

1983

**Austin Hobbs v. The Denver & Rio Grande Western Railroad Company, And State of Utah, Department of Transportation : Brief of Defendant-Respondent State of Utah, Department Of Transportation**

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Stuart L. Poelman; Attorney for Defendant-Respondent

---

**Recommended Citation**

Brief of Respondent, *Hobbs v. Denver & Rio Grande Western Railroad*, No. 19019 (1983).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/4565](https://digitalcommons.law.byu.edu/uofu_sc2/4565)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

AUSTIN HOBBS,

Plaintiff-Appellant,

vs.

Case No. 19019

THE DENVER & RIO GRANDE WESTERN  
RAILROAD COMPANY, and STATE OF  
UTAH, DEPARTMENT OF TRANSPORTATION,

Defendants-Respondents.

- - - - -

BRIEF OF DEFENDANT-RESPONDENT  
STATE OF UTAH, DEPARTMENT OF TRANSPORTATION

- - - - -

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable J. Dennis Frederick

- - - - -

JACKSON HOWARD  
HOWARD, LEWIS & PETERSON  
120 East 300 North  
P. O. Box 778  
Provo, Utah 84603  
Attorneys for  
Plaintiff-Appellant

ALAN L. SULLIVAN  
JEFFREY E. NELSON  
VANCOTT, BAGLEY, CORNWALL  
& MCCARTHY  
Suite 1600, 50 South Main  
Salt Lake City, Utah 84114  
Attorneys for Defendant-  
Respondent Railroad

STUART L. POELMAN  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P. O. Box 3000  
Salt Lake City, Utah 84110  
Attorneys for Defendant  
Respondent D.C.T.

FILED

NOV 21 1983

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

AUSTIN HOBBS,

Plaintiff-Appellant,

vs.

Case No. 19019

THE DENVER & RIO GRANDE WESTERN  
RAILROAD COMPANY, and STATE OF  
UTAH, DEPARTMENT OF TRANSPORTATION,

Defendants-Respondents.

- - - - -

BRIEF OF DEFENDANT-RESPONDENT  
STATE OF UTAH, DEPARTMENT OF TRANSPORTATION

- - - - -

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable J. Dennis Frederick

- - - - -

JACKSON HOWARD  
HOWARD, LEWIS & PETERSON  
120 East 300 North  
P. O. Box 778  
Provo, Utah 84603  
Attorneys for  
Plaintiff-Appellant

ALAN L. SULLIVAN  
JEFFREY E. NELSON  
VANCOTT, BAGLEY, CORNWALL  
& MCCARTHY  
Suite 1600, 50 South Main  
Salt Lake City, Utah 84114  
Attorneys for Defendant-  
Respondent Railroad

STUART L. POELMAN  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P. O. Box 3000  
Salt Lake City, Utah 84110  
Attorneys for Defendant-  
Respondent D.O.T.

## TABLE OF CONTENTS

	Page
NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT	
POINT I. THE LOWER COURT CORRECTLY FOUND SUBSTANTIAL EVIDENCE THAT D.O.T. WAS NOT NEGLIGENT IN THE SELECTION OF THE 1ST EAST CROSSING. . . . .	7
A. There Was No Substantial Evidence That D.O.T. Was Negligent in the Selection of the 1st East Crossing as a Detour Route. . . . .	8
B. There was no Substantial Evidence That D.O.T. was Negligent in the Utilization of Warning Devices at the Crossing. . . . .	12
POINT II. D.O.T. WAS IMMUNE FROM SUIT BY PLAINTIFF UNDER THE GOVERNMENTAL IMMUNITY ACT. . . . .	18
POINT III. THE TRIAL COURT DID NOT ERR IN ITS FINDINGS AND ALLOCATIONS OF NEGLIGENCE AND A REQUEST FOR ALLOCATION ON APPEAL IS IMPROPER. . . . .	20
CONCLUSION . . . . .	22

## CASES CITED

<u>Bramel v. Utah State Road Comm.,</u> 465 P.2d 534 (Utah 1970) . . . . .	9
<u>Christiansen v. Utah Transit Authority,</u> 649 P.2d 42 (Utah 1982) . . . . .	20

<u>Frank v. State</u> , 613 P.2d 517, 520 (Utah 1980) . . . . .	19
<u>High v. The State Highway Dept.</u> , 307 A.2d 799 (Del. 1973) . . . . .	11, 16
<u>Kohler v. Garden City</u> , 639 P.2d 162 (Utah 1981) . . . . .	21
<u>Little v. Utah State Division of Family Services</u> , 667 P.2d 49 (Utah 1983) . . . . .	18
<u>Piacitelli v. Southern Utah State College</u> , 636 P.2d 1063 (Utah 1981) . . . . .	21
<u>Reimchiissel v. Russell</u> , 649 P.2d 26 (Utah 1982) . . . . .	21

#### STATUTES CITED

§27-12-110, U.C.A. . . . .	19
§41-6-95, U.C.A. . . . .	14, 16
§54-4-15, U.C.A. . . . .	19
§63-30-10(1), U.C.A. . . . .	18
§78-27-27, U.C.A. . . . .	21

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

AUSTIN HOBBS,

Plaintiff-Appellant,

vs.

Case No. 19019

THE DENVER & RIO GRANDE WESTERN  
RAILROAD COMPANY, and STATE OF  
UTAH, DEPARTMENT OF TRANSPORTATION,

Defendants-Respondents.

