THE BULLETIN

December 2017

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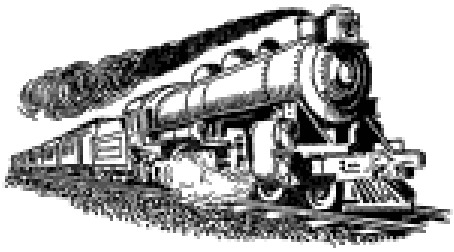

Mission Statement

Serve as a resource for the AAR Publications Committee and the railroad claims industry by submitting articles and features for publication in *The Bulletin*. Act as a point of contact for those new to the industry to help stay connected to some of the newest thoughts and ideas for the greater good of the railroad claims field. Promote *The Bulletin* to groups and individuals within the railroad claims industry and those that support it.

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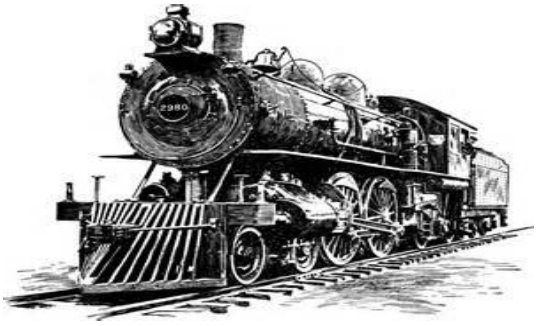

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Chairperson's Perspective

2018: Innovation is the Key to Everything the Future can Be

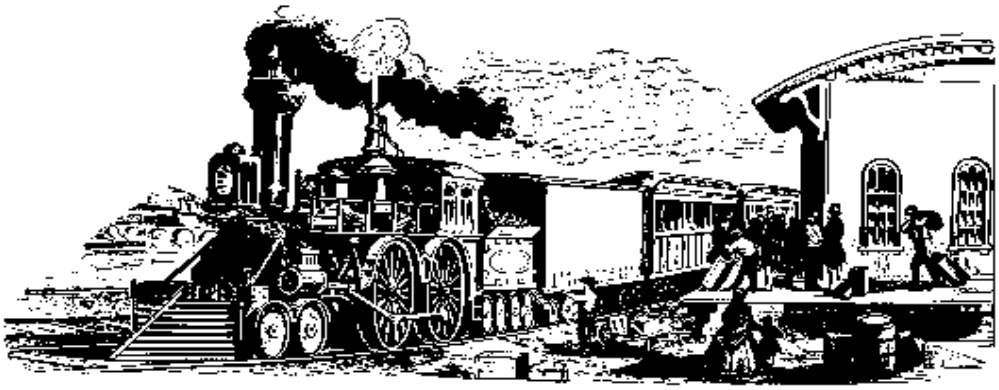
In gathering my thoughts and preparing to chair the 2018 AAR/GCC, I would like to begin by conveying how excited I am to have the opportunity to serve as the 2018 chairperson and express my sincere appreciation for your dedication to this unique association of railroad professionals. Your active participation gives us opportunities to be innovative in our platform; consistent in our message as well as affording opportunities to proficiently support the industry.

As I look around I see a well-blended group of risk management and claims professionals whom are up for the challenge of the ever-changing industry's environment. We are fortunate to have engaging individuals with the perspicacity to remind us of the importance of this group to include the accomplishments that have been obtained through collaboration of the membership. We have journeyed through changes and transitions that have created challenges to include re-evaluating, in one form or another, how we do what we do.

As the railroad industry evolves into a logistics environment, innovation is the key to everything the future can be. For this, I am thankful for those who have pushed the envelope and challenged us to think outside the box, resulting in alternative ways in which we engage. Respecting and embracing this blend of ideals and thought processes is what makes us unique professionals. Although it is paramount that we pursue the future with innovation, dedication and technology, it is just as important to reflect upon our past accomplishments and appreciate our foundation.

My goals for this committee and its members are to go into 2018 reflecting upon our collaborations and achievements in 2017 and to complement them through continuing our alliance through true engagement, innovation and dedication. I invite and I challenge all of us to really "show up" in 2018. Although processes change, environments evolve and challenges are always on the horizon, there are constants; after all, we are definitely stronger together and quality never goes out of style!

Brenda Gunn, Chairperson, AAR/GCC Executive Committee



Don Lord Writing Competition Winners

1st Place
Chad M. Stewart

Claim Representative
Norfolk Southern
Corporation

2nd Place
Terri L. Kwasny

Claim Representative
Norfolk Southern
Corporation

3rd Place
Michael Christian

Claim Representative
Norfolk Southern
Corporation

Honorable Mention
Nina Corrigan

Senior Claim Agent
Norfolk Southern
Corporation

The presentations were made by Terry Richey, Chair of the Publications Committee (left), and Bob Wells, General Manager Casualty Claims, Norfolk Southern Corporation (right).

Personalities

In this issue, we are pleased to feature ***Jeff Beck***, Manager of Risk Management for Union Pacific Railroad in Roseville, CA.

Jeff began his railroad career in Fort Worth, TX, in 2005 with the Union Pacific Railroad. He hired with Operations as a management trainee, eventually elevating to the position of Manager of Yard Operations. In 2006, Jeff migrated to the Union Pacific claim department in Pocatello, ID, working in various locations including Salt Lake City, UT; Spring, TX, and eventually holding his current position of Manager of Risk Management in Roseville, CA. He joined the Publications Committee in September 2017, and we are thrilled to have him as a member of our team.

One of Jeff's many skills is the ability to condense and summarize the facts and key points of a personal injury lawsuit into a brief comprehensive summary report after a trial. Over the last couple of years Jeff has been a welcome contributor of trial summaries to *The Bulletin*. If you have read one of Jeff's trial summaries, I am sure you will agree he has the knack of capturing the essence of the key issues and creating both an interesting and informative read.

Jeff was a self-described "corporate vagabond" as a child. He was born in Houston, TX, but moved around quite a bit. At an early age he was an actual world traveler, graduating from high school in Jakarta, Indonesia. I use the term "graduated" a little loosely; allow me to explain: in the spring of 1998, following months of instability and rioting, Indonesian President Suharto stepped down after 32 years in power. This instability caused Jeff and his family to evacuate to Singapore to escape the chaos. Although his senior year of high school was not entirely complete, he nevertheless earned his diploma; after all of that, he deserved it. Following high school Jeff returned to Texas and graduated from Baylor University with a Bachelor of Business Administration. He then attended law school at the University of Houston, graduating in 2005 and is licensed to practice law in Texas. He has a very diverse personal and educational background which serves him well in the world of railroad claims.

One would think that with a name like Jeff Beck, his hobbies might include rock and roll and guitar (my apologies, I really couldn't resist). Jeff assures me that he never played with the Yardbirds, but my gut tells me when ranking the band's guitarists he would prefer his namesake to Eric Clapton or Jimmy Page. Full disclosure, however, I never asked him that question. Back on point, Jeff leads a very active lifestyle outside of work. He is a cycling enthusiast and enjoys spending his time with his 10-year-old twin sons and Stephanie, his wife of fourteen years. Welcome aboard Jeff!

Terry Richey, Publications Committee

Keeping Track

In this issue, we are pleased to feature ***John Krcmar***, former District Claims & Litigation Manager for Canadian Pacific Railway in St. Paul, MN.

After being retired for almost six years now, former District Claims & Litigation Manager John Krcmar says, "I find this is the best job I ever had!" He is, of course, referring to taking care of his close-knit family, which includes his wife of 41 years, Mary; his two daughters; and four grandchildren. He adds, "spending time with them is my priority."

