

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT**

PAUL DUGLE,)
by and through his legal guardian Megan Dugle, and)
MEGAN DUGLE, *individually,*)
 Plaintiffs)
and)

KENTUCKY ASSOCIATION OF COUNTIES)
WORKERS' COMPENSATION FUND and)
KENTUCKY ASSOCIATION OF COUNTIES)
ALL LINES FUND)
 Intervening Plaintiffs,)
v.)

NORFOLK SOUTHERN RAILWAY COMPANY,)
 Defendant)

**CIVIL ACTION
NO. 3:07-cv-0040-KKC**

**MEMORANDUM OF LAW IN SUPPORT
OF NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION FOR PROTECTIVE ORDER**

Defendant, Norfolk Southern Railway Company, (hereinafter "Norfolk Southern") by counsel, submits this memorandum of law in support of the Motion for Protective Order filed by Railroad asking this Court to preclude the Plaintiffs and their counsel from seeking information that is privileged and protected from discovery or introduction into evidence by 23 U.S.C. § 409. Plaintiffs have requested testimony from witnesses during discovery depositions pertaining to U.S. DOT-AAR Crossing Inventory Forms which are, pursuant to 23 U.S.C. 130(d), compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of railway-highway crossings, and which are therefore prohibited by § 409 from discovery, use, admissibility, or consideration in this lawsuit. 23 U.S.C. § 409; 23 U.S.C. § 130(d).

INTRODUCTION

On September 1, 2009, during the discovery deposition of Mr. Tom Sharp¹, a Norfolk Southern law enforcement officer, over objection by Norfolk Southern and citation to 23 U.S.C. § 409, Counsel for Plaintiffs attempted to cross-examine Mr. Sharp concerning the specific information which is recorded on a form entitled U.S. DOT-AAR Crossing Inventory Form. Mr. Sharp explained that he was not familiar with the U.S. DOT-AAR Crossing Inventory Form. Mr. Sharp testified that he had never seen a document entitled U.S. DOT-AAR Crossing Inventory Form prior to his cross-examination by the Plaintiffs' counsel on September 1, 2009. Plaintiffs' Counsel also propounded questions to Mr. Sharp seeking data which Norfolk Southern is required to submit to the FRA and/or U.S. DOT regarding individual railroad grade crossings, including, but not limited to the railroad grade crossing at milepost 319.7W [U.S. DOT Grade Crossing Number 735613K] where the train-motor vehicle collision which is the subject of this litigation occurred. In addition, and over the objections of the Railroad's Counsel and renewed citation to 23 U.S.C. § 409, Plaintiffs' Counsel presented a copy of a form titled "U.S. DOT AAR – Crossing Inventory Form", bearing the hand written date October 8, 1974 to Mr. Sharp during the course of Plaintiffs' cross examination of Mr. Sharp. Plaintiffs' counsel represented to Mr. Sharp that the U.S.

¹ Mr. Sharp has served as a Norfolk Southern Police Officer from 1997 through February of 2007 and from November of 2008 through present. Mr. Sharp was working in Huntingburg, Indiana at the time of the September 1, 2006 collision. He was asked by his supervisor Steve Crush to respond to the scene of the collision. In February of 2007, Mr. Sharp accepted a position with Norfolk Southern as Manager of Grade Crossing Safety for the states of Virginia, West Virginia, New Jersey, Pennsylvania, Michigan, Ohio, Indiana and New Jersey and moved to Roanoke, Virginia. His geographical territory as Manager of Grade Crossing Safety from February of 2007 through November of 2008 did not include Kentucky. In November of 2008, Mr. Sharp voluntarily sought a transfer to Norfolk Southern's Police Department in Cincinnati, Ohio so that he could spend less time traveling and more time with his wife and daughter. Norfolk Southern arranged for Mr. Sharp to travel from his office and home in Ohio to the law offices of Plaintiffs' Counsel in Louisville, KY. for his 9/01/09 discovery deposition at the Railroad's expense.

DOT-AAR Crossing Inventory Form was prepared by someone with the initials "JSR". Plaintiffs' Counsel asked Mr. Sharp to read into the record the information written on the U.S. DOT - AAR Crossing Inventory Form pertaining to railroad grade crossing U.S. DOT - AAR 735613K at milepost 319.7W.

Mr. Sharp refused to answer these questions based upon his understanding and reading of the federal statute, 23 U.S.C. § 409. Mr. Sharp informed counsel for the Plaintiffs that law enacted by the federal government specifically states that this data and information cannot be used for any purpose in this litigation. Mr. Sharp testified that, as a law enforcement officer, he did not want to violate federal laws.