- - - - -

BRIEF OF DEFENDANT-RESPONDENT

STATE OF UTAH, DEPARTMENT OF TRANSPORTATION

- - - - -

NATURE OF THE CASE

This is an action commenced by Plaintiff against Defendants State of Utah, Department of Transportation and Denver & Rio Grande Western Railroad Company for injuries sustained in a truck-train accident which occurred in Price, Utah.

DISPOSITION IN LOWER COURT

At the conclusion of a two-day trial, the Honorable Dennis Frederick, sitting without a jury, found in favor of both defendants and entered a no cause of action against Plaintiff. The court concluded that the actions of Plaintiff were the sole proximate cause of the accident and that neither defendant Rio Grande Railroad nor defendant State of Utah, Department of Transportation were negligent. (R. 381-387; 396).

## RELIEF SOUGHT ON APPEAL

The Department of Transportation seeks affirmance of the judgment in its favor.

## STATEMENT OF FACTS

Because this Court, in reviewing contentions of Plaintiff, must do so in a light most favorable to the lower court's findings and because the findings will not be disturbed by this Court if they are supported by substantial evidence, respondent State of Utah, Department of Transportation (hereinafter "D.O.T.") shall restate the Findings of Fact made by the lower court with appropriate record references. In addition, the Department would incorporate and adopt the "Statement of Facts" contained in the Brief of defendant Denver & Rio Grande Western Railroad Company (hereinafter "Railroad").

The following Findings of Fact were made by the lower court:

1. At about 10:00 p.m. on April 23, 1979, while driving a coal-hauling tractor-trailer truck in connection with his employment, Plaintiff was involved in a collision with one of the Railroad's trains at the Railroad's crossing located between 2nd and 3rd South on 1st East in Price, Utah. (Tr. 46).
2. The 1st East crossing is composed of five sets of tracks. The northernmost of these tracks is the active or "mainline" track. It was on this track that the collision occurred. (Tr. 141). The tracks approach 1st East from a slightly east-southeasterly direction. (Tr. 589). The mainline track is straight for more than three-quarters of a mile to the

east of the 1st East crossing. (Tr. 62, 589).

3. The Railroad's tracks also cross Carbon Avenue in Price. (Ex. P-10). On the day of the accident, the Carbon Avenue crossing was closed because of repair work being performed there at the direction of the D.O.T. (Tr. 480-485). The D.O.T. detoured traffic from Carbon Avenue to 1st East to permit Railroad and D.O.T. crews to complete the work, which was to take about three to five days. (Tr. 202).

4. The D.O.T. made a decision to detour traffic from Carbon Avenue to 1st East. (Tr. 219). The decision was made after a meeting called by the D.O.T. on April 6, 1979, attended by representatives of the D.O.T., the Railroad, and Price City. (Tr. 190, 260, 273; Defendants' Ex. 29). At the meeting, it was determined that it would be impractical to permit traffic to continue across the Carbon Avenue crossing during the construction. (Tr. 192-193). Another alternative considered at the meeting was the traffic be diverted to 1st West. (Tr. 232, 248). However, the D.O.T. decided to detour traffic to 1st East for several reasons, including, but not limited to, the following:

(a) There was less existing traffic on 1st East than on 1st West;

(b) The housing and population of children were less dense on 1st East;

(c) The turns along the 1st East detour route were easier to negotiate, particularly for large trucks; and



(d) The 1st East crossing was in better condition and could more easily accommodate the additional traffic, including the large coal trucks. (Tr. 225-228, 231-232, 262, 286-289).

The chosen detour diverted traffic traveling northbound on Carbon Avenue right (east) on 3rd South, left (north) on 1st East across the tracks to 1st South, left (west) on 1st South, then right (north) on Carbon Avenue. (Defendants' Ex. 26).

5. Before the construction began, the warning signals at the 1st East crossing consisted of white "crossbuck" signs that had been there for many years. (Plaintiff's Ex. 5). The D.O.T. installed additional yellow railroad warning signs before the detour was imposed. (Ex. 30). The Railroad imposed a "slow" order during the construction, requiring its trains to reduce their speed from 40 mph to 30 mph from milepost 619.0 to 619.5 during the period of the construction. (Tr. 233, 306, 369). Milepost 619.0 was located about 100 feet east of the 1st East crossing, and milepost 619.5 was located one-half mile west of milepost 619.0. (Tr. 564).

6. The train crew in the lead engine on the night of the accident consisted of the engineer (Martin Gasner), the head brakeman (Gerald Leonard), and the road foreman of equipment (James Harvey). (Tr. 364, 370, 399). Mr. Harvey's duties included the supervision and evaluation of the Railroad's crews, and he was seated in the lead engine on the night of the accident for the purpose, among others, of observing and evaluating the crew's performance. (Tr. 420, 560).

7. As the train approached Price on the night of the accident, the train engineer reduced the speed of the train from approximately 60 mph to 40 mph or less in accordance with the applicable Price City ordinance. (Tr. 404, 564). The train engineer further reduced the speed of the train to 30 mph or less at milepost 619.0 in accordance with the Railroad's slow order. (Tr. 405, 433, 564).

8. As the Railroad's train approached to within a quarter mile of the 1st East crossing, its locomotive bell was ringing, the fixed and oscillating headlights on the front of its locomotive were burning, and the train engineer sounded the standard whistle signal, composed of two long blasts followed by one short blast and one long blast. (Tr. 121, 151, 406, 414-415, 417, 436-438, 492).

