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John Woodson Rogers

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Notes

Federal Pre-emption of State Railroad Tort Law: The Misuse of the Federal Railroad Safety Act to Insulate Railroads from Liability

I. INTRODUCTION

In *Walker v. St. Louis-Southwestern Railway*,¹ the Missouri Court of Appeals, Eastern District, faced the issue of whether the Federal Railroad Safety Act (FRSA)² pre-empted state tort law. This was an issue of first impression in the Eastern District of Missouri.³ The FRSA was enacted in 1970, but courts have only recently started considering its pre-emptive effect.⁴ The courts have produced widely conflicting results in attempting to discern which state laws Congress meant to pre-empt, and which Congress intended not to affect.⁵ Most of these courts have held pre-emption exists when it was arguable whether pre-emption was intended. This is especially true in regard

1. 835 S.W.2d 469 (Mo. Ct. App. 1992).

2. 45 U.S.C. §§ 421-425 (1988).

3. *Walker*, 835 S.W.2d at 471.

4. *Id.*

5. See *CSX Transp., Inc. v Easterwood*, 113 S. Ct. 1732, 1743-44 (1993) (federal regulations enacted pursuant to FRSA pre-empt state law excessive speed claims, but do not pre-empt claims regarding grade-crossing warning devices); *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 324 (10th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 8, 1992) (No. 91-1977) (state law is pre-empted even if there had been no determination as to what specific warning device should be required for the grade crossing in question); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 76 (8th Cir. 1989) (FRSA was not intended to pre-empt state tort law); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983) (no pre-emption of state tort law until a local agency makes a determination regarding the type of warning device to be installed at the grade crossing in question); see also *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1553 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1732 (1993); *Missouri Pac. R.R. v. R.R. Comm'n of Tex.*, 948 F.2d 179, 183 (5th Cir. 1991); *Norfolk & W. Ry. v. Public Utils. Comm'n of Ohio*, 926 F.2d 567, 569-71 (6th Cir. 1991); *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio*, 901 F.2d 497, 501-02 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991); *Burlington N. R.R. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989); *Burlington N. R.R. v. Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989); *Florida E. Coast Ry. v. Griffin*, 566 So. 2d 1321, 1324 (Fla. Dist. Ct. App. 1990).

to two issues: train speed and grade crossing warning devices. Both issues were present in *Walker*.

II. FACTS AND HOLDING

On February 28, 1986, the decedent, Randy S. Walker, drove his 1976 Chevrolet Nova onto Randall's Railroad Crossing in Scott County, Missouri.⁶ Randall's Crossing consists of two tracks.⁷ The main-line track is on the east side and a siding track is on the west.⁸ Both tracks curve west at the crossing.⁹ At approximately 7:30 p.m. Walker approached the crossing from the east.¹⁰ The crossing was obstructed by a slow-moving train on the siding track.¹¹ Walker drove his car up to the crossing and stopped on the main line track.¹² As Walker waited for the train to clear the crossing, witnesses watched him move his car back and forth ten to twenty feet, rolling the car on and off the main-line track numerous times.¹³

After several minutes the witnesses observed Walker and the passenger step out of the car, urinate on the tracks and return to the car.¹⁴ Once Walker and the passenger were inside the car, it remained stationary on the main-line track.¹⁵ After several more minutes a southbound train approached the crossing on the main-line track.¹⁶ Due to the curvature of the track, the slower train on the siding track obstructed the view of both Walker and the approaching train on the main-line, making it impossible for either to see the other until the train was only 800 feet from Walker's car.¹⁷ Once the car was in view, the engineer applied the emergency brakes and sounded the train's horn but was unable to stop the train before it struck Walker's car, killing him and the passenger.¹⁸

Appellants, the surviving spouse and the minor child of the decedent Walker, filed a petition for wrongful death in the Circuit Court of the City of

6. *Walker*, 835 S.W.2d at 470.

7. *Id.*

8. *Id.* at 470-71.

9. *Id.* at 471.

10. *Id.* at 470-71.

11. *Id.* at 471.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

St. Louis.¹⁹ Respondent, St. Louis-Southwestern Railway Company, filed a motion for summary judgment²⁰ claiming that its common law duty to maintain a good and safe crossing had been pre-empted by the FRSA.²¹ St. Louis-Southwestern Railway Company claimed the FRSA pre-empted state tort law because the Secretary of Transportation, through the Missouri Department of Transportation (MDOT), had approved the adequacy of the warning devices at the crossing; therefore, the federal standard pre-empted state tort law.²² On January 29, 1991, the trial court heard and sustained respondent's motion for summary judgment.²³

Appellants appealed the grant of summary judgment in favor of respondent to the Missouri Court of Appeals, Eastern District.²⁴ The Eastern District affirmed the grant of summary judgment in favor of respondents.²⁵ Applying a contingent pre-emption analysis, the Eastern District held that when the MDOT, pursuant to the FRSA, makes a determination regarding required crossing protection at a railroad crossing, all further common law duty for the railroad to provide crossing protection is pre-empted by the federal regulations determined by the local agency (MDOT).²⁶ Once the court determined that the federal standard pre-empted state tort law and that the railroad had complied with the regulations promulgated by the MDOT, the railroad had no further duty to maintain a safe crossing.²⁷

III. LEGAL BACKGROUND

A. Federal Pre-emption of State Law

The theory of federal pre-emption finds its authority in the Supremacy Clause of Article VI of the United States Constitution.²⁸ Article VI states that the Constitution and the laws enacted by Congress pursuant to it shall be the "supreme Law of the Land . . . any [t]hing in the Constitution or Laws of any State to the [c]ontrary notwithstanding."²⁹ The pivotal question in pre-emption cases is whether Congress intended to prohibit the challenged state

19. *Id.*

20. *Id.*

21. *Id.*; see also 45 U.S.C. §§ 421-445 (1988).

22. *Walker*, 835 S.W.2d at 472.

23. *Id.* at 471.

24. *Id.*

25. *Id.* at 474.

26. *Id.* at 473-74.

27. *Id.* at 474.

