Federal "Preemption" Under 45 U.S.C. Section 434 of Railroad Liability Regarding Construction of Mechanical Grade Crossing Gates: A Train of Legal Thought Going in the Wrong Direction?

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PROLOGUE

The accident: The plaintiff, a thirty-seven-year-old quality control inspector at a nuclear power plant, turned left across traffic to an intersecting road on a dark, rainy November evening. The intersecting road crossed a right-of-way of the Burlington Northern Railroad. A freight train was approaching from the opposite direction and the plaintiff's vehicle was struck by the train at the crossing. The plaintiff received severe orthopedic injuries and was subsequently diagnosed as having a closed-head injury, leaving the plaintiff no longer able to do his job. By the time of trial he was working in a greenhouse. At trial, the plaintiff alleged that both the city and the railroad were negligent: the city should have placed active warning devices at the intersection and the railroad should have placed active warning devices at the crossing. Both defendants argued the crossing was not hazardous and the plaintiff should have seen the train and headlight and heard the train's whistle.[1]

1. The reason this case was chosen as an example is because the plaintiff did not conform

INTRODUCTION

Who is legally responsible for the siting and construction of active warning devices (gates) at railroad crossings? From the experience of literally hundreds of lawsuits the answer should be clear, but it is not. In fact, the matter is now before the U.S. Supreme Court.[2]

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to the conventional definition of a person struck by a train: namely a young man, probably under the influence of alcohol, speeding at night. The plaintiff in this example was an inspector at a nuclear power plant, clearly someone who would be expected to be cautious. The image of teenagers racing to beat the train, or otherwise skylarking, obscures the fact that persons injured in crossing collisions include a surprising number of police officers and in one instance, a college president. (On September 23, 1987, Dr. Robert James Terry, president of Texas Southern University, was killed when his car, partially on the track, became hung up on a moving locomotive. Dr. Terry was apparently crushed trying to get out of the car which became lodged between the locomotive and a small building. It is not clear whether Dr. Terry was driving around a lowered cross arm or his car was struck from the rear pushing it in front of the train, or both.

2. The United States Supreme Court has granted cert. in a case which deals with this issue. *See* CSX Transportation, Inc. v. Easterwood, No. 91-1206, 1992 U.S. LEXIS 6390, 61 U.S.L.W. 3524. In this case there are two questions that are to be dealt with:

> (a) Whether Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, preempts application of a state tort law duty on railroads to select and install traffic control regulations specify that (1) public authorities, not railroads, have this responsibility, and (2) state regulation of this subject matter of railroad is expressly preempted.
> (b) Whether the fact that federal grade crossing regulations were promulgated under the authority of both the Federal Railroad Safety Act and federal highway legislation affects the express preemption mandated by Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434 (1992).

The Respondent in the case, Mrs. Easterwood, through her counsel, has condensed the case to one simply stated issue:

> [I]s the common law rule requiring a railroad to maintain a safe crossing by placing active warning devices in a hazardous area preempted by the Federal Railroad Safety Act, which only allows for rules regulating the use of federal money?

In Amicus Curiae briefs that were submitted by several other parties the question was essentially the same, but each phrased it differently. These differences are important to note for purposes of this paper.

The Association of American Railroads, in Support of the Petitioner, states that the question before the Supreme Court is the following:

> Whether the United States Court of Appeals for the Eleventh Circuit, in conflict with the United States Courts of Appeals for the Sixth and Ninth Circuits, erroneously concluded that a regulation promulgated by the Secretary of Transportation did not preempt state tort law relating to the railroad safety, merely because the federal regulation was not promulgated pursuant to the Federal Railroad Safety Act.

The Solicitor General, acting on behalf of the United States, separates this case into two issues:

> Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on its alleged failure to design and maintain a reasonably safe grade crossing.
> Whether federal statutes and regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonably excessive speed.

For all briefs relating to the Easterwood case, *see* CSX Transportation Inc. v. Easterwood, U.S. Supreme Court No. 91-790 (October 1991), 91-790 (October 1991), *and* CSX Transportation Inc. v. Easterwood, U.S. Supreme Court No. 91-1206 (October 1991).

In the last decade, the railroads, through their affiliated organization, The National Association of Railroad Trial Counsel[3] began a concerted effort to convince the courts that the railroads have *no* legal duty to site and construct active warning devices. Thus, despite state statutes and case law to the contrary in many states,[4] the railroads have begun to argue that the responsibility to place gates (and make other types of improvement) has been placed *solely* on the states and in some instances, local municipalities. This argument, called the doctrine of "preemption," is the subject of this Article.

. BACKGROUND OF THE PREEMPTION ARGUMENT

In 1970 Congress passed the Federal Rail Safety Act (FRSA),[5] which required the Secretary of Transportation to study and report to Congress on the problem of protecting grade crossings.[6] The Act further required him to undertake a coordinated effort toward solving the grade crossing safety problem under FRSA authority, as well as under the federal statutes that gave him authority over highway traffic, safety and construction.[7]

According to the railroads, the language contained in the FRSA contains the genesis of "preemption" because it contains the express preemption of state laws covering the same subject matter as that contained in the Secretary's regulations, orders and standards:

> 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,

3. (a 1,400 member group of lawyers who represent railroads).

4. From time to time an attempt is made to compile the various state statutes applicable to railroad grade crossings. What appears to be the latest compilation was prepared in 1979 by the Association of American Railroads under contract with the federal government. Among the sixteen topic headings are "*Warning Device,*" "*Train Activated,*" and "*Sight Distance.*" The name of the report is "COMPILATION OF STATE LAWS AND REGULATIONS ON MATTERS AFFECTING RAIL-HIGHWAY CROSSINGS: FINAL REPORT" FHWA-TS-83-203 (April, 1983) (available from GPO).

For general references to the law regarding railroad crossing accidents, *see Railroad Crossing Accidents* 4 GONZ. L. REV. 293 (1969); 84 ALR 2d 813; *Note, Unusually Hazardous Railroad Crossings: The Due Care Trend,* 50 NOTRE DAME L. REV. 380 (December, 1974); Mirza, *Railroad Crossing Accident Litigation*, 23 AM. J. TRIAL ADVOC. 1 (1976); *Railroad Grade Crossings* 5A PERSONAL INJURY: ACTIONS—DEFENSES—DAMAGES (Albany: Matthew Bender, 1978); Carl Waag, *Punitive Damages in Railroad Crossing Cases*, PERSONAL INJURY ANNUAL 573-588 (1981). *See* George A. Lamarca, *Inadequacy of Warning Devices at Railroad Crossings*, 37 PROOF OF FACTS 2D 439-520 (1984) (Standard discussion, includes bibliography). For a compilation of motorists' statutory duties regarding crossings, *see* NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES (US DOT Nat'l Highway Traffic Safety Admin., 1979), § 11-20 s-206; § 11-202; § 11-204(b); § 11-205(a); §§ 11-701 - 11-704 (*particularly*, § 11-703(b)); § 11-801; § 11-1003; TRAFFIC LAWS ANNOTATED (1979).

5. Act of Oct. 16, 1970, Pub. L. 91-458, 84 Stat. 971, codified at 45 U.S.C. § 421 (1992).

6. 45 U.S.C. § 433(a) (1992).

7. 45 U.S.C. § 433(b) (1992).

> 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.[8]

No additional federal legislation was enacted affecting railroad safety until 1973. In the interim, the Secretary's annual reports made continuous reference to the need for greater governmental participation in siting and funding crossing improvements, the logic being that "increasing highway traffic is the controlling element in accident exposure at grade crossings."[9]

In 1973, Congress passed what the railroads insist is the necessary predicate to "preemption" — a statute which imposed on the states the duty to prepare state-wide surveys of all crossings and to implement a schedule of projects which require "separation, relocation, or protective devices."[10] The relevant language reads:

> (d) Survey and schedule of projects. Each State shall conduct and

8. 45 U.S.C. § 434 (1992).

9. *See* 322 I.C.C. 1, PREVENTION OF RAIL-HIGHWAY GRADE CROSSING ACCIDENTS INVOLVING RAILWAY TRAINS AND MOTOR VEHICLES (1964). The aphorism that motorists cause crossing accidents, not railroads, finds some support in the oft-quoted Supreme Court dictum, "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." Nashville, C. & St. L. Ry. Co. v. Walters, 294 U.S. 405, 423-33 (1935). Few people citing this case have bothered to read it. But the basic factual pattern is surprisingly familiar—the railroad was *objecting* to having to upgrade a crossing. In particular, it challenged an order from Tennessee's Highway Commission (predecessor of today's Department of Transportation) which required the railroad to pay half the cost of a new grade crossing separation on a main highway by-pass (federally funded highway) near Linden, Tennessee on the main route between Memphis and Nashville. (The total cost of the project was $17,900; the non-railroad half was to come from federal funds.) The Supreme Court, per Justice Brandeis, agreed the statute/order was arbitrary because there was no rational basis for imposing one-half the cost on the railroad. The court went to great length to point out that this cost to the railroad accrued to the benefit of the railroad's competitors, especially "trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds." *Id.* at 426. The Supreme Court did suggest that the railroad might be required to pay less than half the upgrading cost. *Id.* at 433.

This author suggests that the Court's substantive due process argument, abandoned by the newly re-constituted Supreme Court after 1937 is no longer the law. Moreover, the modern practice of federal participation makes the facts of the case largely obsolete.

But the question remains: Do gates (and separations) protect the railroad or the public? The answer depends on whether you feel that trains hit cars or cars hit trains.

10. This statute was an amendment to the Federal Highway Safety Act, 23 U.S.C. § 130. This was possible because the Act defines a highway to include "railroad-highway crossings". 23 U.S.C. § 101 (1992). Because federal funding of grade crossing improvements was conditioned on a state having fully complied with this amendment, such projects are generally referred to as "Section 130" funds/projects.

systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(g) Annual Report. Each State shall report to the Secretary. . .each year on the progress being made to implement the railway-highway crossing 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. . . .

By 1975, every state had completed what is commonly called its railroad crossing inventory. Receipt of federal funds was conditioned on preparation of an inventory and some $4 billion in federal funds have been spent through state projects for crossings improvements since 1974.[11] According to the federal government some 6,000 crossing projects are completed annually, including 2,300 active warning device projects; and that of the 222,000 public crossings some 36,000 involve grade separation and about 63,000 have active warning devices, of which about 17,000 utilize gates.[12]

Both state and federal officials, as well as most observers, consider the inventory/federal funding scheme to have greatly enhanced railroad safety.[13] Many are quick to point to the dramatic decline in crossing-related deaths as the end result of this program. And the numbers are impressive. In 1972, 1,190 motorists lost their lives in crossing-related accidents. By 1985 this had fallen to an all time low of 472.[14]

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11. RAIL-HIGHWAY CROSSINGS STUDY, Report of the Secretary of Transportation (Publication No. FHWA-SA-89-001) (1989). This report was required by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Publ. L. No. 100-17, 23 U.S.C. § 130. For a brief background discussion of funding, *see History of Section 130*, 8 HIGHWAY & RAIL SAFETY NEWSLETTER 6-7 (June, 1990). (Note that the funding section was formerly Section 230 and for years was known as "Section 230 funding.")

12. *Id.* at 4.

13. There is dissent from the view that the primary cause for the decline in crossing-related accidents and deaths is attributable to the increased federal funding. Using the state of Michigan as a model, Peter M. Briglia, Jr., a former traffic engineer with the Michigan Department of Transportation, suggests the decline in railway road miles from a high of 6,159 in 1971 to 4,185 and a 35 percent reduction in the number of public grade crossings by 1983 are important factors. This, coupled with the 2.3 percent decline in train movements per year, and the 3.2 percent decline in the number of grade crossings per year was a significant statistic. He concludes, "[t]he evidence presented here makes it difficult to attribute a major share of the credit for the reduction of rail-crossing accidents to the [203 Program]." *Evaluation of the Rail-Highway Crossing Safety Program in Michigan*, 54 ITE JOURNAL 43-47 (February, 1984).

14. Note that even before the crossing inventory system was complete and the railroads began asserting the preemption argument, crossing accidents and fatalities had begun to decline but the costs of settlement and litigation expenses kept increasing. One study suggests that in 1978 alone the railroads paid out about $40 million in settlements, exclusive of litigation costs. *See* RAIL-HIGHWAY CROSSING ACCIDENT LIABILITY MANAGEMENT SURVEY 150 (Office of Safety, FRA) (1980).

But since that time the number has continued upward — 533 in 1987, 588 in 1988 and 680 in 1989. The reasons for the increase are the subject of much debate in the railroad safety profession and beyond the scope of this Article.

While the engineering criteria for determining the priority[15] of crossing upgrades is beyond the scope of this Article, it is important to note that the specific changes to be made at a dangerous crossing must conform to "federalized" standards which are outlined in the Manual on Uniform Traffic Control Devices.[16] The receipt of federal funds is conditioned on a state's adoption of the Manual.[17] More specifically, it is the standard for rail-highway grade crossing improvements pursuant to 23 C.F.R. § 646.214(b).[18]

The crux of the railroad's argument that "preemption" has been accomplished by state adoption of the Manual, and other federal regulations which outline the finding procedures for siting crossings, is language in the Manual, which says, "[t]he determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority,"[19] and "[t]he selection of traffic control devices at a

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15. A step-by-step explanation of the Department of Transportation's accident prediction formula for rail-highway grade crossings may be found in RAIL-HIGHWAY CROSSING RESOURCE ALLOCATION PROCEDURE: USER'S GUIDE FHWA-IP-82-7. The vast body of technical literature regarding crossing safety, including gate, includes: MOTORISTS' REQUIREMENTS FOR ACTIVE GRADE CROSSING WARNING DEVICES", FHWA-RD-77-167 (Available NTIS, PB 296 183/AS). A STUDY OF STATE PROGRAMS FOR RAIL-HIGHWAY GRADE CROSSING IMPROVEMENTS, FRA-OPPD-78-7. (Available NTIS, PB 279 774/AS). RAIL-HIGHWAY CROSSING HAZARD PREDICTION RESEARCH RESULTS, FRA-RRS-80-02. (Available from NTIS, PB80 170 749). THE EFFECTIVENESS OF FLASHING LIGHTS AND FLASHING LIGHTS WITH GATES IN REDUCING ACCIDENT FREQUENCY AT PUBLIC RAIL-HIGHWAY CROSSING, 1975-1978, FRA-RRS-80-005. (Available NTIS, PB81 133 886). Elmer J. Frey and Charles E. Theabold, "*Grade Crossing Accident Injury Minimization Study*" (Federal Railroad Administration, 1980). (Available NTIS). Frederick H. Raab, INNOVATIVE CONCEPTS AND TECHNOLOGY FOR RAIL-HIGHWAY GRADE CROSSING MOTORIST WARNING SYSTEMS (Federal Railroad Administration, 1977). (Available NTIS). John B. Hopkins and E. White, IMPROVEMENTS OF THE EFFECTIVENESS OF MOTORISTS WARNINGS OF RAILROAD-HIGHWAY GRADE CROSSINGS. Federal Railroad Administration (Available NTIS). John B. Hopkins, GRADE CROSSING PROTECTION IN HIGH-SPEED, HIGH-DENSITY, PASSENGER-SERVICE RAIL CORRIDORS, Federal Railroad Administration, 1973 (FRA-ORD & D-74-14. DOT-TSC-FRA-73-3 (available NTIS). The Federal Highway Administration's SYNTHESIS OF SAFETY RESEARCH RELATED TO TRAFFIC CONTROL AND ROADWAY ELEMENTS (1983), includes a chapter on railroad-highway grade crossings. Topics include active and passive control devices, site conditions, and illumination. The relevant portions, chapter 13, are found in volume 2. Available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (S/N 050-001-00260-4).

16. Hereinafter "Manual." 23 C.F.R. 646.214(b)

17. 23 C.F.R. §§ 655.601(a) and 655.503(a) (1990). The latter adopts the Manual as the standard for the federal government.

18. It is 23 G.F.R. § 1251.1 which effectively mandates state adoption of the Manual because it says, "in order for a State to receive funds under the Highway Safety Act, the Governor shall. . . ."

19. Manual, 8A-1.

grade crossing is determined by public agencies having jurisdictional responsibility at specific locations"[20]. The Manual continues:

> 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 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 any given state.[21]

When it comes to the actual hands-on business of evaluating the engineering aspects of a particular crossing, the Manual is *not* the standard. Rather, highway engineers and railroads look to the Federal Highway Administration's RAILROAD HIGHWAY GRADE CROSSING HANDBOOK.[22]

Acceptance of the railroads' contention that the foregoing language amounts to a federal "preemption" is the linchpin of the preemption argument. However, such arguments miss two points. First, the language merely restates the procedures for the funding requirements; namely for a site to be upgraded with federal funds, a "public agency" must be involved in the decision. In other words, the federal government has no mechanism for giving money directly to railroads. Rather, the funds must be channeled through the states whose duty it is to see that the upgrade meets minimal standards set forth in the Manual.

Second, when it comes to the actual hands-on business of evaluating the engineering aspects of a *particular* crossing the Manual is *not* the standard. Rather, highway engineers and railroads look to the Federal Highway Administration's RAILROAD HIGHWAY GRADE CROSSING HANDBOOK[23]. This document makes clear that it "does not constitute a standard, specification or regulation" of the federal government.[24]

From the foregoing arguments made by the railroads, it is clear that the central thesis supporting the concept of "preemption" is the notion that there are federal standards for the siting and construction of crossing upgrades. Yet evidence supports the conclusion that federal policy regarding crossings is to the contrary. The reasons are three-fold.

A. THE GRADE CROSSING INVENTORY WAS NOT INTENDED BY THE FEDERAL GOVERNMENT TO CONSTITUTE A PREEMPTION.

The railroads' notion that "preemption" occurred when the railroad

20. Manual, 8D-1.
21. *Id.*
22. RAILROAD HIGHWAY GRADE CROSSING HANDBOOK ("FHWA-TS-86-215") (2nd ed. 1986).
23. (2d ed. 1986) [FHWA-TS-86-215].
24. *Id.*

inventory was complete is wholly unsupported by any federal government (Federal Railroad Administration) statement that such was to be the outcome of the inventory process.

To illustrate, each year the Federal Railroad Administration (FRA) is required to report to Congress on the administration of the Federal Railroad Safety Act of 1970.[25] The report for 1974 describes the Grade Crossing Inventory System (GCIS) project as being underway.[26] The report says nothing about preemption but relates, "[o]nce established, the inventory's existence will make it possible to statistically isolate apparent accident contributing characteristics (by cross referencing to GCIS with the Rail Safety Information System), to determine cost benefit ratios for alternative grade crossing upgrades, to establish responsive "request" procedures to service entities needing inventory data and to provide states *and railroads* (emphasis added) with their portions of the data base."[27] It was also at this time that the FRA published a study of how states use the inventory and seek funding. The report said nothing about preemption.[28] In 1975, the FRA boasted that the data was 98 percent complete, and plans were underway to

> match accident specific data with grade crossing site specific data. It is anticipated that this effort will allow us [FRA] to statistically isolate accident contributing factors and to predict grade crossing accident rates.

With the subsequent introduction of economic information (improvement cost) a means for the systematic allocation of grade crossing improvement funds throughout the nation should be realized.[29] Again, there was no discussion of "preemption," but rather a statement that the purpose of the inventory was to set standards for the payment of federal dollars.

By 1976, the inventory was beginning to be referred to by its official title, National Railroad-Highway Crossing Inventory, which the FRA report said was "funded jointly by the federal government and the railroad industry."[30] The report stated flatly: "Inventory data has been supplied to states, cities, counties, *and railroads* who can use this data to plan and implement grade crossing upgrading programs (i.e. installation of gates

25. 45 U.S.C. § 211 (1992).

