Appeal No. SC96195

IN THE SUPREME COURT OF MISSOURI

SHERRY SPENCE
Plaintiff-Respondent,

vs.

BNSF RAILWAY COMPANY
Defendant-Appellant.

Appeal from the Circuit Court of Stoddard County, Missouri
The Honorable Stephen R. Mitchell

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS....2

TABLE OF AUTHORITIES....3

JURISDICTIONAL STATEMENT....6

STATEMENT OF INTEREST OF *AMICUS CURIAE*....7

CONSENT OF PARTIES TO FILING OF THIS BRIEF....9

STATEMENT OF FACTS....10

POINTS RELIED ON....11

ARGUMENT....11

I. History of Grade Crossing Accidents and Resulting Laws and Regulations

II. Preventing Crossing Accidents: the Importance of Public Education

III. Physics and Why Trains Have the Right-of-Way

IV. The Instructions Given By the Trial Court Confused and Misdirected the Jury.

CONCLUSION....24

CERTIFICATE OF SERVICE AND COMPLIANCE....26

TABLE OF AUTHORITIES

Page(s)

Cases

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 16

McNeill v. City of Kansas City, 372 S.W.3d 906, 909, 910 (Mo.App. 2012) 23,24

Statutes and Regulations

23 U.S.C. §130(d) 15

45 U.S.C. §433(a) 14

45 U.S.C. §433(b) 14

49 U.S.C. §20101 *et seq*. 13

49 U.S.C. §20106(b)(1)(A).....16

23 C.F.R. §646.214(b)(3)&(4).....15

23 C.F.R. Part 924.....15

49 C.F.R. §1.89 16

49 C.F.R. §213.9(a).....17

49 C.F.R. Part 222.....16

49 C.F.R. Part 224.....16

49 C.F.R. §224.1(a).....17

49 C.F.R. Part 234.....16

Page(s)

Other Authorities

Fed. Highway Admin., *Guidance on Traffic Control Devices at Highway-Rail Grade Crossing*s (2002) 18,19

Fed. Highway Admin., *Railroad Highway Crossing Handbook* (2d ed. 1986) 13

Fed. Highway Admin., *Rail-Highway Crossings Study* (1989) 17

Fed. R.R. Admin., *Accident/ Incident Bulletin*, 1980-1996.....19

Fed. R.R. Admin., *Emergency Order No. 15*, 56 Fed. Reg. 36190 (July 31, 1991).....21

Fed. R.R. Admin., *Railroad Safety Statistics Annual Report*, 1997-2010 19

Fed. R.R. Admin., *Track Safety Standards,* 63 Fed. Reg. 33992 (June 22, 1998).....17

Fed. R.R. Admin., *Use of Locomotive Horns at Highway-Rail Grade Crossings, Notice of Proposed Rulemaking,* 65 Fed. Reg. 2230 (January 13, 2000).....20

Gen. Accounting Office, *Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* (1995).....18

H.R. REP. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4101 14

Page(s)

Interstate Commerce Comm'n, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, ICC Report No. 33440, 322 ICC 1 (1964).....13

U.S. Dep't of Transp., *Highway-Rail Crossing Safety and Trespass Prevention Action Plan* (2004).....15

U.S. Dep't of Transp., *Office of Inspector General, Audit of the Highway-Rail Grade Crossing Safety Program* (2004).....15

U.S. Dep't of Transp., *Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1971).....15

U.S. Dep't of Transp., *Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972).....15

JURISDICTIONAL STATEMENT

The AAR as *amicus curiae* adopts the Jurisdictional Statement set forth in Appellant's substitute brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies and the courts. AAR regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's railroads.

This case, arising out of an accident at a highway-rail grade crossing, raises such an issue. In particular, AAR has an interest in the issue of the trial court's instruction to the jury on the train crew's duty to stop or slow the train to avoid a collision. The Not-In-MAI instruction given by the trial court improperly stated the law and misdirected the jury. If that instruction is sanctioned by this Court it ultimately could affect all of the railroads that operate in Missouri, which includes six of the seven largest. AAR files this *amicus curiae* brief to provide the Court with relevant facts about grade crossings, grade crossing accidents, and train

operations, in order to shine a light on the impropriety and unfairness of the contested instruction.

