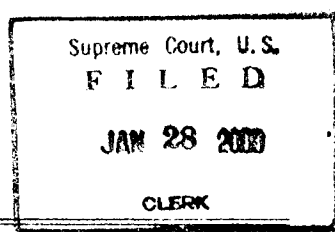


No. 99-312



In The
Supreme Court of the United States

—◆—
NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,
v.

DEdra SHANKLIN, INDIVIDUALLY AND AS
NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

—◆—
On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit
—◆—

BRIEF OF THE ANGELS ON TRACK FOUNDATION,
THE COALITION FOR SAFER CROSSINGS, ACTIVE
PEOPLE AGAINST RAILROAD TRAGEDIES (APART),
HANDS ACROSS THE RAILS, RAILWATCH, AND
THE NATIONAL ASSOCIATION OF RAILROAD
SAFETY CONSULTANTS AND INVESTIGATORS, AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT

—◆—
ROBERT L. POTTROFF, ESQUIRE*
NORBERT C. MAREK, JR., ESQUIRE
MYERS POTTROFF & BALL
320 Sunset
Manhattan, Kansas 66502
(785) 539-4656

* *Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. Lights and gates provide crossing protection that is 90% effective in preventing accidents ..	3
II. Lights and gates provide the most cost effective crossing protection available	7
III. CFR 646.214[b][3] defines “adequate crossing protection” as lights and gates.....	11
IV. Installation of lights and gates has been an affordable option available to the four largest railroads in the United States since 1980	16
V. The Railroad industry made a knowing and intelligent decision to opt for short-term profits by ignoring all state common law duties to upgrade railroad crossings	19
VI. Railroads should not be given the power to create their own preemption defense by manip- ulating the federal funding program	23
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
CASES	
<i>CSX Transp., Inc. v. Easterwood</i> , 507 U.S. 658 (1993)	15, 18, 23, 27
<i>CSX Transportation, Inc. v. Palank</i> , 743 So. 2d 556 (Fla. App. 1999)	17
<i>Shots v. CSX Transportation, Inc.</i> , 38 F.3d 304 (7th Cir. 1994)	13
<i>St. Louis Southwestern R.R., Co. v. Malone Freight Lines, Inc.</i> , 39 F.3d 864 (8th Cir. 1994).....	23
STATUTES AND REGULATIONS	
Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C. 421 <i>et seq.</i>	7
Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130	2, 7, 11, 14
Staggers Rail Act of 1980, Public Law 96-448, 96th Congress, 49 USC 10101, October 14, 1980	17
23 C.F.R. § 646.214(b)(3)(i)	11, 13, 14, 15
MISCELLANEOUS	
U.S. Dep't of Transportation, Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem (1971 Report to Congress) PB206792, (Nov., 1971).....	7, 8, 9, 13, 18

TABLE OF AUTHORITIES – Continued

	Page
U.S. Dep't of Transportation, Railroad-Highway Safety Part II: Recommendations for Resolving the Problem (1972) (1972 Report to Congress), PB 213 115.....	7, 9, 10, 11, 15, 25
United States Department of Transportation, Fed- eral Aid Highway Program Manual.....	14
Federal Highway Administration, U.S. Dep't of Transportation, Manual on Uniform Traffic Control Devices for Streets and Highways (1988) MUTCD	11, 15, 25, 26, 27
Railroad-Highway Grade Crossing Handbook, Sec- ond Edition, FHWA-TW-86-215, Thomas O. Will- ett, Director, Office of Engineering, Federal Highway Administration, September, 1986....	3, 5, 6, 12
Railroad-Highway Grade Crossing Handbook, FHWA-TS-78-214, Dr. R. M. Olson, Federal Highway Administration, August 1978.....	18
The Achievement of Grade Crossing Protection, W. J. Hedley, Assistant Chief Engineer, Wabash Railroad (1949)	3
Factors Influencing Safety at Highway-Rail Grade Crossings, David W. Schoppert and Dan W. Hoyt, sponsored by the American Association of State Highway Officials in Cooperation with the Bureau of Public Roads. (1968) (NCHRP Report 50).....	4
A Study of Railroad Grade Crossing Protection in Houston, C. McEachern, Proc. Inst. Traffic Eng.	4

TABLE OF AUTHORITIES – Continued

Page

Results Accomplished by the Use of the Grade Crossing Protection Fund Established by the Illinois Legislature Beginning September 1, 1955, and Administered by the Illinois Commerce Commission, R.B. Thomas, Illinois Commerce Comm. (1965)..... 4

Accident Reduction at Crossings Protected Under Crossing Protection Fund, California Public Utilities Comm., San Francisco (Aug. 26, 1965) 5

Traffic Control and Roadway Elements: Their Relationship to Highway Safety, Schoppert, D. W., Automotive Safety Found. (1963) 5

Effectiveness of Automatic Crossing Gates in Southern California, 1954 – Through 1963, L.C. Young, California Public Utilities Comm., Los Angeles, (Oct. 1, 1964)..... 5

In the United States District Court for the Western District of Oklahoma, Brenda Burks, et al. vs. Missouri Pacific Railroad Company et al., Case Number CIV-98-204-A, Depositions of Richard Reynolds and Clifford Shoemaker..... 6, 12, 24

In the Circuit Court of Jackson County, Missouri at Kansas City, Kimberly R. Alcorn vs. Union Pacific Railroad Company, et al., Case Number CV-97-31927, Videotaped Deposition of Clifford Shoemaker 6, 12, 16

In the District Court of Caddo County, State of Oklahoma, Steve and Violet Myers, et al. v. Missouri Pacific Railroad Company et al., Case Number CJ-97-46, Deposition of Clifford Shoemaker..... 12, 21, 22

