MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant

DATE: April 24, 2009

RE: Relief from tort liability at railroad crossing improvements made with federal funds

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You have the following question: If federal funds are used to fund safety improvements at a particular railroad crossing in the City, are local governments, the state and the railroads exempted from liability accidents that occur at that railroad crossing?

The answer is generally yes, *only as to the adequacy of the warning devices at the crossing.* For that reason, the TDOT, Project Planning Division Meeting Notes of April 3, 2009, in which said that "Using the Federal fund for safety improvements would exempt the City, State and Railroad Company from liability due to any crashes which could occur at this crossing," is far too broad a promise. The cases involving state-based tort liability claims at railroad crossings have held that not all such claimed are preempted. But I hasten to add that the project in question would undoubtedly greatly reduce the liability potential for all those entities with respect to claims of inadequate warning devices.

Generally

That answer is the product of the U.S. Supreme Court case of Norfolk Southern Railway Company v. Shanklin, 529 U.S. 344 (2000). Although that case held that the *railroad* was exempt from state-based negligence claims for inadequate warning devices that were federally-funded under, and otherwise meet the requirements of, the Federal Railroad Safety Act (FRSA), it appears to exempt states and local governments from the same state-based negligence claims.

But in the U.S. Sixth Circuit Court of Appeals, which includes Tennessee, claims of negligence liability can still be brought against railroads for excessive vegetation in or near railroad crossings that interferes with sight distance, and presumably against counties and municipalities with respect to excessive vegetation along their roads and streets and other of their

properties in the vicinity of railroad crossings but outside the railroad right-of -way that creates sight distance problems. The same is probably true of other negligence claims, some of which fall outside the scope of the liability preemption under the FRSA.

Specific municipal liability under Tennessee Governmental Tort Liability Act

In fact, in the unreported case of Kelly v. City of Rockwood, 1997 WL 671968 (Tenn.Ct. App. 1997), two 13 year old boys were killed when the motorcycle they were riding ran into the side of a train inside the City of Rockwood. Ms.. Kelly, the mother of one of the children, sued Norfolk Southern Railway Company and the city.

The basis of Ms. Kelly's suit against the city was that *it owned and maintained the right-of-way on one side of the road at or near the railroad crossing at which the accident occurred.* She argued that the city generally trimmed the foliage along that right-of-way once in the fall and once in the spring, but that at the time of the accident (May 22, 1994), it had not been trimmed since the prior fall. The consequence was that

> The view of a train approaching from the south when traveling easterly on Black Hollow Road was obstructed by the untrimmed foliage. The tree limbs and bushes also partially obscured the view of a railroad crossbuck sign located near the crossing on the south side of Black Hollow Road. This crossbuck was the only sign on Black Hollow Road warning of a railroad crossing. [At 2]

However, the city had never received any complaints about foliage obstructing the view of trains or signage at the railroad crossing, and there had never been a previous accident at the crossing.

The city filed a motion for summary judgment to dismiss the city as a defendant "based on sovereign immunity" under the Tennessee Governmental Tort Liability Act (TGTLA), which the court refused to grant. [At 1] Before the trial Ms. Kelly settled her claims against Norfolk Southern, and her suit against the city went to trial. The Trial Court awarded Ms. Kelly $750,000. But applying comparative fault, the Trial Court apportioned 10% of the fault for the accident to the City of Rockwood. The city appealed, on two principal grounds:

1. The trial court should have dismissed the city as a defendant because it had sovereign immunity in that its actions or inactions in trimming the foliage were discretionary under ' 29-20-205 of the TGTLA.

2. The evidence did not support the trial court's findings:

> - of constructive notice to the City Rockwood
> - that Black Hollow Road was in a defective, unsafe or dangerous conditions as required by ' 29-20-203 of the TGTLA.

The Court of Appeals acknowledged that under ' 29-20-205 of the TGTLA local governments are immune from liability for discretionary functions, but held that the decision of whether to trim the foliage in this case was not a discretionary function. It pointed to the Tennessee Supreme Court's adoption of the "planning-operational test" in Bowers v. City of Chattanooga, 826 S.W.2d 427 (Tenn. 1992), in which the Court announced that planning decisions were discretionary functions and that operational acts were not discretionary. In this case, declared the Court:

> Applying the "planning-operational test" to the facts of this case we find that the City of Rockwood's failure to trim the foliage on Black Hollow Road was an operational decision and not discretionary. As discussed in *Bowers*, an operational decision is one based on preexisting law, regulations, policies, or standards. Although the City of Rockwood had no written procedure regarding the trimming of foliage on Black Hollow Road the evidence at trial showed a clear policy or standard to maintain the right-of-way... [At 3].

The city, said the Court, had adopted a "custom" of trimming the foliage each fall and spring on Black Hollow Road.