John had a successful 38-year career on the railroad, beginning in June of 1973 when he was hired as an extra-gang laborer on the Milwaukee Road in Wausau, WI. He became a brakeman later that same year.

After graduating college in 1975, John became a Claims Representative in Milwaukee, WI. He moved to Portage, WI, in 1978 and was promoted to Senior Claim Representative and in 1991 transferred to St. Paul, MN, as Regional Claims Manager. (During this time period Milwaukee Road became Soo Line and eventually Canadian Pacific). In 1996, John became Claims & Litigation Manager, which was the position he held until his retirement in March of 2012.

In addition to his work in the claims department, John wrote several articles for *The Bulletin*, and he also taught classes at the AAR Claims School. His enthusiasm for teaching has never left him. In our conversation he quickly rattled off one of the concepts that he used to teach, which he called "the four '*ates'*: investig*ate*, mitig*ate*, negoti*ate* and litig*ate*."

Asked what his advice would be for new claim representatives, he said "learn the craft and get to know your managers," both of which helped contribute to his success. Claims work, he says, "requires you to be able to show compassion and empathy for injured employees, while at the same time representing the interests of the company." A balancing act that John perfected in his career.

John and his wife reside in Woodbury, MN, where they enjoy maintaining their home and property. John did full and part-time daycare for the first of his grandchildren, which allowed him to begin the indoctrination process of making them Green Bay Packer fans.

Asked whether he has missed the railroad, John mockingly says "not a lick." Last year he finally lost 70 pounds which was one of his retirement goals adding, "we have been blessed with good health." We wish John and his family the best in his retirement.

Mike Schmidt, Publications Committee

Meet Some of Our Newest Members

Amtrak

Alice Wilson, Manager of the Passenger Claims Unit, joined the Amtrak Management Team, working out of Washington, D.C. on August 14, 2017. Alice comes to the claims department with five years of Amtrak experience, including risk management, compliance, internal controls, and process improvement. Additionally, Alice has over 20 years of claims and supervisory experience. Alice attended James Madison University, where she received a B.S. degree in psychology. In her spare time, Alice enjoys traveling, photography, and spending time with her family.

BNSF Railway Company

Kevin Leite, Claims Representative, joined BNSF's general claims department in Stockton, CA, on June 16, 2017. Prior to joining BNSF, Kevin was a tool and die maker for 16 years, and he managed a machine shop. Originally joining BSNF in 2011, Kevin has worked as a locomotive machinist and a mechanical foreman. He received a BS degree in operations management from California Polytechnic University – Pomona and an Associate's degree from Santa Anna College in Liberal Arts. Kevin and his wife, Julie, have two children, Grace and Joshua. The family enjoys outdoor activities such as hiking, camping and bike riding.

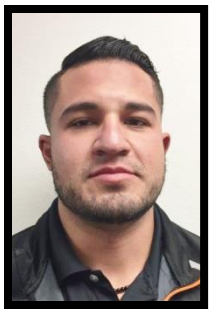
Christopher Groeling, Claim Representative, joined BNSF's general claims department in Chicago, IL, on July 5, 2017. He hired on with BNSF in January of 2015 as a corporate management trainee and worked as a trainmaster in Great Falls and Havre, MT, prior to joining the claims department. Chris was born in Morton Grove, IL, and graduated from the University of Illinois at Chicago with a Bachelor of Science degree in business management. In his spare time, he enjoys photography, mountain biking, and time-trial racing with Sports Car Club of America.

Marcial Sanchez, Claims Specialist, joined BNSF's general claims department in Lincoln, NE, on September 1, 2017. Marcial was born and raised in Dallas, TX, and graduated from Southern Methodist University in Dallas in May 2014 with a Bachelor's degree in mechanical engineering and a minor in Chinese. He began his employment with BNSF in June 2014 in Lincoln as a management trainee, and progressed to a mechanical foreman on the ramps and in the tower. In his spare time, Marcial enjoys reading, playing video games, and working out.

Derek Johnson, Claims Specialist, joined BNSF's general claims department in Fargo, ND, on July 17, 2017. Derek received a BA degree in speech communications from South Dakota State University in Brookings, SD, in May of 2016. He began his employment with BNSF in January of 2015. He has worked as a conductor, trackman, Supervisor of Engineering Support and Production Gang Roadmaster prior to joining the claims department. Derek is married to Megan, who is a diagnostic medical sonographer. They enjoy hiking, skiing, snowboarding, biking, and kayaking.

Torey Hunkus, Claim Representative, joined BNSF's general claims department in Minneapolis, MN, on September 6, 2017. Torey graduated from the University of Tennessee with a degree in business management. She began her employment with BNSF in June 2007 as a management trainee. She has subsequently held the positions of trainmaster in Memphis, TN, division trainmaster in Blytheville, AR, and terminal manager in Minneapolis, MN, prior to her claims position. In her spare time, Torey enjoys biking, kayaking and camping.

Eluterio "Junior" Vargas, Claims Specialist, joined the BNSF general claims department on July 24th, 2017. Junior graduated from the University of North Texas with a degree in logistics and supply chain management. He began his career with BNSF as a transportation management trainee in January 2015, and worked as a terminal trainmaster in Lubbock, TX, for two years. In his spare time he enjoys traveling, the outdoors, and spending time with his family every chance he gets.



Pedrum Khodaie, Claims Representative, joined BNSF on February 24, 2014. Pedrum grew up in Albuquerque, NM, and played defensive tackle for Benedictine College in Atchison, KS, where he received a bachelor's degree in exercise science. He started as a conductor with BNSF in Trinidad, CO, and he took an exempt position as a trainmaster in Gallup, NM, in December of 2014. He moved to Manager of Wellness for the Southwest Division in Belen, NM, in December of 2015. He joined the claims department in Belen, on July 31, 2017. He is single and has a four-year-old Rottweiler. He lifts weights, does competitive body building, and eats copious amounts of burgers.

CSX Transportation, Inc.

Misty Hunter, Manager of Field Investigations, joined CSX Risk Management in Atlanta, GA, on July 10, 2017. Misty attended the University of North Florida in Jacksonville, where she received a bachelor's degree in criminal justice and psychology followed by Lynn University in Boca Raton, FL, where she earned a master's degree in business administration. Prior to Risk Management, Misty worked in the Public Safety Coordination Center as an emergency communication specialist and with the Jacksonville and Clay County Sheriff's Departments. In her spare time Misty enjoys outdoor activities with her two Weimaraners, biking, travel and indoor rock climbing.

Norfolk Southern Corporation

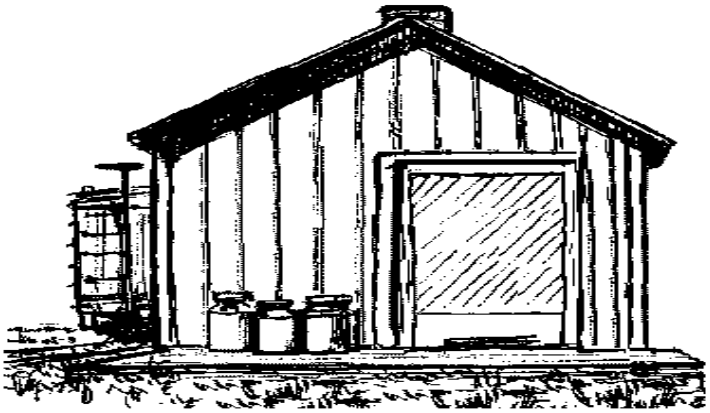
Brian Carr, Casualty Claims, management trainee, joined the NS claim department on July 24, 2017, in Knoxville, TN. This is not Brian's first job with NS; he started in 2007 as a conductor in Knoxville and then became a yardmaster in 2012 in the John Sevier Yard in Knoxville, TN. Brian has a bachelor's degree in business administration with a concentration in management from the University of Tennessee and is currently pursuing an MBA at Union University. His free time is spent with his wonderful wife of 11 years, along with his seven-year-old son and five-year-old daughter.