TABLE OF AUTHORITIES – Continued

Page

In The District Court Of Canadian County, State Of Oklahoma, Brenda and Eugene Spence, et al. vs. Missouri Pacific Railroad Company et al., Case No. CJ-97-1-01 Deposition of Clifford Shoemaker 22

In The District Court Of Pierce County, North Dakota, Gene Graumann, et al., vs. Burlington Northern Santa Fe Corporation, et al., Case No. 98-C-2020, Deposition of Spencer Arndt.....24, 25

Report of Harvey Levine, Ph.D. submitted in *In the Circuit Court of Jackson County, Missouri at Kansas City, Kimberly R. Alcorn vs. Union Pacific Railroad Company, et al., Case Number CV-97-3192716, 18*

Report of Harvey Levine, Ph.D. submitted in *State Of Minnesota, In The District Court Of Polk County, Ninth Judicial District, Toni Weaver, et al. v. Burlington Northern Santa Fe Corporation, et al., Case No. C9-99-22.....12, 17*

Report of Harvey Levine, Ph.D. submitted in *In the United States District Court For the Western District of Tennessee Eastern Division, Dwayne E. Mitchell v. Rickey D. Kelley, et al., Western Division, Defendants, Case No. 93-1220 T16, 25*

Harvey Levine, Ph.D., *The Other Side of Staggers*, Traffic World, Vol. 260, No. 9, page 35 (Nov. 29, 1999)..... 16

Memo of Stephen Trimble addressed to all NARTC members dated March 26, 1990 attached as an exhibit to Plaintiffs’ response to Defendants’ Motion for Summary Judgment in *Weaver19, 20*

TABLE OF AUTHORITIES – Continued

	Page
Letter to Stephen Trimble, dated April 17, 1990 ..	19, 20
Union Pacific Railroad Grade Crossing Resource Manual Chapter 6, Section C page V-C-1 and V-C-2, exhibit 4 of Richard Reynolds deposition in <i>Burks</i>	20
Affidavit of Robert A. Schuetze, Esquire attached as an exhibit to Plaintiffs’ response to Defendants’ Motion for Summary Judgment in <i>Weaver</i>	20
Affidavit of William H. Wendling, submitted in <i>In the Circuit Court of Jackson County, Missouri, at Kansas City, Mark Griffin, et al. vs. Kansas City Southern Railway</i> , Case No. CV93-26148	13
Affidavit of Merrick C. Walton submitted in <i>In the District Court of Labette County, Kansas, Miika M. Monohon, et al., vs. Union Pacific Railroad Co.</i> , Case No. 98-C-27-OS	19
Operation Lifesaver, Inc., Hand-out Section 3 attached as an exhibit to Plaintiffs’ response to Defendants’ Motion for Summary Judgment in <i>Weaver</i>	21, 22, 23
Gregory A. Malkasian, <i>Regulatory Issues – Crossing Safety in Oregon</i> , Published in Proceedings of the International Symposium on Railroad-Highway Grade Crossing Research and Safety 1990 in Knoxville, Tennessee	23, 24

INTEREST OF AMICUS CURIAE

This brief is written on behalf of the following concerned groups: The Angels On Track Foundation a non-profit corporation. A foundation with the mission of providing financial support to communities to improve railroad crossing safety in the state of Ohio and to provide information to communities on other sources of funding that can be used to improve crossing safety. The Coalition for Safer Crossings, whose goal is to contribute to a higher level of safety at railroad grade crossings. The organization also seeks to provide information to the public on how to prevent accidents at railroad grade crossings before they happen. Active People Against Railroad Tragedies (APART) a nonprofit corporation dedicated to railroad safety whose goals include attaining active warning systems, crossing gates, lights and bells where needed at railroad crossings. Hands Across the Rails a group dedicated to safety whose motto is “Lights and Gates for Fifty States.” Railwatch a nonprofit corporation dedicated to educating the public about rail safety and holding the nation’s railroads accountable for their dismal safety record. Railwatch is supported by cities, counties, school districts, emergency management districts, local officials, victims of train accidents and their families, shippers and other concerned citizens throughout the United States. The National Association of Railroad Safety Consultants and Investigators a nonprofit corporation. NARSCI is an independent organization of people interested in railroad safety who actively work or consult in railroad safety matters. These groups have agreed to lend their backing to the preparation of this brief because they believe that affirming the Sixth Circuit

will lead to greater safety at railroad grade crossings and encourage the installation of lights and gates at grade crossings.¹

SUMMARY OF THE ARGUMENT

Lights and gates is undeniably the most effective and cost efficient method of providing crossing safety to the motoring public. Congress, the FRA and the FHWA all acknowledged this fact in the formulation and enactment of the 1973 Federal Highway Safety Act. Therefore, in crafting legislation and regulations, "adequate protection" at hazardous railroad grade crossings was defined as lights and gates. Unfortunately, many of this country's crossings did not even meet the minimum requirements for appropriate signing in the early 1970's. Accordingly, some funding was also made available for "correcting deficiencies" at those crossings that did not have the minimum required signing and pavement markings. The rail industry seized upon the opportunity to use this federal funding program as a conduit to immunize railroads from lawsuits based upon their common law duties to provide reasonably safe crossings. Despite deregulation and the profitability that followed, the industry has adopted a uniform position that railroads will not independently fund the installation of lights and gates. In fact, they

¹ Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded by *amicus*, Grant L. Davis, Esq., and Thomas C. Jones, Esq., of the Law Offices of Lantz Welch, P.C., and was written entirely by counsel representing the interested parties.

continue to ignore basic sign maintenance so as to qualify for funding of crossbuck replacements. The industry also actively promotes the dissemination of misleading information about the effectiveness of lights and gates.

It is respectfully requested that this Court identify the industry's manipulation of a federal funding program and affirm each state's right to protect its citizens through a case by case application of the time-proven common law.

