

July 12, 2004

Mike,

Below is an article from the New York Times. This article produces significant information for the WUTC to consider in TR-040151. Please add this to that docket.

Mark K. Ricci, Ph.D., Chairman  
WSLB-BLET

In Deaths at Rail Crossings, Missing Evidence and Silence

July 11, 2004  
By WALT BOGDANICH

!Jenny Nordberg contributed reporting for this article. Tom Torok contributed data analysis and reporting. Eric Koli contributed reporting from San Francisco.

At 5:45 p.m., with the autumn sun dipping toward the horizon, Blas Lopez, a father of four young children, drove his truck loaded with potatoes bound for market onto a railroad crossing in south-central Washington State. In an instant, a 4,700-ton Union Pacific train rammed Mr. Lopez's truck with the force of an explosion, ripping apart his body.

Union Pacific responded as most railroads do after fatal crossing accidents: It blamed the victim, Mr. Lopez, not itself.

What Union Pacific did not say was that the warning signal at the crossing contained parts that the manufacturer had said, 12 years earlier, should be replaced "as soon as possible" because they might be defective. After a witness to the accident said the signal appeared to have malfunctioned, a lawyer for Mr. Lopez's family arranged with Union Pacific in October 2001 to inspect the signal.

But a railroad manager beat the lawyer there by several hours. In the predawn darkness, the manager secretly swapped the suspect parts for newer ones. The cover-up was not discovered until weeks later, when the Lopezes' lawyer noticed that the serial numbers on the parts did not match the railroad's records.

Union Pacific's conduct is a stark example of how some railroads, even as they blame motorists, repeatedly sidestep their own responsibility in grade-crossing fatalities. Their actions range from destroying, mishandling or simply losing evidence to not reporting the crashes properly in the first place, a seven-month investigation by The New York Times has found.

Union Pacific stands out. In one recent 18-month period, seven federal and state courts imposed sanctions on Union Pacific, the nation's biggest railroad, for destroying or failing to preserve evidence in crossing accidents, and an eighth court ordered a case retried. One sanction has since

been overturned on appeal.

Over the last eight years, railroads have also broken federal rules by failing to promptly report hundreds of fatal accidents, 71 of them last year, denying the federal authorities the chance to investigate when evidence is fresh and still available, according to a computer analysis of federal data by The Times. Enforcement of these rules is so lax that federal officials said they were not even aware of the reporting problems.

In fact, one Union Pacific official said that federal regulators told the railroad in late 1999 "to stop calling" after fatal accidents. Federal officials denied doing so, but the following year, The Times's analysis shows the number of accidents not reported promptly by Union Pacific quadrupled.

Trains, like airplanes, have black-box event recorders, but records show that railroads have a spotty history of keeping them in working order and have sometimes lost or erased their information after crashes. The information from recorders can be so inconclusive that after one 17-year-old girl was killed in Tennessee, the railroad produced five different versions of the accident from the same black box.

On average, one person a day dies at a crossing in the United States. Since 2000, more than twice as many people have been killed at grade crossings as have died in commercial plane crashes. But these deaths draw little national attention because they usually come one or two at a time, often where tracks slice through small towns and rural expanses across the country.

"It's a systemic failure," said James E. Hall, a former chairman of the National Transportation Safety Board. "It's been something that has just not grabbed the attention, unfortunately, of the public."

It has barely grabbed the attention of the government. Only federal authorities, not the local police, have the authority to properly investigate a railroad's role in an accident. But of the nearly 3,000 rail crossing accidents last year, federal authorities fully investigated just four.

Families of victims searching for the cause of a crash have to ask the railroads themselves or file lawsuits. But as judges who have sanctioned Union Pacific have found, getting a straight answer can be difficult.

Kathryn Blackwell, a spokeswoman for Union Pacific, said her company's policy was to keep records as long as federal law requires. "Union Pacific did not purposefully destroy evidence to keep it from the jury," Ms. Blackwell said. "Union Pacific would not destroy documents in anticipation of litigation."

Yet Union Pacific was found to have knowingly destroyed relevant evidence after a collision in Arkansas that left Frank Stevenson brain damaged and killed his wife. Mr. Stevenson has since lost his job, his house and, he said, his stepchildren, who blame him for their mother's death. "I have no family anymore," he said.