Jenni LeVan, joined the NS Casualty Claims Department on July 24, 2017, as a Casualty Claims Trainee. Prior to coming to claims, Jenni was a clerk in both the transportation and mechanical departments in Knoxville, TN. She was promoted to Transportation Secretary for the Central Division and worked there until coming to the claim department. Jenni has a bachelor's degree in organizational management from Ashford University and is pursuing an MBA from LSU – Shreveport. In her spare time, she enjoys time with her family and her hobby of pyrography, which is the art of decorating wood or other materials with burn marks using a wood burning tool.

Union Pacific Railroad

Ray Scioneaux joined Risk Management as a Risk Management Representative on August 7, 2017, in Addis, LA. Ray has fifteen years of service with Union Pacific, most of which was spent as an operating manager. He is married with two children and enjoys spending time with his family when not working.

♦♦♦♦♦



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Members Moving Up

Kansas City Southern Railway

Allison Hinn: On September 1, 2017, was promoted from Claim Agent in Kansas City, MO, to Senior Claim Agent in Kansas City.

Evan Griffin: On September 1, 2017, was promoted from Claim Agent in Jackson, MS, to Senior Claim Agent in Jackson.

Michael Scranton: On September 1, 2017, was promoted from Claim Agent in Shreveport, LA, to Senior Claim Agent in Shreveport.

Michael Scranton: On November 6, 2017, was promoted from Senior Claim Agent in Shreveport, LA, to Manager Claims in Kansas City, MO.

Deana Smith: On October 23, 2017, was promoted from General Claims Specialist in Jackson, MS, to Manager Claims in Jackson.

Norfolk Southern Corporation

Dustin Caldwell: On August 1, 2017, was promoted from Claim Agent in Roanoke, VA, to District Claim Agent in Bluefield, WV.

Terry Richey: On September 1, 2017, was promoted from Claims Development Manager in Pittsburgh, PA, to Regional Manager Claims in Pittsburgh.

Chad Stewart: On October 16, 2017, was promoted from Claim Representative in Elkhart, IN, to Claim Agent in Elkhart.

Michael Christian: On October 16, 2017, was promoted from Claim Representative in Bluefield, WV, to Claim Agent in Bluefield.

Union Pacific Railroad

Jonathan "Andy" Redick: On August 15, 2017, was promoted from Analyst Risk Management in Fresno, CA, to Manager Risk Management in Irving, TX.

John Kuebler: on July 15, 2017, was promoted from Sr. Analyst Risk Management in Des Moines, IA, to Manager Risk Management in Kansas City, KS.

♦♦♦♦♦

Members Moving On

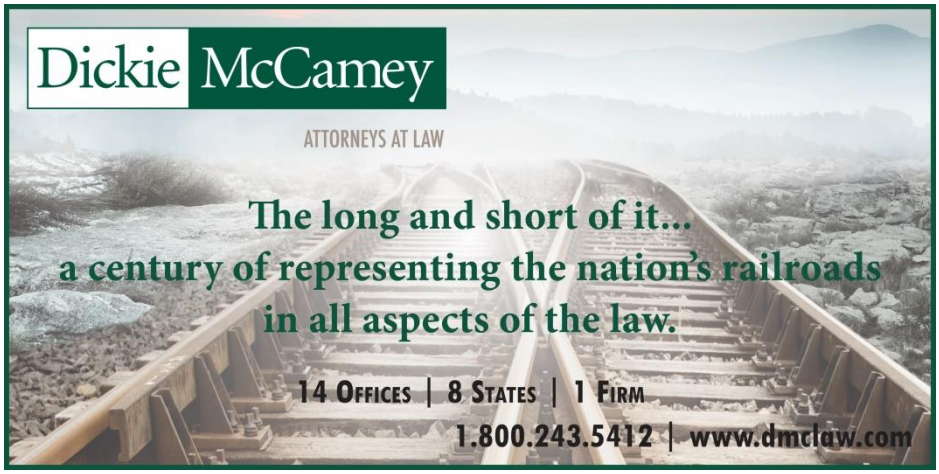
Amtrak

Ken Taranto began his railroad career with Amtrak on ***August 31, 1997,*** in customer service for the Empire Division in Rensselaer, New York. He retired from Amtrak on ***October 20, 2017***. Ken was hired into management with Amtrak on October 1, 2007, joining the Claims Department's rolling stock damage unit.

Prior to his railroad employment, Ken served 22 years in the United States Navy retiring with the rank of Master Chief Petty Officer. After retiring from the Navy, Ken worked as a disease intervention specialist with the State of Florida Department of Health with the identification, testing and referral of HIV-positive individuals.

Hired by the Amtrak Claims Department as an administrative assistant for the rolling stock damage unit, Ken quickly grasped the idea of collecting rolling stock damage losses and was promoted to Associate Claims Representative. Eventually, Ken was promoted to Claims Representative and then to the position of Lead Claims Specialist. Ken and his wife, Mariana, will be retiring to her home country of Ecuador and will start a life on the beautiful beaches of the country's pacific coast.

20 Years



General Claims Conference

Basic and Advanced
2018 Railroad Claims Schools

The AAR General Claims Conference Railroad Claims Schools will be held at Johnson County Community College in Overland Park, KS, May 7-11, 2018. The cost of the program is $450 per student, which includes all class materials. Additional information will be available in the March 2018 issue of *The Bulletin* and on the General Claims website at www.aargcc.org.

♦♦♦♦♦

TRIAL SUMMARIES

We appreciate the reporting of trial results to our Managing Editor, Jim Swan, via email attachment to jswan18@cox.net.

Johnny Perez vs. BNSF Railway Company

On September 22, 2017, BNSF received a defense verdict in a FELA case brought by machinist Johnny Perez, who alleged he suffered a hamstring tear and herniated lumbar disc in an injury that occurred on August 12, 2010. At the time of the accident, Perez was 46 years old and had been working for the railroad since 1993. The case proceeded before Judge Janet Sutton in the Circuit Court of Clay County, Missouri. Perez was represented by Daniel Cohen of St. Louis, MO. BNSF's trial team consisted of attorneys Craig Leff and Brian Bartlett and paralegal Michele Hufferd of Yeretsky and Maher. Mark Stockman, Assistant Superintendent at BNSF's Argentine LMIT, served as the company representative. The claim was initially investigated by Randy Nystul, and upon his retirement, Chris Hawk took over the claim. Mr. Hawk and Kristin Chooncharoen monitored the trial for the railroad.

Perez alleged injuries occurred as he was attempting to close a 75-pound air panel door on an EMD SD75M locomotive. Typically, the door is simply opened and closed for maintenance, but on this occasion it had been removed. Perez said that he managed to lift and carry the door from the running board to the work platform and install the door's hinges in the cradles on the side of the locomotive, all without incident. Perez claimed that as he lifted the door to close it, the door popped from its hinges and began to fall. As he grabbed the door to prevent its fall, Perez claimed to have felt a pop in his right hamstring area

Perez was diagnosed with a hamstring tear and returned to work less than a month later. He last received treatment for his hamstring in November 2010. Then, in December 2010, Perez reported to doctors for the first time that he also suffered a back injury. An MRI confirmed a herniated disc at L5-S1, and after 18 months of conservative treatment, Perez opted for a partial discectomy performed by Dr. Glenn Amundson, who frequently treats FELA claimants and testifies on their behalf. Perez returned to work in April 2013 and has worked full time since. Perez admitted to not missing a single day of work since his return, but claimed that he could no longer work overtime. He sought roughly $90,000 in past wages and a similar amount for his inability to work overtime in the future.

