COMMENTS

FEDERAL PREEMPTION AND PRECLUSION: WHY THE FEDERAL RAILROAD SAFETY ACT SHOULD NOT PRECLUDE THE FEDERAL EMPLOYER'S LIABILITY ACT

TABLE OF CONTENTS

I. INTRODUCTION

A train tears through a gasoline tanker truck at a railroad crossing, sparking a deadly explosion that sends a fireball hundreds of feet into the air and horrifies onlookers. The driver of the truck dies at the scene; two men, the train's conductor and engineer working inside the locomotive are severely burned and later succumb to their injuries.[1]

Citizens on the North side of the track watch in horror as the tanker spews gasoline, witnessing both the train and tanker explode into flames.[2] Other bystanders, including police officers from a nearby juvenile facility, watch in dismay as two railroad employees emerge from the disaster covered in flames.[3]

This is, unfortunately, real life. After the difficult mourning of those loved and lost, the legal reality sets in—who is liable for these injuries? In the context of FELA litigation, one of the first parties that come to mind is the railroad company.

This comment discusses the railroad industry's liability, if any, to its employees for their deaths arising from the fatal burn injuries sustained on the job while operating the train. Specifically, the comment covers the more narrow area of negligence law set forth in the Federal Employer's Liability Act ("FELA"),[4] which grants to railroad employees a federal cause of action for negligence against their employer, the railroad company, for injury and death in the line of duty. This comment analyzes the preclusion, or denial, of FELA claims based on the preemptive language of the Federal Railroad Safety Act ("FRSA"), another federal statute that sets forth standards for all areas of railroad safety.[5] Under this framework, the comment seeks to analyze the legal issues surrounding the Federal Employer's

1. These facts are based on events which took place in Chalmette, Louisiana on Friday June 25, 2004. Steve Cannizaro, Karen Turni Bazile, & Sandra Barbier, *Fatal Train Accident, Explosion Shakes Chalmette*, TIMES PICAYUNE, June 26, 2004, at A1. One man described the calamity as, "Terrible. I think it's the worst thing I ever saw." *Id.*

2. *Id.*

3. *Id.*

4. 45 U.S.C. §§ 51-55 (West 1986).

5. 49 U.S.C. §§ 20101-20106 (West 1997).

Liability Act, the Federal Railroad Safety Act, and the interplay between these two federal statutes.

So what is the problem? This comment discusses the legality and inequity of the railroad industry's use of the FRSA and the doctrines of preemption[6] and preclusion[7] to bar an employee's FELA negligence claim.[8] The main focus of this comment is that some federal circuit courts of appeal have extended the Supreme Court's analysis in *CSX Transportation v. Easterwood*, holding that the FRSA preempted state law negligence claims, to also preclude federal law under the FELA, thus barring the railroad employee from bringing his negligence claim for injury, loss of career, and even worse, loss of life.

As a result, the families of the railroad employees like the conductor and engineer killed at this railroad crossing could be barred from bringing their exclusive remedy for compensation under the FELA. Since 2000, all railroad companies now argue[9] that, as a matter of law, the FRSA's standardized safety

---

6. The source of the preemption doctrine is most often attributed by scholars to the Supremacy Clause of the Constitution, which declares that the laws of the United States shall be the supreme law of the land. U.S. CONST. art. VI, cl. 2. *See also* Richard C. Ausness, *Preemption of State Tort Law By Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 920-922 (discussing express preemption, field preemption, and conflict preemption). Express preemption occurs when a federal statute explicitly excludes state regulation in a particular area. *Id.* at 920. Field preemption occurs when a federal regulation is so "pervasive" that courts infer that Congress intended to occupy the field entirely and exclude all state law. *Id.* at 921. Finally, conflict preemption occurs when a federal regulation conflicts with a state law, which is "overridden." *Id.* at 922.

7. This comment refers to "preemption" (when federal law bars state law) and "preclusion" (when one federal law bars another federal law) as tactics that railroad companies frequently use to avoid negligence litigation by motorists and railroad employees alike. The emergence of the doctrines of preemption and preclusion in FELA litigation will be flushed out beginning with the analysis of *CSX v. Easterwood*, which involved state law negligence claims brought by motorists. CSX v. Easterwood, 507 U.S. 658 (1993).

Particularly, the effect of the FRSA's preemption clause is that the statute "trumps" state law. Recently though, some courts have determined that the FRSA also trumps federal law under the FELA. This "trumping" of federal law is known as "preclusion." This comment counters the railroad industry's position that the FRSA's preemption clause extends also to preclude federal claims brought under the FELA. *See generally* Waymire v. Norfolk S. & W. Ry. Co., 218 F.3d 773 (7th Cir. 2000) (holding for the first time by the Seventh Circuit, that the preemption clause of the FRSA not only "trumped" state law, but also federal negligence claims under the FELA).

8. *See, e.g.*, Waymire v. Norfolk S. & W. Ry. Co., 218 F.3d 773 (7th Cir. 2000).

9. *See infra* notes 76-87 (discussing the impact of *Waymire* and *Easterwood*).

regulations and stated goal of national uniformity will be compromised if railroad employees' negligence claims for on-the-job injuries are permitted under the FELA. Specifically, the railroad companies are disturbed that they could be in compliance with the federal FRSA safety standards yet be found liable for negligence under the FELA.[10] This comment presents an opposition to the railroad companies' position that the preemptive effect of the FRSA should be extended by the Supreme Court to preclude federal negligence claims brought under the FELA because there is absolutely no legal authority that Congress intended this result.

This comment reveals that Congress intended for railroad employees to have a more liberal remedy than ordinary common law negligence available to the public, a remedy that would facilitate recovery for the railroad employee more easily, but still based on proof of fault and grounded in negligence. This comment takes the position that when a railroad company complies with *minimum* safety standards pursuant to the FRSA, the railroad company should still be held to its non-delegable duty under the FELA to act reasonably in providing its employees a safe place to work. Thus, the railroad industry should not be allowed to immunize itself from *federal* FELA claims through court decisions extending the FRSA's preemption of *state* law negligence claims to bar an injured railroad employee from bringing his exclusive negligence remedy under the FELA.[11]

Part II of this comment presents pertinent background and historical information on the mechanics of the FELA, the FRSA, and the emergence of the preemption doctrine in the field of FELA law via *CSX Transportation v. Easterwood*.[12] Part III traces the railroad industry's attempts to transfer the

10. *Waymire*, 218 F.3d 773. *Waymire* was based on the Supreme Court's decision in *CSX Transp. v. Easterwood*, in which the Court held that the FRSA preempted state law negligence claims for excessive speed. This comment deals specifically with what happens when the railroad company is in compliance with these federal regulations. If the railroad company's conduct falls outside the regulations, then the railroad is liable for negligence per se.

11. The main distinction between state law negligence claims and FELA claims is that federal FELA claims are brought exclusively by railroad employees injured on the job. *See, e.g.*, *Waymire*, 218 F.3d 773. State law negligence claims are brought by the public injured at railroad crossings. *See generally Easterwood*, 507 U.S. 658. This comment argues that the *Easterwood* decision, barring state law negligence claims, should not be extended to preclude federal FELA claims.

12. *See generally Easterwood*, 507 U.S. 658.

applicability of the preemption doctrine, which has been applied to state law negligence claims brought by motorists, to bar the railroad employee's federal negligence action under the FELA when they are hurt on the job. In addition, Part III presents an analysis and discussion of case law that rejects the decisions of several Federal Circuit Courts of Appeal which have extended the preemption doctrine in state law negligence claims to federal negligence claims brought under the FELA by railroad employees.

Part IV analyzes the negative effects that preclusion of the FELA will have, and proposes five reasons the FELA cause of action should not be precluded by the FRSA. First, a plain reading of section 55 of the FELA voids any attempt by the railroad industry, using any contracts, rules, or regulations, such as the FRSA, to exempt itself from liability.[13] Second, the Federal Circuit Courts of Appeal decisions that have barred FELA negligence claims are flawed because the FRSA should be treated as a *supplement* to the FELA, similar to the statutory construction of other federal statutes in the past. Third, the subject matter of the FRSA does not conflict with the subject matter of the FELA. Fourth, the FELA will not erode the FRSA's expressed goal of national uniformity. Finally, the *minimum* safety standards in the FRSA do not adequately protect the railroad employee for injuries sustained on the job; rather, the federal negligence remedy granted by Congress under the FELA should be favored to cover those working for the railroad in interstate commerce.

II. BACKGROUND

A. THE FEDERAL EMPLOYER'S LIABILITY ACT[14]

In discussing the limited field of practice involving FELA cases, Judge Moylan said it best when he wrote in *CSX Transportation v. Miller*:

> Federal Employer's Liability Act case. That statement may be self explanatory to the small handful of practitioners who labor regularly, or even occasionally, in that very specialized vineyard. One strongly suspects, however, that many who

13. *See generally* 45 U.S.C. § 55 (2005).

14. For a discussion of the distinct features of the FELA, see 11 AMJUR TRIALS 397 § 2.

> speak of FELA law with breezy familiarity are only whistling past the graveyard. To the more modest vast majority of the bar (and the bench), a FELA case is essentially, if not totally, *terra incognita*. For those suddenly cast ashore on that exotic coast, it may be prudent, before plunging into the interior, to spend a few pages looking about and getting one's bearings.[15]

In contrast to Worker's Compensation Laws[16] passed in the early 20th century, Congress sought to compensate for the thousands of railroad workers being killed and disfigured yearly throughout the late 19th century in what increasingly became seen as a national tragedy.[17] To combat this tragedy, in 1908, Congress granted railroad employees under the FELA their exclusive and sole remedy for compensation of injuries sustained while working on the job.[18] A national law was needed "to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."[19]

Congress' awareness of the inherent danger in railroad work that caused thousands of injuries and cost thousands of lives every year prompted the creation of the FELA. Specifically, the FELA was created to shift the "human overhead" of conducting railroad business from employees to employer.[20] For most

---

15. CSX Transp. v. Miller, 858 A.2d 1025, 1028 (Md. Ct. Spec. App. 2004).

16. This comment does not seek to evaluate state Worker's Compensation Laws, because this scheme does not apply to railroad workers in any way. The Worker's Compensation framework will be referred to periodically in this comment comparatively and to introduce the reader to the basic notion that the overwhelming majority of American workers are covered under no-fault Worker's Compensation laws while railroad workers recover their losses for on the job injuries under the FELA, which is their sole remedy. For a discussion of the FELA's relation to Worker's Compensation, see 11 AMJUR TRIALS 397 § 3. Furthermore, the author recognizes that a genuine debate exists as to whether railroad employees would be better protected by a no-fault state Worker's Compensation system. For more information on why the FELA is favored by Congress over Worker's Compensation, see generally GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRWOMAN, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, FEDERAL EMPLOYER'S LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED (1996). *See also infra* note 21-24 and accompanying text (discussing how the railroad industry, in contrast to most other industries, is regulated under the FELA, rather than state worker's compensation statutes).

