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Supreme Court of Texas.
Missouri Pacific Railroad Company D/B/A Union Pacific Railroad Company
v.
Patricia Limmer, Billye Joyce Smith, and Bobby Jean Nothnagel.
No. 06-0023.

November 13, 2007

Appearances:
Mike A. Hatchell, Locke Lord Bissell & Liddell's, Austin, Texas, for petitioner.
Deborah G. Hankinson, Law Offices of Deborah Hankinson, PC, Dallas, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice D ale Wainwright, Justice Scott A. Brister, Justice David Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett

CONTENTS
ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

CHIEF JUSTICE JEFFERSON: The court is now ready to hear argument in 06- 0023 Missouri Pacific Railroad versus Patricia Limmer.
THE COURT MARSHALL: May it please the Court. Mr. Hatchell will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the Court. The issue in this case is whether the state law negligence claims of the plaintiffs involving the signalization or the adequacy of the signage at the railroad crossing where preempted by two Federal programs. One Federal program to install retro-reflective the crossbucks and another program, to enhance those, crossbucks with retro-reflective material only on the reversal of those and around the post. Normally, in a preemption case, all of the heavy lifting is trying to determine whether the statute and the regulations create preemption and for better or for worse a lot of the heavy lifting has been done in this case where the Court because the United States Supreme Court in two cases, that are-- of which the Court in [inaudible] is familiar, Easterwood and Shanklin has determined that the Federal Railroad Safety Act and Companion Acts and the regulations

promulgated under those acts do create the preemption. The preemption in our case is somewhat conditional. In other words, there have to be certain conditions met before preemption applies and that is what the fight is about today. I would be less than candid with the Court if I told you that as I reviewed the briefing for this case that the canopy of decisions following Easterwood and Shanklin on, on how do you prove, how do you approve this Federal preemption or inconsistent in many respects. They have different analytical frameworks and they can result in a confusing pile that I hope to try and have to straighten out this morning. I mentioned that conditions, so lets try to start there. In the what we call the (b)(3) and (b)(4) regulations promulgated by the Secretary of Transportation. According to the Supreme Court, preempts "State Court, court claims concerning the adequacy of all warning devices installed with the participation of the federal funds." That's quotation from the Shanklin case that is the benchmark, where we begin. So there are two important concepts. Participation of federal funds and the installation of a warning device in a federally approved project. So much the good. Now comes the hard part and I-- what I would propose to do this morning as to try to make the Courts burden much easier. I think that I can give the Court, the proper analytical framework. Under the 1989 tape program by asking three rhetorical questions and I think it can answer the 1977 retro-reflective crossbuck questions by asking the Court, simply as one rhetorical question. Let's look at the 1988 program reposts, the resolution of that is virtually legal in nature. It does not have much of a factual component too. The three, the, the first of the three questions that the Court needs to ask is, "Was there a participation of federal funds in the application of retro-reflective take to the backs of the crossbuck and their posts?" and the answer to that is, is a clear yes, this is the easy [inaudible] in the case. We proved that the tape project was eligible for and got state funds, that's undisputed. We proved that the state tape kit which was purchased or which was ultimately funded in the state funds was in fact applied to both the backs and the posts of the crossbuck at the crossing in question. The member's expert conceded that the tape was installed with federal funds. Question number one, clearly answered as yes. There were federal funds expended and that's really on dispute. Was there an installation and there seems there is lot of discussion in the briefing as to whether putting tape on something is an installation? Well, -

JUSTICE MEDINA: What about the tape being a traffic-controlled device, it is the obvious [inaudible]

MR. HATCHELL: Well, that is question number 3 and I am happy to deal with this so let me just get to you as to why there is an installation. The Texas Act, which required the tape to be installed calls it an installation. The letter of approval from the Federal Highway Administration calls it an installation and the State Highway Department Rules, which govern the application in the case three times, called it an "installation," which leads to Justice Medina's question, was the tape a warning deice? And we say, yes, it clearly was a warning device. We take our touchstone to the, the, the regul--the definition of passive warning device and the regulations passed by the Secretary. The reason we do that is because it is those regulations and those regulations only that the United States' Supreme Court said, "Cover the subject matter of the state or laws and therefore, preempt state laws." So what, what do they, what do those regulation say? There is no question that the crossbuck in question and the tape would be a passive warning device. So under the regulations, passive warning devices are

those types of traffic controlled devices, including signs, markings, or other devices to indicate the presence of the cross -

CHIEF JUSTICE JEFFERSON: Do you agree that there is no evidence in the record that federal funds are expended to install the crossbuck?