Perez's liability theories changed over time. Initially, Perez alleged that a defective door hinge design allowed the door to spontaneously pop from its hinges. But when that theory proved implausible, Perez changed his focus to the weight of door and the absence of training and protocols for installing it. Perez claimed he had never performed this task before and lacked the training needed to do it properly. Plaintiff's liability expert, Tyler Kress, testified that the door was too heavy for a single person to lift and that BNSF should have had training and a JSA warning employees of the hazards inherent in the task.

In response, BNSF presented evidence that Perez's accident was the first of its kind. An EMD witness confirmed that the same door hinge design was in use on thousands of similar locomotives and that Perez was the first to have been injured or to have complained about any supposed difficulties with the door. BNSF's Stockman, and locomotive foreman, Dan Parrish, catalogued the extensive safety training and testing all mechanical employees undergo each year and explained the resources that were available to employees who encountered a task they felt unsafe doing alone. A key exhibit was the recorded statement BNSF claims agent Randy Nystul took from Perez only twelve days after the accident, in which he admitted that he had put the panel doors on by himself many times previously without any problem. Perez further admitted that he could have avoided the accident by seeking another's assistance, but because he was eager to go on break and saw no one in the vicinity, he elected to go it alone.

The railroad conceded that Perez suffered a hamstring tear but showed Perez lost only $5,000 because of it. BNSF further traced Perez's disc herniation to a car accident occurring in 2009, after which an MRI showed the disc herniation at L5-S1. Key to Perez's causation theory was his own testimony that he experienced back pain the day of the accident and complained repeatedly about it to at least three different doctors, all of whom Perez claimed, neglected to record his complaints in their records. BNSF presented testimony from all three physicians and a physical therapist who saw Perez a combined 27 times in the four months following his workplace injury. All denied that Perez ever made any complaints of back pain until four months after the door incident.

The jurors who spoke after the verdict believed that BNSF demonstrated that Perez was provided a reasonably safe workplace, praising the testimony of Stockman and Parrish. Perez, on the other hand, they thought was a poor witness. His trial testimony was at odds with his earlier statements, and he often contradicted himself on the stand, much to his counsel's visible frustration.

Perez rejected the railroad's $40,000 pretrial offer, standing on a $125,000 "drop dead" demand. The jury deliberated for around two and a half hours before delivering a **defense verdict*** for BNSF, with nine of twelve jurors signing the verdict. The favorable result showed the value of obtaining a comprehensive statement from a claimant before attorneys get involved. And essential to the railroad's defense was the testimony of Mr. Stockman and Mr. Parrish, two witnesses who related well to the jury and were able to convey BNSF's commitment to safety.

Craig M. Leff, Yeretsky & Maher, L.L.C.

Steven Logsdon vs. BNSF Railway Company

This combined FELA and FRSA, § 20109, discrimination case was filed in the U.S. District Court for Nebraska by a former laborer, Steven Logsdon, who had six years of service. It arose out of an alleged injury in BNSF's mechanical facility in Alliance, NE, and Logsdon's dismissal for dishonesty in connection with his injury report. Claim handling and assistance was provided by BNSF Claims Representatives Matthew Dimmitt and Matthew Jensen. Logsdon was a laborer who claimed an injury of thoracic outlet syndrome/brachial plexus entrapment from cleaning up coal dumped from underneath a coal car onto pieces of paper placed underneath the car's bottom doors. But when he reported the injury, he reported it as accumulating over time unrelated to a specific event. When he provided an inconsistent statement relating the injury to the alleged coal incident, he was investigated and subsequently was dismissed for dishonesty. To explain his dishonesty, he claimed a supervisor influenced his injury report and made him report it dishonestly.

Before trial, BNSF was granted separate trials for the FELA and FRSA claims, and ultimately received summary judgment on the FRSA claim. Key to the court's summary judgment decision was the lack of any evidence of retaliatory intent in assessing discipline to establish the contributing factor element of the FRSA under Eighth Circuit case law. The court recognized that the critical issue was not whether Logsdon was actually influenced in his injury report, but whether there was any indication of pretext that the decision-makers had believed his allegations. Because it was clear the decision-makers did not, Logsdon could not establish the contributing factor element.

A three-day jury trial on the FELA claim took place in Lincoln, NE, before Judge John Gerrard. Plaintiff was represented by Jeff Chod of Chod Law, LLC, in Denver, CO. BNSF was represented by Tom Sattler and Tyler Spahn of Sattler & Bogen, LLP, in Lincoln, NE. Prior to trial, BNSF undertook significant efforts through motions *in limine* to focus the case on the alleged injury incident only and to exclude any references to the plaintiff's termination for dishonesty. Although this meant foregoing the use of the injury report that the plaintiff claimed was coerced, it prevented the plaintiff from making any references to his FRSA allegations in the FELA case and from putting BNSF and its supervisors on trial.

BNSF's defense theme was that the plaintiff was asked to do a simple task, requiring only pieces of paper and a shovel. It was also significant that the plaintiff was a former supervisor himself, who had briefed on BNSF's safety rules and conducted safety audits. This meant that on cross-examination, the plaintiff would either be required to admit he knowingly performed an unsafe task, or failed to perceive anything unsafe in what he was asked to do. Ultimately, the plaintiff admitted he did not perceive the task was unsafe. He instead attempted to rely on a purported "safer alternative" that all coal should be dumped outside the facility. Testimony at trial showed, however, that this "safer alternative" actually entailed greater risk, as it required the movement of cars through the facility and employees to go outside in all kinds of weather.

Due to the significance of the plaintiff's admissions on cross-examination, BNSF moved for judgment as a matter of law at the close of his case, which was granted. Although the plaintiff had argued for an alternative method, it was clear it arose from a labor complaint rather than a

safety concern. Also key to the court's decision was that there had been no evidence as to the amount of coal the plaintiff had been required to clean. As a result, the jury could not infer any "inherent risk" that the plaintiff may have been exposed to by a large amount of coal. Ultimately, due to the plaintiff's admissions and the lack of any evidence of a safety risk, the court concluded that there was no basis to permit a finding of negligence and entered judgment for BNSF, **a defense verdict**,* as a matter of law. Plaintiff did not appeal.

Tyler K. Spahn, Sattler & Bogen, LLP

*Verdicts are reported as: **defense verdicts**, **verdict in favor of plaintiff,** or **verdict in favor of defendant**. Verdicts in favor of plaintiff are verdicts above the last offer. Verdicts in favor of defendant are verdicts less than the last offer.

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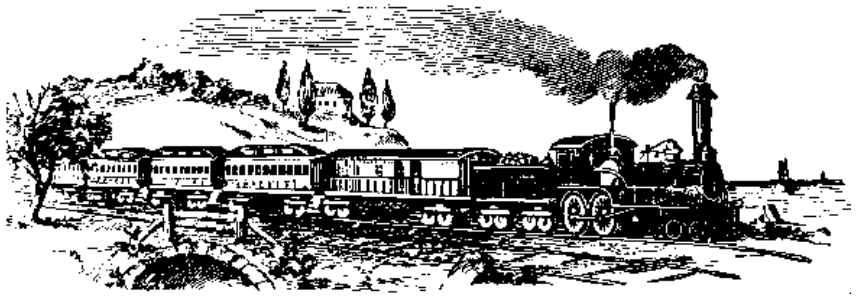

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In Memoriam

Ira "Gene" Hinnant
1950 – 2017

Ira "Gene" Hinnant passed away on February 23, 2017, in Calimesa, CA, after a courageous battle with cancer. Gene began his Union Pacific career in Tucson, AZ, in 1989 as a special agent on the Southern Pacific following service as a special agent on the CSX, public police service in North Carolina and Arizona, and active service as an Army Sergeant in Vietnam. Shortly thereafter, he transferred to the Southern Pacific Claims Department in Tucson.

