No. 19-____

IN THE SUPREME COURT OF THE UNITED STATES

CATHERINE STOUFFER, ET AL.,

PETITIONERS,

v.

UNION PACIFIC RAILROAD CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, ELEVENTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Union Pacific train crashed into a parade honoring wounded war veterans, and killed four of the veterans. The railroad-crossing's warning system had provided the parade only 20.4 seconds warning, despite the railroad's agreement with the State of Texas to provide 30 seconds warning. The governing "State-railroad agreement" mandated by the Federal Highway Administration (FHWA), 23 C.F.R. 646.216(d)(1), included a State-approved 30-second warning-time design. But months before the crash, Union Pacific reduced the crossing's timer by ten seconds without approval.

A State law action against a railroad is not preempted if the railroad violates a federal standard of care. 49 U.S.C. 20106(b)(1)(a). The veterans' survivors alleged that Union Pacific violated 49 C.F.R. 234.225, a Federal Railroad Administration (FRA) regulation that required Union Pacific to "maintain" the warning system "to activate in accordance" with its "design," but "in no event [to] provide less than 20 seconds warning…." But the court below held plaintiffs' action preempted, concluding that the FRA's 20-second minimum warning time "supplanted" the FHWA-mandated agreement's 30-second design, and, therefore, only 20 seconds of warning was enforceable. App., *infra*, 13a.

In so holding, the court below deferred to its understanding of the FRA's interpretation of the 20-second minimum warning-time regulation. But the court applied *none* of this Court's prerequisites for granting such blanket deference to an agency, disregarding 49 C.F.R. 234.225's text, structure, history, and purpose. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414–18 (2019).

The questions presented are:

Should this Court grant, vacate, and remand because the court below did not interpret 49 C.F.R. 234.225 in the manner that *Kisor* requires?

Should FRA regulations be interpreted in concert with FHWA regulations to enforce safety standards in "State-railroad agreements," rather than "supplant" them?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, who were appellants and plaintiffs below, are Catherine Stouffer, individually and on behalf of the Estate of Gary Lee Stouffer, Jr. and as next friend of Shannon Stouffer and Shane Stouffer; Ada Stouffer;[1] Tiffanie Lubbers, individually and on behalf of the Estate of William L. Lubbers and as next friend of Sydnie Lubbers and Zachary Lubbers; and Angela Boivin, individually and as personal representative of the Estate of Lawrence Boivin.

Respondent is Union Pacific Railroad Company, which was appellee and defendant below.

[1] Gary Stouffer, Sr., father of one of the decedents, Gary Stouffer, Jr., and formerly a party to this case, died during the pendency of this litigation.

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Catherine Stouffer, et al., respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Texas, Eleventh District.

OPINIONS BELOW

The Supreme Court of Texas's denial of rehearing on the denial of discretionary review is unreported. The opinion of the Court of Appeals of Texas, Eleventh District (App., *infra*, 1a–21a) is reported at *Stouffer v. Union Pac. R.R. Co.*, 530 S.W.3d 782 (Tex. App.—

Eastland 2017, pet. denied). The summary judgment of the 441st District Court, Midland County is unreported.

JURISDICTION

The judgment of the Court of Appeals of Texas, Eleventh District from which review is sought was issued on August 31, 2017. The Supreme Court of Texas denied Petitioners' petition for discretionary review on November 16, 2018 and denied Petitioners' motion for rehearing on May 31, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a) to claim a right under 49 U.S.C. 20106 to bring a State law action against a railroad for damages for personal injury and death. *See also Lawrence v. Texas*, 539 U.S. 558 (2003) (deciding case based on jurisdiction under 28 U.S.C. 1257(a) after the Texas Court of Criminal Appeals denied discretionary review).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant federal statute, 49 U.S.C. 20106, and Code of Federal Regulation provisions, 49 C.F.R. 234.225, 49 C.F.R. 234.259, 49 C.F.R. 234.201, and 23 C.F.R. 646.216 are reproduced in the appendix to this petition (App., *infra*, 1a–43a).

INTRODUCTION

By Federal Highway Administration mandate, individually tailored "State-railroad agreements" have governed federally-funded improvements to highway-rail crossings for over four decades. 23 C.F.R. 646.216(d)(1). And for good reason. Each railroad crossing will necessarily have its own safety considerations. For example, if the crossing is in a highly trafficked area of town, more time might be required to warn those passing

over the tracks. Or if the crossing exists in a barren plain with an endless horizon, the shorter 20-second minimum might suffice. At any rate, lives depend on the crossing warning system's operating in accordance with its proper design, thereby providing a sufficient amount of warning time between train and impending crossing, as tragically illustrated by the facts of this case. Four veterans went to war, were wounded, yet survived to return to celebrate with their spouses in a victory parade. They did not, however, survive the railroad's failure to follow the 30-second warning safety design required by the federally mandated contract between the State of Texas and Union Pacific.

Yet the court below never mentioned the FHWA's mandate. In disregarding this national directive, the court ignored the harmonious relationship between federal regulations promulgated by the FHWA and its sister agency, the Federal Railroad Administration (FRA). Indeed, the court interpreted the FRA regulation to the exclusion of the FHWA regulation in holding that the FRA had "supplanted" safety standards in State-railroad agreements. App., *infra* 13a.

That erroneous holding countermands the federal railroad-safety scheme and eradicates the States' vital role in furthering that end. It also demonstrates the importance of employing the interpretive principles that this Court recently recognized in *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414–18 (2019). In its interpretation of 49 C.F.R. 234.225, the court below deferred to what it summarily and incorrectly concluded to be the agency's interpretation of that regulation, rather than construe the text of the regulation as *Kisor* requires.

This interplay between the FHWA's regulations—implementing binding contracts between State and railroad where federally funded warning systems

safeguard highways that cross railroad tracks—and the FRA's railroad warning regulation, has surpassing importance to the nationwide safety of our railways. Does the holding of the opinion below, which disregards the FHWA's mandate in its entirety, void all of the individually tailored agreements in the State of Texas setting forth the required seconds of warning for a train's arrival at each crossing? Does that decision's precedent empower—or, at a minimum, encourage—railroads throughout the country to disregard the warning-time designs imposed upon them by federally mandated State-railroad agreements, as Union Pacific did here? Is the FRA's alleged uniform "20-second" rule truly safe for all types of crossings? What if there is a hump at the crossing, as there is here, so that a tractor-trailer is not stopped by the gate arm before crossing the tracks, and fails to clear the tracks before the train arrives? Despite these critical questions, the court below blithely applied its understanding of the FRA's interpretation of the 20-second rule, without any of *Kisor's* required analysis for such extraordinary deference to an agency. Plainly, such analysis is required before a holding of this magnitude becomes law.

As an alternative to granting review and setting this case for submission, the Court should grant this petition, vacate the judgment of the court below, and remand this case to that court to reconsider its decision in conformity with *Kisor*.

STATEMENT

1. In November 2012, an eastbound Union Pacific train crashed into a parade float honoring military veterans at the Garfield Street crossing in Midland, Texas. App., *infra*, 2a–3a. Twelve veterans and their spouses rode the float that day in a ceremony entitled "Show of Support—Hero Parade 2012." *Id.* Petitioners are

survivors of three of the four veterans killed when the train struck the float. *Id.* at 2a n.1.

The warning system at Garfield Crossing gave the float driver 20.4 seconds notice between the time the crossing lights began flashing and the train's arrival. *Id.* at 6a. Under the 1979 Master Agreement between Union Pacific's predecessor and the State of Texas, the warning system at the crossing was designed to provide 30 seconds warning. *Id.* at 13a. This "design" was approved by the State and Union Pacific, and incorporated into the Master Agreement.

The fatal discrepancy between the required warning and its truncated substitute occurred because, eight months before the collision, Union Pacific reduced the crossing timer's setting by ten seconds, to 25 seconds,[2] without obtaining written approval from Texas or municipal authorities that the Agreement requires. *Id.* That unapproved reduction, coupled with a frequency overlap defect that caused the system to provide shortened warning times for eastbound trains, *id.* at 5a n.2, tragically altered a warning system designed to prevent this very kind of catastrophe.

Because the system activated substantially later than designed, the gate arm descended *behind* the driver's cab. *Id.* at 3a. If the system had provided 30 seconds warning, the gate arm would have come down *in front of* the driver's cab. The fatal collision would not have occurred.

2. Petitioners brought suit in Texas State court alleging that Union Pacific's unapproved reduction of the

[2] Though not mentioned in the decision below, despite being explained in Petitioners' opening brief to the court below, it is undisputed that the crossing's timer had been set at 35 seconds before Union Pacific reduced it to 25 seconds.

crossing timer's setting to 25 seconds violated an FRA regulation requiring the railroad to "maintain[]" the "crossing warning system … to activate in accordance with the [State-approved 30-second] design of the warning system, but in no event [to] provide less than 20 seconds warning time…." 49 C.F.R. 234.225.

3. The trial court granted Union Pacific's motion for summary judgment and dismissed Petitioners' action, citing federal preemption. App., *infra*, 15a.

4. The Court of Appeals of Texas, Eleventh District affirmed. *Id.* at 21a

Pointing to final "notice" documentation from the FRA when it promulgated a "new regulatory field" in 1995, Union Pacific argued that the Master Agreement's 30-second warning time was not enforceable after the FRA issued the new regulations. *Id.* at 14a. That argument found purchase with the court below, which held: "We disagree with [Petitioners'] contention that the original design for the warning system as reflected in the 1979 Master Agreement is the controlling 'design of the warning system' under Section 234.225." *Id.* The court instead agreed with Union Pacific's contention that "since Section 234.225 was adopted after the execution of the master agreement, the regulation supplanted the terms of the master agreement." *Id.* at 13a.