MR. HATCHELL: No, I don't agree with that at all. We were, that is our second of our points, and that is -

CHIEF JUSTICE JEFFERSON: At this specific crossbuck, you think there is a conclusive evidence of that?

MR. HATCHELL: Well, I do think, yes. There is. I think that there is evidence that has been accepted by other Courts, particularly Federal Courts that is-- that matches ours exactly, and so that, and that is the second part, part of the argument.

CHIEF JUSTICE JEFFERSON: Well, -

MR. HATCHELL: Yes. Yes, we definitely do -

CHIEF JUSTICE JEFFERSON: And now, and you can get to that when you do but I want to know what, where is the evidence that the crossbuck was purchased with, the crossbucks here were purchased with federal funds, specifically for this railroad crossing?

MR. HATCHELL: Well, first of all, the crossbucks are not purchased. And [inaudible] the crossbucks are funded. What we have in this case is an affidavit from Mr. Kosmak. Who is the administrator of the program and if you read his affidavit, he specifically states and that affidavit was not challenged or offered to be struck. He specifically states that, "The funds were allocated to District 17 and particularly the crossings, which has a specific number, in this case that all those funds were expended and 100 percent of the funds were expended. There is attached to his affidavit." A listing of all of the crossings that were in this-- not, not by name but the number of crossings that were in District 17 -

CHIEF JUSTICE JEFFERSON: - but this was a factual decision made by the trial court and apparently there is some evidence that questions the author's credibility -

MR. HATCHELL: Well, that's-- that is true up to a point, first of all your Honor, let me say, that we, we have stood doing the proposition that we must prove before this Court federal funding as a matter of the law. We achieved in trying the matter to the to a jury because we believe it is a matter, it is a matter for the Court. There is no challenge to Mr. Kosmak's affidavit regarding number one. The records, the state records, which were attached which were proved up as records and in which of course eliminates all the hearsay objections. There was no objection to the statement that funds were appropriated for District 17 and for the crossing in question but-- and that because type of testimony alone was accepted by District Judge Kendall in the McDaniel case and it was accepted in the Obanon case and I believed two other cases. But we actually went further in this case to prove federal funding of the crossbucks because what we did was, in addition, we approved from a man who would actually been to the crossing and he administered the crossbuck program. At the cross-- the actual crossbucks that were standing at the crossing in question were appeared to be are were like those, which were installed under the program, under the federal program. There is also a testimonial statement by Mr. Kosmak, that he is certain that federal funds were applied. He just did not know the dollar amount. That is the part that has been brought into question but quite frankly it is irrelevant to the analysis because we believe and prior to that, the particular studies. The evidence is more than sufficient to establish as a matter of law that federal funds erected were participated in the erection of the original retro-

reflective crossbucks. One additional factor, is the application of the tape itself because the tape could only be applied to a compliant crossbuck. So the fact that the tape was actually applied and it has considered to apply as further evidence that the metal crossbucks that were standing the day of the accident were federally funded crossbuck.

JUSTICE MEDINA: Even those two physicians were correct and we're not saying, I'm not saying that they are but if they were correct would you still have the issue as whether not this tape was a safety device.

MR. HATCHELL: Absolutely, and that was -

JUSTICE MEDINA: And if it's not, would you concede that preemption would not apply here?

MR. HATCHELL: Well, it would not apply to that program -

JUSTICE MEDINA: Would it apply to this specific crossings?

MR. HATCHELL: But, but it, it would but preemption would apply under the 19, the 1976 Act because of the crossbuck standard by itself. In other words, there are two independent basis, either one of which is appropriate and I want to answer your question about whether or not tape is passing-- is a passive warning device because it is a very, very important question. As I indicated a passive warning device is a traffic-controlled device that includes signs, markings, or other devices to indicate the presence of a crossing and the tape is clearly that it's a sign. It's a marking. I mean, it, it, it conveys a very important message. The letter announcing the tape program stated that the tape was to attract the driver's attention to the presence of a moving train at the crossing -

JUSTICE MEDINA: Haven't there been federal judges that have ruled otherwise?