26. 1974 Annual Report by the President to the Congress on the Administration of the Federal Railroad Safety Act of 1970, *A Summary of the Federal Actions to Improve Railroad Safety During the Calendar Year of 1974 and the Status Results Thereof*, 34 STATE GRADE CROSSING PROGRAMS: A CASE STUDY, PB-244 175/AS (September 1974) FRA-OR&/D-75-8.

27. *Id.*

28. STATE GRADE CROSSING PROGRAMS: A CASE STUDY PB-244 175/AS (September 1974) FRA-OR&/D-75-8.

29. *1975 Annual Report by the President to the Congress on the Administration of the Federal Railroad Safety Act of 1970, A Summary of the Federal Actions to Improve Railroad Safety During the Calendar Year of 1974 and the Status Results Thereof*, 34 STATE GRADE CROSSING PROGRAMS: A CASE STUDY, PB-244 175/AS (September 1974) FRA-OR&/D-75-8.

30. *Id.* at 53.

and flashing lights and construction of grade separation.)"[31]

In 1977, the FRA report said that it had mailed "updated forms and procedure manuals [about the inventory] to all railroads and states."[32] Said the report: "Completed forms are not being supplied to states, cities, counties, *and railroads* for use in planning and implementing grade crossing upgrade programs," i.e., installation of gates and flashing lights and construction of grade separation (emphasis added).[33] The 1977 report said nothing about preemption but said that the FRA had conducted "case studies" of state management of the federally funded grade crossing program "to improve opportunities for improving program administration."[34]

The next year, 1978, the report said that 25,000 changes had been made between the 1975 publication and the publication of the June 1977 edition of the Inventory. "Two thirds of the changes were initiated by states, and one third by railroads."[35] That completion of the Inventory was *ipso facto* preemption, and was certainly not the intention of the FRA in 1978. The report that year stated flatly:

> A study assessing alternative means of liability management will provide options to the current practice of railroads assuming total liability for rail-highway crossing accidents. . . .[36] The cost to railroads is approximately $40 million annually.[37]

The report said:

> Among the alternatives to be considered are shared liability with public jurisdictions, liability limited by statute, no fault insurance, joint protective insurance, insurance plans among railroads and federal insurance.[38]

The 1979, 1980, 1981, 1982, 1984, and 1986 reports said nothing about preemption.

The 1983 Report said that, "[r]ail-highway crossing safety has also been designated an emphasis area by the Department of Transportation," with the FRA "enlarging its involvement. . . [and] continuing voluntary maintenance of the US DOT/AAR National Rail-Highway Crossing Inventory by States and railroads, and monitoring questions about the non-operations of rail-highway crossing warning devices."[39]

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31. *Id.* at 53.
32. *Id.* at 36. (1977).
33. Changes had been made before the 1975 publication and publication of the June 1977 edition of the Inventory.
34. *Id.*
35. 1978 Report at 32.
36. 1978 Report at 33-34.
37. *Id.* at 33-34.
38. *Id.*
39. FRA issued its Rail-Highway Crossing Safety Report, 1983 Report at 6. (1985. p. 8) This special report said nothing about preemption.

The 1985 Report stated, "FRA continues to be concerned about public safety at rail-highway crossings and held public hearings in 1984 and 1985 to explore feasible alternatives to improve this situation."[40] In July, 1985, it was widely circulated to professionals concerned with railroad safety.[41]

The 1987 Report outlined the steps taken to implement the better planning of crossing upgrades. It never suggested preemption. Its thrust clearly involved railroads in the process of planning crossing upgrades. The report emphasized greater effort in three areas: education, engineering, and evaluation. It was widely circulated to professionals concerned with railroad safety.[42]

> In 1987, the FRA made available two documents to assist the railroad and state program managers in planning and conducting the rail-highway crossing safety improvement programs. . . . This procedure includes accident and severity prediction formulas and a benefit/cost ranking process which can be useful in setting priorities and assessing railroad crossing safety improvement programs. The formulas enjoy widespread use among states, railroads, counties, cities, regional authorities, Operation Lifesaver program planners and others concerned with railroad safety. Some states are beginning to experiment or at least compare the benefit/cost ranking process to their own in-house decision making procedures.[43]

The 1988 Report expressed concern about the increase in crossing fatalities since 1984 but said nothing about preemption.

The 1989 Report was not cheerful. "During 1989, in the face of increasing train miles and highway travel, the number of highway-rail crossing accidents declined by 2.2 percent. However, the number of fatalities increased by more than 15 percent. Injuries were also up significantly. Highway-rail crossing accidents, though fewer, are becoming more severe!"[44] The report said nothing about preemption. Again discussing the Inventory/Resource Allocation Procedure, the report said:

> The accident prediction model enjoys widespread use among States, railroads and some cities and counties, while the fatal accident prediction capability is seldom used or requested. In light of the increasing number of fatalities and overall severity of highway-rail crossing accidents, the FRA will include, with each request for accident prediction list, a fatal accident prediction list.[45]

From the foregoing it is clear — the concept of preemption was concocted by lawyers for the railroads — not by the federal government.

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40. 1985 Report at 8.

41. *See Federal Rail Administration Releases Rail-Highway Crossing Safety Report*, 3 HIGHWAY & RAIL SAFETY NEWSLETTER 2 (August, 1985).

42. *Id.*

43. 1987 Report at 10.

44. 1989 Report at 11.

45. *Id.* at 12.

B. The Federal Government Has a Normal Rule-Making Procedure and Has Used It in the Past

In 1976, the FRA published a notice of proposed rule making on the establishment of federal standards for the inspection, maintenance, and testing of active warning devices. These proposed regulations said nothing about siting, constructing or upgrading of mechanical signals. After soliciting comments and conducting an extensive examination and analysis lasting over two years, the proceeding was officially terminated. The FRA concluded in 1978 that the issuance of a rule requiring standards for the maintenance, inspection, and testing of highway grade crossing warning devices could not be justified.[46]

It is worth mentioning that the Brotherhood of Railroad Signalmen has urged the adoption of such standards — but this stand has been criticized as being self-servicing because it would result in more work/job security for signalmen.[47] However, ten years later the Federal Railroad Administration held hearings again on this issue finding that the Rail Safety Improvement Act of 1988 *requires* the FRA to issue regulations "as may be necessary" to insure safe maintenance, inspection and testing of signals. During hearings the Signalmen proposed the following regulation:

> Within 240 days, each railroad shall submit for Federal Railroad Administration approval its own program for testing, maintenance and inspection of grade crossing. Each such program shall have requirements for periodic testing and inspection, responding to crossing malfunctions without undue delay, sight distance provisions for motorists, to the extent the matter is subject to the railroad's control and record keeping.[48]

The Association of American Railroads has gone on record as opposing such standards.[49] However, ten years later the FRA held hearings again on this issue, finding that the Rail Safety Improvement Act of 1988 *requires* the FRA to issue regulations "as may be necessary" to insure safe maintenance, maintenance and inspection of grade crossings.

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46. One of the reasons the railroads are reluctant to erect mechanical gates is that they are responsible for maintaining them.

47. For a discussion of this issue *see* AUTOMATIC TRAFFIC CONTROL DEVICES AT RAIL HIGHWAY GRADE CROSSINGS: A CASE FOR THE PUBLIC FUNDING OF MAINTENANCE, CONRAIL, PUBLIC INFORMATION OFFICE 1983. About a dozen states have provisions whereby they can or do share this cost to some extent with the railroads.

48. CITE?

49. One of the reasons the railroads are reluctant to erect mechanical gates is that they are responsible for maintaining them. The expense is not inconsequential. For a discussion of this issue, *see* AUTOMATIC TRAFFIC CONTROL DEVICES AT RAIL HIGHWAY GRADE CROSSINGS: A CASE FOR THE PUBLIC FUNDING OF MAINTENANCE CONRAIL, PUBLIC INFORMATION OFFICE 1983. About a dozen states have provisions whereby they can or do share this cost, to some extent, with the railroads.

Each such plan shall have requirements for periodic testing & inspection, responding to crossing malfunctions without undue delay.

The Signalmen's logic behind crafting the rule this way was that it overcomes the argument that it is a "make work" proposal because the railroads would have effective input into their own responsibilities. The railroads responded vigorously by asserting that such regulations were unnecessary because based on the FRA's own records of some 2,857 accidents in 1987 where active warning devices were present,[50] only one involved an alleged malfunctioning device. The Signalmen countered that FRA report forms are ambiguous and that it is not in the self-interest of railroads to accurately report such failures. Some support for the Signalmen's argument can be found in a pioneering study in Texas, which provided a means whereby motorists could use a toll free number to report signal malfunctions to a public agency. According to a preliminary review of the program, during the first year of the program the agency received over 2,500 calls — 88.7 percent of which concerned a signal that was operating but no train was visible.[51] In September, 1990, the FRA concluded there was no need for federal regulation and proposed further study regarding the issue of malfunctioning signals.[52]

However, in June, 1992, the FRA changed its mind and announced proposed rules in this area which require the railroads to establish a credible system for reporting malfunctions, require each railroad to issue operating rules that employees must report malfunctions, and require the railroads to inspect, test and repair malfunctions within a reasonable time.[53]

C. *How Railroads Raise the Preemption Doctrine*

When confronted with a suit alleging that it failed to erect mechanical gates at a crossing, the railroad's strategy is to nullify two legal challenges. The first is the existence of statutes and case law which exist in several states that hold that railroads have a duty to install gates where the crossing is deemed to be "extrahazardous." Proof of a particular crossing's hazardous nature depends on the facts and circumstances of each case. But the plaintiff will attempt such a showing by offering expert testimony from a railroad safety consultant whose factual data is drawn from the railroad's own records and admissions, and the criteria used to prioritize the crossing's place on the state inventory.[54]

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50. *See A Review of the Texas Signal Malfunction Notification Program*, 3 HIGHWAY & RAIL SAFETY NEWSLETTER 1-2 (May, 1985).

51. *Id.*

52. ??CITE??

53. 57 FR 28819 (June 29, 1992).

54. As will be discussed below, the actual state reports may not be used in a court proceed-

A second goal of the preemption argument is one of pure law: If the railroad had no duty whatsoever to site and construct crossing protection (because this has become under "preemption" a state duty) then it is free of any liability. This is because under the fundamental rules of American tort law, there can be no liability where there is no duty. Stated another way, if there is no legal duty then factual issues regarding the need for a mechanical gate at the crossing are never presented to the jury: the issue is pretermitted.

Hence, the importance of "preemption" cannot be overlooked, even when there are other factors that are alleged to cause the motorist's death, such as allegations that the train was speeding, or that visibility was obscured by misplaced railcars or overgrown vegetation.[55] While reasonable minds might differ regarding the perceived versus actual speed of the train, one thing most persons (including jurors) will agree upon is that a properly functioning mechanical gate will protect motorists regardless of other factors. Conversely, the absence of the gate was a cause in fact of the accident. Not included in this Article are cases where a gate is in place and apparently working properly but an impatient and reckless motorist chooses to disregard the gate and intentionally "drives around" a gate.[56] Regarding such conduct, both plaintiff lawyers and railroad lawyers are in rare agreement that the cause of the accident was the foolish behavior of the motorist.

II. The Law of Preemption Generally

State law may be "preempted" by federal law in three ways. The first, known as "express" preemption, comes when Congress passes a specific law which preempts state authority in express terms. This is what the railroads argue has happened with the passage of Section 434 of the Federal Rail Safety Act. Second, absent explicit preemptive language, a congressional intent to occupy an entire field of regulation may be found from a "scheme of federal regulation. . . .so persuasive as to make rea-

ing by virtue of a special statute which was passed with the railroads' and state's encouragement. *See* Claspill v. Missouri Pac. R.R. Co., 793 S.W.2d 139 (Miss. 1990).

55. The general citation is to a standard legal encyclopedia, 57 AM. JUR. 2D, *Negligence* § 86 (1990).

56. One of the factors frequently alleged as contributing to crossing accidents is the motorist's inability to see the oncoming train because his vision is obscured by overgrown vegetation or freight cars left standing on tracks. While each case must be determined on its own facts, there is some support for this contention generally. In 1985, the National Transportation Safety Board urged the FRA to issue a regulation requiring the railroads to maintain sight distances at grade crossings by ensuring that the railroad right-of-way is free of obstructing vegetation or other sight obstructions such as standing or stored railroad cars. NTSB SAFETY STUDY: PASSENGER/COMMUTER TRAIN AND MOTOR VEHICLE COLLISIONS AT GRADE CROSSINGS (1985). (NTSB/SS-86/04).

sonable the inference that Congress left no room for the states to supplement it."[57] Finally, if "Congress has not entirely displaced state regulation in a specific area," it may nonetheless preempt state law "to the extent that [the state law] actually conflicts with federal law."[58]

The railroads insist that the Federal Rail Safety Act (FRSA) operates as an express preemption because it contains a specific section on the problem of grade crossing safety (the only specific subject addressed in the Act) which requires the Secretary of Transportation to study and report to Congress on the problem of protecting grade crossings, together with his general power over other highway related matters. Thus, the passage of § 434 was, argues the railroads, a limitation on the powers of the states because, "Congress was unwilling to provide the states any broader role because it did not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in fifty different judicial and administrative systems."[59]

The difficulty with the "express" preemption argument is two-fold. First is the plain language of § 434. It does not mandate national grade crossing standards. The first sentence reads, "[t]he Congress declares that laws, rules, regulations, orders, and standards shall be nationally uniform *to the extent practicable*." The subsequent text, which makes up the bulk of the statute, clearly provide that the states shall continue to have some role in railroad safety. The second sentence states clearly:

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

The third sentence goes even farther in suggesting a meaningful state role.

> A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety hazard, and when not compatible with any Federal law, rule, regulation, order, or stan-

57. Railroads and their lawyers are quick to point out that at least half the fatalities at gate-protected crossings are caused by drivers "driving around" gates. The question has been asked: Is it possible to design gates that prevent such irresponsible behavior? One noteworthy study found that a four quadrant gate system reduced the number of gate violations and would substantially increase crossing safety. *See, Driver Response to Innovative Rail-Highway Warning Devices*, 7 HIGHWAY & RAIL SAFETY NEWSLETTER 1-2 (December, 1989); Samuel C. Tignor, *A Train is Coming! Full Barrier Gates Improve Safety at Railroad-Grade Crossings*, TR NEWS 16-19, 26 (No. 147, March-April, 1990) (Cherry Street study described).

58. Rice v. Santa Fe Elevator Corp., 321 U.S. 218, 230 (1947).

59. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983).

dard, and when not creating an undue burden on interstate commerce.[60]

The second difficulty with "express" preemption is that to make vital the second sentence which speaks in terms of the Secretary's right to adopt rules and standards, it is necessary to ask both (1) when and (2) how the Secretary made such rules, in particular, rules regarding crossings.

No federal regulations mention preemption per se. Nevertheless, argue the railroads, the preemption was "completed" when the states completed their various crossing inventories and began accepting federal money and the actual "crossing rules" are found in the Manual, which every state has to follow if it wishes to receive federal dollars. Stated another way, the railroads suggest that federal regulations are actually state regulations as found in the Manual, and that this "preemption" has happened some time ago — long before the crossing accident that is the subject of the litigation at hand.

The necessity of tying section 434 to the Manual in order to show an express "preemption" flies in the face of both the legislative history of the FRSA and other actions by the Federal Railroad Administration regarding nationwide standards. First, the preamble to the FRSA says nothing about a purported "preemption." In fact, its language says the Secretary shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety *supplementing* provisions of law and regulations in effect on October 16, 1970."[61] Similarly, when federal regulations are intended to have preemptive effect, the preemptive effect is typically announced at the time the regulation is issued. For example, under 49 C.F.R. § 255.1, federal railroad accident reporting requirements are preemptive.[62]

In fact, federal regulations relating to grade crossings specifically indicate on-going railroad responsibility. After outlining those instances where automatic gates with flashing light signals must be placed, the federal regulations speak of situations where a diagnostic team has not recommended such protection. The regulations state: "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. . . . Preliminary engineering and right-of-way acquisition costs [for crossing projects] which are otherwise eligible, but incurred by a railroad prior to authorization by FHWA, although not reim-

60. H.R. Rep. No. 1194, 91st Cong., 2nd Sess. 11, reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109.

61. Note that some states have elaborate rules regarding crossings, perhaps the leading state is Oregon. By Public Utility Commission order 83-143 the state adopted comprehensive rules which include such issues as responsibility for installation and maintenance, as well as replacement, of warning and experimental devices.

62. 45 U.S.C. § 431 (1992).

bursable, may be included as part of the railroad share of project costs where such a share is required."[63]

Moreover, at least one court has agreed that there are no federal preemptive grade crossing regulations—even when that court upheld the concept of "preemption" with regard to local (municipal) train speeds. In *Santini v. Consolidated Rail Corp.*,[64] the plaintiff argued that a municipal ordinance of the town of Goshen City, Indiana which required the railroad to install gates at the crossing in question was valid. The railroad said it was not, but did not raise the "preemption" issue directly. Instead, it said that under Indiana law there was "no enabling legislation that would permit the City to enact ordinances regarding crossing safety gates."[65] The Indiana Court of Appeals seemed to agree but did not wholly endorse the concept of "preemption," saying:

> [w]e conclude Municipal Ordinance No. 14-1, requiring Conrail to install and maintain railroad crossing safety gates at the intersection of its tracks with Monroe Street, is not a valid City ordinance and was not in force at the time of Nancy's death. We find no federal authority regulating the installation or maintenance of crossing safety gates.[66]

Railroad safety consultant Denis J. Bergquist, who testifies for plaintiffs in crossing cases, has suggested another reason why there has been no "preemption," or at least not a complete one as would be suggested by the railroads. He points to a funding-related regulation which would suggest that "preemption," if the law at all, is limited to federally aided projects.[67] "Railroads may voluntarily contribute a greater share of project costs than is required. Also, other parties may voluntarily assume the railroad's share."[68]

The legal status of the Manual is beyond the scope of this Article, but despite the fact that the federal government "requires" the states to follow it, the Manual is not necessarily *ipso facto* the legal standard of care of highway grade-crossing in each state. Rather, the Manual may be used as evidence of the prevailing standards. The Manual in many states, e.g. Indiana, provides in its introduction a preclusion of use as an "instrument to mandate the use of any of the control devices or procedures at a particular location. It is not intended as a legal requirement.

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63. *See* Edwards v. Consolidated Rail Corp. 567 F. Supp. 1087, 1101 (D.C. Cir. 1983).

64. 23 C.F.R. § 646.214(4) (1990).

65. 505 N.E.2d 833, 838 (Ind. App. 1987).

66. *Id.*

67. *Id.*

68. 23 C.F.R. § 646 (1990). "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." Bergquist further points out that even the funding-related regulations anticipate railroad involvement, citing 23 C.F.R. 646.210(a).

This Manual has been published as a guide. . . ."[69] In short, there is a substantial question whether a state manual becomes a part of federal law simply because federal law directs its use — and then goes a further step and suggests that manual "preempts" state statutory or common law duties of private parties. To allow such an argument would do grave violence to the principle of federalism and overlooks the fact that the Manual is an evolving document which incorporates (and rejects) some concepts which the various state transportation officials hold dear.

A. *When Does (Did) Preemption Occur?*

Central to the concept of "preemption" is the issue of time. The railroads insist that "preemption" occurred when the inventory was complete and the state officials had not ordered the railroad to do anything the last time it had a chance, or when the state last decided what to do (or not to do) regarding the crossing in the particular case at hand. For example, assume the crossing was first inventoried in 1975. It may have been reinventoried once or twice since that time the last analysis occurring in, say 1987. The accident happened in, for example, 1989. Under the "preemption" doctrine the railroad would argue that it had no legal duty as early as 1975 and certainly as late as 1987. First, because the doctrine says it no longer has any independent duty; second, the state officials did not order the railroad to do anything the last time it had a chance, namely 1987.