CONSENT OF THE PARTIES TO FILING THIS BRIEF

Both parties consent to the filing of this brief.

STATEMENT OF FACTS

The AAR as *amicus curiae* adopts the Statement of Facts as set forth in Appellant's substitute brief.

POINTS RELIED ON

I. History of Grade Crossing Accidents and Resulting Laws and Regulations

II. Preventing Crossing Accidents: the Importance of Public Education

III. Physics and Why Trains Have the Right-of-Way

IV. The Instructions Given By the Trial Court Confused and Misdirected the Jury.

ARGUMENT

This case involves a death resulting from a collision between a train and a pick-up truck at a grade crossing. Crossing accidents often put the spotlight on the conduct of the train crew—the men and women who operate the locomotive at the head end of the train. Here, the jury found the train crew to have acted negligently and awarded a substantial judgment against their employer, BNSF Railway. But the jury's deliberations were tainted by an improper instruction given by the trial judge. That instruction misstated the law and misdirected the jury, and is grounds for reversing the judgment and ordering a new trial.[1]

[1] The trial also was tainted by untruthful answers given by a juror during the voir dire that hid a potential bias against the defendant. The Court of Appeals held that

I. History of Grade Crossing Accidents and Resulting Laws and Regulations

Grade crossings, where railroad tracks intersect with roadways, are ubiquitous on the railroad network. Today, there are about 130,000 public at-grade highway-rail crossings (about 3,400 are located in Missouri); if crossings located on private roads are included the number increases to over 212,000. http://safetydata.fra.dot.gov/Officeofsafety/publicsite/Query/invtab.aspx. The intersection of two very different modes of transportation makes highway-rail grade crossings potentially more dangerous than roadway-to-roadway intersections. Indeed, in 2016 accidents at grade crossings, together with accidents involving trespassers on the tracks, represented about 95% of rail-related fatalities. http://safetydata.fra.dot.gov/Officeofsafety/publicsite/summary.aspx.

Grade crossings did not pose a significant safety challenge during the early days of the rail industry for the simple reason that roads and highways were scarce in many parts of the country. That changed with the advent of motor vehicles.

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the juror's intentional nondisclosure was grounds for a new trial. If this Court agrees with the Court of Appeals, addressing the jury instruction will be unnecessary. But if the Court rules otherwise on the issue of juror nondisclosure, it will need to address the erroneous jury instruction.

The twentieth century saw burgeoning motor vehicle traffic, followed, naturally, by the expansion of the nation's road and highway system. The confluence of a mature railroad industry and an emerging automobile industry began to present public policy makers with new challenges. During the 1920s and 1930s, between 1,500 and 2,500 fatalities occurred at grade crossings each year, with the majority resulting from accidents involving motor vehicles; the number of fatalities remained over 1,000 annually into the early 1970s. Fed. Highway Admin., *Railroad Highway Crossing Handbook* 5 (2d ed. 1986). In 1964, the Interstate Commerce Commission, which, until the creation of the Department of Transportation in 1966 had jurisdiction over railroad safety, concluded that grade crossing safety had become a public concern which should be addressed through public initiatives and funding. Interstate Commerce Comm'n, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles,* ICC Report No. 33440, 322 ICC 1, 81-82 (1964).

Concern over railroad safety, including grade crossing safety, led Congress to overhaul the nation's railroad safety laws in 1970 through enactment of the Federal Railroad Safety Act (FRSA). 49 U.S.C. §20101 *et seq*. Prior to that time, railroads had been subject to several individual federal safety statutes that addressed discrete issues, with a host of often inconsistent state laws filling in the gaps. Ultimately, however, Congress concluded that the most effective way to

regulate railroad safety was through a uniform body of regulations, promulgated and administered at the national level. H.R. REP. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4101. To accomplish this, Congress granted the Secretary of Transportation plenary authority to "prescribe regulations and issue orders for every area of railroad safety." *Id*. §20103(a).

