

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

State of Minnesota
 In Supreme Court

Michael D. Frazier, as Trustee for the
 Next-of-Kin of Brian L. Frazier, deceased,
Appellant (A09-2212),

Harry James Rhoades, Sr., as Trustee for the
 Next-of-Kin of Harry James Rhoades, Jr., deceased,
Appellant (A09-2213),

Denise Renee Shannon, as Trustee for the
 Next-of-Kin of Bridgette Marie Shannon, deceased,
Appellant (A09-2214),

Elizabeth Chase, as Trustee for the
 Next-of-Kin of Corey Everett Chase, deceased,
Appellant (A09-2215),

vs.

Burlington Northern Santa Fe Corporation, et al.,
Respondents,

Richard P. Wright, as Special Administrator
 of the Estate of Corey E. Chase, deceased,
Appellant (A09-2215),

Cristy Y. Frazier, as Special Administrator
 for the Estate of Brian Frazier,
Appellant (A09-2213, A09-2214, A09-2215),
 and

BNSF Railway Company, Third-Party Plaintiff,
Respondent (A09-2213, A09-2214, A09-2215),

vs.

Richard P. Wright, as Special Administrator
 for the Estate of Corey Everett Chase, deceased,
Appellant (A09-2213, A09-2214, A09-2215).

**BRIEF OF ASSOCIATION OF AMERICAN RAILROADS
 AS AMICUS CURIAE IN SUPPORT OF RESPONDENT BNSF**

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 2

 I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT
 A NEW TRIAL ON LIABILITY IS REQUIRED BECAUSE THE
 TRIAL COURT COMMITTED A FUNDAMENTAL ERROR OF
 LAW IN ITS INSTRUCTIONS TO THE JURY..... 2

 A. Congress Determined That Railroad Safety Should Be
 Regulated Comprehensively and Uniformly at the Federal
 Level..... 4

 B. To Achieve Its Goal of Uniform Railroad Safety Regulation
 Congress Preempted State Law in All Areas Covered By
 Federal Law. 8

 C. Federal Railroad Safety Regulations Establish the Standard of
 Care for Railroads and Juries May Not Impose Common Law
 Standards as Allowed By the Trial Court in This Case..... 12

CONCLUSION..... 17

CERTIFICATE OF COMPLIANCE..... 19

TABLE OF AUTHORITIES

Cases

Burlington Northern R.R. v. State of Montana, 880 F.2d 1104 (9th Cir. 1989)..... 10

Burlington Northern Santa Fe Ry. v. Doyle, 186 F.3d 790 (7th Cir. 1999)6, 10

Carrillo v. ACF Ind., Inc., 980 P.2d 386 (Cal. 1999), *cert. denied*,
528 U.S. 1077 (2000)5, 16

Carter v. Consolidated Rail Corp., 709 N.E.2d 1235 (Ohio App. 1998)..... 12

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)9, 10, 12

Feldman v. CSX Transp., Inc., 821 N.Y.2d 85 (N.Y. 2006) 14

Frazier v. Burlington Northern Santa Fe Corp., 788 N.W.2d 770
(Minn.App. 2010)2, 3, 16

Gilbert v. Norfolk Southern Ry. Co., No. L-09-1062 2010 WL 2333772, at ¶
30 (Ohio App. June 11, 2010), *review denied* 935 N.E.2d 47 (Ohio 2010) 10

Henning v. Union Pac. R.R., 530 F.3d 1206 (10th Cir. 2008) 13

Illinois Cent. R.R. v. Williams, 242 U.S. 462 (1917).....6

In re Derailment Cases, 416 F.3d 787 (8th Cir. 2005)..... 10

Johnson v. Southern Pac. Co., 196 U.S. 1, 17 (1904)5

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997).....6, 14

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983).....6

Michigan Southern R.R. v. City of Kendallville, Indiana, 251 F.3d 1152
(7th Cir. 2001)..... 7

Murrell v. Union Pac. R.R., 544 F.Supp.2d 1138 (D.Or. 2008)..... 13

Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926).....6

Norfolk & Western Ry. Co. v. Public Utilities Comm’n of Ohio, 926 F.2d 567
(6th Cir. 1991)..... 11

Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000)..... 10

<i>Ouellette v. Union Tank Car Co.</i> , 902 F.Supp. 5 (D.Mass. 1995)	16
<i>Peters v. Union Pac. R.R.</i> , 80 F.3d 257 (8th Cir. 1996)	7
<i>R.J. Corman R.R. v. Palmore</i> , 999 F.2d 149 (6th Cir. 1993)	4
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	10
<i>Riegel v. Medtronic, Inc.</i> 552 U.S. 312 (2008).....	15
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	14
<i>Schmitz v. Canadian Pac. Ry. Co.</i> , 454 F.3d 678 (7th Cir. 2006)	12
<i>Southern R.R. v. Railroad Comm’n</i> , 236 U.S. 439 (1915)	5
<i>Springston v. Consolidated Rail Corp.</i> , 130 F.3d 241 (6th Cir. 1997).....	12
<i>United Transp. Union v. Long Island R.R.</i> , 455 U.S. 678 (1982)	4

Statutes

24 Stat. 379 (1887).....	4
27 Stat. 531 (1893).....	5
36 Stat. 298 (1910).....	5
45 U.S.C. §431(a)	8
49 U.S.C. § 20106 (2010).....	8
49 U.S.C. §§ 20301-20306 (2010).....	5
49 U.S.C. §§ 20701-20703 (2010).....	5
49 U.S.C. §20101 (2010)	6
49 U.S.C. §20103(a) (2010).....	8
49 U.S.C. §20106 (a)(1).....	8
49 U.S.C. §20106(a)(2) (2010).....	8
49 U.S.C. §20106(b) (2007)	8
Pub. L. No. 103-272, §6(a),108 Stat. 745 (1994)	8

Pub. L. No. 107-296, Title XVII, §1710(c), 116 Stat. 3219 (2002).....	8
Pub. L. No. 89-670, §6(e), 80 Stat. 931 (1966).....	8
Pub. L. No. 91-458, 84 Stat. 971 (1970).....	4
Other Authorities	
1970 U.S.C.C.A.N. 4106	6
1970 U.S.C.C.A.N. at 4108-09	9
1970 U.S.C.C.A.N. at 4109	7
1970 U.S.C.C.A.N. at 4110-11	7
H.R. Rep. No. 91-1194 (1970).....	6, 9
H.R. Report No. 91-1194 (1970).....	7
Sen. Rep. No. 176 (1995)	7
Regulations	
43 FED. REG. 10,584-90 (1978).....	11
43 FED. REG. 10,585 (1978)	11
49 C.F.R. §213.231 (2010)	3
49 C.F.R. §234.201-.273 (2010).....	3
49 C.F.R. Part 231 (2010).....	5
75 FED. REG. 1180 (Jan. 8, 2010).....	12, 13, 15, 16

INTRODUCTION¹

The Association of American Railroads (AAR) is an incorporated, non-profit trade association representing the nation's major freight railroads. In matters of significant interest to its members, AAR frequently appears before Congress, the courts, and administrative agencies on behalf of the railroad industry. In particular, AAR seeks to participate as *amicus curiae* in cases that raise legal issues of importance to the railroad industry. This case presents such an issue. For that reason AAR sought leave to file a brief as *amicus curiae* in support of Respondent BNSF, which was granted by this Court on December 14, 2010.

AAR's member railroads are greatly concerned about the issue before the court because if juries are permitted to establish common law standards of conduct for railroads—as the jury in this case was instructed it could—it will undermine the railroads' ability to rely on the comprehensive scheme of federal regulations that governs practically every significant aspect of railroad operations and safety with which they must comply. AAR has had long-standing involvement with the subject of rail safety, frequently representing its members in proceedings before legislative and federal regulatory bodies. AAR continues to participate in all significant railroad safety rulemaking proceedings as a representative of its member railroads. In addition, AAR

¹ Pursuant to Minn. R. Civ. App. P. 129.03, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

works with its member railroads on many operational issues that impact rail safety, and itself sets standards and guidelines for equipment and components used in interchange on the rail network.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae AAR adopts the Statement of the Case and Facts of Respondent BNSF.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT A NEW TRIAL ON LIABILITY IS REQUIRED BECAUSE THE TRIAL COURT COMMITTED A FUNDAMENTAL ERROR OF LAW IN ITS INSTRUCTIONS TO THE JURY.