17. *Miller*, 858 A.2d at 1029. If not for the FELA, railroad employees would be limited to state tort law claims for worker's compensation payments. DOBBS LAW OF TORTS 300 (2004).

18. *Id.*

19. Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J. concurring).

20. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994) (citing Tiller v. Atl.

industries, this shift of human overhead is embodied in state Worker's Compensation Statutes; but for the railroad industry, the FELA provides the legal framework under federal law because of the industry's interstate commercial character.[21] Additionally, Judge Moylan, in *Miller*, articulated the distinction between Worker's Compensation and the FELA explaining that the FELA does not impose liability on the railroads for injuries suffered by the public generally, but is confined to railroad workers injured during the scope of employment.[22] Specifically, the FELA does not make the employer the insurer of the employee's safety. Rather, the basis of the railroad company's liability is its *negligence*, and not that the injury simply occurred under the scope of the worker's employment.[23] Thus, the FELA does not propose strict liability in which the employee is entitled to compensation simply because his injury occurred.[24]

Under the FELA framework, the railroad industry has a non-delegable duty to provide its employees with a reasonably safe place to work.[25] In providing a reasonably safe place to work, the railroad industry is also under a duty to make tests and discover dangers and is held to have constructive knowledge of defects that could have been discovered.[26] The injured railroad worker may recover damages for any injury caused "in whole or part" by the negligence of his employer.[27] The "in whole or part" causation standard of the FELA is a feather weight test compared to traditional common law negligence, and as a result, the injured railroad worker must show only that the railroad company played the "slightest" part in causing injuries for which the damages are sought.[28]

1. THE HYBRID NEGLIGENCE UNDER FELA

One major characteristic that may be derived from the FELA is Congress' jettison of traditional features of common law negligence, which makes the FELA claim a hybrid form of

---

Coast Line R. Co., 318 U.S. 54, 58 (1943)).

21. Kernan v. Dredging Co., 355 U.S. 426, 431-32 (1958).

22. *Miller,* 858 A.2d at 1029-31.

23. *Id.* at 1031.

24. *Id.*

25. Bailey v. Cent. Vt. Ry. Inc., 319 U.S. 350, 352 (1943).

26. Beattie v. Elgin, J. & E. R. Co., 217 F.2d 863, 866 (7th Cir. 1954).

27. 45 U.S.C. § 51.

28. *Consol. Rail Corp.*, 512 U.S. at 543.

negligence. No doubt, the FELA is a negligence action, which gives an injured railroad employee the exclusive remedy to seek compensation against his employer for injuries sustained within the scope of his employment,[29] but the FELA deviates from traditional common law negligence in several significant ways.

First, considering the statute itself, section 51 of the FELA provides that:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier for injury or death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier.[30]

The "in whole or part" standard of causation under the FELA is a shadow of the elusive doctrine of proximate (or legal) cause because the FELA employee must, at a minimum, establish only that the railroad company partly caused the employee's injuries.[31] The causation standard that the plaintiff must prove under the FELA is therefore a slighter[32] form of causation.

Second, the railroad industry is also deprived of the traditional common law defense of contributory negligence, which is never a bar to recovery under the FELA.[33] Instead, damages are reduced to the proportion of negligence attributable to the employee.[34] Third, under the FELA, the railroad company may not assert that the employee assumed the risk of his employment.[35]

---

29. *See generally* 45 U.S.C. § 51 (2005).

30. *Id.* (emphasis added).

31. *See Miller*, 858 A.2d at 1035 (applying the relaxed standard of "in whole or part" causation to a FELA employee injured while walking on ballast); *see also* Norfolk S. & W. Ry. Co. v. Ayers, 538 U.S. 135, 145 (2003) (further discussing the liberality and wide range of recovery and holding that a railroad worker with asbestosis may recover for fear of later developing cancer).

32. Under the FELA, the test is simply whether the evidence justifies that the railroad company played any part, "even the slightest," in causing the injury for which damages are sought. *Consol. Rail Corp.*, 512 U.S. at 543.

33. 45 U.S.C. § 53 (2005).

34. *Id.* In Louisiana, this is referred to as comparative fault. LA. CIV CODE ANN. art. 2323(A) (2005).

35. 45 U.S.C. § 51 (2005).

Finally, section 55[36] of the FELA promises to the railroad employee that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."[37] These refinements to traditional common law negligence are in keeping with Congress' humanitarian purpose of favoring the railroad employee over employees of other hazardous occupations restricted to seek compensation under Worker's Compensation Laws.[38]

2. THE LIBERAL INTERPRETATION OF FELA

The hybrid nature of the FELA has caused courts to take an interpretive approach that significantly differs from ordinary common law negligence suits.[39] For example, in *Urie v. Thompson*, the U.S. Supreme Court expanded its interpretation of "injury" by allowing recovery for occupational diseases as well as accident-related injuries.[40] The Court expanded its interpretation of the FELA to include such injuries in light of "considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, [and] its accepted standard of liberal construction in order to accomplish those object[ive]s . . . ."[41]

In essence, the FELA should not be read to infer restrictions on the types of employees granted protection, the degree of negligence required, or the types of injury suffered;[42] in fact, to infer such distinctions would be contrary to the text of the statute

---

36. See Part IV.A for a discussion of section 55 of the FELA regarding whether this section prevents the FRSA from precluding the FELA.

37. 45 U.S.C. § 55 (2005). In discussing the FELA in *Atchison,* the Supreme Court generally stated that section 55 of the FELA was intended to ease recovery in meritorious cases. Atchison, Topeka, and Santa Fe Ry. Co. v. Buell 480 U.S. 557, 561 (1987).

38. *Miller*, 858 A.2d at 1034-37.

39. *See* Urie v. Thompson, 337 U.S. 163 (1949).

40. *Id.* at 180. In *Urie*, the plaintiff suffered from a pulmonary disease diagnosed as silicosis. *Id.* at 165-66. For a further discussion of *Urie v. Thompson*, see *infra* pages 67-69.

41. *Id.* at 180.

42. In *Urie*, the respondent Thompson advanced the notion that the common law of negligence does not recognize occupational disease as a compensable injury and further argued that meaning of "injury" should be restricted. *Id.* at 181. However, the Court rejected Thompson's argument and broadly interpreted the FELA to include such a "personal wrong" as the incurring of a disease or harm to health when all other elements of the tort of negligence are present. *Id.* at 182.

and the humanitarian spirit of the law established through liberal construction by the Court.[43] Justice Brennan, in referring to the FELA, stated that "it is clear that the general congressional intent was to provide a liberal recovery for injured workers and that Congress intended the creation of no static remedy, but one which could be developed and *enlarged* to meet changing conditions and changing concepts of the industry's duty toward its workers."[44]

The FELA, as a hybrid statute, derogates from the common law directly because Congress omitted traditional negligence defenses such as assumption of the risk and contributory negligence, and altered the causation standard from proximate cause to "in whole or part;" as a result, in keeping with the statute's humanitarian purpose, the FELA should not be strictly construed. Statutes that derogate from the common law should not require a strict interpretation when that interpretation corrodes Congress' intent or narrows the scope plainly granted to the statute.[45] Though the FELA is a departure from common law negligence, Congress' justification for creating this divergent and more liberally interpreted form of negligence serves a humanitarian purpose by providing an injured railroad employee a better chance at recovery for injuries sustained in the ever-present danger, which the railroad workplace is characterized with little subtlety. Congress' adoption of the FELA shifted the burden of compensating workplace injuries to the railroad

---

43. *Urie*, 337 U.S. at 181 (stating that reading a restriction on coverage of employees, negligence requirements, or types of harm covered would be "contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this court").

44. Kernan v. Am. Dredging, 355 U.S. 426, 432 (1958).

45. Jamison v. Encarnacion, 281 U.S. 635, 639 (1930). In *Jamison*, the plaintiff was assaulted without provocation to hurry his work. *Id.* at 639. The case turned on whether the foreman assaulted plaintiff out of personal indifference, or whether the foreman, acting within the scope of his employment, assaulted plaintiff in furtherance of his work. *Id.* Plaintiff cited the FELA as support, and the Supreme Court agreed that "negligence" within the FELA covered the assault in question even though this assault was not negligent, but intentional. *Id.* at 638-39. The Court stated:

> As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the act.

Id. at 641.

industry and took the human loss of working on the railroad off of the employees, rather than resting that burden squarely on the shoulders of the men who built the industry.

Given the flexible and humanitarian nature of the FELA, when examined in comparison to the FRSA, the distinctions between the two statutes' scope and application become evident, as does the indisputable conclusion that the FRSA was not intended by Congress to abridge the rights it created under the FELA decades before the Secretary of Transportation implemented the minimum safety standards under the FRSA.

B. FEDERAL RAILROAD SAFETY ACT

In 1970, Congress passed the FRSA to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."[46] This Act gives the Secretary of Transportation the authority to prescribe regulations for every area of railroad safety to *supplement* laws and regulations.[47] Using this power granted under the FRSA, the Secretary of Transportation appointed a Task Force charged with the responsibility of studying the problems of railroad safety and recommending solutions for these problems.[48]

The Task Force found that existing federal and state railroad safety regulations did not provide adequate standards for "track, roadbed, equipment, employee training and qualifications, or rules governing safe railroad operations."[49] The Task Force unanimously concluded that broad federal regulatory authority over all areas of railroad safety be granted.[50] As a result, the Secretary of Transportation adopted the recommendation that, with respect to existing *state* statutes then in effect, the statutes

46. 49 U.S.C. § 20101 (2005).

47. 49 U.S.C. § 20103 (2005) (emphasis added).

48. H.R. REP. NO. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4108. According to the statute, the regulations supplement laws and regulations in effect on October 16, 1970. 49 U.S.C. § 20103 (2005).

49. 1970 U.S.C.C.A.N. at 4108. The Task Force noted that the state safety regulations did not adequately regulate employee training and qualifications, but merely stated that employee safety is of continuing concern. *Id.* at 4127. The Report did not offer any in-depth discussion of employee safety.

50. *Id.* The FRSA is an enabling act that delegated power from Congress to the Executive. The actual federal regulations governing Track Safety Standards, Crossing Signal System Safety, and Installation, Inspection, Maintenance of Signal Control Systems can be found in the Federal Code of Regulations. 49 C.F.R. §§ 213, 234, and 236 respectively.

should continue until preempted by federal action.[51] Furthermore, in the House Report from the Interstate and Foreign Commerce Committee, the Task Force reported that the railroad industry has few local characteristics, but rather has a "truly interstate" character requiring a uniform method of regulation and enforcement.[52] These recommendations proposed by the Task Force, and subsequently accepted by the House Committee on Interstate and Foreign Commerce, prompted Congress' creation of the FRSA's preemption clause, which would insure such uniformity among the 50 states.