At the September 1, 2009 discovery deposition of Mr. Sharp, consistent with the position the Railroad has taken throughout the discovery depositions in this case,² Norfolk Southern objected to the questions asked of Mr. Sharp regarding information submitted to the Federal Railroad Administration (FRA) on the U.S. DOT-AAR Crossing Inventory Forms, and to any attempt to introduce into evidence at the deposition the U.S. DOT-AAR Crossing Inventory Form dated 1974 for the crossing identified by the DOT-AAR Crossing Number 735613K. (Over the Railroad's objection, Plaintiffs' Counsel sought to introduce the 1974 U.S. DOT-AAR Crossing Inventory Form as Exhibit 9 to the September 1, 2009 Deposition of Thomas Sharp³). Norfolk Southern

² Specifically, Norfolk Southern objected to questioning at the depositions of Mr. Jeff Sliger and Mr. James R. Stump on the grounds that the information sought regarding U.S. DOT-AAR Crossing Inventory Forms were not a proper subject of discovery under 23 U.S.C. § 409. See Deposition of Jeff Sliger, pp. 23-25; 81-82 (pertinent portions attached as Exhibit A); Deposition of James R. Stump, pp. 129-35, 145-46, 151-52 (pertinent portions attached as Exhibit B).

³ Plaintiffs' Counsel retained Court Reporter Sheila Martin to report and transcribe the September 1, 2009 deposition of Mr. Tom Sharp. Plaintiffs' Counsel began Mr. Sharp's cross-examination at approximately 10:20 a.m. on September 1, 2009 and the examination of Mr. Sharp continued until approximately 7:20 p.m. that same day. The Railroad has ordered a copy of the transcript of Mr. Sharp's deposition from Ms. Martin and has made arrangements to compensate the court reporter for a copy of the deposition transcript as soon as the reporter has had the opportunity to complete the transcription. Counsel for

Railway Company requested on the record that the U.S. DOT-AAR Crossing Inventory Form be stricken from the deposition and that the U.S. DOT-AAR crossing inventory form be placed under seal until the court has ruled and applied the provisions of 23 U.S.C. § 409.

ARGUMENT

The Plaintiffs, in discovery depositions, have sought to require Norfolk Southern Railway Company's witnesses to testify regarding information, data, and documents that are privileged and protected from discovery and admission into evidence by federal law.

A. The text and purpose of Section 409:

23 U.S.C. § 409 states as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

As stated by the first court to interpret the purpose of § 409, Congress enacted § 409 for the purpose of "foster[ing] the free flow of safety related information between the railroad industry and its regulatory bodies by precluding the possibility that such information

NSRC will furnish a copy of the transcript of Mr. Sharp's September 1, 2009 deposition to this court as soon as the transcript has been provided to the Railroad by the court reporter.

would be discoverable and admissible in civil suits.” Bearden v. Southern Ry. Co., No. C.V.88-PT-5-S (N.D. Ala. July 11, 1988) (attached hereto as Exhibit C). In order to encourage the candid evaluation of railway/highway grade crossing safety issues and to further the goal of ameliorating grade crossing hazards, 23 U.S.C. § 409 prohibits the discovery, use, admissibility, or consideration of documents or information compiled or collected and relating to grade crossing safety improvement projects that may be implemented using federal funds:

Courts have inferred that the purpose [of 23 U.S.C. § 409] is to permit those entities involved in the railroad industry to candidly gather and share information which would identify potentially dangerous crossings, to consider how the safety of the crossing could be enhanced, and to establish priorities in view of the work to be done and resources available. The statute fosters this candid exchange by not allowing this information to be used in a court against the railroad industry. Harris[on] v. Burlington Northern R. Co., 7th Cir., 965 F.2d 155 (1992). In other words, Congress recognized that the railroad industry needed encouragement and protection if the industry was going to make an honest survey which would point out dangerous crossings in need of safety enhancement.

Rothermel v. Consolidated Rail Corp., 1998 WL 110010, *4 (Del. Super. Ct. Jan. 21, 1998) (attached hereto as Exhibit D); see also Rodenbeck v. Norfolk and Western Ry. Co., 982 F. Supp. 620, 624 (N.D. Ind. 1997) (noting that the basis for § 409 is to “facilitate candor in administrative evaluations of highway safety hazards”).

