

Nos. A09-2212, A09-2213, A09-2214, A09-2215

State of Minnesota
In Court of Appeals

Michael D. Frazier, as Trustee for the
Next-of-Kin of Brian L. Frazier,

Respondent (A09-2212),

Harry James Rhoades, Sr., as Trustee for the
Next-of-Kin of Harry James Rhoades, Jr., deceased,

Respondent (A09-2213),

Denise Renee Shannon, as Trustee for the
Next-of-Kin of Bridgette Marie Shannon, deceased,

Respondent (A09-2214),

Elizabeth Chase, as Trustee for the
Next-of-Kin of Corey Everett Chase, deceased,

Respondent (A09-2215),

vs

Burlington Northern Santa Fe Corporation, et al.,

Appellant,

Richard P. Wright, as Special Administrator
of the Estate of Corey E. Chase,

Respondent (A09-2212),

Cristy Y. Frazier, as Special Administrator
for the Estate of Brian Frazier,

Respondent (A09-2213, A09-2214, A09-2215),

and

BNSF Railway Company, third party plaintiff,

Appellant (A09-2213, A09-2214, A09-2215),

vs.

Richard P. Wright, as Special Administrator
for the Estate of Corey Everett Chase, deceased, third party defendant,

Respondent (A09-2213, A09-2214, A09-2215).

APPELLANT BNSF'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION

Respondents' brief is long on words,¹ but short on factual and legal support. Factually, every eyewitness at the scene says the signals were working. Witnesses who came forward after trial confirm that the warning devices were in operation. Respondents make much of earlier supposed malfunctions, but the system was subsequently tested, as required by the federal regulations, and was found to be in full compliance with the regulations. The verdicts were apparently based on a stack of empty boxes and inferences about what additional evidence might have shown.

Legally, respondents' brief is at war with itself. Respondents insist that the evidence was sufficient for the jury to decide whether the regulations had been violated and then admit that the jury was told that compliance was not conclusive. Respondents discount train crew testimony as biased but then discard the observations of disinterested witnesses, including a police officer, as no more than cumulative. Respondents concede that the district court only found one instance of spoliation and then argue that the jury could draw all manner of adverse inferences from a variety of circumstances. In the end, the jury was asked the wrong question, denied the full evidentiary picture, and enticed to speculate and punish.

¹ The Court allowed respondents to expand their brief to 17,000 words, but they wrote 18,743 without explanation or excuse.

CLARIFYING THE RECORD

Respondents' arguments are built on false premises, leaving most assignments of error unanswered. Respondents often resort to matters outside of the record or to attorney questions that were not adopted in the answer. This reply cannot correct each misstatement, but a few examples must be exposed.

Respondents recite a litany of accusations without the benefit of record citation. R.Br.71 ("deliberate falsification of documents..."), R.Br.75 ("...suborning false testimony..."), R.Br.80 ("misrepresentations are legion"). Other arguments are based upon "testimony" never heard by the jury, having never been offered at trial. R.Br.8 (citing ██████████ deposition and Shapiro's affidavit); R.Br.51 (citing ██████████ deposition). As a result, many of respondents' so-called "facts" cannot be considered. *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. Ct. App. 1999); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

Respondents rely upon attorney questions as proof of a "cutting and pasting" conspiracy and verification of hair color. See R.Br.3 (citing T.1009-10, T.4142); R.Br.8 (citing T.2284-T.2300). Questions, however, do not constitute evidence,² and the witnesses never agreed with the attorney's assertions. T.2299, T.2335, T.2357, T.2360 (data never manipulated); T.4142 (brown hair question disputed).

Respondents insist that the physical evidence "indisputably" supports their signal malfunction theory (R.Br.3 (citing T.1147-48, T.1033)), and that all experts agreed that a

² *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004).

lowered gate was “physically impossible” (R.Br.3-4 (citing T.1148)). The contrary BNSF expert opinion is said to be “primarily” based on the car’s “black box data” (R.Br.4 (citing T.4100-04, T.4206-07)). In fact, BNSF’s expert concluded that the tire scuff marks, pavement gouges and debris field proved the Cavalier to have been in the wrong lane—having gone around the lowered gate—and that the car’s black box data independently supported that conclusion. T.4069, T.4100, T.4110, T.4126, T.4174.

That reconstruction is consistent with the State Patrol’s finding that tire scuff marks in the proper lane of traffic did not align with the wheel base of an intact Cavalier, meaning that the Cavalier hit the pavement after first being struck in the wrong lane of traffic. *See* Exhibit 308 (Supp.App.001). The State Patrol and BNSF’s expert both agreed that the gate was down.

ARGUMENT

I. PREEMPTION

Respondents insist that the standard of review applicable to preemption findings is abuse of discretion. R.Br.10. Even if the district court had made such findings—which never happened (Add.004-Add.006)—preemption raised in a motion for judgment as a matter of law calls for *de novo* review. *In re Speed Limit for the Union Pac. R.R.*, 610 N.W.2d 677, 682 (Minn. Ct. App. 2000); *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

A. Preemption Was Preserved

Respondents press waiver based upon a supposed failure of BNSF to assert preemption in the answer. R.Br.11-12. Respondents suggest that “grade crossing warning systems” preemption was not raised because only “traffic control devices” preemption was stated. R.Br.11-13. This semantic distinction is meaningless. BNSF’s answer broadly maintained that “any and all of plaintiff’s claims with respect to traffic control devices are preempted by federal law.” (App.0060.) “Traffic control devices”—*i.e.*, the gates, lights and bells—are “grade crossing warning systems.” Because preemption was pled from the outset,³ BNSF preserved the issue.