Though ostensibly over the propriety of jury instructions in a civil trial, the issue raised by this appeal ultimately implicates the policy choice made by Congress about how railroad safety is to be regulated. The trial court instructed the jury that if Respondent, BNSF, complied with applicable federal regulations it would be evidence, but not conclusive proof, of reasonable care, advising that the jurors were free to consider whether BNSF should have complied with additional obligations.² The Court of Appeals correctly held that this instruction “obviously misapplied” the law because “the common-law negligence standard is not the standard by which railroad safety is judged.” *Frazier v. Burlington Northern Santa Fe Corp.*, 788 N.W.2d 770, 780 (Minn.App. 2010). As the Court determined in granting a new trial on liability, the trial court’s instruction

² The court instructed that the jury should consider evidence that BNSF complied with its obligations under federal law, but that such compliance was “not conclusive proof of reasonable care” and that the jury also should consider “all other evidence.”

constituted reversible error, because it “conveyed this error of fundamental law to the jury.” *Id.* at 778.

Plaintiffs alleged a malfunctioning crossing warning device led to the tragic accident from which this case arises. At trial, the plaintiffs sought to implicate BNSF’s conduct with respect to the inspection and maintenance of the crossing and its tracks and signals. Federal regulations address these matters thoroughly, and cover the subjects of plaintiffs’ claims. *See* BNSF Br. at 20-21.³ These regulations are part of a comprehensive scheme of railroad safety regulations which impose duties and obligations on railroads. This regulatory scheme is the product of a deliberate policy choice made by Congress, going back over a century, about how railroad safety should be regulated. Inviting the jury to impose common law standards on a railroad, where it has met the applicable federal obligations, as the trial court did, undermines the very basis of longstanding congressional policy regarding railroad safety.⁴

³ In particular, federal regulations comprehensively cover track structure and inspection, 49 C.F.R. Part 213, Track Safety Standards, including prescribing requirements for the frequency and manner of inspecting track. 49 C.F.R. §213.231 (2010). Federal regulations also comprehensively cover maintenance, inspection and testing of grade crossing signals. *See* 49 C.F.R. §234.201-.273.

⁴ Appellants argue that even if the trial court’s instructions were erroneous, they were invited by BNSF and therefore BNSF is precluded from the relief it was granted by the Court of Appeals. Appellants further argue that BNSF failed to challenge the instructions in its post-trial motions, again a grounds for denial of relief. AAR will not address Minnesota procedural law issues or delve into the record, matters which are fully addressed by the parties. However, AAR notes that the Court of Appeals found that Appellants, “but not BNSF, [] proposed” the erroneous instructions, and that “BNSF did not propose the instructions to which it most strongly objects.” *Frazier*, 788 N.W.2d. at 777, 779. The Court also found that BNSF “strongly objected” to the erroneous instructions in its motion for a new trial. *Id.* at 778.

A. Congress Determined That Railroad Safety Should Be Regulated Comprehensively and Uniformly at the Federal Level.

The railroad network, which dates to the first half of the nineteenth century, is an integral (perhaps the archetypal) instrumentality of interstate commerce. As the integrated and interdependent nature of the rail industry became apparent at the end of the nineteenth century—just a few decades after the railroad industry first spanned the continent, becoming a truly national network—Congress initiated a policy of uniform rail regulation by the federal government to replace regulation by the several states. Recognizing that exercising its authority as a national legislature was the most effective means of promoting safe and efficient rail operations, Congress first targeted specific aspects of rail safety. For many years, Congress approached this policy in a piecemeal fashion, maintaining a dual system of regulation of rail safety. However, in 1970, Congress enacted the Federal Railroad Safety Act (FRSA), rejecting the prior regime and revising its approach to railroad safety. *See* Pub. L. No. 91-458, 84 Stat. 971 (1970). Reaching the realization that continued partial reliance on state regulation was ineffective and counterproductive, Congress opted for a regulatory regime premised on the legislative finding that a comprehensive, uniform, national approach to rail safety would be most effective.⁵