B. The railroad grade crossing at Norfolk Southern MP 319.7W is a “railway-highway crossing” within the scope of Title 23 Section 409

23 U.S.C. § 409 is applicable to “reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety

enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings” pursuant to certain federal statutes. The information sought here involves the latter of these categories, that of “railway-highway crossings.” 23 U.S.C. § 101(a)(11)(A) defines “highway” for the purposes of the statute as including “a road, street, and parkway.” The regulations further define a highway-rail grade crossing as “a location where a public highway, road, street, or private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks at grade.” 49 C.F.R. § 234.5(a). According to the Department of Transportation (DOT) instructions for the completion of crossing inventories, even a “pedestrian walkway” is a grade crossing that should be assigned a U.S. DOT crossing number and for which a U.S. DOT-AAR Crossing Inventory Form should be submitted. “U.S. DOT National Highway-Rail Crossing Inventory Policy, Procedures and Instructions For States and Railroads,” published by FRA Office of Safety, August 2007 (“2007 Manual”), p. 13 (Recording Instructions) (pertinent portions attached hereto as Exhibit E).

The Seventh Circuit Court of Appeals addressed the scope of the term “highway” under § 409 in Harrison v. Burlington Northern R. Co., 965 F.2d 155 (7th Cir. 1992), where the application of § 409 was challenged on grounds that the grade crossing at issue was at a road that could not be a candidate for federally funded improvements, because it was not part of the federal-aid highway system:

[T]he appellant fails to recognize that even though Harmony Road is not part of a federal-aid system, the Harmony Road crossing may nonetheless qualify for federal aid for the purposes of safety enhancement. Harmony Road is a “highway” according to 23 U.S.C. 101(a), which defines “highways” as including “roads, streets, and parkways....” Harmony Road likewise qualifies as a “public road”: “the term ‘public road’ means any road or street under the

jurisdiction of and maintained by a public authority and open to public travel." ... Since Harmony Road qualifies as a "highway" under 23 U.S.C. 101(a), it seems evident that safety improvements to the Harmony Road crossing would qualify for federal funding under 23 U.S.C. § 130.

Id. at 159; see also Mackie v. Grand Trunk Western R. Co., 544 N.W. 2d 709, 712 (Mich. Ct. App. 1996) ("Although Millett Highway is not part of any federal-aid system, the Millett Highway crossing may nonetheless qualify for federal aid for the purpose of safety enhancement.").⁴

The crossing where the collision occurred is a private railroad grade crossing. See August 29, 2008 Affidavit of Shelby County Road Supervisor Carl Henry (attached hereto as Exhibit F) and June 3, 2009 Deposition of Shelby County Road Supervisor Carl Henry (transcript without exhibits attached hereto as Exhibit G). However, it is clear that a railroad grade crossing need not even be a public road to fall within the ambit of the statute. The case of Southern Pacific Transp. Co. v. Builders Transp., Inc., 1993 WL 185620 (E.D. La. 1993), addressed this precise issue. In Southern Pacific, the court held that § 409 was applicable to a private railroad grade crossing on the grounds that § 130 (a) and (d) "establish that federal funding is available for the improvement of railroad grade crossings on all 'highways,' not just 'public roads' or 'Federal-aid highways.'" See id. at **13-14 (attached hereto as Exhibit H). In so holding, the court

⁴ Moreover, it is not necessary that proposed safety enhancement projects actually be federally funded or completed. If a project is one that could conceivably be achieved with the participation of federal monies, the protection of § 409 is triggered. See, e.g., Rodenbeck, 982 F. Supp. at 623 ("the Seventh Circuit [has] held that § 409 extends to any projects that could have conceivably been financed by federal funds") (citing Harrison v. Burlington Northern R.R. Co., 965 F.2d 155, 160 (7th Cir. 1992)). For example, the court in Rodenbeck held that § 409 applied to correspondence between a railroad official and a county official concerning the possible installation of STOP signs at several grade crossings in the county, even though the county rejected the idea and the signs weren't installed. The court stressed that "the language of § 409 is not limited in any way to only approved or completed plans; to hold otherwise would chill the candor that is expected in administrative evaluations of highway safety standards—a recognized danger that § 409 was designed to cure." Rodenbeck, 982 F. Supp. at 624.

noted that the statute makes no distinction between public and private roads. See id. In the words of the Southern Pacific court, this crossing “is clearly a ‘highway’” within the meaning of § 409, and “reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning [its] safety enhancement” at this crossing are not admissible or discoverable in this litigation. Id. at *14, 23 U.S.C. § 409.

C. The information sought by Plaintiffs was “compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings, pursuant to Section 130,” and is therefore within the scope of Title 23 Section 409.