Mr. Stevenson's injuries left him without any memory of the accident. But when he filed a lawsuit, Union Pacific had purged much of its own

institutional memory of the accident, court records show. Track inspection records that might have shown the crossing was hazardous were discarded by the railroad after Mr. Stevenson asked for them. Tapes of the train's crew talking to dispatchers before the accident were not preserved. The train's black box was not much help either: it malfunctioned and did not record the horn.

"Documents have been routinely destroyed despite defendant's knowledge that they are relevant to this lawsuit," Judge William R. Wilson of Federal District Court wrote in 2001, referring to Union Pacific. And, Judge Wilson added: "This does not square with the discovery rules nor with `traditional notions of fair play and justice.' "

#### Between The Cracks

Harvey Levine remembers the day in the mid-1990s when, as a vice president of the Association of American Railroads, he suggested that railroads, not just drivers, might share responsibility for grade-crossing collisions.

The reaction was swift.

"Another vice president said, `Why don't you shut up and sit down,' " recalled Dr. Levine, an economist and a former railroad employee. "I knew the next sentence out of my mouth was going to cost me my job."

With two children in college, Dr. Levine said he did not argue the point.

Railroads and the federal government have spent millions of dollars educating the public about the motorist's responsibility for avoiding trains. "Always Expect A Train!" has become the slogan of the railroads as well as their principal regulator, the Federal Railroad Administration.

"Motorists can stop quickly, trains cannot," said Ms. Blackwell, the Union Pacific spokeswoman.

Grade-crossing deaths have declined by more than 50 percent since 1990 and both the industry and regulators say the educational campaign has contributed to the decline. But Dr. Levine, who has testified for accident victims, said a bigger reason was that tens of thousands of crossings have been closed and the government has paid to install gates or lights at many other crossings. Still, most of the 250,000 crossings have no warning lights or gates, and grade-crossing deaths are up more than 10 percent for the first four months of this year.

Many accidents are indeed caused by careless or reckless driving. A federal study released late last month blames "risky driver behavior or poor judgment" for 87 percent of fatal crossing accidents over the last decade. The audit, though, was based mostly on accident reports from the railroads themselves. In fact, as Ms. Blackwell of Union Pacific acknowledges, railroads are sometimes at fault, too.

Overgrown vegetation can block a driver's view. Gates or lights can fail. An engineer may blow a horn too late. "In order to avoid that train, you have to be able to see the train and to hear the train," said John E. Parker, a South

Carolina lawyer who represents crossing accident victims.

Yet, in most cases, no one thoroughly investigates the railroads' conduct.

The industry has worked to keep the power to investigate grade-crossing accidents centered in Washington, where it has long been an influential force. Vice President Dick Cheney served on Union Pacific's board and the Treasury Secretary, John W. Snow, is a former chief executive of CSX.

But federal authorities rarely use those investigative powers in crossing accidents.

"We typically will only look at those that have extraordinary or unusual circumstances," said Warren Flatau, a railroad administration spokesman. That usually means three or more deaths in a single accident. More federal attention is paid to derailments and train-on-train collisions. And although states can punish railroads for unsafe crossings, they usually do not.

Families of victims have found it hard to get the government to do more. "You are fighting a war with wounded soldiers here," said Vicky Moore, whose 16-year-old son, Ryan, was killed in 1995 at one rural Ohio crossing where at least six others have died.

When an accident happens it is usually up to the local police alone to investigate, but their power over railroads is so limited that they lack the authority, for example, to seize an event recorder or to order a train's crew to be tested for drugs or alcohol.

"We are not given information we need to thoroughly investigate," said Tom Mockbee, chief of police in Waldo, Ark., who has investigated rail crossing accidents. "Their attitude is if I don't get it, they don't have to defend it."

#### The Barber Case

It was hardly a secret that the railroad crossing just west of Palestine, Ark., was dangerous. Like many of Union Pacific's crossings in the area, this one, known as Crossing "123," had no lights or gates to warn motorists.

Overgrown vegetation made the crossing especially hazardous, said Willetta Carroll, the mayor of Palestine, population 700.

"You had to be on the track before you could see the train," Ms. Carroll said. The mayor, whose sister-in-law died at a rail crossing in Palestine, said she complained many times to Union Pacific without success.

So did Carl Jones, a garbage truck driver, who said he had contacted the railroad 7 to 10 times about Crossing 123, according to court records. Once, Mr. Jones said, he stopped a Union Pacific worker on the road to tell him the crossing was life-threatening.

Union Pacific employees noticed the danger, too. Willie Savage, who supervised track workers, thought the crossing was so dangerous that he had flagmen stop traffic before allowing his men to cross the road in their rail

cars, court records show. And Donald DePriest said that when he worked as an engineer he told the railroad that the crossing endangered the public and rail employees alike.