Having concluded that the 1979 Master Agreement could not be enforced, the court disregarded the warning-time design it imposed. Without any reference to the FHWA mandate requiring that Agreement, the court adopted Union Pacific's argument that, "as written, Section 234.225 only requires 20 seconds of warning time." *Id.* at 8a. Because the warning at the time of the collision cleared that metric by four-tenths of a second, the court held that "the warning system at the Garfield

Street crossing performed in accordance with the federal standard of care for warning time systems. Thus, Union Pacific was entitled to summary judgment on [Petitioners'] warning-time claim on the basis of federal preemption." *Id.* at 15a. The Supreme Court of Texas denied Petitioners' petition for discretionary review and motion for rehearing. App., *infra*, 29a. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

A. By failing to appreciate the text, structure, history, and purpose of 49 C.F.R. 234.225, the court below erroneously held that the FRA intended to *supplant* safety standards in State-railroad agreements mandated by the FHWA, rather than *enforce* them.

The court below concluded that when, in 1995, the FRA promulgated a "'*new regulatory field*,'"[3] it intended to "supplant[]" the terms of agreements between States and railroads.[4] With specific regard to the regulation and Master Agreement, the court held that "since [49 C.F.R. 234.225] was adopted after the execution of the master agreement, the regulation supplanted the terms of the master agreement," thereby rendering the Master Agreement's 30-second warning-time design at Garfield Crossing irrelevant. App., *infra*, 13a. The court then held that any claim based on State law is preempted.

The correct interpretation of Section 234.225 is dispositive of this case, because it determines whether Petitioners' action against Union Pacific is, in fact, preempted.[5] The broader question is whether Congress,

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[3] App., *infra*, 14a (quoting Grade Crossing Signal System Safety, 61 Fed. Reg. 31802-01, 31802 (June 20, 1996)) (emphasis added by court).

[4] *Id.* at 13a.

[5] The material facts are undisputed. Thus, the interpretation of 49 C.F.R. 234.225 is dispositive because if Union Pacific complied with that FRA regulation, Petitioners' action against it is preempted, but if Union Pacific did not comply with the regulation, the action is not preempted. 49 U.S.C. 20106(b)(1)(A) (clarifying that "an action under State law seeking damages for personal injury, death, or property damage" is not preempted if the plaintiff "alleg[es] that a party has

either directly or implicitly, supplanted safety standards in "State-railroad agreements" mandated by the FHWA. 23 C.F.R. 646.216(d)(1).

To make that determination, the court should have resolved whether 49 C.F.R. 234.225 is "genuinely ambiguous." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414 (2019). Because, among other errors, the court below ignored the relationship of FRA regulation to FHWA regulation, it did not "exhaust all the 'traditional tools' of construction" before deferring to what it perceived to be the FRA's interpretation. *Id.* at 2415. The court's holding is dangerous precedent as it imperils the safety of railroad-crossings nationwide by preempting countless State-railroad agreements.

Preemption, a blunt instrument that displaces the sovereign authority of a State to police its own tort laws, must be reserved for instances where "'that is the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Petitioners' action against Union Pacific is *not* preempted because, under the correct interpretation of 49 C.F.R. 234.225, Union Pacific violated that regulation's federal standard of care. *See* 49 U.S.C. 20106(b)(1)(A). This Court should grant review. Alternatively, the Court should grant this petition and remand this case to the

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failed to comply with the Federal standard of care established by a regulation … issued by the Secretary of Transportation (with respect to railroad safety matters)…."); *Cf. Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 187–88 (3d Cir. 2012) (holding that "Zimmerman's negligent-maintenance allegation … avoid[s] preemption because 49 C.F.R. 234.245 creates a federal standard of care governing the maintenance of crossbucks.") (citing 49 U.S.C. 20106(b)(1)(A)).

court below with instructions to reconsider it in conformity with *Kisor*.

1a. **Text.** *Kisor* dictates that courts must consider interpretive aids such as text, structure, history, and purpose prior to determining whether a regulation is ambiguous and entitled to agency-interpretation deference. 139 S.Ct. at 2415. However, the court below did not apply the plain text of the regulation.

This Court interprets regulations using the same rules it employs to interpret statutes. *See Kisor*, 139 S.Ct. at 2446 (Gorsuch, J., concurring) ("When we interpret a regulation, we typically (at least when there is no agency say-so) proceed in the same way we would when interpreting any other written law."). A court must "begin [its] interpretation of the regulation with its text…." *Green v. Brennan,* 136 S.Ct. 1769, 1776 (2016). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotations omitted) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000), in turn quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

b. The FRA regulation provides:

> A highway-rail grade crossing warning system shall be maintained to activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal operation of through

> trains before the grade crossing is occupied by rail traffic.

49 C.F.R. 234.225.

The key phrase is "the design of the warning system." *Id.* Warning-system designs may vary from crossing to crossing "based on criteria such as equipment used, particular crossing intricacies, vehicular traffic patterns, and roadway configurations." FRA Technical Bulletin S-08-02, at 3 (July 22, 2008).[6] Because of crossing variations, a warning system at an individual crossing might be designed to provide 30 seconds, 35 seconds, or even more warning time:

> [A] crossing warning system might be designed to activate 30 seconds before a train being operated at the maximum authorized speed arrives at the crossing. At another crossing, the crossing warning system might be designed to activate 35 seconds or more before a train being operated at the maximum authorized speed arrives at the crossing.

Id.

As the court below acknowledged, the warning system at Garfield Crossing was designed for 30 seconds warning time. App., *infra*, 13a. That time was incorporated into signal plans for that crossing that are and were woven into the Master Agreement between Union Pacific's predecessor and the State of Texas. *Id.* The State-approved "design[ed]" warning time is what 49

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[6] "Technical Bulletins are internal documents (usually memoranda) issued to FRA's regional personnel by the Office Director for Safety Assurance and Compliance. The bulletins provide interpretive guidance and they help clarify specific issues under the rail safety regulations and other safety issues." https://catalog.data.gov/dataset/railroad-technical-bulletins

C.F.R. 234.225 tasks railroads to "maintain[]." However, the court below ignored this plain text.

c. 49 C.F.R. 234.225 required Union Pacific to "maintain[]" the warning system at the crossing "to activate in accordance with the [30-second] design of the warning system…." 49 C.F.R. 234.225. This textually required disposition implements a federal standard of safety—the opposite of an "absurd" formulation. *Lamie*, 540 U.S. at 534. It comports with the FRA's understanding that, because the characteristics of crossings vary, the designed warning time for a crossing might be 30 seconds, 35 seconds, or even more. FRA Technical Bulletin S-08-02, at 3 (July 22, 2008). Thus, whatever the number of seconds a warning system might be designed to provide with federally mandated State approval, it makes sense for the FRA to require the railroad to "maintain[]" the warning system "to activate in accordance with [that warning-time] design…." 49 C.F.R. 234.225. In this case, as written, Section 234.225 required Union Pacific to maintain the warning system to provide 30 seconds warning time.

The court below interpreted this regulation differently. It credited Union Pacific's argument that "as written, Section 234.225 only requires 20 seconds of warning time." App., *infra* 8a. That interpretation rewrites the plain text, eliminating the railroad's obligation to *maintain* the warning system to activate in accordance with its warning-time *design*. The court's re-written statute reads:

> A highway-rail grade crossing warning system shall ~~be maintained to activate in accordance with the design of the warning system, but~~ in no event ~~shall it~~ provide less than 20 seconds warning time for the normal operation of through

> trains before the grade crossing is occupied by rail traffic.

49 C.F.R. 234.225 (as modified by court below). The court thus violated this Court's admonitions, equally applicable to regulations, that a court "must *interpret* the statute, not rewrite it," *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018) (emphasis in original), and that "every clause and word of a statute should, if possible, be given effect," *Chickasaw Nation v. U.S.*, 534 U.S. 84, 93 (2001) (internal quotations omitted).

2.a. **Structure.** The court below also displaced the FRA's structure.

As demonstrated above, Section 234.225 is unambiguous because, giving effect to all its words, it is not "capable of being understood in two or more possible senses or ways." *Chickasaw Nation*, 534 U.S. at 90 (internal quotation omitted). But even if it could also reasonably be understood to "only require[] 20 seconds of warning time" at every crossing in the country, App., *infra*, 8a—notwithstanding that warning-time designs may vary from crossing to crossing—that would not end the interpretive inquiry. "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction," *Kisor*, 139 S.Ct. at 2415.

Union Pacific's obligation to *maintain* the warning system at Garfield Crossing to activate in accordance with its 30-second design is reinforced by two companion FRA regulations requiring Union Pacific to "*test[]* for the prescribed warning time at least once every 12 months…," 49 C.F.R. 234.259[7] (emphasis added), and to

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[7] Petitioners briefed the significance of 49 C.F.R. 234.259 to the court below, but the court made no mention of this regulation in its opinion.

keep "[p]lans" at the crossing "for proper *maintenance* and *testing*…, 49 C.F.R. 234.201 (emphasis added). These two FRA provisions must be construed together with 49 C.F.R. 234.225, which the court below made no effort to do.

b. **49 C.F.R. 234.259.** Union Pacific annually tested the actual warning-time results for Garfield Crossing.[8] Those tests cite 49 C.F.R. 234.259; correctly identify the prescribed warning time as 30 seconds; and show that, in each of the five years preceding the collision—including just eleven months before the collision—Union Pacific achieved warning times that met or exceeded that prescribed 30-second warning time.