Counsel for Plaintiffs questioned Mr. Sharp regarding the information contained in the U.S. DOT-AAR Crossing Inventory Form for milepost 319.7W as well as information provided to the FRA or the Department of Transportation concerning other railroad grade crossings and also sought to introduce a specific form into evidence regarding the crossing at Norfolk Southern milepost 319.7W where the collision which is the subject of this litigation occurred. This information is inadmissible and non-discoverable by virtue of 23 U.S.C. § 409.

Moreover, to the extent that the Plaintiffs propounded questions seeking information pertaining to other railroad grade crossings and/or information which is not relevant to the crossing at MP 319.7W, they have no materiality or relevance to this lawsuit, and should not be permitted even apart from any § 409 considerations.

U.S. DOT-AAR Crossing Inventory forms are an integral part of the statutory scheme established by 23 U.S.C. § 130. 23 U.S.C. § 130 provides a federal funding mechanism for highway safety projects, one that deals exclusively with "projects for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a) (emphasis

supplied). To facilitate the planning of grade crossing safety projects, and the efficient use of finite federal funds for grade crossing improvements, and as a prerequisite for receiving federal funds, § 130 requires the States to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d).

The National Highway-Rail Crossing Inventory, under the FRA, is the repository of this required information, some of which is provided by the railroads. The overall goal of the National Highway-Rail Crossing Inventory Program, which was established pursuant to the Federal-Aid Highway Act of 1973 (originally Section 203, now Section 130), is to "provide information to Federal, State, and local governments as well as the railroad industry for the improvement of safety at highway-rail crossings." "Highway-Rail Crossing Inventory Instructions and Procedures Manual," December 1996, published by FRA, Office of Safety ("1996 Manual"), section 1.2, p. 1-1 (pertinent portions attached hereto as Exhibit I).⁵ According to the FRA, a primary purpose of the National Inventory is to "provide for the existence of a uniform inventory data base which can be merged with accident files and used to analyze information for planning and implementation of crossing improvement programs by public and private agencies responsible for highway-rail crossing safety" (1996 Manual, section 1.2, p. 1-1) — which is the purpose of 23 U.S.C. § 130. See, e.g., 23 U.S.C. § 130(a) (referencing the use of federal funds for "projects for the elimination of hazards of railway-highway crossings").

As described in the "Highway-Rail Crossing Inventory Instructions and Procedures Manual," December 1996, published by FRA, Office of Safety ("1996

⁵ The 1996 Manual was in effect at the time of the September, 2006, accident, and is still in effect today.

Manual”), the various responsibilities of the states and the railroads were established at the inception of the program as follows:

The railroad companies . . . were assigned the responsibility for making a site-specific inventory of each highway-rail crossing and for installing a unique identifying number at each location. The railroads were also identified as being responsible for periodic update of certain inventory information and maintenance of the crossing number.

The State highway departments assisted in the project by providing site-specific highway location and use data. State public utility commissions and other State and local governmental agencies also participated in the project. The responsibility for the updating of certain highway information data items was determined to be through the efforts of these agencies.

1996 Manual, section 1.3, p. 1-3. The information gathered by these governmental entities and railroads was, and is, captured on the U.S. DOT -AAR Crossing Inventory Form. 1996 Manual, figure 1-1, p. 1-12 (exemplar of form).

Numerous courts have held that information of this type, and specifically the U.S. DOT-AAR Crossing Inventory Form, is within the scope of § 409. In Gleason v. Soo Line R. Co., 1999 WL 33656833, (N.D. Iowa 1999), for example, the plaintiff sought to introduce an expert’s opinion based upon the “U.S. D.O.T. Inventory Crossing Forms.” In concluding that the expert’s opinion was inadmissible, the court held that the Crossing Inventory Forms were “precisely the type of federally required record-keeping deemed inadmissible by § 409.” Gleason v. Soo Line R. Co., id, at **5-6; see also Vega v. State, 804 N.Y.S.2d 229, 231 (N.Y. Ct. Of Claims 2005) (excluding “evidence concerning the DOT internal classification of the Route 302/Route 17M intersection as a ‘dangerous intersection’”); Palacios v. Louisiana & Delta R.R., 740 So. 2d 95, 98-102 (La. 1999) (excluding inventory information collected about a specific location pursuant

to federal statute); Sawyer v. Ill. Cent. Gulf R.R., 606 So. 2d 1069, 1072-74 (Miss. 1992) (§ 409 precludes DOT letter recommending flashers, crossing hazard rank inventory, and testimony based thereon); Mackie v. Grand Trunk Western RR Co., 544 N.W.2d 709, 711-13 (Mich. App. 1996) (admission of Grade Crossing Report prepared by state was reversible error, as report “clearly falls within the realm of documents protected by § 409”).