The warnings became reality at 9:15 a.m. on Jan. 19, 1998, when a garbage truck driven by Charles Rolfe pulled up to "123." "We started easing up to the crossing until we practically got on the track itself - you couldn't see anything," said Chris Barber, Mr. Rolfe's co-worker who was in the truck.

Suddenly, Mr. Barber turned his head and saw a light and a giant yellow engine. "I put my head down and prayed," he recalled in an interview. The impact killed Mr. Rolfe. Mr. Barber spent the next two months in a hospital and rehabilitation center, recovering from a skull fracture, broken neck, collapsed lung and various other broken bones. He still has trouble walking and is unable to work.

Federal authorities did not investigate the crash and Mr. Barber filed a lawsuit against Union Pacific, saying the railroad failed to keep the crossing safe, to properly sound the train's horn and to operate the train at a safe speed. Union Pacific denied each of those accusations in court.

In preparing for the trial in 2002, Mr. Barber's lawyers found several people who said they were nearly killed at the crossing. The lawyers also wanted voice tapes of the railroad's dispatchers talking to the crew, track inspection records and any "slow orders" directing trains to reduce their speed near the crossing because of hazardous conditions.

Union Pacific, however, said the voice tapes had been taped over and the track reports had been discarded, some after Mr. Barber asked for them. The railroad also said it could find no "slow orders" for the crossing. Even so, Mr. Barber's lawyers sent a consultant, Alan J. Blackwell, a former Union Pacific manager, to Union Pacific headquarters in Omaha to search for slow orders. Mr. Blackwell eventually found some for the track around Crossing 123, despite the railroad's claims that they did not exist.

Union Pacific's conduct earned it a sanction from the presiding judge, who told the jury that it could - but was not required to - conclude that the missing evidence was not favorable to the railroad.

At the trial, Robert L. Pottroff, a lawyer representing Mr. Barber, stacked empty boxes in the courtroom that he said represented missing evidence. "By the time we got done there were a dozen empty boxes," said Mr. Pottroff, a Kansas lawyer who has helped to organize a legal assault on how Union Pacific handles evidence.

The jury awarded Mr. Barber \$5.1 million in compensatory damages and \$25 million in punitive damages.

Union Pacific appealed, but the Arkansas Supreme Court upheld the verdict earlier this year in a blistering opinion that said Union Pacific behaved with a "high degree of reprehensibility."

"This case reflects the development of a corporate policy at Union Pacific that put company profits before public safety," the court wrote. "Union

Pacific intentionally destroyed track records and voice tapes. Furthermore, there is evidence from which a jury would reasonably conclude that Union Pacific attempted to conceal 'slow orders' issued for this portion of track."

Union Pacific has asked the United States Supreme Court to review the case. Ms. Blackwell, the company spokeswoman (who is not related to Mr. Blackwell), said some documents were mistakenly destroyed after they were requested in court because of human error. "It's not something that we are proud of," she said in an interview. "But unfortunately, people make mistakes."

Union Pacific has also put in place a more aggressive, system-wide program to control vegetation at rail crossings, according to the company.

Meanwhile, Chris Barber's wife, Claudette, wondered if the railroad felt any remorse. Mr. Barber doubts it. "They thought they could get away with it as they always had in the past," he said.

#### A Change in Policy

Union Pacific's attitude toward investigating grade-crossing accidents was once very different, three former managers with the railroad said.

Those managers said in interviews that from the mid-1980's until the early 1990's, the company was transformed by a new chief executive, Michael H. Walsh, who wanted a more aggressive, open search for the causes of accidents.

"It was a whole new concept," said Mr. Blackwell, a former manager of track maintenance for Union Pacific. "His theory was basically completely opposite from the law department's theory where you do not admit anything because there is liability."

This new philosophy, said Mr. Blackwell, who left the company in 1995, was embodied in a company manual, "Accident Investigation Guidelines." "The investigator must recognize that in some situations management may have failed to comply with a duty or responsibility, which may result in clear liability on the part of the company," the manual states.

Under Mr. Walsh, Mr. Blackwell said, "all documents, everything was to be preserved not just what was good for the railroad."

But the corporation's attitude began to change after Mr. Walsh, who has since died, left the company in August 1991, said the former managers, who have testified on behalf of accident victims. Mr. Blackwell said the company issued a new manual that focused less on rooting out the causes of accidents than on protecting the company.