ARGUMENT

I. LIGHTS AND GATES PROVIDE CROSSING PROTECTION THAT IS 90% EFFECTIVE IN PREVENTING ACCIDENTS.

The effectiveness of lights and gates in the prevention of accidents at railroad crossings has been recognized for over a half a century. One of the first, and most comprehensive, studies of the effectiveness of various warning devices at railroad crossings was conducted by W.J. Hedley, Assistant Chief Engineer of the Wabash Railroad. His study, "The Achievement of Grade Crossing Protection," was originally published in 1949.² Hedley's work showed lights and gates to be 96% effective.³ In

² The Achievement of Grade Crossing Protection, W. J. Hedley, Assistant Chief Engineer, Wabash Railroad (1949).

³ Railroad-Highway Grade Crossing Handbook, Second Edition, FHWA-TW-86-215, Thomas O. Willett, Director, Office of Engineering, Federal Highway Administration, September, 1986 page 104. Appendix 2.

1968, the American Association of State Highway Officials in cooperation with the Bureau of Public Roads published the National Cooperative Highway Research Program Report 50 entitled Factors Influencing Safety at Highway-Rail Grade Crossings.⁴ The NCHRP Report 50, reviewed Hedley's study and numerous other studies, including the following:

1. "A Study of Railroad Grade Crossing Protection in Houston (1960);"⁵
2. "Results Accomplished by the Use of the Grade Crossing Protection Fund Established by the Illinois Legislature Beginning September 1, 1955, and Administered by the Illinois Commerce Commission (1965);"⁶
3. "Improved Railroad Crossing Protection and Coordination of Traffic Signals with Train Movements."

⁴ Factors Influencing Safety at Highway-Rail Grade Crossings, David W. Schoppert and Dan W. Hoyt, sponsored by the American Association of State Highway Officials in Cooperation with the Bureau of Public Roads (1968) (NCHRP Report 50) Appendix 1.

⁵ A Study of Railroad Grade Crossing Protection in Houston, C. McEachern, Proc. Inst. Traffic Eng., pp. 168-172 (1960).

⁶ Results Accomplished by the Use of the Grade Crossing Protection Fund Established by the Illinois Legislature Beginning September 1, 1955, and Administered by the Illinois Commerce Commission, R.B. Thomas, Illinois Commerce Comm. 13 pp. (1965).

4. "Accident Reduction at Crossings Protected Under Crossing Protection Fund (1965);"⁷
5. "Traffic Control and Roadway Elements: Their Relationship to Highway Safety (1963);"⁸ and the
6. "Effectiveness of Automatic Crossing Gates in Southern California, 1954 Through 1963 (1964)."⁹

NCHRP Report 50 noted that "the ideal protection, disregarding economy, is often said to be grade separation." However, a closer look at accident rates and economies of scale led to the conclusion that "this seems to indicate that grade separation may not be the answer, especially when automatic protection provides a 90% reduction in accidents."¹⁰ In 1986 the Railroad-Highway Grade Crossing Handbook, 2nd Ed.,¹¹ published by the Federal Highway Administration acknowledged the existence of various studies concerning the effectiveness of lights and gates. Table 34, "Effectiveness of Active

⁷ Accident Reduction at Crossings Protected Under Crossing Protection Fund, California Public Utilities Comm., San Francisco (Aug. 26, 1965).

⁸ Traffic Control and Roadway Elements: Their Relationship to Highway Safety, Schoppert, D.W., Automotive Safety Found., pp. 61-64 (1963).

⁹ Effectiveness of Automatic Crossing Gates in Southern California, 1954-Through 1963, L.C. Young, California Public Utilities Comm., Los Angeles, 3 pp. (Oct. 1, 1964).

¹⁰ NCHRP Report 50 page 79. Appendix 1.

¹¹ Railroad-Highway Grade Crossing Handbook, 2nd Ed.

Crossing Warning Devices",¹² contains the results of three of the studies regarding the effectiveness of active warning devices. The average effectiveness of lights and gates at railroad crossings based upon an average of the results of those three studies is 89%. Virtually all credible studies conducted on this issue have confirmed that lights and gates at grade crossings are 90% effective guarding devices for the prevention of accidents. In fact, Clifford Shoemaker, Director of Public Projects for the Union Pacific Railroad who is considered as an expert on the subject in the industry¹³, admitted that lights and gates are 90% effective in preventing accidents at railroad crossings.¹⁴

¹² pp. 104 of the Railroad-Highway Grade Crossing Handbook, 2nd Ed. Appendix 2.

¹³ *In the United States District Court for the Western District of Oklahoma, Brenda Burks, et al. vs. Missouri Pacific Railroad Company et al.*, Case Number CIV-98-204-A, (hereinafter *Burks*) Deposition of Richard Reynolds, taken on October 29, 1998, page 95, line 20 through line 24. Appendix 4.

¹⁴ *Burks*, Volume III of the Deposition of Clifford Shoemaker, taken on December 10, 1998, page 383, line 8 through page 384, line 24. Appendix 6. See also *In the Circuit Court of Jackson County, Missouri at Kansas City, Kimberly R. Alcorn vs. Union Pacific Railroad Company, et al.*, Case Number CV-97-31927, (hereinafter *Alcorn*) Videotaped Deposition of Clifford Shoemaker, taken May 11, 1999, page 11, line 18 through page 12, line 11. Appendix 5.