9. On the night of the accident, Plaintiff drove north on Carbon Avenue, then followed the detour route that led him east on 3rd South, then north on 1st East. (Tr. 483-485). Plaintiff knew that the northernmost track was the mainline track and he was acquainted with the 1st East crossing because he crossed it traveling south earlier on the day of the accident. (Tr. 480). Furthermore, Plaintiff has crossed the Carbon Avenue crossing frequently during the six years he had worked for his employer before the accident. (Tr. 510, 523).

10. As Plaintiff approached the 1st East crossing, he slowed his truck to approximately 3 to 5 mph, (Tr. 123) but failed to come to a complete stop at any point before or on the crossing. (Tr. 485, 514). Plaintiff had a clear view of the

approaching train for at least the last 110 feet before he reached the mainline track, except for a very brief period when his view of the lead engine was obstructed by a stationary boxcar parked approximately 140 feet east of the crossing on a storage track. (Tr. 53, 70, 343, 603, Plaintiff's Ex. 6). After passing that obstruction, Plaintiff had a clear view of the approaching train for more than ten seconds before he reached the mainline track and with ample time to bring his truck to a stop. (Tr. 43-44, 63, 516, 585, 603-614). Plaintiff proceeded across the crossing at approximately 3 to 5 mph and either failed to look or listen for the train or failed to heed what he saw or heard as the train approached. (Tr. 66, 486, 488, 514, 522, 569).

11. James Harvey, who was sitting in the left front seat of the train engine cab, saw Plaintiff's truck approaching the crossing but assumed that, because the truck was decelerating and approaching the crossing so slowly, Plaintiff intended to stop. (Tr. 566). Gerald Leonard, seated behind Mr. Harvey, also saw Plaintiff's truck approaching the mainline track. When Mr. Harvey and Mr. Leonard realized that the truck was not going to stop before the mainline track, they simultaneously warned Martin Gasner. (Tr. 432, 567). At that time, the train could not be stopped short of the crossing. (Tr. 406). Mr. Gasner saw the truck and immediately applied the train's emergency brakes. (Tr. 422-428, 577, 582).

The Findings of the lower court are contained at page 381-387 of the record and is also an appendix to the Brief of Appel-

ARGUMENT

POINT I.

THE LOWER COURT CORRECTLY FOUND  
SUBSTANTIAL EVIDENCE THAT D.O.T.  
WAS NOT NEGLIGENT IN THE SELECTION  
OF THE 1ST EAST CROSSING.

It is difficult to determine from Appellant's Brief the exact basis of his appellate claims against defendant D.O.T. It is assumed that since the only role D.O.T. had in this accident was the selection of the 1st East crossing as a detour for Carbon Avenue, that this selection is the sole basis of Appellant's claim now before this Court. (See Appellant's Brief, p. 13-14).

The statement of Plaintiff is incorrect that D.O.T. was involved with "repair work being conducted at the intersection where the accident occurred." (Appellant's Brief, p. 13). At the time of the accident the only repair work being performed by D.O.T. was at Carbon Avenue--not 1st East. It is clear that D.O.T. did not operate the railroad engine which was involved in the accident nor was it responsible for any actions or omissions of the Railroad.

The claims of Appellant against D.O.T. therefore, can be divided into two categories: first, that D.O.T. was negligent in selecting the 1st East crossing as opposed to other alternatives; second, once the crossing was selected D.O.T. was negligent in not requiring additional warning devices at the crossing. These two contentions will now be discussed.

A. There Was No Substantial Evidence That D.O.T. Was Negligent in the Selection of the 1st East Crossing as a Detour Route.

A review of the evidence shows that Plaintiff spent a great deal of time and effort in the lower court comparing the advantages and disadvantages of the 1st East vs. 1st West railroad crossings. In addition, Plaintiff continuously referred to the traffic patterns and signals utilized on Carbon Avenue in comparing it to both alternatives. If Plaintiff could have shown that the selection of the 1st East crossing breached a duty of D.O.T. to the motoring public then such an effort could be justified. However, the evidence is virtually undisputed that the 1st East crossing which was selected by D.O.T. was a sound and prudent decision in the discretionarily judgment of D.O.T.

Because Plaintiff did not become involved in an accident on his route to the railroad crossing, the selection of the various roads which were utilized in reaching the crossing is immaterial to this lawsuit. For example, the claims of Plaintiff that additional turns or unsafe turns were required have no relevance in this litigation. The only possible relevance as to the detour route concerns the crossing itself. In other words, was the lower court justified in concluding that D.O.T. exercised reasonable care "in the choice of the detour route to 1st East." (Conclusion of Law No. 4).

The evidence clearly shows that D.O.T. was justified in selecting the 1st East detour route while the Carbon Avenue

crossing remained closed. During the meeting in which D.O.T. representatives met with the Railroad and City representatives, the various options for rerouting were thoroughly discussed. While it is true as Plaintiff argues in his brief that the 1st West crossing had certain advantages over the 1st East crossing, it is equally true that there were advantages of the 1st East crossing over the 1st West crossing. As noted by the lower court in the Findings of Fact, these included the amount of traffic, the housing and population of children, the average speed of traffic, the number of turns that had to be made, the condition of the crossings, and the convenience of the detour to the general public. (Tr. 225-233, 533).