28. U.S. CONST. art. VI, cl. 2.

29. *Id.*

or local law at the time of enactment.³⁰ If such intent is found, the state law is pre-empted. Congressional intent to pre-empt may be expressly stated in the statute or implicit in its structure and purpose.³¹

The United States Supreme Court has recognized that state law is pre-empted under the Supremacy Clause of the Constitution in three circumstances.³² First, Congress can enact a statute that pre-empts state law by its express terms.³³ Second, courts will find pre-emption when Congress has indicated that the federal government will exclusively occupy a field of regulation.³⁴ The Court in *English v. General Electric Co.*³⁵ stated that congressional intent can be implied when the statutes and regulations are so pervasive that there is no room left for state regulation or when there are strong federal interests in exclusive regulation of the field.³⁶ However, congressional intent must be "clear and manifest" if the allegedly pre-empted field includes areas of traditional state interest.³⁷ Third, state law is pre-empted to the extent that it actually "conflicts with federal law."³⁸ State law conflicts with federal law when compliance with both state and federal law is impossible or when the state law impedes a federal purpose.³⁹

Congressional action is not always necessary for a court to infer pre-emption. In certain circumstances, inaction, when Congress finds regulation inappropriate, is enough for a court to imply pre-emption. This type of pre-emption is referred to as "negative pre-emption."⁴⁰ For a court to find negative pre-emption it must determine that Congress considered, but did not enact, detailed regulations in a specific area.⁴¹ The United States Supreme

30. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). "The purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

31. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

32. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

33. *Id.*

34. *Id.* at 79.

35. 496 U.S. 72 (1990).

36. *Id.* at 78-79.

37. *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

38. *English*, 496 U.S. at 79.

39. *Id.*

40. See *Northfolk & W. Ry. v. Public Utils. Comm'n of Ohio*, 926 F.2d 567, 570 (6th Cir. 1991); *Walker v. St. Louis S.W. Ry.*, 835 S.W.2d 469, 473 (Mo. Ct. App. 1992).

41. *Missouri Pac. R.R. v. Railroad Comm'n. of Tex.*, 833 F.2d 570, 575-76 (5th Cir. 1987). This court found pre-emption was not intended concerning walkway regulations using the standard announced in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). For a discussion of the *Ray* standard, see *infra* text accompanying note 43.

Court held in *Ray v. Atlantic Richfield Co.*:⁴² "[W]here the failure of . . . federal officials to affirmatively exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation."⁴³

When the pre-empted field is a traditional state interest, there must be a finding of a "clear and manifest" intent by Congress to pre-empt before a court may infer pre-emption.⁴⁴ A state's tort law satisfies this "traditional state interest" requirement.

The intent does not have to be found in a specific congressional act. The Supreme Court stated in *Louisiana Public Service Commission v. FCC*:⁴⁵ "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."⁴⁶ When the requisite intent is found, however, and a state tort law theory of recovery is determined to be pre-empted by federal law, evidence relating to that theory is inadmissible at trial.⁴⁷

There is a strong presumption against the defense of pre-emption.⁴⁸ The party seeking to establish that federal law pre-empts state law has the burden of proving pre-emption was intended by Congress at the time of enactment.⁴⁹ The doctrine of federal pre-emption should not be utilized without clear evidence that pre-emption was the intent of Congress.⁵⁰ The presumption against pre-emption is even stronger when traditional state interests such as

42. 435 U.S. 151 (1978).

43. *Id.* at 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1974)).

44. *See English*, 496 U.S. at 78 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

45. 476 U.S. 355 (1986).

46. *Id.* at 369.

47. *Mahony v. CSX Transp., Inc.*, 966 F.2d 644, 645 (11th Cir.), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992). If a railroad does not comply with the FRSA, then a state tort remedy is available. *See id.*

48. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1739 (1993). The Court stated: "In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is the clear and manifest purpose of Congress." *Id.* at 1737 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

49. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

50. *Id.*

tort recovery are at issue and the federal law provides for no compensation system.⁵¹

B. *The Federal Railroad Safety Act*

The FRSA is the primary source of legislation dealing with the various railroad safety problems.⁵² The declaration of the purpose of the FRSA states: "The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents . . ."⁵³ Congress not only adopted the Act to "promote safety in all areas of railroad operations,"⁵⁴ but also to provide nationally uniform safety regulations.⁵⁵

The FRSA confers upon the Secretary of Transportation authority to prescribe "rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970."⁵⁶ This authority, however, has been delegated by the Secretary to the Federal Railroad Authority (FRA).⁵⁷ The Act requires that the regulatory authority study and develop solutions to problems associated with railroad grade crossings.⁵⁸ The FRA has delegated federal authority to regulate grade crossings to local agencies.⁵⁹

51. *English*, 496 U.S. at 79. Note that neither the FRSA, nor the regulations enacted under it, provide for a method to compensate people injured in railroad accidents. See 45 U.S.C. §§ 421-445 (1988); *infra* notes 141-47 and accompanying text.

52. See generally 45 U.S.C. §§ 421-445 (1988).

53. *Id.* § 421.

54. *Id.*

55. *Id.* § 434.

56. *Id.* § 431(a).

57. 49 C.F.R. § 1.49(m) (1989).

58. 45 U.S.C. § 433 (1988). In 1971, the Secretary reported to Congress on the problems associated with grade crossings. See U.S. DEP'T OF TRANSP., RAILROAD-HIGHWAY SAFETY, PART I: A COMPREHENSIVE STATEMENT OF THE PROBLEM (1971). In 1972, the Secretary recommended solutions to the problems with grade crossings addressed in the 1971 report. See U.S. DEP'T OF TRANSP., RAILROAD-HIGHWAY SAFETY, PART II: RECOMMENDATIONS FOR RESOLVING THE PROBLEM (1972); *infra* note 158.

59. *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 322 (10th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 8, 1992) (No. 91-1977).
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The intent of Congress to pre-empt state laws and regulations governing railroad safety can be found in the language of Section 434 of the FRSA, which declares that

laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.⁶⁰

The legislative history also indicates Congress' intent to pre-empt because it indicates Congress was concerned with a state's role in railroad safety.⁶¹ The House report stated that "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems."⁶² The committee further stated that "where the federal government has authority, with respect to rail safety, it preempts the field."⁶³ The task force recognized the problems inherent in a wide variety of conflicting state safety regulations and concluded that "railroad safety . . . requires a more comprehensive national approach."⁶⁴ The task force recommended that a set of "uniform procedures and standards" needed to be enacted to regulate rail safety.⁶⁵

Even though Section 434 of the FRSA seems to state an express pre-emption of state law, Congress did not intend the FRSA to cover the entire field of railroad safety.⁶⁶ Section 434 cites two exceptions that permit state regulation of railroad safety. First, "preemption does not occur until the Secretary adopts a rule, regulation, or standard covering the subject matter of

60. 45 U.S.C. § 434 (1988). In *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993), the Supreme Court stated that the "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases."