The Court declared that it was not necessary to determine whether the city had constructive notice that Black Hollow Road was in a defective, unsafe or dangerous condition, as required to remove the city's immunity on that ground under ' 29-20-302 of the TGTLA, because it had already found that the city did not have discretionary function immunity under ' 29-20-205 of the TGTLA. But it declared that because the Trial Court's decision had been based on the removal of immunity under T.C.A. 29-20-203 it would address that question. The Court rejected the Trial Court's first reason for finding that the road in question was defective, unsafe or dangerous but accepted its second reason:

> The Trial Court held that Black Hollow Road was defective, unsafe or dangerous because on the date of the accident the foliage on the City of Rockwood's right of way obstructed the railroad warning signs, and that the foliage obscured a driver's view of a train approaching from the south. The law in Tennessee is clear that a defective, unsafe or dangerous condition exists if a governmental entity allows foliage to obstruct the view of a traffic sign that was placed there by local officials. [Citation omitted by me.] However there must be direct proof in the record that the governmental entity owned and controlled the traffic sign in question. [Citation omitted by me.]
> The City of Rockwood cannot be responsible for the obstruction of a sign which they did not own and control. The only proof in the

> record as to who owned, controlled or erected the railroad crossing sign, pointed to the railroad. No direct proof appears anywhere in the record to contradict this assertion. Therefore, the City of Rockwood's immunity was not removed based on the crossbuck sign being obscured by foliage.
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> However, the Trial Court also held that Black Hollow Road was defective, unsafe or dangerous because the untrimmed foliage obstructed a traveler's view of an oncoming train. This specific issue has not been addressed by Tennessee courts, although our Supreme Court has provided a list of characteristics to consider in determining whether a particular site is defective, unsafe or dangerous for purposes of governmental immunity under T.C.A. 29-20-203:
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> The decision of whether a condition of a highway actually is dangerous and hazardous one to an ordinary prudent driver is a factual one, and the court should consider the physical aspects of the roadway, the frequency of accidents at the place in the highway and the testimony of expert witnesses in arriving at this factual determination ... The courts should also consider the road's location, the volume of traffic, and the type of traffic it accommodates... *Sweeney v State*, 768 S.W.2d 253, 255 (Tenn. 1989). [At 4]

The road (street) in this case was a rural, lightly traveled one, on which nobody had any knowledge of an accident having occurred. It was also a narrow one with "very thick and overgrown" foliage that "definitely obscured an easterly traveler's view of a northbound train." [At 5] The city recorder testified that it was his job to keep the brush back from the side of the road, and that "if he had seen the foliage on Black Hollow Road the way it was on the day of the accident he would have had someone trim it back." [At 5] That was enough, said the Court, to support the Trial Court's holding that the road was defective, unsafe or dangerous.

The apportionment of 10% fault against the city, challenged by Ms. Kelly, was also upheld by the Court, which thought that the driver of the motorcycle was 90% at fault.

It is not likely that other Tennessee cities or counties would be immunized from similar claims by federal preemption for reasons that will become apparent when we look at how the Sixth Circuit handled Ms. Shanklin's claim that excessive vegetation interfered with the sight distance, when the U.S. Supreme Court remanded Shanklin to resolve negligence claims not addressed by the Supreme Court. The reason is that in Kelly v. City of Rockwood, the overgrown vegetation occurred *outside* the railbed and far enough away from it and from the railroad crossing that the federal rules and regulations covering vegetation in and near railroad right-of-way did not extend to it.

The U.S. Supreme Court's pronouncements on federal preemption

In Norfolk Southern Railway Company v. Shanklin, above, U.S. Supreme Court considered the question of whether Norfolk Southern was liable for an accident at a railroad crossing in west (Gibson County) Tennessee. In that accident, Mr. Shanklin was killed at a railroad crossing, which was equipped with warning signs and reflectorized crossbucks that, in the Court's words, were "the familiar black-and-white, X-shaped signs that read 'RAILROAD CROSSING....'" [At 350] [citation omitted by me.] The signs, said the Court, had been installed by the Tennessee Department of Transportation (TDOT). They had been installed in 1987 with federal funds under the federal Crossings Program. TDOT's request for funds for that and other crossing projects, "contained information about each crossing covered by the project, including the presence or absence of several of the factors listed in ' [23 C.F.R] 646.214(b)." [At 349] Federal funding paid for 99% of the costs of the signs.

23 C.F.R. '' 646.214(b)(3) and (4) (the cases do not agree whether those sections should be preceded by one ' or two '') address the design and adequacy of railroad crossing warning devices:

> (3)(I) Adequate warning devices under ' 646.214(b)(2) or any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing lights signals when one or more of the following conditions are met:
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> (A) Multiple main line railroad tracks.
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> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive as to obscure the movement of another train approaching the crossing.
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> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
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> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school busses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
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> (F) A diagnostic team recommends them.
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> (ii) In individual cases where a diagnostic team justifies the gates that are not appropriate, FHWA may find that the above requirements are not applicable.