There was no showing by Plaintiff that it was negligent for D.O.T. to expect cars or trucks to be able to safely pass across the 1st East intersection. This was not an instance where a vehicle was directed on a detour which was negligently designed and which caused the accident to occur. C.f. Bramel v. Utah State Road Comm., 465 P.2d 534 (Utah 1970). All of the roads used in the detour were already existing as was the railroad crossing itself. Here, the only purpose of the detour was to route traffic from one existing railroad crossing to another existing railroad crossing. There is no showing whatsoever that the decision was either negligent or that such decision proximately caused Plaintiff's injuries.

Plaintiff argues that because the traffic flow at the 1st East crossing increased from approximately 230 vehicles per day to over 11,000 vehicles per day then D.O.T. was somehow negli-

gent in choosing this particular crossing. Such an argument is without merit. Plaintiff produced no evidence that the 1st East crossing was incapable of handling this additional load of vehicles for a short three to five day period. Obviously, thousands of cars and vehicles had utilized the 1st East crossing for many years prior to the temporary closure of the Carbon Avenue crossing. Thus, while the increased number of cars may have caused congestion or some other traffic flow effect upon the crossing, Plaintiff produced no evidence that the crossing was made dangerous because of these additional cars. If anything, the fact that this number of cars was able to utilize the crossing during the detour period again showed that the decision to utilize the crossing was not negligent.

More importantly, however, is the fact that the number of cars which utilized the crossing is completely irrelevant to this lawsuit. It is undisputed that at the time of the accident there was no other traffic traveling in the railroad crossing. Plaintiff himself admitted to this fact. (Tr. 529-30). Whether there were 11,000, 100,000 or ten cars passing in the intersection that day is completely irrelevant to the facts of this accident in which only the plaintiff and the train were involved.

The focus of Plaintiff upon the Carbon Avenue crossing is completely misplaced. The only factual relevance of the Carbon Avenue crossing is that Plaintiff would not have crossed at 1st East had the Carbon Avenue crossing not been closed. However, this fact is no more relevant than to say that had

the plaintiff eaten his lunch five minutes slower he would not have been at the crossing when the train passed. Thus, as to the choice of the 1st East crossing itself there is no evidence of negligence or proximate causation to Plaintiff's injuries.

A case involving similar claims is High v. The State Highway Dept., 307 A.2d 799 (Del. 1973). In that case the plaintiff's decedent was traveling on a detour which had been routed by the state highway department because of construction on the main highway. A jury verdict was entered in favor of the plaintiff and against the highway department for improperly detouring the traffic.

The Supreme Court of Delaware reviewed the evidence and concluded that judgment, as a matter of law, should be entered in favor of the highway department. The court noted that the traffic routing plan was prepared in accordance with the usual and normal provisions used by the highway department. The plaintiff, while acknowledging that normal procedures were undertaken, urged that additional steps should have been implemented including the placement of guardrails, the erection of more signs, and the construction of a swing-around area.

The court found that the highway department had correctly exercised its discretion in selecting the traffic routing plan that was utilized in this case. The Supreme Court of Delaware stated:

We think it is clear that if there are two acceptable courses of action for the achievement of the same purpose, it is not negligence on the



part of a defendant to pursue one rather than the other. This Court recognized this principle in DeFilippo v. Preston, 173 A.2d 333 (Del., 1961). This was a medical malpractice case, and we held that the decision of the doctor to follow one of two accepted surgical procedures should not be made the basis of a charge of negligence when the operation was unsuccessful. We stated:

We think, therefore, that the plaintiff failed to make a submissible issue of negligence for the jury and that, consequently, on this phase of the case the direction of a verdict for the defendant was proper.

To the same effect is Boston CC and New York Canal Co. v. Seaboard Transportation Co., 270 F. 525 (1st Cir. 1921). We think, therefore, that it was error to refuse the highway department's motion for directed verdict. We point out that this conclusion is not based upon any concept of the doctrine of sovereign immunity, which is specifically waived by 18 Del. C. §6509. This conclusion is based solely upon our opinion that no issue of negligence was presented to be resolved by the jury as to the highway department. The judgment against the state highway department will therefore be reversed. Id. at 850. (Emphasis added).

In the instant case the lower court did not rule as a matter of law that D.O.T. had no liability. Rather, the court found as a trier of fact that the detour plan was reasonable and that D.O.T. exercised reasonable care in the choice of the detour route. There is no substantial evidence to the contrary and therefore the decision of the lower court as to this phase of its opinion must be sustained.

B. There was no Substantial Evidence That D.O.T. was Negligent in the Utilization of Warning Devices at the Crossing.

A closely related claim to the one previously discussed is whether, after choosing the 1st East crossing as the detour route, D.O.T. was obligated to make additional warning devices

available during the detour period. In other words, even if it is assumed that D.O.T. was not negligent in selecting the 1st East crossing as an alternate route was it negligent in not requiring additional warning devices during the time the detour was in effect?

Appellant asserts that because the Carbon Avenue crossing utilized flashing lights and because improvements in the crossing with additional lights were being made that this required some type of signals to be installed on 1st East during the detour. (Appellant's Brief, p. 3, 11, 13-14). In addition, Plaintiff claims that to be a safe railroad crossing the 1st East intersection should have allowed traffic to pass at 30 mph. (Appellant's Brief, p. 20).