Gene was transferred to West Colton, CA, in 1992 and was ultimately promoted to Senior Risk Management Specialist in 2000. He worked there until his well-deserved, but all-to-short retirement, on March 1, 2015. Gene was known across the organization as a consummate claims professional and a seemingly endless source of experience and skill.

The depth of his knowledge was matched equally by a humble willingness to share it with both peers and leadership. Through the years, Gene's mentorship has proven a cornerstone of many successful careers. His immediate response, thorough investigations, excellent work product, and dedicated ownership of his claims set the high water mark.

Outside of work, Gene was an avid outdoorsman who enjoyed hunting, fishing, and shooting sports. Mirroring his professional life, he relished teaching his grandsons these pursuits during long summer visits. He also enjoyed beekeeping, boating, and travel.

Gene's wife, Georgia Hinnant, with whom he shared a beautiful blended family, celebrated nearly 18 years of marriage. Widely beloved, he is dearly missed by all who had the pleasure of knowing him.

Jeff Beck, *Publications Committee*

In Memoriam

Elizabeth M. Dewitte
1962 – 2017

Elizabeth M. Dewitte passed away on August 20, 2017, at the age of 54, after a long battle with leukemia. Elizabeth was born in Virginia and grew up in Redding, CA.

While obtaining a Bachelor of Science in transportation management from Arizona State University, she was also in the ROTC program, where she was chosen as one of three women accepted into the pilot training program.

Elizabeth went on to serve in the U.S. Air Force as a pilot trainee, and later was a police officer for the City of Arlington, before joining BNSF in November of 2011 as a clerk in the engineering department.

In November 2012, she was a welcomed addition to the General Claims Department as a Claims Representative. Elizabeth was in the process of obtaining an MBA degree from the University of North Texas.

Elizabeth has two daughters, Tahlia and Daria Grassie, who are grateful for the time she was a stay-at-home mom during their formative years. Aside from her children, Elizabeth's greatest love in life were her horses.

She and Daria were training for "Three-Day Eventing" competitions, consisting of show jumping, dressage, and cross country. Another favorite past-time of Elizabeth's was walking with her two dogs along Lake Grapevine.

Elizabeth was a well-regarded member of BNSF's Claims Department and is greatly missed by many.

Lorri Savidge, *Publications Committee*

Operation Lifesaver and Railroad Claims Professionals

Someone once asked me if I ever tried to "beat the train?" You know, you are coming to a crossing and you hear the horn and see the headlight. Do you slow down and prepare to stop, or do you decide to gun it and beat the train . . . until you don't? As a claims professional, my answer was a resounding no! It then became a one-on-one opportunity for me to give the person some very pointed advice on why it is never a good idea to try and beat a train at a crossing and the consequences if you lose.

This article is about how we, as railroad claims professionals can use our professional experience to play a more active role in the important job of educating the public about rail safety. From personal experience, we know that far too many people have played out the above scenario and were injured or killed. If you are not already familiar with the depth of the problem, just consider that in 2016 there were more than 2000 collisions between vehicles and trains. A person or vehicle was hit by a train roughly every three hours, and 265 people were killed. Triple that number and you will have the number of people that were injured. Although this is a far cry from the greater number of incidents and fatalities that occurred in the 1970s, 80s, and 90s, driver and pedestrian distraction is at an all-time high, and educating the public about rail safety remains paramount.

A History of Operation Lifesaver

OPERATION LIFESAVER®
Look, Listen & Live

Operation Lifesaver is a nonprofit organization that started in 1972, when the average number of collisions at U.S. highway-rail grade crossings had risen above 12,000 incidents annually. Idaho was the first state to address this problem. The governor's office, along with the Idaho Peace Officers, and Union Pacific Railroad launched a six-week public awareness educational campaign called Operation Lifesaver to promote highway-rail grade crossing safety. After Idaho's crossing-related fatalities fell by 43% that year, the successful program was adopted by the state of Nebraska in 1973. Kansas and Georgia joined the effort in 1974, and within a decade the message had spread across the country. In 1986 the non-profit national office of Operation Lifesaver was created to help support the efforts of the state Operation Lifesaver programs and raise national awareness on highway-rail grade crossing issues.

Some Insights from Claims Department Operation Lifesaver Presenters

The following are a few claims professionals that have been volunteers with Operation Lifesaver for several years:

Lee Kelley, an Amtrak Senior Claims Specialist, in Jacksonville, FL, is an Operation Lifesaver presenter, also known as an Authorized Volunteer (OLAV). She has been with the organization for three years and feels the time she volunteers has been very worthwhile and valuable in helping Operation Lifesaver deliver their message to the people in her community. Lee recalls that when she first started with Amtrak, she was shocked by the number of people who ignored crossing signals and who used the railroad tracks as a playground. She was astounded that people would bike, jog, walk their dogs or even take their children for an ATV ride on active railroad tracks.

Lee, somewhat of an activist and wanting to make a difference in public attitudes about rail safety, volunteered to become a presenter within months of coming on-board at Amtrak. Lee's preference as a volunteer is to speak to elementary and middle school-aged children. She has enjoyed her time as a presenter and finds it a rewarding experience. Sometimes the audience is captive; sometimes not so much. Lee feels if you get the message out to just a couple of kids, you have accomplished something very important — something that may save a life.

Ramona Dottery, an Amtrak Lead Claims Specialist, in Oakland, CA, also serves as an Operation Lifesaver presenter. She has been working with the organization since 2011. Her interest in volunteering as a presenter was magnified after responding to a critical incident involving a teenager. The circumstances of that incident gave her the impetus to find a way to share the rail safety message on a larger scale, and Operation Lifesaver was the answer.

Ramona feels it is important to get the message out to children. Therefore, she primarily seeks presentation opportunities with school children and the bus drivers that transport the children. One of her more recent experiences with Operation Lifesaver was to participate in an event that brought the rail safety message to more than 350 children.

Jeri Wright, a Claims Representative, with Kansas City Southern Railway (KCSR), in Shreveport, LA, is an Operation Lifesaver presenter that went through the application and training process shortly after joining KCSR in 2014. Jeri considered Operation Lifesaver a logical extension of her work as a claim representative. She has always been comfortable with public speaking and felt that being an Operation Lifesaver presenter was an excellent opportunity to share her knowledge of rail safety with a multitude of people, rather than in random one-on-one interactions.

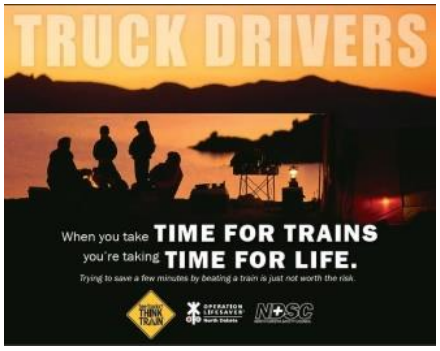
She is passionate about educating others on rail safety and routinely provides presentations and outreach to anyone that will listen, including the following:

- Professional truck drivers
- School bus drivers
- Heavy equipment operators
- Emergency responders
- Public utility workers
- K-12 school children
- Running and cycling groups
- Adult groups

Jeri is proud to say she is part of a strong Operation Lifesaver volunteer group at KCSR. She says she often partners with her colleagues from transportation, railroad police, and other departments when making presentations. In addition, she frequently works with other non-railroad presenters and various community agencies when presenting to large groups or providing outreach education in her community. Those events include Officer on a Train, and other special programs sponsored by Operation Lifesaver. One of her favorite programs is the annual KCSR Holiday Express Train. It is a great opportunity to meet with people and share information vital to increasing their awareness of safety around railroad tracks.