The effect of "preemption" in the foregoing illustration cannot be overstated. The doctrine nullifies case law antedating the preemption doctrine which repeatedly held the railroad had a duty regardless of state's regulatory scheme. For example, in *Gamble-Skomos, Inc. v. Chicago & N.W. Transp. Co.*,[70] the driver said that gates should have been in place since the overhead flashing lights were not effective because they were washed out by the sun. The railroad insisted that since the overhead lights had been installed pursuant to Public Service Commission order, it was inoculated against suit. The court pointed out that the Commission had not actually held a hearing to determine the public safety needs at the crossing, nor had it actually directed or required the installation of this particular type of device. Rather, the commission had merely made a pro forma approval of the installation amounting to a consent, "as distinguished from a command to the railroad after an evaluation of the need for safety in the area." Accordingly, it was appropriate that the jury be allowed to determine, based on all the facts adduced, whether the

69. Letter to Lewis Laska of 7/27/90 from Denis J. Bergquist, Kensington, Minnesota.
70. Indiana UMTCD, Part 1A-1.

crossing was adequate. (It was not; the railroad was found to be 60 percent negligent.)

A similar case is *Koch v. South Pacific Transportation, Co.*[71] Here suit was brought for the death of a teenage passenger whose car apparently ran a stop sign at Thurston Crossing. In the months prior to the accident, an application to the Public Utilities Commission had been made by the railroad to close the Thurston Crossing and install flashers at another parallel crossing down the track. While the work was still in progress, the accident occurred. The court said, in pre-preemption days:

> Defendant is correct that it should not be found negligent for failing to install safety features which the Public Utilities Commission would not permit. However, there is no evidence that the Public Service Commission did not permit such improvements or that it would have refused to allow them in this instance had application been made. The duty of the railroad to install the crossing is not altered by the regulatory scheme unless it can be shown that the request had been denied. Further, the burden of proof to show such action is on the [railroad].[72]

A final argument against preemption, although it is seldom raised by plaintiffs, is the simple fact that the FRA apparently could, if it wished, simply adopt regulations which plainly and simply set out the rules for crossing upgrades without the necessity of the railroad having to make these complicated (and expensive) arguments on a case-by-case basis: The railroads could hardly complain that this amounts to "too much regulation" given that their argument is grounded on the fact that the federal government has *already* made such "regulations." Stated another way, the fact that no specific regulations regarding crossing siting (other than those relating to funding) are found in the Code of Federal Regulations itself tells something about the real policy of the federal government regarding this issue. This is especially true when one observes that so many other aspects of railroad safety are covered by federal regulations. Examples include noise emissions;[73] track safety standards;[74] freight care safety standards;[75] operating practices[76]; alcohol and drug use[77]; radio standards and procedures;[78] rear-end marking devices;[79] safety glazing standards;[80] locomotive safety standards;[81] safety appliance

71. 283 N.W.2d 744 (Wis. 1976).
72. 547 P.2d 589 (Ore. 1976).
73. *Id.*
74. 29 C.F.R. § 210 (1992).
75. 49 C.F.R. § 213 (1992).
76. 49 C.F.R. § 215 (1992).
77. 49 C.F.R. § 218 (1992).
78. 49 C.F.R. § 219 (1992).
79. 49 C.F.R. § 210 (1992).
80. 49 C.F.R. § 221 (1992).
81. 49 C.F.R. § 223 (1992).

standards;[82] power brakes and drawbars;[83] signal and train control systems.[84]

III. Cases Upholding the Preemption Doctrine

Railroad crossing cases may be brought in both state and federal court. The latter forum is possible because in most suits the plaintiff and defendant are citizens of different states, invoking the federal courts' power to hear cases involving diversity of citizenship. When such diversity exists, a railroad also has the right to remove the case from state court over to federal court where it is less likely to face the animus of a "small town" jury. But regardless of which court is chosen, the doctrine of "preemption," if followed by the judge hearing the case, will have the same result — the case (or at least that portion of the case dealing with lack of mechanical gates) will be dismissed. Procedurally, the railroads usually raise the defense early in the litigation with a motion for summary judgment or a motion to strike portions of the plaintiff's complaint.

The railroads have had significant success in convincing both state and federal courts of the merits of the "preemption" doctrine in some cases.

A. State Cases[85]

One of the earliest railroad win cases came in a state trial court opinion in a hotly contested case involving a crossing collision between a train and a gasoline tanker. Here, there were actually two suits. One was brought by the railroad against the tanker company for damages to railroad equipment (and for indemnity); the second was a FELA case brought by survivors of the trainmen killed in the conflagration. The cases were joined for pre-trial discovery but later tried separately and/or settled. The judge in this case simply ruled that as against the tanker company the railroad was entitled to summary judgment as a matter of law, but also went on to rule that no witness could testify regarding any alleged failure of Southern Railway to "provide adequate warning devices at the Chimney Rock Road railroad crossing, and in particular, concerning the presence or absence of automatic gates at the crossing." The court cited 23 U.S.C. § 409 (discussed below), the Federal Highway Safety Act, 23 U.S.C. § 401, under Rule 402, and other considerations as its reason, but did not explain the basis for its decision.[86]

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82. 49 C.F.R. § 229 (1992).
83. 49 C.F.R. § 231 (1992).
84. 49 C.F.R. § 232 (1992).
85. 49 C.F.R. § 236 (1992).
86. For additional cases that do not preempt state negligence claims, *see* Martin v. Illinois Central Gulf R.R., Appellate Court of Illinois, First District, No. 1-90-0998, Dec. 31, 1991, *and*

Another early railroad victory came in a North Dakota state trial court, which conjures images of every parent's nightmare: the collision between a school bus and a train. Suit alleged negligence of both the bus driver and the railroad in an accident that happened at East Fairview, North Dakota on October 7, 1985. The claims against the railroad include speeding, failure to sound the whistle, and lack of proper gates. The children received multiple injuries. Ruled the court:

> With respect to Burlington Northern Railroad Company's Motion in Limine, the Court having considered the pleadings, arguments of counsel, and other matters properly placed before the Court, finds that the mentioning, directing or inducing, or introducing other evidence concerning any alleged failure by Burlington Northern to provide adequate warning devices at the East Fairview Elementary School railroad crossing, and in particular, concerning the presence or absence of signals at the crossing, both at the time of the collision between the school bus and the train on October 7, 1985, and subsequent to that time is inadmissible in light of 23 U.S.C. § 421 et seq., Rules 402 and 403 of the *North Dakota Rules of Evidence*, and would tend to prejudice Burlington Northern and confuse and mislead the jury regarding the issues properly before the Court.[87]

It is worth noting that this and a companion case were settled. It may be argued that the railroad did not want to appeal this issue to the North Dakota supreme court.[88]

Some state appellate courts have accepted the preemption doctrine. For example, *Barger v. Chesapeake & Ohio Railway Co.*,[89] accepted preemption. The facts in this case are similar to others discussed. On the evening of October 19, 1984, at approximately 9:00 p.m., Larry Barger was traveling westbound on Kinnear Road in the city of Columbus.[90] At a point just west of State Route 315, Kinnear road bisects a set of railroad tracks.[91] The crossing has three tracks; two mainlines, and an industrial spur. The appellant approached the crossing, and momentarily stopped at the flashing warning lights, and then proceeded to the first set of tracks, where he stopped again. He then proceeded slowly forward, where he ultimately collided with a train on the second set of tracks. In analyzing preemption, the court turned to 4 U.S.C. § 434 which stated: "The Con-

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Duncan v. Union Pac. R.R., 132 Utah Adv. Rep. 30, (1990), 1992 WL 70535 (Utah Supreme Court No. 900233).

87. *See* Southern Ry. Co. v. Bralley-Willett Tank Lines, Inc. (General Court of Justice, Superior Court Division, Guilford County, North Carolina No. 87 CVS 8959 and 88 CVS 3898, Order, June 26, 1989).

88. Flynn v. Howard and Burlington N. R.R. Co.. 89-C-021 (McKenzie County, N.D., Dis. Ct.) (Order November 13, 1989).

89. *See* Southern Ry. Co. v. Singer, Guilford County Sup. Ct. Div. No. 87 CVS 8958 and 88 CVS 3898 (11th Cir., Logan County, Ill.), No. 84 L 29.

90. 70 Ohio App. 3d 307, 590 N.E.2d 1369 (10th Dis.).

91. *Id.*

gress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. . . . "[92] The court stated that this provision "expressly vested the Secretary of Transportation with the authority to preempt state law by enacting regulations controlling railway safety."[93] The Court then turned to the Highway Safety Act of 1966,[94] which provided that the type of crossing warning devices required are to be determined by the local agency having jurisdictional control. Evidence showed that the local controlling agency, the Bureau of External Contracts, identified the Kinnear intersection as needing upgrade during the fiscal year 1984. The court stated that since a decision was made by a federally-authorized, local agency regarding warning signs, "the duty to install warning devices was no longer vested with the railroad, and any negligence action predicated upon the failure to install crossing gates could not be maintained [against the railroad]."[95] The effect of this was that the railroad had no duty of care with regard to the placement of warning devices at this intersection."

In Walker v. St. Louis - S.W. Ry. Co.,[96] the court addressed the issue of whether it was appropriate for a trial court to grant summary judgment based upon preemption. The court, citing *Karl v. Burlington Northern*,[97] pointed out that there is a heavy burden to establish preemption, but that only "a small minority of jurisdictions have ruled that preemption does not apply to cases similar to the one at bar." This court did a preemption analysis based upon four theories; (1) did congress intend to preempt all State law, regardless of any express statement in the Statute? (2) did Congress expressly preempt State law? (3) did Congress refuse to act, deeming regulation in this area inappropriate at any level?[98] (4) did a Congressional regulation, in combination with judicial support, manifest an intent to preempt State law? The court noted that the latter of these was not widely accepted, and said that this last one would only apply in the situation where there had been some determination as to what were appropriate warning devices.

The court also did an extensive "contingent preemption" analysis, focusing on the question of the case where the designated state agency had not determined appropriate railroad crossing warning devices. An argument was made that, even if no state agency action had occurred, preemption should still exist because the State had deemed it to be inap-

92. *Id.*
93. 4 U.S.C. sec. 434 (1992).
94. *Supra* note 89.
95. 23 U.S.C. §§ 401-404 (1990).
96. Mo. Ct. App., E. Dist., No. 59816 (Feb. 11, 1992).
97. Id.
98. 880 F.2d 68 (8th Cir. 1989).

propriate to establish any standards at all. The court rejected this argument, stating that for preemption to exist —

> [T]he State entity which is in charge of determining the adequacy of a grade crossing must act affirmatively, or determine no action is appropriate, regarding any particular grade crossing as a condition precedent to the application of [the] Federal preemption doctrine. Inaction due solely to financial constraints does not trigger preemption.[99]

The court stated that the granting of summary judgement in this case was appropriate, because federal law had preempted any state claim based primarily upon the theory of contingent preemption.

Two state appellate courts have upheld the preemption doctrine, using very strong language suggesting that the railroad would be a trespasser if it erected gates on its own right-of-way, using very strong language suggesting that the railroad would be a trespasser if it erected gates on its own right-of-way, and a second case found preemption under the unique language of state, and a second case found a preemption under the unique language of state, not federal, law.

In *Duncan v. Union Pacific Railroad Co.*,[100] the Utah Court of Appeals emphatically endorsed the concept of preemption but it did not mention any federal law or regulations specifically. The facts appear to present a straightforward crossing case. Four motorists were killed on the evening of April 9, 1983, when their car pulled in front of a train at a crossing in rural Tooele County. The crossing was protected by signs, but "there were 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."[101] The suit alleged both the railroad and the State of Utah were negligent for failing to install mechanical gates. The defendants sought dismissal by summary judgment. The railroad argued preemption. The state asserted sovereign immunity.

The Utah Court of Appeals began its decision with a long discussion of the general duty of a railroad regarding crossings and said "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. . . . This is to be a jury question."[102] The court further said:

> 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 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

99. This is referred to as "contingent preemption."
100. *Supra,* note 95.
101. 790 P.2d 595 (Utah Ct. App. 1990).
102. *Id.* at 30.

> 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 sign devices on the public road.[103]

The court continued.

> The design and maintenance of state roads and the control of traffic on state roads are UDOT's responsibilities and prerogatives.[104] At common law, this responsibility at railroad crossings was shared with the railroad.

Here, in a footnote, the court said:

> Although we hold that the railroad does not have authority or responsibility to place signs or roadblocks on the public roads, 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). Thus, in *English v. Southern Pacific Co.* [13 Utah 407, 45 P. 47 (1896)] . . . . 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" [citing Utah Code Ann. § 54-4-15(2) (1990)]. Although that responsibility in no way reduces the railroad's responsibility to maintain its right of way [citing *Gleave v. Denver & Rio Grand Western Railroad Co.*, 749 P.2d 660, 664 (Utah, 1988)], it would nevertheless, under ordinary circumstances, place the railroad in the role of meddler, trespasser, or usurper[105] 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, and it is not liable in tort for its failure to do so"[106]

What about the potential liability of the State of Utah? Here the Court of Appeals said that the State's duty is only to provide minimal warning and control, and that it was immune from suit under governmental immunity. "The basis asserted here for recovery against UDOT is its failure to do more than minimal warning and control, we hold that plaintiffs cannot recover against UDOT or the State."[107]

The Court of Appeals summarized the law of grade crossings in

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103. *Id.* at 32.
104. *Id.* at 32.
105. *Citing* Utah Code Ann. § 54-4-15.1 (1990).
106. For additional cases that do not preempt state negligence claims, *see* Martin v. Illinois Central Gulf R.R., Ill. App. Ct., 1st Dist., No. 1-90-0998, Dec. 31, 1991, and Duncan v. Union Pac. R.R., 132 Utah Adv. Rep. 30, (Utah S.Ct. No. 900233, 1990).
107. *Id.* at 32.

The court's opinion in Duncan suggests that there might be some legal "penalty" for a railroad to attempt to enhance safety at crossings. However, it is noteworthy that the federal government conducted a study in 1980 to determine if the use of innovative warning devices at grade crossings increased a railroad's liability in the event of a grade crossing accident. The findings concluded there was no support for the premise that the use of innovative devices would increase railroad's liability. *See*, LEGAL EFFECTS OF USE OF INNOVATIVE EQUIPMENT AT RAILROAD-HIGHWAY GRADE CROSSINGS ON RAILROAD'S ACCIDENT LIABILITY (1979). FRA-RRS-80-01 (available from NTIS, PB80 137 888).

Utah, "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 signage is present on the public road, then the plaintiffs are 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."[108]

The decision in *Duncan* was met with glee by the railroads. Promptly after the decision was announced, it was distributed by the American Association of Railroads. In a memorandum to the AAR Policy Committee in Highway-Rail Programs, the AAR's executive director Paul C. Oakley wrote as follows:

> Please find attached a Utah crossing accident court decision which certainly should serve as a model with respect to railroad responsibility for highway-rail crossing safety improvements. As you will appreciate, decisions such as *Duncan v. Union Pacific Railroad Co.* do not happen by accident, rather they are the consequence of the creation, perpetuation, and expansion of public sector crossing improvement programs, such as the Section 130 Program. If they are not already familiar with *Duncan v. Union Pacific*, perhaps your law department should be alerted to this decision.[109]

The Utah Supreme Court granted Certiorari for this case and heard it on April 6, 1992.[110] The Court stated that "a railroad cannot be held liable for crossing conditions unless the crossing is more than ordinarily hazardous."[111] The Court stated that it would be impractical to require a railroad to have to petition the Utah Department of Transportation in order to improve rail crossings.[112] So unless the crossing was more than ordinarily hazardous, the current state standard would be sufficient to avoid negligence.

In determining whether or not the state could be held liable for establishing an inadequate standard for the crossing, the Court looked to Utah legislation that provides immunity for any discretionary function in the government.[113] The court therefore upheld the granting of summary judgment by the lower court on both issues.

The unique legal holding in *Hunter v. Chicago & Northwestern Transportation Co.*[114] arose out of a very common crossing accident. The plaintiff was injured (suit alleged that his death 10 years later was acci-

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108. *Id.* at 33.

109. *Id.*

110. Memorandum, May 23, 1990.

111. Duncan v. Union Pacific Railroad Company, 1992 WL 70535 (Utah S. Ct. No. 900233, 1990).

112. *Id.*

113. *Id.*

114. *See* Utah Code Ann. § 63-30-10(1)(a) (1990).

dent-related) when he drove his car across the Lake Avenue crossing in Glenview, Illinois at 7:30 a.m April 18, 1972, in front of a 30 mile per hour freight train. The primary factual issue was whether the crossing lights were working and/or whether they were obscured by dirt and snow. Testimony was contradictory on this point. The crossing was last signaled in 1959 and consisted of crossbucks, "four flashing lights mounted on masts on the roadside, four overhead cantilevers, and a crossing bell."[115] The appellate court's opinion is long and deals with many issues relating to proof, none of which are relevant to this Article. However, the Court analyzed the statute, not utilizing a "preemption" argument to deal with the plaintiff's allegations that the railroad failed to install a gate. Said the court,

> Plaintiff first argues that between 1959 and the date of decedent's collision, C&NW made no effort to determine the need for a crossing gate even though 18,000 vehicles traversed the crossing daily in 1972. . . . . Defendant has responded that pursuant to an article in the Illinois Commercial Transportation Law, which governs the safety requirements for rail carriers [Ill.Rev.Stat 1987, ch. 95 1/2 par. 18c-7401 (3)], once the Commerce Commission has ordered a particular type of warning device at a crossing, that device is "deemed adequate and appropriate." Defendant correctly maintains, citing the legislative debates relating to this law, that the legislative intent was that the issue of the adequacy of the warning devices at a crossing, once ordered by the Commission, would no longer be an issue in this type of litigation. Once the Commission has investigated and ordered the installation of a particular kind of warning device, its decision is conclusive, and the railroad is precluded from installing any other signal.[116]

Curiously, the statute referred to above stated that it did not "adjudicate any pending litigation." Hence, because the present suit was filed March 13, 1978, it was pending at the time the law was passed. Thus, while the provisions under the safety requirements article represent the current state of the law in Illinois, this was not the applicable law at the time this lawsuit was filed and pending.[117] Accordingly, the court decided the present case by the law which existed at the time of the accident which allowed the jury to decide whether the railroad should have erected a gate or not. A final aspect of the case is worth mentioning. The plaintiff motorist was found 95 percent responsible, the railroad only 5 percent. With damages set at $1.5 million, the plaintiff actually only received $75,000 because of the degree of his negligence. The jury rejected the claim that his death was actually caused by the wreck.

115. 200 Ill.App.3d 458, 558 N.E.2d 216 (1978).
116. *Id.* at 2.
117. 82nd Ill. Gen. Assem., House proceedings, April 22, 1982, at 114-123.

B. FEDERAL CASES[118]

The first prominent federal case was *Nixon v. Burlington Northern Railway.*[119] The memorandum opinion by Judge James F. Battin came on a motion for summary judgment. Motorist Nixon was killed in the town of Plevna, Montana, lacking any mechanical signals at a crossing and the railroad's failure to have installed such was alleged as negligence. However, the facts in the case were unique. Prior to the accident an agreement had been made between the Montana Department of Highways, the local county government (Fallon County) and the railroad wherein the parties agreed to install flashing light signals with automatic gates at the Plevna crossing. According to the court:

> 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 a 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.[120]

In reaching this decision the court distinguished the case of *Marshall v. Burlington Northern*[121] (discussed below), by observing that in *Marshall* no decision had been made by "the locality in charge of the crossing" regarding the type of warning devices to be installed.[122] The court in *Nixon*[123] also said the term "local agency" as contemplated in the *Marshall* decision was the state, not the city, but in any event it made no difference because the facts in Nixon showed that the Plevna town council had petitioned the state to install a flashing light signal with gates and this had been a part of the state's decision to enter the contract.[124] The Georgia federal courts also allow ome aspects of the preemption doctrine but not others; in fact, with regard to mechanical gates it rejected it on the unique facts presented. The leading case is *Mahony v. CSX Transp., Inc.*[125] Eve Mahony was struck and killed by a CSX train as she walked

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118. Supra, note 100, at 9.