MR. HATCHELL: There had been federal judges that have in a way, ruled otherwise, some have found they are not entirely certain and I think that it clearest holding is by Justice Folsom in the Enrique's case but unfortunately Justice Folsom analysis' is defective and I now tell you why but, but I want to answer your question more clearly. The letter announcing the tape states that "It is designed to attract the driver's attention to the presence of a moving train at the crossing which satisfies the requirement that the warning device indicate the presence of a crossing." The Texas Acts says that "The tape had to be affixed so that it focuses the attention to the presence of a nonsignalized crossing." The approval letter from the Federal Highway Administration called the tape program, want to enhance warning sign visibility. So there just is no question that the application of the tape was designed to indicate the presence of a crossing and there is also no to dispute that, that is a warning. It is the flickering of that, that warns motorists not proceed as to the reason why I think Judge Folsom's contrary conclusion in the Enrique's case is analytically flawed. He fails to in, in my, in my judgment do two things. One he fails to look at the definition of passive warning device and go through the analysis and I have just done with, Your Honor, to fit the tape itself into the definition of passive warning device but even more important than that, Judge Folsom overlooks the fact that when you installed the tape on to the back of the crossbuck. In effect, what you are doing is erecting a new crossbuck because it's very clear from a submission from the Federal Highway Administration that improvements and upgrades essentially result in the installation of a new device and you look at that new device to determine the application of Federal preemption and that new device is determined to be adequate and it is the adequacy of the device that preempts the state law.

CHIEF JUSTICE JEFFERSON: Is there argument in rest on the enhanced divisibility of the crossbuck?

MR. HATCHELL: Yes.

CHIEF JUSTICE JEFFERSON: So what about the respondent's argument that a spot, would a spotlight on an existing crossbuck at night be a traffic warning device or traffic-controlled device?

MR. HATCHELL: Easily it could be if the Secretary approved it as such.

JUSTICE WILLETT: I [inaudible] some rebuttal time talking about the jury questions?

MR. HATCHELL: [inaudible] and Mr. Chief Justice you were interested in the 1976 program and I wanted to give you the rhetorical question that I would ask today. Under the evidence that I outlined before you, what is the degree of likelihood that the crossbuck standing that matched entirely the federal program were not installed, with federal funds. There are two cases that the-- Abenin case and a case in particular and other two other cases that say in metaphysical doubt that the crossbucks might not have been installed with federal funds is insufficient and I think that is all you have here. All the argument that you hear is simply [inaudible] a metaphysical doubt.

JUSTICE WAINWRIGHT: Mr. Hatchell, if there was a dead tree at the crossing with no limbs, no obstructions around it, and federally funded tape was put on a tree, will that suffice?

MR. HATCHELL: Absolutely.

JUSTICE WAINWRIGHT: How much tape, and does it have to be in a certain design or certain amounts?

MR. HATCHELL: As long as it's, as long as it's approved by the secretary, it, it is sufficient. A very good place for the court to look is Attorney General Cornyn's amicus brief in the Shanklin case, which outlines the procedures that States have to go through to do exactly what you are talking about. There have to elaborate proposals, plans, and specifications of the devices, and that the Secretary has a device presented for federal funding and he determines that tape put up on a dead tree is sufficient and expends federal funds, then that is more than sufficient to create preemption for, because of a, and often times overlooked provision of the act which says that, "No funds shall be approved for expenditure unless proper safety protective devices complying with the safety standards determined by the Secretary at that time as being adequate, shall be installed and be in operation."

JUSTICE WAINWRIGHT: To agree with you. Wouldn't we have to agree-- disagree with all three Federal District Judges, even Judge [inaudible] says, the tape standing alone is not a warning device. We'd have to disagree with all three of them, wouldn't we?

MR. HATCHELL: Well, you would probably have to disagree. I am not sure, quite frankly. If you read Judge [inaudible] opinion that he was all that certain. He just said that it is not clear -

JUSTICE WAINWRIGHT: He concludes there is fact question there -

MR. HATCHELL: Well, well, he said, and he said, "It was not clear to him that the application of the tape would be the applic- would be the installation of, of a warning device." -

JUSTICE WAINWRIGHT: But that, would that doubt seem to be connected to the fact that there was a crossbuck also there that it was placed on but he didn't state -

MR. HATCHELL: Right.

JUSTICE WAINWRIGHT: But he didn't state pretty succinctly and independently that tapes standing alone is not a warning device.

MR. HATCHELL: And the analytical flaw in that is that you did not

consider tapes standing alone. What you do is you consider the definition of a warning device, we need to consider or not whether or that tape has been integrated into a warning device. I think it is standing alone but there is no question that once it is integrated into a warning device that it functions as a warning device. The application of a federally funded tape to a warning device creates a new warning device that is adequate. Thank you.