> (4) For crossings where the requirements of ' 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

Shanklin's widow sued Norfolk Southern, based on "Tennessee statutory and common law." [At 350] The railroad, alleged Ms. Shanklin, had been negligent in failing to maintain adequate warning devices at the crossing. The railroad argued that the FRSA preempted her lawsuit. As we shall see later, it is important to note that Ms. Shankin also alleged, among other things, that the railroad was negligent for failing to maintain safe sight distance by reducing the height of vegetation along the railroad track. The U.S. District Court for the Western District of Tennessee held that Ms. Shanklin's allegations that the signs installed at the railroad crossing that her husband was killed were inadequate was not pre-empted. The U.S. Sixth Circuit Court of Appeals upheld the District Court. On appeal, the U.S. Supreme Court stated the question:

> "[W]hether the FRSA, by virtue of 23 C.F.R. '' 646.214(b)(3) and (4) (1999) pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the installation of such devices? [At 351]"

Yes, answered the High Court, reversing the U.S. District Court, and the Sixth Circuit Court of Appeals. Citing a legislative history of the adoption of the Federal Railroad Safety Act and the Highway Safety Act, the Court concluded that under the authority of those Acts, the Secretary of Transportation, through the Federal Highway Administration, promulgated the regulations implementing the Crossings Program. One of those regulations was 23 C.F.R. ' 646.214(b). As the Court pointed out, crossings that met the conditions in (b)(3) were required to have automatic gates and flashing light, and crossings at which those conditions were not present, required the decision of what warning devices were to be used to be approved by the FHWA.

The High Court distinguished the regulations in 23 C.F.R. '' 646.214(b)(3) and (4) from other federal railroad crossing regulations that were more general that the Court had held were not pre-empted in CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993). But the Court declared that it had announced the rule that '' 646.214(b)(3) and (4) preempted state tort law in Easterwood, a fact that had obviously escaped the attention of the U.S. Government lawyers, and some of the Federal Courts, including the U.S. Sixth Circuit Court of Appeals, all of which had argued against or rejected preemption. Indeed, the Court acknowledged that there was a split among the Circuits on the preemption question. The reason it had rejected the argument that ' 646.214(b)(3) and (4) pre-empted state tort law in Easterwood, said the Supreme Court was that

> .... As here, the plaintiff brought a wrongful death action alleging

that the railroad had not maintained adequate warning devices at a particular grade crossing. *Id*. At 661, 113 S.Ct. 1732. We had that '' 646.214(b)(3) and (4) were not applicable because the warning devices for which federal funds had been obtained were never actually installed at the crossing where the accident occurred. Id. At 671-673, 113 S.Ct. 1732. Nonetheless, we made it clear that, when they do apply, '' 646.214(b)(3) and (4) "cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and repair dangerous crossings." *Id.* At 671, 113 S.Ct. 1732. The sole question in this case [Shanklin], then, is whether '' 646.214(b)(3) and (4) "are applicable" to all warning devices actually installed with federal funds.

We believe that *Easterwood* answers this question as well. As an original matter, one could plausibly read '' 646.214(b)(3) and (4) as being purely definitional, establishing a standard for the adequacy of federally funded warning devices but not requiring that all such devices meet that standard. *Easterwood* rejected this approach, however, and held that the requirements spelled out in (b)(3) and (4) *are mandatory* [Court's emphasis] for all warning devices installed with federal funds. "[F]or projects that involve grade crossings ... in which 'Federal-aid funds participate in the installation of the 'warning' devices regulations specify warning devices *must be installed*. Id at 666, 113 S.C.t 1732 (emphasis added [by the Court]). Once it is accepted that the regulations are not merely definitional, their scope is plain: They apply to any project where Federal-aid funds participate in the installation of the devices." 23 C.F.R.' 646.214(3)(I).

Sections 646.214(b)(3) and (4) therefore establish a standard of adequacy that "determine[s]" the devices to be installed when federal funds participate in the crossing improvement project. Asteroid, 507 U.S. at 671, 113 S.Ct. 1732. If a crossing presents those conditions listed in (b)(3), the state must install automatic gates and flashing lights; if the (b)(3) factors are absent, (b)(4) dictates that the decision as to what devices to install is subject to FHWAS approval. See id., at 670-671, 113 S.Ct. 1732. In either case, ' 646.214(b)(3) or (4) "is applicable" and determines the type of warning device that is "adequate" under federal law. *As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation "displace[s]" state and private decision making authority by establishing a federal law requirement that certain*

protective devices be installed or federal approval obtained. Id. At 670, 113 S.Ct. 1732. [At 353-54] [Emphasis is mine.][1]

[1]Here The High Court also addressed an interesting question as to the application of the Manual on Uniform Traffic Control Devices (MUTCD). Ms. Shanklin argued that preemption did not apply to the railroad crossing at which the accident occurred "because TDOT did not install *pavement marking* as required by the MUTCD," [At 357] {although early on in the case, the Court implies that the *signage* at the crossing conformed to MUTCD). [At 344] The Court"s response was that:

> This misconceives how pre-emption operates under these circumstances. When the FHWA approves a crossing improvement project and the state installs the warning devices using federal funds, '' 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates "the devices to be installed and the means by which railroads are to participate in their selection." *Easterwood, supra*, at 671, 113 S.Ct. 1732. It is this displacement of state law concerning the devices adequacy, and not the State's or the FHWA's adherence to the standard set out in 6746.214(b)(3) and (4) or to the requirements of the MUTCD, that pre-empts state tort actions. Whether the state should have installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question. [At 357-58]

The Sixth Circuit Court of Appeals on the remand of Shanklin: not all negligence claims preempted

But on remand to the Sixth Circuit Court of Appeals for the resolution of other claims of negligence brought against the Norfolk Southern by Ms. Shanklin, that Court in Shanklin v Norfolk Southern Railway Co., 369 F.3d 978 (2004), declared that:

> The [U.S. Supreme] Court held that common law clams attacking the adequacy of grade crossing warning signals were preempted from the time federal authorities approved and committed funding to the installation of warning signals. *The court did not speak explicitly to the vegetation claim, and accordingly remanded the case for rehearing on any remaining claims*. [At 983]

A second trial was subsequently held in which Ms. Shanklin was awarded $1,434.000 on her sight distance claim. Norfolk obviously argued that sight distance claims were preempted under the 23 C.F.R.'' 646.214(b)(3) and (4).

