

NO. A11-1329

State of Minnesota
In Court of Appeals

Dmitriy Zimbovskiy,

Appellant,

v.

Union Pacific Railroad Company; Soo Line Railroad Company,
a Minnesota corporation d/b/a Canadian Pacific Railway, and a wholly
owned subsidiary of Canadian Pacific Railway Limited,
and Canadian Pacific Railway Limited, a Canadian Corporation;
and James A. Stroik,

Respondents.

**RESPONDENT, UNION PACIFIC RAILROAD COMPANY'S,
BRIEF IN RESPONSE**

Sharon L. Van Dyck (#0183799)
VAN DYCK LAW FIRM, PLLC
5354 Parkdale Drive, Suite 103
St. Louis Park, MN 55416
(952) 746-1095

and

Robert C. Sullivan (MO #52408)
George E. Chronic (#0388688)
SULLIVAN, MORGAN
& CHRONIC, LLC
1600 Baltimore Avenue, Suite 200
Kansas City, MO 64108
(816) 221-9922

*Attorneys for Appellant
Dmitriy Zimbovskiy*

David A. Donna (#0163624)
Julius W. Gernes (#0189704)
Erica A. Weber (#0389557)
DONNA LAW FIRM, P.C.
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
(952) 562-2460

*Attorneys for Respondent
Union Pacific Railway Co.*

Timothy R. Thornton (#0109630)
Jonathan P. Schmidt (#0329022)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Respondents
Soo Line Railroad Co., and James Stroik*

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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S INADEQUATE SIGNALIZATION CLAIMS AS BEING PREEMPTED UNDER FEDERAL LAW

Trial Court Holding: It was undisputed that federal funds were expended on the warning devices at the crossing at issue in the case, and MnDOT waived any 23 U.S.C. § 409 privilege with respect to Union Pacific's use of MnDOT documents for the purpose of its summary judgment motion. (*Order of Dismissal*, pp. 37- 40; R.A. 172.)

Authorities: 23 U.S.C. § 409

CSX Transportation, Inc. v. Easterwood, 506 U.S. 658 (1993).

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

Burlington Northern R. Co. v. Deatherage, 1997 U.S. Dist. LEXIS 9886 (N.D. Miss. 1997).

Hester v. CSX Transportation, Inc., 61 F.3d 382 (5th Cir. 1995).

Renfro v. Burlington Northern and Santa Fe RR, 945 So.2d 857 (La.App. 3 Cir. 2006).

II. WHETHER THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S INADEQUATE SIGNALIZATION CLAIMS AS BEING PRECLUDED UNDER STATE LAW

Trial Court Holding: The Commissioner of Transportation found that the particular warnings in existence on the date of the accident at the Yosemite Avenue crossing were the "adequate and appropriate" level of protection pursuant to Minn. Stat. § 219.402 and therefore appellant's common law claims were precluded by state law. (*Order of Dismissal*, p. 41; R.A. 172.)

Authorities: Minn. Stat. § 219.402

McEwen v. Burlington Northern Railroad Co., Inc., 494 N.W.2d 313 (Minn.App. 1993)

Chandler v. Illinois Central Railroad Co., 798 N.E.2d 724, 207 Ill.2d 331 (Ill. 2003).

III. WHETHER APPELLANT IS BARRED FROM RECOVERY UNDER
COMPARATIVE FAULT LAW

Trial Court Holding: The District Court concluded that reasonable minds could differ on whether or not appellant's contributory negligence was greater than that of the railroad. (*Order*, p. 45; R.A. 172.)

Authorities: *Winkler v. Magnuson*, 539 N.W.2d 821 (Minn.App. 1995), *review denied* (Minn. Feb. 13, 1996).

Winge v. Minnesota Transfer Railway Co., 290 Minn. 399, 201 N.W.2d 259 (Minn. 1972).

STATEMENT OF THE CASE

This case arises from a November 29, 2003 accident at a grade crossing at Yosemite Avenue in Savage, Minnesota. A westbound train, operated by Soo Line Railroad d/b/a/ Canadian Pacific Railway, collided with a southbound truck, driven by Appellant Dmitriy Zimbovskiy (appellant). Respondent Union Pacific owned and maintained the railroad tracks at the crossing where the collision occurred.

After conducting discovery, Union Pacific moved for summary judgment on appellant's claims, asserting: 1) federal law preempted appellant's claims of inadequate crossing protection; 2) state law preempted appellant's claims of inadequate signalization; and 3) that no evidence existed that vegetation in the railroad's right-of-way contributed to the cause of this accident.¹ Union Pacific also argued that appellant's negligence exceeded the railroads' alleged negligence, if any, thereby requiring dismissal. Following a hearing on the motion, the District Court agreed, granting summary judgment and dismissing all claims against Union Pacific. This appeal followed.

STATEMENT OF FACTS AND THE DISTRICT COURT FINDINGS

On November 29, 2003 appellant, operating a tractor-trailer southbound on Yosemite Avenue collided with a westbound train at the railroad crossing in Savage, MN, identified by the U.S. Department of Transportation as crossing #185314H. (*Order of Dismissal* (hereinafter "*Order*", p.4; R.A. 172.) Canadian Pacific operated the train on tracks owned by Union Pacific. (*Order*, p. 3; R.A. 172.)

¹ Appellant agreed with the District Court's grant of summary judgment on the vegetation claim and did not appeal that ruling.