CHIEF JUSTICE JEFFERSON: Any further other questions. Thank you. The Court is now ready to hear the argument from the respondents.

THE COURT MARSHALL: May it please the Court. Ms. Hankinson will present argument for the respondents.

ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE RESPONDENT

MS. HANKINSON: May it please the Court. Mr. Hatchell and I, have a fundamental disagreement that this case is only about preemption. We also believe that it is about the side obstruction claim and the jury charge issue. I hope in the time that I'm out-- allowed, that I will be able to address both issues. Our briefs meticulously and methodically detail both the preemption legal analysis, including the interpretation of the applicable statutory and regulatory language and the evidence. It can be summarized with two conclusions. First, we are on a side of strict construction regarding the preemption issues presented. The preemption rule is a bright line rule. It is not subject to the kind of fussing-up that you just heard from Mr. Hatchell. Federal funds must participate in "the installation of a warning device", that cannot be separated in a few phrases. This has been clearly prescribed by the United States Supreme Court in the Easterwood and Shanklindecision. -

JUSTICE BRISTER: So if you put [inaudible] octagonal sign painted white and the Feds paid for the red paint, It's not a stop sign if it's painted white, right? Feds and red paint standing along in the closet would not be a traffic control device but if the Feds paid for the red paint, to paint it red and put "Stop" on it, that's involved in an installation of a traffic control device, right?

MS. HANKINSON: Well, if it is a traffic control device as defined by the MUTCD you have to actually install the device. And that is the applicable law, the MUTCD is a standard -

JUSTICE BRISTER: So let's, let's say, you've got flashing red lights and the Feds paid for the light bulbs, I agree the light bulbs standing alone at Lowe's or Home Depot are not a traffic control device but if the Feds paid for the light bulbs that make it flash, why isn't that Federal payment for a traffic control device?

MS. HANKINSON: Because it is not a traffic control device as defined by the MUTCD.

JUSTICE BRISTER: Which part of the definition doesn't fit.

MS. HANKINSON: It does not fit the definition of MUT- under the MUTCD because it does not regulate, warn or guide traffic. The bulb itself does not do that. This is a bright line rule, your Honor. A bright line rule the Supreme Court was very, very clear. The railroads came to the Supreme Court, asking for much broader preemption, and the Court said, "No." Look at the decision in Easterwood. In Easterwood , they determined in that the motion detectors circuitry was not a warning device. It does not regulate , warn, or guide traffic, which means it does not give any information to the driver in order to allow

them to make decisions. So that kind of thing does not--that's why I say it's a bright line rule, and if you look at all the Federal Authority, it is a bright line rule. The MUTCD has a listing of all of the kinds of traffic devices. You will not find reflective tape in there anywhere. If you look at -

JUSTICE HECHT: Could I, could I be sure that the you do agree that federal funds were spent on the installing the tape?

MS. HANKINSON: We do, Your Honor.

JUSTICE HECHT: So you would, you would think then that a stop, I mean a floodlight, or spotlight on the crossbucks would not -

MS. HANKINSON: It would not be. The regulation say, that all traffic control devices must comply with the MUTCD. The Secretary has incorporated the MUTCD into the regulation. We have an official ruling -

JUSTICE BRISTER: Under that theory, if the Feds give you the wood, and the paint, and the poles, and we have prison inmates actually paint the crossbucks. It is not a, the Feds weren't involved in providing a traffic control device. The paint -

MS. HANKINSON: No but if you -

JUSTICE BRISTER: - and poles don't warn you about anything -

MS. HANKINSON: Well, no, they don't. The paint in the pole separately, don't. If when put together at that point in time, that is taken out there, planted into the ground as a traffic control device that comes within the definition of the MUTCD -

JUSTICE BRISTER: Unless, the Congressmen paint the sign it's not a traffic control device

MS. HANKINSON: Well, no. I do not think I said that, your Honor.

JUSTICE BRISTER: Nonetheless, your saying--

MS. HANKINSON: What I am saying is that -

JUSTICE BRISTER: It's only if they give you a completed sign.

MS. HANKINSON: That's correct. A complete, traffic control device as it has been designed in the MUTCD. Look at the official ruling from the Department of Transportation on this. Go to the website and see that this is an official means by which the Department of Transportation communicates so that we have uniformed standard. They issued an official ruling that tape is not a traffic control device.