Claims investigators were instructed not to share their findings with other departments, unless permission was granted. The revised manual also noted that "no useful purpose is served by extensively documenting evidence" when company liability is obvious. Instead, the manual said, the company should try to settle the claim quickly and fairly.

The manual advised care in deciding "the degree and extent to which obviously harmful and possibly inflammatory evidence is documented." For example, the

company said "gory" pictures might inflame the jury. "Statements documenting hazardous conditions in great detail serve only the same purpose when such conditions are known to have existed," the manual stated.

Company investigators were further cautioned about taking pictures of any obstructions that might have blocked a motorist's view. "A panoramic view taken at one point might show a possible view obstruction, while an unobstructed view may be demonstrated by moving slightly closer to or away from the crossing," the manual stated.

It also recommended that investigators fully document evidence that could implicate the motorist, including photographing the vehicle's speedometer, and the controls for the radio, air conditioner, heater and stereo - all possible signs that a driver was distracted or might not have heard the train horn.

The railroad also did not want certain interviews and conversations taped, including those with train crews. Mr. Blackwell, the former manager, said he was told by a company official that when investigating an accident he should use private phone lines rather than communicating by radios, which are often recorded.

Ms. Blackwell, the Union Pacific spokeswoman, said the company's procedures for investigating an accident scene were not intended to hide anything. "There's no desire to alter what the motorist would see, only a desire to show what he would have seen," she said. She also said the instructions should be viewed in the context of the manual's overall message, which is to conduct a full and fair investigation, including collecting evidence "even though it might be detrimental to the company's position."

Ms. Blackwell said the manual was taken out of service early last year.

Michael Easley, of Arkansas, one of the lawyers representing Mr. Stevenson and Mr. Barber, said the investigation manual reveals Union Pacific's agenda. "This shows an investigation that's not looking for the truth but for an advantage," Mr. Easley said.

Sanctions Pile Up

Other major railroads have been accused of seeking a similar advantage.

After Debbie and Eddie Wood lost their daughter at a crossing in Cleveland, Mo., in 1998, their lawyer sent a letter to Kansas City Southern railroad that ended with the plea: "Please do not destroy any evidence." But the railroad not only destroyed dispatch tapes and data from the event recorder, it also "lied" about its brush-cutting records, according to a ruling by Judge Marco A. Roldan of Circuit Court in Jackson County, Missouri, who sanctioned the railroad last year.

A spokesman for the railroad declined to comment because another lawsuit related to the accident is pending.

When Kenneth D. Breinig's 16-year-old son was killed at a crossing near their rural Nebraska home in 1997, Mr. Breinig accused the railroad that owned the

track, the Burlington Northern and Santa Fe Railway Company, of clearing the overgrown vegetation only after the accident occurred.

Patrick Hiatte, a spokesman for Burlington Northern, said his company had solid evidence that the railroad cleared the vegetation several hours before the accident. But Mr. Breinig's lawyer found witnesses who said it was done afterward, and the railroad settled a lawsuit filed by the family. "They tried to say that it was done the day before the accident, but we had too many witnesses," said Mr. Breinig, who was a minister before his son's death left him unable to continue.

"It was a cover-up," he said.

Still, Union Pacific's record of seven court sanctions between July 2001 and January 2003 for destroying or failing to preserve evidence - the legal term is spoliation - stands out. "There is hardly an excuse for one incident of spoliation, and I can't imagine an excuse for seven," said Steven Lubet, a law professor who teaches legal ethics at the Northwestern University School of Law. "It is extremely unusual."

Union Pacific lawyers have argued in court that documents and tapes were discarded as part of the company's "document retention" policy, which states that voice tapes of crew conversations be recycled after 90 days and track inspection reports be discarded after a year, which is how long federal law requires that they be kept.

"Nothing wrong with housekeeping, but once there is knowledge of the possibility of litigation, that trumps housekeeping," said Mr. Lubet. "Document retention policy is a euphemism for document destruction."

The sanctioning judges seemed to agree.

In July 2001, for example, Judge Wilson sanctioned Union Pacific in the Frank Stevenson case for destroying records, but noted that the railroad kept dispatch tapes when they aided the company's defense. "Can one not reasonably infer that when U.P. believes the voice tape is favorable, it preserves it?" Judge Wilson wrote.

One week later, a state appellate court in Louisiana said that given the railroad's failure to produce documents and tapes "a trier of fact could easily conclude that Union Pacific negligently or intentionally failed to preserve this evidence." Yet, the court noted, "the documents important to Union Pacific's defense seemed to always be available."

