

SUPREME COURT OF LOUISIANA

*No. 94-C-2728 and 94-C-2743*

KATHLEEN ARCHON ET AL

Versus

UNION PACIFIC RAILROAD ET AL

Consolidated with

MELTON TRUCK LINES

Versus

MISSOURI PACIFIC RAILROAD

LEMMON, J., Concurring

The Rick case and the present case are both negligence cases. Although I was not on the Rick panel under the temporary eight-member system of this court's composition, I tend to disagree with the finding of negligence in the Rick decision.

In Rick the negligence of the DOTD was in failing to select the particular crossing for earlier upgrade "because the DOTD negligently assigned it [the crossing] a low hazard index."<sup>1</sup> 630 So. 2d at 1276. The theory of liability was that if DOTD had assigned the correct hazard index, the crossing would have been selected for improvement many years earlier, and Rick's death would have been prevented with earlier improvement of the crossing. As I tend to view the Rick decision, DOTD's duty to improve the particular crossing within a reasonable time arose when the particular crossing was selected for improvement by the means of a process which included

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<sup>1</sup>The erroneous hazard index, which caused other crossings with a high index to be improved first, resulted from DOTD's error in using non-current and inappropriate data for its selection process.

numerous factors for consideration.<sup>2</sup>

In the present case, the particular crossing was selected for improvement in May 1983, as shown by the letter of Michael Morgan, DOTD's agreement engineer, which stated that "[a] new rubber pad grade crossing with subbase treatment and flashing lights at the Van Ply location will be required." (emphasis added). According to Morgan's testimony, once the DOTD selected a particular crossing for improvement and the on-site inspection was conducted,<sup>3</sup> the federal government, never refused to approve the financing of the improvement and the railroad never refused to perform the work on the crossing that was paid through governmental funds.

The negligence of DOTD in the present case, after selecting the particular site for grade improvement and installation of flashing lights and knowing that the federal government would approve the financing and the railroad would perform the construction, was in failing to include the installation of flashing lights in the project notice issued on July 23, 1983. The project notice, resulting from Morgan's May 1983 letter and from the on-site inspection of June, 1983, only called for the improvement of the grade crossing. Morgan, who had complete authority at DOTD to make these decisions, explained that the installation of flashing lights simply "fell through the cracks."

In my view, once DOTD selected a particular crossing for improvement, it had the duty to issue the project notice that included the recommendations indicated the selection process. Here, DOTD was clearly negligent in failing to include in the project notice the very recommendation that was one of the two bases for selection of this

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<sup>2</sup>The Rick decision also held DOTD negligent for not monitoring the railroad's response to DOTD's selection of the crossing for improvement. This factor is not involved in the present case.

<sup>3</sup>The on-site inspection was apparently conducted on June 1, 1983, the date scheduled in Morgan's letter, because DOTD on July 23, 1983 issued a project notice pursuant to the on-site inspection.

particular crossing for improvement. The trial court found as a fact that failure to improve the crossing was a cause-in-fact of this accident, and the fatal injury to Archon was within the scope of the duty of DOTD to include installation of flashing lights in the project notice for the Van Ply crossing.