These "tests" required by the FRA demonstrated that Union Pacific had been "maintaining" the warning system at Garfield Crossing to activate in accordance with its 30-second design, as required. It was only after Union Pacific unilaterally reduced the crossing timer's setting by ten seconds just months before the collision that the warning system provided less than 30 seconds warning—a full 9.6 seconds less. But the decision below refers neither to the tests required under 49 C.F.R. 234.259 nor to Union Pacific's test results showing its years of compliance with this regulation—up until just months before this multiple-fatality collision.

c. **49 C.F.R. 234.201.** Union Pacific's obligation to "maintain[]" the warning system at Garfield Crossing to activate in accordance with its 30-second warning-time design, 49 C.F.R. 234.225, and to annually "test[]" the system to ensure that it was achieving that prescribed 30-second warning time, *id.* 234.259, is further reinforced by Union Pacific's obligation to keep "[p]lans … for proper maintenance and testing" at the "crossing warning

[8] Attached as Appendix 13 to Brief of Appellant in the Court below.

system location," *id.* 234.201. These "plans" must be "legible and correct." *Id.*

The court below cited this regulation for an insupportable proposition. The court embraced "Union Pacific['s] conten[tion] that 'the design of the warning system' is the current setting of the warning system as reflected by the plans located at the crossing." App., *infra*, 13a. According to Union Pacific, the plans located "at the crossing" at the time of the collision showed a designed warning time of 25 seconds. *Id.* That is a disputed fact issue, but it is immaterial to the interpretation of this regulation. Yet the court deemed this disputed evidence sufficient to establish that the "design" of the warning system at the time of the collision was the 25-second design on the plans Union Pacific contends, but Petitioners dispute, were there. *Id.* at 14a.

The "correct" plans for Garfield Crossing were, and always have been, the State-approved 30-second plans that the court below acknowledged were made part of the Master Agreement. App., *infra*, 13a. These are the same "[p]lans" mandated by the FHWA. 23 C.F.R. 646.216(d)(2)(x). The court's failure to employ a *Kisor* analysis caused it to rely on the wrong "plans."

Union Pacific could not unilaterally change the 30-second warning-time design specified by the federally mandated Master Agreement by invoking alleged 25-second plans that never received written State or municipal approval. The Master Agreement expressly so states: "*No changes* are to be made in the *design*, operation or location of the warning systems *without the written approval* of the STATE or MUNICIPALITY of

jurisdiction."[9] Thus, the "correct" plans were not whatever plans Union Pacific insists were at the crossing at the time of the collision, no matter when, why, or how they got there. The "correct" plans were those made a part of the Master Agreement.

d. "[E]very part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 116 (1879). Thus, the court below was required to "[c]onstru[e] [49 C.F.R. 234.225, 234.259, and 234.201] together, and giv[e] effect to [all of them]…." *Rake v. Wade*, 508 U.S. 464, 472 (1993).

Why would a railroad be required to annually "test[] for the *prescribed warning time*"[10]—which, depending on the crossing, might be 30 seconds, 35 seconds, or even more[11]—if the railroad was only required to achieve 20 seconds of warning at every crossing, as the court below held? If that were the case, the FRA's requirements (i) to annually "test[] for the prescribed warning time," 49 C.F.R. 234.225, and (ii) to keep plans at the crossing "required for proper maintenance and testing," *id.*, 234.201, would be superfluous.

49 C.F.R. 234.225 means that every federally financed railroad-crossing warning system in this country must provide at least 20 seconds warning time. But at a crossing, like Garfield Crossing, where the State-approved designed warning time *exceeds* 20 seconds, the

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[9] Master Agreement ¶ 7. A copy of the Master Agreement was attached as Appendix 5 to Petitioners' opening brief of appellants in the court below and as Appendix 2 to their reply brief.

[10] 49 C.F.R. 234.259 (emphasis added).

[11] FRA Technical Bulletin S-08-02, at 3 (July 2008).

warning system must be "maintained to activate in accordance with [that State-approved in-excess-of-20-seconds] design," not whatever "design" the railroad might assert it unilaterally adopted. *Id.*

c. **History and Purpose.** In addition to misconstruing the plain text of the FRA regulation, and ignoring the structure that lends vital context, the court below also bypassed the history and purpose behind 49 C.F.R. 234.225, including its inextricable relationship to the FHWA and its regulations. FRA regulation 49 C.F.R. 234.225 must be construed together with FHWA regulation 23 C.F.R. 646.216(d) to give full effect to the Federal Railroad Safety Act (FRSA).

"The Federal Railroad Administration (FRA) was created by the Department of Transportation Act of 1966 … to enable the safe, reliable, and efficient movement of people and goods for a strong America, now and in the future."[12]

Congress enacted FRSA "'to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons....'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 661 (1993) (quoting 45 U.S.C. 421, now amended at 49 U.S.C. 20101)). To carry out its mandate, "FRSA grants the Secretary of Transportation the authority to 'prescribe regulations and issue orders for every area of railroad safety,' § 20103(a), and directs the Secretary to 'maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing

[12] "About FRA," https://www.fra.dot.gov/Page/P0002.

problem,' § 20134(a)." *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000).

Three years after enacting FRSA, Congress enacted the Highway Safety Act of 1973, § 203, 87 Stat. 283, which created the Federal Railway–Highway Crossings Program encouraging States to eliminate the hazards of railway-highway crossings. To participate in the Crossings Program, States must:

> "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." … That schedule must, "[a]t a minimum, ... provide signs for all railway-highway crossings."

Shanklin, 529 U.S. at 348 (quoting 23 U.S.C. 130).

Two years later, the Secretary promulgated, through the FHWA, 23 C.F.R. Part 646, Subpart B to "prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities." 23 C.F.R. 646.200(a) (1975). As a prerequisite to obtaining federal funding for a grade-crossing improvement under the Crossings Program, the FHWA mandated "an agreement in writing between the State highway agency and the railroad company," *id.* 646.216(d)(1), and, to satisfy that requirement, "[m]aster agreements between a State and a railroad on an area or statewide basis may be used," *id.* 646.216(d)(5). "These agreements would contain the specifications, regulations, and provisions required in conjunction with work performed on all projects." *Id.* The FHWA-mandated "State-railroad agreement" must include, *inter alia*, a provision for "[m]aintenance responsibility," and "[a]ppropriate reference to or

identification of plans and specifications." 23 C.F.R. 646.216(d)(1), (2)(viii), (x).

These regulations remain in force, and the obligation to enter into State-railroad agreements containing "appropriate reference to or identification of plans and specifications" is still required. Consequently, if the terms of State-railroad agreements—including their reference to plans and specifications—have been "supplanted" by 49 C.F.R. 234.225, why is federal assistance *still* dependent on these agreements? How could the Secretary of Transportation, who presides over both the FRA and the FHWA, intend for railroads to comply with one set of regulations but not the other?[13]

With regard to Garfield Crossing, Texas and Missouri Pacific Railroad Company—which Union Pacific subsequently acquired—executed a "Railroad Signal Master Agreement for Federal Aid Projects" in compliance with FHWA regulation.[14] Though not

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[13] That the FHWA and FRA are sister agencies within the Department of Transportation, and act in concert, cannot be ignored. *See Harris v. Chao*, 257 F. Supp. 3d 67, 69 n.3 (D.D.C. 2017) (identifying the FRA and FHWA as two of the Department of Transportation's operating administrations). For example, while the FHWA coordinates the federal funding for the Crossings Program, "[t]he Federal Railroad Administration (FRA) maintains the Crossing Inventory. On January 6, 2015, the FRA published regulations that require railroads to submit information to the Crossing Inventory about crossings through which they operate." "Railway-Highway Crossings (Section 130) Program," https://safety.fhwa.dot.gov/hsip/xings/. Thus, the FRA and FHWA work together to achieve the railroad safety Congress envisioned when it enacted FRSA.

[14] As previously noted, FHWA regulation 23 C.F.R. 646.216(d)(1) requires a "State-railroad agreement" for each railroad crossing at which the warning system is improved with "Federal aid," and

mentioned by the court below, the Master Agreement requires Union Pacific to "maintain and operate … highway-railroad grade crossing warning systems as installed and in accordance with the design of operation as shown in the EXHIBIT B."[15] In 1987, a Diagnostic Team[16] comprised of representatives of Union Pacific, the State of Texas, and the City of Midland prescribed the warning system design for the Garfield Street crossing to be 30 seconds.[17]

Two years later, that design was "made a part of" the Master Agreement, when Union Plans prepared plans incorporating the 30-second designed warning time, and these 30-second plans were approved by the Texas Department of Transportation and marked Exhibit B.[18]

This "history" shows that the 1979 Master Agreement between the State of Texas and Union Pacific, and the 30-

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"[m]aster agreements" may be used to satisfy that requirement. *Id.* 646.216(d)(5).

[15] Master Agreement ¶ 7.

[16] *See* 23 C.F.R. 646.204 ("A diagnostic team means a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing or a group of crossings.") (cited in *Easterwood*, 507 U.S. at 666). The decision below makes no mention of the undisputed fact that an FHWA-mandated diagnostic team prescribed a 30-second warning time for the Garfield Street crossing. But the court acknowledged that the "Exhibit B of the master agreement shows an original designed warning time of 30 seconds for the Garfield Street crossing." App., *infra* 13a.