The U.S. DOT-AAR Crossing Inventory Forms are, pursuant to 23 U.S.C. § 130(d), "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of. . . railway-highway crossings." The forms compile and collect information regarding the planning and implementation of grade crossing closure, signalization and other projects eligible for federal funding. 23 U.S.C. § 130(d). This information therefore falls squarely within 23 U.S.C. § 409's coverage, and is, by virtue of that statute, not discoverable or admissible. Testimony referencing the content of these forms, or the data contained within them, is likewise covered by § 409, and is equally protected from discovery or admission into evidence. See, e.g., Harrison v. Burlington Northern R. Co., 965 F.2d 155, 160 (7th Cir. 1992) (“We agree with the trial judge that allowing the witnesses to testify as to the content of the letter and report would have circumvented the purposes of [§ 409]”); Powers v. CSX Transp., Inc., 177 F. Supp. 2d 1276, 1279-80 (S.D. Ala. 2001) (“It is well settled that a plaintiff may not circumvent Section 409 by asking a witness to testify to matters the witness learned from documents protected by Section 409”) (citing Bowman v. Norfolk Southern Railway Co., 1995 WL 550079 at *6 (4th Cir. 1995); Harrison v. Burlington Northern Railroad Co., 965 F.2d 155, 160 (7th Cir. 1992); Robertson v. Union

Pacific Railroad, 954 F.2d at 1435; and Shots v. CSX Transportation, Inc., 887 F. Supp. 204, 206 (S.D. Ind. 1995)).

Moreover, the purpose and rationale of § 409, and the concomitant public interest in increasing safety at highway/railway grade crossings, would be well-served by granting Norfolk Southern Railway Company's Motion for Protective Order to prohibit Plaintiffs from pursuing discovery regarding these U.S. DOT-AAR Crossing Inventory forms, or from introducing them into evidence in this lawsuit. If railroads know that data they provide to the federal government in pursuit of laudable safety goals will be widespread in the plaintiffs' bar, and aggressively used in grade crossing litigation against them, the process of candid evaluation of grade crossing safety practices will be hindered. See Rodenbeck, 982 F. Supp. at 624 ("If a railroad knows that its candid efforts of persuasion directed to a local government that possesses discretionary authority may ultimately be used against it, the railroad will be far less forthcoming in offering any 'data' by which that discretion can be exercised, and indeed may choose not to offer safety suggestions at all.").

Counsel for Norfolk Southern Railway Company certifies by affixing her signature hereto that, pursuant to the Local Rules for the United States District Courts for the Eastern and Western Districts of Kentucky, the Railroad's counsel has made a good faith effort to resolve these issues with Counsel for the Plaintiffs prior to filing this Motion for Protective Order and seeking the assistance of this court in applying the provisions of 23 U.S.C. §409. Counsel for the Railroad states that the actions of Plaintiffs' counsel during the course of their cross-examination of Norfolk Southern officers Mr. James

Stump, Mr. Jeff Sliger and Mr. Thomas Sharp support the Railroad's position that the court's assistance is needed to interpret and apply the provisions of 23 U.S.C. § 409.

Accordingly, Norfolk Southern Railway Company's Motion for Protective Order should be granted and the provisions of 23 U.S.C. § 409 should be applied as they were intended by the U.S. Congress.

CONCLUSION

For the foregoing reasons, the Railroad respectfully requests that this Court grant Norfolk Southern Railway Company's Motion for Protective Order precluding the Plaintiffs and the Plaintiffs counsel from questioning any witness concerning the contents, data, or information contained in any U.S. DOT – AAR Crossing Inventory Forms for US DOT - AAR Grade Crossing 7356136K at Norfolk Southern milepost 319.7W as well as the contents, data, or information contained in any U.S. DOT – AAR Grade Crossing Inventory for any other railroad grade crossings and prohibiting the Plaintiffs from seeking to introduce any U.S. DOT- AAR Crossing Inventory Forms or the data or information contained therein which is subject to the provisions of 23 U.S.C. § 409 into evidence, as the requested information is privileged and protected from discovery or use at trial by federal statutory law.

The certification of the Railroad's trial Counsel Pursuant to Local Rule 37.1 of the United States District Courts for the Eastern and Western Districts of Kentucky and an appropriate order granting Norfolk Southern Railway Company's Motion for Protective Order is attached for this Court's consideration.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of Norfolk Southern Railway Company's Motion for a Protective Order Pursuant to the Provisions of 23 U.S.C. § 409 and the Railroad's Memorandum of Law in Support, and the exhibits thereto along with the Certification of Counsel were served electronically on the following Counsel for Plaintiffs and Counsel for the Intervening Plaintiffs, this 9th day of September, 2009:

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