119. For additional federal cases accepting the preemption doctrine, *see* Conner v. Missouri Pac. R.R. Co., (D. Ok. No. 90-C-562-E, March 1991), and Cothron v. CSX Transportation, Inc. No. 3-89-0960 (M.D. Tenn., Nashville Div., April 1991).

120. Nixon v. Burlington N. Ry., Civ. No. 85-384 BLG-JFB (D. Mont. 1985).

121. *Id.* at 4

122. 720 F.2d 1149 (9th Cir. 1983).

123. *Supra,* note 118.

124. *Supra* note 119.

125. But in any event it made no difference because the facts in *Nixon* showed that the Plevna town council had petitioned the state to install a flashing light signal with gates and this had been a part of the state's decision to enter the contract *See also* Russell v. Southern Ry. Co., (S.D. Ga., Brunswick Div. No. CV-2-89-059).

across a grade crossing. Suit alleged lack of mechanical gates, excessive train speed, and failure to erect a pedestrian overpass. When the suit was first filed, the railroad sought summary judgment contending the preemption doctrine barred any of these theories. The lower court judge began his discussion by explaining that Congressional intent in passage of the Rail Safety Act was to establish nationally uniform railroad safety and allowed a narrow spectrum of deviation from national uniformity by permitting state regulation under two circumstances only.[126] First, a state may regulate railroad safety until the Secretary of Transportation has adopted a "rule, regulation, order or standard covering the subject matter." Second, a state may regulate if the local measure is necessary to eliminate or reduce a local hazard, is not incompatible with federal law, and does not unduly burden interstate commerce. Ultimately the lower court judge granted summary judgment on both issues. The lower court in this case relied upon *Marshall v. Burlington Northern* and *Donelon.*

When *Mahoney* came before the Eleventh Circuit, a different panel of the circuit had already decided the *Easterwood* case. The relevant portion of the opinion is as follows:

> Without intending to expand on the meaning of *Easterwood*, we note that at least two principles announced by that panel will have application to the present case on remand.
>
> *[Speed]*
>
> First, the plaintiffs' claim that CSX was negligent because the train was allegedly traveling too fast is preempted by federal law. As stated in *Easterwood*, a theory "that [an] accident was caused by specific federal regulations governing the speeds at which trains can travel on particular classes of track." [*Easterwood*, 933 F.2d at 1553.] Because the CSX train that struck Mahoney was traveling below the maximum speed allowed under federal law, the plaintiffs may not attempt to establish CSX's liability on the basis of the train's alleged excessive speed.
>
> *[Warning Devices]*
>
> Second, the plaintiff's theory of liability relating to the inadequacy of the railroad grade crossing (in particular, CSX's failure to install automated warning devices at the crossing) is not preempted by federal law. The *Easterwood* panel specifically noted that although the federal government was minimally involved in regulating the construction of safer railroad grade crossings, that involvement was not so substantial or specific as to preempt state tort suits based upon a railroad's failure to maintain a safe railroad crossing. Accordingly, in this case, the district court should not have dismissed the plaintiffs' claim that CSX negligently failed to install automated warning signals.

The case was vacated and remanded back to the trial court.

It is interesting to note that *Easterwood* was decided without the benefit of the citation of several applicable authorities.However, the court

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126. 966 F.2d 644 (11th Cir. 1992).

bound itself to the *Easterwood* decision, stating that if the railroad felt that the *Easterwood* opinion was wrongly decided, CSX should file a motion to rehear the case *en banc*.

In *Edelman v. Consolidated Rail Corp.*,[127] the Court did an extensive analysis of general preemption using a "plain language" standard that stated "Congress can define explicitly the extent to which its enactments pre-empt state law."[128] When it analyzed the unsafe speed issue, the court had little difficulty in stating that a speed rule established by state case law was preempted, and did not fall within the "local problems" exception noted in the legislative history of the Act.

When looking at the crossing gates issue, the Court had more difficulty in applying preemption. The Court noted that the *Karl* decision provided for no explicit preemption, and the 11th Circuit decision in the *Easterwood* case also provided for no preemption of state tort claims. However, the Court immediately rejected the *Karl* case, stating that "the Court failed to consider the pre-emptory effect of section 434," and confined its discussion of preemption to the latter two types identified in *English* (Congressional intent to occupy a field and direct conflict analysis), stating that it "fail[ed] to answer the question presented by this case. Namely, does promulgation of the MUTCD by the Secretary [of Transportation] constitute a regulation concerning railroad safety, thereby triggering the preemptive effect of section 434?"

The Plaintiffs argued that the MUTCD was not a "regulation" because it was adopted by the Federal Highway Administration, and therefore does not preempt state law via the FRSA. They stated that the MUTCD had never been listed in the Secretary's [of transportation] annual report to Congress, contrary to the FRSA, which requires that all regulations and orders issued under the FRSA be reported to Congress.

The Court rejected the argument stating that It makes no difference under what authority the MUTCD was adopted. The relevant question is whether it contains rules, regulations or standards concerning railroad safety.[129]

In addressing the *Easterwood* decision (discussed below), the Court relies upon the Ninth Circuit's decision in *Marshall v. Burlington Northern, Inc.* that discusses an interaction between the FRSA and the Highway Safety Act.[130] The *Marshall* court in the *Marshall* case said that the Secretary of Transportation had "delegated federal authority to regulate grade crossings at local agencies." The court concluded that when

127. *Id.* [Citing Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973)].
128. 110 S.Ct. 2270, 2275 (1990).
129. *Id.*
130. *Id.*

"standards contained in the MUTCD are applied to a particular crossing" preemption will occur.[131]

The plaintiff's also argued that their claim was not preempted under § 434 because the state tort claim was "necessary to eliminate or reduce an essentially local safety hazard," — a proscribed exception to § 434. The court stated that because the tort claim "is a rule which applies statewide it does not fall within the local hazard exception. . ."[132]

The final argument the Plaintiffs made was based upon the Restatement (Second) of Torts § 288C (1965) that states "compliance with a legislative enactment . . . does not prevent a finding of negligence where a reasonable [person] would take additional precautions." Citing the *Easterwood* case where the court rejected this argument with regards to speed and grade crossings the Court rejected this argument. The court also noted that "[d]espite the superficial appeal of this principle, its effect would be to undermine the national uniformity which the federal regulatory scheme seeks to establish."

The Court ultimately adopted the *Marshall* analysis, which was defined as a "two step process." The Court stated that first the Secretary of Transportation must take action, and then the state agency having jurisdiction over the crossing must take action. The Court stated that the promulgation of the MUTCD by the Secretary was sufficient to fulfill the first prong of the test.

In determining what fulfills the second prong of the test, state agency action, the Court rejected the dictum in the case *Hatfield v. Burlington Northern Railroad Co.*,[133] that suggested that preemption would not occur until an enforceable agreement for the installation of new or additional warning devices is entered into by the railroad and the state. Instead of this threshold, the *Edelman* Court, to preempt state tort law, required only an "assessment under the MUTCD of the safety devices appropriate for the crossing. . . ."[134] Even under this analysis, the Court was unsure as to whether preemption actually occurred. The reason for this was that the State's manual, the Ohio Manual of Uniform Traffic Control Devices for Streets and Highways, may not be in conformance with the MUTCD. The Court stated that if the Manual conformed, there would be preemption. But if it failed to conform, since the second prong was not done pursuant to federal authority, there would be no preemption.[135]

Another case accepting the preemption doctrine is *Neely v. Consoli-*

131. 720 F.2d at 1154 (9th Cir. 1983).
132. *Id.*
133. *Id.*
134. 757 F. Supp. 1198, 1207 (D. Kan. 1991).
135. *Supra, note 130.*

dated Rail Corp.[136] *On July 19, 1987 plaintiff's decedent was killed when struck by the defendant at the defendant's crossing on Waterloo Road in Portage County. There were warning signs and lights, but no crossing gates.*

After the filing of suit, the defendant moved that the adoption of the FRSA by Congress in 1970 preempted the entire field of railroad crossing safety, eliminating any common law duty on the defendant to provide for safe crossings. The plaintiff, rather than directly challenging the preemption, claimed that no local agency decision had been made with regards to the crossing. Failure of the agency to act prevented the fulfillment of the second prong of the Marshall preemption test, local agency action. The evidence indicated that the Department of Transportation for the State of Ohio had programmed the Waterloo crossing for improvement, but funding for the project had not been received and construction had not commenced.

The court, rather than relying solely upon the *Marshall* decision, looked to the *Karl* and *Nixon* cases. The court concluded that the *Nixon* opinion was most on point, and that the agreement regarding improvement was sufficient to establish local agency action (and ultimately federal action), so any tort claim was preempted.

The plaintiff, after losing on this argument, claimed that Conrail's failure to install the gates that were discussed in the agreement breached its duty of care to provide a crossing gate at the intersection. The court had great difficulty in finding consistent precedent on the question of whether this kind of plan establishes an appropriate duty of care for the intersection. Ultimately the court stated that, while it was absurd that the passage of the federal statute, and the subsequent local action, eliminated any duty of care by the defendant, this was the case. The fact that the defendant could have added protection "does not negate the preemptive effect of the Railway Safety Act. . . ."[137]

An often cited opinion in recent cases regarding the preemptive effect of the FRSA is *Armijo v. Atchison, Topeka & Santa Fe Railway.*[138] This case, similar to others, arose out of a collision at a train crossing where there were no crossing gates, and in this case no warning lights. Early in the case the defendant moved for summary judgment pursuant to Rule 56.1b of the United States District Court for the District of New Mexico. The defendant cited *Burlington Northern Railroad Co. v. Montana,*[139] in support of its motion, claiming that the FRSA preempts all state laws aimed at the same safety concerns addressed by federal regulations.

136. *Id.*
137. (N.D. Ohio, E. Div. No. 5, No.89 CV 0531).
138. *Id.*
139. 754 F.Supp. 1526 (D. N.M. Nov. 1990).

The plaintiff made the argument that the crossing in question was "essentially a local safety hazard," and therefore subject to an exemption pursuant to section 434.

The court did an extensive factual analysis of the federal and state actions prior to the accident. The State of New Mexico adopted the MUTCD offered by the Secretary of Transportation, and prioritized and ranked railroad crossings that were in need of crossing gates. The court concluded that there had been sufficient action to create preemption, noting that "the scope of preemption under the FRSA has been broadly construed by the courts."[140]

The court universally rejected the argument that the Plaintiff made regarding the section 434 exception, they based their decision on H.R. Rep. No. 91-1194[141] that stated that the exception in section 434 was not intended "to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter."[142] The defendant's motion for summary judgement was granted.

A recent Sixth Circuit opinion has also accepted the preemption doctrine. In *Norfolk & Western Railway Co. v. Public Utilities Commission of Ohio,*[143] the court addressed the issue of whether the FRSA preempted a state law requiring "A suitable walk or railing from which trainmen may walk shall be provided along at least one side of all bridge and coal, ore or other trestles." The Public Utilities Commission first argued that the walkways were not covered expressly in section 434 of the FRSA, and therefore regulation of such items was not preempted by federal law. The Federal Railway Administration (FRA) argued that the federal government had negatively preempted regulation of these walkways, by failing to promulgate any rules." The court accepted the argument by the FRA, stating that the Agency's explicit refusal to adopt a regulation requiring railroad bridge walkways was not appropriate, and thus amounted to negative preemption. The effect of this decision is that the FRA may be able to extend its preemptory powers far beyond its expected limits, by refusing to regulate in areas of railroad safety.

C THE *EASTERWOOD* CASE

The most recent railroad victory has come in *Easterwood v. CSX Transportation, Inc.*[144] It leaves no doubt that in the Northern District of Georgia — the same court but not the same judge that decided the *Mahony* case — preemption is the law.

140. 880 F.2d 1104, 1106 (9th Cir. 1989).
141. *Id.*
142. Reprinted in 1970 U.S. Cong. & Admin News, 4104, 4116-4117.
143. *Id.*
144. 926 F.2d 567 (6th Cir. 1991).

Thomas Easterwood was killed on February 24, 1988 at the Cook Street crossing in the city of Cartersville, Georgia when his car was struck by a CSX train. The suit alleged a constellation of wrongs: excessive train speed, excessive vegetation blocking view, improperly working signals, and, of course, failure to have installed a mechanical gate.

The railroad filed a motion for summary judgment. The plaintiff attempted to file an affidavit from an expert to raise factual issues regarding the crossing, but did not do so in a timely manner. Therefore, the court was free to proceed and decide the legal issues, in particular preemption. After discussing the procedural aspects of the case and a few of the facts the court said:

> It is well established that Congress, through the pervasive federal regulation of railroads in the Federal Railway Safety Act of 1970, ("FRSA") 45 U.S.C. § 421 et. seq., intended to establish national safety and preempt state regulation of railroads. *See, Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1976). The FRSA specifically controls the speed at which trains may operate by classifying sections of track and assigning to each classification a maximum speed limit. The track in question is classified as class four track and, according to federal regulations, the maximum train speed for class four track is 60 miles per hour. Based on the pervasive nature of federal regulation of the subject area, the court finds that train speed is expressly preempted by federal law. *See Sisk v. Nat'l R.R. Co.*, 647 F.Supp. 861, 865 (D.Kan. 1986).[145]
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> Similarly, the court finds that the plaintiff's claim that the defendant was negligent in failing to install gate arms on the Cook Street crossing is preempted by federal law. Public agencies having jurisdiction over railroad crossings have the authority to select appropriate traffic control devices. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th.Cir. 1983). That is, federal authority to regulate railroad crossings has been delegated to local agencies whose decisions then constitute federal decisions and have a preemptive effect. *Id.* In early 1989 the Georgia Department of Transportation ("DOT"), acting pursuant to federally delegated authority, elevated railroad crossings in the Cartersville area and determined the warning devices necessary for the various crossings. Initially, DOT determined that gate arms should be installed at the Cook Street crossing, but the funds earmarked for this crossing were later transferred to other projects. The decision to install gate arms at the Cook Street crossing was placed on a list of projects to be considered at a later time.
>
> Based on this evidence, the court finds that DOT made a decision not to install gate arms at the Cook Street crossing when it transferred funds to other projects and removed the Cook Street crossing from the list of crossings to receive gate arms. Accordingly, DOT's determination constitutes a federal decision in accordance with federal law, and the plaintiff's claim that the defendant was negligent in not providing gate arms is preempted.

145. N.D. Ga., Rome Div. No. 4-88-CV-0141-RLV (Order August 8, 1990).

The Eleventh Circuit took the *Easterwood*[146] case on appeal. The court did an extensive analysis of several claims raised by the plaintiff:

Speed Limit

In the original case, Easterwood claimed that the accident was caused in part because of a "negligently high rate of speed." The speed of the train at the time of the accident was testified to be between thirty-two and fifty miles per hour. The Court noted that the Secretary of Transportation had established regulations governing maximum speed limits for passenger and freight trains on various classes of track, and for this track the speed limit was sixty miles per hour. The plaintiff argued that the speed limit set was not for the purpose of avoiding accidents, but for several other purposes. The court rejected the plaintiff's argument and found that the speed limit of a train at a crossing was preempted by the Secretary's regulations.

Vegetation

The next issue raised by the plaintiff was that the excessive vegetation on the side of the track obstructed the views of the train engineers and the decedent, and that the defendant should have cleared the vegetation.[147] The court stated that with regards to vegetation that fit within this definition, state law is preempted. However, any vegetation that is not immediately adjacent to the railbed is not covered by this regulation, so any negligence claim based upon this type of vegetation being present is not preempted.

Warning Devices

The most important claim by the plaintiff, and the one discussed the most, is the question as to whether the warning devices at the intersection where the accident occurred were adequate. The court starts by separating the two sections of the United States Code that are in issue in this case.

The first statute referred to in the opinion is the Federal Railroad Safety Act. This act has preemptory language within it. However, "neither the Act nor the regulations specifically address the problem through federal regulation of the signals and the design of grade crossings."[148] The only requirements under this act are to "study problems with existing grade crossings" and to "create grade crossing and demonstration projects."[149] Because there is no explicit requirement to estab-

146. *647 F.Supp. 861, 865 (D. Kan. 1986).*

147. 933 F.2d 1548 (11th Cir. 1991).

148. 49 C.F.R. § 213.37 (1990). Federal regulations require that track owners "must keep vegetation on or immediately adjacent to the tracks under control."

149. *Supra, note 4.*

lish standards, preemption does not occur due to this section of the United States Code.

In an entirely separate section of the United States Code, Congress has passed legislation dealing with the grade crossing problem. 23 U.S.C. § 130 requires "states to conduct a systematic survey of all railroad crossings and then create and implement a schedule for bringing the grade crossings into compliance with the MUTCD."[150] While this requires states to establish standards, there is no explicit preemptory language in this section of the code. The court goes further, stating that "this statute is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field."[151] Therefore, the court held that there was no preemption with regards to state common-law liability claims based upon the negligence of maintaining or installing grade crossings.

The Hump in the Road

The last issue the court analyzes deals with the topography surrounding the railroad track. The plaintiff claimed that there is a steep hump in the road elevating the railroad track above the roadway. This hump forces traffic to slow down in order to navigate over this hump. CSX could not cite any federal statute or regulation regulating the angle of the roadway as it approaches the railroad track. Therefore the court held that this claim was not preempted.

The court ultimately reversed on the granting of summary judgment on three different issues: (1) the claim that vegetation on the side of the track contributed to the accident; (2) the claim that the hump in the road contributed to the accident; and (3) the claim that there were inadequate warning devices installed at the grade crossing.

The court did a final analysis in this case concerning contributory negligence. Under Georgia law, a plaintiff's action is barred if he or she is more than 50 percent at fault.[152] The court started its analysis of Georgia contributory negligence law by stating that contributory negligence is an issue of fact that is not to be determined by the courts as a matter of law except in palpably clear, plain, and undisputed cases. There were two Georgia cases where a driver was clearly contributorily negligent. These two cases require that either: (1) A driver be aware of a train, and attempt to beat it, or (2) The driver saw the train, or should have seen the train, and nevertheless continued across the tracks. Based upon the record, the court could not resolve this issue as an undisputed matter.

150. 45 U.S.C.A. §§ 433-445 (1992).
151. (1992).
152. *Supra*, note 146.

Therefore summary judgment against the plaintiff because of contributory negligence was inappropriate.