The comparison of the Carbon Avenue crossing to the 1st East crossing is inappropriate. The Carbon Avenue crossing was designed to carry a large load of traffic. As noted by Appellant himself, the crossing carried an average of 11,000 cars a day. The purpose of the intersection and its warning systems was to allow a speedy flow of traffic across the railroad tracks except when trains were present. Thus, the 30 mph speed which was desirable for providing stability for trans-versing traffic (Tr. 167) is only applicable to an "improved" railroad crossing. (Tr. 216). The purpose of the alternating electronic signals is to stop traffic only when trains are coming and to therefore allow the smooth flow of traffic when trains are not present.

On the other hand, the 1st East railroad crossing is similar

to thousands within the country and within the State of Utah. This is a low density crossing which is not designed for large volume of traffic and it is not a high speed route for rail. Rather, these type of crossings rely on the ability of the motorist to prudently observe the sound of a train and use the train to give appropriate signals when it approaches. The argument advanced by Plaintiff would, in effect, require the imposition of automated signals at every intersection within the State of Utah regardless of the number of vehicles which may use it in any given day. Such a suggestion is both illogical and completely unattainable unless millions of dollars in additional signal equipment is appropriated for such use.

It is clear that Utah law permits these type of intersections on the assumption that a motorist, once he is warned that a railroad crossing exists, will exercise the type of care necessary to avoid an accident in conjunction with the same care utilized by railroad personnel. §41-6-95, U.C.A.

D.O.T. was not negligent in selecting the 1st East railway crossing for the detour since its terrain and warning signs were more than adequate for observation of trains. The crossing had full visibility of all four quadrants of the crossing. (Tr. 201). There was very little elevation difference in the tracks thereby allowing full visibility in all directions. (Tr. 233). (See photograph contained in Appendix herein).

In addition, there were adequate warning signs that the railroad tracks were present. Prior to the tracks on the

pavement there were 12-inch wide cross-type or crosses with the symbol "RR". (Tr. 231). In addition there were "cross-ticks" which signified the existence of the railroad tracks and a vertical circular sign with the RR symbol. (Tr. 231). D.O.T. felt that because of these warnings and because of the terrain of the crossing that additional warning devices would not be necessary. (Tr. 201).

There can be no question from the record that the plaintiff was aware of the existence of the railroad tracks before he entered the crossing. The evidence is undisputed that he was completely familiar with the railroad tracks at the time of the accident. Plaintiff had traveled across these same tracks at the Carbon Avenue crossing for over six years and admitted that he knew trains generally used the northernmost track. (Tr. 511). He also admitted that he knew he was traveling over railroad tracks at the time of the accident and, in fact, had traveled over four sets of tracks before he was hit by the train on the fifth set. (Tr. 523).

As to Plaintiff's claim that he should have been warned about the approach of the train, it is not the obligation of the D.O.T. in this type of intersection to give such a warning. Rather, it is the sole responsibility of the motorist and the train personnel to insure that they are both watching for each other's presence. Had this been a case in which a flashing signal was present but failed to activate when a train approached then Plaintiff would justifiably have a claim against D.O.T. if it had the duty to maintain the device. Had Plaintiff shown that

the accident was caused by the increased traffic flow on 1st East he may also have had a valid claim. Here, there was neither a mechanical device nor the existence of any other traffic. Thus, no breach to warn is present.

Plaintiff has shown a duty which requires D.O.T. to place a mechanical device or a flagman at every railroad crossing in the state. While Utah law requires a motorist to stop for an electrical or mechanical signal device or for a human flagman, it also requires a motorist to stop when a railroad train emits an audible signal or when an approaching train is visible and is in a hazardous proximity to the crossing. §41-6-95, U.C.A.

The facts giving rise to this accident do not really concern defendant D.O.T. in that it merely routed the traffic to a perfectly usable railroad crossing in which adequate notice of the crossing was given. Whether Plaintiff was negligent in failing to observe the train or whether the train personnel were negligent in failing to adequately warn the plaintiff or failing to observe him does not concern the liability of the D.O.T.

Unlike the plaintiff in High, supra, Appellant produced no expert testimony that either the crossing was extra hazardous or required additional warning devices. As noted earlier, even if such testimony had been presented, the trial court is still able to rule as a matter of law in the favor of the detour planning agency. Here, there was no evidence of any breach by D.O.T. in relying on the warnings in existence and upon the

high visibility of the crossing itself.

Thus, the lower court correctly concluded that the D.O.T. exercised reasonable care in the choice of crossing protections required and installed at the first East crossing. (Conclusion of Law No. 4). It also concluded that the crossing was not extra hazardous because of volume of traffic, the nature of the crossing, the presence of obstructions, or because of other circumstances prevailing on the night of the accident. The court also correctly found that neither the D.O.T. nor the Railroad had a duty to place flagmen or additional warnings or protection at the 1st East crossing under the circumstances of Plaintiff's accident. (Conclusion of Law No. 5).

These conclusions are based upon substantial evidence. Even if it is assumed arguendo that D.O.T. had some legal responsibility for the events occurring within the railroad crossing itself the evidence is clear that Plaintiff's conduct was the cause of the accident. The undisputed facts as to the warnings given by the Railroad as verified by two disinterested witnesses and the series of photographs showing the visibility of the railroad tracks during the 10 to 15 seconds which Plaintiff had available to observe, clearly supports the lower court's findings that Plaintiff's actions were the sole proximate cause of the accident. (See photographs depicting time sequence of Plaintiff's approach to the mainline track contained in the Appendix herein).