The Sixth Circuit rejected Norfolk's preemption claim, declaring that:

> [T]he regulation [" 646.214(b)(3) and (4) requires the DOT to consider, in assessing the need for automatic gates and flashing signals, the presence of "high speed train operation combined with limited sight distance," 23 C.F.R. ' 646.214(b)(3)(i)(c), and the presence of "unusually restricted sight distance," 23 C.F.R ' 643.214(b)(3)(i)(E). However this argument takes the regulation's language out of context. While a visual encumbrance, be it overgrown vegetation, a structure, or the contour of the land, triggers the regulatory mandate for certain waning devices, and accordingly preempts common law claims regarding the adequacy of warning signals, it does not follow that the warning device regulations preempt an action based on the alleged failure to eliminate such a visual impediment. *The regulations governing warning signals, not vegetation growth*.... [At 987] [Emphasis is mine].
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> The Court pointed to other DOT regulations governing vegetative growth:
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> .... In particular, 49 C.F.R. ' 213.37 states: "Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not ... (b) [o]bstruct visibility of railroad signs and signals ..." 49 C.F.R. ' 213.37(b). This regulation preempts any state-law claim regarding vegetative growth that blocks a sign immediately adjacent to a crossing, but it does not

> "impose a broader duty to control vegetation so that it does not obstruct a motorist's visibility of oncoming trains." *O'Bannon v. Union Pac. R.R. Co.*, 960 F. Supp. 1411, 1422-23. (W.D. Mo.1997); see also *Mo. Pac. Ry. Co. v. R.R. Comm'n*, 833 F.2d 570, 577 (5th Cir. 1987)(rejecting ruling that ' 213.37(b) controlled a railroad's right-of-way in its entirety); *Bowman v. Norfolk S. Ry. Co*., 832 F. Supp. 1014, 1020-21 (S.D.C. 1993), aff'd 66 F.3d315 (4th Cir. 1995) (federal regulations do not preempt claims concerning vegetation outside the area immediately next to the railbed.). The comparison of 49 C.F.R. ' 214.37 and the adequate warning regulation persuasively shows that *23 C.F. R. ' 646.214(b)(3) does not "cover" actions based on negligent failure to clear vegetation*. [At 987] [Emphasis is mine.]

Could a claim of negligence be made against a county or city that it allowed vegetation to grow up off the railroad right-of-way, along its roads or streets leading up to a railroad crossing, that interfered with the sight distance? We have seen that has already happened in Kelly v. City of Rockwood. But as a practical matter, that is the only case I can find in Tennessee where a local government has been found liable for an accident that has occurred at railroad crossings for any reason. Railroads are generally the target of suits for railroad crossing accidents, probably for the obvious reason that recovery of damages from local government is comparatively limited by the TGTLA. But the potential for local government liability is still there for such claims.

The 2007 amendment to the Railway Safety Act

A 2007 amendment to the Railway Safety Act also raises uncertainties about the outcome of cases in the area of federal preemption of state-based tort suits against local governments for railroad crossing accidents. That amendment has been argued to overturn Shanklin.or call into question its continuing application. But the cases that interpret that amendment where a claim of negligence for an inadequate warning at a railroad crossing is made against a railroad, and where other claims of negligence have been made that have a bearing on that issue, suggest that Shanklin is still solid in such cases. They also continue to point to claims of negligence that are not preempted under Shanklin. The 2007 amendment and the cases that have a bearing on it will be discussed at length below.

The Railroad Safety Act was amended in 2007, as a result of the "Implementing Recommendations of the 9/11 Commission Act of 2007, and of a train derailment in Minot, North Dakota," according to 6 *Litigating Tort Cases*, ' 70:3.5 (Lee, J.D and David C.). That derailment appears important for interpreting the legislative history of the 2007 amendments were signed into law August 3, 2007, but its text made it retroactive to January 18, 2002 (the date of the Minot, North Dakota train derailment) for "all pending State law causes of action arising from events or activities occurring on or after that date." [49 U.S.C.A. ' 20106(b)(2)]. Like many amendments to statutes, this one adds more confusion than "clarification" to questions of negligence liability for accidents at railroad crossings. But the cases following that amendment, speaking at some length

about problems arising from the North Dakota District Court's interpretation of the preemption provisions of the FRSA, have shed some light on that amendment.