Beyond the court's opinion in the *Easterwood* case, the Georgia Trial Lawyers Association submitted a twenty-two page amicus brief arguing that the FRSA does not preempt Georgia's common law of negligence.[153])

IV. Cases Rejecting the Preemptive Doctrine

A. *State Cases*

A state supreme court has rejected the preemption doctrine in crossing cases. Similar to *Karl*, the Montana Supreme Court in *Runkle v. Burlington Northern*,[154] turned aside the railroad's arguments with the following:

> The Federal-Aid Highway Act of 1973 represents an effort by the federal government to improve the safety of grade crossings, and to provide funding for the same. That Act does not lessen in any degree the duty, statutory or common law, of a railroad to maintain a good and safe crossing. The Manual on Uniform Traffic Control Devices (MUTCD), promulgated by the Montana Highway Department, may be considered as a standard or norm to be used for traffic control devices. It does not have the force and effect of law in determining the duties and responsibilities of a railroad with respect to the safety of grade crossings."[155]

B. *Federal Cases*

One of the earliest cases rejecting the preemption doctrine in grade crossing cases where suit alleged the railroad should have placed a mechanical crossing is *Karl v. Burlington Northern Railroad Company*,[156] where the court said, "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."[157] The facts in the case suggest a typical crossing suit. Betty Karl was severely injured when, as the court said, "her automobile collided with a Burlington Northern locomotive."[158] Suit alleged a full range of alleged negligence by the railroad: (1) by failing to give plaintiff adequate notice of the approach of the train; (2) by operating the train at an excessive or unreasonable rate of speed under the circumstances or under applicable rules, regulations

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153. Ga.Code.Ann. § 46-8-291 (1982).
154. The documents can be found in *Easterwood v. CSX Transportation*, 933 F.2d 1548 (11th Cir. 1991).
155. 613 P.2d 982 (Mont. 1980).
156. *Id.*
157. 880 F.2d 68 (8th Cir. 1989).
158. *Id.* at 76.

or statutes; (3) by failing to properly maintain the warning devices at the grade crossing at issue; (4) by failing to recognize that the grade crossing at issue was unusually hazardous, requiring traffic control devices beyond the minimum required by statute; (5) by failing to have warning devices in place at the grade crossing which would have provided a driver in the same circumstances as plaintiff with warning, notice of an approaching train, notice of the location and angle of the tracks and notice of a sage place to stop, and (6) by failing to upgrade the traffic control.[159]

The precise location of the Iowa accident is not given in the opinion, but Iowa law controlled this federal diversity case. The preemption issue became important because the jury found the railroad liable only on allegation number six (failure to upgrade the crossing). After dealing with numerous other issues relating to the jury's conduct in reaching its verdict, the court finally said this about preemption:

> Burlington Northern further contends that it did not have a duty to upgrade its traffic control and warning devices, and that the plaintiff therefore cannot recover under that theory of negligence. It first argues that federal safety and railway acts preempt any claim of common law negligence based upon the inadequacy of the warning devices at the crossing.

The court cited as a footnote the following:

> Burlington Northern specifically argues that the Federal Highway Safety Act, 23 U.S.C. § 402 (1982), and the Federal Railroad Safety Act, 45 U.S.C. §§ 433, 434 (1982), preempts "common law negligence claims."

The court contends that since federal law grants to the Secretary of Transportation the power to authorize a local agency to regulate grade crossings, and since the local agency in this case approved the warning devices, that approval preempts any common law negligence claims. We find no merit to this argument.

In general, state laws may be preempted if they actually conflict with an express or implied federal declaration, or if state law is in a field that is so pervasively controlled by federal law that no room is left for state rulemaking.[160] Neither circumstance is present in this case. First, nothing suggests that the defendant was forced to choose whether to follow federal or state law, a traditional test of whether state and federal laws are in actual conflict.[161] 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. Our conclusion is supported by *Runkle v. Burlington Northern*,[162] where Bur-

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159. *Id.* at 69.
160. *Id.* at 69-70.
161. *See* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982); *see also* Flanagan v. Germainia, 872 F.2d 231, 233-34 (8th Cir. 1989); Deford v. Soo Line R.R. Co., 867 F.2d 1080, 1084 (8th Cir. 1989).
162. *De la Cuesta*, 458 U.S. at 153.

lington Northern made a similar preemption argument with regard to the Federal-Aid Highway Act of 1973. The court held that the Act represents an effort by the federal government to improve the safety of grade crossings, but that it does not lessen the statutory or common law duty of a railroad to maintain a good and safe crossing.[163] Similarly, in *Marshall v. Burlington Northern Inc.*,[164] the court held that the Railroad Safety Act did not occupy the field of railroad safety governance. We conclude that plaintiff's negligence claim is not preempted by federal law.

Burlington Northern also argues that because Iowa statutes specifically set forth safety requirements applicable to grade crossings, and as Burlington Northern was not found to have violated these statutes, it should not face liability at common law for negligence. Here, the court cited the following as a footnote: "Burlington Northern specifically points to Iowa Code § 327G.2 (1985), which addresses the signals at road crossings."[165] It is well established, however, that "compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[166] While Iowa courts have not yet had occasion to apply this rule in the context of a railway crossing accident, courts nationwide have adopted the Restatement standard in circumstances similar to this.[167] The district court did not err in submitting the issue of Burlington Northern's negligence to the jury.[168]

The railroads call the case an "aberration" and suggest several reasons why it should not be followed. First, it is the "only federal circuit decision which holds that where the Secretary has issued regulations, they are not preemptive of state law under the FRSA."[169]

None of these cases involve mechanical gates, however. The first case held that state caboose laws were preempted by 49 C.F.R. 221,5-16 providing for radio telemetry equipment instead. The second case held that state railroad accident reports were preempted by 49 C.F.R. 225.1 providing for federal accident reports. The third case held Louisiana local officials could not impose track safety standards that conflicted with federal ones codified in 49 C.F.R. 213.1-241. (Even in the latter case the court observed that state officials may participate in regulating railroad safety, even under the Railroad Safety Act.)

163. 188 Mont. 286, 299-300, 6 P.2d 982, 900-91 (1982).

164. *Id.*

165. 720 F.2d 1149, 1153 (9th Cir. 1983).

166. Karl v. Burlington N.R.R., 880 F.2d 68, 76 (8th Cir. 1989).

167. Restatement (Second) of Torts, § 288C (1965); *accord* Schmitt v. Clayton County, 284 N.W. 2d 186, 190 (Iowa 1979).

168. *See* Duffert, *The Role of Regulatory Compliance in Tort Actions*, 26 HAV. J. ON LEGIS. 175, 180-88 (1989).

169. Marshall v. Burlington Northern, *id.* at 76.

In fact, one of the leading "preemption" cases, *Sisk v. Nat'l R.R. Passenger Corp.*,[170] which held that local train speed ordinances are preempted, has not been followed without question. For example, a Florida appellate court explained the meaning of *Sisk* by saying:

> We recognize that subsequent to the [Rail Safety Act] municipalities may not impose speed limits more stringent than federal regulations allow, and that this may impact on the admissibility of evidence in a negligence action in order to avoid doing indirectly what cannot be done directly without conflicting with the federal law.[171]

Citing *Sisk* in *Chesapeake & Ohio Railway v. City of Bridgeman*:[172]

> We reject the [railroad's] contention that the federal act has preempted consideration of negligent conduct of a railroad and its agents when faced with a dangerous condition or event, notwithstanding that the acts of negligence involve failure to reduce speed below the maximum limit established by federal law. (Citing cases including *Marshall*, discussed below.)

Said the court:

> Certainly it was not the intent of the act is to insulate railroads from liability for specific tortious acts in the face of hazardous conditions. Therefore, on retrial, the jury may properly consider evidence of the railroad's failure to issue a slow order and the engineer's failure to reduce speed or stop.[173]

Second, the court in *Karl* did not understand the holding in *Marshall* because, according to the railroads, that decision actually held the FRSA was preemptive as to grade crossing warning devices when a state agency makes the determination as to what level of protection is required for a crossing. The railroads point out that the grade crossing in *Karl* had been approved by the local agency, and thus stands in direct conflict with the *Marshall* holding as to grade crossing preemption. The railroads like to point out that the "confusion" in *Karl* was that it did not discuss 23 U.S.C. § 130(1)d) (the requirement that states perform surveys), nor did it discuss the Secretary's power under 45 U.S.C. § 433(b) to regulate grade crossing safety pursuant to his authority over highway safety.

Third, the court comment in *Karl* about the absence of ". . .case law or legislative history to support the theory that Congress intended to completely occupy the field of railroad safety governance" is off base, according to the railroads, because the court "completely overlooked the express provisions of the FRSA," notably that it affects "all areas of rail-

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170. The support for this claim are four cases: Burlington N. v. Montana, 880 F.2d 1104 (9th Cir. 1989); Missouri Pacific R.R. Co. v. R.R. Comm'n of Texas, 850 F.2d 264 (5th Cir. 1988); Nat'l Ass'n of Regularity Util. Commissioners v. Coleman, 542 F.2d 11 (3rd Cir. 1976); and Donelon v. New Orleans Terminal Co. 474 F.2d 1108 (5th Cir. 1973).

171. 647 F.Supp. 861 (D. Kan., 1986).

172. Florida E. Coast Ry. Co. v. Griffin, (Fla. Dist. Ct. App., 4th Dist. No. 88-2273, 1990 WL 120654 at 3) (August 22, 1990).

173. 699 F.Supp 823 (W.D. Mich. 1987).

road operations."[174]

Fourth, the statement that no preemption is expressed or implied by the FRSA is wrong, contend the railroads, because of the language in 45 U.S.C. § 433(b) which speaks of "until such time as the Secretary adopts a regulation or standard covering the subject matter of the state requirement."

Regardless of what the railroads think about the ruling in *Karl*, it remains an important decision of an appellate court of high rank, and until there is a United States Supreme Court decision on point, or has been expressly overturned, it is an important decision and remains the "best" rule.

As mentioned in the *Karl* case, there are other decisions rejecting the preemption doctrine in crossing cases. In some respects, the decision in an earlier case, *Marshall v. Burlington Northern*,[175] mentioned in *Karl*, is arguably more important than *Karl*. The reason is simple — its author is now Justice Kennedy of the United States Supreme Court.

Kenneth Marshall was killed when his car was struck by a train; the jury awarded $75,000 compensatory and $750,000 punitive damages. The plaintiff's case alleged two wrongs. The first was the failure of the locomotive to have strobe lights and oscillating lights; the second was the lack of a gate at the crossing. The verdict was overturned and a new trial ordered by the Ninth Circuit.

Judge (now Justice) Kennedy ruled for the railroad on the issue of lights. Here, the locomotive complied with the requirements of the Boiler Inspection Act[176] with regard to its standard 800 foot visible beam. The Railroad Safety Act of 1970 did not subsume or recodify previously existing federal statutes on railroad safety. "Rather, it leaves existing statutes intact, including the Boiler Inspection Act, and authorizes the Secretary to fill interstitial areas of railroad safety with supplementary regulation."[177] Moreover, the FRA had studied the strobe and oscillating light issue and found it did not promote safety. "The recent action of the FRA is support for the conclusion that the subject has been preempted by administrative action as of this date; but we rely on other indices of preemption we have discussed for out conclusion that state regulation was displaced at the time of the accident."[178]

Turning to the issue of the gate protection argument, the opinion actually gave some support for the notion that the Manual on Uniform Traffic

174. Florida E. Coast Ry. Co. v. Griffin, Fla. Dist. Ct. of App., 4th Dist. No. 88-2273, 1990 WL 120654 at 3 (August 22, 1990).
175. 45 U.S.C. § 421 (1992).
176. 720 F.2d 1149, 1154 (9th Cir. 1983).
177. 45 U.S.C. § 23 (1982).
178. *Id.* at 1152-53.

Control Devices is a federal regulation — an issue the railroads have urged with fervor in recent cases, despite the precise holding that no preemption had occurred in the case at hand. Here is the court's discussion:

> Plaintiff contended at trial that the railroad was negligent in failing to provide a more adequate warning device at the crossing in question. Plaintiff's expert testified that the crossbuck, a sign with an X-shaped warning, was inadequate for the crossing, considering the multiple tracks, the possibility of two trains at the crossing, the use of high speed trains, and certain possible restriction on sight distance. He testified that an automatic gate with flashing lights should have been installed at the crossing. Burlington argues that evidence of the adequacy of its crossing should have been excluded because federal law also preempts this aspect of common law negligence. Burlington's preemption argument here is based solely on the Railroad Safety Act, since it is clear that the Boiler Inspection Act is not applicable. The question is whether the state is trying to regulate the same "subject matter" already regulated by the Secretary.[179]
>
> The Railroad Safety Act requires the Secretary to study and develop solutions to problems associated with railroad grade crossings.[180] The Highway Safety Act of 1966,[181] directs the Secretary to develop uniform standards and to approve state-designed highway programs that comply with them, which are then eligible to receive federal financial assistance.[182] 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,[183] which also was adopted by Montana.[184] 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.
>
> 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 is to maintain a "good and safe" crossing. Mont. Code Ann. § 69-14-602 91(1981) is not preempted. Evidence concerning the adequacy of the warning device at the crossing in question was properly admitted.[185]

Just as there are trial court orders upholding the preemption doctrine, there are trial court orders rejecting it too. In fact, there are proba-

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179. *Id.* at 1154.
180. 45 U.S.C. § 434 (1976).
181. 45 U.S.C. § 433 (1976).
182. Pub.L. No. 89-564, 80 Stat. 731 (1966) (as amended, codified at 23 U.S.C. subsection 401-404 (1982).
183. 23 U.S.C. § 402 (1982).
184. *See* 23 C.F.R. § 655.601 (1981).
185. *See* Mont. Code Ann. § 61-8-202 (1981).

bly more trial court cases rejecting preemption than there are trial and appellate decisions accepting the doctrine, but these opinions are not generally available. There are two reasons for this. First, because the case was not appealed there is no way for plaintiffs' lawyers to "find" the cases and cite them in on-going litigation. Second, the railroad lawyers, in briefs arguing in favor or preemption, do not cite trial court decisions (which have no precedential authority anyway) which run counter to their preemption argument. The following trial court cases are illustrative.

In the case of *Moore v. Soo Line Railroad Co. v. Overton*,[186] three

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186. *Id.* at 1154.

A federal magistrate in Nebraska has rejected the preemption doctrine as it relates to grade crossing protection (but affirmed it regarding the sound level of the "audible warning device" on the train). In a very thorough opinion the magistrate began by summarizing the railroad's preemption argument, saying:

In arguing that federal law preempts the plaintiff's common law claims regarding traffic control of warning devices, the defendant asserts: (1) Nebraska has accepted, in exchange for federal highway funding, the obligations of implementing through its regulatory agencies the Secretary of Transportation's program for improving grade crossings; (2) the Nebraska Department of Roads had, before the accident in question, investigated the crossing at issue and began the procedure of acquiring additional crossing protection warning devices at the crossing in question; and therefore (3) the duty to install adequate crossing protection warning devices shifted from the railroad to the state" (p.6). Here is what the magistrate said regarding this issue: Karl v. Burlington N. Ry., 880 F.2d 68 (8th Cir. 1989), involved a railroad intersection collision. *Id.* at 69. The defendant railroad argued that it did not have a duty to upgrade its traffic control and warning devices and that the plaintiff therefore could not recover under that theory of negligence. The defendant argued that the FRSA and the FAHA preempted any claims of common law negligence based on the inadequacy of the warning devices at the crossing. The defendant then argued that as the federal law grants to the Secretary of Transportation the power to authorize a local agency to regulate grade crossings, and since the local agency approved certain warning devices, that such approval preempted any common law negligence claims. *Id.* at 75-76.

The Eighth Circuit determined that the plaintiff's negligence claim was not preempted by federal law for two reasons. First, the situation was not one of actual conflict between federal and state laws. [Here the magistrate recited that portion of the case saying that 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. . ."] *?? WHAT's this? Id.* at 7. Concluded the magistrate:

Acknowledging the Eighth Circuit's ruling in *Karl*, I find that the plaintiff's common law claims regarding crossing protection warning devices are not preempted by federal law. Therefore, insofar as these claims are concerned, the defendant's motion for summary judgment is denied ??(p.8). *Carson v. Burlington N. R.R. Co.*, United States District Court, Nebraska No. CV-89-0-513 (Memorandum and Order, Magistrate Richard G, Kopsf, June 27, 1990).

A federal magistrate in Oklahoma has rejected the preemption doctrine, at least in part, in a case where the railroad (apparently) offered the Model Brief. The plaintiff was injured in an accident that happened at a crossing between 81st and 91st Streets in Broken Arrow, Oklahoma, on December 14, 1987. According to the railroad, "The grade crossing was initially numbered and relevant data obtained as to the crossing by the Oklahoma Highway Department in 1976, and was physically surveyed by Highway Department engineers sometime prior to 1987. Pursuant to that investigation authority to commence construction of warning devices at the subject crossing was issued by letter of H.R. Hoefner, Chief Traffic Engineer, Oklahoma Department of Transpor-

teenagers were killed when their car was struck at a crossing lacking

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tation, dated December 11, 1987. This letter was received by the railroad on December 16, 1987, two days after the subject accident occurred" (Memorandum of Points and Authorities in Support of Motion to Strike, May 8, 1990, 1-2).

The railroad challenged the plaintiff's contention that gates should have been in place by asserting the preemption doctrine in a motion to strike the plaintiff's gate-related allegation.

The magistrate ruled as follows:

Defendant contends that federal regulations have been adopted concerning railroad grade crossing warning devices. Defendant points out that 23 C.F.R. § 655.607 adopts the Manual on Uniform Traffic Control Devices for streets and Highways as the national standard and § 646.214 applies it to railroad grade crossing improvements.

The manual, in turn, requires approval from "the appropriate agency within any given state" before a new grade crossing warning system is installed (Section 8D-1 of Manual). In Oklahoma, the Oklahoma Corporation Commission is the agency vested with authority to make such determinations (17 O.S. Sec. 86, 66 O.S. Sec. 129, 66 O.S. Sec. 130).

The parties have identified only two cases dealing with the precise issue in this case: whether federal law preempts a state-imposed duty on a railroad to maintain safe railroad grade crossings. The Eighth Circuit decision in Karl v. Burlington N. Ry., 880 F.2d 69 (8th Cir. 1989) holds that federal law does not preempt a state statutory or common law duty to maintain a safe crossing. *Id.* at 76. The Ninth Circuit decision in Marshall v. Burlington N. Ry., 720 F.2d 1149 (9th Cir. 1983) suggests a contrary result could be reached on different facts. The United States Magistrate finds the reasoning of Marshall to be more compelling, but notes both cases ultimately lead to the same result.

In *Marshall*, as in this case, Plaintiff was injured when his motor vehicle collided with a train. In each case the grade crossing was marked by "crossbucks," the traditional X-shaped railroad warning signs. In each case, Plaintiffs contended that the railroad companies were negligent by not installing additional warning devices. Both Defendants countered with the preemption argument.

The *Marshall* court began its consideration by noting that the FRSA directed the Secretary of Transportation to study and develop solutions to railroad grade crossing safety problems. *Id.* at 1154. Likewise, the court noted that the Highway Safety Act required the Secretary to develop uniform standards for all highway warning signs, and to approve complying state highway safety programs. *Id.* The *Marshall* court then found that by adopting the Manual on Uniform Traffic Control Devices, the Secretary delegated federal authority to state agencies for the task of regulating grade crossings. *Id.* Against this backdrop, *Marshall* held that the deciding factor in the preemption question is whether a "federal decision" has been reached "through the local agency" on the adequacy of a particular crossing's warning devices: "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."

In the case at bar, the "local agency" would be the Oklahoma Corporation Commission. The Corporation Commission, however, did not make a decision as to the specific crossing involved here until December 29, 1987 (two weeks after plaintiff's train collision). (See, Exhibit "D", Defendant's Reply to Plaintiff's Brief in Opposition to Defendant's motion to Strike.) This, following the reasoning of *Marshall*, in the case at bar, the preemptive "federal decision" made through the Oklahoma Corporation Commission as to the particular crossing in question, was reached on December 29, 1987. It follows then that state law imposing on defendant as to the subject crossing had *not* been preempted at the time plaintiff's action arose. Therefore, the United States Magistrate finds the Defendant's Motion to strike should be, and is denied." Ketcher v. Missouri-Kansas-Texas R.R., United States District Court, Northern District of Oklahoma, No.CV-89-C-962-C (Order per Magistrate Jeffrey S. Wolfe, August 23, 1990).

mechanical gates on West Street in Odon, Indiana. The lack of gates was one of the allegations of railroad negligence. But the facts are unique in that Soo Line was in the process of installing additional crossing protection pursuant to a joint agreement with the county and the state at the time of the accident.[187]

In its motion to dismiss the claim relating to failure to upgrade the crossing, the railroad made all the arguments outlined above regarding preemption and insisted that "Soo Line was proceeding in its usual, expeditious fashion to complete the project."[188] It argued that the facts of the case were virtually identical to *Nixon v. Burlington Northern*[189] (discussed above) because the crossing had been identified as needing upgrading and obviously was in the process of improvement at the time. The railroad also argued that the crossing was not "extrahazardous" within the meaning of Indiana common law because the railroad had never been in an accident at the crossing involving either personal injury or property damage prior to the case at hand.