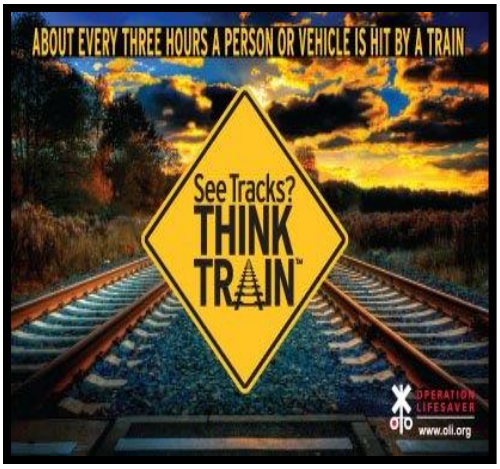
It is fair to say the Operation Lifesaver message is ever present in her mind. When she attends various department safety meetings, Jeri is not hesitant to share her Operation Lifesaver training and remind other railroaders of the importance of keeping rail safety uppermost in their minds. It may seem like she is "preaching to the choir," but reminding her fellow workers to be alert and aware in their travels around the railroad is now second nature.

Jeri observes that as claims professionals, we offer a distinct perspective when presenting information on rail safety. It is an opportunity to talk to audiences that reside in our immediate area; people that live adjacent to our tracks and people that travel over our rail crossings. Her goal is to make drivers and pedestrians more aware of their surroundings and give them the tools necessary to be safer when they intersect with rail operations. She has found that the educational material provided by Operation Lifesaver offers an excellent resource for presentations to any public group.



Sometimes those presentations involve adding levity to make a point. One example is when talking with professional truck drivers on the topic of "high centering" the vehicle while going over a crossing. She will point out the importance of making sure drivers pulling trailers are always aware their trailer landing gear is in the raised position before going over a crossing. She then lightens the moment with a quip about, "it is much better to meet me in the classroom than at a crossing." Sometimes it involves presenting a sobering video to bus drivers struggling to find ways to keep children quiet during the many steps required for safe rail crossings. Jeri says she typically learns something new at every presentation and uses that information to find new ways to get the message across as loud and clear as our train horns!

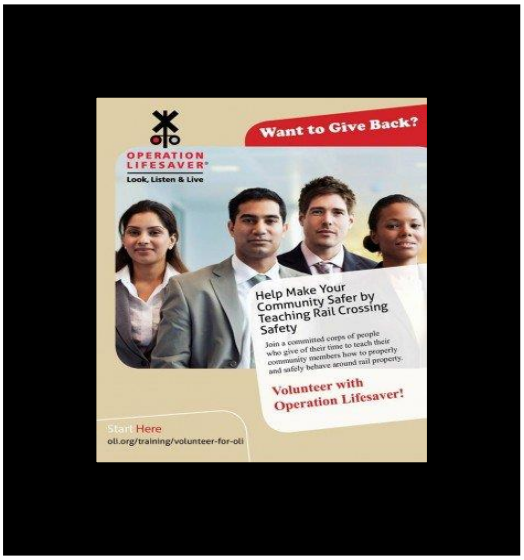
How Can Claims Professionals Help



As claims personnel for the railroad, we have a unique and often too vivid view of crossing accidents, trespassers, and the injuries and deaths that result from these events. We meet the drivers, the passengers, the pedestrians, the witnesses, and the family members. We see the incidents from our train crew members' eyes. We know that these incidents are preventable, and, as we investigate, document, and preserve, we learn more about those last few minutes than anyone else involved in the incident. We move on and we take the experience with us, wondering why those involved in the most current incident never got the message.

But how many of us take our knowledge and insights to the public? How many of us have taken advantage of the opportunity to be a presenter for Operation Lifesaver? Many of us participate in road-centric safety initiatives, and all of us know that our individual railroads value the security of our employees, our customer's freight, and the people in the areas we traverse; a safety trifecta. But participating at a national level brings us so much more. Just like the AAR, Operation Lifesaver brings our roads together. But Operation Lifesaver also draws in other like-minded community members who have an interest in public safety and a desire to assist the railroads in getting the message out. Working together, our credibility and our reach grow. We connect with others, we receive tools and training, and we have a presence in our communities that sends both a personal and united message. It demonstrates we care, and that we give back to the communities.

Consider Becoming a Volunteer



The foregoing information gives you some insights into the importance and the rewards of helping to spread the rail safety message. Our hope is that this article has given sufficient information to generate an interest on the part of more claims professionals to become an Operation Lifesaver presenter. Not everyone enjoys the aspect of public speaking, or feels they can spare the time to become a volunteer. The Operation Lifesaver staff is aware of these potential barriers and makes it pretty easy to overcome any fear you may have about public speaking. As for your time, it can be a challenge to find a few extra hours to fit into your schedule. They know your time is valuable and will do everything they can to accommodate your schedule.

Steps to Becoming an Operation Lifesaver Volunteer

The first thing you will notice about Operation Lifesaver is that they are organized. They want their presenters to be the best they can be. To accomplish that goal they have a process in place that lends to the success of each presenter, and they support them along the way.

- Prospective Volunteers fill out and submit an online application. The application is then reviewed by an Operation Lifesaver State Coordinator. Applicants will receive an email telling them how to go to the next step in the process, which is the online classroom training.

- Applicants next complete the Authorized Volunteer e-Learning online classroom, (AVE). The class is available 24/7, so it is available whenever it fits your schedule. You can save your progress in the online training module, and are encouraged to complete it over more than one session.

- After completing the AVE online classroom, your state coordinator will contact you to schedule the next step, which involves attending an in-person classroom session or videoconference where you will complete the training process.

For more detailed information about volunteering, visit the Operation Lifesaver website at: https://oli.org/about-us.

The new year brings new numbers for Operation Lifesaver. Lee, Ramona, Jeri, and all the other Operation Lifesaver volunteers help spread the word, and it really plays an important role in reducing the number of incidents, with the result being that the number of injuries and deaths go down each year. What will 2018 look like and how will *your* involvement help keep everyone safe around trains and train tracks?

Shelly Molaschi, and ***Jeri Wright,*** Publications Committee
With ***Lee Kelley,*** and ***Ramona Dottery,*** Amtrak Claims

"It wasn't the reward that mattered or the recognition you might harvest. It was your depth of commitment, your quality of service, the product of your devotion — these were the things that counted in life. When you gave purely, the honor was in giving, and that was honor enough."

~ Captain Scott O'Grady

New Claim Agents' Forum
A Perspective on Claims Work

We are pleased to feature an article by ***Jessica DeLaRosa***, Claim Representative with BNSF Railway Company in Chicago, IL.

Incident Google

How often do you get to hang out with law enforcement? Hopefully, the answer to that is only when you are on scene! It is unfortunate, but a large part of our job requires us to respond to incidents where someone's choice will change the lives of their loved ones forever. We respond at all times, in all types of weather, and during the most inconvenient times of day.