61. See generally H. REP. NO. 1194, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4104.

62. *Id.* at 4109.

63. *Id.* at 4108.

64. *Id.* at 4127.

65. *Id.* at 4130.

66. *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

the state law."⁶⁷ A state regulation applies to the same subject matter as an FRA regulation if it "addresses the same safety concerns."⁶⁸

Secondly, Section 434 of the FRSA recognizes situations in which a state can adopt its own regulation even when the Secretary of Transportation has issued a "rule, regulation or standard covering the same subject matter" as the state law.⁶⁹ The state law or regulation covering the same subject matter still controls so long as it (1) is "necessary to eliminate or reduce an essentially local safety hazard," (2) is "not incompatible with any Federal law, rule, regulation, order, or standard" and (3) does not create an "undue burden on interstate commerce."⁷⁰

The legislative history makes it clear that this exception for "local safety hazards" is to be narrowly construed.⁷¹ The House Report states:

The purpose of this . . . provision is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.⁷²

Several deductions can be made from the FRSA and its legislative history. First, the history of the FRSA makes it clear that Congress was concerned with the problems created by various and conflicting state regulations.⁷³ Second, the legislative history of the FRSA explicitly states that it intends to pre-empt all state regulations covering the same subject matter as the federal regulations, unless the regulation meets the local safety

67. *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 321 (10th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 8, 1992) (No. 91-1977).

68. *Burlington N. R.R. v. Montana*, 880 F.2d. 1104, 1105 (9th Cir. 1989); *Burlington N. R.R. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989).

69. 45 U.S.C. § 434 (1988).

70. *Id.*

71. See H. REP. NO. 1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117.

72. *Id.* *Missouri Pacific Railroad v. Railroad Commission of Texas*, 948 F.2d 179, 183 (5th Cir. 1991), was in accord with the legislative history when it held that regulations having statewide application cannot be justified as addressing a "local safety hazard."

73. See H. REP. NO. 1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

hazard exception.⁷⁴ The converse is also true: if there is no federal regulation covering the same subject matter as the state regulation, the state regulation is not pre-empted.⁷⁵ Third, one of the goals of the FRSA was to make the "standards relating to railroad safety . . . nationally uniform to the extent practicable."⁷⁶

It appears that Congress contemplated a "contingent pre-emption" analysis when it enacted the FRSA.⁷⁷ Thus, pre-emption is contingent on whether there is a federal regulation or standard covering the same subject matter as the state regulation.⁷⁸ Therefore, the initial inquiry is to determine if any federal regulations have been promulgated that cover the conduct at issue. If there is a federal law or regulation covering the subject matter, then pre-emption will be found.⁷⁹ If there is no federal regulation governing the particular matter at issue, most state and federal courts have recognized that state common law doctrines apply.⁸⁰

In *CSX Transportation, Inc. v. Easterwood*,⁸¹ the Supreme Court applied a contingent pre-emption analysis to determine whether Georgia negligence law regarding the adequacy of the warning devices at a grade crossing and train speed were pre-empted by federal regulations.⁸¹ The Court focused on the use of the word "covering" in Section 434 to determine that Congress only intended pre-emption to occur if the federal regulations "substantially subsume" the state law.⁸² To further support the Court's narrow pre-emption reading of Section 434 it pointed out that the "term 'covering' is . . . employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses."⁸³

74. *Id.* at 4108.

75. 45 U.S.C. § 434 (1988).

76. *Id.*

77. See *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

78. See H. REP. NO. 1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4108.

79. *Id.*

80. See *generally* *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1732 (1993); *Karl v. Burlington N. R.R.*, 880 F.2d 68 (8th Cir. 1989); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983); *Florida E. Coast Ry. v. Griffin*, 566 So. 2d 1321 (Fla. Dist. Ct. App. 1990).

81. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1738 (1993).

82. *Id.* The Court stated: "To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter . . . for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.*

83. *Id.*

Even though the FRSA and its implementation seem relatively clear, courts have produced a wide variety of conflicting results.⁸⁴ The diverse outcomes are largely due to the fact that some courts have given a very broad pre-emption reading to the federal regulations,⁸⁵ while other courts have given the regulations a very narrow reading.⁸⁶ For example, in a grade crossing case, *Hatfield v. Burlington Northern Railroad Co.*,⁸⁷ the court gave the broadest pre-emption reading yet to the FRSA.⁸⁸ In *Hatfield*, the court held that the FRSA pre-empted state regulation of railroad grade crossings although a local agency never visited the crossing to determine what type of warning devices were needed.⁸⁹ The court found it sufficient that the Secretary adopted the Manual of Uniform Traffic Control Devices on Streets and Highways (MUTCD), which contained standards for grade crossings.⁹⁰ The court reasoned that since the Secretary had adopted grade crossing regulations in the MUTCD, all "state law relating to grade crossing safety devices was then superseded."⁹¹ Once the court found pre-emption it stated, "the Secretary has absolved railroads from complying with duties imposed by state law regarding safety devices at grade crossings."⁹²

84. See *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 324 (10th Cir. 1992) (state law is pre-empted even if local regulating agency had not determined what specific warning device should be required for the grade crossing in question), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 8, 1992) (No. 91-1977); *Karl*, 880 F.2d at 75 (FRSA was not intended to pre-empt state tort law); *Marshall*, 720 F.2d at 1154 (no pre-emption of state tort law until local agency makes a determination regarding the type of warning device to be installed at the grade crossing in question).

85. *Hatfield v. Burlington Northern Railroad Co.*, 958 F.2d 320 (10th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 8, 1992) (No. 91-1977), is illustrative.

86. *Mahony v. CSX Transportation, Inc.*, 966 F.2d 644 (11th Cir. 1992), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992), and *Griffin*, 566 So. 2d 1321, both give a narrow pre-emption reading to the FRSA.

87. 958 F.2d 320 (10th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 8, 1992) (No. 91-1977).

88. *Id.* at 324.

89. *Id.*

90. *Id.* at 323. The MUTCD has been incorporated into federal regulations promulgated by the Secretary. See 23 C.F.R. §§ 655.601-603 (1992).