In opposing the motion to dismiss, the plaintiff recited the counterarguments and cases discussed above, e.g. no expressed preemption, no preemption in fact, and statutory law unique to the case, namely the fact that both public and private persons in Indiana can petition for grade crossing improvements, although such improvements must be "approved" by the Department of Transportation.

The plaintiff argued strongly that the latest meaningful United States Supreme Court decision on the issue of preemption was *Silkwood v. Kerr-McKee Corp.*,[190] which rejected the preemption doctrine even in the area of nuclear energy safety concerns (although the states have no regulatory control in this area) with the statement that, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."

But perhaps the most telling document produced by the plaintiff was a report prepared by the School of Engineering, Purdue University entitled *Rail-Highway Grade Crossing Programs for Indiana County Highways and City Streets*[191] which contained the statement, "The installation and maintenance of flasher signal devices at grade crossings is the responsibility of the railroad company since the device is owned and operated by

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187. Hennepin County (MN) Dist. Ct., No. 88-7878.

188. The case illustrates the delay common in such matters. The state initiated contact with Soo Line's predecessor regarding the crossing in 1979. The contract to do the work—100 percent state funding—was not signed until 1986. According to the railroad some sort of work had actually begun in May 1986. The accident happened May 9, 1986.

189. Defendant's Memorandum of Law in Support of Motion to Dismiss Claim That Crossing was Inadequately Protected 13.

190. *Id.*

191. 646 U.S. 238 (1984).

the railroad and is located on railroad right-of-way." The document had been prepared in conjunction with the Highway Extension and Research Project for Indiana Counties and Cities. Without assigning reasons for its decision, the trial court denied the railroad's motion regarding preemption.[192]

Four important federal trial court opinions also reject the preemption doctrine. *Esters v. Seaboard System Railroad, Inc.*,[193] involved an acci-

192. (1984).

193. Order, January 5, 1990, Hon. Henry W. McCarr, District Court.

A Pennsylvania trial court decision also rejected the preemption doctrine, but here again, there was no written opinion, only a short court order rejecting it. The case is actually two cases, Miklos v. Seelinger v. Norfolk & Western Ry. and Paul M. Seelinger v. Norfolk & Western Ry., Erie County (PA) Common Pleas Court No. 799-A-1986 and 2258-A-1986.

The accident involved a collision on the night of December 16, 1984 at the Peach Street crossing in Erie, Pennsylvania. Both the driver, Mary T. Seelinger, and her passenger, Patricia Miklos, were killed when their car was struck by an eastbound Norfolk & Western freight train. The facts are somewhat complicated but the suit's major contention was that the crossing should have been protected by "short arm gates." According to the plaintiff's proof, the Seelinger vehicle had just entered the crossing at a slow rate of speed. Seelinger stopped on the Norfolk & Western tracks short of the flashing signal standard which Norfolk & Western allowed to remain improperly located on in the Northwest quadrant of the crossing after Peach Street had become one-way northbound approximately 20 years prior thereto. According to the plaintiff, "Norfolk & Western decided to leave these signals improperly located on the outside chance that the City of Erie at some later time would make the street two-way." Seelinger's Brief in Opposition to Norfolk & Western's Motion for Protective Order Regarding Pending Discovery. p.10. According to the plaintiff the signals had a history of malfunctioning, a common allegation in crossing cases, but very difficult to prove. Contended the plaintiff, "The flashing signals at this crossing were reported to have activated about half their intended cycle, i.e. 10 to 15 seconds prior to this train colliding with the Seelinger car. This was not unusual. The same flashing signals were found to have operated improperly at the time of a collision on December 9, 1984, between a northbound motorist and a Norfolk & Western freight train and when the crossing was inspected thereafter between December 9, 1984 and December 16, 1984. During this time period, Norfolk & Western never inspected the crossing to determine the adequacy of the warning system and claims they never malfunctioned or operated for time cycles less than 24 seconds prior to train arrivals at the crossing" *Id.* at 10.

The railroad's preemption argument, namely that it had not been ordered to upgrade the crossing by the Public Utility Commission, was challenged by the plaintiff with two arguments. First, as a matter of general tort law mere compliance with state regulators does not inoculate a railroad from suit, citing two pre-Rail Safety Act cases, Stevens v. Norfolk & Western, 357 N.E. 2d 1, at 3 (Ind. App. 1976) and Dimenco v. Pennsylvania Railroad Company, 126 F.Supp. 417 (Del. 1954). The second reason may have been a crucial point. According to the plaintiff, "Pennsylvania Public Utility Commission's railroad regulations adopted June 24, 1946, as revised on May 1, 1971, Rule 2A provide that a railroad operating in Pennsylvania through a grade crossing similar to Norfolk & Western's operation or operations through the Raspberry Street grade crossing in Erie, Pennsylvania may voluntarily, by itself, increase the protection at any such crossing without being ordered to do so. The regulations provide that a railway company need not receive the Public Utility Commission's prior approval to install additional temporary and/or experimental protection at such crossings and need only promptly notify the Commission of such an increase in protection at any given railway crossing. See also, 52 Pa. Code 33.21-33.23." *Id.* at 20.

According to plaintiff's counsel Andrew J. Conner, Erie, Pennsylvania, the trial court has

dent that occurred at about 11:00 p.m. on March 23, 1983. Plaintiff's decedent was traveling south on Main Street in the city of Biloxi, Mississippi approaching the east-west railroad track of the defendant. The train was traveling east at the alleged speed of 30 m.p.h. when it struck the decedent's auto on the passenger side. There were no activated signs or gates, only the standard crossbucks. According to the proof that plaintiff was prepared to offer, (1) there were nine train-auto collisions at this crossing in the seven years from 1976-1982; (2) the defendant had actual notice of each of these accidents; (3) that in 1981, the Main Street crossing had a hazard ranking of 8 out of 3,589; (5) that the defendant admitted that the Main Street crossing would have had a hazard ranking of 1 out of its 300 crossings in the State of Mississippi in 1981 and 1983; (6) that the sight distances at the Main Street crossing were grossly inadequate, in that the available sight distance from the north to south on Main Street

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tentatively denied the railroad's motion in limine on the preemption issue. However, no opinion was issued (Letter from Andrew J. Conner to Lewis Laska, August 23, 1990). Likewise, a federal judge in Connecticut has rejected the preemption doctrine but no detailed opinion was written. As is customary, the railroad filed a motion for summary judgment asking that "Count One of the complaint [be dismissed] for the reason that, as a matter of law, any duty of Amtrak under state and common law regarding crossing bars, gates or other traffic safety devices at the Toelles Road crossing was preempted by the State's application of federal law and regulations." The court placed its ruling the motion itself, saying,

DENIED upon a full review of the record. Summary judgment as to the Count 1 of the complaint is denied in view of the plaintiff's claim that defendant Amtrak was negligent in not petitioning to eliminate the allegedly dangerous conditions at the Toelles Road Crossing in accordance with CGS Section 13b-275. This denial is without prejudice to any motions in limine or requests for jury instructions that may be appropriate in view of the arguable federal preemption of any claim of Amtrak's responsibility for public safety at railroad crossings." Torres v. Consolidated Rail Corp.and Nat'l R.R. Passenger Corp., United States District Court, Connecticut N-87-16 (JAC) (Order/Ruling of January 12, 1990).

A state trial judge in Illinois has also rejected the preemption doctrine. The facts are interesting and not altogether unlike the *Nixon* case (discussed above). The decedent was killed in a collision with a Union Pacific train at Rezy Road Crossing, Madison County, on January 20, 1990. The railroad and the city (Olive Township) had been ordered/agreed to improve the crossing by the Illinois Commerce Commission on August 23, 1989. This, according to the railroad, meant that it had no more legal duty that is, the state had made a decision that the crossing be signalized and therefore the railroad had no more legal liability. (In support of its position the railroads offered the usual unpublished opinions in *Nixon* and *Mahony*, discussed above.) Here is what the trial court ruled:

"The defendant Union Pacific Railroad Company's Motion to Dismiss Counts I and II of Plaintiff's Complaint having been taken under advisement, the Court now being fully advised in the premise finds as follows:

1. The defendant had a common law duty to provide adequate warning devices at the crossing, and the pleadings are sufficient to state a cause of action.

2. There being no showing that defendant had completed compliance with the 8-23-89 order of the ICC, defendant could not have been relieved of its duty by virtue of that order.

3. Plaintiff's claim is not preempted by federal law. Wherefore, defendant Union Pacific's Motion to Dismiss is denied. Pratt v. Union Pacific R.R., Madison County Cir. No. 90-L-646 (Order, Judge P.J. O'Neill, July 31, 1990).

were 20 feet to the east and 27 feet to the west (direction from which defendant's train struck plaintiff's decedent, as compared to a "required" sight distance of 281 feet; (7) there is a visual clutter in the area which competes for the driver's attention when approaching the crossing; and (8) there are parallel streets and a steep grade at the crossing that provides for difficult or complex driving maneuvers at the crossing.

The issue of preemption came before the court in an unusual manner. The railroad offered a proposed jury instruction which recited the facts of the case such as the fact that there were federal laws that provided for the funding of improvements, that the city had adopted a resolution calling for more protection and that the federal-state plan was a "fair and reasonable allocation of resources" and "since the defendant was a participant in the Federal and State railroad crossing program, you may not return a verdict for the plaintiff based on the fact that the defendant had not installed signals and gates before March 23, 1983." In other words, the jury instruction itself incorporated the preemption doctrine and this was apparently urged upon the court by the defendant's brief. Thus, it was the plaintiff who filed a motion in limine to block the use of the jury instruction. The plaintiff prevailed. While the court did not give a detailed reason for its ruling, its views were clear:

> This matter having come to be heard on Plaintiffs' Motion in Limine, dated February 20, 1987, the Court having considered the same, including briefs of counsel for the Plaintiffs and Defendant, finds that said Motion should be and is hereby sustained as follows:
>
> 1. That the Defendant, Defendant's witnesses and counsel for Defendant shall not mention, refer to, or being before the jury, or potential jurors any evidence asserting and/or implying that the duties of the Defendant with respect to crossing protection under Mississippi law have been in any way preempted by the Federal-Aid Highway Act of 1973 and/or that its *duties* have been delegated to or are the responsibility of the Mississippi State Highway Department or any other person or entity by virtue of any written agreements or contract with the railroad-Defendant or any other person or entity relieving the Defendant of its duties, responsibilities and/or liability in its failure, if any, to carry out its duties under Mississippi law.
>
> 2. Further, that the Defendant, Defendant's witnesses and counsel for the Defendant are prohibited from introducing, either testimonial or documentary in nature, evidence which would tend to suggest or imply, directly or indirectly, that the Federal Highway Act of 1973 or any agreements or contracts executed in compliance thereto or as a result thereof relieved the Defendant of its duties and/or liability in its failure, if any, to carry out its duties under Mississippi law.
>
> 3. Further, counsel for the Defendant shall inform Defendant's representatives and all witnesses called by Defendant to refrain from mentioning or referring, in any way, in the presence of the jury or potential jurors, to the matters set forth herein, unless specifically permitted to do so by ruling of this Court outside the presence of the jury.

4. However, the Defendant shall not be prohibited form introducing evidence which demonstrates Michael Esters' actual knowledge, experience and general awareness of risk and dangers associated with Main Street crossing Biloxi, Mississippi, in support of Defendant's affirmative defense of contributory negligence of plaintiff's decedent." (Order, August 26, 1987; 3 pages).

According to plaintiff's counsel Tim C. Holleman, Gulfport, Mississippi, the case was settled on the first day of trial. Another federal trial court which has rejected the preemption doctrine did so in *McMinn v. Consolidated Rail Corp.*[194] The accident happened in New Jersey so the New York court applied New Jersey law in this diversity action. According to District judge John E. Sprizzo:

> Plaintiff was driving her automobile toward a Conrail crossing, and she did not see the flashing lights at the crossing because glare from the sun washed out the lights. The crossing did not have automatic gates or bells, although there was testimony that the train's bell was ringing. Plaintiff approached the tracks slowly because she was aware of loose timbers on the track, and intended to change the gears of her standard shift auto when she slowed down. She stopped with the front end of the auto hanging over the tracks and then became aware of the train, but was unable to reverse in time. The train struck the front left of the auto[195].

In affirming the $1.125 million verdict (reduced to $843,750 because of the plaintiff's 25 percent comparative negligence), the court dealt with several issues. But it said this about preemption:

> Conrail next argues that it cannot be deemed negligent because the safety devices at this crossing had been approved by the State of New Jersey. However, a railroad is under a duty to consider changing conditions and alter its warning systems accordingly.[196] Although Conrail argues that the crossing was approved by the state and that it could not have effected a change without the approval of New Jersey authorities, the duty to provide a safe crossing is on the railroad, and the railroad cannot absolve itself from liability on this ground because it was hardly vigorous in its effort to persuade the appropriate regulatory authorities that changes should be made at the crossing.[197]

RECENT FEDERAL CASES

Within the last three years there have been several federal courts that have rejected preemption on a variety of grounds. In *Taylor v. St. Louis Southwestern R. Co.*,[198] Southwestern asked the court to determine, as a matter of law, that all issues with regard to railroad crossing safety be

194. U.S. Dist. Ct., S.D. Miss., S. Div. No. S85-0945(NG).
195. U.S. Dist. Ct., S.D.N.Y., 84-CV-6874 (JES).
196. *Id.* at 2.
197. *See* DiDomenico v. Pennsylvania-Reading Seashore Lines, 178 A.2d 10, 19 (1962).
198. Memorandum Opinion, July 31, 1989 at 5, n. 5.

preempted by federal law. The court looked to the *Karl* case, which stated that negligence claims were not preempted. It indicated that "no federal decision had been reached through the local agency, and the railroad's duty under applicable state law is not preempted." Therefore, there was no preemption in this case. However, the court did say that if evidence was introduced that did indicate local action pursuant to the FRSA had occurred, it would preempt the negligence claim.

In *Brown v. Southern Pacific Transportation Co.*,[199] the court indicated that "Preemption. . .should not be inferred from every Congressional enactment that overlaps with state regulation." Further, the court said that where there is no direct conflict, "courts should find federal law implicitly [preemptive] where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation or where the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state on the same subject." The court pointed to section 434 of the FRSA which states that safety standards were to be "to the extent practicable." And stated this indicated a congressional desire not to totally preempt state regulation. The court ultimately concluded that "While the Federal Railway Safety Act of 1970 may represent an effort by the federal government to improve the safety of grade crossings, it does not lessen the statutory or *common law* duty of a railroad to maintain a good and safe crossing."

Recent cases have also considered the situation common law negligence applies when there has been no determination as to the appropriate warning device for a given crossing. In *Anderson v. Chicago Central and Pacific R.R. Co.*,[200] the court stated that even under the doctrine stated in *Marshall*, if there hadn't been a determination by some governmental agency, preemption would not occur. However, the court also cited the *Karl* case, and stated that even if there had been some determination, a defendant could be subject to a common law negligence claim. In *Anderson*, there was no governmental determination, so the court ruled that under both doctrines preemption did not occur.

In a case decided in just this last year the District Court for the State of Nebraska held that there was no preemption. In *Duester v. Burlington Northern Railroad Co.*,[201] the court did a brief three step analysis for federal preemption. The court looked to the *Karl* decision when writing its opinion. With regards to protection devices the court held that federal law does not preempt state common law in this instance.

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199. 746 F.Sup. 50, (D. Kan., 1990).
200. U.S. Dist. Ct., E.D. Tex., Beaumont Div. No. B-89-00933.
201. U.S. Dist. Ct., N.D. Ill. (Jan. 14, 1991).

CONCLUSIONS ON PREEMPTION

The developing view of the railroads' argument regarding preemption is that preemption does occur in these cases. This is especially true at the state level. If this view is adopted by both state and federal courts, potential plaintiffs' only possible area of recovery will be from individual states and localities, which in itself presents a whole series of problems which will now be discussed.

V. STATE LIABILITY FOR NEGLIGENCE IN SITING AND CONSTRUCTING MECHANICAL GATE GROSSINGS

The doctrine of preemption, if followed to its logical conclusion, means that the state is the only potential defendant in a suit alleging failure to erect proper mechanical gates. Thus, while the plaintiff may name the railroad, the state, and possibly local governing entities such as counties or cities, the doctrine will leave the later governmental entities as the sole remaining defendants.

Have the states assumed the responsibility for grade crossing protection? This is both a legal and policy question.

VI. LEGAL IMPLICATIONS OF STATE DUTY TO SITE AND CONSTRUCT MECHANICAL GATE CROSSINGS

A. GENERALLY

The prevailing legal rule at this time is that the various states do not have a legal duty to site and erect mechanical gate crossings.[202] While there are some exceptions, the general rule is that suggested by the Utah Court of Appeals in the *Cooper* case: "The basis asserted here for recovery against UDOT is its failure to better warn 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."[203]

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202. U.S. Dist. Ct. D. Neb., CV No. 90-0-140 (Nov. 1, 1991).

203. At least one influential person long involved with the issue of grade crossing safety appears to agree with the decision in *Duncan*. Dr. Hoy Richards, publisher of the newsletter Highway & Rail Safety Newsletter, said *Duncan* "clears the air" on several elements of the issue of state v. railroad responsibility. In introducing the case, Richards gave the following background:

> Several years prior to the creation of the U.S. Department of Transportation, the Interstate Commerce Commission found that highway-rail safety is a public responsibility. The establishment of Section 203 grade crossing safety improvement program early in the 1970s demonstrated that the U.S. Congress also believed that the public should finance the major portion of the cost associated with grade crossing warning devices. The Congress also empowered the Federal Highway Administration to establish specific procedures for states to receive and expend federal-aid highway funds for crossing safety improvements. In this process, the states establish priorities for selecting crossings for improvement, conduct field evaluations to deter-

The reason there can be no state liability in the typical failure-to-install gates case is two-fold. First, the doctrine of sovereign immunity prevents suits for money damages from being brought in state courts naming the state as a defendant. While many states have altered or waived sovereign immunity in certain types of cases, such as where active negligence of a state employee can be shown (e.g. the driver of a state vehicle causes a collision with another motorist), most sovereign immunity "waiver" statutes contain exclusions which bar suits where the activity was "discretionary" in nature. Thus, the "discretionary function" exception would virtually bar a crossing claim. This is because the decision to site and construct a crossing gate (or the decision to order the construction of a gate) involves a professional engineering assessment. This is a classic example of a discretionary function.

A typical example of how this logic works is the case of *Barger v. Chesapeake & Ohio Railway Co.*[204] In that case the railroad is urging the appellate court to affirm the trial court's adoption of the preemption doctrine. In arguing against preemption the plaintiff has explained that the Ohio courts have already rejected any state liability in the case at hand.[205] The reason was explained in the State's brief:

> Gates and warning lights are the responsibility of the railroad company to install and maintain under Sections 4907.47 and 4907.49 Revised Code, after a hearing and determination by the Public Utilities Commission of Ohio. Speed regulations and traffic warning signs are the responsibility of the country, or township, on country or township roads. (Citing 4511(a), Revised Code.)
>
> The State's position was further stated as follows:
>
> As has already been stated, ODOT has no responsibility for the installation of warning devices a railroad crossings. Further, DOT has no responsibility for the regulation of safety at railroad crossings. Again, ODOT merely identifies statistically dangerous crossings and informs local authorities and railroad companies of its findings.
>
> ODOT does have the authority to recommend the installation of gates,

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mine which warning system is the most appropriate for a particular situation and monitor the installation of the warning devices. Statistical tools and technique recommended by FHWA for prioritization of crossing improvements and implemented by the states are by federal legislation inadmissible in a court in a court proceeding. Most courts agree that the public has the responsibility for highway-rail safety. They also agree that the railroads are responsible for the maintenance of their right-of-way and the safe operation of their trains. Therefore, it would appear that there is a clear distinction of responsibility between the railroad and the public at highway-rail intersections. This, of course, is not the case. The argument of responsibility becomes an issue in almost all litigation involving motor vehicle/train accidents." See, *Railroad Responsibility for Crossing Safety Improvement*, 8 HIGHWAY & RAIL SAFETY NEWSLETTER (June, 1990), at 1.