³ Respondents’ reliance (R.Br.12) on *Dueringer v. Gen. Am. Life Ins. Co.*, 842 F.2d 127 (5th Cir. 1988) goes for naught: the *Dueringer* defendant waived preemption by not asserting the defense at trial. In contrast, BNSF stressed preemption at all stages, and unlike in *Dueringer*, respondents’ negligence claims cannot be recast as causes of action to enforce federal regulations.

Respondents complain that preemption was not taken up again until the directed verdict motion. R.Br.12. But the rules do not require periodic repetition of affirmative defenses. Fact questions needed to be resolved; thus BNSF appropriately waited until the close of the evidence to revisit the issue. T.4312, T.4549-T.4552.⁴

Respondents conjure up a “law of the case” bar based on a requested common law negligence jury instructions. R.Br.36-40. Common law negligence, however, needed to be addressed because the driver—not BNSF—was held to that standard. In contrast, regulatory compliance is the measure of railroad due care when the subject matter is covered by federal regulations. *See* 75 Fed. Reg. 1180, 1208-10 (Jan. 8, 2010)(“Once the Secretary of Transportation has covered a subject matter through a regulation or order, and thus established a Federal standard of care, Section 20106 preempts State standards of care regarding this subject matter.”)(App.0005-App.0016).

Respondents’ “invited error” arguments are misleading and incorrect. R.Br.39. The jury instructions in the cited cases (R.Br.39, n.198) were not challenged in a new trial motion; thus the errors were not saved for appeal. *See Heise v. J.R. Clark Co.*, 245 Minn. 179, 190-91, 71 N.W.2d 818, 825-26 (1955); *Lee v. Wilson*, 167 Minn. 248, 250, 208 N.W. 803, 804 (1926). BNSF’s post-trial motions did detail jury instruction errors. (App.0388, App.0391.) *See Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 228, 214 N.W.2d 672, 676 (1974)(“[T]he duty or degree of care imposed on a party

⁴ BNSF’s failure to seek a preemption summary judgment (R.Br.12) is of no import: appellate courts review directed verdict and judgment notwithstanding the verdict—not summary judgment—denials following a trial on the merits. *Bahr*, 766 N.W.2d at 919.

is fundamental law and objections to instructions relative thereto [can] be assigned for the first time in a motion for a new trial.”⁵

B. The Federally Compelled Standard

FRSA preemption displaces state common law claims when (1) FRA regulations cover the subject matter, and (2) the railroad complies with the covering regulations. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671-73 (1993); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000); 49 U.S.C. § 20106(b)(1). If regulatory violations cannot be proved, dismissal must follow. *Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 388 (1986)(“Preemption [is] the practical manifestation of the Supremacy Clause[.]”). If compliance is in dispute, the jury must determine whether covering regulations have been violated because “[t]he applicable standard [for railroads], as always, is the standard imposed by the [federal regulations].” *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 567 (Minn. 2001). *See also* 75 Fed. Reg. 1180, 1208-10 (Jan. 8, 2010)(App.0005-App.0016).

1. No presumptions against preemption

Respondents propose a “presumption” against preemption (R.Br.13-14), but such a presupposition would only apply in the context of *implied preemption*. Nothing is presumed when a federal statute *expressly preempts*; instead the statutory text and

⁵ This Court has accepted the well established status of federal preemption—a jurisdictional defense that can be raised at any time. *Friedges Drywall, Inc. v. North Cent. States Regional Council of Carpenters*, No.A09-427, 2009 WL 5091593, at *1 (Minn. Ct. App. Dec. 29, 2009)(Supp.App.002). *See also* *Evans v. Gen. Motors Corp.*, 976 A.2d 84, 98 (Conn. Super. 2007); *Berger v. Medtronic*, 623 N.Y.S.2d 985, 987 (N.Y. Sup. Ct. 1995).

congressional purpose show the way. In enacting the FRSA, Congress left no doubt about preemptive intent. 49 U.S.C. § 20106(a). The Supreme Court has twice given effect to the preemption expressed by the FRSA,⁶ and the operative language remains unchanged. *Henning v. Union Pacific R.R.*, 530 F.3d 1206, 1214-16 (10th Cir. 2008); H.R. Conf. Rep. No.110-259 at 351 (2007). In these circumstances, state law that would disturb national uniformity must be presumed to be superseded. *CSX v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

2. The FRA's power to preempt

Respondents discount the Federal Railroad Administration's (FRA) capacity to displace state law because—while interpreting a different statute—the Supreme Court declined to yield to the Food and Drug Administration's (FDA) implied preemption assertions. R.Br.17-20 (citing *Wyeth v. Levine*, 129 S. Ct. 1187 (2009)). Importantly, the rules of the FDA do not have the benefit of an “express pre-emption provision.” *Wyeth*, 129 S. Ct. at 1200. Besides that, the FDA had not historically played a significant preemption formulating role: the FDA's assertion of preemption in the preamble to the regulation represented both a “dramatic change” in FDA preemption practice and a clash with congressional preemptive intent. *Id.* at 1198, 1200-03.

Unlike the FDA, Congress purposefully empowered the FRA to preempt by promulgating regulations that cover state law subject matters. 49 U.S.C. § 20106(a)(2). “Since Congress provided that delegation very forthrightly in Section 20106 and the

⁶ *Shanklin*, 529 U.S. at 358-59; *Easterwood*, 507 U.S. at 664.

Supreme Court has interpreted the statute to provide for preemption of State law by FRA regulations, there can be no real question that FRA has authority to preempt State regulation.” 75 Fed. Reg. 1180, 1213 (Jan. 8, 2010)(App.0013). *See also Shanklin*, 529 U.S. at 356; *Easterwood*, 507 U.S. at 670.

