

**Supreme Court Reaffirms That State Tort Claims Against Railroads Based on Alleged Inadequacy of Warning Devices at Crossings Are Preempted By Federal Law**

by

Earl E. DeBrine

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

The United States Supreme Court, in an April 17, 2000 7-2 opinion, resolved a conflict among the federal Circuit Courts of Appeal concerning the scope of federal preemption in railroad grade crossing accident cases, ruling that the Federal Railroad Safety Act of 1970 ("FRSA") preempts state tort claims concerning a railroad's alleged failure to maintain adequate warning devices at crossings where federal funds participate in the installation of warning devices at a crossing. See Norfolk Southern Railway Co. v. Shanklin, No. 99-312 (U.S. S. Ct. April 17, 2000).

The FRSA and the Highway Safety Act of 1973 established a federal program which provides funds to the States to improve safety at railroad grade crossings. Under the program, the States are required to systematically maintain a survey of all public railroad crossings and establish and implement a schedule for projects to eliminate the hazards posed by grade crossings. The FRSA contains an express preemption provision which directs that laws related to railroad safety be "nationally uniform" and prescribes that a "state may adopt or continue in force a law, regulation or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement." 49 U.S.C. § 20106. One of the regulations promulgated by the Federal Highway Administration ("FHWA"), 23 C.F.R. § 646.214(b)(3) and (4), establishes various requirements for installation of warning devices at crossings.

At issue in the Norfolk Southern case was what action by FHWA officials is necessary to establish preemption of state law tort claims seeking to hold the railroad liable for the alleged inadequacy of warning devices at railroad grade crossings. The high court first visited this issue seven years ago in CSX Transportation Co., Inc. v. Easterwood, 507 U.S.658 (1993), holding that the FRSA and regulations promulgated by FHWA and the Federal Railroad Administration establishing train speeds and the requirements for the installation of warning devices at grade crossings preempt state law claims that the train was traveling at an excessive speed or that the railroad should have installed additional warning devices at the crossing. In Easterwood, the Court found that the Plaintiff's claim was not preempted because federal funds were not utilized to fund improvements at the crossing where the accident occurred. 507 U.S. at 670.

The Circuit Court of Appeals had since split on the issue of whether the funding of improvements by itself triggered preemption or whether it was necessary for the Department of Transportation to expressly determine that the federally-funded safety improvements were adequate for safety at the crossing. Compare Armijo v. Atchison, Topeka & Santa Fe Ry. Co., 87 F. 3d 1188 (10<sup>th</sup> Cir. 1996) (same); Elrod v. Burlington

Northern Ry. Co., 68 F.3d 241 (8<sup>th</sup> Cir. 1995) (same); Hester v. CSX Transportation Co., Inc., 61 F. 3d 382 (5<sup>th</sup> Cir. 1995) (same), with Shots v. CSX Transportation Co., Inc., 38 F.3d 304 (7<sup>th</sup> Cir. 1994) (preemption does not occur unless federal officials make a specific judgment about the adequacy of warning devices).

The Supreme Court in Norfolk Southern joined the majority of the Courts of Appeal in ruling that "[w]hen the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, [the FHWA's regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." Slip. op. at 12. Because the Tennessee Department of Transportation had, under a project approved by the FHWA, installed reflectorized crossbuck signs and advance warning signs at the crossing where the accident occurred, the Court held the plaintiff's inadequate signalization claim was preempted. Id.