Substantial evidence exists to support the lower court's findings and conclusions. Regardless of what theory is utilized

by Plaintiff, the evidence simply does not support any claim that D.O.T. was negligent in the warning to Plaintiff of the crossing or in the warning to Plaintiff of the approaching train. As such, the conclusion of the lower court in D.O.T. favor should be sustained.

## POINT II.

### D.O.T. WAS IMMUNE FROM SUIT BY PLAINTIFF UNDER THE GOVERNMENTAL IMMUNITY ACT.

While the issue of governmental immunity was never reached by the lower court, respondent D.O.T. would assert that the decision to utilize the 1st East crossing was clearly a discretionary function and therefore D.O.T. is immune, as a matter of law, from any liability in selecting that crossing.

Section 63-30-10(1), U.C.A. provides that immunity shall not be waived if the negligent act or omission arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. In the recent case of Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983) this Court delineates the requirements of a discretionary vs. a ministerial function. This Court stated, "If the state posits immunity on such an exercise of discretion, it must make a showing that a conscious balancing of risks and advantages took place." Id. at 51. Here, the April 6, 1979 meeting held by the D.O.T. was a clear illustration of how a balancing of risks and advantages occurred.

In addition, this Court noted four other preliminary questions which must be answered. Again, all four are applicable in the

case. First, the decision of D.O.T. as to the improvement of the Carbon Avenue intersection and the route to be used during the detour involved a basic program of upgrading railroad intersections throughout the state. (Tr. 162-167).

Second, the improvement work on the Carbon Avenue crossing and the requirement of rerouting the traffic was essential to the realization of the upgrading program. (Tr. 166-167).

Third, the action of evaluating which crossings to upgrade and the detour routes to be utilized during the upgrading required the exercise of basic policy evaluation, judgment, and expertise on the part of D.O.T. (Tr. 187-191, 208-218).

Finally, D.O.T. was clearly possessed with the statutory authority to make the required upgrading of the intersection and to reroute the traffic during the upgrading. §54-4-15, et seq. U.C.A.; §27-12-110, U.C.A.

The decision to perform work on the Carbon Avenue crossing and the concurrent decision to route the traffic during the construction period through 1st East was clearly a discretionary function on the part of the D.O.T. This was not a one-to-one dealing between the department and the plaintiff. Rather, the decision as to the highway improvement and routing had an impact "on large numbers of people in a myriad of unforeseeable ways." And as such, the D.O.T. is protected "from individual and class legal actions, the continual threat of which would make public administration all but impossible." Frank v. State, 613 P.2d 517, 520 (Utah 1980).

In the alternative, therefore, D.O.T., as a matter of law,



is immune from any action being brought against it by Plaintiff regarding this accident.

POINT III.

THE TRIAL COURT DID NOT ERR IN ITS  
FINDINGS AND ALLOCATION OF NEGLIGENCE  
AND A REQUEST FOR ALLOCATION ON APPEAL  
IS IMPROPER.

The final point urged by Appellant is that this Court should grant a new trial on the basis that the decision of the lower court was against the weight of the evidence. (Appellant's Brief, p. 14-19). In support Plaintiff relies upon a decision of the Supreme Court of Maine (Maiso v. Malone, 407 A.2d 310), a decision of the Florida Appellate Court (Kinsey v. Kelly, 312 So.2d 461) and a decision of the Supreme Court of Wisconsin (Lawver v. City of Park Falls, 151 N.W.2d 68). This argument and these authorities are not relevant to this case.

There are many standards of appellate review throughout the United States. While some appellate courts consider the "weight of the evidence" in reviewing a verdict or findings of a lower court, this Court and the Constitution of Utah prohibit such review. In Christiansen v. Utah Transit Authority, 649 P.2d 42 (Utah 1982) an action was brought by the plaintiff against the defendant Utah Transit Authority seeking damages for personal injuries. A jury returned a verdict of 70% of negligence for the plaintiff and 30% for the defendant. The plaintiff appealed. This Court affirmed the jury verdict and rejected the same argument now being made by Appellant in the

instant case. This Court stated:

Christiansen contends that the verdict is contrary to the clear weight of the evidence. Our scope of review in a law case does not permit us to determine that question. The Constitution of Utah, Art. VIII, §9 limits our review in cases at law to questions of law and thus we will not disturb a jury verdict on a factual question which is supported by any competent evidence. Uintah Pipeline Corp. v. White Superior Co., 546 P.2d 855 (Utah 1976); Nelson v. Peterson, 542 P.2d 1075 (Utah 1975); Weber Basin Water Conservancy District v. Skeen, 328 P.2d 730 (Utah 1959). Id. at 45.

The scope of review in this case is whether there is substantial evidence in the record to support the findings and conclusions of the lower court. On appeal, this Court must consider all evidence in a light most favorable to the trial court's findings of fact and those findings are entitled to presumption of correctness and may not be overturned so long as they are supported by substantial evidence in the record. Reimchiissel v. Russell, 649 P.2d 26 (Utah 1982); Kohler v. Garden City, 639 P.2d 162 (Utah 1981); Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981).

Even the Federal Circuit case cited by Appellant (Scovill v. Missouri, 458 F.2d 639) held that a question for the jury existed as to the negligence of both the plaintiff motorist and the railroad. While in Scovill the finder of fact concluded that the conditions were such that the plaintiff was not properly warned by the railroad and could not observe the train coming, the principle is still the same that the trier of fact decided the circumstances based upon all of the evidence. Here, the trier of fact found to the contrary but still con-

sidered all of the evidence relating to the actions of the parties. As such, a new trial is not proper unless there is no substantial evidence justifying the lower court's decision.