91. *Hatfield*, 958 F.2d at 324.

92. *Id.* The Supreme Court rejected the *Hatfield* analysis in *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732, 1740 (1993). The Court stated, "Petitioner's argument suffers from an initial implausibility: it asserts that established state negligence law has been implicitly displaced by means of an elliptical reference in a Government manual otherwise devoted to describing for the benefit of state employees the proper size, color and shape of traffic signs and signals." *Id.* The Court concluded, "the MUTCD provides a description of, rather than a prescription for, the

In contrast, the court in *Marshall v. Burlington Northern, Inc.*⁹³ held that state law was not pre-empted until a local agency made a specific determination regarding the type of warning device to be installed at the grade crossing in question.⁹⁴ In the same vein, but with an even narrower pre-emption reading, is *Mahony v. CSX Transportation, Inc.*⁹⁵ In *Mahony*, the court noted that the federal government was minimally involved in regulating the construction of safer railroad grade crossings, but held that state tort law was not pre-empted because the federal "involvement was not so substantial or specific" as to pre-empt state tort suits based on the railroad's failure to maintain a safe crossing.⁹⁶

Almost all courts that have faced the issue of whether the FRSA pre-emptes local speed regulations have found pre-emption.⁹⁷ These courts have pointed to federal railroad speed limits enacted pursuant to the FRSA to justify their position.⁹⁸ Not all courts, however, will ignore a railroad's negligent conduct regarding a failure to reduce train speed below the maximum speed limit established by federal regulations. In *Florida East Coast Railway v. Griffin*,⁹⁹ the court rejected the argument that the federal speed regulations excluded all evidence of a railroad's negligent conduct regarding train speed.¹⁰⁰ The court concluded, "Certainly it was not the intent of the act to insulate railroads from liability for specific tortious acts in the face of hazardous conditions."¹⁰¹

allocation of responsibility for grade crossing safety." *Id.*

93. 720 F.2d 1149 (9th Cir. 1983).

94. *Id.* at 1154.

95. 966 F.2d 644 (11th Cir.), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992).

96. *Id.* at 645.

97. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1743-44 (1993); *Mahony*, 966 F.2d at 645; *Burlington N. R.R. Co. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989); *Burlington N. R.R. Co. v. Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989). See *infra* part V.B for a criticism of these holdings.

98. 49 C.F.R. § 213.9 (1989). In *Easterwood*, the Supreme Court employed not only § 213.9(a), but other related safety regulations adopted by the Secretary, to conclude that a common-law negligence action for excessive speed was pre-empted. *Easterwood*, 113 S. Ct. 1732, 1742-43. For a discussion about why the Court's holding should have narrow application, see *infra* note 139.

99. 566 So. 2d 1321 (Fla. Dist. Ct. App. 1990).

100. *Id.* at 1324.

101. *Id.*

IV. THE INSTANT DECISION

In the instant case, the appellants alleged five claims of negligence: (1) the railroad crossing at issue was an extra-hazardous or ultra-hazardous crossing, and the warning devices at the crossing were inadequate; (2) the warning devices at the crossing were not adequately and properly maintained; (3) respondent's train was not operating at a speed commensurate with the extra-hazardous nature of the crossing; (4) the crossing was too narrow; and (5) the crossing itself was not properly and adequately maintained.¹⁰² The court stated that federal pre-emption was at issue in the first, third, and fourth claims.¹⁰³ The court found that the second and fifth claims had no factual merit.¹⁰⁴

The court recognized that there is a presumption against pre-emption,¹⁰⁵ but found that "rejection of Federal preemption in this area of the law avoids the clear reality of the situation."¹⁰⁶ Of the possible approaches to the pre-emption issue, the court found the contingent pre-emption rule of *Marshall v. Burlington Northern, Inc.*,¹⁰⁷ to be the most persuasive.¹⁰⁸

The court in *Marshall* determined that the Secretary of Transportation had delegated federal authority to regulate grade crossings.¹⁰⁹ The *Marshall* court reasoned that when a federal decision is reached regarding the adequacy of crossing warning devices through a local agency, the railroad's duty to maintain a good and safe crossing is pre-empted by the local agency's decision.¹¹⁰ If no determination has been made regarding the adequacy of the crossing's warning devices, the FRSA does not cover the warning devices at these crossings, and the pre-emption doctrine does not apply.¹¹¹

Applying the *Marshall* court's contingent pre-emption analysis, the court held that appellants' first claim had been pre-empted by federal law and failed to state a cause of action upon which relief could be granted.¹¹² The court specifically noted that officials from both the Missouri Division of Transportation and Cape Girardeau County, as well as railroad officials, went to

102. *Walker*, 835 S.W.2d at 471.

103. *Id.*

104. *Id.* at 474.

105. *Id.* at 472.

106. *Id.* at 473.

107. 720 F.2d 1149, 1154 (9th Cir. 1983).

108. *Walker*, 835 S.W.2d at 473.

109. *Marshall*, 720 F.2d at 1154.

110. *Id.*

111. *Id.*

112. *Walker*, 835 S.W.2d at 474. The plaintiffs' first claim was that the crossing was extra-hazardous and the warning devices were inadequate. *Id.* at 471.

Randall's Crossing to conduct a safety survey of the grade crossing.¹¹³ The MDOT and the Transportation Commission determined that no other warning devices needed to be installed at the crossing in addition to the existing railroad cross bucks.¹¹⁴ The court found this regulation scheme was what Congress contemplated when it enacted the FRSA and, therefore, the railroad's common law duty to maintain a good and safe railroad crossing was pre-empted by federal law under the contingent pre-emption analysis announced in *Marshall*.¹¹⁵

Next the court addressed appellants' claim that the warning devices at the crossing were not adequately and properly maintained.¹¹⁶ To support their claim, appellants asserted that the railroad crossing sign was rusted and deteriorated.¹¹⁷ The court stated that the purpose of a cross buck sign is to warn traffic of a railroad crossing.¹¹⁸ Noting that at the time of Walker's approach there was a slow moving train on the siding track blocking decedent's path, the court held that there was no doubt that the decedent knew of the crossing and was adequately warned of its existence.¹¹⁹ To support its holding, the court cited *Rowe v. Henwood*,¹²⁰ which held that the presence of a train on a track is normally a sufficient warning of a railroad crossing.¹²¹ The court said in the face of this precedent, the appellants' assertion that the cross buck sign was rusted and deteriorated was "utterly meaningless."¹²²

The court also found no merit in appellants' claim that the crossing was not properly and adequately maintained.¹²³ To support this claim appellants cited the fact that the crossing was filled with ruts and potholes.¹²⁴ The court stated that the only reason potholes might become important is if they impeded Walker's movement in some way, making his escape difficult or impossible.¹²⁵ The court said that the potholes did not affect the mobility

113. *Id.* at 473.