The 2007 amendment reads:

> ' 20106. Preemption
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> (a) National uniformity of regulation.
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> (1) Laws, regulations and orders related to railroad safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable.
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> (2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order
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> (A) Is necessary to eliminate or reduce an essentially local safety or security hazard;[2]
> (B) Is not incompatible with a law, regulation, or order of the United States Government; and

[2]I have chosen not to address the question here of what constitutes an "essentially local safety hazard," because the court did not find one in this case, and because it is a rare case where one is found due to the incredibly strict definition of what safety hazards qualify. Indeed, it is said in VanBuren v Burlington Northern Santa Fe Railway Company, that the "[t]he prototypical 'specific individual hazard' is a child standing on the track." [citing Bashir v. National R.R.Passenger Corp., 929 F.Supp. 404 ...] The Shanklin Court simply said without comment that the "specific individual hazard" question did not exist in that case. However, the Sixth Circuit addressed a claim of the existence of such a safety hazard in a case it handed down almost immediately after it resolved Shanklin on remand from the U.S. Supreme Court: the unreported case of Ludwig v Norfolk Southern Railway Company, 50 Fed.Appx. 743, 2002, WL 31554085 (C.A.6 (Tenn.)). There Ms. Ludwig sued Norfolk Southern Railway Company in the U.S. District Court for Western Tennessee, for the death of her son, who was a passenger in a car hit by Norfolk Southern's train. On the question of whether construction in the vicinity of the railroad crossing at issue created a "specific, individual hazard, " a jury found Norfolk Southern 3% negligent and awarded Ms. Ludwig $75,000 damages. The District Court overturned the jury's verdict and granted Norfolk Southern a judgment as a matter of law, applying the strict definition of that term to find that construction at crossings was too general a hazard to qualify. The U.S. Sixth Circuit upheld the District Court's judgment. I have extensive research on this issue for anyone who may be interested in it.

(c) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(c) has failed to comply with a State law, regulation or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising form events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.BNothing in this section creates a Federal cause of action of behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

The 2007 amendment's impact on ShanklinBcases

What, if anything, does that amendment do to the U.S. Supreme Court's ruling in Shanklin v. Norfolk Southern Railway? It does not appear to me to have made any substantive changes to its preemption provision [subsection (a)]. Prior to the 2007 amendment, the comparable statute (bearing a different number) read:

> The Congress declares that laws, rules, regulations, order, 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 has adopted a rule, regulation,

> order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, [3] and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

A comparison of the two statutes suggests they are essentially the same in a slightly different format. Indeed, Van Buren v. Burlington Northern Santa Fe Railway Company, 544 F. Supp.2d (D. Neb. 2008), which will be discussed below, made those comparisons and saw no substantive differences.

What is new in ' 20106 is subsection (b). It is that provision that derives from the Minot, North Dakota train derailment on January 18, 2002, which generated the case of Mehl v. Canadian Pacific Railway, Limited, 417 F. Supp.2d 1104 (D. North Dakota (2006), both of which caught the attention of the Congress. The derailment of a Canadian Pacific freight train near Minot damaged several tanker cars, releasing anhydrous ammonia into the air, injuring many people and apparently killing one. Besides Mehl a number of other suits arising out of that derailment were filed, both in the state courts in Minnesota and in the federal district court in Minnesota (the headquarters of Soo Railway Lines, a wholly owned subsidiary of Canadian Pacific.) In Mehl , the plaintiffs alleged that the cause of the derailment was the failure of a portion of the continuous weld track (CWT). They sued on several state-based tort grounds: (1) negligence, (2) private nuisance, (3) public nuisance, (4) trespass on land, (5) strict liability, (6) intentional infliction of emotional distress, and (7) negligence per se.[At 1106]

Canadian Pacific argued that all those claims were preempted by federal regulation, characterizing the negligence claims as (1) negligent inspection claims, (2) negligent construction and maintenance claims, (3) negligent training claims, and (4) negligent operation claims. All those claims were preempted, reasoned Canadian Pacific, by the specific federal regulations noted by the Court in Footnote 5 in the case, and considered at length by the Court at 1116B118. With with respect to the claims of intentional infliction of emotional distress, strict liability and negligence per se., Canadian Pacific argued alternatively that those claims were not recognized under North Dakota law, which the arguments the Court also considered at length at 1118- 119.

The Court reluctantly rejected every claim made by the plaintiffs as being preempted by federal regulations, or not recognized under North Dakota law. In Section 10 of the case, it labeled **"HARSH IMPACT**," the Court declared that, "While the Court is convinced the dismissal of Plaintiff's claims is inevitable under the current state of federal law in the Eighth Circuit, this Court recognizes that such a result is unduly harsh and leaves the Plaintiffs with essentially no remedy for this tragic accident...." [At 1120]

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[3] See Footnote 2

The Court's reasoning for that declaration was that *where there was federal preemption of railroad safety regulations there was no way for the state or federal courts to determine whether there had been negligence in compliance with the federal regulations.* If the derailment was caused by negligence in the inspection of the tracks pursuant to federal regulations, there was no way for the federal court to make that determination once preemption was found. Similarly, with respect to construction and maintenance claims, "The issues of bolt tightness, cracked joint bars, restressing, adjusting or destressing as to CWR [continuously welded rail], rail anchoring, and defective track conditions, are all covered by federal regulations." But one it was determined that those regulations preemped state regulation, there was no way for a plaintiff to challenge the application of those regulations. The same result applied to negligence claims for training and operation.