Finally, it should be noted that in order for Plaintiff to prevail in any argument concerning the need for new trial this Court would have to determine that there was no substantial evidence that Plaintiff was at least 50% negligent at the time of the accident. §78-27-27, U.C.A. Even assuming arguendo that the plaintiff was not the sole proximate cause of the accident it would still be Plaintiff's burden to prove that he was less than 50% at fault. D.O.T. submits that this conclusion cannot be reached by any review of the evidence utilizing any standard.

Quite clearly, Plaintiff failed to make any effort to observe or hear sights and sounds which were seen and heard by others including disinterested witnesses. Since the Railroad performed all of the statutory requirements of warning there can be no doubt that Plaintiff was at least 50% negligent in failing to observe and heed these warnings regardless of any conduct or misconduct on the part of the defendants.

For these reasons, therefore, the trial court did not err in its findings nor is there any justification to remand this case for new trial.

#### CONCLUSION

While Plaintiff has presented an interesting case on appeal involving numerous alleged issues, a breakdown of the relevant

issues shows that there is no valid argument made by Plaintiff. For example, the facts surrounding the 1st West crossing and the Carbon Avenue crossing have no materiality to this appeal whatsoever.

Why Plaintiff reached the 1st East crossing is of no importance. The traffic history of the crossing on that day is of no importance. The only question of relevance is whether D.O.T. breached any duty to Plaintiff at the exact moment that the crossing was attempted.

There is substantial evidence supporting the lower court's conclusion that no such duty was breached--neither in initially selecting the detour route or in the warnings that were present. In any event, D.O.T. is immune from prosecution because of the discretionary role this activity invoked.

The decision of the court is fully justified by the evidence. The decision should be affirmed.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 

Stuart L. Poelman

Attorneys for Defendant-Respondent  
State of Utah, Department of  
Transportation

MAILING CERTIFICATE

I hereby certify that true and correct copies of the foregoing Brief of Defendant-Respondent State of Utah, Department of Transportation were mailed postage prepaid, this 21<sup>st</sup> day of November, 1983 to the following:

Jackson Howard  
HOWARD, LEWIS & PETERSON  
120 East 300 North  
P. O. Box 778  
Provo, Utah 84603  
Attorneys for Plaintiff-Appellant

Alan L. Sullivan  
Jeffrey E. Nelson  
VANCOTT, BAGLEY, CORNWALL  
& McCARTHY  
Suite 1600, 50 South Main  
Salt Lake City, Utah 84114  
Attorneys for Defendant-Respondent  
Denver & Rio Grande Western Railroad Co.