Congress focused special attention on grade crossing safety, concluding that "[t]he need to do something about these terrible accidents . . . necessitates an immediate attack on the grade crossing problem as soon as possible." H.R. REP. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. at 4116. FRSA mandated the Secretary of Transportation to submit to Congress within a year, "a comprehensive study of the problem of eliminating and protecting railroad grade crossings" to include "recommendations for appropriate action," and to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem" using regulatory authority over both rail and highway safety. 45 U.S.C. §433(a) & (b).[2]

The congressionally-mandated study produced a two-volume report in which the Secretary concluded that rather than simply being a railroad problem, "[t]he grade crossing safety problem today . . . is part of a national traffic safety

[2] FRSA was originally found in Title 45 of the U.S. Code. In 1994, it was codified in Title 49.

problem," propelling Congress to act. U.S. Dep't of Transp., *Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem*, at A30 (1971). The Federal-Aid Highway Act of 1973 created the Federal Grade Crossing Program, which established a uniform process for determining the need for, and providing for the installation of, warning devices at railroad grade crossings with public funds. *See* 23 U.S.C. §130(d); 23 C.F.R. Part 924. In addition, standards were established for determining the adequacy of crossing warning devices when federal funds are used. 23 C.F.R. §646.214(b)(3)&(4).[3]

[3] In recognition of the hazards posed by grade crossings, it is also the policy of the U.S. Department of Transportation to support elimination of unnecessary crossings. U.S. Dep't of Transp., *Highway-Rail Crossing Safety and Trespass Prevention Action Plan* 7 (2004); U.S. Dept. of Transp., *Office of Inspector General, Audit of the Highway-Rail Grade Crossing Safety Program* 14 (2004) (The "most effective way to prevent trains from colliding with motor vehicles" is to close crossings.) Indeed, as efforts have been made to close crossings and separate railroad tracks and highways, the number of crossings has decreased over the years. (There were well over 200,000 public crossings in the early 1970s. *See* U.S. Dep't of Transp., *Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving the Problem,* at i (1972).) But not all crossings

Today, railroad safety in general is pervasively regulated by the federal government. The Secretary's authority to promulgate rail safety regulations is delegated to the Federal Railroad Administration (FRA). 49 C.F.R. §1.89. Railroad safety regulations issued by the Secretary establish the "[f]ederal standard of care" under which railroads are required to conduct their operations. 49 U.S.C. §20106(b)(1)(A), and preempt state law "related to" railroad safety whenever the Secretary issues a regulation covering, that is, substantially subsuming, the subject matter of the state law, thereby "precluding additional state regulation." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 674 (1993).

Federal railroad safety regulations often strictly prescribe railroad conduct. They cover a wide range of subjects, some specifically aimed at grade crossings. Regulations prescribe how and when railroads must sound their horns as trains approach crossings. 49 C.F.R. Part 222. Other regulations prescribe maintenance, inspection and testing of crossing warning devices. 49 C.F.R. Part 234. In addition, railroads are required to reflectorize their cars in order to make them more visible at crossings at night. 49 C.F.R. Part 224 (regulations aimed at "reduc[ing] of highway-rail grade crossing accidents and deaths . . . by enhancing the conspicuity of rail freight rolling stock so as to increase its detectability by motor

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can be eliminated, and they remain a pervasive and problematic presence on the rail network.

vehicle operators at night and under conditions of poor visibility." *Id*. at §224.1(a)).

FRA also regulates the speed at which trains are authorized to travel, based on the class of track over which the train is being operated. 49 C.F.R. §213.9(a). These regulations apply equally when trains approach grade crossings. "FRA's current regulations governing train speed do not afford any adjustment of train speeds . . . at grade crossings." Federal Railroad Administration, *Track Safety Standards,* 63 Fed. Reg. 33992, 33999 (June 22, 1998). FRA determined that the "safest train maintains a steady speed" and that frequently slowing down and speeding up can create "safety hazards." *Id.*

II. Preventing Crossing Accidents: the Importance of Public Education

Railroads typically maintain the crossings on their lines, including the warning devices as well as the train detection system (e.g, track circuitry). Fed. Highway Admin., *Rail-Highway Crossings Study* 3-4 (1989). However, crossing warning devices are aimed at motorists, not trains. Passive devices, such as crossbucks and signs, alert the motorist to the presence of tracks; active devices, such as bells, lights and gates, alert the motorist to the approach of a train. This information is intended to put the motorist in a position to avoid an accident, for the simple reason that they are able to do so and – as discussed below -- oncoming

trains often are not. *See generally* Fed. Highway Admn., *Guidance on Traffic Control Devices at Highway-Rail Grade Crossings* (2002).