Then in January 2002, a Kansas state judge, Robert J. Fleming, concluded that Union Pacific's policy of recording over the voice tape served no purpose "other than to keep the voice tapes out of the hands of the plaintiffs."

In November of that year, Magistrate Judge Jerry Cavaneau of Federal District Court in Arkansas criticized Union Pacific for destroying the dispatch tape and discarding the safety warning sign, which the victim's family contended was faded and difficult to see. Union Pacific, the judge ruled, "knew litigation was likely and knew or should have known that the condition of the warning devices at the intersection could be an issue."



Last month, a federal appeals court overturned one sanction that had been imposed against Union Pacific in Arkansas, concluding that the railroad had not acted in "bad faith" by discarding audio tapes.

Ms. Blackwell of Union Pacific blamed the sanctions mostly on a legal strategy of several lawyers to shift attention from the accidents to the company's record retention policies, which judges had previously found not to be a problem. Even so, Ms. Blackwell said, Union Pacific now realizes the evidence should have been kept. "We've been punished," she said. "So I think we've learned our lesson."

Union Pacific said that last October it had implemented "new procedures to locate and retrieve all reasonably relevant crossing accident documents and preserve them far beyond federal requirements."

In Brinkley, Ark., however, some people still question the railroad's commitment.

On Feb. 11, a Union Pacific train struck a vehicle at a crossing that had no lights or gates, seriously injuring the driver, Joshua Armstrong, who had just dropped off his two children at a baby sitter's house on his way to nursing school. Mr. Armstrong remained in a coma for two months, his relatives said.

Officer Jason Martin of the Brinkley Police Department arrived on the scene minutes after the crash. After helping Mr. Armstrong, whose pickup had been pushed down the track, Officer Martin noticed people wearing Union Pacific uniforms back at the crossing. Only later, Officer Martin said, did he realize that they had cut vegetation around the crossing before he had a chance to assess whether it might have blocked Mr. Armstrong's view of the train.

"I was upset that they did not let us know what they were doing," he said. To document their activity, Officer Martin said he has pictures of the fresh cuts.

"Why didn't they go out there to cut those bushes a week before?" he asked. "That doesn't look good."

The officer also expressed concern about a second Union Pacific train that had been parked on a parallel track near the crossing. Officer Martin said that before he could measure how close the parked train - which could have blocked Mr. Armstrong's view of the oncoming train - was to the crossing, railroad workers backed it farther away from the crossing.

To establish how far that second train moved, Officer Martin said he asked the railroad for data from the engine's event recorder. But five months later he said he has yet to receive it.

Yet another problem arose, Officer Martin said, when he noticed that someone had taken bulbs from the brake lights in Mr. Armstrong's truck after it was towed from the accident scene.

The officer said he did not know what happened to the bulbs. The railroad's accident reconstruction team, he said, denied taking them. But whoever took them, he said, probably knew their value in an investigation. "What the bulbs do is tell if the brakes had been applied or not," Officer Martin said. And that could indicate whether Mr. Armstrong saw the train before it struck him.

Officer Martin said he is certain about one thing: "I won't get them back."

Ms. Blackwell, the Union Pacific spokeswoman, said that because she expects the Armstrong case to result in a lawsuit, she declined to comment except to deny all the accusations made by the Brinkley police.

"We are at the mercy of the railroads," said the Brinkley mayor, Billy Clay. "Their philosophy is, 'Hey, we were there first and you built the town around us.' This is their attitude."

If the Armstrong family does decide to sue Union Pacific, it will have to go forward without one of its witnesses, a young mother, Kelly Turner, who lived near the crossing. Two months after Mr. Armstrong's accident, Ms. Turner was killed in a crash at the same crossing.

#### Accidents Go Unreported

A basic maxim of accident investigations is the sooner evidence is collected, the better.

"Decades of experience in accident investigation have taught F.R.A. that the best information is often available only very early in the investigation, before physical evidence is disturbed and memories cloud," according to railroad administration policy.

For that reason, federal rules require railroads to quickly report by telephone crossing fatalities to the National Response Center, which functions as a national 911 call center. Those reports are forwarded to the railroad administration and National Transportation Safety Board where officials decide whether to dispatch investigators.

For years, the safety board required railroads to report crossing fatalities within six hours, but the deadline was shortened to two hours in 1989 after the board found "numerous instances" where investigators could not get to the scene before the post-accident cleanup had begun.