204. Ohio Ct. App., 10th Dist., No.90AP-402, *aff'd* 70 Ohio App. 3d 307, 590 N.E.2d 1369 (Ohio App. 1990).

205. Ohio has a Court of Claims which hears cases involving state liability; it denied the plaintiff's claim in the case of Barger v. ODOT., Ct. Cl. No 86-10450.

and other types of warning devices at railroad crossings, pursuant to the powers granted it under Section 5523.31, Revised Code. However, that Section limits ODOT's authority to conducting statistical surveys at all railroad crossings that have a high probability of accidents. Based upon the survey information obtained, ODOT identifies the highest priority crossings, then it may negotiate with the railroad companies affected, and local subdivisions, to arrange for the installation of warning devices by the railroad company. (ODOT Reply Brief in Support of Motion for Judgment on the Pleadings, January 31, 1989).

There is a dearth of case law on the issue of whether a state bears legal liability for failure to upgrade a railroad grade crossing. The reason is this. The theory that states are responsible for crossing protection has arisen only recently, coincident with the erosion of the doctrine of strict governmental immunity and the rise of the preemption argument. Many cases name the state (or municipality) as a defendant largely for tactical reasons, not because of a clear belief that a judgment can be gotten against the state. That is, plaintiffs' lawyers sue the state in order to take the depositions of appropriate officials who will (1) explain the engineering criteria by which dangerous crossings are determined; (2) explain that the railroad knew or had reason to know of the dangerous nature of the crossing; and (3) the state would have given permission for the railroad to upgrade the crossing had the railroad asked. In short, the purpose of suing the state is to find a credible witness who will pin liability on the railroad. Sophisticated state transportation officials know this. Those who do not, tend to over-react and attempt to avoid involvement by invoking 23 U.S.C. § 409. The net effect, however, hardly promotes railroad safety. Where preemption prevails the railroads do little or nothing in the crossing area (except urge greater public awareness of the dangers of "beating the train" and the like); and states lose any leverage they have to "force" the railroads to upgrade crossings.

Cases where states have settled cases where this is an allegation may be found, but they are not very instructive and do not represent the norm. In *Prescott v. Burlington Northern Rairoad*,[206] a jury slapped the railroad with $5.2 million compensatory and $18 million punitive damages for the massive injuries suffered by two sisters, ages 24 and 27, whose car was struck at an unprotected crossing. The collision occurred in the evening hours at a crossing bordering the city of Longmont in Boulder County, Colorado. Visibility was restricted by trees and brush, the advance warning sign was down, and the pavement markings were not in place. The train was travelling slightly above the municipal speed limit. Suit alleged the railroad acted recklessly (justifying punitive damages) by not providing active protective devices, especially given the restricted vis-

206. Boulder County (CO) Dist. Ct., No. 83 CV 8842 (December 17, 1984).

ibility, and due to excessive speed. Evidence revealed that for 12 years prior to the collision, the county and state had notified the railroad that the crossing warranted upgraded activated protective devices and had cited the crossing as the second most hazardous in the state, Noteworthy is the fact that the State of Colorado and the county settled the case prior to trial for $850,000.

Parenthetically, it should be mentioned that at least one state has codified the rule that railroads have no duty to erect mechanical gates unless told to by government. While the wisdom of such a statute can be debated, at least it makes clear when the railroads' duty to act arises. The state is Michigan, whose statute provides, "The erection of or failure to erect, replace, or maintain a stop sign 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." MCL 257.668(2); MSA 23.68(2). The statute was found to be "clear and unambiguous" in *Baughman v. Consolidated Rail Corp.*,[207] in which the court barred the use of Michigan Department of Transportation files as evidence in the case (the court did not cite 23 U.S.C. § 409, however) and served to effectively bar the plaintiff from bringing a case against Conrail alleging failure to erect mechanical gates.

B. The Eleventh Amendment

There exists a constitutional impediment in finding a state liable where a case is brought in federal court, namely, the Eleventh Amendment to the United States Constitution.[208] This amendment has been interpreted to bar a suit for damages against a state where the plaintiff is alleging negligence. Thus, in the typical crossing case brought in federal court it will be literally impossible to hold the state liable. As explained above, many crossing cases are brought in federal court by the plaintiff. Other cases, where the railroad deems it strategically advisable, will be removed to a federal court by the railroad. Regardless of whether the suit begins in or is removed to federal court, the result as to the state defendant is the same: it will be dismissed against the state on Eleventh Amendment grounds.

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207. 460 N.W.2d 895 (Mich. App. 1990).

208. For additional federal cases accepting the preemption doctrine, *see* Connor v. Missouri Pacific Railroad Company, (D. Ok.) NO. 90-C-562-E, (March 1991), Cothron v. CSX Transportation, Inc. (M.D. Tenn, Nashville Div.) No. 3-89-0960 (April 1991). Another case, that isn't directly related to federal preemption, is Moore v. Atchison, Topeka and Santa Fe Railway Company, 966 F.2d 1992 (8th Cir. 1992). In this case, rather than looking to the federal acts, the court cited Missouri law that gave immunity for the installation and maintenance of warning devices at crossings where the MDOT had taken over jurisdiction. *See* § 389.640.2, R.S. Mo. (1986).

C. *The Difficulty of Proving Railroad (or State) Negligence in Failing to Install Mechanical Gates—The Impact of 23 U.S.C. § 409.*

Negligence in failing to install gates is commonly alleged in crossing accidents but it is very difficult to prove. The plaintiff must offer expert testimony to show that the crossing, by virtue of the number of trains and motor vehicles, as well as their type (such as school buses) and other factors, was "extra hazardous." That is, the mere fact that an accident occurred does not raise the inference of negligence, nor is a railroad crossing a hazardous condition which in and of itself requires the highest form of protection that technology can create.

Proving the "extra hazardous" nature of the crossing requires the expert witness to rely on data which was in existence prior to the accident, which the railroad can be deemed to have actual or constructive notice. Notable among these data are survey reports and any special reports prepared by state officials as part of the federally-mandated inventory process. Likewise, accident reports of prior accidents at the crossing are required by law to be sent to the FRA to serve as a basis for testimony.

Here, the plaintiff will encounter two difficult obstacles. First, accident reports which are sent to the FRA may not be offered in evidence for proof of the matter contained therein. This is because in 1910 the Congress passed, at the behest of the railroads, 45 U.S.C. § 41 which bars the admission of such records.

State crossing inventory data and reports were admissible until 1987. However, that year, at the behest of the railroads and the states, Congress passed 23 U.S.C. § 409, an amendment to the Highway Safety Act which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled for the purpose of identifying, 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 report, surveys, schedules, lists, or data.

The railroads argue that this statute is further proof of the fact that Congress was preempting the issue of railroad safety by making it a state responsibility. The argument is based upon a May 4, 1983 internal Memorandum of the Federal Highway Administration signed by Marshall Jacks, Jr. Associate Administrator for Safety to Mr. D.L. Ivers, Chief Coun-

sel which urges passage of a bill containing the language now found in 23 U.S.C. § 409 and assigns the following reason:

> It is the intent of this provision to prevent the unauthorized disclosure of information that States compile in good faith to meet the purposes of federal-aid highway programs to eliminate or reduce hazardous roadway conditions.[209] It is also the intent to protect information that may be compiled by railroads or utility companies for States in identifying hazards in connection with these programs.

The issue of keeping such data from plaintiffs' attorneys was the subject of testimony by railroad officials in hearings in 1985 as well. According to one view,

> Frequently such information, in the form of surveys and reports, has been used by attorneys representing plaintiffs in trials involving highway-railroad crossing accidents. As a result of this practice, states have understandably been reluctant to identify hazardous situations on a priority basis because of exposure to potential liability. Railroads, as well, have been cautious in supplying information to the states to be used in identifying hazardous crossings. These reports and surveys are developed in good faith to aid in the effectiveness of the Section 203 programs and should not be permitted to be used against states or railroads in personal injury or property damage litigation.[210]

This statute flies in the face of the modern rules of litigation which foster broad discovery. Most courts allowed the plaintiff to discover such materials.[211] Other courts barred discovery as well.[212] This includes barring discovery of data that was collected prior to enactment of the statute but the suit was filed after its passage.[213]

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209. *e.g.* 23 U.S.C. § 152 and § 203 of the Highway Safety Act of 1973.

210. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The amendment was adopted in response to Chisholm v. Georgia, 2 U.S. 419 (1793) whereby a citizen of South Carolina brought suit against the state of Georgia to recover on a debt relating to the Revolutionary War|the amendment was quickly passed to keep such "foreigners" (including persons who had been loyal to Britain) from bringing suits in the federal courts. The amendment was soon interpreted as a bar against any suit against a state where the plaintiff was seeking money damages and the state had not "consented" to suit. See, Hans v. Louisiana, 134 U.S. 1 (1890). There are very few such "consents" (none done intentionally) even where a state has partially waived its sovereign immunity in suits brought in its own courts under a state tort claims act. The Eleventh Amendment is probably the most criticized of all amendments, even by supreme court justices themselves. See, John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447-498 (Spring, 1986).

211. *See* Martinolich v. S. Pacific Transp. 532 So.2d 435, 438 (La. App. 1988).

212. Bearden v. S. Ry., U.S. Dist. Ct., N.D. Ala., S. Div., No. CV-88-PT-0005-S (Memorandum Opinion per Judge Robert B. Probst, July 19, 1988 and Order April 27, 1988). *See also,* Nelson v. S. Ry. Colbert County (AL) Circuit No. CV 86-23 (Order January 27, 1988).

213. Another relevant case is Neely v. Consolidated Railway, U.S. Dist. Ct., N.D. Ohio, No. 5-89CV-0531 (Order, January 8, 1990). Recently, the Missouri Supreme Court, barred use of such data in Federal Employer's Liability Act (FELA) cases as well. This statute, under fierce attach by

Today, survey data is neither discoverable or admissible. In 1991, the Administration, at the behest of the states and railroads, urged an amendment to section 409 which makes it clear that "data, reports and surveys" may not be discovered in pre-trial proceedings in "any action for damages arising from any occurrence at a location addressed by such information."[214]

D. *Policy Implications of a State Duty to Site and Construct Mechanical Gates at Crossings*

Apart from a state's legal duty is the question of public policy—should the state, as a matter of transportation policy, take upon itself the duty to site and construct gates? The answer to this question is beyond the scope of this Article, but the complete answer begins with another question: Do the various states currently see themselves as having the duty which the railroads suggest is theirs? The answer is no.

During the summer of 1990, the author wrote letters to the state transportation officials of the 50 states asking them the following question:

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the railroad industry, allows a tort-based recovery by injured railroad workers, rather that a workers' compensation recovery, provided the worker can show that the railroad was negligent. In the Missouri case, Claspill v. Missouri Pac. R.R. Co., No. 77264 (Opinion July 31, 1990)), the plaintiff was a locomotive engineer who alleged post traumatic stress disorder after being involved in three crossing accidents that occurred in a three-month period in 1986. The present suit involved the latter two collisions and his FELA claim alleged "the railroad should have imposed a reduced speed limit through both cities, installing flashing lights at both crossings as well as a crossing gate and ringing bell [at one site] and cleared off vegetation on the right-of-way [another]."

The railroad interposed the statute to bar the testimony of an (apparent) expert witness Leroy Meisel whose testimony would have referred to the inventory and a Field Inspection Form proposing the addition of flashing signal lights. Denial of this evidence was proper, ruled the Missouri Supreme Court, taking the statute on its plain meaning. Furthermore, there was nothing in the history of the statute, nor in Missouri law, to prevent the statute having retroactive effect. That is, it could be used to bar evidence in a accident that happened before the statute having retroactive effect. That is, it could be used to bar evidence in an accident that happened before the statute was passed. In partial contrast to the Claspill decision stands a case where the Indiana Department of Transportation refused to turn over grade crossing safety analysis reports to the plaintiff in a grade crossing suit against a railroad. The state relied on Section 409. The plaintiff said the documents were discoverable even if they might not be admissible and asserted the Indiana state open records act as supporting a general right of access to the documents. The Indiana Court of Appeals agreed relying on both the statute and holding in *Martinolich v. Southern Pacific* (supra) saying the documents were discoverable. *Indiana Dep't of Transp., Div. of Railroads v. Overton*, 555 N.E.2d 510 (Ind. App. 1990).

214. (Testimony of Patrick H. Halstead, at the Field Hearings conducted before the Senate Subcommittee on Transportation of the Committee on Environment and Public Works on September 28, 1985 (S. Hrng. 99-270, Pt. 2) at p. 215-16. For similar testimony from other railroad officials see, Committee on Public Works and Transportation in 1985 (Hearing Report 99-20) testimony by Richard E. Briggs, executive director of AAR (p. 885-89) and William H. Dempsey, president of AAR (p. 896-98); also Senate Subcommittee on Transportation (July, 1985) (S. Hrng. 99-270 at pages 178-79 and 226-232.).

Is it the policy of your state that it (your state) has assumed the duty to prioritize and order the construction of mechanical gates at crossings *and by assuming such duty* the policy of your state is that individual railroads have no *independent* duty to construct such gates on their own without a prior order from proper state officials?

The responses were clear: Of the thirty-six states responding, only two—California and North Carolina—suggested or implied that the state had assumed the total responsibility in this matter. At lease nineteen others plainly stated—sometimes with emphasis—that state involvement in upgrading crossings did not obviate the railroad's independent duty to site and construct mechanical gate crossings. This is true even in those states where there are now court opinions ruling that the railroads have no duty, the prime example is Georgia. The following is the response received from Georgia:

> We have a section within my office that is responsible for inspecting railroad crossings over the State. Information compiled from these inspections are used to assist in identifying those crossings over the State where additional safety equipment will produce the greatest accident and fatality reduction. Those crossings so identified are put on a list and designated as priority locations to be considered for signalization. This listing is sent to the Federal Highway Administration for their approval and verification should Federal Aid Safety Funding be requested to fund safety improvements for the identified crossings.
>
> Georgia law gives the Department review and approval authority when active railroad crossing safety equipment is installed at public crossings within the state. This is to insure that all crossing signal equipment is installed in accordance with the Manual on Uniform Traffic Control Devices.
>
> The railroad companies are totally responsible for designing the crossing signals, drafting the necessary circuit plans, installing the equipment, plus maintaining the equipment. There are no restrictions whatsoever that prohibit the railroads from funding and installing active railroad crossing signal equipment at crossings identified by them as needing such.[215]

The majority view regarding this issue was succinctly expressed by a Nebraska official responding to the author's inquiry; "The State of Nebraska does prioritize public grade crossings in the State to use as a starting point for our Diagnostic Inspections for signal projects utilizing State or Federal safety funds. We do not perceive that this puts the entire responsibility on the State or that it takes away any responsibility that the railroads have."[216] Likewise, the response from the State of New York summarizes most states' positions and sheds an insight into the policy

215. Letter from Ron Colvin, P.E., State Traffic & Safety Engineer, Operations Divisions, to Lewis Laska, June 20, 1990.

216. Letter from Ellis Tompkins, Railroad Liaison Engineer, Project Development Division, Nebraska Department of Roads to Lewis Laska, June 12, 1990.

implications of the current status of site selection. Responded a New York official:

> This State has assumed the responsibility for prioritizing the order of funding for installation or upgrading of grade crossing warning devices under the federally funded Section 130 Program, which is administered by this Department. The assuming of this responsibility is not considered to relieve the railroads or highway authorities of any responsibilities they might have.
>
> It is this Department's position that both the Railroad and the highway authority independently evaluate their transportation facilities (track and highway) and take steps to address priority safety matters. This includes grade crossing safety. The Section 130 Program is viewed by this Department as one source nor should the NYSDOT be viewed as having sole responsibility for addressing the grade crossing safety needs of a railroad or a non-state highway authority. New York State Railroad Law provides a mechanism for non-section 130 improvement proposals.
>
> Practically speaking, the Section 130 Program's existence has probably encouraged the railroads and highway authorities to defer these grade crossing safety needs in hopes that the State will eventually give them priority.[217]

One finding of the survey was that officials in at least twelve states could not (or would not) give a clear statement of what their states' policy was on this narrow question. Their responses tended to simply describe the prioritization process and avoid answering the question. In answering, most of these twelve made it clear that nothing in way of state policy truly interfered with the railroads' coming forth independently and suggesting/making improvements. The response from Texas was illustrative:

> [Texas] policy, as administered by this Department, can be summarized by our efforts to comply with the Federal Rail Safety Act of 1970. These efforts do include the compilation of accurate records for all at-grade crossings, prioritizing the hazard rating of each crossing, and budgeting all available state and federal funds for upgrading the protective devices at the most hazardous crossings. The Department does not prohibit the construction of gates or other protective devices by the independent railroad companies it, in fact, encourages local entities and railroad companies to provide gates or other protective devices to obtain the maximum protection for the motoring public.[218]

The Wisconsin response was also illuminating:

> A regulatory agency, the Office of the Commissioner of Transportation, has legal authority to order crossing warning devices to be installed by railroad companies, after public hearing. The Commissioner's priority is based

217. Letter from Bruce W. Smith, Grade Crossing & Signal Section, New York Department of Transportation, to Lewis Laska, June 16, 1990.

218. Letter from Alvin R. Luedecke, Jr., State Transportation Planning Officer to Lewis Laska, June 15, 1990.

on which crossings are petitioned for investigation, although the Commissioner may petition if he feels the need. Department policy and state law do not prohibit a railroad company from installing warning devices, including gates, on its own and at its own cost. It is our perception, however, that the railroads operating in Wisconsin rarely do crossing protection work on their own initiative. For liability purposes they may feel more comfortable doing work after it has been ordered by the regulatory authority.[219]

Fifteen states did not respond to the survey. Not surprisingly, some of these were states where the issue is now before the courts, including Utah, Mississippi, and Michigan.

E. United States Department of Transportation Policy Regarding State Duty

What is the official position of the United States government regarding the issue of state duty to site and construct crossings? Is it consistent with what the individual states think? Does the USDOT agree with the railroads?

To gain an answer to these questions, author Lewis Laska contacted his congressman, the Honorable Bob Clement (5th District, Tennessee) and asked him to query Gilbert Carmichael, Administrator of the Federal Railroad Administration. The reply from Mr. Carmichael was both predictable and surprising. It was predictable in that he restated federal policy regarding the issue of the source of funding for crossing improvements. But it was surprising in this regard: Mr. Carmichael said he had "neither seen nor had the opportunity to study" the issue of preemption. The following is the full text of his letter:

August 22, 1990
The Honorable Bob Clement
House of Representatives
Washington, DC 20515-4205

Dear Mr. Clement:

Thank you for your recent letter in which you forwarded a letter from a constituent regarding federal policy with respect to the siting and constructing of "mechanical gates" at railroad crossings.

Your constituent asks whether FRA agrees with the "position of the railroads," which they have apparently taken in the course of litigation. Of course, I cannot agree or disagree with a position I have neither seen nor had the opportunity to study. However, I am pleased to discuss the general area your constituent is concerned with.

For many years, it has been the generally accepted view that grade crossing protection in the form of grade separation and warning devices are primarily for the protection of the motoring public.