We meet and greet law enforcement at crossings, depots, in the middle of the night, during traffic jams, in the rain, and under pressure and time constraints. As claims representatives, we are tasked with acquiring the most information in the shortest amount of time under the strangest of circumstances. Every time I respond to a scene, I find myself thinking "they did what?" or "why in the world?" numerous times during my investigation. Luckily, I have law enforcement officers to help me get through those questions and decipher crucial information. Most of the time, local law enforcement and first responders will be there before you get there. They will talk to witnesses, survey the scene, and gather information from people that you are often not able to ask. The value in being able to speak to someone with all of the answers is immeasurable. Law enforcement is your "incident Google!"

Recently, I responded to a grade crossing accident where a pedestrian was struck while crossing the tracks after not checking for an oncoming train. The gates were down, and the lights were flashing at the time, but she still chose to run around them. When I arrived on scene, the train was stopped, the gates were up, the lights were off, and the woman was gone. I saw a local law enforcement officer and asked for any information he could share with me. Not only was I able to get all of the details of the incident, but he even promised to call me once he reached the hospital where she had been transported to give me her information. Roughly 45 minutes later, that same officer did just that — he called and gave me all of her information. He even shared personal details that the family had given him. The officer gave my information to another officer on scene, who made an effort to find me and inform me that they had clear video of the crossing. Not only could I view the video, but they even had a copy of it for me.

Law enforcement may provide us with the most information and details, but that is not the only benefit. Law enforcement, especially those departments that are near our tracks and have had dealings with us before, understand our needs. They are the liaison between us, the local community, and the family members of loved ones who have just been lost so suddenly. They remove the burden of having to explain the details of the incident and they are able to gather and share information that we would not have access to without their help. They secure the scene and provide protection. Sometimes, they even block off the area until you are able to take your measurements and photos or anything else you might need. In some cases, they can even assist

in getting the coroner's report, which at times can be costly and difficult to acquire. If you have a designated territory, it is quite possible that you will see the same faces when responding to an incident. In my experience, if you are able to build a rapport with these officers and they come to trust you and your work product, they will be more forthcoming when you request information. Another thing to consider is that law enforcement may not be the only other entity on scene that you may want or need information from, either at that moment or in the future. For a fatality, the coroner is summoned to the scene to confirm their status and pronounce time of death. While they can declare the individual's condition on the spot, it can take months to complete and release a coroner's report. I have found I have a better chance of acquiring a coroner's report much sooner when I am able to speak to the coroner on scene, introduce myself, and let them know what I do and how I might be helpful to their investigation. I share information with law enforcement and the coroner partly because they often will be more willing to share information with me.

In our line of work, information and details are currency; our reputations sometimes precede us; and our efficiency is invaluable while on scene. It is important to gather information as well as to be informative. The more information you can gather, the more thorough your investigation will be. You will be in a better position to make informed decisions and next-step movements on the case. Building rapport with those first responders can make all the difference in the world on how far you are able to get with your investigation. Next time you find yourself on scene with an officer or two, keep in mind all they do for us — "incident Google!"

♦♦♦♦♦

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As of February 8, 2016, Godfrey, Braun & Frazier, LLP has combined the firm's 90+ years of legal services with 65 business and public sector law attorneys at Davis & Kuelthau, s.c.

For more information, contact **William H. Frazier** at **414.225.1408** or **wfrazier@dkattorneys.com**.

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The advertisers in *The Bulletin* play a major role in keeping this publication in print. In appreciation of their support, the Publications Committee highlights longstanding advertisers. In this issue, we are pleased to feature ***Joe and Tom Parmelee of Atlas Settlement Group, Inc.*** They have been advertisers and supporters of *The Bulletin* for 20 years.

Atlas Settlement Group, Inc., is a national, full service, structured settlement broker with access to all life insurance markets that provide structured settlement annuities and services. The end result of structured settlements is a tax-free, guaranteed investment for injured people. One particular area of concern recently in FELA cases is the role of Medicare. Atlas has consistently been out front on this issue and continues to work with the industry to educate and conclude those cases where Medicare is an issue. However, the many uses of its discount method have proven an invaluable tool in evaluating and settling even the most difficult cases. As individuals stare at their bank accounts with more questions than answers, the security and guaranteed tax-free benefits of a structured settlement continue to be as attractive as ever. With all of the moving parts involved in the development of a claim, finding a trusted business partner who truly has your best interest in mind is invaluable.

Joe Parmelee is the Senior Partner at Atlas Settlement Group, Inc., in St. Louis, MO. He grew up in central and north central Illinois and is a graduate of Illinois State University with a Bachelor of Arts degree in political science and Russian studies. He is a life-licensed agent and member of the National Structured Settlement Trade Association.

Joe began his structured settlement career in 1986 with the firm JMW Settlements, Inc., in Washington, D.C. It was there that he was first introduced to railroad claims and the FELA. He joined the Chicago office of Ringler Associates, Inc., in 1989 and relocated to St. Louis in 1993. In 2007, Joe, with his brother Tom, opened the St. Louis office of Atlas Settlement Group, Inc., and continues to work there with his brother and partner Tom Parmelee. Joe has been providing structured settlement services to the railroad industry for over 30 years. "I feel very fortunate to have found the railroad business. As a country boy, the railroad has allowed me the opportunity to travel the entire United States and meet people from one of the oldest and truly American industries. With its history and continued operation, railroading is undeniably a fundamental piece of the fabric of our country." Joe and his wife, Stacy, have two boys, Joseph and Charles. Away from work he enjoys spending time with his family, sports, fishing, reading, and gardening.

Tom Parmelee is a partner of Atlas Settlement Group, Inc., in St. Louis, MO. He grew up in central Illinois with his parents, two older brothers, and an older sister. He is a graduate of Illinois State University with a Bachelor of Arts degree in political science. He is a member of

the National Structured Settlement Trade Association and is licensed to sell and provide structured settlement services.

Tom began his career in the structured settlement business interning at Ringler Associates, Inc., in 1995. Following graduation from college in 1995, he began his fulltime career, relocating to St. Louis to work with his brother Joe at Ringler. In 2007, Tom helped start Atlas Settlement Group's office in St. Louis, where he continues to work. Tom has traveled the country over the past 22 years educating railroad claims people on the value of structured settlements. Away from work, Tom enjoys sports, running, playing with his nephews, and working in his beautiful yard.

Joe and Tom have been longtime and proud supporters of *The Bulletin*, the AAR General Claims Conference, and the Southeastern Claims Association (with both Ringler and Atlas). In addition to supporting our publication and conferences, they also teach at the AAR Claims School (Basic and Advanced) and continuing education classes for The United States Arbitration and Mediation Center in St. Louis. They have prepared and presented complex cases for several railroads at individual staff meetings, have traveled the country extensively to educate newer claim agents at the request of different railroads, and have presented the many valuable uses of structured settlements at the General Claims Conference. Our many thanks to Joe, Tom, and Atlas for supporting *The Bulletin* for the past 20 years.

Jeri Wright, Publications Committee

Atlas Settlement Group, Inc.
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2018 Don Lord Writing Competition

This competition is sponsored by the Publications Committee of the General Claims Conference and is open to all Claim Department members.

Here are just a few reasons why you should consider entering this year's competition. Every railroad claims professional has accumulated some degree of knowledge and experience that can be helpful to others. The writing competition is the perfect forum in which to share your knowledge. In 2016, we modified the competition from an essay competition to a writing competition to encourage outside-the-box entries and creative submissions. Publication of a prize-winning entry in *The Bulletin* is one of our industry's highest honors. Also, who could not use an extra $1,000?