[17] A copy of the Diagnostic Team's Crossing Evaluation Report was attached as Appendix 6 to Petitioners' opening brief of appellants in the court below.

[18] These State-approved Exhibit B 30-second plans were attached to Petitioners' opening brief in the court below as Appendix 5b.

second warning-time design for Garfield Crossing that was made a part of that Agreement in 1989, were executed in accordance with FHWA regulation for the very "purpose" of furthering the railroad safety scheme contemplated by FRSA. *Kisor*, 139 S.Ct. at 2415. Far from discharging its responsibility to "'carefully consider[]'" this history and purpose, *id.*, the court below ignored it to reach the conclusion that 49 C.F.R. 234.225 "supplanted the terms of the master agreement." App., *infra* 13a.

Because it bypassed the history and purpose of the federal scheme underlying railroad safety the court got it backwards. Section 234.225 did not "supplant[]" the terms of the Master Agreement. *Id.* Rather, the Master Agreement *supplied* an essential term in Section 234.225: "the design of the warning system." 49 C.F.R. 234.225. The Master Agreement effectuated the federal scheme by determining that at Garfield Crossing, the "design of the warning system" required 30 seconds warning. Thus, Union Pacific was required to "maintain[]" the "warning system" at Garfield Crossing "to activate in accordance with the [30-second] design of the warning system…." *Id.*

Union Pacific's obligation to "*maintain*" the warning system to activate "*in accordance with the design*" of the system under this FRA regulation, *id.* (emphasis added)

Paragraph 3 of the Master Agreement, entitled "PLANS AND DESIGN," provides:

> The STATE and the RAILROAD agree jointly to prepare plans and estimates based on specifications approved by the STATE for the proposed grade crossing warning systems and after having been approved in writing by the STATE, said plans and estimates are to be marked EXHIBIT B which, by reference, are to be made a part hereof.

echoes its "Maintenance" obligation under the FHWA-mandated Master Agreement: "The RAILROAD shall *maintain* and operate these highway-railroad grade crossing warning systems as installed and *in accordance with the design* of operation as shown in the EXHIBIT B."[19]

This textual congruence shows that when the Secretary of Transportation's left hand (the FRA) promulgated regulations in 1995, it knew all about master agreements and their State-approved warning-time designs that the Secretary's right hand (the FHWA) had made an integral part of railroad-crossing safety for the previous two decades. Indeed, as this case illustrates, "State-railroad agreements" mandated by the FHWA give meaning to the FRA regulations. Thus, the "*new regulatory field*" that the FRA promulgated in 1995 was "new" only in the sense that it enforced the safety standards in State-railroad agreements, including the Master Agreement here; it did not "supplant[]" them. App., *infra*, 13a.

By failing to interpret 49 C.F.R. 234.225 to encompass, as the federal standard of care, the State-approved warning time found in the Master Agreement, the court below erased the States' prescribed role in railroad-crossing safety and impermissibly altered the standard of care.

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Eschewing the text, structure, history, and purpose behind 49 C.F.R. 234.225, the court below failed the *Kisor* test. It misinterpreted 49 C.F.R. 234.225, and thus erroneously concluded that Union Pacific complied with

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[19] Master Agreement ¶ 7 (emphasis added).

that regulation and that Petitioners' action is therefore preempted.

B. The decision below is important to railroad-crossing safety nationwide, and the questions it raises are cleanly presented to this Court.

For four decades, the federal government has provided 90% of the funding for railroad-crossing improvements.[20] As a result, virtually every railroad-crossing warning system in the country is governed by a "State-railroad agreement." 23 C.F.R. 646.216(d)(1). To avoid catastrophes like the one at Garfield Crossing, courts must accurately interpret congressional intent as reflected in federal regulations.

The State of Texas, no less than the federal government, has a powerful role in policing. Yet because of the dearth of existing jurisprudence, Union Pacific persuaded the lower court to confer upon railroads near ubiquitous power to configure warning times not as approved by a State/Federal directive attuned to safety, but for their own purposes.

Without immediate intervention, the precedent established by the decision below will encourage railroads to disregard the obligations imposed upon them by FHWA-mandated State-railroad agreements. That would undermine Congress's purpose "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons...." *Easterwood*, 507 U.S. at 661 (internal quotations and citations omitted), as this case so tragically demonstrates. The questions presented are

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[20] Federal Highway Administration Railroad-Highway Grade Crossing Handbook at 10 (2d ed. Sept. 1986).

cleanly framed, unencumbered by other issues,[21] and are of national significance. Accordingly, this Court should either grant this petition and set this case for submission, or, alternatively, grant this petition, vacate the judgment of the court below, and remand this case to that court to reconsider its decision in conformity with *Kisor*.

CONCLUSION

The petition for writ of certiorari should be granted.

[21] Union Pacific's argument that the partial summary judgment in its favor under 49 C.F.R. 234.223 is dispositive of Petitioners' warning-time claim under 49 C.F.R. 234.225, was rejected by the court below, App., *infra*, 7a, and issues regarding duty and causation, and gross negligence were not reached by the court below, *id.* at 17a-18a, and, therefore, are questions for resolution by that court on remand.

Respectfully submitted.

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August 29, 2019

APPENDIX

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Appendix A(1)

Opinion filed August 31, 2017

In The
Eleventh Court of Appeals

No. 11-15-00052-CV

CATHERINE STOUFFER ET AL., Appellants

V.

UNION PACIFIC RAILROAD COMPANY, Appellee

On Appeal from the 441st District Court
Midland County, Texas,
Trial Court Cause No. CV50285

O P I N I O N

This appeal arises from a tragic accident where four veterans riding on a flatbed tractor-trailer during the "Show of Support – Hero Parade 2012" in Midland were killed when a Union Pacific train collided with their

parade float. Appellants[1] sued Union Pacific for wrongful death and personal injuries, alleging violations of various federal regulations pertaining to railroad crossings. The trial court resolved many of the claims asserted by Appellants by granting partial summary judgment in favor of Union Pacific prior to trial.

The case proceeded to trial on Appellants' remaining claim alleging negligence on the part of the train crew. As the trial progressed, the trial court made an evidentiary ruling concerning expert testimony that Appellants' counsel deemed to be the equivalent of a directed verdict for Union Pacific. The trial court subsequently granted summary judgment on this matter, which resulted in a final judgment in favor of Union Pacific on all claims asserted by Appellants. On appeal, Appellants assert that the trial court erred by (1) granting summary judgment against their warning-time claims based on federal preemption grounds, (2) granting summary judgment against their train-crew negligence claim based on federal preemption grounds, and (3) granting summary judgment on their gross negligence claims. We affirm.

Background Facts

On November 15, 2012, during the "Show of Support – Hero Parade 2012" in Midland, two tractor-

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[1] Appellants are Catherine Stouffer, individually and on behalf of the Estate of Gary Lee Stouffer, Jr. and as next friend of Shannon Stouffer and Shane Stouffer; Ada Stouffer; Gary Stouffer, Sr.; Tiffanie Lubbers, individually and on behalf of the Estate of William L. Lubbers and as next friend of Sydnie Lubbers and Zachary Lubbers; and Angela Boivin, individually and as personal representative of the Estate of Lawrence Boivin.

trucks pulling flatbed trailers served as floats in the parade. Each tractor-trailer carried twelve veterans and their wives sitting in folding chairs on top of the trailers. The tractor-trailers traveled southbound on South Garfield Street.

Michael Sayre Morris, one of the veterans riding on the first trailer, testified that, as the first tractor-trailer was crossing the Union Pacific railroad tracks located south of West Front Avenue, he heard the railroad crossing bell and saw the Union Pacific train on the tracks. The warning lights at the Garfield crossing activated as the first tractor-trailer was moving off the tracks. At first, Morris thought the train was stopped, but once he was past the tracks, he could tell it was moving fast. Morris saw the gate arm coming down behind the cab of the second tractor-trailer. He then realized the train was going to hit the second tractor-trailer.

When the eastbound Union Pacific train was approximately 2,500 feet away from the Garfield railroad crossing, the engineer aboard the train spotted the first tractor-trailer proceeding through the crossing and said to the conductor, "Look at that idiot. Can you believe this?" But neither the engineer nor the conductor slowed the train. Shortly thereafter, when the train was approximately 1,200 feet away, the second tractor-trailer proceeded through the Garfield railroad crossing. The train crew sounded the train's horn when the train was about 799 feet from the crossing. The train crew applied the emergency brake when the train was about 462 feet from the crossing, but the brakes did not engage until the train was about 46 feet from colliding with the tractor-trailer. The train, traveling at approximately 62 miles per hour, crashed into the last 39 inches of the second tractor-trailer. Four of the veterans riding on the second tractor-

trailer were killed in the collision, and several other riders were injured. Appellants are survivors of three of those veterans.

Analysis

Warning-Time Claims

We review a summary judgment de novo. Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 862 (Tex. 2010). Appellants assert in their first issue that the trial court erred in granting Union Pacific's motion for partial summary judgment on their warning-time claims on the basis of federal preemption. Union Pacific presented its federal preemption contention as a traditional ground for summary judgment. A party moving for traditional summary judgment bears the burden of proving there is no genuine issue of material fact as to at least one essential element of the cause of action being asserted and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); Nassar v. Liberty Mut. Fire Ins. Co., 508 S.W.3d 254, 257 (Tex. 2017). When reviewing a traditional motion for summary judgment, we review the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts against the motion. City of Keller v. Wilson, 168 S.W.3d 802, 824 (Tex. 2005). A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 509 (Tex. 2010).