JUSTICE WAINWRIGHT: That's a very brief one-sentence statement in a letter with no explanation. It's, it's hard to know exactly what they meant about that. Let me ask -

MS. HANKINSON: It is but your Honor if I may-

JUSTICE WAINWRIGHT: -if there's a federally funded crossbuck and then the Feds fund the placement of an additional arm of that existing crossbuck that said-- and there's a round sign that says "Stop. Railroad Crossing" is that additional sign a warning device?

MS. HANKINSON: I am, I am not sure that I understand what the additional sign is your Honor.

JUSTICE WAINWRIGHT: It's an arm hanging off the 50-year-old crossbuck and the only arm that has been attached. It says, "Stop. Railroad Crossing."

MS. HANKINSON: It is not the installation of a traffic control device. When I say it is a bright line rule. It is a bright line rule and the court, the Federal Courts have been very, very precise about this.

JUSTICE WAINWRIGHT: So if-- what if that arm is put on the crossbuck at the time that the whole crossbuck was put in the ground. So you have the crossbuck, we have the pole and then you have the arm I am talking about that says, "Stop. Railroad Crossing." All that's

federally funded could be in the ground for sometime.

MS. HANKINSON: That's a traffic control-- if that, if that meets in what you've put in falls within what the MUTD--CD says which it sound like it does then it would be a traffic control device.

JUSTICE WAINWRIGHT: But if you just-- if you put the crossbuck in the pole on the ground and then come back a month later, and put the additional arm that says, "Stop. Railroad Crossing." The additional-

MS. HANKINSON: That's right.

JUSTICE WAINWRIGHT: -arm is not -

MS. HANKINSON: That's right.

JUSTICE WAINWRIGHT: -in your opinion, a warning device.

MS. HANKINSON: It is not. It is not. The, the, the test-- the, the regulation uses the word, "Installation of warning devices." The Supreme Court has very strictly construed what that mean. It does not mean maintaining. It does not mean enhancing. It does not mean any of those things. It means actually installing a traffic control device. We are very meticulously in the brief, walked the Court through. The statutory and regulatory language and how all the pieces fit and, and, and the official ruling in the letter from the Department of Transportation if the court will go to the website that the Department of Transportation has up that talking about this official rulings, then you will see that that is in fact the case. The Court of Appeals' analysis here about the take is right on and it conforms with what the Federal Judges are saying about it. If this Court decides that tape-- reflective tape in and of itself is a warning device meaning a traffic control device it will go it alone contrary to what the federal government is saying and the Federal Court's are saying.

CHIEF JUSTICE JEFFERSON: Mr. Hatchell says that "He has proved conclusively with the crossbuck was-- that federal funds were involved in the installation of the crossbuck." What is your response?

MS. HANKINSON: He has not your Honor. This is the Dirty macaroni case turned around with the defendant trying to use dirty macaroni to become not just some evidence but conclusive evidence.

JUSTICE HECHT: Could I ask a question about that. We understand that. However, we must establish this matter as a of law so conclusively prudent. But I was wondering and, and you are quite right. The briefs are very thorough about going to the evidence. But I was wondering is there any affirmative evidence that the crossbucks could have come from some other source than the federal fund.

MS. HANKINSON: Yes, there is, your Honor.

JUSTICE HECHT: As opposed to just a possibility that it is not foreclosed.

MS. HANKINSON: Yes your Honor, there is evidence. If you look at the letter that documents the program. What you see is that the letter refers to existing crossbucks and the fact that existing crossbucks will not be replaced. So this is not to put a crossbuck everywhere. So the letter reflects the fact that in this district and around the state, there were existing crossbucks that were in place.

JUSTICE HECHT: That complied with the federal or not.

MS. HANKINSON: Yes. All right. And so that is some evidence of the fact that there were crossbucks in place. We don't know what happened. The interesting thing about preemption here is it this case has always been about the 1977 program until it landed in this Court. It was about the 1977 program when it was tried, taped, they paid a very minor role. When we went to the Court of Appeals, it was the lead preemption article, it did a preemption issue and the Court of Appeals looked at that superficial argument that they made and took the date on it just

like a couple Federal Judges said that. But what ended up happening along the way is the Court took a second look just like Judge Folsom did. And what he found which has now been exposed nationally is the fact that we had a representative here in Texas who was testifying under oath saying to things that he did not have personal knowledge of-

JUSTICE MEDINA: Is that the Kosmak?