II. LIGHTS AND GATES PROVIDE THE MOST COST EFFECTIVE CROSSING PROTECTION AVAILABLE.

Two years after NCHRP Report 50 suggested the need for "intensive research" to be conducted on the cost effectiveness of train activated protection (lights and gates) at crossings versus grade separation, Congress adopted the Federal Highway Safety Act of 1970.¹⁵ This legislation marked the beginning of an extensive research project by the Federal Highway Administration and the Federal Railroad Administration culminating in the preparation of two joint reports prepared for consideration by Congress. Those reports were: 1) Report to Congress. Railroad-Highway Safety, Part 1: A Comprehensive Statement of the Problem,¹⁶ and 2) Report to Congress. Railroad-Highway Safety Part II: Recommendations for Resolving the Problem.¹⁷ In the 1971 Report to Congress,¹⁸ the FRA and FHWA analyzed the current problem with accidents at grade crossings. In their economic analysis of safety problems at grade crossings, the FHWA

¹⁵ Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C. 421 *et seq.*, and the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130.

¹⁶ U.S. Dep't of Transportation, Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem (1971 Report to Congress) PB206792, (Nov., 1971).

¹⁷ U.S. Dep't of Transportation, Railroad-Highway Safety Part II: Recommendations for Resolving the Problem (1972 Report to Congress), PB 213 115.

¹⁸ 1971 Report to Congress, at Section III, "THE CURRENT PROBLEM," pp. 23-36.

and the FRA made it clear that there are only three types of “warranted improvements” contained in their analysis. Those included 1) new grade separation; 2) reconstruction of existing grade separations; and 3) installation of automatic grade crossing protective devices (lights and gates).¹⁹ In that report, Table 6²⁰ provides the results of the economic analysis for protective device improvements at grade crossings. That table specifically indicates that the protection improvements include “flashing lights and automatic gates.” There is no reference to crossbuck reflectorization programs contained in the economic analysis of “warranted improvements” in this report. The only reference to crossbuck reflectorization programs is a reference that the railroads have a continuing duty to maintain grade crossing protection facilities. The report recognizes that “reflectorization of crossing signs has been an ongoing program for several years.”²¹ The 1972 Report to Congress included an Executive Summary.²² The Executive Summary specified that the economic analysis in the report was limited to grade separation structures and flashing lights and automatic gates.²³ The Federal Highway Administration and Federal Railroad Administration unequivocally recommended crossing protection through the installation of lights and gates by stating the following:

¹⁹ *id.* see page 32.

²⁰ *id.* at page 35.

²¹ *id.* see page 40.

²² *id.* see page vi.

²³ *id.* see page vi.

“An economic analysis was used in this study to identify various levels of improvement and to evaluate the reduction in nationwide losses at public grade crossings that would result from each. For purposes of the economic analysis, the types of improvement considered were limited to flashing lights, automatic gates, and grade separation structures.

The cost benefit analysis indicates that grade crossing protection will return both greater overall benefits and much greater safety benefits for a given level of investment than will grade separation. Accordingly, any new federal initiative should concentrate on grade crossing protection, while grade separations and similar elimination-type projects should continue to be included in other highway programs.”

Chapter X, “PUBLIC GRADE CROSSING IMPROVEMENT NEEDS,” in the 1972 Report to Congress II,²⁴ contains the economic analysis of federal funding for grade crossing improvements. That economic analysis is limited to grade separation and crossing improvements that include flashing lights and automatic gates. The 1972 Report specifically indicates that it was not “possible to include in the economic analysis other possible types of improvements such as passive device improvements.”²⁵ The entire discussion of “passive device improvements” is contained in one paragraph on page 90 of the 1972 Report. That one paragraph reads as follows:

²⁴ *id.* pages 74-92.

²⁵ *id.* page 75.

It is not possible at this time to make a benefit-cost analysis of improved passive devices, such as pavement markings and signing at and in advance of the crossing. The inventory conducted for this study indicated that there are 11,365 crossings at which there are no signs. In addition, it is known that there are many crossings that have a crossbuck sign on only one highway approach. The inventory did not record those crossings with missing or otherwise deficient advance warning signs. As a first step in improving grade crossing safety, each railroad and each responsible public agency which does not already have one should undertake a program of passive device improvement. Such programs should also include the removal of obstacles from the crossing quadrants, i.e., those which impair visibility, to improve safety. The estimated cost to correct these deficiencies in passive signing and markings alone may be on the order of \$10 million.

The analysis of "passive device improvements" such as crossbuck reflectorization programs was limited to one paragraph out of the two reports submitted to Congress in 1971 and 1972. In that one paragraph, the Federal Railroad Administration and Federal Highway Administration limited the discussion to such passive device improvement programs which are necessary to correct "deficiencies in passive signings and markings." The conclusion concerning the analysis of crossing improvement needs in Chapter X in Report II is as follows:

Any new initiative should concentrate on grade crossing protection while grade separations and similar elimination-type projects

should continue to be included in other highway programs. For a given level of investment much greater safety benefit can be obtained from a program of grade crossing protection than from a program including both protection and elimination of crossings by grade separations and the like. The ratio of benefits to costs for a given level of investment is much greater for protection than for grade separations and the initial cost of protection is much less than the initial cost of grade separations.

That conclusion went on to clarify that expenditures for other improvements such as "passive device improvement" should be undertaken by the public agencies and the railroads to make sure that all crossings meet the minimum requirements of MUTCD. After considering the reports to Congress the Highway Safety Act of 1973 was passed.

III. 23 C.F.R. § 646.214(b)(3) DEFINES "ADEQUATE CROSSING PROTECTION" AS LIGHTS AND GATES

If certain potentially hazardous conditions exist at any given crossing, the installation of lights and gates is mandated. 23 C.F.R. § 646.214(b)(3)(i) defines "adequate warning devices" as devices which include "automatic gates with flashing light signals." 23 C.F.R. § 646.214(b)(3)(ii) provides that *gates* may not be necessary if a diagnostic team justifies that "gates are not appropriate." Nothing in 23 C.F.R. § 646.214(b)(3) indicates that something less than flashing lights could ever meet the definition of "adequate warning devices." In recent years, most of the installations of active warning

devices at crossings include lights and gates.²⁶ The reason for the inclusion of automatic gates with an active installation is obvious. It only costs about \$15,000 to add gates to an active installation that railroads are currently installing for somewhere in the neighborhood of \$150,000.²⁷ The effectiveness of gates added to a lights-only installation is also verified in the Railroad-Highway Grade Crossing Handbook.²⁸ The addition of relatively low-cost gates to a flashing lights installation increases the installation's effectiveness by 67%.²⁹ Obviously, the expenditure of an additional \$15,000 to make an active warning installation 67% more effective is clearly a wise expenditure. The cost of this increased effectiveness is 10% of the entire installation.