Regarding events leading up to the November 29, 2003 accident, appellant testified at his deposition that he stopped well before the crossing's stop sign, at a location in the roadway where his vision down the tracks was obstructed by a fence and vegetation which was located on private property. (*Ex. C to Gernes Affidavit*, Depo. pp. 8: 5-13; 9: 1-7; 12: 26 through 13: 4; 38: 6-10; and 50: 1-10; see also Ex. 33 (police overhead photograph, marked by appellant with "S" to indicate his stopping point just before this accident); R.A. 118.) Appellant admitted that where he stopped, his view to the east of the oncoming train was obstructed. (*Ex. C to Gernes Affidavit*, p. 9: 1-10; R.A. 118.) Appellant explained that he stopped at a place with an obstructed view because "[u]sually we heard the trains from far away." (*Id.*, p.9: 26-30.) He also was used to relying on seeing a headlight to know of a train's approach: "Usually I do this at night. I see a light from far away. And I did this for almost a year." (*Id.*, p. 42: 18-27.) He admitted that his decision to stop where he could not see down the tracks and then to proceed was "maybe" a bit like playing "Russian Roulette." (*Id.*, p. 18: 5 - 14.)

Appellant testified he was looking away from the oncoming train before the accident. He proceeded onto the railroad tracks. When he realized the train was approaching, he stopped his semi on the tracks trying to change gears, a violation of the Minnesota Commercial Driver's License regulations:

- Q "Proceed only when you are sure no train is coming."² How could you have been sure that no train was coming when you ended up on the tracks with a train bearing down on you?
- A As to my first stop, **I'm looking to the highway** [beyond the crossing] **because I have to get to the highway. On my right side**, cars going faster than from left, because that's a speed limit change, from right to the left. **And I was looking on my**

² All quoted material during the appellant's deposition was from the Minnesota Commercial Driver's Manual. (See *Ex. C to Gernes Affidavit*, p. 38: 21-29; R.A. 118.)

right [away from the oncoming train], to be sure there's no cars back. And then when I looked to the left [toward the oncoming train], I saw the train, and it's the last thing in my mind, stop and avoid it. I was hit.

* * * * *

Q . . . Tell me how you became sure that no train was coming before you proceeded:

A Okay. This is my second day working at day shift. Usually I do this at night. I see a light from far away. And I did this for almost a year. And that's when you do every day, you can see light coming, train blowing horn from far away, and you prepare, is the train coming, so you know train coming. That's a day shift, and I do what I usually do, I stop, look, listen, go. That's what I do.

Q But if the fence and the tree blocked your view to the east, then **how could you have been sure that no train was coming before you proceeded?**

A I don't know.

* * * * *

Q . . . "Do not stop, change gears, pass another vehicle or change lanes while part of your vehicle is in the crossing." Now, **part of your vehicle was in the crossing, isn't that correct?**

A Yes.

Q [And] you stopped, didn't you?

A Yes.

Q And you changed gears, didn't you?

A Yes.

Q You violated this regulation, didn't you?

A No.

Q How did you not violate it?

A Because I changed to avoid the situation.

Q By stopping and changing gears?

A Yes.

(Ex. C to Gernes Affidavit, pp. 41:27 through 42:7; 42:18 through 43:1; and 44:26 through 45:24, respectively; R.A. 118)(**emphasis** added).

Assuming appellant's testimony to be true for the purposes of this argument only, he stopped where his view of the oncoming train was obstructed by features on private (not railroad owned) property. Because he did not hear a train approaching, and while

looking in the opposite direction of the oncoming train, appellant elected to pull forward onto the railroad tracks. When he realized the train approach was imminent, he stopped on the track and tried to change gears, in violation of the Commercial Driver's Manual directives. The undisputed evidence in this matter established that appellant stopped at a location where his view was obstructed by obstacles located outside of the railroad's right of way. (See *Ex. C to Gernes Affidavit*, Depo. pp. 9: 1-7; 12: 26 through 13: 4; 38: 6-10; and 50: 1-10; see also Ex. 33 (police overhead photograph, marked by appellant with "S" to indicate his stopping point); R.A. 118.) Appellant then pulled onto the railroad tracks, failing to yield the right-of-way to the oncoming train, despite it being plainly visible and in hazardous proximity to the crossing.

The District Court in this matter noted that appellant had testified that he had stopped prior to crossing the railroad tracks at the time of the accident, but that he was "inconsistent as to where he stopped." (*Order*, p. 9; R.A. 172.) The Court found that appellant "later explained that he did not see the westbound Canadian Pacific train because he was looking ahead to Highway 13 to determine if he would be able to get his tractor-trailer onto the busy highway." (*Order*, p. 10; R.A. 172.) The Court determined that there was "no evidence that Plaintiff ever looked to his left [the direction of the oncoming train] after his stop at the stop sign until approximately two seconds before the collision." (*Order*, p. 43; R.A. 172.)

In support of its motion for summary judgment on preemption grounds, Union Pacific presented documentation from the Minnesota Department of Transportation (MnDOT), supported by MnDOT employees Mary Ann Frasczak's and Timothy Spencer's affidavits. (R.A. 120 and 121.) This MnDOT information was voluntarily

produced by MnDOT to all parties, and then exchanged by all parties during discovery in this litigation.