C. The Wrong Standard Of Care Applied To Preempted Claims

Respondents contend that their claims were “pled and tried in accordance with the standard of care envisioned by Congress.” R.Br.21. The jury, however, was never charged with deciding regulatory compliance. If respondents’ after-the-fact rationalization were true, the instructions would have asked: did BNSF violate federal regulations regarding track and signal maintenance, operation and inspection; and, if so, did any such violations proximately cause the September 26, 2003 accident?

1. Regulatory compliance as a matter of law

Respondents necessarily admit that the “crux of [their] case below was that the warning system...failed because BNSF was negligent in its maintenance, operation and inspection of the signal warning system in the months and years leading up to the accident.” R.Br.24. Because the subject matters of crossing signal maintenance, operation and inspection are regulatorily covered, compliance—not common law negligence—determines liability. Respondents’ expert acknowledged that all federal inspection and maintenance obligations had been satisfied. T.2700-05 (App.0973-App.0978); T.2652-85 (App.939-App.972). That admission precluded a finding of regulatory violation, thereby compelling judgment as a matter of law.

Respondents contend that supposed signal malfunctions in April 2001, March 2002 and February 2003 showed violations of federal regulations. R.Br.24-32. The reports of these incidents do not bear on whether a regulatory transgression caused the September 2003 tragedy because BNSF fully abided by all inspection and testing requirements every month after each alleged breakdown. (App.0205-App.0289; App.0333-App.0351; App.0352-App.0354.) *See also* T.1942; T.1964-70; T.2062-64; T.2700-05; T.2933-40; T.2996-T.3001. Even if signal trouble tickets did not receive the attention that respondents would like, BNSF's subsequent inspections and tests ensured system functionality and regulatory compliance. *Id.*

Respondents suggest that three unconfirmed complaints compelled the railroad to provide indefinite alternative crossing protection. R.Br.31-32. But the regulations only require alternative protection "until repair or correction of the warning system is completed[.]" 49 C.F.R. § 234.103(b). As respondents' expert concedes, BNSF faithfully inspected, tested, and maintained the tracks and signals following the complaints and before the accident. T.2700-05 (App.0973-App.0978), T.2652-85 (App.0939-App.0972). "Common sense dictates that the regulations did not intend to require flagging or police officers directing traffic for several months [or even years] if the signals were again working properly." *Fogle v. CSX Transp.*, No.2007-203, 2009 WL 2020782, at *2 (E.D. Ky. July 9, 2009)(Supp.App.007).

Respondents' other claims of regulatory violation fail because the compliance in question has no connection to the inspection, operation and maintenance of crossing warning systems. Respondents complain that 49 C.F.R. § 213.103, which regulated

ballast, was violated because “mud” pumped up and allegedly undermined rail support. R.Br.26. 49 C.F.R. § 213.103, however, subsumes “the issue of ballast size.” *See Nickels v. Grand Trunk W. R.R., Inc.*, 560 F.3d 426, 431 (6th Cir. 2009). Neither the ballast type nor size has anything to do with signal maintenance. Notably, ballast is not regulated by Part 234, which, as respondents recognize (R.Br.23-24), sets warning systems standards.

Similarly, respondents’ allegations about “deteriorated insulation” on unbonded rail joints (R.Br.26) do not implicate federal regulations. A violation of this regulation could not have contributed to the cause of this accident because the joints around Ferry Street were not insulated at the time. T.2676-78. *See also* T.3217-18; T.3438. Thus 49 C.F.R. § 234.235 is not even applicable.

Accusations about BNSF violating internal track maintenance rules (R.Br.34) ignore a key statutory limitation: an internal rule can give rise to civil liability only if it was “created pursuant to a regulation or order issued by either of the Secretaries.” 49 U.S.C. § 20106(b)(1)(B). The internal rules about which respondents complain were not “created pursuant to” FRA regulations or orders.

The FRA has determined that railroads should not be held liable in tort based upon internal standards not promulgated in response to FRA regulation or orders. 75 Fed. Reg. 1180, 1209 (Jan. 8, 2010)(App.0009). *See also Van Buren v. Burlington Northern Santa Fe Ry. Co.*, 544 F. Supp. 2d 867, 879 (D. Neb. 2008)(internal rule violation claim preempted because railroad’s “vegetation regulation was not created pursuant to a regulation or order of the Secretary of Transportation”); *Murrell v. Union Pac. R.R. Co.*,

544 F. Supp. 2d 1138 (D. Or. 2008)(internal speed regulation claims preempted because internal rules were not created in response to a federal regulation or order).

Because compliance with the applicable regulatory standards was established, respondents' claims should never have gone to the jury.

2. Jurors told to apply the wrong standard of care

Even if regulatory compliance had been a fact issue, the jury was not told that the regulations defined the standard of care. Instead, the district court instructed: “[t]here is evidence in this case that defendant BNSF followed a legal duty written into law as a statute. It is not conclusive proof of reasonable care if you find that BNSF followed such a legal duty.” T.4386 (App.1073). Yet a determination of liability depended upon a finding that the railroad contravened a federal regulation. Thus the jury allocated fault based upon a preempted standard, believing that regulatory compliance only provided some evidence of due care.

Respondents urge that the “overall charge was correct” and now struggle to portray their negligence claims as causes of action to redress federal regulatory infractions. R.Br.35, 38. The jury, however, was instructed to the contrary: that compliance with federal law was *not* conclusive proof of requisite due care. (App.0391; T.4386.) Respondents' closing argument urged the jury to assess BNSF fault by anything but the federal regulatory standard. T.4457-T.4517.

