devices at the crossing and certified that the project was complete. In *Anderson v. Chicago Cent. & Pac. R.R. Co.*, 771 F.Supp. 227 (N.D.Ill.1991), the court found the railroad failed to present evidence that the Illinois Commerce Commission made any determination under the MUTCD on the type of warning device to be installed at the crossing where the collision occurred.

In *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir.1991), the court held preemption did not occur where a state, because of financial constraints, failed to implement a decision to install a particular signal device. Finally, in *Southern Pac. Transp. Co. v. Maga Trucking Co.*, 758 F.Supp. 608 (D.Nev.1991), although citing *Marshall*, the court found no preemption where the Nevada Public Service Commission had issued a report recommending the crossing be upgraded with flashing lights and automatic gates, but, at the time of the accident, the improvements had not been made because the railroad claimed it had not received federal funds.

### IV.

The dilemma presented by these varied results must be solved by resort to the language in the regulations adopted by the Secretary. First, all traffic control devices proposed for railroad crossings must comply with the uniform federal standards expressed in the MUTCD. 23 C.F.R. § 646.214(b)(1).<sup>5</sup> Second, all states must adopt the MUTCD and its revisions in order to receive federal highway funding. 23

4. Courts have found the Secretary has acted upon other safety subjects. See, e.g., *Burlington Northern R.R. Co. v. State of Mont.*, 880 F.2d 1104 (9th Cir.1989) (caboooses); *Burlington Northern R.R. Co. v. State of Minn.*, 882 F.2d 1349 (8th Cir.1989) (caboooses); *Sisk v. National R.R. Passenger Corp.*, 647 F.Supp. 861 (D.Kan. 1986) (speed limit); *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990) (hazardous materials), cert. denied, — U.S. —, 111 S.Ct. 781, 112 L.Ed.2d 845 (1991); *Norfolk & Western Ry. Co. v. Public Utils. Comm'n of Ohio*, 926 F.2d 567 (6th Cir.1991) (walkways); but see *Southern Pac. Transp. Co.*

*v. Public Utils. Comm'n of Cal.*, 820 F.2d 1111 (9th Cir.1987) (track clearance and walkways); *Missouri Pac. R.R. v. Railroad Comm'n of Tex.*, 850 F.2d 264 (5th Cir.1988) (caboooses), cert. denied, 488 U.S. 1009, 109 S.Ct. 794, 102 L.Ed.2d 785 (1989).

5. This provision relates to "grade crossing improvements" and states: "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."

C.F.R. § 655.603(b)(1). Third, the MUTCD standards are "intended for use both in new installations and at locations where general replacement of present apparatus is made." MUTCD, ¶ 8A-2.

Fourth, the MUTCD specifically states:

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.

MUTCD, Part VIII, ¶ 8A-1. This provision is particularly important for two reasons. One, it circumscribes the authority to determine what "devices" shall be erected at a grade crossing to "the public agency with jurisdictional authority." Two, it also makes the "installation and operation" of such devices subject to the determination of that agency. Thus, until a determination of need is made, no new device can be installed or operated at a crossing.

#### V.

The operation of ¶¶ 8A-1 and 2 results in a consequence which concerned the district court. Assuming preemption occurred when the MUTCD was adopted or when the Secretary promulgated 23 C.F.R. § 646.200, the court reasoned that a significant delay could be encountered before a safety device would be installed. The court believed this "gap period" is inconsistent with "the recognized view that '§ 434 manifests an intent to avoid gaps in safety regulations.'" *Hatfield*, 757 F.Supp. at 1205. Moreover, the court found "no regulation promulgated by the Secretary ... which

would *prohibit* a railroad from voluntarily deciding to put in place an improved warning device ... during the gap period." *Id.* at 1206. Thus, the court reasoned, the railroad has the authority (and assumably the duty) to install an improved warning device at a dangerous crossing during the "gap period." We disagree.

The district court's conclusion overlooks the specific language of MUTCD ¶ 8D-1 which states:

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

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.*

(emphasis added). This regulation effectively prohibits a railroad from acting on its own to select and install a safety device, contrary to the district court's conclusion. Moreover, it absolves the railroad of any independent duty regarding grade crossing safety devices.<sup>6</sup>

#### VI.

The scheme of regulation is patent. Congress expressed an intent to invade the field of grade crossing safety devices, postponing that invasion only until the Secretary of Transportation adopted a rule, regulation, order, requirement, or standard relating to that field. The Secretary has responded by adopting the MUTCD and making it applicable to grade crossings. Recognizing the variability of conditions that can arise at each intersection, the Sec-

6. See also Kan.Stat. Ann. § 8-1512 which states:  
(a) No person shall place, maintain or display upon or in view of any highway any unauthor-

ized sign, signal, marking or device which purports to be or is an imitation of or resembles an official ... railroad sign or signal.

retary has delegated to local authority the responsibility of assessing the needs and establishing the design for safety devices. Nonetheless, the statutory mandate for the adoption of a standard that would supplement any state requirement for grade crossing safety devices is satisfied by the adoption of the MUTCD. To that extent then, we disagree with *Marshall*.

Our disagreement with *Marshall* goes beyond our differing analysis of language in FRSA and MUTCD pertaining to preemption of common law standards of care for grade crossings, however. Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.

Having adopted the MUTCD, the Secretary prescribed the standard required by 45 U.S.C. § 434, and any state law relating to grade crossing safety devices was then superseded. All § 434 requires for preemption to occur is the adoption of the standard, and the MUTCD contains the standard. Postponing the determination of what specific device is required for a given grade crossing is simply a matter of implementing that standard. The scheme enacted by Congress did not anticipate that the effect of the standard was to be deferred or made selectively applicable for each grade crossing in the United States. To the contrary, once the Secretary adopted the standard, its superseding effect became uniform throughout the nation.

We do not believe leaving responsibility for implementation of the standard to local

authority diminishes this result. Requiring a local survey of grade crossings to determine need and design is no more than a pragmatic response to the multitude of conditions that exist throughout the country which dictate whether and what kind of a device is required at a specific place. Nonetheless, with the adoption of the MUTCD, the Secretary has absolved railroads from complying with duties imposed by state law regarding safety devices at grade crossings. Without such a duty, a railroad cannot be liable in common law negligence for failure to provide adequate safety devices at a grade crossing.

The judgment of the district court is REVERSED and REMANDED with instructions to grant defendant's motion for summary partial judgment and for further proceedings on plaintiff's remaining claims.



**The AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA. Plaintiff-Appellee.**

v.

**FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the Federal Savings and Loan Insurance Corporation Resolution Fund. Defendant-Appellant.**

and

**James W. Wilkinson; James H. Burge; Stanley Youngheim; Walter Ross; David Delana; Mark Franklin; Globe Savings Bank, F.S.B.; Federal Savings & Loan Insurance Corporation, in its corporate capacity or its successor, Defendants.**

No. 91-6038.

United States Court of Appeals,  
Tenth Circuit.

March 12, 1992.

Assignee of officers and directors liability policy issued to savings and loan as-