²⁶ *Alcorn*, Videotaped Deposition of Clifford Shoemaker, taken May 11, 1999, page 19, lines 11-15, and page 20, lines 9-17. Appendix 5.

²⁷ *In the District Court of Caddo County, State of Oklahoma, Steve and Violet Myers, et al. v. Missouri Pacific Railroad Company et al.*, Case Number CJ-97-46, (hereinafter *Myers*) Deposition of Clifford Shoemaker taken on April 1, 1999, page 40 line 19, Appendix 8. *Burks*, Volume I of the Deposition of Clifford Shoemaker, taken on November 12, 1998, page 29 line 18, Appendix 6. Report of Harvey Levine, Ph.D. submitted in *State Of Minnesota, In The District Court Of Polk County, Ninth Judicial District, Toni Weaver, et al. v. Burlington Northern Santa Fe Corporation, et al.*, Case No. C9-99-22 (hereinafter *Weaver*). Appendix 10.

²⁸ See Railroad-Highway Grade Crossing Handbook, 2nd Ed., page 104, Table 34, Appendix 2.

²⁹ That is the average of the three studies referenced in the Railroad Grade Crossing Handbook, 2nd Ed., Appendix 2.

The railroad industry has attempted to bootleg "passive protection improvements" into the definition of "adequate warning devices" under 23 C.F.R. § 646.214(b)(3)(i) in an attempt to immunize railroads from liability under the banner of federal preemption. That position is not supported by the legislative history, interpretation of the regulation itself, nor the Federal Highway Administration's implementation of the Federal Highway Safety Act.

According to Wm. H. Wendling a former official of the Federal Highway Administration, the FHWA's cross-buck program was separate and distinct from programs to erect lights and gates. Crossbucks only provided minimum protection as mandated by law at all crossings as opposed to a determination of adequate protection at an individual crossing.³⁰ Judge Posner reached the same conclusion in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994). He noted that the Secretary of Transportation would have engaged in an "extraordinary act of irresponsibility" if he precluded liability by providing funds for minimum protection without determining what adequate protection was at an individual crossing.³¹ Mr. Wendling's affidavit confirms that the Secretary was acting responsibly in his treatment of the crossbuck program.

³⁰ William H. Wendling Affidavit submitted in *In the Circuit Court of Jackson County, Missouri, at Kansas City, Mark Griffin, et al. vs. Kansas City Southern Railway*. Case No. CV93-26148. (Wendling Affidavit) Appendix 18.

³¹ *Shots* at 309.

As mentioned in the previous section, “passive device improvement” was included in the 1972 Report to Congress II only as an indication that many crossings needed programs that were designed to correct “deficiencies in passive signings and markings.” 23 C.F.R. § 646.214(b)(4) allows the FHWA approval over any federal expenditures for such passive device improvements. The legislative history of the Federal Highway Safety Act of 1973 makes it clear that Congress intended to have appropriate signage at all 170,000 passive crossings. Congress had already targeted 29,000 of those 170,000 passive crossings for upgrading to “train actuated protection” as recommended in the 1971 Report to Congress.³² The numbers referenced in the legislative history makes it clear that the massive signage programs designed for “passive device improvement” was intended to establish minimum compliance for all passive crossings and that at least 29,000 of those passive crossings were also targeted to be upgraded with lights and gates. As further confirmation of this fact, the Federal Highway Administration published the Federal Aid Highway Program Manual.³³ The manual specified that the first priority under the new Highway Safety Act of 1973 required “as a minimum” the states and railroads needed to “institute an improvement program to provide signing and pavement markings in

³² Federal-Aid Highway Act of 1973, Legislative History p. 1892. Appendix 19.

³³ United States Department of Transportation, Federal Aid Highway Program Manual. (Attached as exhibit 1 to the Wendling Affidavit) Appendix 18.

compliance with the Manual on Uniform Traffic Control Devices at all grade crossings.”³⁴

The issue on whether compliance with the MUTCD can rise to the level of federal preemption has already been answered in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 669 (1993) wherein the court rejected the notion that compliance with the MUTCD somehow gave rise to federal preemption of any claims based upon the adequacy of grade crossing protection devices. “The MUTCD provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads.”³⁵ 23 C.F.R. § 646.214(b)(4) and the Federal Highway Administration’s characterization of these projects as being designed to obtain minimal compliance with the MUTCD is totally consistent with the 1972 Report to Congress. The report, the regulation and the implementation all address the need for “correcting deficiencies” in passive devices at thousands of railroad crossings. The lack of any cost-benefit analysis on those projects further supports the conclusion that such “passive devices improvements” were intended solely to bring all crossings into minimal compliance with the MUTCD.³⁶

³⁴ *id.* at Vol. 6, Chap. 8, Sec. 2, p. 6. Appendix 18.

³⁵ *id.* at 669.

³⁶ See page 75 Report to Congress II.

IV. INSTALLATION OF LIGHTS AND GATES HAS BEEN AN AFFORDABLE OPTION AVAILABLE FOR THE FOUR LARGEST RAILROADS IN THE UNITED STATES SINCE 1980.