“[T]he duty or degree of care imposed on a party is fundamental law”; hence the erroneous instruction “destroy[ed] the substantial correctness of the charge as a whole[.]” *Lindstrom*, 298 Minn. at 228-29, 214 N.W.2d at 676 (quotes omitted). The

fundamentally wrong jury instruction “result[ed] in substantial prejudice” and “cause[d] a miscarriage of justice[.]” *Id.*

If the case is not reversed and remanded with instructions for judgment to be entered in the railroad’s favor as a matter of law, then BNSF is “entitled” to a new trial due to the improper negligence theories that were submitted to the jury. *Kaiser-Bauer v. Mullan*, 609 N.W.2d 905, 911 (Minn. Ct. App. 2000)(emphasis added). A new trial with the instructions compelled by federal law is the least that can be done to correct the erroneous treatment of preemption.⁷

⁷ By being asked to consider common law negligence, the jury could not have decided whether federal regulatory non-compliance proximately caused the accident. Respondents’ preoccupation with alleged violations of 49 C.F.R. § 234.201 (R.Br.33) does not justify the finding of railroad fault because any failure to maintain accurate signal plans in the signal crossing bungalow could not have been the “but for” cause of the September 26, 2003 accident.

II. NEWLY DISCOVERED EVIDENCE

Respondents dismiss the significance of three independent, unbiased witnesses who confirm signal functionality moments before the accident. R.Br.64-70. The new evidence vitiates respondents' theory of a complete activation failure. The district court abused discretion by denying a new trial in which this critical evidence would be considered.

A. Due Diligence

Respondents argue that BNSF should have found the witnesses sooner. R.Br.65-67. Due diligence requires only "reasonable investigation efforts" and not "impeccable, flawless investigation of all situations." *Turner v. Suggs*, 653 N.W.2d 458, 467 (Minn. Ct. App. 2002); *Higgins v. Star Elec., Inc.*, 908 S.W.2d 897, 903-04 (Mo. Ct. App. 1995). Before trial BNSF exhaustively searched for evidence. (App.0472-App.0474; App.0434-App.0437.) Despite unquestioned professionalism and stature, even the State Patrol, Sheriff and police investigations came up empty. (*See, e.g.*, App.0466-App.0471.) How could BNSF have located eyewitnesses whose identities eluded law enforcement?

Contrary to respondents' version of events, Sergeant [REDACTED] had neither involvement in nor jurisdiction over the investigation. (App.0523.) He helped notify the Chase family, but [REDACTED] observations from the night of the accident never found their way into any report until April 2009. *Id.* BNSF cannot be expected to have tracked down every person who might have been at the crossing. *See Wilbur v. Iowa Power & Light Co.*, 275 N.W. 43, 46 (Iowa 1937). [REDACTED] presence at the Chase house gave no clue about his experience at Ferry Street on the night of September 26, 2003.

B. Relevant And Admissible

Respondents argue that “it is virtually certain that Olson and the █████ traversed the crossing at about 9:30 pm,” when an earlier train crossed Ferry Street. R.Br.68. In fact, █████ pick-up time was not dependent upon the game clock. (App.0475-App.0478; App.0490; App.0542, App.0552.) The parent / child meeting had been prearranged for 10:00 p.m. (App.0489-90; App.0542.) Cell phone records—which respondents ignore—confirm that the rendezvous coordinating calls were placed shortly after 10:00 p.m. (Add.022, Add.027.) Those documents are exactly consistent with the █████ recollection.

After retrieving the youngsters, the █████ crossed Ferry Street and saw the lights illuminate and heard the bells ring; in the rear view mirror Sergeant █████ watched the gate go down. (App.0485-86; App.0541.) The Smith car unquestionably drove over the crossing just before the 10:10 p.m. accident, and the warnings witnessed by the █████ could only have been activated by the train involved in the accident. (*Id.*) The previous train cleared Ferry Street just after 9:30 p.m., long before the █████ were in the vicinity.

Respondents further downplay the evidence because the witnesses did not see the gate fully lowered, the train at the crossing or the collision. R.Br.68. Yet respondents’ premised their trial theory upon the lights, gates and bells remaining dark, motionless and mute despite the approaching train. The recently discovered observations are unquestionably relevant to crossing system performance, and the testimony is clearly admissible as firsthand, eyewitness accounts of conditions at the scene seconds before the

Cavalier maneuvered around the gates.⁸ Not even respondents pretend that if Sergeant [REDACTED] had come forward sooner he would not have been allowed to take the stand.

C. Not Collateral, Impeaching, Or Cumulative

Respondents discount the new evidence as cumulative of the train crew. R.Br.69. Respondents, however, branded the engineer and conductor as biased: they “toe[d] the company line.” T.4487 (App.1081). New testimony about signal activation would not be cumulative because the witnesses are impeccably disinterested. *See Duffy v. Clippinger*, 857 F.2d 877, 880 (1st Cir. 1988)(evidence from “relatively disinterested witness” is not cumulative of two “interested” witnesses).

D. Trial Outcome Would Have Been Influenced

Respondents insist that the new evidence would not have affected the verdicts because debris evidence is said to be compelling (R.Br.70); yet the State Patrol examined the same physical evidence and reached an opposite conclusion. T.668; T.677; T.743; T.2790, T.2793-94.