But the safety board regulation carried no enforcement power, so in May 2003 the railroad administration began requiring that railroads report fatalities immediately.

Despite these federal regulations, railroads repeatedly ignore them, according to a computer analysis by The Times of tens of thousands of federal accident reports compiled by the National Response Center and the railroad administration.

The analysis found that over the last eight years about 750 fatal accidents were not reported to the response center. These accidents were eventually

reported to the railroad administration in monthly filings, but that was after a timely investigation could have been conducted.

Because some victims may have died more than 24 hours after the crash - and would not have to be reported to the response center - the total violations over the eight years cannot be definitely stated. But for accidents in 2003, The Times examined police reports and coroner records to establish a time of death and found 71 fatal accidents, or nearly 25 percent of all fatal crashes that year, that should have been reported.

Of those, the greatest number, 46, involves Union Pacific. Another eight fatal accidents were not reported properly by CSX.

The Times provided its findings to the safety board and the railroad administration. Paul Schlamm, a spokesman for the safety board, said he had referred the cases "for appropriate follow-up," and he added: "We expect railroad operators to comply with this requirement."

But the railroad administration, said its spokesman, Mr. Flatau, "is not required or obligated" to enforce these rules. "Rather, it is a matter subject to nuanced prosecutorial discretion," he said.

Adam Hollingsworth, a CSX spokesman, said, "We have put in place additional procedures to ensure that those notifications are made."

Ms. Blackwell of Union Pacific acknowledged that some accidents were not reported properly, but said that according to two company managers, the Federal Railroad Administration told the railroad in October or November of 1999 not to tell the response center about every crossing fatality. "They both say that the F.R.A. asked us to stop calling the N.R.C.," Ms. Blackwell wrote in an e-mail message. She declined to provide further details.

Steven W. Kulm, a Federal Railroad Administration spokesman, said he was unaware of any formal or informal instructions about not reporting accidents. Nonetheless, figures show that the number of fatalities not reported by Union Pacific to the response center quadrupled in 2000, the year after the railroad said it was contacted by federal regulators.

On Thursday, Ms. Blackwell said that after receiving The Times's analysis "our vice chairman and our president have authorized an internal audit of all of our reporting processes." She added that "based on our obvious failures in these areas you have highlighted, they are checking the whole company." That check has uncovered 10 fatal accidents this year that were not reported to the response center, Ms. Blackwell said.

Even when companies do report fatal accidents to the response center, they often report them late. The Times's analysis found that from 1996 through 2003, more than 800 fatal accidents were reported to the response center later than the two hours allowed by federal regulation.

Prompt notification can be especially important when an accident involves a report of malfunctioning gates or warning lights at a crossing. That was the case after a fatal accident on July 9, 2003 when a Union Pacific train

traveling more than 60 miles per hour rammed a car at a crossing in Mecca, Calif., a tiny town southeast of Los Angeles.

According to a police report, Aniano Arce, 76, was behind the wheel of his Toyota waiting for an approaching train to pass. The crossing gate had lowered automatically. Across the tracks from Mr. Arce, a spice salesman named Esteban Rojas was also waiting to cross.

Suddenly, Mr. Rojas noticed the gate on Mr. Arce's side rise, suggesting that it was safe to proceed. Mr. Rojas said he watched Mr. Arce slowly make his way across the tracks when the train hit Mr. Arce's car, killing him.

"I was shocked," said Mr. Rojas, who told police he was certain that the gate had malfunctioned. "That is why I stuck around, I couldn't believe it," he said. He repeated that account to The Times and said he told the same story to Union Pacific representatives who visited his house.

A railroad official told the police that the gates were checked and found to be working properly, but the police investigator was skeptical. After noting that the base of one of the warning units was cracked and bent, the officer concluded that the crossing gate failed "to operate properly," according to a police report.

Last September The Times asked the railroad administration about the accident that had killed Mr. Arce in July. "I'm not seeing that at the moment," said Mr. Flatau, the agency spokesman. In fact, Union Pacific had not reported the accident to the National Response Center.

Union Pacific reported the fatality to federal authorities in its monthly accident filings, but because the filings are processed through an F.R.A. contractor, they did not reach Washington D.C. for two months, Mr. Flatau said.

Immediate notification might have triggered an investigation, Mr. Flatau said. A state official did eventually inspect the gates and found nothing wrong with them, but that was more than one week after the accident.