Union Pacific asserted that Appellants' warning-time claim was preempted because federal regulations cover the timing operation of a railroad's warning systems. Appellants contend that their warning-time

claim is exempt from preemption because Union Pacific violated federal regulations that establish a federal standard of care. Specifically, Appellants assert that Union Pacific failed to comply with federal regulations pertaining to "designed-warning-time" and "frequency-overlap" claims.[2]

The parties do not dispute that state tort law actions challenging the adequacy of railroad crossing warnings are preempted whenever federal regulations address the applicable warning devices. See Mo. Pac. R.R.. Co. v. Limmer, 299 S.W.3d 78 (Tex. 2009) (addressing federal preemption under federal law and regulations for the selection of the types of warning devices used at a railroad crossing). Congress enacted the Federal Railroad Safety Act of 1970 (FRSA) "to promote safety in all areas of railroad operations and to reduce railroad-related accidents and injuries to persons." Id. at 82 (quoting Pub. L. No. 91–458 § 101, 84 Stat. 971 (1970), codified as amended at 49 U.S.C. § 20101). The FRSA calls for "[l]aws, regulations, and orders related to railroad safety [to] be nationally uniform to the extent practicable," and to that end, the FRSA authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." Id.

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[2] Appellants premised their frequency-overlap claim on the allegation that a defect in the circuitry caused eastbound trains to trigger shorter warning times than westbound trains. Appellants contend that a frequency overlap for eastbound trains contributed to the particular eastbound train that was involved in the accident not giving the requisite warning time required by the original design of the warning system. We will collectively refer to these claims as Appellants' warning-time claims.

(alterations in original) (quoting 49 U.S.C. §§ 20103(a), 20106(a)(1)).

As noted by the court in Limmer, under Section 20106, federal regulations "covering the subject matter" of a railroad safety requirement preempt state law, including common law tort liability. Id. (citing Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 357–58 (2000); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 670–71 (1993)). However, when a party alleges that a railway failed to comply with a federal standard of care established by a federal regulation, preemption does not apply. 49 U.S.C. § 20106(b)(1)(A); see Nunez v. BNSF Ry. Co., 730 F.3d 681, 682 (7th Cir. 2013) ("A state may provide a remedy for negligence resulting from violation of federal railroad safety regulations."); see also Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1214–216 (10th Cir. 2008), cited in Limmer, 299 S.W.3d at 80 n.3.

Union Pacific asserts it is entitled to summary judgment on federal preemption grounds because it established as a matter of law that it did not violate the applicable federal regulation concerning warning time. See Gauthier v. Union Pac. R.R. Co., 644 F. Supp. 2d 824, 838 (E.D. Tex. 2009) (Federal preemption precludes claim when railroad establishes as a matter of law that it did not violate relevant federal regulation.). The warning time regulation that is relevant to this case is 49 C.F.R. § 234.225, entitled "Activation of warning system." This regulation provides as follows:

> A highway-rail grade crossing warning system shall be maintained to activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal

> operation of through trains before the grade crossing is occupied by rail traffic.

The warning time regulation is relevant to this appeal because it governs the amount of notice required between the flashing of warning lights at a railroad crossing and the arrival of the train at the crossing. Appellants assert that the warning lights at the Garfield Street railroad crossing should have started sooner and that, if they had done so, the gate arms on the crossing would have started their descent sooner, possibly causing the truck driver to stop before driving across the tracks. See 49 C.F.R. § 234.223 ("Each gate arm shall start its downward motion not less than three seconds after flashing lights begin to operate and shall assume the horizontal position at least five seconds before the arrival of any normal train movement through the crossing.").

We first note Union Pacific's contention that its partial summary judgment under Section 234.223 on the timing of the gate arms is dispositive of Appellants' warning-time claim because Appellants have not challenged it on appeal. Union Pacific bases this contention on the fact that the gate arms do not have to finish their descent until five seconds before the train arrived at the crossing. We disagree with Union Pacific's contention that this ruling is dispositive of Appellants' warning-time claims. Appellants' claims are not based on the contention that the gates were not fully horizontal in a timely manner but, rather, that the gates should have started moving downward sooner. Under Section 234.223, the downward movement of the gates is triggered by the flashing lights beginning to operate.

Accordingly, we direct our analysis toward Section 234.225, the warning-time regulation.

Appellants and Union Pacific disagree on the interpretation of Section 234.225. In summary, Appellants assert that the initial, approved "design of the warning system" at the Garfield Street crossing required a warning time of 30 seconds and that the warning time of 20.4 seconds was not sufficient under "the design of the warning system" component of Section 234.225. Conversely, Union Pacific asserts that the programmed "design of the warning system" only required 25 seconds of warning time and that, as written, Section 234.225 only requires 20 seconds of warning time.

The resolution of Appellants' first issue requires an interpretation of Section 234.225. The construction of a federal regulation is a question of law. See Nakimbugwe v. Gonzales, 475 F.3d 281, 284 (5th Cir. 2007). Accordingly, our review is de novo. See State v. Shumake, 199 S.W.3d 279, 284 (Tex. 2006). In construing a statute, we would first look to the plain meaning of the text, giving undefined terms the ordinary meaning unless a different or more precise definition is apparent from the context. See Greater Houston P'ship v. Paxton, 468 S.W.3d 51, 58 (Tex. 2015). We would only resort to rules of statutory construction or extrinsic aids when a statute's words are ambiguous. See id. We apply these same rules to our interpretation of Section 234.225, with one notable exception. See Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs., 718 F.3d 488, 494–95 (5th Cir. 2013) (applying rules of statutory construction to the interpretation of regulations). The exception arises from the fact that Section 234.225 is a federal regulation promulgated by the Federal Railroad Administration (FRA), an agency within the Department of

Transportation. See Grade Crossing Signal System Safety, 61 Fed. Reg. 31802-01 (June 20, 1996). "An agency's interpretation of its own regulation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Elgin Nursing & Rehab. Ctr., 718 F.3d at 492 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). In this regard, an agency's opinion letters, handbooks, and other published declarations of its views are authoritative sources of the agency's interpretation of its own regulations. Id.

The FRSA granted the Secretary of Transportation authority to prescribe regulations and issue orders relating to railroad safety. 49 U.S.C. § 20103(a). Section 234.225 is contained within Subpart D entitled "Maintenance, Inspection, and Testing" of 49 C.F.R. Part 234 dealing with "Grade Crossing Safety." The FRA promulgated Subpart D between 1994 and 1996 to establish rules "requiring that railroads comply with specific maintenance, inspection, and testing requirements for active highway-rail grade crossing warning systems." Grade Crossing Signal System Safety, 61 Fed. Reg. 31802-01, 31802 (June 20, 1996) (emphasis added).

As originally proposed, Section 234.225 simply provided that "[a] highway- rail grade crossing warning system shall activate to provide a minimum of 20 seconds warning time before the grade crossing is occupied by rail traffic." Grade Crossing Signal System Safety, 59 Fed. Reg. 3051-01, 3066 (January 20, 1994). The commentary that accompanied the originally proposed rule indicated that a 20-second minimum was consistent with the Manual on Uniform Traffic Control Devices (MUTCD) issued by the Federal Highway Administration and that

it was consistent with "current industry practices." Id. at 3059; see Oliver v. Ralphs Grocery Co., 654 F.3d 903, 909 (9th Cir. 2011) ("The federal MUTCD is a regulation promulgated by the Department of Transportation (DOT) that sets 'the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel.'" (quoting 23 C.F.R. § 655.603(a))). MUTCD Section 8C.08 provides that "[f]lashing-light signals shall operate for at least 20 seconds before the arrival of any rail traffic." U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS 775 (2009).

The regulation that was finally adopted added additional language. Instead of simply requiring a minimum warning of 20 seconds, the adopted regulation provides as follows:

> A highway-rail grade crossing warning system shall be maintained to activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal operation of through trains before the grade crossing is occupied by rail traffic.

49 C.F.R. § 234.225. The addition of the phrase "the design of the warning system" is significant to this appeal because this phrase is the source of the conflict in the parties' interpretation of Section 234.225. The FRA indicated in its notice that accompanied this change that the additional language was added on the recommendation of "[t]he labor/management group" to reflect "a maintenance, rather than a design requirement." See Grade Crossing Signal System Safety,

59 Fed. Reg. 50086-01, 50099 (Sept. 30, 1994). The FRA further indicated that the 20- second minimum was retained in the regulation to "maintain a minimum activation standard for warning systems." Id.

The FRA has issued other publications addressing Section 234.225. The FRA's Office of Railroad Safety has issued a "Signal and Train Control (S&TC) Technical Manual."[3] The overview portion of the Technical Manual addressing 49 C.F.R. Part 234 indicates that it provides "authoritative guidance regarding the correct application of the Federal requirements." It also states that:

> The rules contained in Part 234 are used by inspectors in their inspection and investigation activities, and are the **minimum** standards by which highway-rail grade crossing warning systems are evaluated for compliance. It is pertinent to note that many railroads have adopted their own standards that are more stringent than those set forth in Part 234. However, the FRA and State inspectors can enforce only the **minimum** standards set forth in Title 49 CFR Part 234.

Volume II of the Technical Manual contains a section entitled "Application" addressing Section 234.225.