Respondents also discount *Keyes v. Amundson*, 391 N.W.2d 602 (N.D. 1986). R.Br.69-70.⁹ The *Keyes* witness observed the scene just before the accident. *Keyes*, 391

⁸ Respondents’ preoccupation with Officer [REDACTED] statement (R.Br.68)—which was never introduced or referenced at trial—is puzzling: [REDACTED] was too far from the tracks to have seen either the signals or the accident. [REDACTED] inability to remember exactly when he was stopped at Ferry Street does not discredit the new witnesses who are certain about being at the crossing moments before the accident and actually hearing the bells, seeing the lights and watching the gates.

⁹ Respondents offer no response to this Court’s newly discovered evidence precedents. *See* Opening Br. at 29-30 (citing *Disch v. Helary, Inc.*, 382 N.W.2d 916, 919 (Minn. Ct. App. 1986); *In re Ball v. Prow*, 2009 WL 511343, at *8 (Minn. Ct. App. Mar. 3,

N.W.2d at 604. Similar to *Keyes*, this case was tried without disinterested eyewitness testimony regarding a critical liability fact. As in *Keyes*, the newly discovered witnesses provide “an important link in the evidence,” can “refute[] or support[]” expert assumptions, and create “a strong probability of a different result.” *Id.* at 606.

2009)(App.1195)). Instead, respondents (R.Br.70) refer in passing to *Bruno v. Belmonte*, 252 Minn. 497, 90 N.W.2d 899 (1958). *Bruno* is inapposite because the new witness was plaintiffs’ neighbor who lived one-half block away from the accident. *Id.* at 503, 90 N.W.2d at 903. The neighbor merely saw someone waving at defendant’s vehicle; thus nothing that could be offered would lead to a different result. *Id.*

III. TRIAL ERRORS

Respondents denounce a sufficiency of evidence argument that BNSF never made. R.Br.9. Rather, BNSF demonstrated that a series of extremely prejudicial and compounding errors denied a fair trial.

A. The Adverse Inference Invitation

1. The instruction

Respondents argue that BNSF acquiesced to the wide-open adverse inference instruction. R.Br.44-45. On the contrary, BNSF vehemently opposed any adverse inference beyond the missing blueprint. T.4279-T.4301. Judge Maas inserted the “for example” opening over BNSF’s objection. *Id.*

Respondents extol the “Midnight Order”¹⁰ as an appropriate recourse against signal blueprint unavailability. R.Br.42-43. Regardless of whether an instruction restricted to the blueprint may have been warranted, the district court went well beyond any such limitation. Instead, the “for example” addition suggested that a pattern of spoliation was afoot. (App.0381.)

Respondents scramble to minimize the harm suffered by contending that “[n]othing in the last sentence permits the jury to make an adverse inference about any of the other evidence in the case.” R.Br.43-45. The blueprints, however, were depicted as an example of “some of the original evidence” that “should have been preserved” but was

¹⁰ App.0355.

not. App.0381; T.4737 (emphasis added).¹¹ A fair reading of the instruction—especially by a lay juror—does not circumscribe adverse inference opportunity to the blueprints.

To make matters worse, the “for example” expansion implied that the district court had made factual findings about wide-spread spoliation. *Huhta v. Thermo King Corp.*, 2004 WL 1445540, at *3 (Minn. Ct. App. June 29, 2004)(App.1207). Respondents do not dispute that a judge must make the spoliation findings and admit that the blueprints were “the only piece of evidence” that Judge Maas found to be missing. R.Br.43-44. Accordingly, respondents cannot seriously contest the wrongfulness of the instruction. By characterizing the blueprints as a mere “example” of spoliation, the district court delegated the judicial task of deciding what evidence went missing and why to the jury.

2. Closing arguments

Respondents maintain that BNSF never objected to the empty box stunt. R.Br.45-47. At the same time, respondents acknowledge that BNSF challenged the spoliation props both before and after closing argument. *Id.* Even the trial court recognized that the “objection is preserved for the appellate record.” T.4521. Any failure to more vehemently protest is attributable to the lack of advance notice.

The cases require prior disclosure in order to allow for objections to be voiced before props are displayed to the jury. *Brabeck v. Chicago & Nw. Ry. Co.*, 264 Minn. 160, 168, 117 N.W.2d 921, 926-27 (1962); *Malik v. Johnson*, 300 Minn. 252, 263, 219

¹¹ The discussion leading up to the “for example” aberration demonstrates that Judge Maas intended the instruction to reach beyond blueprints. T.4279-T.4301. Respondents’ closing argument ensured that the jurors would perceive no limitation on the inferences that could be drawn. *See infra* III.A.2.

N.W.2d 631, 638 (1974). BNSF was not alerted to the empty boxes theatrics until the curtain was about to come up on closing arguments, and the “use of the boxes was indeed argumentative.” R.Br.46. Respondents’ tactics made a mockery of the visual aid disclosure rule. *Brabeck*, 264 Minn. at 168, 117 N.W.2d at 926-27.

The boxes became the platform from which respondents exploited the adverse inference error. As a prelude to the empty box performance, counsel re-read the “for example” instruction. T.4487-96 (App.1082-96). He thereafter repeatedly encouraged the jury to make assumptions about each empty box. T.4490 (“You can infer what’s in it from it not being here.”...“Your common sense tells you why they’re not here.”); T.4492; T.4504.¹²

Even worse, respondents stacked up boxes to represent evidentiary circumstances for which an adverse inference had already been rejected (T.4285) or that involved no more than routine record management policies (T.4495). T.4491-95. The jury was led to believe that any document and every data that had not been proffered, for whatever reason, should be presumed to be damning.