Mr. Flatau said the railroad administration "is going to recommend a violation." But one of the agency's top safety officials, Grady C. Cothen, Jr., believes regulators should go easy on Union Pacific. "I don't see any reason to be excessively critical of U.P. in this case, as I understand the facts," Mr. Cothen wrote in an internal e-mail message made available to The Times. "I don't see this as a case where a civil penalty is likely to help."

#### Black Boxes

In 1969, just two years after its inception by Congress, the National Transportation Safety Board began a campaign to require event recorders on all mainline trains, just as it does on airplanes.

That campaign would last a quarter of a century because the railroads and the railroad administration argued that the cost of recorders outweighed their benefit.

Safety board investigators strongly disagreed. "The Safety Board's views are shaped by years of experience in using recorders to help reconstruct and 'solve' aircraft accidents," the agency stated in a 1988 report.

Although many trains had carried black box event recorders to monitor crew behavior, records showed that without federal rules, railroads taped over data, incorrectly recorded information from the recorders, lost data or even lost the recorder itself. Sometimes railroads said they simply forgot to install a recorder. In a few rare cases, railroads were accused of tampering with the recorder or manipulating its results.

The safety board prevailed and starting in 1995 trains that go faster than 30 miles an hour were required to carry event recorders. But in 1999, a safety board report concluded that "missing or erroneous data continue to occur at an alarming rate." That report, presented at a symposium on event recorders, concluded that poor maintenance "may be an industrywide problem" due in part to weak government regulations.

Last year, when a railroad administration inspector visited Norfolk Southern's locomotive shop in Chattanooga, Tenn., he found that event records were not being properly inspected.

On a return trip in August, he found "no action had been taken" to correct the problems. Moreover, a spot check of four locomotives found black-box data from two showing train speeds of 158 miles per hour and 137 miles per hour. Those speeds far exceed the limit for freight trains, indicating the event recorders malfunctioned. A railroad official admitted that the company "had dropped the ball," records show.

Then in February of this year, the federal authorities reported that some Norfolk Southern trains still had problems, but they praised the railroad for improving. Whatever the problems were, "we fixed it," said Frank Brown, a spokesman for Norfolk Southern.

After winning the fight to require event recorder, the safety board pushed to make them crash-worthy. In December 2000, the safety board said it was "very concerned at the lack of progress" by the railroad administration, noting that hundreds of new locomotives were being equipped with recorders that might not survive crashes.

"A lot of the industry, certainly, was not very receptive to having recorders," said Jim Cash, chief of the vehicle recorder division of the safety board. "And so it was kind of a way of delaying the process by dickering over crash-viability standards."

Although rules on making event recorders crash-worthy are expected soon, full implementation could take several years, according to the Safety Board.

Families of victims also criticize regulators for allowing railroads to keep custody of the recorders in all accidents except the few that are investigated by federal officials.

That differs from the airline industry. "United Airlines doesn't download and determine what was said or wasn't said," complained Robert A. Schuetze, a Colorado lawyer who represents crash victims. "But in the railroad industry, they control it."

And railroads are sometimes reluctant to share their data.

A Colorado State Trooper, Brian C. Lyons, testified last year that in an accident reconstruction course taught by Burlington Northern and Santa Fe Railway, he was instructed on the importance of getting the contents of train's black box. Yet, in his first grade-crossing accident investigation, which involved a Burlington Northern train, the officer said the railroad refused to give him a printout of the data for six to eight months. A spokesman for Burlington Northern said the data was turned over sooner than that.

Families of accident victims have had similar problems getting access to a train's event recorder. J. Roberto Oaxaca, a Texas lawyer, said Burlington Northern failed to produce black-box data after he asked for it in two fatal accidents.

In one case, two boys ages 10 and 12, were killed at a rail crossing in 1997 near Canutillo, Texas. Mr. Oaxaco said witnesses did not hear the train's horn. "We asked for the tape and they plain flat said there was no tape in the recorder," he said. "The law required that they have an event recorder, but they said, 'We just messed up and didn't put a tape in it.'" The railroad confirmed that there was no tape, and it won the case.

Mr. Oaxaco criticized the railroad administration for not punishing Burlington Northern. "They should have investigated and should have cited somebody," he said. "You can't say I just didn't have a tape."

#### A Secret Switch

This was to have been Blas Lopez's last year in the potato fields of Washington State. With a steady scrap metal business in McAllen, Texas, Mr. Lopez, 35, had tired of the long drive north during the potato harvest. "He really didn't want to go up there," his wife, Ruth, recalled. But Mr. Lopez's brother convinced him there was money to be made, Ms. Lopez said. So he went.