FRSA section 20106 states:

> 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.* 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) . . . prescribes a regulation or issues an order *covering* the subject matter of the state requirement.[53]

In practice, the FRSA's individual "built-in" preemption clause provides that any regulation authorized under the FRSA that covers the field will preempt any *state law* or statute in that field.[54] The seminal case that allowed the railroad industry to use the above-mentioned preemption clause to bar state law negligence claims brought by motorists began in *Easterwood.*[55]

C. CSX TRANSPORTATION V. EASTERWOOD

Easterwood involved the interplay between the FRSA's preemption clause and state law negligence claims brought by motorists; however, lower district courts and federal appellate circuit courts use this decision for guidance when applying the FRSA to other negligence claims, albeit federal FELA claims

---

51. 1970 U.S.C.C.A.N. at 4108.

52. *Id.*

53. 49 U.S.C. § 20106 (2005) (emphasis added).

54. *Miller*, 858 A.2d at 1047 (emphasis added).

55. CSX Transp. v. Miller, 507 U.S. 658 (1993). Though *Easterwood* held only that state law negligence claims were preempted by the FRSA, this decision was instrumental to the Seventh Circuit's decision in *Waymire v. Norfolk S. & W. Ry. Co.* holding the FRSA also precluded federal FELA negligence claims. *See infra* notes 78-92 and accompanying text (discussing the *Easterwood* progeny).

brought by injured railroad workers.[56] As a result, the Court's reasoning in *Easterwood* is instrumental in analyzing the FRSA's eventual preclusive effect on federal FELA claims in two federal circuit courts of appeal.

In *Easterwood*, the widow of a truck driver, killed at a federally-funded railroad crossing, filed suit against the railroad company under Georgia state law claiming that it negligently operated its train at an excessive speed and failed to maintain adequate warning signals.[57] The Court held that the plaintiff was barred from asserting her state law negligence claim for excessive train speed[58] because the FRSA regulations on train speed preempted Georgia state law negligence claims.[59] More specifically, when the crossing in question received improvements bought with federal funds, private and state decision-making authority to prescribe safety standards was displaced, and as a result, federal FRSA regulations *covering* the same subject matter on which the negligence claim was based, in this case train speeds, serve as a bar to plaintiff's state law negligence claim.[60] In distinguishing between "covering" the same subject

---

56. *See generally* Waymire v. Norfolk S. & W. Ry. Co, 218 F.3d 773 (7th Cir. 2000) (analyzing FELA and FRSA in the context of a railroad worker's injury claim); Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880 (N.D. Ga. 1993) (addressing a railroad conductor's claims stemming from a train collision and discussing how FELA and FSRA affect those claims); Grimes v. Norfolk S. Ry. Co., 116 F. Supp. 2d 995 (N.D. Ind. 2000) (same).

57. *Easterwood*, 507 U.S. at 661.

58. *See* 49 C.F.R. § 213.9 (1992) (setting forth maximum train speeds for different classes of tracks). *Easterwood* carves out a niche of preemption to bar state law negligence claims asserting excessive speed when the railroad is in compliance with the federal safety standards under the FRSA. *See generally Easterwood*, 507 U.S. at 658.

59. *Easterwood*, 507 U.S. at 661.

60. *Id.* Because the subject of train speeds is regulated under federal law (i.e. the FRSA), as soon as a railroad crossing is improved with federal funds, state law claims for excessive train speed are barred under the doctrine of preemption. Notably, the same subject matter is officially "covered" by the FRSA, thus triggering preemption, only when the improvement (i.e. warning device) has been installed and operating, not merely when the federal funds have been earmarked for the project. *See also* Isbell v. Union Pac. R.R. Co, 318 Ill. App. 3d 1011 (Ill.App. Ct. 2001) (holding that a state claim for inadequate warning devices was not preempted by the FRSA because the project was federally ear-marked for crossing improvements, but these improvements were not installed or operating, and thus preemption was not triggered). *But see* Hesling v. CSX Transp. Inc., 396 F.3d 632, 645-46 (5th Cir. 2005) (holding that claims for the negligent delay in installing warning signals are preempted by the FRSA regulations, possibly having the effect that preemption is triggered as soon as the federal funds for improvements are ear-marked for a

matter and "touching upon" the same subject matter for the purposes of preemption, the Court stated that the federal law must "substantially subsume" the subject matter of the state law in order to preempt the law.[61] The Court noted, however, that in interpreting a federal statute purporting to cover subject matter traditionally governed by the states, it would be reluctant to find preemption.[62]

Intensifying its support for the presumption against preemption, the Court stated that preemption will not lie unless it is the "clear and manifest purpose" of Congress.[63] Even in the face of these high hurdles, the Court focused on the plain wording of the FRSA's preemption clause and implied the preemptive intent of Congress.[64] The Court, using a broad construction of the FRSA preemption clause (section 20106), interpreted "law, rule, regulation, order, or standard relating to railroad safety" to include legal duties imposed on railroads by the common law, i.e., negligence claims.[65] Under this framework, the Court determined that plaintiff's state law negligence claim was preempted by the

---

particular crossing); *see also* Armijo v. Atchison, Topeka and Santa Fe Ry. Co., 87 F.3d 1188, 1190 (10th Cir.1996) (stating that, to trigger preemption, "the financial commitment must be such that it shows a clear federal intent to require a federally approved warning device at the crossing in question").

61. *Easterwood*, 507 U.S. at 664. *See also* Richard C. Ausness, *Preemption of State Tort Law By Federal Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 941 (2004) (explaining that the term "covering" is a restrictive term suggesting that federal regulations would preempt only if they "substantially subsume" the matter of relevant state law).

62. *Easterwood,* 507 U.S. at 662. If the Court is reluctant to find preemption when the FRSA relates to state law, then it is reasonable to assume that the Court would be just as reluctant, if not more reluctant, to find that one federal statute nullifies another federal statute, thus stripping the railroad employee of his exclusive remedy granted by Congress under the FELA.

63. *Id.* Importantly, federal courts have acknowledged that FRSA preemption is even more disfavored than preemption generally. *See, e.g.*, United Transp. Union v. Foster, 205 F.3d 851 (5th Cir. 2000).

64. *Easterwood,* 507 U.S. at 664.

65. *Id.* The terms "law, rule, regulation, order or standard" are ambiguous terms. Broad construction of these terms by the *Easterwood* Court to preempt not only state regulations, but also federal negligence claims, is arbitrary because Congress did not intend to include FELA claims in this list. *See also* John S. Gardner, *Federal Preemption of State Health and Safety Regulations: CSX Transp. Inc. v. Easterwood, 113 S.Ct. 1732 (1993)*, 17 HARV. J.L. & PUB. POL'Y 273, 281-82 (1994) (reasoning that clarity in statutes provides certainty in the application of the law, and in the absence of such certainty, Congress should wield its power of preemption under the Supremacy Clause with care).

FRSA.[66]

For reasons identical to those set forth in *Easterwood*, the Court, in *Norfolk S. and W. Ry. Co. v. Shanklin*, extended the FRSA's preemptive effect to state law negligence claims alleging inadequate warning signals.[67] In *Shanklin*, the surviving wife of a motorist killed at a railroad crossing sued the railroad company for failure to maintain adequate warning devices at the crossing.[68] The Court reasoned that once the Federal Highway Act ("FHWA") funded the crossing and the warning devices were installed and operating, the FRSA displaced state and local authority by establishing a federal requirement that certain protective devices be installed and federally approved.[69] The Court held that the warning signal requirements set forth in title 49, sections 646.214(b)(3) and (4) of the Code of Federal Regulations covered the same subject matter as Shanklin's negligence claim for inadequate safety devices at the crossings.[70]

As a result, the plaintiff's negligence claim for inadequate warning devices was preempted by the state's acceptance of federal funding and warning signal improvements to the crossing.[71] Simply put, "what States [or motorists in state law negligence claims] cannot do—once [the State has] installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices."[72] Under

66. *See generally Easterwood*, 507 U.S. 658 (1992) (finding that FRSA preempted train conductor's negligence claim based on train speed); *Shanklin*, 529 U.S. 344 (2000) (holding that claim by motorist killed at crossing based on state law negligence was preempted by federal law because the state used federal funds for the railroad crossing).

67. *See Shanklin*, 529 U.S. at 354 (2000). The Supreme Court waited until *Shanklin* to extend preemption to warning signal claims because in *Easterwood*, the signals had not yet been installed, and thus, the railroad company's common law duty to motorists continued until installation. *See also* Isbell v. Union Pac. R.R. Co., 318 Ill. App. 3d 1011 (Ill. App. Ct. 2001) (holding that a state claim for inadequate warning devices was not preempted under regulations promulgated under FRSA based on the fact that the railroad, prior to the accident, had received federal funds in reimbursement for preliminary engineering work on crossing improvements).

68. *Shanklin*, 529 U.S. at 349. *See also* 49 C.F.R. § 646.214(b)(3) and (4) (setting forth standards for adequate warning devices).

69. *Shanklin*, 529 U.S. at 353-55.

70. *Id.* at 354.

71. *Id.* at 359.

72. *Id.* at 358. An accountability problem arises if railroad companies are immune from responsibility as to the adequacy of their warning devices. Accordingly, in dissent, Justice Ginsburg argued that the railroads achieved a double windfall in

the *Shanklin* reasoning, once the railroad has complied with the standards set forth in the FRSA, the injured motorist loses his negligence claim and is therefore deprived of recovery.

Because of *Easterwood* and *Shanklin*, the FRSA preempts state law negligence claims brought by motorists, or their families, in two areas: excessive train speeds and inadequate warning devices.[73] The *Easterwood* Court's preemption analysis, reaffirmed in *Shanklin*, is the linchpin of the railroad industry's contention that the preemption clause of the FRSA should be extended to preclude the railroad employee's FELA negligence claim. The *Easterwood* decision, in effect, enabled the railroad industry in subsequent cases to make the argumentative leap from preemption of state law negligence to the preclusion of federal negligence claims under the FELA. Importantly, the Supreme Court has yet to decide whether the standards set forth in the FRSA preclude the railroad employee from bringing federal FELA claims based on excessive train speeds or inadequate warning signals.[74] However, several Federal Circuit Courts of Appeal have tackled this issue.

Part III examines the Federal Circuit Courts of Appeal

---

that the federal government "foots the bill" for installing new safety devices and that same expenditure of federal funds insulates the railroad from tort liability. *Shanklin*, 529 U.S. at 360-61. Furthermore, although *Easterwood* and *Shanklin* have preempted state law negligence claims for excessive speed and warning signals, other courts have found ways around federal preemption of state common law negligence claims. *See Isbell*, 318 Ill. App. 3d at 1022 (holding that the FRSA's preemption clause was not triggered until the device was installed and operating); Strozyk v. Norfolk S. Corp., 358 F.3d 268 (3rd Cir. 2004) (holding that federal regulations do not cover the entire subject matter of a railroad's duty to provide a reasonably safe grade crossing because the bare mention of conditions in the FRSA standards does not indicate an intent to regulate those conditions, and that a plain reading of the regulations defies an expansive reading).