It was undisputed that at the time of the accident, the intersection was protected by warning devices, including advanced warning signs, crossbucks and a stop sign. (*Order*, p. 36 and p. 40, R.A. 1722; see also *Gernes Affidavit – Ex. C, Zimbovskiy Depo.* pp. 111: 17 through 112: 2, R.A. 118.) The signs were installed as part of federal Aid Project PRP RRS 0092 (985) for improvements to grade crossings in the Twin Cities area, including crossings in Scott County, Minnesota. (*Fraszczak Affidavit*, ¶ 2, R.A. 120; and *Spencer Affidavit*, Exhibit B; R.A. 121.) The project began with the issuance of a June 14, 1993 “Statement of Need and Petition for Investigation Hearing and Order” (*Spencer Affidavit*, Exhibit A, R.A. 121) and a July 21, 1993 Order (*Spencer Affidavit*, Ex. B, R.A. 121). Approval for the project was given by the Federal Highway Administration (“FHWA”), and an Agreement with the railroad for installation of signage was reached (*Spencer Affidavit*, Exs. C-D, R.A. 121). The FHWA approved and paid 90 percent (90%) of the cost of the project, including the signs in place at the Yosemite Avenue crossing on the date of this accident (*Fraszczak Affidavit*, ¶ 2, R.A. 120). Following installation, the FHWA inspected the work and issued an Inspection Report and final approval (*Spencer Affidavit*, Exs. E and G, R.A. 121). Appellant testified that these state and federally approved railroad crossing and stop signs were in place and visible on the date of the accident. (*Gernes Affidavit- Ex. C, Zimbovskiy Depo.* pp. 111: 17 through 112: 2, R.A. 118.)

The District Court properly considered the undisputed evidence, and determined that the Fraszczak and Spencer affidavits, with their accompanying attachments,

established the project installing warning devices at the subject crossing was “actually carried out with use of 90% federal finds.” (*Order*, p. 40, R.A. 172.) The Court found there was no dispute of this material fact, although appellant argued against their admissibility under 23 U.S.C. § 409. (*Order*, pp. 36 and 40, R.A. 172.) Holding that such documents were admissible to defend on preemption grounds; the Court found that appellant’s argument that 23 U.S.C. § 409 somehow barred the affidavits and attachments would undermine the purpose of the statute, and thus was without merit. (*Order*, p. 38, R.A. 172.) The Court determined that, as there was no dispute that federal funds were expended on the warning devices installed at the subject crossing at the time of this accident, federal law preempted the inadequate signalization claims. (*Id.*)

The Court also determined that Exhibits A and B to the Timothy Spencer Affidavit documented MnDOT’s determination that signage at the subject crossing was “adequate and appropriate” under Minn. Stat. § 219.402; thus state law also preempted appellant’s inadequate signalization claims. (*Order*, pp. 40-41, R.A. 172.)

LEGAL ARGUMENT

I. Standard of Review

Any appellate review of a district court’s grant of summary judgment considers two basic questions: whether genuine issues of material fact exist, and whether the district court erred in its application of the law. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002); *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A reviewing court must defer to the district court’s findings, which should not be set aside

unless the findings are clearly erroneous and the reviewing court has a definite and firm conviction that a mistake occurred. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996). A determination to grant summary judgment will not be disturbed when evidence relied on by the appealing party “merely creates metaphysical doubt as to a factual issue.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Instead, a party disputing summary judgment must present substantial evidence of a genuine issue of fact; mere allegations of a dispute of fact will not suffice. *Id.*, at 69-70.

The appellate court can review de novo whether or not summary judgment was appropriate as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *DLH Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). This Appellate Court has previously determined that an inadequate signalization claim was preempted by federal law when the undisputed evidence established, through MnDOT records, that the FHWA approved the crossing’s warning devices and federal funds participated in their installation. *Hernandez v. State*, 680 N.W.2d 108 (Minn.App. 2004).

II. The District Court Properly Ruled that Federal Law Preempted Appellant’s Common Law Negligence Claims

Questions of federal preemption are subject to de novo review. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008); *In re Speed Limit for Union Pacific R.R.*, 610 N.W.2d 677, 682 (Minn.App. 2000), *review dismissed* (Minn. July 7, 2000). It is well established law that tort claims are preempted through a combination of federal statutes and regulations. See *CSX Transportation, Inc. v. Easterwood*, 506 U.S. 658, 670 (1993).

The Federal Railroad Safety Act of 1970 (FRSA) declares that states may enact their own laws or regulations related to railroad safety until such time as the Secretary of Transportation issues a regulation or order that covers the subject matter of the state requirement. 49 U.S.C. § 20106. Pursuant to FRSA, various regulations have been adopted that cover the subject matter of warnings at grade crossings, including those at 23 CFR §§ 646.214(b)(3) and (4). These regulations provide that grade crossing warning devices deemed appropriate by a state regulatory agency are subject to approval by the FHWA.

The U.S. Supreme Court has previously addressed crossing-accident cases, declaring that federal regulations concerning railroad crossings will preempt state law and common-law standards. In *CSX Transportation, Inc. v. Easterwood*, 506 U.S. 658, 113 S.Ct. 1732, 113 S.Ct. 1732 (1993), the Court held that claims of inadequate warning devices at crossings are preempted when federal funds "participate in the installation of such warning devices." *Easterwood*, 507 U.S. at 670, 113 S.Ct. at 1737. Under "[45 U.S.C.] § 434 [the predecessor to 49 U.S.C. § 20106], applicable federal regulations may pre-empt any state law, rule, regulation, order, or standard relating to railroad safety. Legal duties imposed on railroads by the common law fall within the scope of these broad phrases." *Easterwood*, at 664.

Under §§ 646.214(b)(3) and (4) a project for the improvement of grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] devices.' Thus . . . §§ 646.214(b)(3) and (4) displace state and private decision making authority by establishing a federal law requirement that certain protective devices be installed or federal approval be obtained . . . In short, for projects in which federal funds participate in the installation of warning devices, the secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The secretary's regulations, therefore, cover the subject matter of state law

which. . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 670-71, 113 S.Ct. at 1741.

In *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) the Supreme Court further addressed preemption, concluding:

The FRSA pre-empts [a] state tort claim that the advance warning signs and reflectorized crossbucks installed at the . . . crossing were inadequate. . . Once . . . the signs were installed using federal funds, the federal standard for adequacy displaced [state] statutory and common law addressing the same subject, thereby pre-empting [the Appellant's] claim.