MS. HANKINSON: Yes, Sir. That he was testifying to things he did not have personal knowledge of. That he had signed affidavits in Federal Court indicating that federal funds was spent at crossbuck-- at crossings when he had no knowledge of it and there was no record that could support it and when he was asked the questions under oath, his testimony contradicted his affidavit.

JUSTICE MEDINA: And it, it seems to me is why Judge Folsom made the decision that he did made.

MS. HANKINSON: Exactly right and you can see the two decisions that Judge Folsom. They keep the Johnson decision to the Court of Appeals the day before oral argument, the first time. Enriquez came out in the meantime. And Judge Folsom saw through what was going on. It is now-- this has been a sham evidentiary matter. Those are the words that are being used. This is not conclusive proof nor can it be backed-up by looking at Mr. Woods with what "Appears to be reflective prospects" in light of the fact that there is conflicting evidence and in the light of the fact that there all the evidentiary problems about how meager that is under this Court's evidentiary review.

JUSTICE BRISTER: What do you do and I want to get to the jury issue but-if, you know, the Brooklyn Bridge was built 100 years ago. The [inaudible] but everybody that built it and all the records have all disappeared so-- and the same situation here if Brooklyn Bridge was built by federal funds everything state law prohibit-- preempt it and your situation is if you just wait long enough for the bridge to fail when everybody has died and the records are all gone then the preemption disappears.

MS. HANKINSON: I don't disagree. I don't disagree. I, I disagree with that analysis, you Honor. I don't, I think that if these were a plaintiff who were here trying to make a case and the records were gone. The court would say you didn't uphold your burden and the same-

JUSTICE BRISTER: I do not care who wins or losses. I am just trying to get to-- the point you are making is, if these were with federal funds and congress said then if we preempt state law. In fact, Congress' preemption disappears when everybody-- let me finish-- when everybody who did it dies and when the records are thrown away. So preemption dies with the records and the people.

MS. HANKINSON: It doesn't die with the records and the people. It just cannot be -

JUSTICE BRISTER: How would you prove--

MS. HANKINSON: -proven.

JUSTICE BRISTER: How would you prove it--

MS. HANKINSON: It can't be proven then but that doesn't mean the preemption dies. The court had said, the Supreme Court had said and we all know that preemption is an affirmative defense and it must be proved. If you don't have the evidence, does that mean that the court steps in and says, "Well, sorry the evidence is gone. We will give one side the benefit of doubt and decide there's evidence." It's just a fact of life in terms of the way things handled, are handled but it does not, in anyway, lessen the responsibility of the defendant to prove conclusively now before this Court that there is preemption.

JUSTICE GREEN: Is there any reason why congress couldn't just

simply do the commerce clause and what not preempt all claims involving [inaudible].

MS. HANKINSON: It, it, it could but it didn't. And that's the whole point. And that's what was the debate in Easterwood and in Shanklin because that was the position that the railroads took and at that point in time, Solicitor General Starr came in to the Supreme Court with a brief on behalf of the government saying that is not what Congress intended. It is not fail to preemption. It is subject matter preemption and if you look at all the federal authority dealing with preemption issues. For example, site obstruction. You will see that Federal Court will not apply the warnings regulation to preempt site obstruction client. An evaluated speed in the Shanklin case to see if it is preempted under that regulation. There is no intent by Congress to displace totally state law and state regulations or responsibility on the part of the railroad with respect to railroad process.

JUSTICE WILLETT: Let us return to the jury charge.

MS. HANKINSON: The jury charges issue that is before the court. Looks at three different issues. The first issue has to do with whether there's preservation. The second whether there's even error and finally, whether or not there is harm. We believe that under existing Texas law, this is an issue at all three levels. That weighs in favor of and in fact, the [inaudible] should win. First, let me just briefly mention, this case was not tried on the basis that there was no duty on the part of the railroad to keep the tracks free of side obstruction. They tried it fully because we have a regulatory scheme in Texas. Both by regulation under the Transportation Code and as a result of the State using the [inaudible] site guidelines for evaluating house side obstruction need to be dealt with. They admitted at trial that they had a duty under Texas law. That duty has exists, they had admitted, their witnesses admitted they have a duty. The State of Texas came in and admitted that they held UP to a duty. So it was tried that way. This is a, a new argument that came up on appeal. It's the public policy of the state. The old cases can be harmonized with each other as we've discussed and can be harmonized with the regulatory scheme. The idea that there is no duty here is just amazing. The Federal Courts have all recognized side obstruction claims as being different than inadequate warning claims. The preemption analysis is different. So with that background, where did we find ourselves when it came time to submit the charge to the jury. The objections that were made by the railroad to the charge with respect to the liability issue were this. That number three which is the side obstruction issue was a "double dip" of number one, it takes number one and number 2 to get you to an inadequate warnings finding. But it was a double dip. It was a shade of the same facts were going to be considered under number one as would be under number three.