It was those problems that were at issue when the Congress adopted subsection ' 20106(b). But none of the cases that have analyzed the substance of the 2007 amendment have found any intention on the part of Congress to overhaul state-based tort liability preemption, or to overturn Shanklin, one case going as far as to call the Mehl Court's interpretation of preemption "erroneous," based on a misunderstanding of how preemption worked.

That case is probably the most important post-2007 amendment case: Henning v. Union Pacific Railroad, 530 F.3d 1206 (Tenth Cir. 2008). There the U.S. District Court found that the claim of the plaintiffs, survivors of a person killed at a railroad crossing, for damages from Union Pacific Railroad Company on the basis of inadequate warning devices and negligent delay in installing the warnings at the railroad crossing were preempted. Other of the plaintiff's claims went to trial and a jury returned a verdict for the railroad! The plaintiff's appealed the District Court's preemption ruling to the Tenth Circuit Court of Appeals, arguing that the 2007 amendments to the FRSA saved his signalization and negligent delay claims. (I will not separately discuss the negligent delay claims.) *The Tenth Circuit held that the 2007 amendments did not apply to this case*.

The plaintiff argued that ' 20106(b) (titled "Clarification Regarding State Law Causes of Action") saved her claims from preemption. In rejecting that argument, the Henning Court explained the part the derailment in Minot, North Dakota played in the 2007 amendments. In language worth quoting at length, it said:

> .... The court in *Mehl [v. Canadian Pac. Ry., Ltd*, 417 F.Supp.2d 1104 (D.N.D. 2006)] explicitly asked Congress to intervene 417 F.Supp.2d at 1120 [At 1215] *Meh*l and *Lundeen* brought to light an erroneous interpretation of FRSA preemption not supported by the text of ' 20106, *Easterwood* or *Shanklin*. Thereafter, Congress amended 49 U.S.C. ' 20106 by adding the clarification amendment, making it clear than when a party alleges a **railway** *failed to comply* [court's emphasis except the bold, which is mine.] with a federal standard of care established by regulation or with its own plan, rule or standard created pursuant to a federal regulation, preemption will not apply. 49 U.S.C. ' 20106(b)(1). Henning argues Union Pacific

failed to comply with the federal standard of care by not installing active warning devices, and thus her inadequate signalization and negligent delay claims are not preempted. This argument, however, fails to account for how preemption operates in the context of ' 646.214(b)(3) and (4). Unlike the regulation at issue in *Mehl* and *Lundeen*, establishing federal standards of care under which the railroads must affirmatively act, ' 646.214(b)(3) and (4) displace railroad decision-making authority. *There is, therefore, no federal standard of care under which Union Pacific could have failed to comply*. [Emphasis is mine.]

It is apparent that ' 646.214(b)(3) and (4) did not establish a federal standard of care under which a railroad must act when the regulation is compared to the regulation at issue in the Minot derailing cases. In *Mehl*, the plaintiffs alleged, *inter alia*, the railroad failed to properly inspect the track and freight cars in violation of 49 C.F.R. '' 215.11 and 215.13. *Mehl,* 417 F. Supp.2d at 1116-17. These regulations are intended to prevent negligent inspection by setting forth minimum qualifications for inspectors and specifying the particular aspects of freight cars that must be inspected prior to departure. 49 C.F.R. ' 215.11(b) (requiring inspectors to meet minimum qualification); *Id* ' 215.13; 45 Fed. Reg. 26708, 26711 (April 21, 1980) (requiring inspection for imminently hazardous conditions such as insecure couplings and objects extending from the side of the freight cars). These regulations place affirmative, ongoing duties on railroad operators to follow federal safety standards of care. In contrast, ' 642.214(b)(3) and (4) operate in a different fashion. Instead of setting out a federal standard of care under which railroads must operate, the regulation established a paradigm under which "federal funds participate in the installation of warning devices [ ][and] the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection [i.e. through their participation in diagnostic teams]." *See Easterwood*, 507 U.S. at 6771, 113 S.Ct. 1732; *see also Armijo*, 87 F.3d at 1192. Unlike the regulations or internal polices at issue in *Lundeen* and *Mehl*, the regulations in this case take the "final authority to decide what warning system is needed ...out of the railroad's and the state's hands." *Armijo*, 87 F.3d at 1192. The regulations do not establish a federal standard of care under which Union Pacific must continually act. Thus, Union Pacific could not, as a matter of law, fail to comply with ' 646.214(b)(3) and (4).