73. This comment does not cover whether the Supreme Court's decisions in *Easterwood* and *Shanklin* should be overturned. However, this comment argues that the Supreme Court's reasoning, that compliance with FRSA standards preempts state law negligence claims, *should not be extended* to also preclude federal negligence claims brought by railroad employees under the FELA.

74. Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 885 (N.D. Ga. 1993). For example, under an excessive speed FELA claim, the railroad employee would argue that the railroad company failed to provide a safe place to work because the mandated speed at which the train was traveling at the time of the accident was excessive. Also, in an inadequate warning signal claim, the railroad employee would argue that the railroad company failed to provide a safe place to work because the warning signals at the intersection were inadequate to prevent motorists from crossing the tracks when a train is passing.

decisions that have extended the doctrines of preemption and preclusion to federal FELA claims. The discussion will begin with *Waymire v. Norfolk S. and W. Ry. Co.*[75]

III. THE EASTERWOOD PROGENY

Because the FELA is a federal law, the legal event triggered by a superseding federal statute is an issue of preclusion and not preemption.[76] The question that must therefore be asked is which federal statute takes precedence, the FELA or the FRSA?[77] Although the case law is split, the railroad industry obtained a considerable victory in the Seventh Circuit case of *Waymire v. Norfolk S. and W. Ry. Co.*[78]

In *Waymire*, the Seventh Circuit extended the preemptive purpose of the FRSA to phase out claims for excessive speed and inadequate warning devices in FELA litigation.[79] Waymire, a train conductor, brought suit against the railroad company after his train collided with a truck stopped in the tracks.[80] As a result of the collision, Waymire suffered post-traumatic stress disorder and was unable to continue his employment.[81] Waymire argued that the railroad company was negligent because it allowed the train to travel through the intersection at an unsafe speed and it failed to install additional warning signals, which caused the accident and his injuries.[82]

The main issue presented in *Waymire* was whether a railroad company can be liable in a FELA negligence action claiming unsafe speed and inadequate warning devices when the railroad's conduct complied with the standards of the FRSA.[83]

---

75. Waymire v. Norfolk S. and W. Ry. Co., 218 F.3d 773 (7th Cir. 2000).

76. CSX Transp. v. Miller, 858 A.2d 1025 (Md. Ct. Spec. App. 2004). *See also supra* notes 61, 62 (explaining when preemption is triggered).

77. *Waymire*, 218 F.3d at 1049 ("The vast majority of courts examining law suits arising out of automobile/train collisions do so under state law. Thus, the courts employ a preemption analysis. We do not do so here, as we are instead faced with the interaction of two federal statutes."). Therefore, courts must reconcile the FELA and the FRSA not by preemption, but by preclusion. Nonetheless, the analogy to preemption law is apt. *Miller*, 858 A.2d at 165.

78. *Waymire*, 218 F.3d at 777.

79. *Id.*

80. *Id.* at 774.

81. *Id.*

82. *Id.*

83. *Waymire*, 218 F.3d at 775. *See also supra* note 78 and accompanying text (discussing the *Waymire* case).

Notably, the Seventh Circuit purposely and carefully drew the distinction between preemption and preclusion.[84] After carefully explaining that the issue in *Waymire* involved preclusion instead of preemption, the Seventh Circuit adopted the Supreme Court's preemption analysis set forth in *Easterwood* and *Shanklin*.[85] The court reasoned that in order to uphold the FRSA's goal of uniformity stated in the FRSA's preemption clause,[86] the FELA must be precluded.[87]

The Seventh Circuit, in concluding that the FRSA superseded Waymire's FELA claim based on inadequate warning devices and excessive train speed, reasoned that the crossing was federally-funded, operated, and installed in accordance with the regulations set forth in the FRSA[88] and therefore, preclusion had been triggered.[89] The Seventh Circuit noted that two other courts[90] have faced the issue of the preclusive effect of the FRSA and the FELA and found that a FELA claim for excessive speed and inadequate warning signals cannot stand in the face of the FRSA's adoption of speed regulations and warning device standards.[91] Therefore, in the simplest terms, the *Waymire* court applied *Easterwood* and *Shanklin's* holdings to FELA cases involving excessive train speeds and inadequate warning devices to achieve uniformity of the laws.[92]

---

84. *Waymire*, 218 F.3d at 775.

85. *Id.* at 776-77. *See also supra* notes 55, 66 (citing *Easterwood* and *Shanklin*).

86. *See supra* note 53 (quoting the FRSA's preemption clause).

87. *Waymire*, 218 F.3d at 776. The Seventh Circuit, in determining that the FRSA's goal of uniformity included the FELA, likely relied on the district court's ruling that railroad operations cannot be carried out without railroad employees and therefore it would seem clear that employee safety is addressed by the FRSA. *See Waymire*, 65 F. Supp. 2d at 956 (reasoning that the FRSA's legislative history proves that employee safety was a consideration of the FRSA). *But see supra* note 49 (noting that the Task Force recommendations in the House Report mentioned employee safety but did not discuss it in detail).

88. *Waymire*, 218 F.3d at 777.

89. *See supra* note 60 (explaining that preemption is triggered only when the improvements are installed and the crossing is in operation).

90. *See* Rice v. Cincinnati, 955 F. Supp. 739 (E.D. Ky. 1997) (holding that the FRSA's goal of uniformity would be compromised if a plaintiff were not allowed to pursue an unsafe speed claim under state law, but would be allowed under the FELA). *See also* Thirkill v. J.B. Hunt Transp. Inc., 950 F. Supp. 1105 (N.D. Ala. 1996) (holding that a FELA unsafe speed claim is barred by the FRSA).

91. *Waymire*, 218 F.3d at 776.

92. *Id.* The Seventh Circuit also stated that "it would thus seem absurd to reach a contrary conclusion [to *Easterwood*] in this case when the operation of both trains was identical and when the Supreme Court has already found that the conduct is not

Further, in the Fifth Circuit, *Lane v. R.A. Sims Jr. Inc.* was brought on appeal from a district court's decision granting partial summary judgment for CSX on Lane's FELA negligence claim based on excessive speed.[93] Lane argued that FRSA speed regulations are *minimum* requirements in which compliance provides evidence of due care but does not preclude a finding of negligence if a reasonable railroad company would have taken additional precautions.[94] The Fifth Circuit, however, rejected this argument by relying on the reasoning of *Easterwood* and on the Seventh Circuit's decision in *Waymire*.[95] The Fifth Circuit adopted the Seventh Circuit's reference to *Easterwood*'s persuasiveness that "it would seem absurd to reach a contrary conclusion . . . when the Supreme Court has already found that the conduct is not culpable negligence."[96] Interestingly, the Fifth Circuit noted that because the case at hand involves two federal statutes, the FELA and the FRSA, and *Easterwood* dealt with a state common law negligence claim, *the FRSA's express preemption clause is not controlling.*[97]

Instead, the Fifth Circuit supported its reasoning with two other federal district court decisions that examined the interplay between the FRSA and the FELA.[98] Specifically, those district courts determined that the goal of uniformity intended by Congress in drafting the FRSA would be compromised if negligence claims based on excessive speed were permitted under the FELA.[99]

Relying on "uniformity of the laws" as a key consideration, the Fifth Circuit bolstered its position claiming that such uniformity can be achieved only if the regulations covering train

---

culpable negligence." *Waymire*, 218 F.3d at 776.

93. Lane v. R.A. Sims Jr. Inc., 241 F.3d 439, 441 (5th Cir. 2001).

94. *Id.* at 442 (emphasis added). *See infra* note 209 and accompanying text (discussing Lane's argument).

95. *See generally Lane*, 241 F.3d at 443 ("In the light of Congress' intent that railroad safety regulation be nationally uniform to the extent practicable, we find *Waymire*, *Thirkill*, and *Rice* far more persuasive than *Earwood*.").

96. *Id.* (citing *Waymire*, 218 F.3d at 776).

97. *Id.* at 442 (emphasis added).

98. *Id.* *See also Rice*, 955 F. Supp. at 740-741 (E.D. Ky. 1997) (holding that the FRSA precluded an FELA excessive speed claim where the train was traveling below the speed limits established in the FRSA); *Thirkill*, 950 F. Supp. at 1107 (holding that a FELA excessive speed claim was precluded by the FRSA when that train is traveling within the standardized speed limit).

99. See *supra* note 98 for clarification.

speeds, for example, are applied similarly to a FELA negligence claim.[100] The Fifth Circuit feared that if not applied uniformly, a railroad employee could assert an excessive speed claim under the FELA, but a non-employee motorist would be precluded from doing the same.[101] The Fifth Circuit thus adopted the reasoning of the Seventh Circuit and held that the FRSA precluded FELA negligence claims for excessive speed and inadequate warning signals.[102] Notably, in the Fifth Circuit's opinion, the court addressed but rejected Lane's assertion that the FRSA's "goal of national uniformity for laws and regulations relating to railroad safety [did] not preclude a FELA excessive-speed claim . . . because the FRSA and the FELA are not in conflict."[103]

As a result, the *Easterwood* progeny, in particular *Waymire* and *Lane,* has allowed the preemptive effect of the FRSA to further insulate the railroad industry from litigation brought under the FELA. The *Easterwood* and *Shanklin* holdings have prompted some courts, like the Fifth and Seventh Circuits, to hold that the FRSA has the same effect, albeit a preclusive effect, when applied to the FELA.[104] Other courts, however, do not follow the Fifth and Seventh Circuits and, as a result, have reached a different conclusion with regards to whether the FRSA precludes FELA negligence claims.

Shortly after the Supreme Court ruled in *Easterwood* that the FRSA preempted state law negligence claims based on excessive speeds, one federal district court, in the case of *Earwood v. Norfolk S. Ry. Co.*, declined to extend the FRSA preemption to bar a FELA negligence claim.[105] In *Earwood*, the plaintiff instituted his FELA action against Norfolk arguing that

---

100. *Lane*, 241 F.3d at 443.

101. *Id.* This basic inconsistency, that a railroad employee might bring an FELA claim while a motorist would be barred from such a claim, is the crux of the Seventh and Fifth Circuits' reasoning.

102. *Id.*

103. *Id.* at 442. The assertion that the FRSA and FELA are not in conflict will be examined fully in Part IV.C., which argues that the FELA does not conflict with the FRSA.

104. *Easterwood* held that that the FRSA preempted state common law negligence claims for excessive speed, and *Shanklin* held that claims based on inadequate warning signals were also preempted. *See supra* notes 58-59, 71-72 (discussing the holdings of *Easterwood* and *Shanklin*).

105. Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880 (N.D. Ga. 1993). The Northern District of Georgia is in the Eleventh Circuit.

his injuries were caused by unsafe working conditions.[106] Particularly, the plaintiff argued that Norfolk knew or should have known of the unsafe work conditions and, by not acting, failed to provide a safe place to work.[107] The court conceded that the FRSA preempted *state* common law negligence claims based on excessive speed, but reasoned that the rule in *Easterwood* did not address any effect of the FRSA on *federal* FELA negligence claims.[108] The *Earwood* court, relying on another Supreme Court decision, reasoned that as a general rule of statutory construction, absent an intolerable or irreconcilable conflict[109] between two statutes, a court need not decide whether one controls over the other or whether one statute impliedly repeals the other.[110]

The *Earwood* court agreed with the plaintiff's contention that the FELA does not conflict with the FRSA safety regulations since the FELA is the employee's exclusive tort remedy and intended to be broadly interpreted.[111] In contrast to the FELA, the regulations promulgated by the Secretary of Transportation under the FRSA are *minimum* safety requirements, and neither the FRSA nor its regulations purport to define the standard of care with which railroads must act with regard to its employees.[112] The court reasoned that the heightened standard of care[113] which the railroad industry owes to its employees is the core of the FELA, but this duty of care is neither spoken of in the

106. *Earwood*, 845 F. Supp at 883.

107. *Id.* At the time of the accident no active warning signals had been installed; however, there was an agreement between the railroad company and the Georgia Department of Transportation to install such devices at the time of the accident. *Id.* at 883.

108. *Id.*

109. *See* Atchison, Topeka, and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 566 (1987) (holding that the Railroad Labor Act did not preclude a railroad employee from bringing his FELA claim because the two federal statutes were not in conflict and could thus operate fully). The *Buell* Court reasoned that there was no basis for assuming that allowing FELA actions for emotional injury would erode the general scheme of RLA arbitration. *Buell*, 480 U.S. at 566.

110. *Id.*

111. *Id.*

112. *Id.*

113. The author notes that the use of the phrase "heightened" or "higher duty" may be misleading. The standard of care under the FELA is that of a reasonably prudent person under the circumstances. When referring to the FELA, some courts refer to a "heightened duty" presumably because of the liberal interpretation, slight causation standard, jettison of traditional negligence defenses, and historical formulation of the Act.

FRSA nor tangentially mentioned. Thus, there is no conflict between the statutes and both statutes may operate fully.[114]

After the court decided that the FRSA did not preclude the FELA and subsequently denied Norfolk's motion for summary judgment, Norfolk brought a Motion for Reconsideration. In reaffirming its holding, the court opined that Norfolk misunderstood the application and purpose of preclusion.[115] The court reasoned that, "had Defendant violated the speed limit, plaintiff would have been able to establish negligence per se. However, the fact that the Defendant was within the speed limit does not necessarily preclude a finding that Defendant was negligent with regard to the heightened duty under the FELA."[116] The court then clarified the real issue: "whether the Secretary's regulations issued pursuant to a federal statute abrogate the federal common law surrounding the FELA."[117] The court held that it did not.[118]

Support for favoring the FELA over the FRSA is also found in *Grimes v. Norfolk*; however, the claim did not involve excessive train speeds or inadequate warnings.[119] Grimes brought his action under the FELA for injuries sustained when he fell into a hole after he was forced to walk beyond the track bed because of the steep walkway and unstable footing along the ballasts.[120] The *Grimes* court correctly stated the issue with which it was faced, whether the *Waymire* decision intervenes to rearrange the standards of care in the FELA so that the railroad's negligence could only be based on non-compliance with FRSA standards.[121]

Grimes argued that Norfolk was negligent because had it adequately inspected the railroad right-of-way along the tracks, Norfolk would have discovered the hole and been able to fix it;[122]

---

114. *Buell*, 480 U.S. at 566.

115. *Id.* at 889.

116. *Id.*

117. *Id.*

118. *Id.*

119. Grimes v. Norfolk, 116 F. Supp. 2d 995 (N.D. Ind. 2000). The Northern District of Indiana is in the Seventh Circuit.

120. *Id.* at 998. The instability was due to large rocks. *Id.*

121. *Id.* at 1000. Interestingly, *Grimes* was argued and briefed by the exact same plaintiff and defense counsel as in *Waymire*.

122. *Grimes*, 116 F. Supp. 2 at 1000. It should be noted that Grimes' argument is not a negligence per se argument. Further, *Grimes* was heard in federal district court within the Seventh Circuit. As a result and because of the holding in *Waymire*,

thus, the railroad had constructive notice of the hole and failed to correct it.[123] Second, Grimes argued that Norfolk had an obligation under both the FRSA and the FELA to provide employees with a safe place to work, and it failed to do so when company policy required him to physically inspect the train.[124]

Relying on *Waymire*, Norfolk argued that its compliance with the FRSA regulations precluded Grimes' negligence suit and immunized it from FELA claims arising out of injuries which occurred while Grimes traversed the right-of-way[125] during train inspections.[126] In finding that Grimes' FELA claim was not precluded by the FRSA, the court made a fact-specific analysis into whether the regulations in the FRSA covered the same subject matter upon which the FELA claim was based.[127] The court found that the regulations specifying the speed at which roadside walkways were to be inspected applied to inspections at crossings but not to inspections between crossings, which is where Grimes sustained his injury.[128] Therefore, the court held that the FRSA did not cover the basis of the FELA claim.

The court concluded that the FRSA regulations were directed at creating a safe roadbed for trains, not a safe walkway for employees that inspect the trains.[129] Focusing less on the specifics of the regulations, the court also found that, "[t]here is nothing in the language or legislative history of any enactment, including the FRSA, that indicates a serious purpose of undermining the

---

if the basis of Grimes' FELA claim was covered in the FRSA regulations, the *Grimes* Court would be bound to hold that the FRSA precluded the FELA. Instead, Grimes argued that since the issue of inspecting walkways was not covered in the FRSA, the FELA claim based on this issue could not be precluded. *See also infra* notes 126-27 and accompanying text (stating the reasoning and holding of the *Grimes* court).

123. *Grimes*, 116 F. Supp. 2d at 1000.

124. *Id.*

125. *See* 49 C.F.R. § 213.31 ("prescribing *minimum* requirements for roadbed and areas immediately adjacent to the roadbed") (emphasis added).

126. *Grimes*, 116 F. Supp. 2d at 1000.

127. *Id.* at 1001. Grimes argued that Norfolk was negligent because its inspection procedure for the road beds was inadequate. Specifically, Grimes argued that the speed for inspecting crossings is too fast to adequately inspect the roadside. *See generally* 49 C.F.R. § 213.7. Although the Court agreed with Grimes that his claim for negligent inspection of the roadbed was not precluded by the FRSA, Grimes failed to produce any evidence outside of his own testimony that the hole actually existed. *Grimes*, 116 F. Supp. 2d at 1004.

128. *Grimes*, 116 F. Supp. 2d at 1004.

129. *Id.* at 1001-02.

basic core of FELA and its essential purposes."[130] The court added, "neither has the Supreme Court, nor for that matter any decision of the Circuit Courts of Appeal, indicated a basic hostility to the legislative purpose embedded in the FELA, now or in the past."[131]

Finally, the *Grimes* court determined that the FRSA regulations did not cover the FELA, by hinging its analysis on the divergent purposes of the FELA and the FRSA, as well as the inability of previous courts to find a "hostility" to the purpose of the FELA.[132] The court concluded, "Norfolk has asked this court to extend *Waymire* well beyond its holding to preclude a negligence claim under the FELA for any conduct by the railroad even remotely covered by a regulation enacted under the FRSA. This court declines the invitation to do so."[133]

Other courts[134] have also chosen to follow the analysis set forth in *Earwood* and *Grimes*; specifically, that FRSA regulations do not preclude FELA claims. For example, the court in *Miller v. CSX Transp.*[135] held that the plaintiff's FELA claim for knee injuries caused by cumulative trauma[136] occurring while in the course and scope of his employment was not precluded by the FRSA.[137] The court reasoned that the FRSA regulations relied on by CSX do not touch upon, nor remotely cover, the railroad yard conditions that injured Miller and which CSX had a duty to safely maintain.[138] The FRSA regulation concerns a safe roadbed for trains and not a safe walkway for railroad employees.[139]

---

130. *Grimes*, 116 F. Supp. 2d at 1003.

131. *Id.* The *Grimes* Court, in searching for judicial hostility toward the FELA, is referring to the Supreme Court decisions in *Easterwood* and *Shanklin*, which were cited by the Defendant, but did not rule on the effect of the FRSA on negligence claims under the FELA. *Id.* at 1002. The *Grimes* court is also referring to the *Waymire* decision which did not reflect "judicial hostility" toward the core purposes of the FELA. *Id.*

132. *Id.* at 1002.

133. *Id.* at 1004.

134. *See also* Elston v. Union Pac. R.R. Co., 74 P.3d 478, 488 (Colo. Ct. App. 2003) (holding similar to *Miller* and *Grimes* that the FRSA safety standards do not cover the same subject matter as safe walkways and, therefore, do not preclude a FELA claim on that basis).

135. Miller v. CSX Transp., 858 A.2d 1025 (Md. Ct. Spec. App. 2004).

136. The trauma was due to CSX's use of large ballasts. *Id.* at 1039.

137. *Id.* at 1052.

138. *Id.*

139. *Id.*

Therefore, the court held that the FRSA did not preclude the plaintiff's FELA claim.[140]

The Fifth and Seventh Circuits' decisions in *Lane* and *Waymire* are prominent indicators that federal FELA negligence claims based on any subject matter also regulated in the FRSA will continue to be precluded. Other above-mentioned courts like *Earwood*, *Miller*, and *Grimes* have "side-stepped" preclusion of FELA negligence claims by successfully arguing that the FELA claims were not based on the same subject matter regulated or "covered" in the FRSA.[141] However, these courts also provided a wider analysis, specifically that since the FELA is a tort remedy and the FRSA is a federal regulation, the two statutes are not facially in conflict. Using this broader analysis, courts should be compelled to find that even if the FELA claim is based on an FRSA regulation, the FRSA should not preclude the FELA.

IV. ANALYSIS: WHY THE FRSA SHOULD NOT PRECLUDE FELA CLAIMS

Until the Supreme Court determines whether the FRSA precludes the FELA the case law will remain split on this issue.[142] The Seventh Circuit's decision in *Waymire* extended the FRSA's preemption clause to the FELA without precedent, and as a result, it was the first decision of its kind by a federal appellate court. The Seventh Circuit relied heavily on the Supreme Court's decision in *Easterwood*, that federal law preempts state law, and without precedent or foundation, extended state law preemption

140. *Miller*, 858 A.2d at 1052.