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[3] The most recent Technical Manual was issued in April 2012 and consists of two volumes. The cover of the manual identifies it as "Signal and Train Control Regulations, Technical Applications, and Defect Codes." It can be found at https://www.fra.dot.gov/eLib/details/L01187 and https://www.fra.dot.gov/eLib/details/L01188.

It refers to the "design of the warning system" as the "intended warning time." Specifically, the Compliance Manual provides that "[b]oth the intended warning time and the '20 seconds' provision applies to the design and maintenance of warning systems to provide warning for the normal operation of through trains." The Compliance Manual also contains a section entitled "Classification of Defects" where it indicates that "Defect 234.225.A1" occurs when the crossing warning time is not in accordance with the design of the warning system and "Defect 234.225.A2" occurs when the crossing warning system does not provide at least 20 seconds of warning time. The Compliance Manual also contains a "Note," which states: "Defect 234.225.A1 applies to instances where the system warning time differs significantly from the designed warning time."

The FRA also issued Technical Bulletin S-08-02 in 2008 that addressed Section 234.225. The Technical Bulletin provides that crossing warning systems might be designed to activate at different times other than the minimum of 20 seconds. It further provides:

> The designed warning time typically utilizes railroad industry design standards but is, on occasion (as determined by an engineering study that involves the applicable highway agency and railroad representatives), calculated based on criteria such as equipment used, particular crossing intricacies, vehicular traffic patterns, and roadway configurations.

The Technical Manual also provides guidance about the defect classification for when the crossing warning time is not in compliance with the designed warning time.

"This defect applies in instances where the system warning time differs significantly from the prescribed warning time . . . ." It defines a "significant difference" as "one that is meaningful or important to the safety and/or credibility of the warning system and a situation in which an expected corrective action must be taken." It further suggests an acceptable range of "plus or minus 5 seconds or more."

With this guidance from the FRA pertaining to Section 234.225, we analyze the parties' contentions. Appellants assert that the "design of the warning system" is the original design of the system. They rely on a 1979 "Railroad Signal Master Agreement" between Union Pacific's predecessor, the State of Texas, and the City of Midland. Exhibit B of the master agreement shows an original designed warning time of 30 seconds for the Garfield Street crossing. Appellants contend that Union Pacific did not have the unilateral authority to reprogram the warning time system to another warning time based on the terms of the master agreement that its predecessor executed with the State and the City of Midland.

Union Pacific acknowledges that the original design plans called for 30 seconds of active warning time; however, it contends that it was permissible for it to reprogram the warning system to provide a designed warning time of 25 seconds, which included five seconds of buffer time. Union Pacific asserts that, since Section 234.225 was adopted after the execution of the master agreement, the regulation supplanted the terms of the master agreement. Union Pacific contends that "the design of the warning system" is the current setting of the warning time system as reflected by the plans located at the crossing. Union Pacific cites 49 C.F.R. § 234.201 in support of this proposition. This regulation provides that

"[p]lans required for proper maintenance and testing shall be kept at each highway-rail grade crossing warning system location." Union Pacific further argues that Section 234.225 sets a federal minimum warning time of 20 seconds, which they complied with by providing at least 20 seconds of warning time at the Garfield crossing at the time of the accident.

The warning time setting for the Garfield Street crossing at the time of the accident was entered into the warning system in March of 2012 by Union Pacific. The reprogramming occurred as the result of a field inspection involving representatives of Union Pacific, the City of Midland, and Campbell Technology Corporation. Campbell noted that the design plans for the crossing required 25 seconds of warning time but that the system had been set for a longer warning time. Union Pacific accepted Campbell's recommendation by reprogramming the warning system to provide a warning time of 25 seconds.

We disagree with Appellants' contention that the original design for the warning system as reflected in the 1979 Master Agreement is the controlling "design of the warning system" under Section 234.225. Neither Section 234.225 nor any of the other documents issued by the FRA support this conclusion. The final "notice" documentation pertaining to 49 C.F.R. Part 234 indicated that "maintenance, inspection, and testing and timely response to warning device malfunctions is a <u>new regulatory field</u>." Grade Crossing Signal System Safety, 61 Fed. Reg. 31802-01, 31802 (June 20, 1996) (emphasis added). The FRA promulgated Section 234.225 in the mid-1990s, approximately fifteen years after the execution of the Master Agreement. That section is contained within Subpart D, which contains regulations

directed at railroads rather than other entities or governmental units. As indicated in one of the summaries issued by the FRA pertaining to Part 234: "FRA is issuing a final rule requiring that railroads comply with specific maintenance, inspection, and testing requirements for active highway-rail grade crossing warning systems." Grade Crossing Signal System Safety, 59 Fed. Reg. 50086-01, 50086 (September 30, 1994) (emphasis added).

Union Pacific set the designed warning time for the Garfield Street crossing at 25 seconds, which included 5 seconds of buffer time. This exceeded the minimum warning time of 20 seconds required by Section 234.225. Furthermore, the performance of 20.4 seconds at the time of the accident did not constitute a defect of the design warning time under the FRA's technical bulletin and Technical Manual because it did not constitute a "significant difference" because it fell within the acceptable performance range of plus or minus 5 seconds. Accordingly, we conclude that the warning system at the Garfield Street crossing performed in accordance with the federal standard of care for warning time systems. Thus, Union Pacific was entitled to summary judgment on Appellants' warning-time claim on the basis of federal preemption.

Our conclusion is supported by the few cases that have addressed Section 234.225. Some of these cases have simply determined that a warning that provides at least 20 seconds of warning time satisfies the federal standard of care required by the regulation. See Nunez v. BNSF Ry. Co., 936 F. Supp. 2d 969, 977–78 (C.D. Ill. 2012), aff'd, 730 F.3d 681 (7th Cir. 2013). We note that this construction is consistent with the statement in the FRA Technical Manual that "FRA and State inspectors can

enforce only the **minimum** standards set forth in Title 49 CFR Part 234."

From an analytical perspective, the case that comes the closest to the contentions in this appeal is Gafen v. Tim-Bar Corp., No. 01–7626–CIV, 2002 WL 34731033 (S.D. Fla. Oct. 25, 2002). The plaintiffs in Gafen asserted that the warning system did not provide "as much warning time as it was designed to provide." Gafen, 2002 WL 34731033, at *4. In reliance upon Section 234.225,[4] the trial court held as follows in Gafen:

> It is uncontroverted, however, that the system provided at least 26.7 seconds of warning prior to the Amtrak train's occupation of the grade crossing at Cypress Creek Road on May 20, 2000. The warning system, therefore, provided Gafen the 20 seconds of warning required by law. Thus, the Court finds that an action for failure to provide adequate warning is preempted and CSX is entitled to judgment as a matter of law.

Id. at *4. Thus, the allegation in Gafen was almost identical to Appellants' allegation of a design warning time being in excess of the 20-second minimum. The court rejected the contention that the failure to achieve a

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[4] The opinion in Gafen contains citations to "49 C.F.R. § 234.255." Gafen, 2002 WL 34731033, at*3–4. These citations were obviously intended to be citations to Section 234.225 because that is the regulation quoted by the court. Id. at *3.

design warning time in excess of 20 seconds constituted a violation of Section 234.225.

As noted previously, the MUTCD provides that "flashing-light signals shall operate for at least 20 seconds before the arrival of any rail traffic." U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS 775 (2009). The MUTCD provides two exceptions: a shorter signal operating time when all rail traffic operates at less than 20 miles per hour and additional warning time when determined by an engineering study. Id. at 775–76. Thus, a signal warning time greater than 20 seconds is the exception rather than the rule. The Federal Highway Administration's Railroad-Highway Grade Crossing Handbook notes that "[c]are should be taken to ensure that warning time is not excessive Excessive warning time has been determined to be a contributing factor in some collisions." U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 125 (2007). Excessive warning time may cause a motorist to cross the track despite the operation of the flashing light signals. Id. Accordingly, a longer warning time does not necessarily result in greater safety.

We overrule Appellants' first issue pertaining to the summary judgment on their warning-time claims. In doing so, we do not reach Union Pacific's cross-points asserting that Appellants cannot satisfy the tort elements

of duty and causation with respect to the warning-time claims.

Gross Negligence Claims

Appellants assert in their third issue that the trial court erred in granting Union Pacific's motion for summary judgment on their gross negligence claims. They premise this claim on their warning-time claims addressed in their first issue, relying upon their frequency-overlap claim to establish the objective and subjective elements of a gross negligence claim. See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue, 271 S.W.3d 238, 248 (Tex. 2008). Accordingly, our resolution of Appellants' first issue is dispositive of their gross negligence claims. We overrule Appellants' third issue.

Train-Crew Negligence

In their second issue, Appellants contend that the trial court erred by granting summary judgment on their train-crew negligence claim because the claim is exempt from preemption under the "specific, individual hazard" exception recognized in Easterwood, 507 U.S. at 675 n.15. The Supreme Court held in Easterwood that federal preemption does not foreclose a lawsuit against a railroad for breaching the duty to slow or stop when confronted with a "specific, individual hazard." Id. Appellants contend that the first tractor-trailer constituted a specific, individual hazard that placed a duty upon the Union Pacific train crew to begin slowing the train when they saw the first tractor-trailer. Union Pacific contends that the first tractor-trailer does not fall within the specific, individual hazard exception because the train crew knew that the first tractor-trailer would clear the

tracks before the train arrived and because the first tractor-trailer was not involved in the accident.