Henning argues that to the extent *Shanklin* held federal preemption applies even where a railroad violates a federal standard or its own

> plan, it has been overruled. This argument assumes *Shanklin* conflicts with the clarification amendment. As explained above, however, because *Shanklin* analyzed the preemptive effect of ' 646.214(b)(3) and (4), which do not establish a federal standard of care for the railroad, there is no conflict. Congress did not overrule *Shanklin*, but instead provided clarification for courts interpreting *Shanklin*, establishing FRSA preemption does not apply when a railroad violates a federal safety standard of care. This interpretation is supported by the legislative history of the clarification amendment. The Conference Report sates the "restructuring is not intended to indicate any substantive changes in the meaning of the provision." H.R. rep. No. 110-259, at 351, 120 Cong. Rec. H8589 (2007), U.S. Code Cong. & Admin. News 2007, pp. 119, 119. The provision was intended to Aclarify the intent and interpretation of the existing preemption statute and to rectify the Federal court decisions relating to the Minot, North Dakota accident that are in conflict with precedent. *Id*. (Emphasis added [by court]).Further, the amendment is labeled as a "clarification" which indicates Congress sought to resolve an ambiguity rather than effect a substantive change. See, e.g. *Gown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) (explaining that Congress often amends law to "clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." (quotation omitted)). In this case, Congress explicitly explained that it sought to rectify the Minot, North Dakota cases "that are in conflict with precedent." H.R. Rep. No. 110-259, at 351, U.S. Code Cong. & Admin. News 2007, pp. 119-119. Had Congress sought to overrule *Shanklin* and *Easterwood* it would have done so in express terms .... The clarification amendment merely rectified the district court's erroneous application of *Shanklin* and *Easterwood* to federal regulations establishing a standard of care. Because ' 646.214(3) and (4) do not create a federal standard of care, the clarifying amendment is not applicable to this case. Thus, we hold Henning's inadequate signalization and negligent delay claims are preempted by ' 646.214(b)(3) and (4). [At 1215-16].

Similarly, although Van Buren v. Burlington Northern Santa Fe Railway Company, 544 F.Supp.2d 867 (D. Neb.2008) did not involve an inadequate signalization claim but a claim of vegetation along side the track (but not in the railroad right-of-way or near it), *that violated the railroad's vegetation policy caused the accident in question,* the Court explained what **railroad policy** violations would trigger the blocking of preemption under the 2007 amendment, particularly under the "clarification of state law causes of action" provision in ' 20106(b):

> Congress responded [to the Minot, North Dakota derailment case] by clarifying that *a state law cause of action is not preempted when it is based on an allegation that a party failed to comply with a*

> *federal standard of care established by regulation or failed to comply with its own plan, rule or standard created pursuant to federal regulation.* [Emphasis is mine.]
>
> After amendment of section 20106, the familiar preemption analysis of *CSX Transp., Inc. v. Easterwood* , 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000) and their progeny is applied to allegations of state law negligence, **unless:** (*1) the negligence involves* ***the railroad's failure*** *to comply with a federal standard of care and section 2010(b)(1)(A) applies* or (2) the negligence involves a **railroad's failure to comply with its own plan, rule, or standard created pursuant to a federal regulation and section 20106(b)(1)(B) applies**. Section 20106(b)(1)(c), which provides that "[n]othing in this section shall be construed to preempt a state law action alleging that a party has Afailed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)," merely restates the general preemption rule and the exception found within section 20106(a)(2). [At 876] [Emphasis mine.]

It is clear from that case that had the adequacy of railroad crossing signalization been an issue, the Court would have applied Shanklin on the preemption issue. As it was, it illustrated how the 2007 amendment applied to the railroad on the vegetation and other negligence claims:

As to the railroad's failure to follow its own policy regarding vegetation growth, the court responded:

> Additionally, this claim is preempted. **Section 20106 permits an action under state law alleging that a railroad was negligent for failing to comply with its own regulation only if that regulation is "created pursuant to a regulation or order issued by either of the Secretaries [of Transportation, regarding safety matters, and of Homeland Security, regarding security matters**]." 49 U.S.C ' 20106(b)(1)(B) Plaintiff has clearly admitted that Defendant's vegetation regulation was not created pursuant to a regulation or order of the Secretary of Transpiration... [At 879] [Bold emphasis is mine.]

As to the claim that the railroad did not blow the horn:

> Federal regulations specify when a locomotive must sound its horn. 49 C.F.R. '' 222.21, 222.23. The parties agree that whether the claim that Defendant sounded the horn is preempted depends upon a factual predicate. If the crew failed to sound the horn, then Plaintiff's claim of negligence based on the failure to sound the

> horn **in accordance with the federal regulations** is not preempted under 49 U.S. C. ' 20106(b)(1)(A). [At 877]

Another case that analyzes the effect of the 2007 amendment is Murrell v. Union Pacific Railroad Company, 544 F. Supp.2d 1138 (D. Oregon 2008). In that case, Maria Murrell was killed when walked across a railroad track at an intersection in Salem, Oregon, and was struck by an Amtrak train. The railroad crossing at which she was killed was owned by Union Pacific Railroad, but Union Pacific did not maintain its railroad crossing. That was done by the Oregon Department of Transportation (ODOT). The crossing was identified in the federal crossing inventory, and was equipped with

> two vehicle gates, two warning bells, and two mast mounted flashing devices. These vehicular warning devices were all operational at the time of the incident .... In addition, there is a pedestrian control device which is visible to pedestrians traveling in a westerly direction on the north sidewalk of Chemekets Street that is located on the west side of 12th street, across the railroad tracks, and across 12th street. This pedestrian control device indicates "DON'T WALK" when the automatic gates and flashing lights are activated to stop vehicular traffic traveling on Chemeketa street. The crossing protection devices were paid for, in part, using 23 U.S.C. ' 130 federal funds as ordered by the Oregon Public Utility Commission ("PUC"), Order Nol 89-408, on March 24, 1989. [At 1142]

Maria Murrell's survivors sued Union Pacific under various state law grounds: (1) warning devices protecting the crosswalk were inadequate, (2) failure to warn, (3) failure to provide adequate visibility, (4) train operating at excessive speeds, (5) failure to issue a slow order, (6) failure to eliminate a dangerous condition, and (7) train operator's failure to keep a proper lookout. [At 1144] Union Pacific argued that the Murrell's clams were preempted by the FRSA.