Respondents rationalize their “send a message” argument (T.4472) as a mere “passing comment.” R.Br.47. Such an argument, however, impermissibly urged the jury to “consider the future consequences of their decision” instead of focusing on “the past and present facts” of the case before them. *Byrd v. Kemmer*, 2001 WL 506635, at *4 n.1 (Minn. Ct. App. May 15, 2001)(App.1219). Counsel thus goaded the jury to punish, even

¹² The center piece of respondents’ closing argument was the contrived evidence spoliation conspiracy. T.4472-4517.

though punitive damages had been rejected. The verdicts show that the invitation to amerce was accepted with relish.

B. Unrestricted Special Verdict Question

Respondents would have the passing mention of the accident's date in the causation special verdict question ameliorate the harm done by the open-ended negligence inquiry. R.Br.47-48. But the special verdict question, as stated (App.0406), allowed BNSF to be put on trial for incidents from April 2001, March 2002 and February 2003 that had no bearing on the September 26, 2003 tragedy. *See* Opening Brief at 36-37 (record citation). Respondents' counsel openly embraced that strategy. T.4356-59 (App.1063-66). "Prior incident" evidence guaranteed that fault would be allocated based upon completely unrelated circumstances. To make matters worse, the causes of the so-called prior malfunctions are no more than conjecture: subsequent inspections and maintenance ensured that the signals were operating properly after the so-called earlier malfunctions and before this accident. (App.0205-App.0289; App.0333-App.0351; App.0352-App.0354.)

Respondents discount *Peterson v. Burlington N. R.R. Co.*, 399 N.W.2d 175 (Minn. Ct. App. 1987) because train operations were involved. R.Br.48-49. *Peterson* addressed whether the locomotive's whistle and bell constituted "due care at the time and place" of the accident. *Peterson*, 399 N.W.2d at 178. Like the warning devices at issue in *Peterson*, the Ferry Street signals were designed to foretell the approach of trains. Since locomotive audible warnings and crossing systems serve the same purposes, the focus on the specific when and where of the allegedly negligent conduct can be no different.

Respondents cannot wish away *Perkins v. Nat'l R.R. Passenger Corp.*, which also arose from a crossing accident. 289 N.W.2d 462, 463-64 (Minn. 1979). See Opening Br. at 36 (citing *Perkins*). “[T]he focus of a jury’s inquiry should be whether the railroad exercised due care under all of the circumstances of the case before it.” *Perkins*, 289 N.W.2d at 463, 466. The inquiry in this case should have likewise focused on exercise of “due care at the time and place” of the accident. That never happened because the jury’s attention was lured away from the night of September 26, 2003 by the open-ended negligence question.

C. The “Rebuttal” Expert Witness

Respondents wrongly assert that the district court allowed ██████ to testify “just as she did with the other two members of the State Patrol reconstruction team.” R.Br.50. This pronouncement ignores the palpable differences between ██████ and Sergeants ██████ and ██████. ██████ conducted the Patrol’s investigation—assisted by ██████—and authored the official report. T.668. ██████ only took photographs of an exemplar car after the fact. T.538-39, T.647-48.¹³ Respondents neither named ██████ as an expert witness nor provided expert disclosure. Despite those omissions, he was allowed to take the stand over BNSF’s objections.¹⁴ Incredibly, ██████

¹³ Respondents fault BNSF for waiting until ██████ testimony had begun before objecting. R.Br.53. Yet BNSF took issue as soon as ██████ wandered beyond his photographic role and began offering causation opinions. T.1816. Without timely expert disclosure, BNSF had no way of knowing what ██████ might say.

¹⁴ T.1816-19, T.1822, T.1868, T.4210.

testified in his capacity as a State Patrol officer as well as a surprise “rebuttal” expert called in respondents’ case-in-chief.

Relying on a pre-trial deposition, motion in limine arguments and opening statements, respondents accuse BNSF of misconstruing the context of [REDACTED] testimony. R.Br.51-53. But the record reveals the truth: [REDACTED] so-called “rebuttal” was allowed because the district court was led to believe that [REDACTED] had characterized his report as a “consensus” among a team that included [REDACTED] T.1820 (“[W]hen the word ‘consensus’ was used, then the rebuttal opportunity presented itself.”). Before the jury, however, [REDACTED] never mentioned a “consensus opinion” or identified [REDACTED] as a participant. *See* T.509-T.744.

Respondents’ citation to pre-trial activities is beside the point because the door to rebuttal cannot be opened by evidence that never sees the light of a trial day. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 386 (Minn. 1977). BNSF’s opening statement could not be the welcome mat for [REDACTED] undisclosed opinions: attorney rhetoric is not evidence, and [REDACTED] alone joined in [REDACTED] conclusions. T.668. If that were not enough, respondents never argued below—and district court never found—that opening statement remarks provided the entrée for [REDACTED] “rebuttal.” T.1816-31.

Despite the official finding of driver fault (T.743-44), [REDACTED] testifying as an undisclosed expert, suggested that the State Patrol had made “a mistake” and implied that the Patrol had come to disavow the investigation. T.1896. Respondents used [REDACTED] “expert” testimony to insinuate that the Patrol had second thoughts. T.4467-68 (“[T]he only state patrol officer who had the courage to come forward and say, We made a

mistake, was sergeant [REDACTED] T.4478. The district court abused discretion by allowing surprise expert testimony to call into question the official causation conclusion. Only a new trial can cure the severe prejudice.¹⁵

¹⁵ Contrary to respondents' assertion (R.Br.54), BNSF only elicited "collaboration testimony" after the [REDACTED] ambush had been sprung. See T.1820, T.1875. By then, the damage was done.