Risky driver behavior and driver error account for a substantial majority of crossing accidents. *Audit of the Highway-Rail Grade Crossing Safety Program,* at 5 (2004); *see also* Gen. Accounting Office, *Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 4 (1995) ("Drivers' inappropriate behavior . . . is a major cause of railroad crossing accidents and fatalities.") That is why both governmental agencies and private organizations have made significant efforts at educating the public on the hazards of grade crossings.

Operation Lifesaver (OLI) is a nonprofit public safety education and awareness organization based in Alexandria, Virginia that is dedicated to reducing collisions, fatalities and injuries at highway-rail crossings. Through a nationwide volunteer network, OLI provides educational programs to audiences of all ages to enhance public awareness. Railroads provide funding and actively support OLI, and several railroad employees sit on its board of directors. *See* https://oli.org/aboutus/contact/board-of-directors.

The Department of Transportation also puts emphasis on educating the public on grade crossing safety. "Education and outreach are critical to the railroad crossing safety effort." https://www.fra.dot.gov/Page/P0851. Among other things, the Department of Transportation urges motorists to "be prepared to stop at the

crossing" and to "slow down, look both ways, and listen." https://www.fra.dot.gov/Page/P0843. *See Audit of the Highway-Rail Grade Crossing Safety Program,* at 5 ("enhanced education" is an important part of improving crossing safety)

By all accounts, the focus on crossing safety has been a success. Since 1980, grade crossing accident rates declined by 81 percent, as has the number of grade crossing collisions. The number of injuries and fatalities resulting from grade crossing accidents declined by 75% and 72%, respectively.[4]

III. Physics and Why Trains Have the Right-of-Way

Individual grade crossings vary in numerous ways, but certain characteristics of trains and railroad operations are constant, which is why a "train always has the right of way" at a crossing. *Guidance on Traffic Control Devices at Highway-Rail*

[4] Fed. R.R. Admin., *Railroad Safety Statistics Annual Report*, 1997-2010, Tables 1-1, 1-3; Fed. R.R. Admin., *Accident/ Incident Bulletin*, 1980-1996, Tables S. For more recent data see http://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx. Rail safety in general has improved markedly during the same period. From 1980 through 2015, the rate of train accidents declined by 78 percent; and the employee injury rate declined by 84 percent. *Id.*

Grade Crossing, at 4. Crossings may differ in terrain, number of sets of tracks, the nature of the roadway and the surrounding area (rural or urban), and the angle of the intersection, to name a few. However, trains always operate over fixed rails. If an accident is imminent, the train cannot swerve or take other evasive action. If a motor vehicle attempts to cross the tracks as a train is about to enter the crossing, the ability of the train crew to avoid the accident is limited to trying to alert the driver, or trying to slow or stop the train.

Trains are very large and extremely heavy. The average freight locomotive weighs between 140-200 tons, and many freight trains weigh in excess of ten thousand tons. The laws of physics limit what humans can do. It takes a one-hundred car train traveling at 30 miles per hour approximately half a mile to stop; at 50 miles per hour the stopping distance increases to one and a third miles. Fed. R.R. Admin., *Use of Locomotive Horns at Highway-Rail Grade Crossings, Notice of Proposed Rulemaking,* 65 Fed. Reg. 2230 (January 13, 2000). This means that for a train travelling at 30 miles per hour to avoid a collision with a car crossing the tracks, the operator would have to be able to see the car approaching the crossing from more than half a mile away, conclude immediately that the driver was going to violate the law and cross in front of the train, and immediately apply emergency brakes. Thus, as the FRA recognized, "railroad crews [ ], despite performing their duties correctly, are usually unable to avoid the collisions." *Id*.

It is in everyone's interest to continue to reduce the number of crossing accidents. In addition to motorists involved in grade crossing collisions, members of the train crew also are at risk from crossing accidents, as are passengers when a collision involves a passenger train. *Id.* Not only is a train crew unlikely to be able to avoid an accident, "emergency applications of train brakes greatly increase the risk of derailment and consequent injury or death to rail passengers and train crew." Fed. R.R. Admin., *Emergency Order No. 15*, 56 Fed. Reg. 36190 (July 31, 1991). This is something the crew must take into consideration in determining whether and when to try to stop a train at a crossing, if there is even time to do so.

