



April 4, 2019

By electronic filing and overnight delivery

Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *BNSF Railway Co. v. Nye*, No. 18-847 (scheduled for conference Apr. 19, 2019)

Dear Mr. Harris:

I represent Respondent Juanita Nye in the above-captioned case, which is scheduled for conference April 19, 2019. Pursuant to obligations noted in Rule 15 to point out “any perceived misstatement of fact,” I seek leave to identify, through this letter, a factual issue raised in the Petitioner’s Reply Brief, filed April 2, 2019.

The case presents an issue of preemption that depends on whether railroad crossbucks were federally funded. In seeking to establish a circuit conflict, BNSF asserts that “[t]here is no material difference between respondent’s version of the facts in this case and *O’Bannon v. Union Pacific Railroad Company*, 169 F3d 1088 (8th Cir. 1999).” Reply Br. 3. To support that statement, BNSF points out that, in *O’Bannon*, the defendant “railroad submitted a quantities installed form showing the installation of “one crossbuck and one wooden post.” *Id.* Then, referring to the facts in the present case, BNSF states: “Respondent tried before a jury whether one of the crossbucks at the subject crossing actually complied with the project’s terms. (Opp. 3, 9; Pet 13.).” Reply Br. 6.

The latter statement is incorrect because compliance was not at issue, only whether the crossbuck was federally funded. At trial and before the Oklahoma Supreme Court, the evidence established that no crossbuck at the crossing was funded with federal dollars. A federally funded project did exist between 1978 and 1980. Under its terms, if this crossing was included in the Federal project, it would have received two crossbucks. App. 17a. However, if a crossbuck was installed before 1978 or after 1980, it was not installed with federal funds. App. 18a.

Record evidence showed that before 1978 one crossbuck was installed at the site and that, after the federal project ended in 1980, there was still only one crossbuck. Tr. Vol. 5 at 1144:8-1145:15. These facts indicate that the federal project did not touch this crossing. There was no evidence that one crossbuck was installed with federal funds, as BNSF now suggests in its Reply Brief. Below, BNSF never claimed that one crossbuck was paid by federal funds. To the contrary, BNSF admitted that if federal funds were involved, then two crossbucks would have been installed – not one. Tr. Vol. 7 at 1657:14-1658:6.

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I am providing counsel for Petitioner a copy of this letter by email and overnight delivery.

Sincerely,



Robert S. Peck
Counsel of Record

cc: Charles Glaston Cole
Counsel for Petitioner