⁵ *See United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982) (“[T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system.”); *R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 151 (6th Cir. 1993) (“[p]erhaps no industry has a longer history of pervasive federal regulation than the railroad industry”). Even before its foray into rail safety, Congress undertook to regulate the economic sphere of the rail industry. *See* Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (1887), under which the Interstate Commerce

The end of the nineteenth century saw enactment of the first federal railroad safety law, the Safety Appliances Act of 1893 (SAA). *See* 27 Stat. 531 (1893). Initially aimed at ending a then common and dangerous practice, the SAA required rail cars to be equipped with automatic couplers in order to eliminate the need for rail workers to go in between cars to couple and uncouple them. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 17 (1904). In 1910, Congress amended the SAA to establish additional uniform national standards for “safety appliances” on railroad cars, occupying the field. Act of April 14, 1910, c. 160, *See* 36 Stat. 298 (1910).⁶

In 1911, Congress expanded the scope of federal safety regulation by enacting the Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) (now codified as the Locomotive Inspection Act (LIA), 49 U.S.C. §§20701-20703), to cover all aspects of locomotive safety. *See* 49 U.S.C. §§ 20701-20703 (2010). As does the SAA with respect to freight

Commission (ICC) was given broad authority to regulate practically every aspect of railroad operations.

⁶ *See Southern R.R. v. Railroad Comm’n*, 236 U.S. 439 (1915) (The regulations promulgated under the SAA preempt state law requiring “greater or less or different equipment.” *Id.* at 446); *Carrillo v. ACF Ind., Inc.*, 980 P.2d 386, 389-90 (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000) (“Since Congress ‘has so far occupied the field’” [citation omitted] “the categories of safety appliances created by [the SAA] . . . should be broadly read to include every device falling within that category, even if the Secretary of Transportation has not seen fit to standardize a particular type or use of that device.”) The SAA was originally codified at 45 U.S.C. §§1-16 and is codified today at 49 U.S.C. §§20301-20306. *See* 49 U.S.C. §§ 20301-20306 (2010). In the 1910 Act, Congress directed the ICC to issue safety appliance standards, a directive implemented by the ICC in an order of October 13, 1910. Regulations implementing the SAA are contained at 49 C.F.R. Part 231. *See* 49 C.F.R. Part 231 (2010).

car appliances, the LIA completely preempts state efforts to regulate locomotives.⁷ The enactment of the SAA and LIA manifested recognition by Congress of the importance of uniformity in regulation as a means of best promoting railroad safety. *See Illinois Cent. R.R. v. Williams*, 242 U.S. 462 (1917). (“To this primary purpose of protecting the life and limb of employees is added the purpose of protecting the lives of passengers and of securing the safety of property by requiring *uniform standards* as to other equipment of cars . . .” *Id.* at 467.) (emphasis supplied)

In 1970, Congress greatly expanded the already extensive and long standing federal regulation of railroad safety. Congress recognized that the existing federal laws, which focused on regulating discrete areas of rail safety, were "reasonably effective in their respective areas," 1970 U.S.C.C.A.N. 4106 (originally printed in H.R. Rep. No. 91-1194 (1970)). However, Congress determined that there was a pressing need for a more uniform and comprehensive approach to regulating rail safety, because the railroad industry is “a national system” with “very few local characteristics.” *Id.* at 4110. Therefore, Congress enacted FRSA with the purpose of “promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents.” 49 U.S.C. §20101 (formerly codified at 45 U.S.C. §421).⁸

⁷ *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (In delegating this authority, Congress “intended to occupy the field” with respect to the equipment of locomotives, ousting the authority of states to regulate that subject. *Id.* at 613.); *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983).