The U.S. Supreme Court has not defined what constitutes a specific, individual hazard. Anderson v. Wis. Cent. Transp. Co., 327 F. Supp. 2d 969, 977 (E.D. Wis. 2004). Courts have generally interpreted the exception narrowly. Partenfelder v. Rohde, 850 N.W.2d 896, 899 (Wis. 2014).[5] A specific, individual hazard is a unique occurrence that could cause an accident to be imminent, rather than a generally dangerous condition. Hightower v. Kan. City S. Ry. Co., 70 P.3d 835, 847 (Okla. 2003). The exception almost always relates to the "avoidance of a specific collision." Hesling v. CSX Transp., Inc., 396 F.3d 632, 640 (5th Cir. 2005) (quoting Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F.Supp. 1152, 1153 (N.D. Tex. 1994)). The classic examples of a specific, individual hazard are a child standing on the tracks or a motorist standing on the tracks. See Driesen v. Iowa, Chicago & E. R.R. Corp., 777 F. Supp. 2d 1143, 1156 (N.D. Iowa 2011). "Imminence and specificity are crucial components of the specific, individual hazard exception to preemption." Partenfelder, 850 N.W.2d at 900.

Appellants rely on Anderson to support their argument that the first tractor- trailer constituted a specific, individual hazard. In Anderson, the court found that a prior vehicle that passed through the railroad crossing could constitute a specific, individual hazard even though it was not involved in the collision between

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[5] In Partenfelder, the Supreme Court of Wisconsin determined that a parade was not a specific, individual hazard because the parade only created a generally dangerous traffic condition. 850 N.W.2d at 896.

the train and the following vehicle. Anderson, 327 F. Supp. 2d at 977–79. The prior vehicle unsuccessfully attempted to stop at the crossing after the warning lights started flashing and then accelerated across the tracks prior to the train reaching the crossing. Id. The plaintiff argued that, based on the first vehicle's failed attempt to stop, the train crew should have been alerted that there was a problem at the crossing that should have caused the train crew to slow or stop the train. Id. at 977. The court found that, if "the movements of the [first] vehicle should have alerted the crew that something was wrong . . . and created a duty to slow or stop the train, such duty would be a duty to avoid a specific, individual hazard." Id. at 978–79.

This case differs from Anderson because the first tractor-trailer did nothing to alert the train crew that there was a problem at the Garfield Street crossing causing them to slow or stop the train. Although the train crew saw the first tractor-trailer proceed through the crossing—causing the engineer to say, "Look at that idiot. Can you believe this?"—the first tractor-trailer successfully drove through the crossing ahead of the train. A collision with the first tractor-trailer did not occur, and nothing in the record shows that, based on the actions of the first tractor-trailer, the train crew knew the second tractor-trailer would proceed through the crossing. Thus, the train crew's observation of the first tractor-trailer did not indicate that a collision with the second tractor-trailer was imminent. Accordingly, the

first tractor-trailer did not constitute a specific, individual hazard. Appellants' second issue is overruled.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

August 31, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.

Appendix A(2)

11TH COURT OF APPEALS
EASTLAND, TEXAS
JUDGMENT

Catherine Stouffer et al., * From the 441st District Court of Midland County, Trial Court No. CV50285.

Vs. No. 11-15-00052-CV * August 31, 2017

Union Pacific Railroad Company,

* Opinion by Bailey, J. Panel consists of: Wright, C.J., Willson, J., and Bailey, J.)

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed. The costs incurred by reason of this appeal are taxed against Catherine Stouffer, individually and on behalf of the Estate of Gary Lee Stouffer, Jr. and as next friend of Shannon Stouffer and Shane Stouffer; Ada Stouffer; Gary Stouffer, Sr.; Tiffanie Lubbers, individually and on behalf of the Estate of William L. Lubbers and as next friend of Sydnie Lubbers and Zachary Lubbers; and Angela Boivin, individually and as personal representative of the Estate of Lawrence Boivin.

Appendix A(3)

CAUSE NO. CV50285

CATHERINE STOUFFER, Individually and on behalf of the ESTATE OF GARY LEE STOUFFER, JR. and as Next Friend of SHANNON STOUFFER and SHANE STOUFFER; ADA STOUFFER; and GARY STOUFFER, SR.,	§
Plaintiffs,	§
AND	§
ANGELA BOIVIN, Individually, and as Personal Representative of the Estate of LAWRENCE BOIVIN,	§
Intervenor,	§
AND	§
LEONCE AND LUCETTE BOIVIN,	§
Intervenors,	§
AND	§

TIFFANIE LUBBERS, Individually and on behalf of the ESTATE OF WILLIAM L. LUBBERS and as Next Friend of SYDNIE LUBBERS and ZACHARY LUBBERS, *Intervenors*,	§	
AND	§	
RICHARD SANCHEZ and HEATHER SANCHEZ, Individually and as Next Friends of CALEB SANCHEZ, ALEX SANCHEZ and AVA SANCHEZ, Minors; TODD KING and LACI KING; AARON KIBBY; LAURA KIBBY; THOMAS PLEYO and KELLI PLEYO, Individually and as Next Friends of ADDISON BAILEIGH JONES, JADEELISE JONES and CHRISTOPHER ANDREW PLEYO, Minors; SHANE LADNER; MARGARET (MEG) LADNER; MARY DAYLYN MICHAEL,	§	IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS 441st JUDICIAL DISTRICT

Individually and as Independent Executrix of the ESTATE OF JOSHUA C. MICHAEL, DECEASED, and as Next Friend of RYAN P. MICHAEL and MAC1 D. MICHAEL, Minors; TRAVIS REICHERT; ELSIE REICHERT; MICHAEL R. LUBBERS; KAREN S. LUBBERS; PATRICK L. MICHAEL; and SHERYLD. MICHAEL, *Intervenors*,	§
AND COLLEEN ROSE AND JOHNATHAN ROSE, *Intervenors*,	§
v.	§
UNION PACIFIC RAILROAD, INC. AND SMITH INDUSTRIES, INC., *Defendants*.	§

Order of Severance and Final Judgment

On the 10 day of February, 2015, came on to be heard by submission Defendant Union Pacific Railroad Company's Amendment to its Motion for Partial Summary Judgment (Train Speed) and Motion for Entry

of Final Judgment, as well as Defendant Union Pacific's Objections to Summary Judgment Evidence. No objection was made to the amendment, the timing of Claimants' response or Union Pacific's reply and objections, or the timing of the hearing by submission. The Court, having considered the amendment, the pleadings on file, any evidence presented, and arguments of counsel, GRANTS the Motions.

The Court SUSTAINS Union Pacific's Objections to the first two paragraphs within Section C of Exhibit 4 (Declaration of Colon Fulk) to Claimants' Response and Union Pacific's Amendment to its Motion for Partial Summary Judgment (Train Speed) and Motion for Entry of Final Judgment. All other objections to Claimants' summary judgment evidence are denied.

The Court GRANTS partial summary judgment as follows:

1. As the Court has determined, the first tractor-trailer driven by James Atchison, and the facts and circumstances associated with its crossing the Garfield Street Crossing, as a matter of law did not create a specific, individual hazard and, for this reason, it did not create a duty on the part of the train crew to slow or stop the train; and

2. Plaintiffs have no evidence that Union Pacific's train crew could have avoided the accident by taking action at the time when the crew first knew, or through the exercise of ordinary care should have known, based on their perception of the second tractor-trailer driven by Dale Hayden, that a collision was imminent.

It is ORDERED that all claims brought by the following claimants are severed from this action and made the subject of a separate action on the docket of this Court: Richard Sanchez and Heather Sanchez,

Individually and as Next Friends of Caleb Sanchez, Alex Sanchez, and Ava Sanchez, Minors; Todd King; Laci King; Aaron Kibby; Laura Kibby; Thomas Pleyo and Kelli Pleyo, Individually and as Next Friends of Addison Baileigh Jones, Jadeelise Jones and Christopher Andrew Pleyo, Minors; Shane Ladner; Margaret (Meg) Ladner; Mary Daylyn Michael, Individually and as Independent Executrix of the Estate of Joshua C. Michael, Deceased, and as Next Friend of Ryan P. Michael and Maci D. Michael, Minors; Travis Reichert; Elsie Reichert; Michael R. Lubbers; Karen S. Lubbers; Patrick L. Michael; Sheryl D. Michael; Leonce Boivin; Lucette Boivin; Colleen Rose; and Johnathan Rose. It is further ORDERED that the Clerk of the Court shall assign a separate cause number to the severed action, Cause No. CV51052, and is hereby ordered to place in the new file all pleadings, orders, transcripts, this severance order, and other documents relating to the new case, as designated by any party.

Following severance, the following claimants remain in this cause (the "remaining claimants"): Catherine Stouffer, Individually and on behalf of the Estate Of Gary Lee Stouffer, Jr. and as Next Friend of Shannon Stouffer and Shane Stouffer; Ada Stouffer; Gary Stouffer, Sr.; Tiffanie Lubbers, Individually and on behalf of the Estate of William L. Lubbers and as Next Friend of Sydnie Lubbers and Zachary Lubbers; and Angela Boivin, Individually and as Personal Representative of the Estate of Lawrence Boivin.

Because all claims raised by the remaining claimants cause have now been disposed of by the Court, the Court hereby RENDERS Final Judgment for Defendant Union Pacific Railroad Company. It is ADJUDGED that the remaining claimants take nothing by their suit. All costs of court spent or incurred in this

cause are adjudged against the party that spent or incurred them.