IV. NEW DAMAGES TRIALS OR REMITTITUR

A. Damage Awards Beyond The Pale

Respondents argue that the damages were not excessive and that identical awards for very different decedents can be condoned. R.Br.57-60. The fungible verdicts confirm the jury's failure to perform individualized scrutiny and refusal to assess the distinct pecuniary losses.¹⁶ That approach to the damage assessment process can only be explained by passion and prejudice provoked by counsel's inflammatory arguments. *DeWitt v. Schuhbauer*, 287 Minn. 279, 285-86, 177 N.W.2d 790, 794-95 (1970).

The evidence did not come close to demonstrating the loss of counsel, aid, advice, comfort, assistance, companionship or protection sufficient to justify such jury magnanimity.¹⁷ The decedents had at best relatively normal familial relationships. T.4625. The young victims were either completely independent or well on their way to liberation. T.4653, T.4655, T.4755, T.4805. Each was at a stage in life when family companionship and support was not an important consideration. *Id.* See also *Benning v. Moore*, 2005 WL 2129094, at *5 (Minn. Ct. App. Sept. 6, 2005)(App.1232).

Some of the next-of-kin were not around, unaware of serious problems, or oblivious to their child's circumstances. T.4668-71, T.4687, T.4693-95, T.4707-09, T.4733-36. A relative's absence from and ignorance about a decedent's life belies support for the largest pecuniary damages award to the next-of-kin of unemployed minors and young adults in Minnesota's history. See *Benning*, 2005 WL 2129094, at *5.

¹⁶ See, e.g., App.0649-App.0652.

¹⁷ Minn. Stat. § 573.02 (2008).

Respondents' counsel repeatedly raised next-of-kin grief—even though recovery for distress and wounded feelings is precluded. Minn. Stat. § 573.02 (2008); Minn. CivJig 91.75. Respondents have no explanation for such questioning other than to say that “rich testimony about four kids who were extremely close to and involved with their families” was proffered. R.Br.61.

The solicitation of inappropriate testimony was compounded by counsel's “send a message” exhortation. T.4860. By asking for damages of between \$10 and \$12 million per family counsel entreated the jury to make an example out of BNSF. T.4861-62. This deviation from basic pecuniary loss principles can only be rectified by new damages trials or remittitur. *Walser v. Vinge*, 275 Minn. 230, 234-45, 146 N.W.2d 537, 540 (1966).

B. Remittiturs

At a minimum, the staggering awards should have been remitted. Respondents ignore all remittitur arguments, but the “shock the conscience”¹⁸ verdicts compel the remittitur conclusion. Conditional remittitur would align the verdicts with the evidence and remedy the serious miscarriage of justice. *Ahrenholz v. Hennepin County*, 295 N.W.2d 645, 649-50 (Minn. 1980).

¹⁸ *Verhel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 591 (Minn. 1984).

V. SANCTIONS: UNAUTHORIZED AND UNWARRANTED

In an attempt to justify unprecedented sanctions, respondents dredge up every discovery dispute and evidentiary controversy. R.Br.76-81. Respondents denigrate standard record retention policies, impute sinister motives to routine litigation activity and demonize misremembered facts. R.Br.76-81. While by-no-means laudable, memory lapses and preservation mistakes do not rise to the level of malevolence. Negligence—even gross negligence—does not equate with bad faith. *In re Mrosak*, 415 N.W.2d 98, 102 (Minn. Ct. App. 1988).¹⁹

Respondents exalt district court “inherent authority” to deal with misconduct that “does not fit neatly into the existing sanctions framework provided by the rules of procedure and relevant statutes.” R.Br.74. The rules promulgated to remedy discovery inadequacy foreclose that argument.²⁰ Tellingly the retribution to which BNSF was subjected was not based on demonstrated prejudice. Instead, the district court meted out punishment that goes well beyond the “least restrictive” sanction available under the circumstances. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995).

¹⁹ Respondents rely most heavily on the supposed “legion” of misrepresentations attributed to ██████████ R.Br.80. Curiously, all of the allegations about lack of candor relate to the same incident: Hildebrandt’s second download of the event recorder on September 29. ██████████ recollection, solicited years after the fact, was unfortunately in error. Respondents’ insinuations about sinister motives seem odd in light of what the September 29 download showed: the warning system was in operation at the time of the accident. See Ex.139. See also T.2663. Thus ██████████ faulty memory actually harmed BNSF, not respondents.

²⁰ See Minn. R. Civ. P. 11.02(a); 26.07; 37.01.

A. The Correct Standard: Prejudice

Respondents accept *Patton* as the seminal sanction precedent. R.Br.74. *Patton* surveyed the parameters of inherent judicial authority and defined “the prejudice to the opposing party” as the “reasonable and workable” measure of sanction appropriateness. *Patton*, 538 N.W.2d at 119. Thus a showing of prejudice is the *sine qua non* to the exaction of sanctions. *Id.*

Giving short shrift to that paradigm, respondents charge that the misconduct reaches beyond the parameters of *Patton*. R.Br.74. *Foust v. McFarland* holds otherwise. 698 N.W.2d 24 (Minn. Ct. App. 2005). Like respondents, the *Foust* appellants sensationalized their case as different from and “bigger” than *Patton* because of bad faith. For that reason a showing of prejudice was said to be unnecessary, and the court should seek to punish and deter. *Id.* at 30. This Court disagreed: “*Patton* is the law in Minnesota on spoliation”—*i.e.*, demonstrated prejudice is an absolute prerequisite to the imposition of sanctions. *Id.* at 31. Bad faith allegations transform neither the sanction inquiry nor measure.

“Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice.” *Foust*, 698 N.W.2d at 30. The sanctions proceedings below should have begun with an assessment of what, if any, evidentiary advantage was gained. *Id.*

The verdicts demonstrate that BNSF achieved no such advantage. The available evidence, including eyewitness testimony, placed the signal system in operation. T.979, T.1031, T. 3954, T.3967. (App.0111-App.0125.) The supposedly missing evidence

hindered—not helped—BNSF’s defense by allowing respondents to lead the jury into the shadows of inference and speculation. *See* T.4472-4517. Any prejudice caused by the lost blueprints would have been more than cured by the original, limited allowance for an adverse inference.²¹

B. Inherent Authority Is Not Without Restraint

Even if respondents had been prejudiced, courts must “impose the least restrictive sanction available under the circumstances.” *Patton*, 538 N.W.2d at 118. The \$4 million sanction, on top of the expanded adverse inference jury instruction, are anything but the least restrictive sanctions available.

1. Unauthorized attorneys’ fees

The Minnesota Supreme Court has yet to address district court “inherent authority” to levy attorneys’ fees sanctions. Longstanding precedent, however, precludes fee shifting absent statutory or contractual authorization. *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998). No such statute or contract applies to these circumstances.

Mahoney & Emerson v. Private Bank shows why the sanctions in this case cannot withstand scrutiny. 2009 WL 1852789 at *6 (Minn. Ct. App. June 30, 2009)(App.1249). The district court imposed attorney-fees based upon the “firm belief that Mahoney was acting in bad faith.” *Id.* at *6-*7. This Court reversed because a Rule 11 motion had not been filed and no order to show cause had issued. *Id.* Sanctions were an abuse of

²¹ Respondents suggest the damages awarded cannot preclude a showing of prejudice because BNSF seeks to have the verdicts set aside. R.Br.82-83. If the verdicts are reversed, as they should be, the prejudice analysis would need to change and to await the ultimate determination of liability.

discretion—regardless of any bad faith—because a statute and rules specified procedures that had to be followed. *Id.*

Respondents never filed a proper motion, and the district court never issued an order to show cause. Respondents attempt to avoid *Mahoney* by condemning the misconduct of which BNSF is accused as beyond what the rules were promulgated to address. R.Br.85. Yet the allegations leveled against BNSF fall squarely within the rules regarding the derogation of discovery duties. *See* Minn. R. Civ. P. 11.02 (signing pleadings); 26.07 (discovery compliance); 37.01 (discovery cooperation). As in *Mahoney*, the invocation of those rules must be premised upon the satisfaction of mandatory procedural prerequisites, which were not met in this case.

To make matters worse, the district court shifted almost \$1 million in attorneys' fees without demonstrating any nexus between sanctions imposed and prejudice suffered. *See Clark v. Fontana*, 2008 WL 5137116, at *4 (Minn. Ct. App. Dec. 9, 2008)(sanction did not bear a rational relationship to the discovery violation, and the amount “greatly exceeds any prejudice” inflicted)(App.1284).

Respondents excuse their lack of supporting documentation by paralogizing that personal injury attorneys cannot be expected to keep time records. R.Br.86. The rules do not countenance such a dispensation. Respondents knew for months that attorneys' fee sanctions would be sought; yet the lawyers never recorded their time. Fees cannot be shifted without a detailed accounting of attorney work. *See Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628 (Minn. 1988).

2. Improper disgorgement and pre-judgment interest

Respondents stipulated to the one year continuance that provoked the district court to order disgorgement and to assess pre-judgment interest. R.Br.88. Respondents rewrite history to blame BNSF for the delay. *Id.* Nothing in the record, however, reflects “reluctance” or “trepidation” about respondents’ agreement to delay the trial. *Id.* Accordingly, the onus for a postponement that respondents and the court both endorsed cannot be placed on BNSF.

Critically, discovery transgressions or evidence spoliation have never resulted in a disgorgement sanction. No authority allows for such a mulct in the circumstances of this case²² or supports the infliction of duplicative punishment: interest and return on investment for the same passage of time.

Finally, respondents offer no substantive basis for their clairvoyant contention that the same \$22 million would have been the result of an earlier convened trial. R.Br.88. Simply put, the district court was not empowered to subject BNSF to both pre-judgment interest and earnings disgorgement.

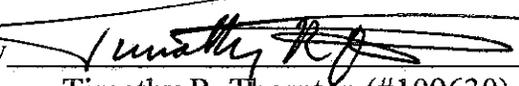
²² Respondents embrace *Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009) and *U.S. v. Nacchio*, 573 F.3d 1062 (10th Cir. 2009). R.Br.89. Disgorgement in those cases redressed federal securities law violations, not litigation misconduct. “An individual found liable for fraudulently trading federal securities may properly be ordered to disgorge any ill-gotten profits.” *SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990).

CONCLUSION

FRSA preemption requires reversal and dismissal as a matter of law. Alternatively, preemption demands a remand for a new trial with proper instructions. Newly discovered evidence and serious trial errors also cry out for a new trial on liability and damages, or at least remittitur. The unprecedented sanctions award cannot pass abuse of discretion muster.

Dated: May 3, 2010

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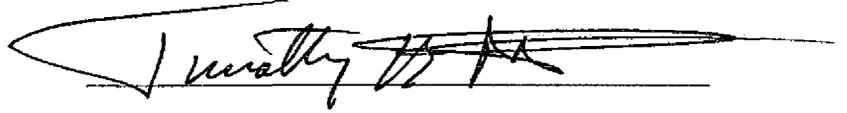
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2007, which reports that the brief contains 6,906 words.

A handwritten signature in black ink, appearing to read "J. M. [unclear]", written over a horizontal line.