Shanklin, 529 U.S. at 358-59; 120 S.Ct. at 1477.

(a) Appellant's Claims are Barred as Federal Funds Paid for, and the FHWA Approved Installation of, the Subject Crossing's Signalization; Once Preemption Exists, All Subsequent Claims Are Barred

Appellant admits that the U.S. Supreme Court cases of *Easterwood* and *Shanklin* established that "inadequate warning device claims are preempted by the FRSA when federal funds paid for and the FHWA approved the installation of the warning devices that are in place and operating on the day of an accident." (*Appellant's Brief*, p. 21.) It is undisputed that such funding and approval existed in this matter. (*Order*, p. 40, R.A. 172.)

Once a determination of adequacy is made, and federal funds have been expended, then preemption bars subsequent claims - even if it is later determined that different warning devices are appropriate. *Shanklin*, 529 U.S. at 358; *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996). "[W]hether conditions at the crossing have changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Shanklin*, 529 U.S. at

358; see also *Armijo*, 87 F.3d at 1192 (“the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad’s and the state’s hands under 23 C.F.R. § 646.214(b)(3) & (4).”); *Bock v. St. Louis Sw. Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999) (“Preemption is not a water spigot that is turned on and off simply because a later decision is made to upgrade a crossing.”). Once federal funds have been expended, as here, preemption bars crossing device claims because the determination regarding signal adequacy is no longer in the railroad’s purview.

(b) Appellant Does Not Dispute the Fact that the Crossing at Issue Was Federally Funded

The lower court in this matter determined that the subject crossing’s warning devices were installed using federal funds. (*Order*, p. 40, R.A. 172.) Specifically, Judge Hooten noted that there was no dispute of this material fact, although appellant argued against the admissibility of documents which established federal funding. (*Order*, pp. 36 and 40, R.A. 172.) Consistent with that finding, appellant admitted in his brief on appeal that Union Pacific had submitted documents “linking a federal-aid project to the warning signs in place at the Yosemite Avenue Crossing.” (*Appellant’s Brief*, p. 24.) However, on appeal he again asserted that 23 U.S.C. § 409 somehow barred Union Pacific from submitting evidence that federal funds paid for, and the FHWA approved the installation of, warning devices. (*Id.*, p. 22.) Appellant objects to the lower court’s consideration of the MnDOT crossing file documents, asserting that the 23 U.S.C. § 409 “by its plain language” does not allow production by MnDOT employees of these records. (*Id.*, p. 25.) This argument requires the Court to read more into the “plain language” of the statute than is there.

(c) Admissibility of Documents Under 23 U.S.C. § 409

In its entirety, 23 U.S.C. § 409 states:

§409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected 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 148 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 subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Beginning in 1966, Congress enacted legislation to improve the safety of national highways, adopting several programs to assist states in identifying and funding roadways in need of improvement.³ Not long after enacting these programs, the Secretary for the Department of Transportation reported concerns regarding the lack of confidentiality, and the fear that diligent efforts to identify roads eligible for federal aid would increase liability for accidents that occurred at identified locations before improvements could occur. *Pierce County v. Guillen*, 537 U.S. 129, 134 (2003), citing H.R. Doc. No. 940-386, p. 36 (1976).

Congress enacted 23 U.S.C. § 409 in response to the concerns, to encourage candid evaluation and correction of highway and railway safety hazards by shielding the process from private tort litigation. *Pierce County v. Guillen*, 537 U.S. 129, 133-135, 123 S. Ct. 720, 154 L.Ed.2d 610 (2003); accord *Robertson v. Union Pacific Railroad*

³ See 23 U.S.C. §§ 130, 144 and 152 (Railway-Highway Crossings, Highway Bridge Replacement and Rehabilitation Program, and Hazard Elimination Program, respectively).

Co., 954 F.2d 1433, 1435 (8th Cir. 1992); *Harrison v. Burlington Northern Railroad Co.*, 965 F.2d 155, 160 (7th Cir. 1992). The statute protects any information collected or authored in the interest of developing safety projects or future plans eligible for Federal Funds from being used against the state or an involved railroad in civil litigation. See *Harrison v. Norfolk & Western Railway Co.*, 982 F.Supp. 620, 623-624, (N.D.Ind. 1997). Nothing in the statute's plain language limits the application of this section solely to governmental entities, or prevents the state from providing a railroad with the documents necessary to establish preemption, as appellant suggests. Further, no case law exists in support of this assertion.

Other courts have however specifically found that the provisions of 23 U.S.C. § 409 extend to protect both States and railroads. The United States District Court for the Southern Division of Alabama wrote:

The Court agrees that Section 409 extends to otherwise protected information compiled or collected by railroads just as it does to information compiled or collected by state agencies. **The passive voice utilized by the statute is broad enough to encompass railroads**, and the railroads' significant role in identifying and correcting rail crossing hazards, recognized by statute and regulation, is sufficient to demonstrate Congress' intent that railroads be protected. See also *Taylor v. St. Louis Southwestern Railway Co.*, 746 F.Supp. 50, 54 (D.Kan. 1990); *Rothermel v. Consolidated Rail Corp.*, 1998 WL 110010 at *4 (Del.Super.1998); *Fry v. Southern Pacific Transportation Co.*, 715 So.2d 632, 637 (La.App. 1998).

Powers v. CSX Transportation, Inc., 177 F.Supp.2d 1276, 1277 at fn. 1, (2001)

(**emphasis added**).