141. *See supra* note 137 and accompanying text (discussing the holding of the *Miller* case). *Miller* and *Grimes* side-stepped the preclusive effect of the FRSA by arguing that the basis of the FELA claim, in those cases the ballasts and safe walkways respectively, were not covered in the FRSA. These courts did not hint to what would happen if the ballasts and walkways were regulated in the FRSA. In light of this, *Miller* and *Grimes* provide two instances where the bases of the plaintiffs' claims were not regulated, which can be contrasted with *Waymire* and *Lane* cases, which found that the FRSA precludes the FELA because excessive speed and inadequate warning device claims were regulated in the FRSA.

Even if the basis of an FELA claim is regulated in the FRSA, that is to say, even if ballasts and walkways are regulated in the FRSA, the FELA should still survive preclusion under the *Earwood* analysis because the subject matter of the two statutes do not conflict, one being an exclusive tort remedy, and the other, a federal safety statute.

142. The Supreme Court denied certiorari on appeal from the Seventh Circuit's decision in *Waymire*. Waymire v. Norfolk S. and W. Ry. Co., 218 F.3d 773 (7th Cir. 2000), *cert denied*, 531 U.S. at 1112 (2001).

of the FRSA to an area of federal preclusion, thereby judicially repealing areas of the FELA contrary to the intent of Congress. Furthermore, the Supreme Court in *Easterwood* failed to even mention the effect that the FRSA might have on federal negligence claims brought under the FELA.

The continued effect of FRSA preemption on federal FELA claims brought exclusively by railroad employees for on the job injuries runs the risk of creating substantial injustice. That bleak proposition seems reasonable when one follows the logic that the Secretary of Transportation, through FRSA preemption, could erode substantial areas of culpable negligence under the FELA action by promulgating standards and regulating areas that may form the basis of a valid FELA negligence claim. The unintended result would be that the only way for an injured railroad employee to recover for an on the job injury would be to prove a regulatory violation of an FRSA standard, thus turning the FELA civil action, which is firmly rooted in the theory of negligence, into a remedy conditioned upon only statutory violations.

Since the United States Supreme Court has only addressed preemption of state law negligence claims brought by motorists and has never addressed the issue of whether FELA claims brought by railroad employees are in any way impacted by the FRSA, this analysis will discuss five reasons why the FRSA should not preclude FELA claims:

(1) A plain reading of section 55 of the FELA makes void any attempt by the railroad from using any contract, rule, regulation, or device to exempt itself from liability.[143]

(2) The decisions in *Lane* and *Waymire* are flawed because the FRSA should be treated as a *supplement* to the FELA, just as other federal statutes have been construed in the past.[144]

---

143. *See generally* 45 U.S.C. § 55 (2005).

144. *See generally* Weaver v. Missouri Pac. R.R. Co., 152 F.3d 427, 429 (5th Cir. 1998) (holding that the railroad company's compliance with federal Locomotive Inspection Act (LIA) regulations, which did not require protective window screens, did not preclude a finding that the railroad was negligent under the FELA for failing to equip the train with protective screens); *see also* Urie v. Thompson, 337 U.S. 163, 189 (1949) (holding that the Boiler Inspection Act and the Safety Appliance Act were intended by Congress to be supplemental to the FELA and should in no way limit recovery under the FELA); *Buell*, 480 U.S. at 565 (1987) (holding that an employee

(3) The subject matter of the FRSA does not conflict with[145] or subsume[146] the content of the FELA.

(4) Preclusion of the FELA on the grounds that negligence claims brought under it will erode the FRSA's expressed goal of national uniformity is error because the FELA's status as a federally-created "hybrid" negligence claim created by Congress and its treatment by the courts as a broadly interpreted statute mean that it is specifically intended to be liberally applied in the humanitarian spirit in which it was passed.[147] Congress precisely created this humanitarian legislation to compensate for the "human overhead" of injury and suffering inflicted upon railroad employees so that recovery in a *federal* FELA negligence claim would be easier than recovery of a non-railroad employee motorist under traditional state law negligence claims.

(5) Finally, minimum safety standards in the FRSA do not adequately protect railroad employees from injury; rather, the federally-mandated duty of reasonable care imposed by Congress on the railroad industry under the FELA should be favored.

A. THE FRSA CANNOT PRECLUDE THE FELA GIVEN THE PLAIN READING OF SECTION 55 OF THE FELA

Section 55 of the FELA provides that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any

---

could bring a labor grievance under the Railroad Labor Act without being precluded from asserting his rights under the FELA); Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 286-87 (E.D. Pa 1991) (holding that Title VII did not preclude an employee's FELA claim for negligent infliction of emotional distress).

145. *See Buell*, 480 U.S. at 567 (setting forth that absent an intolerable conflict between two statutes, the court should not be inclined to determine whether one impliedly repeals the other).

146. *See Easterwood*, 507 U.S. at 664 (reasoning that federal regulations must not merely touch or relate to a subject matter, but substantially subsume the subject matter). Since courts, particularly the *Waymire* and *Lane* courts, found the *Easterwood* analysis instructive in holding that the FRSA precludes the FELA, in applying this same test, the FRSA nevertheless does not substantially subsume the FELA.

147. *See generally Urie*, 337 U.S. at 180 (reasoning that Congress created the FELA in a humanitarian spirit, and therefore, the statute should be interpreted liberally in light of Congress's intent to facilitate the ease of recovery under the FELA).

liability created by this chapter, shall to that extend be void."[148] Because the FRSA falls within the plain meaning of "contract, rule, or regulation," the FRSA cannot preclude the FELA.[149] This section binds the railroad industry as a matter of law from using any regulation or entering into any contract, such as a contract requiring an employee to waive their rights under the FELA, that might limit its liability.[150]

Should the Supreme Court hear this issue, it is suggested that it follow its precedents and continue to apply the liberal interpretation of the FELA as it has in the past.[151] Section 55, as part of this broad remedial negligence statute, should be interpreted to include federal railroad regulations implemented under the FRSA because the interpretation of the FRSA's preemption clause, in cases such as *Lane* and *Waymire,* has had an insulating effect similar to employment contracts that waive an employee's rights under the FELA, which are void under section 55. Under both the employee waiver contract and the FRSA regulations, the railroad industry exempts itself from liability and given the plain wording of section 55, such an exclusion of liability is contrary to Congress' intent. Therefore, both should be void pursuant to section 55 of the FELA.

In *Philadeplhia, Baltimore & Washington Railroad Co. v. Schubert,* the Court outlined the scope and application of section 55.[152] The Court reasoned that:

> The words 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of this section, is to be found in the necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such a general application could the statute [the FELA] accomplish the object which it is plain that Congress had in view.[153]

148. 45 U.S.C. § 55 (2005).

149. *Id.*

150. *Buell,* 480 U.S. at 559.

151. *See generally* Urie v. Thompson, 337 U.S. 163 (1949).

152. Philadeplhia, Baltimore & Washington Railroad Co. v. Schubert, 224 U.S. 603, 613 (1912).

153. *Id.*

Following the *Schubert* analysis, regulations implemented under the FRSA and its preemption clause,[154] which have been found to preclude FELA claims, also exempt the railroad industry from liability. Though section 55 prohibits the railroad industry from exempting itself from liability, section 55 should be broadly construed in light of the FELA's liberal interpretive history to also prevent the railroad industry from using federal safety regulations under the FRSA to strip the railroad employee of his sole remedy, thereby defeating the liability which the FELA was designed to enforce. Should the Supreme Court find that the FRSA precludes the FELA as other United States Circuit Courts of Appeal have, section 55, operating as the last line of defense, would statutorily void the preclusive effect of the FRSA regulations. Therefore, section 55 of the FELA stands on its own two feet by voiding any of the railroad industry's attempts through contract, regulation, or order, including FRSA standards, to immunize itself from FELA claims.[155]

B. THE FRSA SHOULD BE TREATED AS A SUPPLEMENT TO THE FELA

The FRSA states that "The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety *supplementing* laws and regulations in effect on October 16, 1970."[156] In this section, Congress sets out the scope of the FRSA and using explicit language states that the FRSA is supplementary to laws and regulations already in effect.[157] In addition, the *Earwood* court explained in judicially interpreting legislative enactments that "[s]tatutes which invade the common law are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."[158] The word "supplement" in section 20103 of the FRSA indicates that Congress did not intend for the FRSA to bar FELA claims, but to act as a complement to the FELA.

The FELA, enacted in 1908, comes from a "long established-principle" of the common law which must be maintained absent

154. 49 U.S.C. § 20106 (2005).
155. 45 U.S.C. § 55 (2005).
156. 49 U.S.C. § 20103 (2005) (emphasis added).
157. *Id.*
158. *Earwood,* 845 F. Supp. at 890.

Congress's express intent to repeal it through other legislation; in fact, in section 20103 of the FRSA Congress expressly sets forth the supplemental nature of the FRSA.[159] In *Earwood* the court stated that whether a federal common law action has been displaced by another federal statutory law requires an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law.[160] The FELA exists to protect the human overhead of the railroad industry, namely the employees, while the FRSA exists to make railways safer for the public in general. The plain wording of section 20103 bears out that Congress recognized that the FRSA would not commandeer or eliminate, but supplement other laws in effect as of 1970, including the FELA.[161]

Other federal statutes, which courts have not given a preclusive effect over FELA negligence claims, are worth discussion.[162] In *Urie v. Thompson*, the plaintiff, a steam locomotive fireman, filed suit under the FELA for silicosis, a pulmonary disease.[163] The silicosis was caused by faulty "sanders" that emitted silica and silicon dioxide in excessive amounts, which the Defendant knew or should have known about.[164] The Missouri State Supreme Court on appeal held that the complaint

159. Supplemental is defined as "supplying something additional; adding what is lacking." BLACK'S LAW DICTIONARY 1480 (8th ed. 2004). Given this definition, Congress intended that the FRSA create a uniform system of regulation across the country so that all trains crossing the 50 states in interstate commerce would abide by the same standards. Until the FRSA, state standards were inadequate to regulate the trains in interstate commerce. *See, e.g.*, H.R. REP. NO. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104. Problems with "Uniformity" will be discussed more fully in Part D.

160. *Earwood,* 845 F. Supp. at 890.

161. *See* § 20103 ("The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970."). *See also,* Brief for Petitioner at 11, Waymire v. Norfolk S. and W. Ry. Co., 2000 WL 34000886 (U.S. Oct. 12, 2000) (No. 00-594).

162. *See also* Weaver v. Missouri Pac. R.R. Co., 152 F.3d 427, 429 (5th Cir. 1998) (holding that the railroad company's compliance with federal Locomotive Inspection Act regulations, which did not require protective window screens, did not preclude a finding that the railroad was negligent under the FELA for failing to equip the train with protective screens); Smolsky v. Consolidated Rail, 785 F. Supp. 71 (E.D. Pa. 1992) (holding that Title VII did not preclude a railroad employee's claims of negligent infliction of emotional distress under the FELA).