114. *Id.* at 473-74.

115. *Id.* at 474.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. 207 S.W.2d 829 (Mo. Ct. App. 1948).

121. *Id.* at 833.

122. *Walker*, 835 S.W.2d at 474.

123. *Id.*

124. *Id.*

125. *Id.*

of Walker's car, citing the fact that he moved his car back and forth about ten to twenty feet several times when he arrived at the crossing.¹²⁶

The next issue the court addressed was appellants' third claim that the train was traveling at a speed that was not commensurate with the extra-hazardous nature of the crossing.¹²⁷ The court noted that train speed is the subject of extensive federal regulation.¹²⁸ Applying the contingent pre-emption analysis in *Marshall*, the court held that this claim was pre-empted by the federal regulation.¹²⁹ Because this issue was pre-empted by the federal regulation, the railroad was under no duty to moderate the speed of its trains below the maximum speed allowed in the federal regulations.¹³⁰

Finally, the court addressed the appellants' fourth claim that the crossing was too narrow.¹³¹ The court could not figure out how the width of the crossing could affect any safety concerns, but held the issue was likewise pre-empted by federal regulations.¹³² The court did not conduct any analysis of this issue, nor did it point to the federal regulation that pre-empted this claim.¹³³

V. COMMENT

A. Federal Pre-emption of Railroad Tort Law

The rationale for finding state tort law pre-empted by the FRSA is sound. There is little doubt that uniformity of railroad safety regulations to the extent practicable was needed. It was virtually impossible for a railroad to know and conform with all the diverse safety regulations in every jurisdiction across the country. To force a railroad to comply with varying and conflicting regulations would be unnecessarily burdensome and unfair to a railroad. For these reasons, the FRSA was enacted.¹³⁴

While the FRSA was intended to insulate the railroads from state tort liability to a certain extent, Congress did not intend to totally protect railroads from state tort actions if the railroad acted negligently, even though it complied with the federal regulations.¹³⁵ A court, by finding pre-emption

126. *Id.*

127. *Id.*

128. *Id.* (citing 49 C.F.R. § 213.9 (1991)).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. See *supra* notes 61-65 and accompanying text.

135. See 45 U.S.C. § 434 (1988).

in the face of negligent conduct, ignores its responsibility to the general public. A railroad must keep rail travel safe; if it does not, a court should supply a system of compensation for people harmed by the negligent acts of another.

Congress recognized that national uniformity of railroad regulations was not possible, or desirable, under all circumstances.¹³⁶ Likewise, the FRA, in the preface to the speed regulations enacted pursuant to the FRSA, recognized that specific local conditions would require remedial regulations to provide for safe railroad operation.¹³⁷ Courts must recognize what Congress and the FRA specifically noted in their regulations before finding federal pre-emption of state law. Thus, courts should not find pre-emption when local conditions and circumstances of an accident suggest the railroad was negligent.

Courts have been zealous in recent years in finding that the FRSA pre-empts state tort law.¹³⁸ In their efforts to insulate railroads from tort liability, the courts have failed to realize that some federal regulations are

136. *See id.*

137. 49 C.F.R. § 213.1 (1991). A similar disclaimer is contained in the MUTCD: "It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1740 (1993) (quoting MUTCD at 1A-4). The U.S. Department of Transportation also disavows any claim to pre-empt state regulation of railroad grade crossings. "Jurisdiction over railroad-highway crossings resides almost exclusively in the States. Within some States, responsibility is frequently divided among several public agencies and the railroad." *Id.* at 1740 (quoting U.S. DEP'T OF TRANSP., FEDERAL HIGHWAY ADMINISTRATION, TRAFFIC CONTROL DEVICES HANDBOOK 8A-6 (1983)).

138. *See Easterwood*, 113 S. Ct. 1732, 1743-44 (pre-emption of state law excessive speed claim); *Hatfield v. Burlington N. R.R. Co.*, 958 F.2d 320, 324 (10th Cir. 1992) (pre-emption regarding safety devices at grade crossing); *Mahony v. CSX Transp., Inc.*, 966 F.2d 644, 645 (11th Cir. 1992), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992) (FRSA pre-empted issue of train speed); *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1553-55 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1732 (1993) (pre-emption regarding train speed and railbed vegetation); *Missouri Pac. R.R. v. Railroad Comm'n of Tex.*, 948 F.2d 179, 184 (5th Cir. 1991) (FRSA pre-empted state walkway regulation); *Norfolk & W. Ry. Co. v. Public Utils. Comm'n of Ohio*, 926 F.2d 567, 571 (6th Cir. 1991) (FRSA regulations pre-empted state regulations requiring railroad bridge walkways); *CSX Transp., Inc., v. Public Utils. Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991) (FRSA pre-empted state regulations purporting to cover transportation of hazardous materials); *Burlington N. R.R. Co. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989) (FRSA pre-empted power brake and rear-end marking device regulations); *Burlington N. R.R. Co. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (FRSA pre-empted caboose regulations); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1151 (9th Cir. 1983) (pre-emption regarding proper warning equipment to be used on locomotives).

liability, the courts have failed to realize that some federal regulations are particularly well suited to pre-empt state law, while others are not. For example, regulations concerning what type of lights or horns are needed on trains are perfect candidates for pre-emption. To require a train to have oscillating strobe lights in one jurisdiction but flashing lights in another would be unreasonable. Likewise, if some jurisdictions were allowed to require an engineer in the caboose, while others were not, the regulation would be unnecessarily burdensome. To require a railroad to comply with divergent regulations such as these would ignore the reality that trains are used for interstate commerce and travel through many jurisdictions.