Appellant argues that the 23 U.S.C. § 409 privilege is conferred "on the State, acting through MnDOT", citing *Pierce County v. Guillen*, 537 U.S. 129 (2003). He then

proposes that the § 409 privilege is solely for the state to assert or waive.⁴ (*Appellant's Brief*, p. 25-26.) Appellant's reliance on *Pierce* is misleading. The *Pierce* court never addressed the position advocated by appellant; rather it was a case involving a constitutional challenge to the federal statute itself. *Pierce*, 537 U.S. at 140. While the Court determined that 23 U.S.C. § 409 did survive a constitutional challenge; the Court made no determination regarding whether the scope of 23 U.S.C. § 409 is limited to state entities. To date, Respondent has found no court decision supporting the position advocated by the appellant. However, courts *have* consistently ruled that railroads, in order to establish preemption, are allowed to present exactly the same type of § 409 evidence that appellant here asks this Court to bar.

(d) Court Decisions Allow Railroads to Present § 409 Documentation to Establish a Preemption Defense

The United States Supreme Court in *Norfolk Southern v. Shanklin*, 529 U.S. 344 (2000) referred to documents establishing FHWA approval, and records establishing federal funding for warning devices. These references demonstrate that the Supreme Court considered it appropriate for a railroad to present DOT records in order to establish a preemption defense. In *Shanklin* (which considered whether or not the Federal Railway Safety Act, 49 U.S.C. § 20101, *et seq.*, in conjunction with the Federal Highway Administration (FHWA) regulations, pre-empted state tort actions), the Supreme Court specifically relied on evidence that the Tennessee Department of Transportation (TDOT) had determined that certain warning devices were appropriate,

⁴ In this case, even if the Court determines that the privilege must be waived by the State in order for the documents to be admissible, the undisputed facts here demonstrate that MnDOT did in fact waive the privilege. (See *infra*, § II.(f).)

and that FHWA approval had been granted. See *Shanklin*, 529 U.S. at 350. The Court noted:

And **because the TDOT determined that warning devices** other than automatic gates and flashing lights **were appropriate**, its decision was subject to the approval of the FHWA. See § 646.214(b)(4). **Once FHWA approved the project** and the signs were installed using federal funds, the federal funds standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby preempting respondent's claim.

(*Id.*, 529 U.S. at 358-59)(**emphasis added**). Thus, the Court acknowledged the railroad's presentation of DOT determinations, and FHWA approval, to support its argument for preemption.

Courts have relied upon evidence from DOT files to determine whether or not preemption applies in other grade crossing cases as well. This Court, in an unpublished decision, noted that affidavits submitted by two MnDOT employees demonstrated that the FHWA had approved the crossing protection at the involved crossing, and that the protections had been paid for by federal funds, thereby preempting negligence claims. *Ellingson v. Burlington Northern and Santa Fe Railway Co.*, 2006 WL 696315, *5 (Minn.App., March 21, 2006).

In the unreported case of *Burlington Northern R. Co. v. Deatherage*, a U.S. District Court specifically rejected an argument that a railroad should not be allowed to prove the facts of preemption through DOT documentary evidence. The *Deatherage* plaintiff argued that § 409 barred the railroad from using state DOT documents to prove that federal funds had participated in a crossing upgrade project. The court ruled that:

to accept [the proposition that 409 precludes all evidence of federal funding] **would eliminate the doctrine of federal preemption of inadequate signage claims as there would be no way to prove that**

the federal funds were used to install or upgrade the signalization at specific crossings.

Burlington Northern R. Co. v. Deatherage, 1997 U.S. Dist. LEXIS 9886 (N.D. Miss. 1997)(**emphasis added**). Thus the court concluded that allowing a plaintiff to use 23 U.S.C. § 409 to bar presentation of documents needed to establish federal preemption under 49 U.S.C. § 20106 would defeat the purpose of Congress' legislation. *Id.*

Similarly, in *Renfro v. Burlington Northern and Santa Fe RR*, an appellate court considered the argument that 23 U.S.C. § 409 prevented a defendant railroad from attaching documents in support of its summary judgment motion. The argument was flatly rejected, with the Court noting that "the discovery and evidentiary privilege established by Section 409 can be waived by the party entitled to assert the privilege." *Renfro v. Burlington Northern and Santa Fe RR*, 945 So.2d 857, 860 (La.App. 3 Cir. 2006). See also *Borden v. Kansas City Southern Railway Co.* 895 So.2d 787, 802 (La.App. 2 Cir. 2005)(a party entitled to assert a §409 privilege may also elect to waive that privilege regarding documents used to support summary judgment arguments; the documents are not rendered inadmissible simply because they were not produced in discovery); *Hargrove v. Missouri Pacific R. Co.*, 861 So.2d 903, 905-907 (La.App. 2003)(rejecting appellant's request to use § 409 to bar the railroad from presenting evidence in support of its summary judgment motion).

The Circuit Court of Arkansas, in an unpublished decision, also rejected an argument that 23 U.S.C. § 409 barred consideration of certain documents presented by the railroad to support a motion for summary judgment on preemption grounds. *Fletcher v. Union Pacific Railroad Company*, 2005 WL 6755760 (Ark.Cir. Feb. 11,

2005). The Court recognized that the documents the plaintiff wanted stricken would be subject to the protections of 23 U.S.C. § 409, but determined:

...if, as Fletcher argues, § 409 prevents the court's consideration of the documents on the threshold question of whether preemption has occurred, then the court would be unable to make an initial determination as to whether the preemption provisions of 23 U.S.C. § 20106 even applied. Statutes should be interpreted to avoid unreasonable results whenever possible. [citations omitted]. . . Interpreting 23 U.S.C. § 409 to preclude consideration of the documents would produce an untenable result.

Fletcher, 2005 WL 6755760, *2 (Ark.Cir. Feb. 11, 2005.)