Harvey Levine was the prior Vice President of Economics for the Association of American Railroads. He spent eighteen years with the Association of American Railroads working on economic policy and economic analysis for the railroad industry.³⁷ After retiring from his work for the Association of American Railroads, Harvey Levine's interest in crossing safety led him to analyze grade crossing policies of the country's major railroads. Levine's analysis of the Union Pacific Railroad,³⁸ the Burlington Northern Santa Fe Railroad Company³⁹ and the Norfolk Southern⁴⁰ are contained at Appendix 9, 10, and 11. These railroads and the CSX are the four "mega railroads" which now account for 95% of the industry's traffic.⁴¹ The economic decisions of these "mega railroads" reveal a clear industry-wide choice to prefer short-term profits to crossing safety. One of the purposes of the

³⁷ Attachment 1 to the report of Harvey Levine, Ph.D. submitted in *Alcorn* and attached as Exhibit 5 to the Deposition of Harvey Levine, Ph.D. taken on August 17, 1999. Appendix 9.

³⁸ *id.*

³⁹ Report of Harvey Levine, Ph.D. Appendix 10.

⁴⁰ Report of Harvey Levine, Ph.D. submitted in *In the United States District Court For the Western District of Tennessee Eastern Division, Dwayne E. Mitchell v. Rickey D. Kelley, et al., Western Division, Defendants*, Case No. 93-1220 T (hereinafter *Mitchell*). Appendix 11.

⁴¹ Harvey Levine, Ph.D., *The Other Side of Staggers*, Traffic World, Vol. 260, No. 9, page 35 (Nov. 29, 1999). Appendix 12.

Staggers Act,⁴² which deregulated the industry, was to increase the profitability of the railroads so that they could better maintain and improve their infrastructure, which, in turn, would increase public safety.⁴³ However, the "mega railroads" Harvey Levine reviewed were already very profitable prior to deregulation and then became even more profitable following deregulation. Despite the enormous profits generated by deregulation, these railroads refused to independently fund crossing safety improvement programs. The railroads' unified position contravened one of Congress's fundamental motivations for passing legislation to deregulate the industry.⁴⁴ The American public, who was to benefit from Staggers, has not seen additional expenditures of railroad income on crossing safety.

Conclusions similar to Levine's can be drawn from a review of *CSX Transportation, Inc. v. Palank*, 743 So. 2d 556 (Fla. App. 1999). In that case, the Florida Court of Appeals upheld a punitive damage award of \$50,000,000 based upon the conscious decisions of CSX to divert over two billion dollars (\$2,000,000,000) from safety and maintenance expenditures to maximize corporate profit and extend the railroad's market share.⁴⁵ Harvey Levine's analysis of the other three "mega railroads" reveals the

⁴² Staggers Rail Act of 1980, Public Law 96-448, 96th Congress, 49 USC 10101, October 14, 1980.

⁴³ Report of Harvey Levine Ph.D. on BNSF submitted in *Weaver*, page 3. Appendix 10.

⁴⁴ BNSF report Appendix 10; UP report Appendix 9; NS report Appendix 11.

⁴⁵ *Palank* at 560 and 564.

same conscious decision-making. In fact, a jury in Jackson County, Missouri recently assessed \$120,000,000 in punitive damages for this same conscious disregard for crossing safety.⁴⁶ The 1971 Report to Congress contains an extensive history of legal responsibilities for financing grade crossing safety improvements at Appendix 1 of that report. A review of that Appendix clearly establishes that states and railroads both have financial responsibilities for crossing safety.⁴⁷ The concept of joint responsibilities was confirmed in *Easterwood*.⁴⁸ In 1978, the first edition of the Railroad Grade Crossing Handbook clearly provided that:

“Financial conditions of some major railroads is such that their interest in grade crossing improvements is maintained. It may be expected that as the financial condition of an individual railroad deteriorates or improves, the company’s commitment to grade crossing improvement financing will change. Therefore, no single generalized statement applies to all railroads’ ability to or interest in participating in grade crossing improvements.”⁴⁹

In spite of record profits and growth, the four mega railroads that now exist in the United States have elected

⁴⁶ *Alcorn v. Union Pacific Railroad Co.*, In the Circuit Court of Jackson County, Missouri at Kansas City, Case No. CV 97-31927, Div. 10.

⁴⁷ See Appendix 1 of the 1971 Report to Congress.

⁴⁸ *Easterwood* at 669.

⁴⁹ Railroad-Highway Grade Crossing Handbook, FHWA-TS-78-214, Dr. R. M. Olson, Federal Highway Administration, August 1978 p.67. Appendix 3.

to not spend any of their funds on independent programs for grade crossing safety improvements.

V. THE RAILROAD INDUSTRY MADE A KNOWING AND INTELLIGENT DECISION TO OPT FOR SHORT-TERM PROFITS BY IGNORING ALL STATE COMMON LAW DUTIES TO UPGRADE RAILROAD CROSSINGS.

In 1989, the National Association of Railroad Trial Counsel Executive Committee formed a “Special Advisory Committee on Grade Crossing Litigation.”⁵⁰ The purpose of that committee was to establish a preemption defense to *all* claims that railroads have a duty to provide any additional grade crossing warning devices. The work of this committee was financed by the financial backing of the Burlington Northern Railroad; the Santa Fe Railroad Company, Norfolk Southern Railroad, the Union Pacific Railroad Company, the Southern Pacific Railroad and the CSX.⁵¹ The committee prepared a model brief that was intended to “overturn the longstanding law in many states that allocate the duty and responsibility for

⁵⁰ Memo of Stephen Trimble addressed to all NARTC members dated March 26, 1990 attached as an exhibit to Plaintiffs’ response to Defendants’ Motion for Summary Judgment in *Weaver*. Appendix 13.