163. *Urie,* 337 U.S. at 165.

164. *Id.*

did not state a cause of action under the FELA but stated a claim under the Boiler Inspection Act.[165] The U.S Supreme Court reversed and held that the existence of an injury recoverable under a violation of the Boiler Inspection Act does not preclude an action under the FELA.[166]

The Court reasoned that "the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively . . . amendments to the Federal Employer's Liability Act. [T]aken in practice, the Boiler Inspection and Safety Appliance Acts cannot be regarded as statutes wholly separate from and independent of the Federal Employer's Liability Act."[167] Accordingly, Congress intended for these acts to be "supplemental" to the purpose of facilitating a railroad employee to recover, not inhibit recovery or make it impossible.[168] In light of the Supreme Court's reasoning in *Urie,* that the Boiler Inspection and Safety Appliance Acts are supplements to the FELA, and given the plain wording of Section 20103, courts should also treat the FRSA as a supplement to the FELA.

Similar to the *Urie* Court's decision, the Court in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* examined the interplay between the Railway Labor Act ("RLA") and the FELA.[169] In *Buell,* the Court addressed whether a plaintiff pursuing a railroad labor grievance under the RLA deprived the employee of his right to bring a negligence claim under the FELA.[170] The text of the RLA, like the text of the FRSA, does not mention the FELA or the subject of tort liability.[171] The stated purpose of the RLA is to provide a comprehensive framework for the resolution of labor disputes in the railroad industry.[172]

---

165. *Urie,* 337 U.S. at 172. *See also* 45 U.S.C. § 23, repealed by Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994).

166. *Urie,* 337 U.S. at 196.

167. *Id.* at 189. The Boiler Inspection and Safety Appliance Acts dispense, for the purpose of employee suits, with the necessity of proving that violations of the safety regulations prove negligence, and showing that these violations were made is effective to show negligence as a matter of law. *Id.*

168. *Id.*

169. *Buell,* 480 U.S. at 557. *See generally* 45 U.S.C. § 151-164 (2005).

170. *Buell,* 480 U.S. at 557. Like the FELA claims based on standards within the FRSA, the claim brought in *Buell* under the FELA arose out of a labor grievance covered by the RLA.

171. *Id.* at 557.

172. *Id.* at 562.

In contrast, the FELA provides the employee with substantive protection from the negligent conduct of railroad companies independent of the railroad's obligations under its labor agreements.[173] Noting the differing goals of the two statutes, the Court held that it would be inconceivable that Congress intended that an injured railroad employee would be denied recovery under the FELA simply because the employee might also bring a labor grievance under the RLA.[174]

Further, the Court in *Buell* distinguished between the goals of the RLA and the FELA and found that both statutes could operate fully side by side.[175] The same should be done in regard to the FELA and the FRSA. Given Congress's purpose to implement comprehensive regulations for every area of railroad safety,[176] and given that the FELA is a broad remedial tort statute subject to a standard of broad and liberal interpretation,[177] these two statutes can operate side by side because of their differing goals. Furthermore, Congress explicitly stated that the regulations and orders issued for every area of railroad safety would *supplement* laws in effect as of October 16, 1970.[178]

C. THE SUBJECT MATTER OF THE FRSA DOES NOT "SUBSTANTIALLY SUBSUME" THE CONTENT OF THE FELA, NOR DOES THE INTERPLAY BETWEEN THE TWO STATUTES PRESENT AN "IRRECONCILABLE CONFLICT"

As mentioned in Part II, the Supreme Court's decision in *Easterwood* proved highly instructive to several United States Circuit Courts of Appeal, particularly the Seventh and Fifth Circuits.[179] *Easterwood's* analysis provides that in order to prevail on a claim using the FRSA's preemptive effect, it must be established that the statute more than touches or covers the subject matter; the federal regulations *must* substantially

173. *Buell*, 480 U.S. at 563.

174. *Id.* at 565.

175. *Id.* at 564.

176. *See* 49 U.S.C. § 20101 (2005).

177. *See supra* note 147 (arguing that the FELA's status as a federally created, hybrid negligence claim created by Congress and its treatment by the courts as a broadly interpreted statute mean that it is specifically intended to be liberally applied).

178. 49 U.S.C. § 20103 (2005).

179. See *supra* notes 79 and 102 and accompanying text for the holdings in *Waymire* and *Lane*.

subsume the relevant law.[180] However, it should be kept in mind that the FRSA's preemption clause does not mention the FELA or any other federal statutes dealing with railroad safety.

As a result, looking to the text of the FRSA alone, the statute does not survive the "substantially subsume" test articulated in *Easterwood* because the FRSA's effect on pre-existing federal law is not mentioned.[181] The FRSA's preemption clause merely states that the laws related to railroad safety should be "uniform to the extent practicable" and that *states* may adopt or continue to enforce a law related to railroad safety until the Secretary of Transportation prescribes a law covering the subject matter.[182] This clause applies only to *states* and does not show congressional intent to limit a railroad employee's *federal* cause of action under the FELA.

Furthermore, the Secretary of Transportation need not prescribe a law that specifically grants railroad employees a tort remedy under which they might seek compensation for injuries caused by the negligence of their employer because the FELA has been the exclusive remedy for railroad employees since 1908. Had Congress intended to substantially subsume the subject matter of the FELA when it passed the FRSA, it would have to have said so or Congress would have had to repeal the FELA and provide another remedy such as no-fault state workers' compensation. The FRSA, as a federal regulatory statute, does not mention railroad employee remedies. It is silent on this subject. Thus the FELA cannot be logically argued to have been subsumed by the FRSA. Further, if FELA claims are precluded by the FRSA, the railroad employee will be stripped of his sole remedy and will therefore, be unable to seek compensation for his injuries or question the minimum safety standards under which he was injured. This absurd result was never intended.

It should be noted that the *Waymire* court actually supported the argument that the two statutes do not conflict. Specifically the Seventh Circuit stated: "as a general negligence statute the FELA neither prohibits nor requires specific conduct [while] . . . the FRSA . . . empowers the Secretary of Transportation to implement comprehensive and detailed railroad safety

180. *Easterwood*, 507 U.S. at 664.

181. *See supra* note 61 (discussing the "substantially subsume" test for preemption applied in *Easterwood*).

182. 49 U.S.C. § 20106 (2005).

regulations."[183] Therefore, it logically follows that the FRSA cannot substantially subsume the FELA because the FELA provides a standard of care which the industry owes to its employees and must abide by, while the FRSA sets forth strict safety standards owed to the public. Furthermore, because Congress enacted both the FELA and the FRSA for different purposes it cannot be said that these goals present an irreconcilable conflict in which a Court must determine whether one federal statute repeals an earlier statute.[184]

The *Earwood* court provides the proper analysis in its conclusion that the FRSA does not preclude the FELA. The FELA is the railroad employee's exclusive remedy for compensation of on-the-job injuries, or even death, and is intended to be interpreted broadly.[185] In contrast, the FRSA is primarily intended to protect the general public, not employees. Further the FRSA is directed to the states, thus, no conflict between the statutes exists and both may operate side by side.[186]

The fundamental advantage of applying the *Earwood* analysis is its simplicity. In order for preclusion to apply, statutes must cover the same subject matter.[187] The FRSA is a federal railroad safety regulation. The FELA is a federal tort remedy statute. The two statutes do not cover the same subject matter. Therefore, the FRSA cannot preclude the FELA unless Congress passes legislation to this effect. As discussed in Part B of this section, Congress did not repeal the FELA when it passed the FRSA, but instead determined that the FRSA would "supplement" existing law.

Furthermore, within the FRSA's preemption clause Congress mentioned only *state* laws and failed to discuss the FRSA's effect on federal statutes such as the FELA.[188] As a result, the general "supplemental" rule in section 20103 should apply and the FRSA should not preclude but supplement the FELA. Congress never intended for the courts to judicially expand the FRSA to *supplant*

183. *Waymire*, 218 F.3d at 775.

184. *Buell*, 480 US at 565.

185. *Earwood*, 845 F. Supp. at 884.

186. *Id.*

187. *See Easterwood*, 507 U.S. at 664.

188. Within the FRSA's preemption clause, where Congress would presumably identify all types of laws that are not "supplemented," but outright preempted, it mentioned only *state* laws.

an area of the law which it merely intended to *supplement*. Thus, the FELA action must stand.

D. THE SUPREME COURT'S AND OTHER COURTS' TREATMENT OF THE FELA SUPPORTS THE POSITION THAT CONGRESS INTENDED THAT THE FELA FALL OUTSIDE OF THE "UNIFORMITY" EXPRESSED IN THE FRSA

In contrast to the *Earwood* reasoning, the fundamental flaw of the *Waymire* and *Lane* decisions is that the courts rely on the phrase "uniform to the extent practicable." This phrase is ambiguous and therefore, courts' reliance on this phrase as evidence of Congress's intent is arbitrary.

Only Congress can repeal the FELA, but the Seventh and Fifth Circuits have erroneously inferred Congress's intent to repeal the FELA where there was none. The Seventh and Fifth Circuits, in *Lane* and *Waymire*, were able to imply this congressional intent by hinging their analysis on the FRSA's goal that all laws regarding railroad safety should be uniform to the extent practical.[189] What is this uniformity referring to? In the Seventh Circuit's opinion, "to allow a plaintiff to argue adequacy of warning claims under the FELA but not under state law (referring to motorist claims) would undermine the railroad safety uniformity intended by Congress."[190]

The history of the FELA, its hybrid nature,[191] and the liberal interpretation[192] afforded to it by the courts support the position that the FELA is not intended to be uniform within the meaning of the FRSA. While the FRSA is a public safety act dealing with railroads, the FELA was enacted to provide a broad measure of recovery[193] to the injured railroad employee. Courts have made it

189. 49 U.S.C. § 20103 (2005).

190. *Waymire*, 218 F.3d at 776. Recall that state law tort claims for inadequate warning devices and excessive speed were the two areas in which the Supreme Court preempted using the FRSA. *See generally* CSX Transp. v. Easterwood, 507 U.S. 658 (1992); Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000).

191. *See* 45 U.S.C. §§51-55 (2005). A claim arising under the FELA differs from a traditional common law negligence claim in that Congress did not include the traditional defenses of contributory negligence and assumption of the risk. Furthermore, Congress provided for a less stringent burden of proof by providing that the injury of the employee need only be caused in whole or part by the negligence of the railroad company.

192. *See* CSX Transp. v. Miller, 858 A.2d 1025, 1030 (Md. App. 2004).