Appellant cites no case law directly on point in support of his assertion that evidence from DOT files, and supporting affidavits from MnDOT employees, are inadmissible under 23 U.S.C. § 409 when offered to establish preemption. (See *Appellant's Brief*, p. 28.) Appellant admits, at p. 27 of his brief, that *Hester v. CSX Transportation, Inc.* allowed the railroad to establish federal preemption using state Department of Transportation (DOT) file documents and supporting affidavits from DOT employees. *Hester v. CSX Transportation, Inc.*, 61 F.3d 382, 386-87 (5th Cir. 1995). Appellant urges this court to disregard *Hester* on the basis that there was no indication in the ruling "that the plaintiff ever objected to the admission of those documents at trial." (*Appellant's Brief*, p. 27.) Citing to *Walden v. Department of Transportation*, 27 P.3d 297 (AK 2001), appellant urges that *Walden* supports his interpretation of 23 U.S.C. § 409. (*Id.*) It does not.

In *Walden*, the ability of a non-state entity to assert/waive 23 U.S.C. § 409 provisions was never an issue. To the extent that *Walden* relates to this matter, the decision upholds the assertion that the 23 U.S.C. § 409 protections apply to DOT documents, once asserted. Otherwise, that ruling has little bearing on this matter. In

Walden, a DOT Design Study Report that had been produced in discovery became an issue at trial. The plaintiff agreed in open court that the document was properly excluded from evidence at trial, but then argued an expert should be allowed to testify regarding the report's conclusions. *Walden*, 27 P.3d at 303-04. On appeal the Court upheld the document exclusion by the trial court, stating that § 409's protections could be waived in pre-trial discovery production, then later asserted at trial:

Even if *Walden* had not waived this issue, **we would affirm nonetheless because the superior court did not err in excluding the DSR** [the state DOT design study report]. The superior court excluded the DSR on the basis of 23 U.S.C.A. § 409, which explicitly states that reports made for the purpose of planning safety enhancements for or developing "any highway safety construction project" which may be implemented using highway funds cannot be subject to discovery or admitted in any state or federal action for damages arising from an accident occurring at a locale mentioned in the report. . . . *Walden's* argument [that the DOT waived the protections of 23 U.S.C. § 409] nonetheless fails because, **at most**, by that action **DOT waived only the protection of the statute** [23 U.S.C. § 409] with respect to discovery, not to its admission in court.

Walden, 27 P.3d at 304-05 (**emphasis added**). Nothing in the decision addresses appellant's argument that a non-state entity is somehow barred from using DOT documents to establish federal funding and a preemption defense.

(e) *Boyd and Vega Do Not Support a Finding that 23 U.S.C. § 409 Bars Production of Documents Needed to Establish a Preemption Defense*

Appellant also argues that the evidentiary bar of 23 U.S.C. § 409 cannot be waived, that the "statutory bar is absolute", citing to *Boyd v. National Railroad Passenger Corporation*, 10 Misc.3d 822, 821 N.E.2d 95 (Mass.App. Ct. 1/20/05), *rev'd on other grounds*, 845 N.E.2d 356 (Mass. 4/14/06) and *Vega v. State*, 804 N.Y.S.2d 229 (N.Y. Court of Claims 2005). (*Appellant's Brief*, pp. 25-26.) These cases are distinguishable from the case at bar.

In both cases cited by appellant, the plaintiffs were trying to submit documents protected by 23 U.S.C. § 409 in order to defeat motions for summary judgment filed by the defendant railroad or State. See *Boyd*, 821 N.E.2d at 795; *Vega*, 804 N.Y.S.2d at 230. The documents at issue were not affidavits and proof of FHWA approval, as in this matter, but were: documents, reports, testimony, and surveillance tapes installed to evaluate safety enhancements at railroad crossings (in *Boyd*); and accident reports, incident reports, and intersection diagrams (in *Vega*). *Boyd*, 821 N.E.2d at 795; *Vega*, 804 N.Y.S.2d at 233. The respective courts, after considering the purpose of the statute and judicial precedent, determined that § 409 is a shield provided by Congress to prevent the use of such documents in civil litigation, because encouraging the “candid study, design and construction of highway safety improvements is paramount” public policy. *Vega*, 804 N.Y.S.2d at 825; see also *Boyd*, 821 N.E.2d at 795-96. Therefore, the respective judges declined to allow private litigants to utilize § 409 documents in their civil litigation against the States and railroads, in accordance with the statute. *Id.* To extend these rulings and now find, as appellant argues, that their holdings apply to bar the state or railroads from presenting § 409 documents in order to prove federal preemption, would be completely contrary to the purpose of 23 U.S.C. § 409.

Judge Hooten found persuasive prior holdings that the intent of § 409 is to prohibit federally required records from being used as a tool in private litigation **against the railroad**. *Order*, p. 37; R.A. 172; citing *Robertson v. Union Pacific*, 954 F.2d 1433, 1435 (8th Cir. 1992) and *Palacios v. Louisiana & Delta R.R.*, 740 So.2d 95, 98 (La. 1999)(when enacting § 409, Congress intended to encourage the free flow of safety

information by precluding the possibility that such information would later become admissible in civil litigation). As Judge Hooten stated:

Plaintiff's interpretation of the statute – that a railroad cannot even present limited information regarding the use of federal funds for the subject crossing – actually transforms this statute, which shields the railroads and States from claims based upon their investigations, into a sword, in that such interpretation forces railroads to give up any federal preemption defenses in cases where there is federal funding of improvements. . . .