## APPENDIX

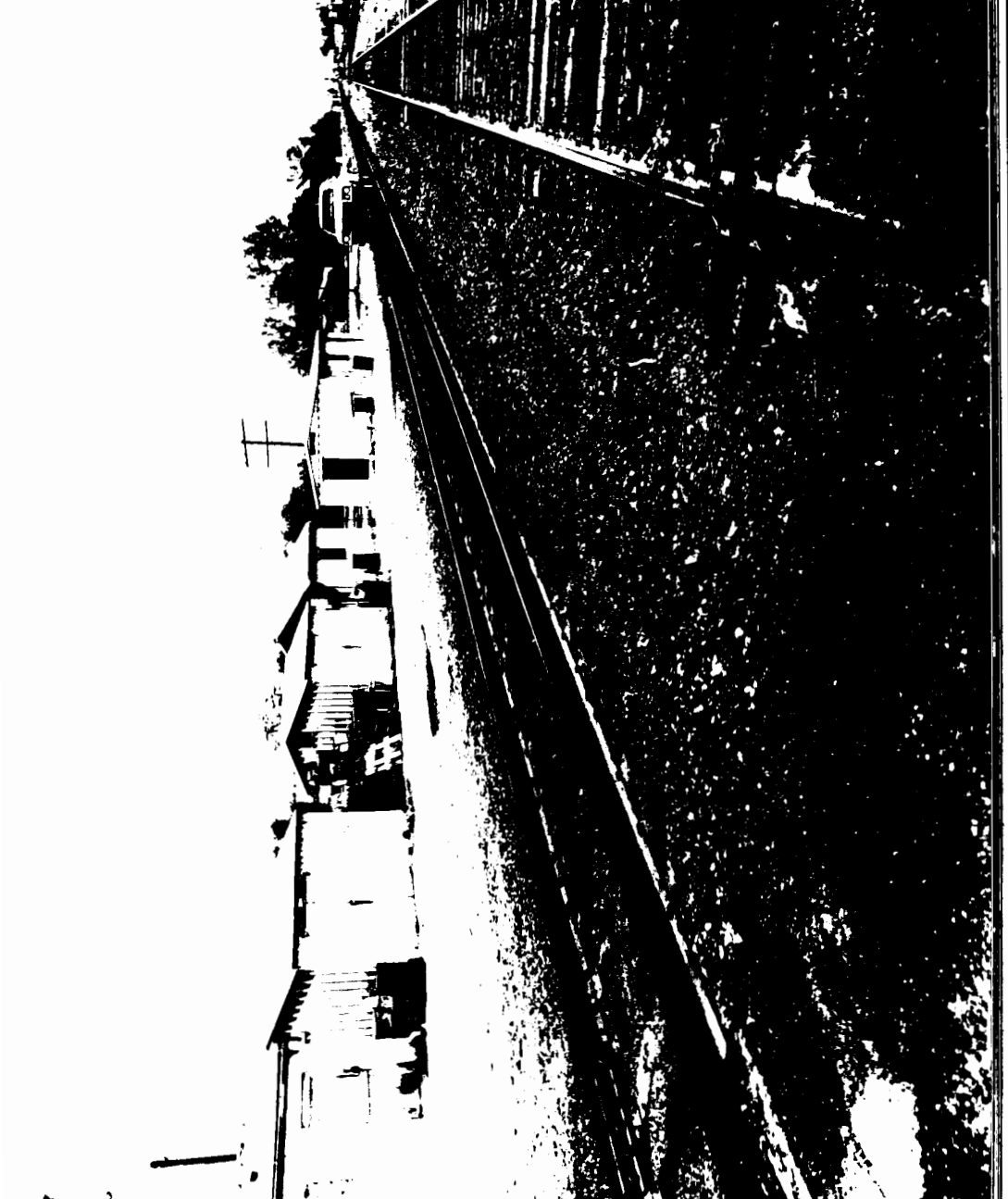


Exhibit D-52 view of plaintiff 13.2' from mainline rail and  
3 seconds before accident. (Truck = locomotive)



Exhibit D-50 view of plaintiff 22' from mainline rail and 5 seconds before accident. (Truck = locomotive)





Exhibit D-44 view of plaintiff 66' feet from mainline rail and 15 seconds before accident. (Truck = locomotive)

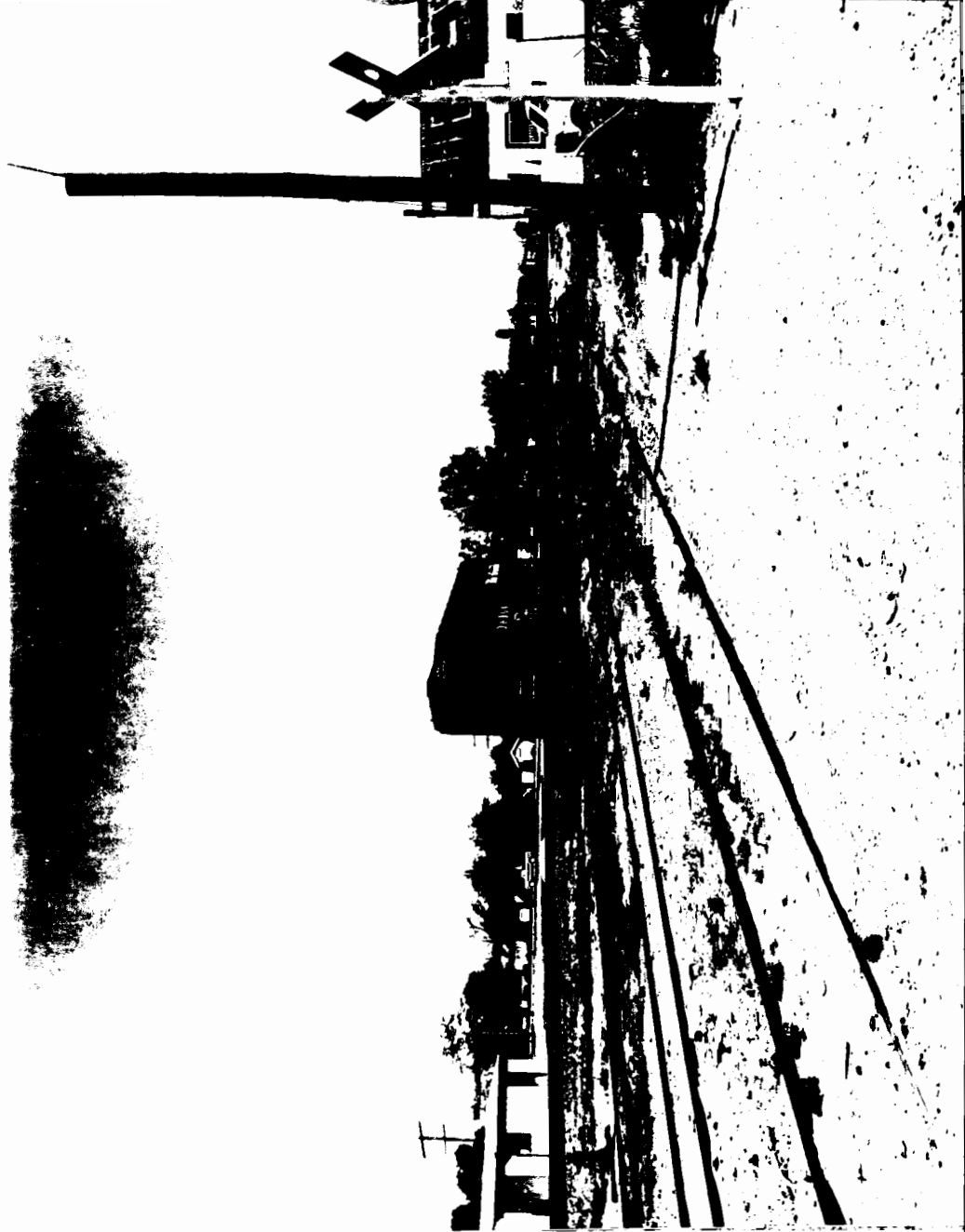


Exhibit D-42 view of plaintiff 110' from mainline rail and  
4 seconds before accident. (Truck = locomotive)