⁵¹ See Letter to Stephen Trimble, dated April 17, 1990. Mr. Trimble was the Chairman of the Special Advisory Committee on Grade Crossing Litigation. The letter was also sent to Henry Moffett, Head of the National Association of Railroad Trial Counsel (NARTC). Appendix 14. See Affidavit of Merrick C. Walton in *In the District Court of Labette County, Kansas, Miika M. Monohon, et al., vs. Union Pacific Railroad Co.*, Case No. 98-C-27-OS. Appendix 15.

grade crossing safety to the railroads.”⁵² Shortly after the dissemination of the model brief, it became obvious that members of the National Association of Railroad Trial Counsel began shopping for “good facts and good judges who are receptive to preemption arguments.”⁵³

The Union Pacific Railroad has a specific policy which emphasizes that the Union Pacific Railroad will not independently fund grade crossing improvement programs which upgrade crossings to include lights and gates.⁵⁴ The Burlington Northern Santa Fe Railroad Company has had a similar policy in effect for years.⁵⁵

The refusal of major railroads to finance crossing improvement projects is not unique to the Union Pacific Railroad nor the Burlington Northern Santa Fe Railroad Company. In fact, all four of the largest railroads in the United States participate in the Operation Lifesaver, Inc. program. That program holds itself out as an independent public information program dedicated to reducing

⁵² Memo of Stephen Trimble addressed to all NARTC members dated March 26, 1990. Appendix 13.

⁵³ Letter to Stephen Trimble dated April 17, 1990. Appendix 14.

⁵⁴ See Union Pacific Railroad Grade Crossing Resource Manual Chapter 6, Section C page V-C-1 and V-C-2, exhibit 4 of Richard Reynolds deposition in *Burks*, Deposition of Richard Reynolds, taken on October 29, 1998, page 137, line 23-25, page 138, line 1-24, page 141, lines 17-25, page 142, lines 1-17, page 143, lines 23-25, page 144, lines 1-7, page 147, lines 19-23. Appendix 4.

⁵⁵ See Affidavit of Robert A. Schuetze, Esquire attached as an exhibit to Plaintiffs’ response to Defendants’ Motion for Summary Judgment in *Weaver*. Appendix 21.

crossing accidents. However, Operation Lifesaver, Inc. is governed by an eleven-member Board of Directors⁵⁶ who are “financially, legally and ethically responsible for all activities of the corporation.”⁵⁷ That eleven-member board is comprised of personnel associated with the rail industry with the exception of one member.⁵⁸ Operation Lifesaver’s Position Statement reads as follows:

To enhance highway-rail grade crossing safety, Operation Lifesaver, Inc. endorses the concept of reducing the number of crossings through consolidation, elimination, grade separation and restricting the number of new crossings.

Conspicuously missing from the Position Statement of Operation Lifesaver, Inc. is the support for the installation of lights and gates at grade crossings. The most cost-effective means of crossing protection endorsed by the FRA and FHWA is not endorsed by the industry’s “public education program.” In fact, Operation Lifesaver, Inc. teaches its presenters to **NEVER** refer to a crossing as “protected” or “unprotected” or “guarded” or “unguarded” because “this implies that crossings with gates, lights and bells somehow protects the motorist when in fact they are merely warning devices that are too

⁵⁶ See Operation Lifesaver, Inc., Hand-out Section 3 attached as an exhibit to Plaintiffs’ response to Defendants’ Motion for Summary Judgment in *Weaver*. Appendix 16.

⁵⁷ *id.* Appendix 8 and 16.

⁵⁸ *Myers*, Deposition of Clifford Shoemaker taken on April 1, 1999, pages 59-61. Appendix 8.

often disregarded.”⁵⁹ The program stresses that Operation Lifesaver, Inc. presenters are not spokespersons for Operation Lifesaver, Inc. and that they should avoid specific questions about rail policy and technology. However, when they are asked, “why aren’t there gates and lights at every crossing,” the following response is suggested:

Most people think that gates and lights are the answer to preventing tragedies at grade crossings. Unfortunately, these active warning devices often are not enough because drivers sometimes choose to disregard them; in fact, over half of all grade crossing crashes at public crossings occur where active warning devices (gates, lights, bells) exist.

This scripted response is clearly misleading because it answers a specific question about *lights and gates* with statistics that include all active warning devices including antiquated systems that are in excess of fifty years old. In reality, Clifford Shoemaker, one of the board members of Operation Lifesaver, Inc.,⁶⁰ admits that only about 20% of all accidents occur at crossings with lights and gates despite the fact that 85% of the traffic encounters between cars and trains occur at those crossings.⁶¹ Operation

⁵⁹ See Operation Lifesaver, Inc., Hand-out Section 3. Appendix 16.

⁶⁰ *Myers*, Deposition of Clifford Shoemaker taken on April 1, 1999, page 59. Appendix 8.

⁶¹ *Myers*, Deposition of Clifford Shoemaker taken on April 1, 1999, page 146 and *In The District Court Of Canadian County, State Of Oklahoma, Brenda and Eugene Spence, et al. vs. Missouri Pacific Railroad Company et al.*, Case No. No. CJ-97-1-01 (hereinafter *Spence*) Deposition of Clifford Shoemaker taken on October 21, 1999, page 159. Appendix 8 and 7.

Lifesaver, Inc. presenters are specifically advised to tell the public that “flashing red lights and gates don’t eliminate collisions, either.”⁶² This industry “public education” program is misleading at best, if not a totally fraudulent misrepresentation of the facts.

The “public education” program of Operation Lifesaver, Inc. adopts the industry’s position that it is entirely the government’s responsibility to place lights and gates at grade crossings.⁶³ That position mirrors the position of the National Association of Railroad Trial Counsel, but totally ignores the holding in *Easterwood*, which rejected this blanket preemption argument.