In contrast to such regulations are safety regulations that are dependent on local conditions and circumstances. Train speed and grade crossing warning devices are examples of regulations dependent on local conditions and circumstances. The fact that almost all courts have found federal pre-emption of local speed regulations is especially troubling.¹³⁹ Just as troubling are courts such as *Hatfield* which find federal pre-emption of grade crossing warning devices when no local agency has made a determination of required warning devices at a specific crossing.¹⁴⁰

In general, the issue of federal pre-emption of state tort law should be approached in a cautious manner by the courts. The purpose of the FRSA is to promote railroad safety,¹⁴¹ not to abolish state tort law without providing a new system of liability and compensation. Because there is no comprehensive federal system to redress parties injured in train accidents, it is arguable that the FRSA permits the states to continue imposing liability in tort.¹⁴²

139. See *Easterwood*, 113 S. Ct. 1732, 1743-44 (1993); *Mahony*, 966 F.2d at 645 (11th Cir. 1992); *Easterwood*, 933 F.2d at 1553 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1732 (1993); *Burlington N. R.R. v. Montana*, 880 F.2d at 1105; *Burlington N. R.R. v. Minnesota*, 882 F.2d at 1353. It should be noted that the Supreme Court's holding in *Easterwood* can be read narrowly in regard to train speed pre-emption. The Court limited its holding to pre-emption of common-law negligence claims for excessive speed and declined to address the related state law claims for violation of a statutory speed limit or the duty to slow or stop a train to avoid a specific hazard. *Easterwood*, 113 S. Ct. at 1743 n.15.

140. *Hatfield*, 958 F.2d at 324. The Supreme Court effectively overruled *Hatfield* in regard to pre-emption of grade crossing warning devices in *Easterwood*. See *Easterwood*, 113 S. Ct. at 1740. Reasons why pre-emption of train speed and grade-crossing warning devices should be approached cautiously are discussed *infra* parts V.B and V.C, respectively.

141. 45 U.S.C. § 421 (1988).

142. Title 45 U.S.C. § 434 specifically states that a state may continue to enforce a law when there is no federal regulation covering the same subject matter. Because there is no federal compensation system for parties injured in train accidents, a strong argument can be made that state tort law should continue to impose liability when a

The *Restatement (Second) of Torts* Section 288C cautions, "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."¹⁴³ At least three courts have recognized that the *Restatement* standard may affect the result in the context of railroad crossing accidents depending on the circumstances of a particular case.¹⁴⁴ The American Law Institute illustrated Section 288C with a railroad grade-crossing example.¹⁴⁵ "[C]ourts nationwide have adopted the *Restatement* standard in circumstances similar to" railroad negligence cases.¹⁴⁶ For example, many auto negligence cases will apply the "unusual circumstances" standard even if the driver is not speeding.¹⁴⁷ When the same subject matter has been addressed by federal regulations, a strong argument can be made against pre-emption by citing the *Restatement* standard.

B. Train Speed Pre-emption

There is a line of cases holding that federal speed regulations pre-empt local speed ordinances.¹⁴⁸ Negligence cases based on excessive speed have held that pre-emption of local speed ordinances rendered any evidence of train

railroad is negligent. See Dale Haralson & Adam Levine, *Grade Crossings and Train Speed: Preemption*, TRIAL, Feb. 1991, at 18, 21.

143. RESTATEMENT (SECOND) OF TORTS § 288C (1965). For examples of appropriate application of the *Restatement* standard, see *infra* notes 162-63 and accompanying text.

144. See *Mahony v. CSX Transp., Inc.*, 966 F.2d 644, 646 (11th Cir. 1992), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992); *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1554 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1372 (1993); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 76 (8th Cir. 1989). In *Karl*, the court accepted the *Restatement* argument and held that the district court did not err in submitting the issue of Burlington Northern's negligence to the jury. *Karl*, 880 F.2d at 76. In *Mahony*, Judge Birch recognized the applicability of the *Restatement* standard in his concurrence and demonstrated why the standard is necessary in a hypothetical. *Mahony*, 966 F.2d at 646. In *Easterwood*, the court rejected the argument because the train speed limits were part of a comprehensive statute. *Easterwood*, 933 F.2d at 1554. For the arguments for and against pre-emption in *Easterwood*, see notes 164-74 and accompanying text.

145. See RESTATEMENT (SECOND) OF TORTS § 288C cmt. a, illus. 1 (1965).

146. *Karl*, 880 F.2d at 76.

147. See MO. APPROVED JURY INSTRUCTIONS 17.03 (1991).

148. *Easterwood*, 113 S. Ct. 1732, 1743-44 (1993); *Mahony v. CSX Transp., Inc.*, 966 F.2d 644 (11th Cir.), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992); *Burlington N. R.R. Co. v. Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989); *Burlington N. R.R. Co. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989).

speed inadmissible for the purpose of showing negligence.¹⁴⁹ The decisions finding pre-emption of tort claims based on train speed are not totally supported by the federal regulations they cite as authority.¹⁵⁰ Track speed regulations established by the FRA set maximum operating speeds for different classes of tracks.¹⁵¹ Determinations of track classification consider only objective, invariable track conditions such as ballast, cross ties, rail conditions and tie plates.¹⁵² Track classification determines the maximum permissible speed for a locomotive traveling on that track.¹⁵³

The FRA recognized in the preface to its speed regulations enacted pursuant to the FRSA that track classification does not take into account the many factors affecting the safety of grade crossings.¹⁵⁴ The preface states: "The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation of the requirements of this part, may require remedial action to provide for safe operations over that track."¹⁵⁵

Despite the express disclaimer in the preface to Section 213, the Supreme Court, in *CSX Transportation, Inc. v. Easterwood*,¹⁵⁶ nevertheless determined that the speed limits of Section 213.9(a) were set with safety concerns in mind.¹⁵⁷ The Court arrived at this conclusion by citing several reports that noted that the conduct of the driver, and not the train, is the major variable in grade-crossing accidents.¹⁵⁸ The Court, based on these reports,

149. See *Mahony*, 966 F.2d at 645.

150. See 49 C.F.R. § 213 (1991); see also Haralson & Levine, *supra* note 142, at 24. In order to find pre-emption of the common-law excessive speed claim, the Supreme Court, in *Easterwood*, could not point to a single regulation that pre-empted state law, but instead invoked several related safety regulations to conclude pre-emption was intended. *Easterwood*, 113 S. Ct. 1732, 1742-43.

151. 49 C.F.R. § 213.9 (1991).

152. See *id.* § 213.

153. *Id.* § 213.9.

154. *Id.* § 213.1.

155. *Id.*

156. 113 S. Ct. 1732 (1993).