⁸ *See Burlington Northern Santa Fe Ry. v. Doyle*, 186 F.3d 790, 794 (7th Cir. 1999) (Congress passed FRSA “[i]n response to the perceived need for comprehensive rail

Congress concluded that the primary culprit for ineffective railroad safety regulation, which FRSA sought to remedy, was the patchwork nature of the existing regime, a consequence of the varied and piecemeal role played by the states. *See* 1970 U.S.C.C.A.N. at 4109 (originally printed in H.R. Report No. 91-1194 (1970)). (“The Committee does 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 50 different judicial and administrative systems.”). *See Peters v. Union Pac. R.R.*, 80 F.3d 257, 261, n.2 (8th Cir. 1996). Explaining its decision to greatly expand the federal role in rail safety, Congress noted that the railroad industry “has very few local characteristic,” but rather

has a truly interstate character calling for a uniform body of regulation and enforcement. * * * To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

1970 U.S.C.C.A.N. at 4110-11 (originally printed in H.R. Report No. 91-1194 (1970)).

Indeed, the guiding principle of federal regulation of railroads remains Congress’ recognition that it is essential that the national rail network operate safely, efficiently and competitively, and that in order to achieve that goal, uniformity with regard to operations must be maintained. “Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry’s ability to provide the ‘seamless’

safety regulation.”); *Michigan Southern R.R. v. City of Kendallville, Indiana*, 251 F.3d 1152, 1155 (7th Cir. 2001) (“Congress’ occupation of the field of railroad regulation is to ensure uniform national standards.”).

service that is essential to its shippers and would weaken the industry's efficiency and competitive viability." Sen. Rep. No. 176, at 6 (1995).

B. To Achieve Its Goal of Uniform Railroad Safety Regulation Congress Preempted State Law in All Areas Covered By Federal Law.

To effectuate its intent in enacting FRSA, Congress granted plenary power to regulate rail safety to the Secretary of Transportation. *See* 49 U.S.C. §20103(a) (2010) (formerly codified at 45 U.S.C. §431(a)). "Supplementing laws and regulations in effect on October 16, 1970," the Secretary was granted authority to "prescribe regulations and issue orders for every area of railroad safety." *Id.*⁹ In conjunction with that grant of authority, Congress declared that "laws, regulations and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. §20106 (a)(1). To achieve this goal, FRSA permits state laws to remain in effect only until the Secretary of Transportation "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* at §20106(a)(2).¹⁰ Thus, while the SAA and LIA occupy the

⁹ Four years earlier, when the Department of Transportation was established, authority for implementing the railroad safety laws enacted by Congress, originally a function of the ICC, was delegated to the Federal Railroad Administration (FRA), an agency within DOT. Department of Transportation Act. *See* Pub. L. No. 89-670, §6(e), 80 Stat. 931 (1966).

¹⁰ FRSA's preemption provision was originally enacted as 45 U.S.C. §434. In 1994, FRSA was recodified and moved to Title 49 of the U.S. Code, without any intent to make substantive changes to the law's provisions. Pub. L. No. 103-272, §6(a), 108 Stat. 745 (1994). The preemptive provision of FRSA is currently codified at 49 U.S.C. §20106. *See* 49 U.S.C. § 20106 (2010). By amendment in 2002, FRSA's preemption provision was extended to apply to regulations or orders related to railroad security issued by the Secretary of the Department of Homeland Security. Pub. L. No. 107-296, Title XVII, §1710(c), 116 Stat. 3219 (2002). FRSA was again amended in 2007 to clarify that a precondition to preemption is compliance with the applicable federal regulation. Pub. L.

field, FRSA leaves room for state regulation, but *only* in areas where the Secretary of Transportation has not regulated.

FRSA's accommodation of state law under limited circumstances did not arise from Congress' desire to encourage state regulation of rail safety, but rather as an acknowledgment of the role some states had already assumed in regulating rail safety. *See* 1970 U.S.C.C.A.N. at 4108-09 (originally printed in H.R. Report No. 91-1194). In order to avoid gaps, Congress permitted such regulation to remain intact, but *only until* the Secretary had regulated in the same area. Thus, federal law preempts state law "related to" railroad safety whenever the Secretary of Transportation issues a regulation covering the subject matter of the state law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

In *Easterwood*, the U.S. Supreme Court interpreted FRSA's preemption provision in a case arising from a grade crossing accident in which the plaintiff alleged, among other things, that the crossing warning devices were inadequate and that the train was traveling at an excessive rate of speed. The Court held that the Secretary of Transportation had issued regulations covering the adequacy of crossing warning devices that are installed with federal funds, and that where those regulations were applicable state tort law could not impose "an independent duty" on the railroad. *Id.* at 671. The Court also held that the Secretary had issued regulations covering the subject of train