The Murrell's responded by arguing that under the 2007 amendment to the Railroad Safety Act contained in 49 U.S.C., subsection (b)(1)(c), "their common law state tort claims are no longer preempted by federal law and that the U.S. Supreme Court's decision in CSX Transp., Inc. v. Easterwood, 507 U.S. 658 ... and Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 ... are overruled.." [At 1146-47] [Emphasis is mine.]

The Court rejected the Murrell's argument, for two reasons:

1. Nothing in the 2007 amendment to ' 20106 or its legislative history declares that common law tort claims are preempted except within the exceptions listed in subsection (a)(2). The amendment to ' 20106 will be contained in a new federal regulation that takes effect on Aril 14, 28, which will be codified at 49 C.F.R. " 217.2 and 218.4. "This final rule" makes it clear that "[i]n general, 49 U.S.C. 20106 will preempt any State law: whether statutory or *common law* [court's emphasis]: and any State regulation, rule or order, that concerns the same subject matter as the regulations in his rule." [At 1148]

2. The clarification regarding state law causes of action to ' 20106[b] did not explicitly overrule Shanklin and Easterwood. However,

> The changes made in section 20106 did modify, though, the approach courts take when analyzing whether state law is preempted by federal law. Before such changes, non-compliance with federal regulations or rules created pursuant to a federal regulations need not be taken into account to determine whether state law was preempted by federal law. *Shanklin*, 529 U.S. at 357-58, 120 S.Ct. 1467. Further, there was no need to inquire into the purpose of the regulation or rule. *Easterwood*, 57 U.S. at 675, 113 S.Ct. 1732. In that regard, *Shanklin* and *Easterwood* should not be relied on. However, the amendment to section 20106 did not change the findings that common law negligence claims would be preempted by federal law as long as such state law claims are covered by federal regulations pursuant to section 20106. Therefore, the Court's decision in *Shanlkin* which held that common law negligence claims are preempted continues to stand today as long as the defendant complies with the requirement listed in section 20106(b)(1) ....
>
> Congress' amendment of section 20106 did limit some state law tort claims from being preempted by federal law, specifically when a party has failed to comply with a standard of care established by a

> federal regulation or order when it has failed to comply with its own plan, rule or standard. However, new subsection (b)(1)(c) did not provide for all state law tort claims from being preempted by federal law as plaintiff seems to suggest. [At 1148]

Here the Court analyzed the Murrell's preemption claims, finding that: Excessive speed, failure to issue a slow order, inadequate warning devices, failure to warn were all preempted by federal law, *but that "these claims may still survive summary judgment if I find there exists an essentially local safety hazard. See 49 U.S.C. 20106(a)(2)(A*)."[4] However, the Court found that the claims of inadequate visibility, failure to eliminate a dangerous condition, and failure to keep a proper lookout were not preempted

Of particular interest to municipalities in Murrell is that the City of Salem was a defendant, apparently based on the city council's adoption of the 12th Street Safety Promenade Master Plan. That master plan attempted to address recurring safety issues in the vicinity of the railroad crossing at issue, but which did not intercept the plaintiff's decedent's death there. The city argued that while it was liable for the torts of its officers, employees and agent under Oregon's Tort Claims Act, it was immune under that Act for liability arising from claims "based upon the performance of or failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." ORS 30.265(3) [At 1157]

Without getting into a comparison of Tennessee's and Oregon's governmental tort liability acts, the Court held that the planning that it had done in the vicinity of the railroad crossing at issue was a discretionary act. The result would have undoubtedly been the same under the Tennessee Governmental Tort Liability Act.

The unreported case of Gauthier v. Union Pacific Railroad Co., 2009 WL 812261 (E.D. Texas), also follows the post 2007 amendment cases of Henning, Durrell, and Van Buren.

Brief summary

Shanklin and the post-2007 amendment cases hold that state-based tort claims are preempted by federal regulations as to adequacy of railroad crossing warning devices installed with federal funds (although the court in Gauthier found that there was a fact question as to whether the crossing in that case was actually improved with federal funds). But other state-based tort claims arising from railroad operations at railroad crossings may not be preempted. There appears to be general agreement in the post-2007 amendments cases dealing with state-based claims of liability for railroad accidents of various kinds, including at railroad crossings, what conditions will result in the allowance of federal preemption of those claims. But Kelly v. City of Rockwood stands for the proposition that local governments in Tennessee may be liable under the Tennessee Governmental Tort Liability Act for excessive vegetation the interferes with the sight

[4] See footnote 2

distance (of motorists in that case) in relation to, but *outside*, railroad crossings. Such claims appear not to be preempted. It is not clear whether other claims under the TGTLA might be available to victims of railroad crossing accidents.