IV. The Instructions Given By the Trial Court Confused and Misdirected the Jury.

One of the issues in this case is whether the crew operating the BNSF train negligently failed to stop or slow the train to avoid the collision. The trial court gave Instruction 7, a Missouri-approved instruction that addressed the precise situation presented by this case. It instructed the jury to determine whether the train crew knew or should have known a collision was imminent "*in time* . . . to have slackened the train's speed or to have stopped the train." However, over BNSF's objection, the court also gave Instruction 8, a non-Missouri-approved instruction. That instruction advised the jury that a vehicle's "unwavering approach" to the

crossing "requires the train's crew either to slow the train or stop, in addition to any other preventive measures it can take to avoid the collision."

Instruction 8 was erroneous in two ways. In contrast to Instruction 7, it did not include a time element. As the laws of physics dictate, time is a crucial element in determining whether a crew has any ability to avoid an accident. In many cases sufficient time does not exist for the crew to avoid the accident. This must be accounted for by any proper jury instruction. At best, Instruction 8 would have confused the jury over whether it could consider the time element when evaluating the crew's conduct. At worst, it suggested that the crew's failure to avoid the accident -- regardless of whether it could have done so -- constituted negligence.

Another aspect of Instruction 8 was equally problematic. The jury was instructed that it could consider "any other preventive measure" the crew could have taken to avoid the collision, language that is not in the Missouri-approved instruction. Instruction 8 did not provide any guidance, or any limits, on what kind of "other measures" the jury could consider. Without further instruction as to what those measures might be, the jury was invited to hold the railroad responsible for any conceivable conduct it could imagine that might have avoided the accident. This could have included conduct that was not physically possible or was inconsistent with federal law. As written, the instruction imposed an absolute duty on the train crew to take "other preventive measures" without defining those

measures leaving the jury free to speculate what the crew could have done without any support in the record regarding what the "other preventive measures" were.

Instruction No. 8 amounts to a “roving commission,” which is grounds for reversible error. *McNeill v. City of Kansas City*, 372 S.W.3d 906, 909 (Mo.App. 2012). As noted in *McNeill*:

> A “roving commission” is “an abstract instruction ... in such broad language as to permit the jury to find a verdict without being limited to any issues of fact or law developed in the case.” ***910** *Edgerton v. Morrison,* 280 S.W.3d 62, 66 (Mo. banc 2009). “A ‘roving commission’ occurs when an instruction assumes a disputed fact or submits an abstract legal question that allows the jury to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability.” *Klotz v. St. Anthony’s Med. Ctr.,* 311 S.W.3d 752, 766 (Mo. banc 2010) (internal quotation omitted).
>
> “To avoid a roving commission, the court must instruct the jurors regarding the specific conduct that renders the defendant liable.” *Rinehart v. Shelter General Ins. Co.,* 261 S.W.3d 583, 594 (Mo.App. W.D.2008).

Id, at 910. Having failed to instruct the jury "what acts or omissions of the [BNSF], if any, found by it from the evidence would constitute liability, the instruction is a roving commission." *Id*.

Eighteen railroads, including six of the seven largest, operate in Missouri over 3,800 miles of track. The guidance this Court's provides on how trial courts must instruct juries in crossing accident cases (should it reach that issue) is important to all of those railroads. The conduct of the train crew often is at issue in these cases. The Missouri-approved instruction on how a jury must evaluate the train crew's conduct when a motor vehicle approaches a crossing correctly states the law and properly takes into account the realities of grade crossings and train operations. This Court should make it clear that it is the only instruction to be given on this subject. Should this Court instead open the door to alternate instructions that ignore these realities, like Instruction 8 that was given in this case, it will sanction the misdirection of juries in numerous crossing cases, ultimately affecting all railroads that operate in Missouri.

CONCLUSION

For these reasons, the judgment of the trial court should be reversed.

Respectfully submitted.

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Dated: May 15, 2017

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,738 words, excluding the cover, this certificate, and the signature block, as counted by Microsoft Word software; and

2. The attached brief includes all of the information required by Supreme Court Rule 55.03; and

3. The attached brief was served by means of the electronic filing system on May 15, 2017, upon Counsel of Record.

/s/ William A. Brasher , Attorney