This Judgment is final, disposes of all claims and all parties, and is appealable.

Signed this 10 day of February, 2015.

J. M. Rush
Judge Presiding

Appendix A(4)

IN THE SUPREME COURT OF TEXAS

NO. 17.0845

CATHERINE STOUFFER, ET AL	**§**	**MIDLAND COUNTY,**
V.	**§**	
UNION PACIFIC RAILROAD COMPANY	**§**	**11TH DISTRICT**
	§	

November 16, 2018

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

May 31, 2019

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under

the date shown.

It is further ordered that petitioner, CATHERINE STOUFFER, ET AL., pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 31st day of May, 2019.

/s/ Blake A Hawthorne, Clerk
Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

Appendix B

49 U.S.C.A. § 20106

§ 20106. Preemption

Effective: August 3, 2007

Currentness

(a) National uniformity of regulation.–(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.

(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—

> **(A)** is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> **(B)** is not incompatible with a law, regulation, or order of the United States Government; and
>
> **(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 from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.--Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

Appendix C

49 C.F.R. § 234.225

§ 234.225 Warning time.

Currentness

A highway-rail grade crossing warning system shall be maintained to activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal operation of through trains before the grade crossing is occupied by rail traffic.

Appendix D

49 C.F.R. § 234.259

§ 234.259 Warning time.

Currentness

Each crossing warning system shall be tested for the prescribed warning time at least once every 12 months and when the warning system is modified because of a change in train speeds. Electronic devices that accurately determine actual warning time may be used in performing such tests.

Appendix E

49 C.F.R. § 234.201

§ 234.201 Location of plans.

Currentness

Plans required for proper maintenance and testing shall be kept at each highway-rail grade crossing warning system location.

Plans shall be legible and correct.

Appendix F

23 C.F.R. § 646.216

§ 646.216 General procedures.

Currentness

(a) General. Unless specifically modified herein, applicable Federal-aid procedures govern projects undertaken pursuant to this subpart.

(b) Preliminary engineering and engineering services.

(1) As mutually agreed to by the State highway agency and railroad, and subject to the provisions of § 646.216(b)(2), preliminary engineering work on railroad-highway projects may be accomplished by one of the following methods:

(i) The State or railroad's engineering forces;

(ii) An engineering consultant selected by the State after consultation with the railroad, and with the State administering the contract; or

(iii) An engineering consultant selected by the railroad, with the approval of the State and with the railroad administering the contract.

(2) Where a railroad is not adequately staffed, Federal-aid funds may participate in the amounts paid to engineering consultants and others for required services, provided such amounts are not based on a percentage of the cost of construction, either under contracts for individual projects or under existing written continuing contracts where such work is regularly performed for the railroad in its own work under such contracts at reasonable costs.

(c) Rights-of-way.

(1) Acquisition of right-of-way by a State highway agency on behalf of a railroad or acquisition of nonoperating real property from a railroad shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.) and applicable FHWA right-of-way procedures in 23 CFR, chapter I, subchapter H. On projects for the elimination of hazards of railroad-highway crossings by the relocation of railroads, acquisition or replacement right-of-way by a railroad shall be in accordance with 42 U.S.C. 4601 et seq.

(2) Where buildings and other depreciable structures of the railroad (such as signal towers, passenger stations, depots, and other buildings, and equipment housings) which are integral to operation of railroad traffic are wholly or partly affected by a highway project, the costs of work necessary to functionally restore such facilities are eligible for participation. However, when replacement of such facilities is necessary, credits shall be made to the cost of the project for:

(i) Accrued depreciation, which is that amount based on the ratio between the period of actual length of service and total life expectancy applied to the original cost.

(ii) Additions or improvements which provide higher quality or increased service capability of the facility and which are provided solely for the benefit of the railroad.

(iii) Actual salvage value of the material recovered from the facility being replaced. Total credits to a

project shall not be required in excess of the replacement cost of the facility.

(3) Where Federal funds participate in the cost of replacement right-of-way, there will be no charge to the project for the railroad's existing right-of-way being transferred to the State highway agency except when the value of the right-of-way being taken exceeds the value of the replacement right-of-way.

(d) State-railroad agreements.

(1) Where construction of a Federal-aid project requires use of railroad properties or adjustments to railroad facilities, there shall be an agreement in writing between the State highway agency and the railroad company.

(2) The written agreement between the State and the railroad shall, as a minimum include the following, where applicable:

(i) The provisions of this subpart and of 23 CFR part 140, subpart I, incorporated by reference.

(ii) A detailed statement of the work to be performed by each party.

(iii) Method of payment (either actual cost or lump sum),

(iv) For projects which are not for the elimination of hazards of railroad-highway crossings, the extent to which the railroad is obligated to move or adjust its facilities at its own expense,

(v) The railroad's share of the project cost,

(vi) An itemized estimate of the cost of the work to be performed by the railroad,

(vii) Method to be used for performing the work, either by railroad forces or by contract,

(viii) Maintenance responsibility,

(ix) Form, duration, and amounts of any needed insurance,

(x) Appropriate reference to or identification of plans and specifications,

(xi) Statements defining the conditions under which the railroad will provide or require protective services during performance of the work, the type of protective services and the method of reimbursement to the railroad, and

(xii) Provisions regarding inspection of any recovered materials.

(3) On work to be performed by the railroad with its own forces and where the State highway agency and railroad agree, subject to approval by FHWA, an agreement providing for a lump sum payment in lieu of later determination of actual costs may be used for any of the following:

(i) Installation or improvement of grade crossing warning devices and/or grade crossing surfaces, regardless of cost, or

(ii) Any other eligible work where the estimated cost to the State of the proposed railroad work does not exceed $100,000 or

(iii) Where FHWA finds that the circumstances are such that this method of developing costs would be in the best interest of the public.

(4) Where the lump sum method of payment is used, periodic reviews and analyses of the railroad's

methods and cost data used to develop lump sum estimates will be made.

(5) Master agreements between a State and a railroad on an areawide or statewide basis may be used. These agreements would contain the specifications, regulations, and provisions required in conjunction with work performed on all projects.

Supporting data for each project or group of projects must, when combined with the master agreement by reference, satisfy the provisions of § 646.216(d)(2).

(6) Official orders issued by regulatory agencies will be accepted in lieu of State-railroad agreements only where, together with supplementary written understandings between the State and the railroad, they include the items required by § 646.216(d)(2).

(7) In extraordinary cases where FHWA finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds, provided satisfactory commitments have been made with respect to construction, maintenance and the railroad share of project costs.

(e) Authorizations.

(1) The costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation. Preliminary engineering and right-of-way acquisition costs which are otherwise eligible, but incurred by a railroad prior to authorization by the FHWA, although not reimbursable, may be included as part of the

railroad share of project cost where such a share is required.

(2) Prior to issuance of authorization by FHWA either to advertise the physical construction for bids or to proceed with force account construction for railroad work or for other construction affected by railroad work, the following must be

accomplished:

(i) The plans, specifications and estimates must be approved by FHWA.

(ii) A proposed agreement between the State and railroad must be found satisfactory by FHWA. Before Federal funds may be used to reimburse the State for railroad costs the executed agreement must be approved by FHWA. However, cost for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings prior to the approval of the executed State–Railroad Agreement in accordance with 23 CFR 140.922(a) and § 646.218 of this part.

(iii) Adequate provisions must be made for any needed easements, right-of-way, temporary crossings for construction purposes or other property interests.

(iv) The pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract.

(3) In unusual cases, pending compliance with § 646.216(e)(2)(ii), (iii) and (iv), authorization may be given by FHWA to advertise for bids for highway

construction under conditions where a railroad grants a right-of-entry to its property as necessary to prosecute the physical construction.

(f) Construction.

(1) Construction may be accomplished by:

(i) Railroad force account,

(ii) Contracting with the lowest qualified bidder based on appropriate solicitation,

(iii) Existing continuing contracts at reasonable costs, or

(iv) Contract without competitive bidding, for minor work, at reasonable costs.

(2) Reimbursement will not be made for any increased costs due to changes in plans:

(i) For the convenience of the contractor, or

(ii) Not approved by the State and FHWA.

(3) The State and FHWA shall be afforded a reasonable opportunity to inspect materials recovered by the railroad prior to disposal by sale or scrap. This requirement will be satisfied by the railroad giving written notice, or oral notice with prompt written confirmation, to the State of the time and place where the materials will be available for inspection. The giving of notice is the responsibility of the railroad, and it may be held accountable for full value of materials disposed of without notice.

(4) In addition to normal construction costs, the following construction costs are eligible for participation with Federal-aid funds when approved by the State and FHWA:

(i) The cost of maintaining temporary facilities of a railroad company required by and during the highway construction to the extent that such costs exceed the documented normal cost of maintaining the permanent facilities.

(ii) The cost of stage or extended construction involving grade corrections and/or slope stabilization for permanent tracks of a railroad which are required to be relocated on new grade by the highway construction. Stage or extended construction will be approved by FHWA only when documentation submitted by the State establishes the proposed method of construction to be the only practical method and that the cost of the extended construction within the period specified is estimated to be less than the cost of any practicable alternate procedure.

(iii) The cost of restoring the company's service by adjustments of existing facilities away from the project site, in lieu of and not to exceed the cost of replacing, adjusting or relocating facilities at the project site.

(iv) The cost of an addition or improvement to an existing railroad facility which is required by the highway construction.