By allowing Union Pacific to present evidence of federal funding of improvements at a railroad crossing to establish federal preemption defense, but disallowing any evidence of any of the underlying investigation and studies done by the railroad and State that lead to the construction of signage at the subject crossing at trial, the Court is able to give full effect to the intent of section 409. At the same time, the Court can avoid the absurdity of interpreting section 409 as requiring a railroad to give up its federal preemption defense.

Order, p. 38; R.A. 172.

(f) MnDOT Waived the 23 U.S.C. § 409 Privilege

Even if the Court were to consider appellant's statutory interpretation, *arguendo*; this argument is irrelevant under these facts. Any privilege was already waived by the state as to pre-trial discovery and as to use of the MnDOT records for the summary judgment motion. (See Affidavits of MnDOT employees Spencer and Fraszak, R.A. 121 and 120.) The documents which establish federal preemption for the subject crossing were voluntarily produced by MnDOT to both appellant and respondents. This production, coupled with the affidavits submitted by MnDOT employees in support of Union Pacific's Motion for Summary Judgment, clearly constituted a waiver of any privilege under § 409 as to the documents at issue. See *Ellingson v. Burlington Northern and Santa Fe Railway Co.*, *supra*, p. 16. The District Court properly considered evidence from the MnDOT file on the issue of preemption. This court should

affirm the district court's grant of summary judgment on appellant's inadequate signalization claim where common law negligence claims are preempted by federal law.

III. The District Court Properly Ruled that State Law Precluded Appellant's Common Law Negligence Claims

In Minnesota, warning devices placed at railroad crossings are appropriate as a matter of law once approved by State regulatory entities. *Minn. Stat. § 219.402* (2010). The statutes provide that the Transportation Regulation Board (as part of the Minnesota Department of Transportation) determines what warning devices are needed at railroad-highway crossings. *Minn. Stat. §§ 219.01 and 219.015* (2010). Once a Commissioner of the Department of Transportation decides which types of devices should be installed at a particular crossing; those devices are deemed adequate and appropriate under state law. The statute reads:

Crossing warning devices or improvements installed or maintained under this chapter as approved by the commissioner or any predecessor, whether by order or otherwise, are adequate and appropriate warning for the crossing.

Minn. Stat. § 219.402 (2010).

Appellant does not dispute the fact that the subject crossing's warning devices were found to be "adequate and appropriate protection" for the subject crossing under *Minn. Stat. § 219.402*, as found by MnDOT and the lower court. (See *Order*, p. 40-41; R.A. 172; see also *UP's Motion for Summary Judgment*, "Spencer Affidavit", Exhibit A, p.7, R.A. 121). Instead he asserts that the evidence that Union Pacific presented is inadmissible and that therefore *Minn. Stat. § 219.402* does not operate to bar his state law negligence claims, promoting his position that the statute applies "to relieve the

State of any legal responsibility”, but not a railroad. (*Appellant Brief*, p. 32.) Both arguments are inconsistent with the law.

(a) *Argument that the District Court Relied on “Inadmissible” Evidence Fails as a Matter of Law*

Appellant’s issue regarding the evidence considered by the District Court in its decision to dismiss the inadequate signalization claim under state law is identical to his issue with the federal preemption claim - appellant asserts that the documentation considered was inadmissible under 23 U.S.C. § 409. (*Appellant’s Brief*, pp. 28-29.) Appellant’s assertion that the evidentiary bar of 23 U.S.C. § 409 cannot be waived by the railroad fails for all of the reasons set forth above at pp. 9-22.

(b) *The District Court Properly Dismissed the State Law Negligence Claims for Inadequate Signalization; the Required Warning Devices Were Found to be “Adequate and Appropriate” for the Purposes of Minn. Stat. § 219.402*

This Appellate Court has previously held that because signals installed pursuant to an Order of the State Agency are “adequate and appropriate” crossing protection under the plain language of § 219.402, any claim that the railroad should have installed different protection must fail as a matter of law. *McEwen v. Burlington Northern Railroad Co., Inc.*, 494 N.W.2d 313, 316 (Minn.App. 1993). The *McEwen* Court felt that the legislature was quite clear: as a matter of law, warning devices installed “under this chapter” are “adequate and appropriate.” Minn. Stat. § 219.402 (2010).

Jurisdictions across the nation with similar legislation, where agency approval of grade crossing warning devices determines the required level of protection at that crossing, are in accord. Those courts also did not limit application of their laws to state

entities, but found that summary judgment for railroads on tort claims was appropriate in light of similar legislation.

In *Chandler v. Illinois Central Railroad Co.*, 798 N.E.2d 724, 207 Ill.2d 331 (Ill. 2003), dismissal of inadequate signalization claims against a railroad was found appropriate because the state's finding of adequate and appropriate crossing signalization created "a conclusive legal presumption" that the claims were properly dismissed as a matter of state law. *Id.*, 798 N.E.2d at 731. The federal district court for the Eastern District of Missouri similarly noted: "If a state exercised jurisdiction over a crossing, be it individually or generally, preemption occurs." *Bryan v. N. & W. Ry. Co.*, 21 F.Supp.2d 1030, 1038 (E.D. Mo. 1997), *aff'd* 154 F.3d 899 (8th Cir. 1998). The Court of Appeals for the Eighth Circuit agreed, finding that railroads may not be held liable for inadequate safety devices once the state (Missouri) DOT exercised and retained jurisdiction over a crossing's warning devices. *Moore v. Atchison, Topeka & Santa Fe Ry. Co.*, 966 F.2d 351, 353 (8th Cir. 1992). The Illinois Court of Appeals found that once a state approves signalization at a crossing under state law, no further duty is owed by a railroad because "[t]he statute is clearly intended to foreclose litigation over the adequacy of approved warning devices. Plaintiffs cannot circumvent the purpose of the statute through the 'back door'." *Danner v. N. & W. Ry. Co.*, 648 N.E.2d 603, 606 (Ill.App. 1995).