VI. RAILROADS SHOULD NOT BE GIVEN THE POWER TO CREATE THEIR OWN PREEMPTION DEFENSE BY MANIPULATING THE FEDERAL FUNDING PROGRAM.

It has been noted that the installation of lights and gates by major railroads (Class 1 railroads) using limited federal funds are characterized by unreasonable delays and excessively high costs.⁶⁴ It has also been suggested

⁶² Operation Lifesaver, Inc. Presenters’ Manual, Section 3. Appendix 16.

⁶³ Operation Lifesaver, Inc., Hand-out Section 3. Appendix 16.

⁶⁴ Gregory A. Malkasian, *Regulatory Issues – Crossing Safety in Oregon*, Published in Proceedings of the International Symposium on Railroad-Highway Grade Crossing Research and Safety 1990 in Knoxville, Tennessee. Appendix 17. See also *St. Louis Southwestern R.R., Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994) (referencing a fifteen month delay in the erection of lights and gates).

that federal funds which could be used for the installation of lights and gates are too frequently diverted to other projects which have the net result of lessening the number of lights and gates which can be installed under the federal funding program.⁶⁵ The Union Pacific Railroad admittedly uses federal funding to supplement its maintenance budget by applying for funding of cross-buck replacements, lens replacement programs and crossing surface improvement programs.⁶⁶ These expenditures would otherwise be ordinary expenses that should come out of the railroad maintenance budget.⁶⁷ The Union Pacific Railroad is not alone in this methodology of utilizing federal funds to supplement their own maintenance budget. The Burlington Northern Santa Fe Railroad Company openly admits that they do not do anything to inspect crossbucks to determine when they have exceeded their useful life.⁶⁸ They do not even attempt to maintain the reflective qualities on their crossbucks. In fact, the Burlington Northern Santa Fe Railroad Company waits for the state to determine that the crossbucks have fallen into such a state of disrepair that they no longer

⁶⁵ *id.* at 63. Appendix 17.

⁶⁶ *Burks*, Volume II of the Deposition of Clifford Shoemaker, taken on December 9, 1998, pages 314-319. Appendix 6.

⁶⁷ *id.* Appendix 6.

⁶⁸ *In The District Court Of Pierce County, North Dakota, Gene Graumann, et al., vs. Burlington Northern Santa Fe Corporation, et al.*, Case No. 98-C-2020, Deposition of Spencer Arndt taken on July 15, 1999 page 81, lines 12-21, page 86 lines 5-15, pages 93-95, and pages 107-108. Appendix 20.

comply with the MUTCD as "reflectorized."⁶⁹ By waiting for an entire rail corridor to become a legally deficient safety hazard, the railroad qualifies for federal funding to replace all crossbucks in that corridor.⁷⁰

Despite record profits recognized from operating revenues, the major railroads still refuse to participate in research and development costs as recommended in the 1972 Report to Congress.⁷¹ They refuse to use competitive bidding to bring down the costs of installing lights and gates and further refuse to supplement the federal spending programs with any of their own profits. By diverting funds that could otherwise be used for lights and gates, the railroads are also effectively diluting the overall effectiveness of the federal lights and gates program. Current practices allow the major railroads to divert funds from lights and gates installations, use their own forces to install lights and gates at unreasonably high prices, create excessive delays in installation so that funds are subject to being more readily diverted and refuse to supplement the federal program with any of their own funds. These industry practices have impeded the installation of lights and gates. At the current rate, it will take in excess of One Hundred Years to provide lights and gates at all crossings in Tennessee.⁷² Impeding the installation of the most cost-

⁶⁹ *id.* Appendix 20.

⁷⁰ *id.* Appendix 20.

⁷¹ See page 68 Report to Congress II. *Burks*, Volume II of the Deposition of Clifford Shoemaker, taken on December 9, 1998, pages 201-203, and 219. Appendix 6.

⁷² Report of Harvey Levine, Ph.D. in *Mitchell*. Appendix 11.

effective form of crossing protection has never been one of the goals of Congress or the FHWA.

Manipulation of the federal funding program is simple. Any railroad can ignore sign maintenance until passive signs exceed their useful life and become non-compliant with the Manual on Uniform Traffic Control Devices. The reward for this intentional neglect of sign maintenance is the receipt of federal funding to supplement your maintenance budget. The added bonus for such conduct is the potential for gaining immunity from being sued for your intentional decision to ignore your common law duty to upgrade crossings.

Now that virtually every crossing in the United States has obtained some type of passive warning sign funded with federal money intended to "correct deficiencies" at crossings, the railroads have almost completed their plan to gain blanket immunity for their election to ignore common law duties. The last step remaining is for the United States Supreme Court to accept the industry's argument that all state law claims of inadequate warning devices at all railroad crossings are preempted by the use of federal funds used to make those crossings meet minimum compliance standards of the MUTCD. This brief is offered in support of those safety organizations and victims' groups who respectfully request this Court to thwart the industry's plan to obtain blanket immunity.



CONCLUSION

On behalf of the crossing safety organizations and victims groups joining in this brief, it is requested that the United States District Court for the 6th Circuit Court of Appeals Decision be affirmed. Affirming the Court of Appeals would do the following:

1. add confirmation that adequate crossing protection for hazardous crossings is lights and gates;
2. remove some incentive for manipulating the federal funding process in hopes of obtaining preemption of state law claims;
3. reaffirm the *Easterwood* opinion that minimum compliance with MUTCD does not preempt state law claims for improved crossing safety; and
4. allow states to protect their citizens when something less than "adequate crossing protection" exists at a hazardous crossing.

Respectfully submitted:

ROBERT L. POTTROFF
 NORBERT C. MAREK, JR.
 MYERS POTROFF & BALL
 320 Sunset
 Manhattan, Kansas 66502