JUSTICE: And you read them?

MS. HANKINSON: [inaudible]

JUSTICE HECHT: Well then it's, it's included in one of these--

MS. HANKINSON: I do not agree with that your Honor.

JUSTICE HECHT: Well, the harm argument was that--

MS. HANKINSON: Well, I agree, I agree that the facts are subject to being considered with respect to both. But I, I disagree, that they milled into one negligence theory.

JUSTICE HECHT: Well, then--

MS. HANKINSON: The law recognizes more than one duty. Excuse me?

JUSTICE HECHT: Well, then there should be harm. I thought the harm argument was there can't be harm because--

MS. HANKINSON: That's right.

JUSTICE HECHT: Three's in one and two.

MS. HANKINSON: The facts are in one and two. This is a granulated liability submission and the reason why it is granulated is because the second objection that the railroad made was that the side obstruction claim which they acknowledge they had a duty under-- in the trial court was preempted by the warnings regulations and they also agreed that the negligence in the warnings issue was preempted by the same regulatory scheme. As a result of that, these issues were granulated because the preemption analysis is different. That's why it was granulated.

JUSTICE HECHT: Why is that? I mean it seems to me. I am having trouble keeping it out and putting a hand. It seems to me--

MS. HANKINSON: Well, -

JUSTICE HECHT: -if its in then I understand your harm argument they couldn't have hurt anybody because

MS. HANKINSON: That's right.

JUSTICE HECHT: -they were just part of the rest of the trial but if it's out then there could be--

MS. HANKINSON: Well, no, my point is your Honor that if you did a broad form submission then you could ask it together. But the point is that it had to be granulated because, because we do not have field preemption. This Court if we have put them together we would be here with them arguing we're unable to say to the court even though there is no preemption of side obstruction because it's wrapped into the first issue on liability, that's my point about why it is separate. Because it's tied to the need to be analyzed at preemption differently. But second of all they claim there is no duty under Texas law which they claimed for the first time on appeal and there is. So there is not any error in saying to the jury, "We're going to let you decide that now." Here's what happens next, they say it's a double dip. If it's a double dip if they're saying it's diplocodus issue. This Court has held at least as early as 1929 that a diplocodus submission is never error, harmful error. It's not, that was the only thing the judge was unnoticed of that was the complaint and if you look at Texas law, we know it wouldn't be harmful. And---

JUSTICE HECHT: But you're saying it's not duplicative. You said it was not duplicative it had to be said out and that's my confusion.

MS. HANKINSON: Well, it is not duplicative from this standpoint that if your are going to granulate. It is not duplicative. If you added they asked a broad form negligence which is questioned without specifying specific types of negligence then it becomes one.

JUSTICE HECHT: Well.

MS. HANKINSON: I want to make sure I am trying to answer your question and were not communicating--

JUSTICE HECHT: No, because I'm confused. You say it's implicative the law has been this way since for a long time but that cannot be harmful but it is not implicative because we have to separate it out because it's a different issue so--

MS. HANKINSON: Well, it's a negligence issue, your Honor. I mean, I mean, it is. You could ask, did the railroad-- was the railroad negligent, and what's the proximate cause and if it were true broad form submission that's what you'd ask. But given the fact that the preemption issue was different for the two. You have to put the negligence issue as a granulated submission and that's what it was. But there's no question that with respect to surrounding circumstances, surrounding circumstances include the state of the obstructions that are at the crossings. So the point is to say, first of all, in

preservation, the preservation issue, we have no objection to comparative causation. That's a broad form objection that the trial court was not on notice would be complained about. This allows them to speculate on the jury verdict. BLD and AZ say otherwise, so do Castille and Harris County. And then as Justice Hecht as said with respect to the harm analysis for it to be duplicative means that the jury is going to consider the same facts. That's what were all on notice they were complaining about. It's with reasonable certainty we know there was no harm. First, because this Court says, "There's no harm from duplicative submission." As a matter of law. And second of all, because it can't be harmful for the jury to consider facts in doing the comparative causation questioned that it is entitled to consider which is what distinguishes this case from case from Romero on the harm analysis.