No.110-53, Title XV, §1528, 121 Stat. 453 (2007), 49 U.S.C. §20106(b). (The language quoted above reflects the current statutory language, which has been modified slightly since the original enactment.)

speed. *Id.* at 674-5. The Court ultimately determined that the regulations covering the adequacy of warning devices were inapplicable because the devices in question had not been installed with federal funds, *Id.* at 671-2. However, the Court found the plaintiff's excessive speed claims were preempted because the federal regulations "not only established a ceiling [on train speed], but also preclude[ed] additional state regulation" of that subject. *Id.* at 674. Thus, notwithstanding the general presumption against preemption, the Supreme Court has clearly established that federal railroad safety regulations issued by the Secretary preempt any state law purporting to cover the same subject as the federal regulation. This ruling was reaffirmed in *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000).¹¹

FRSA does not preempt only state laws that impair or are inconsistent with federal regulations, but all state laws aimed at the same safety concerns as the federal regulations. *Burlington Northern R.R. v. State of Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989).¹² Moreover, FRSA preemption does not depend on a single federal regulation itself covering the subject matter. Rather, preemption may flow from the interplay of related safety regulations and the context of the overall structure of the regulations.

¹¹ As the FRSA was enacted in 1970, the federal government has now been the dominant regulator of railroad safety for over 40 years. Accordingly, the Ohio Court of Appeals recently rejected use of the presumption against preemption in interpreting the scope of the FRSA. *Gilbert v. Norfolk Southern Ry. Co.*, No. L-09-1062 2010 WL 2333772, at ¶ 30 (Ohio App. June 11, 2010), *review denied* 935 N.E.2d 47 (Ohio 2010).

¹² *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947) (Regulated party "could not be required by the State to do more or additional things or to conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act.").

Easterwood, 507 U.S. at 674; *Doyle*, 186 F.3d at 795. Nor is it necessary for the Secretary to “impose bureaucratic micromanagement” in order to cover a particular subject matter. *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005). In addition, where FRA has considered regulating a subject matter and made a determination that no regulation is appropriate, state regulation of that subject matter is preempted. *Norfolk & Western Ry. Co. v. Public Utilities Comm’n of Ohio*, 926 F.2d 567, 571-72 (6th Cir. 1991).

In carrying out Congress’ intent, FRA recognized that effective regulation of rail safety calls for a comprehensive, integrated approach, requiring an appreciation of the big picture, rather than isolated efforts to address individual problems through “piecemeal” regulation. Greatly instructive on the primacy of federal railroad safety regulation is a 1978 Policy Statement in which FRA explains the nature of safety regulation in the railroad industry and why, in the areas over which FRA has asserted authority, that agency must be the sole source of regulatory authority. Federal Railroad Administration, Docket No. ROS-1, Notice 3; Railroad Occupational Safety and Health Standards; Termination, 43 FED. REG. 10,584-90 (1978). Advising that it had exercised authority over (1) track, roadbeds, and associated devices and structure; (2) equipment; and (3) human factors, FRA explained that

Implicit in each major area of regulation is the threefold objective of protecting passengers, persons along the right-of-way, and railroad employees. Protection of the public generally and employees in particular is, of necessity, an integrated undertaking. As a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property. Therefore, it is essential that the

safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and preexisting regulations.

43 FED. REG. 10,585 (1978).

Though the 1978 Policy Statement dealt with FRA's primacy over OSHA as the federal agency responsible for rail safety regulation, its reasoning applies with even greater force as between the federal and state governments. As FRA explained more recently, the focus of §20106(a) "is clearly on who regulates railroad safety: the Federal government or the States. It is about improving railroad safety, for which Congress deemed nationally uniform standards to be necessary in the great majority of cases." Federal Railroad Administration, Passenger Equipment Safety Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives, 75 FED. REG. 1180, 1209 (Jan. 8, 2010) (Passenger Equipment Standards).

C. Federal Railroad Safety Regulations Establish the Standard of Care for Railroads and Juries May Not Impose Common Law Standards as Allowed By the Trial Court in This Case.