Mr. Lopez's last day of hauling potatoes began sometime between 4 a.m. and 6 a.m. on Sept. 27, 1997. About 12 to 14 hours later, weighted down with his final load, Mr. Lopez drove his truck up to a rail crossing east of the city of Pasco.

The crossing had only warning lights, no gates, to protect drivers on the busy highway where the speed limit was 60 miles per hour. A private tree farm on one side of the crossing made it difficult to hear and see trains, nearby residents said.

A Union Pacific engineer, Brian K. Baller, said that during his training he was warned that drivers got dangerously close to trains at that crossing, according to court records. Mr. Baller said he had two close calls, which he

reported to the railroad. Once, a police car narrowly avoided a crash by stopping a mere foot or two short of the train.

In addition to the red flashing lights at crossing, there was an advance warning light about 700 feet from the crossing. Both lights were supposed to activate simultaneously at least 20 seconds before a train entered the crossing.

As Mr. Lopez approached the crossing, Helen Gibson was behind him in a truck. Ms. Gibson was familiar with the crossing, having once had a close call with a train there because, she said, the warning lights began flashing too late.

Ms. Gibson testified later that Mr. Lopez had already passed the advance warning light before it began flashing. Another motorist said he saw Mr. Lopez shielding his eyes from the setting sun just before the train hit and killed him.

After Ms. Lopez and her four young children filed a lawsuit against Union Pacific, the railroad took its usual position and blamed Mr. Lopez. The railroad even said in court papers that Mr. Lopez's negligence caused damage to its train and that the Lopez family should pay Union Pacific for "loss of use of its locomotives, rail cars and equipment."

But the Lopez family's lawyer, Nicholas Scarpelli, focused on whether the accident was caused by a "short signal," a warning light that activated too late.

There were, however, problems with his case. The railroad denied the signal malfunctioned and on Oct. 16, 2001, seeking to have the Lopez case dismissed, the railroad presented a sworn affidavit from the regional signal manager, Robert Ryan, stating that the signal been inspected regularly with no problems reported.

Two days later Mr. Scarpelli told Mr. Ryan of his plan to inspect the signal box the next day. "I asked Ryan, 'May we look in the box tomorrow morning?'" and he said, 'Yeah,' " Mr. Scarpelli recalled. When Mr. Scarpelli and his expert inspected the signal box that morning with Mr. Ryan's help, they found nothing unusual.

That might have been the end of the Lopezes's case had Mr. Scarpelli's legal team not noticed more than a month later that the serial numbers on the parts they had inspected did not match those given to them by another representative of the railroad.

In a court proceeding Mr. Ryan explained under oath that he drove to the crossing a few hours before Mr. Scarpelli's inspection to replace potentially defective signal parts. A dozen years earlier, the manufacturer had reported that those parts had malfunctioned in one instance and cautioned that signals with those parts might fail to warn motorists of oncoming trains in time. In other words, they could cause a "short signal."

For that reason the manufacturer had urged that the parts be quickly replaced. Mr. Ryan also admitted that as many as 60 percent of crossings in

his region appeared to have the same suspect parts. "It was a widespread problem," he said in a deposition.

Mr. Scarpelli quickly asked the court for sanctions against Union Pacific and got them in February 2002. "His actions were not that of a rogue underling," fumed Judge John C. Coughenour of Federal District Court. "His acts were egregious. Severe sanctions are appropriate."

As punishment, Judge Coughenour ruled that at trial Union Pacific could not dispute that "this defect caused the crossing signals to fail."

The railroad settled the Lopez lawsuit soon after.

Ms. Blackwell said Mr. Ryan "was a good employee who made a very bad decision and he was fired." Afterward, the company instituted a new centralized database to ensure that suspect signal parts are removed quickly, she said.

But several weeks ago, after The Times asked about potentially defective parts that had not been removed from a signal at an Arkansas crossing where a woman had been killed, Ms. Blackwell said Union Pacific realized its tracking system was experiencing "some technical difficulties."

Ms. Blackwell said that the railroad's senior management had ordered that the system be fixed quickly. "They have put the highest priority on this," she said, adding, "When we see that we've made a mistake and when we see that we can improve our processes, we take action."

Monday: The cost of silence

<http://www.nytimes.com/2004/07/11/national/11RAILS.html?ex=1090568991&ei=1&en=3b6ecb5786b9ca68>

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