157. *Id.* at 1742-43.

158. *Id.*; see *id.* at n.14 (quoting U.S. DEP'T OF TRANSP., RAILROAD-HIGHWAY SAFETY, PART I: A COMPREHENSIVE STATEMENT OF THE PROBLEM (1971) ("Nearly all grade crossing accidents can be said to be attributable to some degree of 'driver error.' Thus, any effective program for improving [crossing] safety should be oriented around the driver and his needs in approaching, traversing, and leaving the crossing site as safely and efficiently as possible"); see also U.S. DEP'T OF TRANSP., FEDERAL HIGHWAY ADMINISTRATION, RAIL-HIGHWAY CROSSINGS STUDY 8-1 (1989) ("the most influential predictors of train vehicle accidents at rail-highway crossings are [the] type

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determined that train speed only had a minor effect on safety concerns and what effect train speed did have, was addressed in Section 213.9(a).¹⁵⁹ Two Justices, however, were not able to make the necessary leap in logic to find pre-emption of train speed. The dissent stated, "Speed limits based solely on track characteristics, . . . cannot be fairly described as 'substantially subsum[ing] the subject matter of . . . state law' regulating speed as a factor in grade crossing safety."¹⁶⁰

The federal regulations do not factor local safety hazards into permissible speeds for a track.¹⁶¹ Operating a train within the maximum possible track speed may constitute lack of due care depending on the particular local safety hazards at a specific crossing. For example, a railroad track that runs by an elementary school playground should be required to slow down to the local speed ordinance. Likewise, a train should be liable in tort if it causes an accident because it failed to slow down when there is low visibility due to heavy fog.¹⁶² Allowing trains to barrel ahead at the maximum federal speed limit in the face of conditions such as these is unconscionable.¹⁶³ Courts must recognize that track classification determines speed maximums under a general classification of conditions and does not take into consideration local conditions that could endanger both the general public and railroad personnel.

The argument that federal speed regulations do not take into account local conditions was rejected by the Eleventh Circuit in *Easterwood v. CSX Transportation, Inc.*¹⁶⁴ The appellant, Easterwood, argued that pre-emption was inappropriate because the speed limits were not adopted in order to

of warning devices installed, highway traffic volumes, and train volumes. Less influential, but sometimes significant [is] maximum train speed . . .").

159. In arriving at this conclusion the Court ignored the Secretary's own explanation of the train speed regulations he promulgated. "When the Secretary promulgated his speed regulation in conjunction with a set of track safety standards, he declined to consider 'variable factors such as population density near the track' because these matters fell 'beyond the scope of the notice of proposed rule making.'" *Easterwood*, 113 S. Ct. at 1744 (Thomas, J., dissenting) (quoting 36 Fed. Reg. 20336 (1971)).

160. *Easterwood*, 113 S. Ct. 1732, 1744 (1993) (Thomas, J., dissenting). Justice Thomas concluded: "Because the Secretary has not even considered how train speed affects crossing safety, much less 'adopted a rule, regulation, order or standard covering [that] subject matter,' Georgia remains free to 'continue in force any law' regulating train speed for this purpose." *Id.* at 1745 (quoting 45 U.S.C. § 434 (1988)).

161. *Id.*

162. See *Mahony v. CSX Transp., Inc.*, 966 F.2d 644, 646 (11th Cir.), *reh'g granted*, 980 F.2d 1379 (11th Cir. 1992).

163. Presumably, claims such as these would not be pre-empted under the Supreme Court's holding in *Easterwood*. See *Easterwood*, 113 S. Ct. at 1743 n.15.

164. 933 F.2d 1548, 1553 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1372 (1993).

minimize the number of grade crossing accidents.¹⁶⁵ Easterwood pointed out that the various speed limits found in Section 213.9 are related to the class of track and the curve of the track.¹⁶⁶ The sections of track are classified on the basis of several factors including the track ballast¹⁶⁷ and the number and quality of the cross ties.¹⁶⁸ Easterwood pointed to these factors and argued that the speed limits are not related to the density of the surrounding population.¹⁶⁹ Easterwood argued that the speed limits were adopted to prevent derailments and not to prevent grade crossing accidents.¹⁷⁰ The court rejected this analysis and stated that this interpretation is just a guess at Congress' motive for enactment of the speed regulations.¹⁷¹ The court cited *Florida Lime & Avocado Growers, Inc. v. Paul*,¹⁷² which held that it is irrelevant to pre-emption analysis whether the state law's objectives are similar to or different from the federal law's objectives.¹⁷³ Instead, pre-emption analysis turns on Congress' intent to pre-empt state law and on the nature of the federal regulation.¹⁷⁴ The Supreme Court was in accord, noting that Section 434 does not "call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter of train speed."¹⁷⁵

In ruling that the speed regulations promulgated pursuant to the FRSA pre-empt, in a wholesale manner, any claim that a railroad company was negligent for operating its train at an excessive speed, a court fails to consider the "local safety exception" of the FRSA, Section 434.¹⁷⁶ It also fails to consider the FRA's acknowledgment that local conditions and circumstances would require remedial regulations to provide for safe railroad operation.¹⁷⁷ A plaintiff should be able to assert that a train was negligent for failing to slow down because, under the circumstances, a reasonably prudent train operator would have exercised additional caution. Pre-emption of local speed regulations goes far beyond adherence to the Supremacy Clause. Application of the doctrine of pre-emption in this area effectively insulates a railroad from

165. *Id.*

166. *Id.*; see 49 C.F.R. § 213.57 (1991).

167. 49 C.F.R. § 213.103 (1991).

168. *Id.* §§ 109, 113.

169. *Easterwood*, 933 F.2d at 1554.

170. *Id.*

171. *Id.*

172. 373 U.S. 132 (1963).

173. *Id.* at 142.

174. *Easterwood*, 933 F.2d at 1554.

175. *Easterwood*, 113 S. Ct. at 1743. *But see id.* at 1745 (Thomas, J., dissenting).

176. 45 U.S.C. § 434 (1988).