CHIEF JUSTICE JEFFERSON: Any other questions. Thank you.

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

MR. HATCHELL: May it please the Court. I just want to make four very brief points on preemption and I want to address, Mr. Justice Willett's and the other Justices' questions about the jury charge matter. Very important for the court to understand the argument that you have just heard. It sits like an inverted pyramid on the notion that the tape applied to the crossbucks is not a warning device because it is not defined as such in the MUTCD. The MUTCD has absolutely nothing to do with preemption and that is found most of all in the Enriquez opinion which is the best opinion that supports their position. The judge in that case specifically plaintiffs, contend that retro reflective tape does not meet the definition of a warning device per the MUTCD or passed a warning device and defined in the CFR. Whether the device meets the requirements of the MUTCD is irrelevant. And that is well grounded in the decisions of the United States Supreme Court.

JUSTICE MEDINA: Well, what relevance if any does this so-called "sham evidence" from the Kosmak affidavit.

MR. HATCHELL: Well, your Honor, I hate to get in, into the, the terms like that because this is all based upon references to a deposition taken in a case two years after this. There is no suggestion in, in this -

JUSTICE MEDINA: No, but does there an indication--

MR. HATCHELL: -that there's any kind of sham defense.

JUSTICE MEDINA: Judge, Judge Folsom states in his writing that the affidavit is contradictory and is not explained.

MR. HATCHELL: Based upon the record in that case he could make any determination he wants but can this Court look to Judge Folsom's opinion in a completely different record that is not before the court in violation of your holding in the Falcon Ridge case that is that you don't, you know, add to the appellate record the stuff from other cases. But the other important thing is that nobody questions Mr.Kosmak's credibility or truthfulness in so far as the state records are concerned. We verified the state records under the business transactions act, the business record act and those are proved up without a doubt and nobody has ever challenged that and part of our argument is that those records alone in conjunction with two or three other pieces of fact established federal funding conclusive.

JUSTICE MEDINA: And what about the preservation of error in, in your opponent's brief there is reference to not being specific in your objection and that maybe your trial counsel is sandbagging and knows objections--

MR. HATCHELL: First of all, the objection to the submission of question two and three was about as specific is I think you can make it. The objections that are quoted in the briefs. The objection essentially was that question three was an evidentiary matter and it was not an ultimate issue but that objection was augmented later by post-verdict of motions which also raised no evidence and other matters. I do not know if we raised the immateriality or not I cannot--frankly I cannot remember as we stand here today. So the question simply is, is whether or not, question three which was the site restriction matter was a viable ultimate issue for the court to decide. The Court of Appeals that absolutely no problem finding that we have raised our objections-- they have properly raised the objections they so held and I cannot see any valid argument for saying that we did not,. The issue and then you go to the law underlying that which I do not think it's been seriously challenged at least since the 1800's that is site restrictions are simply a matter to be taken into account as, as regards the operation of the train and that is particularly understood by the regulations of the Federal Highway Administration in this case, which basis both it's speed determinations and the adequacy of devices on, on the basis of, of the site restrictions.

JUSTICE WILLETT: Ms. Hankinson says the idea that there is no duty here is amazing in her view. What do you say.

MR. HATCHELL: I think the idea recognizes the real life fact that railroad crossings are dynamic. That may been years. They are constantly changing and there are number of legitimate construction both by the railroad and by third parties that would inevidently include-- thank you. So the policy of the law has been to allocate the risk of site restrictions to the drivers approaching the crossing and to the railroad and therefore, they say it is wrapped up and those two determinations which were submitted in this case. [inaudible] your Honor, over this argument, we have to object to the portion. The difficulty with that argument is the portion question is not erroneous. We have no objection to that. I mean, the objection was properly overruled, the question three. A portion in that question is where are the impact of the harm is and I think Justice Hecht pretty much nailed that question in the Romero case. It is an unusual rule seems to me that says, "Making a valid objection to a submitted question." I also have to tell the trial court why the appellate court is going to find that this is [inaudible] overruling of that objection is harmful.

CHIEF JUSTICE JEFFERSON: Are there any further questions. Thank you, Counselor. The cause is submitted and the court will take a brief recess.

THE COURT MARSHAL: All Rise.

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