Railroad safety regulations issued by the Secretary of Transportation not only override state regulations of the same subject matter, they also preempt common law negligence claims. *Easterwood*, 507 U.S. at 664 ("Legal duties imposed on railroads by the common law fall within the scope of [FRSA's preemption provision]."); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997); *Carter v. Consolidated Rail Corp.*, 709 N.E.2d 1235, 1240 (Ohio App. 1998). Preemption of state law tort claims is integral to the national policy because federal railroad safety regulations establish the

standard of care to which railroads are held. *See Schmitz v. Canadian Pac. Ry. Co.*, 454 F.3d 678, 684 (7th Cir. 2006) (federal regulations on controlling trackside vegetation established standard of care for railroad). This point was underscored in 2007 when Congress amended FRSA to clarify that a state negligence claim may be maintained only if it is based on the federal standard of care, and a plaintiff could prevail if he or she could prove that the railroad failed to comply with the federal standard (and that the failure caused the harm alleged). *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1215 (10th Cir. 2008) (“Congress amended 49 U.S.C. 20106 by adding the clarification amendment, making clear that when a party alleges a railway *failed to comply* with a federal standard of care established by regulation or with its own plan, rule, or standard created pursuant to federal regulation, preemption will not apply.”)¹³ However, to permit a state negligence claim to establish a concurrent, state law standard of care would undermine the federal regulatory regime. *Murrell v. Union Pac. R.R.*, 544 F.Supp.2d 1138, 1148 (D.Or. 2008) (“[T]he amendment to section 20106 did not change the finding that common law negligence claims would be preempted by federal law as long as such state law claims are covered by federal regulations pursuant to section 20106.”)

Inherent in the adjudication of a negligence action is a jury’s determination as to the proper standard of conduct to which the defendant should have adhered, *i.e.*, whether a duty was owed and, if so, whether due care was exercised in carrying it out. Damages

¹³ FRA has taken pains to distinguish between preemption of state common law standards of care as opposed to a state cause of action. The latter would not be preempted, however, where a federal regulation has covered the subject of a particular claim, it may only go forward if based on the federal standard embodied in the regulation. Passenger Equipment Standards, 75 FED. REG. at 1208.

assessed through findings of negligence under state tort law, no less than prescriptive regulations enacted by a state legislature or administrative body, constitute the imposition of a state standard of conduct, a result contrary to Congress' intent. In *San Diego Bldg. Trades Council v. Garmon*, the Supreme Court explained that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusively federal regulatory scheme." See *Law v. General Motors Corp.*, 114 F.3d at 910-12. (The "purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. * * * Imposing tort liability . . . would transfer the regulatory locus from the Secretary of Transportation to the state courts" a result that is clearly contrary to federal law.); *Feldman v. CSX Transp., Inc.*, 821 N.Y.2d 85, 89 (N.Y. 2006) (SAA preempts state product liability claims based on theories of design defect or failure to warn when the plaintiff alleges that the railcar design is defective due to the failure to include certain safety appliances or instructions not prescribed by the statute or regulations of the FRA promulgated pursuant to FRSA).

Indeed, juries are particularly ill suited to establish standards in areas where Congress has assigned that role to the federal agency with specific expertise in the subject matter. Unlike the expert agency, which takes into account all relevant information and factors when weighing whether to issue a regulation and the regulation's proper scope, a jury necessarily focuses on a single event, interpreted by expert witnesses who are paid

by the litigants. In a recent decision, the U.S. Supreme Court explained that where the federal government has implemented a regulatory regime, permitting juries to establish a standard of care under state common law can be even more disruptive to the federal scheme than would actions of a state regulatory agency. While the regulatory agency presumably weighs the costs and benefits of a proposed regulation, “a jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits.” *Riegel v. Medtronic, Inc.* 552 U.S. 312, 325 (2008). That is precisely why national policy on rail safety reflects the view that safety standards should be set by “experts in railroad safety to whom Congress has assigned the task” rather than “twelve jurors . . . most of whom probably do not know anything about railroad safety.” Passenger Equipment Standards, 75 FED. REG. at 1210.