177. 49 C.F.R. § 213.1 (1991).

tort liability for excessive speed as long as the railroad stays within the federal speed limits, regardless of the local conditions.¹⁷⁸

C. *Grade Crossing Warning Devices*¹⁷⁹

Any grade crossing can be characterized as a local safety hazard under the exception contained in Section 434 of the FRSA.¹⁸⁰ Many of the numerous factors that affect the safety of a grade crossing are particular to its location, and some even particular to that location at a given point in time. The multiplicity of possible factors affecting the safety of a crossing makes nationally uniform safety standards for crossings infeasible.¹⁸¹

Railroads should have a duty of reasonable care when installing and maintaining grade crossing warning devices, and when operating their trains.¹⁸² Thus, a railroad should have a common law duty to provide adequate warning when approaching a grade crossing.¹⁸³ Whether this necessitates automatic warning devices, simply a cross buck, or some other device depends on the number and nature of the factors creating the hazard at the crossing.¹⁸⁴ In most cases this should be a question of fact for the jury.¹⁸⁵

A court may continue to impose a common law duty on railroads to maintain a safe crossing—even after local authorities have determined what

178. Justice Thomas' interpretation of the Secretary's regulations regarding train speed expresses the correct view of pre-emption: "I would follow the most natural reading of the Secretary's regulations: the Federal Government has chosen neither to regulate train speed as a factor affecting grade crossing safety nor to prevent States from doing so. The Court's contrary view of these regulations' pre-emptive effect may well create a jurisdictional gap in which States lack the power to patrol the potentially hazardous operation of trains at speeds below the applicable federal limit." *Easterwood*, 113 S. Ct. at 1745 (Thomas, J., dissenting).

179. The Supreme Court recently addressed the issue of federal pre-emption of required warning devices at grade crossings in *Easterwood*. 113 S. Ct. at 1738-42. The Court concluded that *Easterwood*'s grade-crossing claim was not pre-empted under the facts of that case. *Id.* at 1742. However, the Court did indicate that under an appropriate set of facts pre-emption will be found. *Id.* 1740-41. Thus, determining whether federal regulations pre-empt local grade-crossing ordinances is a fact specific analysis and the result will depend on what federal regulations are applicable to a certain fact pattern.

180. 45 U.S.C. § 434 (1988); see also Haralson & Levine, *supra* note 142, at 21.

181. Haralson & Levine, *supra* note 142, at 21.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

safety measures are needed at a crossing—without violating the dictates of the FRSA.¹⁸⁶ Although the FRSA envisioned "nationally uniform standards to the extent practicable,"¹⁸⁷ such uniformity is not possible with grade crossings due to the varying local conditions that make a uniform standard unworkable.¹⁸⁸ According to one article, "Population growth, neighborhood development, increases in traffic patterns or any of a number of factors may render inadequate what was once a suitable warning device at a grade crossing. Imposing a continuing duty on railroads to improve these warnings or to provide some other form of adequate warning is the best way to protect motorists from grade-crossing dangers."¹⁸⁹

D. Applying the Above Analysis to Walker

When the reasoning advocated above is applied to *Walker v. St. Louis-Southwestern Railway*, it becomes apparent that several additional factors need to be considered. First, in regard to grade-crossing warning devices, the court correctly chose to apply the contingent pre-emption analysis announced in *Marshall*. Before the court finds pre-emption of state tort law, however, it must make certain that the factors that influenced the local agency's determination have not radically changed. If the conditions at the crossing have substantially changed, thus rendering the warning devices at the crossing inadequate, pre-emption should not be found. Railroads should not be totally insulated from tort liability by blindly complying with the local agency's determination. The railroad should have a continuing duty to monitor the safety of a crossing and its warning devices in order to protect the public and train crews. The *Walker* court correctly found pre-emption on the issue of the adequacy of grade-crossing warning devices if the conditions at Randall's Crossing did not radically change between the time the MDOT made its determination of the required crossing protection and the time of the accident.

Courts should be wary of finding pre-emption on the issue of train speed. First, if the circumstances of the accident suggest the railroad was negligent by operating at a given speed, even if the speed is below the maximum set by the federal regulations, the issue should not be pre-empted by the federal regulations.¹⁹⁰ Second, courts need to give effect to the "local safety exception" contained in Section 434 of the FRSA.¹⁹¹ After reviewing the relevant case law, many individual localities might think they do not have the

186. *Id.* at 23.

187. 45 U.S.C. § 434 (1988).

188. Haralson & Levine, *supra* note 142, at 23.

189. *Id.*

190. *See supra* part V.B.

191. 45 U.S.C. § 434 (1988).

authority to promulgate speed limits for railroads. Courts need to recognize that localities have this power. If this is not recognized, a court will be ignoring the intent of Congress and the FRA.¹⁹²

It is likely that the court reached the correct decision in *Walker*. If the factors outlined above are not considered in the future, however, the courts will allow the railroad industry to misuse the FRSA to effectively insulate railroads from liability when they are in fact negligent. Using the FRSA for this purpose is repugnant to the intent of Congress and the American system of justice.

VI. CONCLUSION

In general, courts should approach federal pre-emption of state tort law cautiously. When the federal regulation can be nationally uniform because varying local conditions and circumstances have no effect on the regulation, pre-emption should be routinely found. Courts should be wary, however, of finding pre-emption when varying local conditions make it impracticable to have a uniform standard.

The Supreme Court's decision in *Easterwood* should be interpreted narrowly in regard to train speed pre-emption. The Court merely found that Easterwood's claim that the train was traveling too fast given the "time and place" was pre-empted by federal speed regulations.¹⁹³ The Court expressly stated that the decision does not bar a claim for a related tort law duty, "such as the duty to slow or stop a train to avoid a specific, individual hazard."¹⁹⁴ Thus, if local conditions or circumstances suggest a reasonable train operator should slow the train below the federal speed limits, he should be required to do so. If the train operator acts negligently in the face of dangerous conditions, the railroad should be liable, and the *Easterwood* decision does not bar such a claim.

When courts apply a contingent pre-emption analysis to grade crossing warning devices, they should make sure that the factors that went into the local agency's determination have not radically changed. A railroad should not be completely insulated from liability merely because it complied with the federal regulations. The railroad should have a duty to monitor its grade crossings to make sure changing conditions do not make the present warning

192. See *id.*; 49 C.F.R. § 213.1 (1991).

193. *Easterwood*, 113 S. Ct. at 1743 n.15.

194. *Id.*

devices inadequate. When a court fails to recognize this duty, it ignores the local safety exception contained in Section 434 of the FRSA. Furthermore, a court does not fulfill its responsibility to the public to compensate injured parties for their losses.

JOHN WOODSON ROGERS