Appellant's request that this Court disregard the provisions of § 219.402, that a crossing configuration approved by a state agency is deemed "adequate and appropriate" as a matter of law, should similarly fail. For the subject crossing, the Minnesota Transportation Regulation Board, by Order dated July 21, 1993, concluded

that a number of improvements were needed along the Chicago North Western corridor.⁵ The Board ordered crossbucks, signs, and/or pavement markings to be installed at highway-railroad crossings as identified in the Statement of Need and Petition. The Yosemite crossing in Savage, MN was included in that Order. The Order, executed by Chairman Richard Helgeson, specifically deemed the crossing warnings as adequate and appropriate, as required under Minn. Stat. § 219.402. (*Affidavit of T. Spencer*, ¶ 4, Ex. B, R.A. 121.) It is undisputed that the signage and warning devices deemed “adequate and appropriate” by the state were in place at the time of the involved accident. (*Ex. C to Gernes Affidavit, Zimbovskiy Depo.*, pp. 111: 17 through 112: 2, R.A. 118.)

By approving passive warning signs as part of an improvement project, the Minnesota Department of Transportation specifically triggered the “adequate and appropriate” protections available under Minn. Stat. §219.402. Once the agency evaluated the corridor project, including physical characteristics, traffic and train volumes, etc., then determined that passive warning devices were proper, as documented by Chairman Hegelson’s July 21, 1993 Order, MnDOT met the requirements of § 219.402. That statute places the determination of protection into the hands of a specialized agency; not in the hands of the railroad, local authorities, or a jury evaluating a crossing after the fact. Therefore, this court should affirm the district court’s grant of summary judgment on appellant’s inadequate signalization claims where those negligence claims are precluded by state law.

⁵ The corridor which includes the subject crossing.

IV. APPELLANT'S COMPARATIVE NEGLIGENCE REQUIRED SUMMARY JUDGMENT AS A MATTER OF LAW

Orders granting summary judgment will be affirmed if summary judgment can be sustained on **any** grounds. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn.App. 1995), *review denied* (Minn. Feb. 13, 1996). Although Judge Hooten reserved ruling on the argument that appellant's negligence exceeded respondents' as a matter of law; the evidence requires a finding that appellant's negligence exceeded the railroads' negligence, if any, as a matter of law. As set forth in the facts, *supra* pp. 3-6, the evidence surrounding the occurrence of this accident establishes that the appellant stopped behind a fence located on private property, where his view of the train track was obscured, then proceeded onto the tracks in front of an oncoming train without ever looking toward the oncoming train until just two seconds before the collision. (*Order*, pp. 9-10 and 43; R.A. 172.)⁶

When a plaintiff admits that he breached his duty to yield the right-of-way to an oncoming train and to take precautions, a determination that the plaintiff was more negligent than the defendant railroad is appropriate as a matter of law. *Winge v. Minnesota Transfer Railway Co.*, 290 Minn. 399, 201 N.W.2d 259 (Minn. 1972). Here, using appellant's evidence, he unreasonably stopped well back from the crossing where his view was obstructed by a fence and/or tree on private property. He then proceeded to pull onto the train tracks while looking away from the oncoming train. (*Union Pacific Memorandum in Support of its Motion for Summary Judgment*, p. 19; R.A. 117.) He never looked toward the train until two seconds before the collision. (*Order*, p. 43; R.A.

⁶ For an even more detailed discussion of the facts supporting Summary Judgment on comparative fault, please also see the Response Brief of co-Respondent Soo Line/Canadian Pacific, "Statement of the Case, section "C."

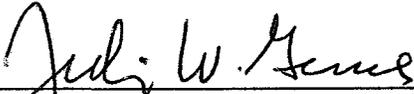
172.) Assuming appellant's testimony and evidence is true solely for the purposes of this appeal, a determination that appellant was more negligent as a matter of law is appropriate under the facts of this case.

CONCLUSION

The District Court properly considered evidence from the MnDOT files that established federal preemption and state preclusion of appellant's inadequate signalization claims. Additionally, the evidence established that appellant was negligent and that his negligence was the primary cause of the subject accident. For all reasons stated herein, Respondent Union Pacific Railroad Company respectfully requests that this Court affirm the order for summary judgment in all respects.

Dated: November 4th, 2011.

DONNA LAW FIRM, P.C.

By:  _____

David A. Donna #163624
Julius W. Gernes #0189704
Erica A. Weber #0389557
Suite 350
7601 France Avenue South
Minneapolis, MN 55435
(952) 562-2460

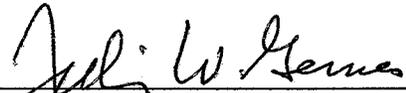
ATTORNEYS FOR RESPONDENT
UNION PACIFIC RAILROAD CO.

CERTIFICATION OF COMPLIANCE

Julius W. Gernes, an attorney for Respondent Union Pacific Railroad Company, hereby certifies that the Respondent's Brief in this matter, including the Statement of the Case, Statement of Facts, Argument, and Conclusion contains 7,314 words, which is less than the 14,000 type-volume limitation set forth in Minn. R. Civ. App. 132.01, subd. 3(a)(1). The count was performed, and the brief was prepared using Microsoft Word 2010.

Dated this 4th day of November, 2011.

DONNA LAW FIRM, P.C.



David A. Donna (#0163624)
Julius W. Gernes (#0189704)
Erica A. Weber (#0389557)
7601 France Ave. S., Suite 350
Minneapolis, MN 55435
952-562-2460
*Attorneys for Respondent
Union Pacific Railroad Co.*