193. The FELA does not include either the defense of contributory negligence or assumption of the risk as a bar to recovery, and the employee must prove only the

unmistakably clear that the FELA should be liberally interpreted to favor recovery by the injured railroad employee.[194] The spirit of the FELA is not in conformity with narrowly construing the Act's broad and general terms or cutting down its full scope by inference or implication.[195]

The Fifth and Seventh Circuits in *Lane* and *Waymire* ignored the liberal interpretive approach endorsed by the Supreme Court.[196] Instead, these courts inferred that the FRSA's preemption of traditional state law negligence claims in *Easterwood,* included by implication *all* other negligence claims such as the FELA.[197] This inference is misguided. Congress intended that the recovery owed to a railroad employee under the FELA be easier than that owed to a non-employee motorist injured under the same conditions. After all, Congress altered the traditional form of negligence making the FELA a negligence hybrid, free from the common law defenses of assumption of the risk and contributory negligence and also weakening the causation standard, thus facilitating easier recovery for railroad employees.[198] If disallowed from bringing their sole cause of action under the FELA, railroad employees are consequently stripped of the only opportunity to question the safety standards and regulations under which he or she works and are deprived of any means for recovery of an on-the-job injury.

Additionally, *Waymire* and *Lane* used the FRSA to preclude the FELA negligence claim for fear of eroding the uniformity of the laws, but the railroad industry owes its employees a "higher" duty than to non-employees under traditional negligence. When Congress passed the FELA, it lowered the hurdle for employees to recover for injuries caused by the negligence of his or her employer.[199] If Congress had intended for the railroad industry to

---

slightest negligence by showing that employee's injuries were cause in whole or part by the negligence of the railroad company. *See generally* 45 U.S.C. §§ 51-55 (2005).

194. *See Urie*, 337 U.S. at 180-181; Jamison v. Encarnacion, 281 U.S. 635, 640 (1930); *Earwood*, 845 F. Supp. at 885; *Miller*, 858 A.2d at 1037-1038.

195. *Urie*, 337 U.S. at 186.

196. *See generally*, Lane v. CSX Transp., 241 F.3d 439 (5th Cir. 2001); Waymire v. Norfolk S. and W. Ry. Co., 218 F.3d 773 (7th Cir. 2000).

197. *See generally*, Lane v. CSX Transp., 241 F.3d 439 (5th Cir. 2001); Waymire v. Norfolk S. and W. Ry. Co., 218 F.3d 773 (7th Cir. 2000).

198. *See generally* 45 U.S.C. §§ 51-55 (2005).

199. *See supra* notes 191 and 193 (discussing the characteristics of the FELA claim which distinguish it from traditional negligence).

owe an identical duty to both the railroad employee and to the public in general, then why did Congress preempt only *state* laws covering the same area?[200]

A second possible interpretation of the FRSA's "uniformity" goal is that Congress enacted the FRSA to achieve uniformity of regulations. That is to say, Congress, concerned with the inconsistency among state regulations, intended to create a nationally uniform regulatory system that would apply to all trains traveling across the 50 states in interstate commerce.[201] This interpretation is supported by the House Interstate and Foreign Commerce Committee Report. The Secretary of Transportation appointed a Task Force to study the rail safety problem, and this Task Force presented its recommendation to the Committee.[202] One of the recommendations characterized the railroad industry as having few local characteristics but having a truly interstate character calling for a uniform body of *regulation* and enforcement.[203]

Taking the Task Force's recommendation into consideration, it is clear that Congress never intended this desired uniformity to preclude federal negligence claims brought under the FELA. Congress achieved its desired goal of uniformity in passing the FRSA because the FRSA standardized railroad safety regulations across the 50 states. This was Congress' intent and purpose, therefore, the Seventh and Fifth Circuits in *Waymire* and *Lane*, have stretched the meaning of "uniformity" well past its intended scope by judicially confusing Congress' desire to create uniform regulations with the intent to preclude federal negligence claims under the FELA.[204]

E. THE MINIMUM REQUIREMENTS SET FORTH IN THE FRSA DO NOT PROVIDE A STANDARD OF CARE THAT REASONABLY PROTECTS THE RAILROAD EMPLOYEE

Assume for a moment that the horrific train accident described in the Introduction occurred at a notoriously busy

200. *See generally* 49 U.S.C. § 20106 (2005).

201. H.R. REP NO. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110.

202. *Id.* The main problem was the recent increase in rail-related accidents. *Id.*

203. *Id.* at 4105-06.

204. *See supra* note 133 and accompanying quote (discussing court's conclusion in *Norfolk* not to preclude a negligence claim under the FELA for "any conduct by the railroad even remotely covered by a regulation enacted under the FRSA").

intersection and railroad crossing during lunch hour on a normal Monday afternoon. Assume that most people in the community knew that this intersection was busy during lunch hour and that from time to time vehicles tried to "beat" approaching trains. Assume further that the crossing is federally-funded and the FRSA regulations for this particular railroad crossing provided that the maximum speed limit for passing trains at this intersection was 45 miles per hour, and at the time of the accident, the train was traveling within the speed limit at 40 miles per hour when a tanker pulled into the crossing causing a terrible collision.

Is it possible that a speed of 40 miles per hour, which is below the 45 miles per hour limit, might be too fast for this busy intersection? What cases like *Waymire* and *Lane* say is that since the train was traveling below the maximum speed limit of 45 miles per hour, the injured railroad employee, in this case the deceased railroad employee's family, will be precluded from bringing a FELA cause of action to challenge this speed limit as unreasonably excessive. It is unjust to use the FRSA to prevent this family from simply having a jury hear the evidence and be allowed to answer a simple question: given what we know about this intersection, was this speed limit an adequate standard to protect this family's loved one from being injured?

Speed limits are necessary and must be required at all crossings, but speed limits, or any other standard, must comport with the "heightened duty" owed by the railroad industry to the injured employee under the FELA. To choose the minimum standards[205] of the FRSA as the last line of protection and safety to a railroad employee and to deny the railroad employee the opportunity to question the reasonability of these standards after he is injured on the job is a considerable injustice; one which Congress did not intend merely for the sake of uniformity.

It is an equal injustice to the non-employee motorist injured as a result of the same conduct, however, that he might be denied recovery while the employee's claim is actionable under the FELA. The Supreme Court in *Crane v. Cedar Rapids & Iowa City Ry.* ruled that "it is for Congress to amend the statute to prevent such injustice. It is not permitted [for the] Court to

205. *See* 49 § C.F.R. 213.1(a) (2005) (stating that standards establishing speed are minimum requirements for a railroad track that is part of the general railroad system of transportation).

rewrite the statute."[206]

The Supreme Court, should it hear this issue, should overrule the Fifth and Seventh Circuit's reasoning in *Waymire v. Norfolk So.*[207] In holding that the FRSA precluded a railroad employee's negligence claim under the FELA, the Court reasoned that once federally-funded devices are installed at a crossing, the railroad may not be held responsible for the adequacy of those devices.[208] The result of this reasoning is that a railroad employee, who is owed a "higher duty" by his employer under the FELA, will not be able to bring his sole cause of action under the FELA to question the reasonableness or adequacy of those safety regulations.

Also, the plaintiff's argument in *Lane v. CSX Transp.* provides guidance which the Supreme Court should follow.[209] In that case, Lane argued that the FRSA regulations are minimum requirements in which compliance provides evidence of due care but does not preclude a finding of negligence if a reasonable railroad company would have taken additional precautions.[210] Lane's argument draws the proper distinction between the FRSA and the FELA. Particularly, the FRSA regulations do not provide a standard of care for railroad conduct but guidelines, while the FELA cause of action explicitly sets forth the duty owed to the employee by the railroad industry.[211] Lane's argument is proper because the FELA defines the standard of care and duty owed by the railroad industry to the employee, while the FRSA prescribes only a minimal standard of conduct owed to the public.[212] The railroad industry should be held to its duty of care under the FELA, rather than be immunized from FELA claims by merely

206. Crane v. Cedar Rapids & Iowa City Ry. Co., 395 U.S. 164, 167 (1969).

207. *See supra* notes 71-92 (discussing the Court's reasoning in *Shanklin* and *Waymire*).

208. *Shanklin*, 529 U.S. at 358.

209. *Lane v. CSX Transp.*, 241 F.3d at 439 (5th Cir. 2001). *See supra* notes 93-94 and accompanying text (discussing the *Lane* case).

210. *Lane*, 241 F.3d at 441. *See also* Brief for Appellant at 13, Lane v. CSX Transp. 241 F.3d 439 (5th Cir. 2000); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36 at 233 (5th ed. 1984) (stating that compliance with a statute evidences due care, but does not establish due care as a matter of law).

211. *See generally* 45 U.S.C. § 51 (2005).

212. *Lane*, 241 F.3d at 441.

conforming its conduct to minimal standards.[213]

Nevertheless, precluding an FELA action and relying only on the minimum requirements set forth in the FRSA to protect a railroad employee's rights, is fundamentally unjust and will create immunity for the railroad industry and unfairly insulate it from legitimate FELA claims. The effect of such immunity will be that railroad employees may be deprived of the only opportunity granted by Congress to show that the railroad's compliance with these minimum safety standards does not satisfy the heightened duty afforded to them under the FELA.

V. CONCLUSION

If the FELA claim is allowed to stand in the face of the preclusive effect of the FRSA, the reasonableness of all railroad safety standards will be subjected to scrutiny. The railroad industry may take the position that such a result would undermine the uniformity intended by Congress in drafting the FRSA, particularly that each individual railroad crossing would have to be scrutinized to determine if the standards under which that crossing operates are reasonable. After all, if a jury were allowed to hear the FELA claim arising out of a train accident in Chalmette, Louisiana, the jury could find that the maximum speed of 45 mph was excessive for that particular crossing and that it should be lowered.

Therefore, the question is whether, for the *sake of uniformity*, and for the sake of regulatory efficiency, the Court should prevent a railroad employee from bringing his only remedy under the FELA? This is only the legal question.

But what is the human issue? Should the families of the two men burned to death at the crossing in Chalmette, Louisiana be allowed to ask whether the safety standards at that crossing were reasonable enough to adequately protect their loved one? Should these families be allowed to enforce the non-delegable duty owed to them by the railroad industry and seek compensation? When the answers are "No," and when uniformity and efficiency are

213. *See, e.g.*, 49 C.F.R. § 213.1 (2005) (setting forth the scope of the standards as *minimum* requirements). *See also Earwood*, 845 F. Supp. at 884 (reasoning that the regulations promulgated by the Secretary of Transportation under the FRSA are minimum requirements which do not define a standard of care with which railroad companies must act in regards to its employees).

favored over a person's right to question the rules under which he works, or the rules under which a loved one has been injured or killed, the system has derailed by protecting the wrong side.

Joseph Mark Miller[214]

214. The guidance and suggestions of an experienced FELA advocate and mentor were indispensable in the development of this comment. I sincerely thank Benjamin B. Saunders.

***