Railroad safety regulations, like those addressing crossing inspection and maintenance, typically are the product of extensive rulemaking, with public participation, in which the views of interested parties are solicited and considered. They are subject to revision where experience or new technology might warrant. Once issued, railroads rely on these regulations to establish their obligations and guide their conduct. Compliance with applicable federal railroad safety regulations constitutes a railroad’s adherence to the standard of care and the railroad cannot be found to have been wanting for failing to undertake some additional or different course of action that a jury concludes should have been undertaken. If juries are free to penalize railroads for failing to take additional or different steps beyond what is required by the applicable federal regulations, railroads’ ability to rely on the federal regulations will be undermined.

As FRA recently explained, the “contention that a railroad that complies with the Federal standard of care set by Federal law should nevertheless be held to be negligent for the very behavior required by Federal law would make a nullity of the Federal railroad safety laws.” If that position was adopted, “the effective railroad safety standard would be the most recent jury verdict in each State and national uniformity of safety regulation would no longer exist.” 75 FED. REG. at 1210. *See Carrillo v. ACF Ind., Inc.*, 980 P.2d at 389 (“Permitting state tort claims ‘would generate precisely those inconsistencies in railroad safety standards that Congressional action was intended to avoid.’” quoting *Ouellette v. Union Tank Car Co.*, 902 F.Supp. 5, 10 (D.Mass. 1995)). For that very reason, the trial court’s instructions constituted a fundamental error of law.

Plaintiffs assert that BNSF violated federal regulations and thus, the improper instructions do not matter because even a properly instructed jury would have found BNSF liable for having violated the regulations. BNSF vigorously argues that the evidence showed that it had complied with all the applicable regulations, citing to plaintiff’s expert’s own conclusion, among other things. The Court of Appeals noted too that Appellants’ “own expert testified that he had no basis to dispute that” BNSF had complied with FRA’s track inspection and signal testing and inspection requirements. *Frazier*, 788 N.W.2d at 774. In any event, the Court held that whether BNSF had complied with the federal regulations was a question of fact for the jury, a question the jury was never asked to answer. *Id.* at 777, n.9. Regardless of who is correct, the important point is that by erroneously instructing the jury to consider other evidence of BNSF negligence, the trial court rendered irrelevant resolution of the question whether

BNSF complied with the federal standard of care, “an essential prerequisite to a finding of liability.” *Id.* at 781.

Had the jury been properly instructed to consider only the federal standard of care as embodied in the federal regulations, it may well have concluded that that BNSF complied with the applicable regulations and therefore was not negligent. Instead, guided by erroneous instructions inviting it to look beyond the applicable regulations, the jury found BNSF liable and issued a multimillion dollar verdict. Clearly BNSF was prejudiced by the erroneous instructions. While Appellants claim that BNSF failed to comply with the federal regulations, that is a matter that can only be resolved at a new trial, as ordered by the Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should affirm the remand for a new trial.

Respectfully submitted,

ASSOCIATION OF AMERICAN RAILROADS

Dated: 2/18/11

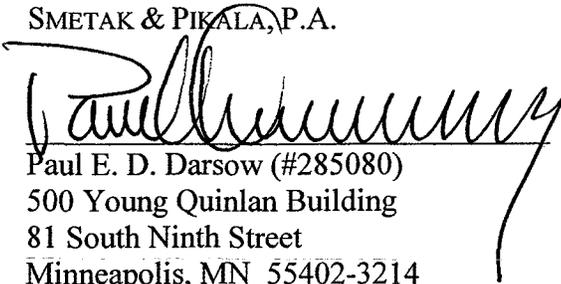
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c). The brief was prepared using Microsoft Word 2010, which reports that the brief contains 4,929 words.

Respectfully submitted,

ASSOCIATION OF AMERICAN RAILROADS

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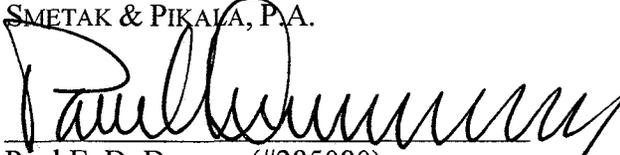
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