In 1964, the Interstate Commerce Commission stated: [t]hat highway

219. Letter from Ronald M. Nohr, Chief Utilities Engineer to Lewis Laska, June 20, 1991.

users are the principal recipients of the benefits flowing from rail-highway grade separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices is a public responsibility and should be financed with public funds the same as highway traffic devices. 322 I.C.C. 87 (1964). This policy is expressed today by Federal Highway Administration regulations governing Federal-aid highway projects. Indeed, the regulations themselves made the point that grade crossing improvements are of "no ascertainable net benefit to the railroads" and therefore the railroads should not be required to share the costs of the improvements. 49 C.F.R. 646.210(b)(1)

We should think it senseless if a highway were constructed to cross an airline runway. Of course, a train, given its great momentum and weight, requires even more distance to stop than does an airplane landing or taking off and, like the airplane, the train cannot stop quickly for automobiles, trucks, or anything else in its path.

In addition to the deaths, injuries, and damages that occur at grade crossings in the United States, collectively they have slowed the fuel-efficient, very safe railroad system down so that it loses much of its efficiency and timeliness. If, like European and Japanese high-speed rail lines, our main freight and passenger lines did not have at-grade crossings, the speed of our trains and the financial health of our transportation system, as well as its safety, would be dramatically improved.

Sincerely yours,
Gilbert E. Carmichael
Administrator

Despite FRA Administrator Carmichael's never having "seen or had the opportunity to study" the preemption issue, it is clear that the FRA practice has been to encourage railroads to participate actively in site selection and upgrading.

For example, a 1978 FRA report examined the practices in five states (Massachusetts, New York, Louisiana, Texas, and Oregon) but contained no mention of this being solely a state government responsibility.

To the contrary, in discussing Massachusetts, the report says:

Since the railroad must prepare the specifications for the projects, improvements cannot be undertaken unless the railroads cooperate. Of course, if a crossing is extremely dangerous the [Mosey governmental authority] could order it to be improved, but to our knowledge this has not occurred.[220]

In discussing the New York situation, the report said:

The Traffic and Safety Division, the group within the New York Department of Transportation which has regulatory powers, can influence the use of innovative signal devices through its review process. However, once again the railroads must initiate a proposal for a new signal system.[221]

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220. 1978 FRA Report, at 18.
221. *Id.* at 22.

In discussing the Louisiana experience the report states: "State and FHWA officials are CK3 about the effectiveness of gates, but where the railroad can justify them, they are installed."[222] The report implicitly rejects the notion that the MUTCD is a mandatory federal standard. "Applying the MUTCD *suggestion* that multiple track crossings be considered for automatic gates, one finds that there is potential for more work in Louisiana."[223]

The report summarized the problem with getting the railroads to upgrade crossing, citing Massachusetts as typical.

> The railroads are responsible for maintenance of all signal equipment after installation. In addition, the railroads have muse for maintaining all crossbucks whether installed by the state using federal funds or by the railroad with its own funds.[224]

The report indicates clearly why the railroads have been slow to innovate.

> There are two factors which have discouraged the railroads from upgrading their signals to incorporate motion sensor or constant warning time (CWT) devices. First, sophisticated equipment is costly to maintain; railroads, in general, want to avoid higher maintenance charges. The railroads are also concerned with potential liability in the event of an accident. The railroads claim that they do not know what their liability would be should an accident occur at a crossing where an innovative device was used.[225]

Again from this it is clear. The FRA does not act in a manner consistent with the railroads' notion of preemption. In fact, the FRA has always acted in a manner that recognizes an ongoing duty by the railroads to keep crossings safe.

F. The Problem of Delay in Constructing Gates Once a Decision Has Been Made That They Be Installed

It is not unusual for many months, sometimes years, to pass between the time a state agency serves notice upon a railroad that it should upgrade a crossing and the time the actual work is complete. There are several reasons for this. One is simply the fact that railroads do not want to bear the expense of signal upkeep and drag their feet in order to save money. Other reasons include delays in finalizing the financial details of

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222. *Id.* at 25.
223. *Id.* at 26.
224. *Id.* at A-16.
225. *Id.*

The outcome of the case mentioned in the Introduction is as follows. The jury awarded $1,125,812 but found the plaintiff thirty percent negligent, bring his recovery down to $788,068. Because the defendants offered a joint defense they agreed before trial to share a verdict equally; this was done. Roy Polly v. Burlington N. R.R. and City of Lacey, Thurston County (WA) Superior Court No. 84-2-1523-1.

the crossing project. While the bulk of the funding comes from the federal government it must pass through state hands where approval delays occur; moreover, some states require local governing bodies to share what is a small percentage of the cost and local funding approval brings about more delay.

Where it is clear that the railroad showed conscious indifference to the consequences when it knows that an injury could occur, at least one court has allowed punitive damages against a railroad. The facts in *Brown v. Missouri Pac. R.R.*[226] are extreme but illustrative. The train collided with the decedent's pickup truck at a crossing in Arkansas. A crossbuck was present but no active protection devices had been installed despite the fact that the state highway department had rated the crossing among the ten percent most dangerous in Arkansas. Suit sought punitive damages for the railroad's reckless disregard for the public's safety by refusing to install safety devices. The jury awarded $80,000 compensatory and $62,000 punitive damages. The Eight Circuit affirmed reciting testimony, albeit hearsay, that a railroad employee suggested to city fathers at a Kiwanis Club meeting that the railroad did not install safety devices at its crossings between 1947 and 1976 because it was "cheaper to be sued than to protect railroad crossings." Under Arkansas law, a railroad has a duty to provide active warning devices at abnormally dangerous crossings. Here the evidence showed that punitive damages were appropriate. (This is one of the most controversial crossing cases in recent times. The railroad employee vigorously denied making the statement.)

Another case tells a similar story. Plaintiff Bjugstad, a twenty-one-year-old college student, was riding in a tractor-trailer being driven by her fiance which became "hung-up" while attempting a left turn in a busy intersection during rush hour traffic and the driver apparently never saw the approaching train. The intersection had been identified as a problem intersection for large trucks. Several years before the accident the State Department of Highways had considered modifications to eliminate the problem. No action was taken although the modifications would have cost only $500. In 1981, the City of Sheridan had requested federal funding to install automatic gates at the crossing because the accident rate was one of the state's highest. The funding was approved in early 1982, but no gates had been installed at the time of the accident in September, 1985. Plaintiff's (and apparently some of the defendants') experts agreed that the gates would have probably come down in front of the truck before it crossed over the tracks, preventing the accident. Substantial modifications were made both to the road and the crossing in 1987.

226. 703 F.2d 1050 (8th Cir. 1983).

The plaintiff, who was severely burned, received a structured settlement of some $3.4 million. It is not clear who contributed but the suit named several railroads as well as the city and state.[227]

Only one case can be found where a state was held liable for delay in bringing about an upgrade of a crossing. Of course, the facts are unique, but they are at the same time familiar. Here is what the Louisiana Court of Appeals said in upholding a verdict against both the railroad and the state in *Herbert v. Missouri Pac. R.R. Co.*,[228] which involved an accident that occurred on December 6, 1974:

> As early as 1969, the dangerous nature of this crossing was brought to the attention of the Highway Department and Missouri Pacific. Due to accidents occurring at the crossing, the St. Laundry Paris Police Jury passed a resolution asking the parties concerned, the Highway Department and Missouri Pacific, to take steps to protect the public from the hazard.
>
> Lawrence Harry, an engineer for the Highway Department, made a survey of the crossing in 1969 and found that the sight distances were less than minimum requirements. He calculated the hazard rating as 2.32, meaning that he projected that number of accidents to occur over a five-year period. He recommended that the crossing be equipped with flashing lights, warning bell and advance warning signs. Mr. Harry made another survey in 1973 with the same result.
>
> Mr. Harry submitted his findings to Turner Lux, Jr., agreement engineer with the Highway Department. Lux sent the report and recommendations to Missouri Pacific in 1970. Missouri Pacific responded two years later, in 1972, offering to install the signal equipment if the Highway Department would pay 90% of the costs. There was an exchange of communications between the Highway Department and Missouri Pacific was consummated in June, 1974. The installation took place in 1975, *after the accident in question.*
>
> The railroad had knowledge of the need for automatic signals at this crossing for over five years before it installed same. This need was shown, not only by the surveys of the engineers but by the fact that William McClendon, claims man of Missouri Pacific, stated that five accidents occurred at this crossing between 1959 and 1974.
>
> Automatic signals serve the same purpose as a whistle or bell on an approaching train. These devices all warn the motorist that impending danger exists as a train is approaching the crossing and is in the immediate vicinity of same. Under the unusual circumstances presented herein, the unreasonable delay in the railroad's installation of the safety devices was negligent and such negligence was a proximate cause of the accident.[229]

Continued the court:

> In connection with the liability of the railroad, we have discussed the sequence of events that led up to the installation of the automatic signaling

227. Bjugstad v. City of Sheridan, Boulder County Superior No.—.(December, 1988).
228. 366 So.2d 608 (La. App. 1978).
229. *Id.* at 611-12.

devices which were installed after the accident. As early as August 1973 the Highway Department agreement man had authority to accept Missouri Pacific's prior offer of 90%-10% participation in costs. The acceptance wasn't prepared and entered into until June 1974. The explanation given for the unusual delay was that the agreement office personnel were busy with other work. We have examined the testimony of the Highway Department personnel and conclude that in view of the risk to the public that was involved, the cost of the installation (approximately $25,000.00), and the knowledge by the Highway Department of this dangerous condition, the delay was unjustified.

We conclude that under the particular and unusual circumstances presented, the trial court was correct in its conclusion that the Highway Department had violated its duty to the public and such was negligence that was a proximate cause of the accident.[230]

VII. Liability of States If They Construct a Warning Device

There has been one case where a court has held a state may be held liable if it constructed a warning device, and then failed to maintain it. In *Huseby v. Board of County Commissioners of Cowley County, Kan.*,[231] the court had before it a case where the local government had installed an advance railway warning sign, two sets of rumble strips, a warning symbol on the pavement, and a crossbuck warning sign. The state had required that this crossing also needed an electronic lighted signal. The Defendant in this case had not installed the electronic signal, and had allowed the rumble strips and various warning devices to come into disrepair. The court stated that once the warning devices had been put in place "the defendant had the duty to inspect and maintain the [warning signals]." The court held that the government was not immune from liability in this case because it had taken on an affirmative duty of protection by installing and periodically inspecting this crossing.

G. Personal Liability of Government Officials

Public officials cannot be held personally liable for negligence with regards to the maintenance of railroad warning devices. In *Ingle v. Ridge*,[232] James E. Harrington, former Secretary of the North Carolina Department of Transportation was named as a co-defendant in a railroad crossing suit. Mr. Harrington moved for dismissal for failure to state a claim upon which relief may be granted under rules 12(b)(1) and (6). The court granted this motion noting two things: (1) Mr. Harrington was a "Public Official" at the time of his serving in has capacity as Secretary; and (2) he had not acted in a corrupt or malicious manner during his

230. *Id.* at 612-613.
231. United States District Court, (D. Kan.), Dec. 20, 1990.
232. U.S. Dist. Ct., W.D.N.C., Shelby Div., SH-C-90-152.

tenure. Based upon these two facts and *Wiggins v. City of Monroe*,[233] the court allowed the motion, and dismissed Harrington.

CONCLUSIONS ON STATE LIABILITY

Finding States and localities liable for injuries that occur at railroad crossings would place an undue burden on government. It would force governments to build the best warning devices available at the expense of the taxpayers, when it should be at least paid for in part by the co-beneficiary of the devices, the railroads. This kind of liability would fly in the face of the long held tradition of sovereign immunity, except in the case where the government is acting as a market participant. This result is neither desirable, nor an efficient method of distributing liability.

VIII. WHAT NEXT AFTER PREEMPTION DOCTRINE IS ADOPTED REGARDING THE DUTY TO CONSTRUCT GATES

The most recent attempt by the railroads to urge the preemption doctrine regarding mechanical gates is part of a concerted effort to assert the doctrine in all aspects of railroad operations. For example, state laws regarding cabooses, train speeds, and train lengths have already been successfully challenged, based on specific federal regulations.

What will be the next area where the railroads will assert the doctrine? The answer is this: track maintenance. The doctrine was recently tested in the case of *Southern Pac. Transp. Co. v. Maga Trucking Co.*,[234] which involved a suit brought by (not against) the railroad. The defendant's tractor-trailer became stuck on the tracks and was struck by the Southern Pacific train which derailed. The railroad sued the trucking company for property damage. The trucking company counterclaimed saying the cause of the accident was the poor condition of the crossing which caused the truck to "hang up" across the track. The railroad asserted that under Nevada law it does not have the duty to maintain crossings (at least the crossing in question) and filed a motion to strike the counterclaim. In denying the counterclaim, the court ruled:

> Plaintiff has moved to strike defendants' counterclaim alleging property damage proximately caused by Southern Pacific's negligent maintenance of the crossing at the intersection of the railroad with Hershell Road west of Winnemucca, Humbolt County, Nevada. The allegation is that Herschell crossing was in such deplorable condition the defendants' tractor-trailer became stuck on the tracks and was run into by the oncoming train.
>
> The thrust of the motion is that all areas of rail safety have been pre-

233. 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985). Public officials are immune from liability for mere negligence in the performance of their duties.
234. U.S. Dist. Ct., Nev. No. CV-N-89-352 BRT.

empted by the Railroad Rail Safety Act of 1970[235] and the Highway Safety Act[236]. Particular reliance is placed on 45 U.S.C. § 434. Here the court recited the entire language of Section 434. Unquestionably, these statutes do preempt certain areas of the subject matter of railroad safety.[237] The lesson to be learned from *Marshall v. Burlington Northern,*[238] is that preemption by the Railroad Safety Act is selective and the tenants of state common and statutory law are not preempted in areas in which is selective and the tenets of state common and statutory law are not preempted in areas in which the federal and regulations have not sought to control. Counsel have directed our attention to no such regulations and we have found one. Part 213, 49 C.F.R. deals with "*Track Safety Standards*" with the following subheadings: "*Roadbed,*" "*Track Geometry,*" "*Track Structure,*" "*Track Appliances and Track Related Devices,*" "*Inspection.*" While on the surface some of these would seem to encompass the area of our dispute, a careful reading of the regulations discloses that all are designed for the safety of the trains. Not one speaks to the design of tracks, design and construction of roadbeds and the like for the safety of vehicular and other traffic crossing the railroad right of way at designated crossings. Nothing is directed at track and roadbed maintenance to protect against crossing vehicles becoming struck on the right of way. In Marshall the court said: "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[239] is not preempted. Evidence concerning the adequacy of the warning device at the crossing in question was properly admitted.

In the instant case the railroad has a common law duty of care to all persons crossing the right of way at designated crossings. The standard of care is to use the care in construction and maintenance of its roadbed and tracks that ordinary persons would use in the same of similar circumstances. That standard of care has not been preempted by the Railway Safety Act and restrictions.[240]

CONCLUSION

Close analysis of federal laws, together with current regulations, reaches the conclusion that the doctrine of "preemption," as it relates to abrogating the railroads' duty to site and construct mechanical gates, is without substantial legal support. Rather, what has happened is that the railroads have taken a scheme which was designated to promote railroad safety by assuring that states systematically determine safety needs and

235. 45 U.S.C. § 421 (1992).
236. 23 U.S.C. § 130 (1992).
237. Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973).
238. 20 F.2d 1149 (9th Cir. 1983).
239. Mont. Code Ann. § 69-14-602 (1981).
240. Order Denying Motion to Strike, August 29, 1990.

allocate federal funds in a logical manner, and have used it as a device for avoiding legal responsibility.

The doctrine of "preemption," if it becomes the prevailing legal view, along with the current presumption of sovereign immunity of states means that an individual injured or killed at a railroad crossing with inadequate warning devices will in almost all instances have no ability to recover for his or her injuries. Moreover, there is manifest confusion regarding state transportation policy in this area. A survey of state transportation officials indicates that only two states in the continental United States agree with the railroads' contention that the state has primary legal responsibility (and the railroads have none). Officials in at least nineteen states take a wholly contrary position, namely that state participation in the siting and funding of crossing upgrades does not in any way relieve the railroads of their independent duty under state statutory or common law to upgrade dangerous crossings. Transportation officials in at least thirteen states could not (or would not) give a clear statement of what their states' policy was on this narrow question, although most made it clear that *nothing* in their states' laws prevented a railroad from proactively upgrading a dangerous crossing. At the federal level, FRA Administrator Gilbert Carmichael has said that he had "neither seen nor had the opportunity to study" the issue of preemption.

The doctrine of "preemption," if it becomes the prevailing legal view will mean that most motorists injured or killed in grade crossing collisions will be unable to recover where the primary contention is the crossing should have had mechanical gates. This is because with states as sole defendants a recovery will generally be barred by the doctrine of sovereign immunity. As interpreted by most courts, even in those states where the sovereign immunity doctrine has been relaxed, the decision to site and construct a mechanical gate is a "discretionary function" for which no liability will attach. Moreover, suits brought in federal court against states for alleged negligence in failing to order the construction of such gates will be barred by the Eleventh Amendment.

Will the doctrine of "preemption" promote public safety? While the answer to that question is beyond the scope of this Article, the tentative answer is that it will not. In full flower the doctrine will remove a significant incentive for railroads to be watchful for crossing hazards, namely, the legal liability that attaches and financial responsibility that flows from a finding of negligence.[241] Likewise, if states are found to be the sole defendant they will likely choose to pass statutes granting themselves further immunity from suit rather than spend more money in upgrading

241. Judith B. Gertler, A Study of State Programs for Rail-Highway Grade Crossing Improvements, Report No. FRA-00PD-78-7 (Final Report, February, 1978).

crossings. With the state having immunity there will be less state motivation to upgrade crossings, further placing the public at risk.

In the final analysis, the decision whether states should bear the legal responsibility for upgrading crossings (and railroads have none) is a matter of state and national transportation policy and should not be decided on a case-by-case basis by courts. A strong argument can be made that this should be a state responsibility. But to accomplish this there must be a full airing of the issues and public debate. A federal statute could be passed which places this duty on the states,[242] but if so, that statute should make clear that states can be sued (including use of federal courts) for negligence in carrying out their duties. Until this issue is placed on the national agenda of transportation policy debate, however, more cases will arise where the doctrine is asserted and more courts may unwittingly adopt a train of legal thought going in the wrong direction.

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242. The question of whether Congress should pass such a statute is separate from the question of whether it can. The author's opinion is that it can. In 1964, the Supreme Court ruled that states could be sued under the Federal Employer's Liability Act when they conduct interstate railroad operations. The court reasoned that in doing so the state (Alabama) had "consented" to suit under the FELA by conducting such operations. Parden v. Terminal Railway, 377 U.S. 184 (1964). In 1990 the Supreme Court turned aside the opportunity to overturn this ruling in Port Authority Trans-Hudson Company v. Feeney, 495 U.S. 299, 110 S. Ct. 1868 (1990). For a general discussion of this issue, *see* Jesse Michael Feder Note, Congressional Abrogation of State Sovereign Immunity, 86 Colum. L. Rev. (Nov. 1986) 1436-52. Feder explains that Congress must make its "intention unmistakably clear" that it is abrogating the states' constitutionally secure immunity from suit in federal court when it passes such a statute, citing Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142, 3147. Additional Sources

For a general discussion of highway department liability see Larry W. Thomas, *Liability of State Highway Departments for Design, Construction, and Maintenance Defects*, 3 Selected Studies in Highway Law 1771-1834 (Transportation Research Board: Washington, DC, 1978). This article also includes state-by-state references to statutes dealing with sovereign immunity and a short bibliography. *See also*, Committee Report, Administrative Subcommittee on Legal Affairs, Survey of the Status of Sovereign Immunity in the States, 1988 (American Association of State Highway and Transportation Officials: Washington, D.C., 1988). Another early reference is JAMES F. FITZPATRICK, ET AL., THE LAW OF ROADSIDE HAZARDS (Charlottesville, VA, 1975).