Everyone has at least one idea, concept or experience worth writing about. Take the leap and challenge yourself. Any topic is open, as long as it relates to claims work. Remember your audience is someone just like you, doing the work you do. If it is interesting to you, it will be interesting to *The Bulletin* readers. This is not an editorial, but rather your thoughtful compilation of information from which others can learn. You want original thoughts. These can be your own opinions, but be sure to back them up with facts, studies or other articles to support them. Give yourself time to write and revise. While you do not have to formally site your sources, you do need to reference where you are getting your information. Remember to check for grammar, spelling, and punctuation—ask a friend or coworker to proofread your entry if needed.

Everyone is anxious to hear the results of the judging. However, the custom is not to announce the winners until the General Claims Conference in October. As an added incentive, winners are often invited to the conference by their respective roads to accept the awards in person. Now is the time to get started! If you have any questions about the Don Lord Writing Competition process, contact your Publications Committee representative today.

Things to know before you get started:

- The topic area must be pertinent to claims work and of original thought
- Entries must be in Word document format and double spaced
- There is no specific guideline as to length

Four Keys to Success:

1. Focus: a) Introduction (Is the topic stated clearly and precisely--is there a clear beginning?) b) Theme (Does paper have a single focus?) c) Conclusion (Does it summarize or make recommendations--is there a clear ending?)
2. Support of Ideas: a) Are opinions based on related experience and/or facts? b) Are facts relevant to the topic? c) Is the length appropriate for the topic? (Too long? Too short?) d) Are sources cited appropriately? (if applicable)
3. Maturity of Language Used and Mechanics: a) Clear expression; b) Easily readable; c) Correct vocabulary; d) Proper grammar; e) Correct spelling; f) Accurate punctuation; g) Sentence structure (subject-verb and pronoun-antecedent agreement, proper tense, run-on sentences avoided).
4. Creativity: a) Original thought versus information taken primarily from sources. b) Captures the interest of the reader.

Previously submitted essays, not selected as winners, may be re-submitted for consideration one additional time. Consider thoughtful revisions that clarify and further your arguments. In that regard, although the Publications Committee members, as a matter of policy, do not provide unsolicited feedback, they can give you feedback upon request. This is particularly important to those who wish to learn from the experience and improve their writing skills, as well as improve their chances of winning future competitions.

Names of all authors will be removed prior to submission to the judges. Please do not include any personal or railroad identifying characteristics in the entry.

Submissions, without exception, must be emailed by ***June 1, 2018***. Attach your entry to an email and send it to Jim Swan, Managing Editor of *The Bulletin,* at jswan18@cox.net.

In addition to being considered for publication in *The Bulletin*, winners will be awarded as follows:

- First Place will receive a plaque and $1,000.00
- Second Place will receive a plaque and $750.00
- Third Place will receive a plaque and $500.00
- Honorable Mention: The number of honorable mention winners will be based on ten percent of the number of entries, and they will each receive a certificate and $250.00

Deadline: June 1, 2018
Attach your entry to an email and send it to Jim Swan, Managing Editor of The Bulletin, at jswan18@cox.net.

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First Place
2017 Don Lord Writing Competition

"All Eye's Aboard:
Inward-Facing Cameras and Cellphone Detectors"

Chad Stewart
Claim Representative
Norfolk Southern Corporation

Chad Stewart was born and raised in Decatur, IL. He graduated from Southern Illinois University-Edwardsville with a Bachelor of Science degree in business administration. Chad began his railroad career with Norfolk Southern Corporation in October of 2014 as a Conductor in St. Louis, MO, and was hired into the Claim Department in September of 2015. He currently holds the position of Claim Agent in Elkhart, IN. In his free time, he enjoys riding motorcycles, boating, meeting new people, and spending time with close friends and family. He enjoys writing and appreciates the opportunity to compete in the Don Lord Writing Competition. Chad is looking forward to writing another essay in the future. He wants to congratulate everyone who won an award and participated in the 2017 competition.

All Eye's Aboard: Inward-Facing Cameras and Cellphone Detectors

Distractions are defined as, "things that prevent someone from giving full attention to something else." They are inevitable and are a part of our lives every day when we are at work to when we are at home with our families. However, we cannot let distractions be an excuse and must be held accountable for these distractions when they get in the way of performing work safely. We must do our jobs efficiently and safely day in and day out to ensure we and our coworkers make it home safely.

Over the last 17 years, the railroad industry as a whole has seen some tragic events unfold from some "distractions" within the industry. One of those distractions at the forefront of the conversation is personal cellular devices. Cellular devices are almost a part of our bodies now and I often hear people say, "I feel naked without my cellphone." They play a role in nearly everything we do: talking to others, directions to a restaurant, finding out what the weather is, socializing, etc. A cellular device can be a great distraction from the realities of what are going on in our personal lives, but can be a devastating distraction from the daily duties of railroad employees. According to a cell phone report done by the Federal Railroad Administration (FRA), distraction of a railroad employee who in entrusted with safety-related duties has the potential, which has been realized in a few accidents described below, to compromise performance and endanger the employee, coworkers, or members of the public (Impact).

A few tragic incidents involving the use of a cellular device are incidents in Chatsworth, CA, in 2008 and Philadelphia, PA, in 2015. On September 12, 2008, in Chatsworth, CA, a Southern California Regional Rail Authority Metrolink train collided head on with a Union Pacific Railroad freight train. The incident killed 25, injured 102, and the damages estimated to be in excess of $12 million (Safety Recommendation). The National Transportation Safety Board (NTSB) determined that the probable cause was the failure of the Metrolink engineer to observe and appropriately respond to the red signal because he was engaged in prohibited use of a wireless device, specifically text message, which distracted him from his duties (Safety Recommendation). After the investigation, the NTSB published recommendations R-10-1 and R-10-2 to all Class I railroads, advising them to take action in installing inward-facing camera's (IFCs). This incident was fuel to the fire in igniting conversation about IFCs among all railroads.

The other incident on May 12, 2015, near Frankfurt Junction in Philadelphia, PA, when the train that was heading into a 4-degree curve which had a 50 mph permanent speed restriction derailed. Event recorder data indicated the train was traveling 106 mph when the engineer made an emergency brake application; soon afterward, the train derailed at the curve. Eight passengers died and more than 200 were treated (National). Now there was no more talking, and it was time for action. By June of 2015, all Class I railroads made the decision to decrease the possibility of instances like the ones aforementioned and began to install IFCs to locomotives in each of their fleets.

The installation of IFCs is best explained by Canadian Pacific's CEO, Keith Creel, who said, "Having the ability to use this technology in a proactive manner will allow us to prevent

incidents and improve rail safety — further protecting the public, our employees, and the goods we transport for our customers" (Stephens). IFCs address the railroad industries push toward safety being the utmost priority in daily operations. The use of IFCs will "be a preventative, proactive, behavior-changing tool the industry should have been allowed to use years ago," said Creel (Stephens).

It will be important to understand various aspects of IFCs and what their intended use will be and what purpose they will serve. Also, with the installation of IFCs in locomotives across Class I railroads, a second in-cab device called, cellphone detectors, are also being installed across Class I railroads. Implementation of these new devices will give railroads insight in preventing and understanding accidents and injuries. It will also change the way claims are handled across Class I railroads.

IFCs — What Are They And What Is Their Purpose?

An IFC is exactly what it sounds like, a camera that is installed inside of the cab of a locomotive to record what is happening in the cab of the locomotive. Normally, an IFC is mounted on the back wall of the cab of the locomotive and gives a "fish-eye" view of the locomotive cab and some IFCs will only record video and no audio. The IFC technology can be used to "recreate the sequence of events, pinpoint problems and make improvements that further promote safety" said Laura Phelps, CSX's Media Relations Manager (Gunnoe). The use of an IFC is to have the ability to prevent accidents and provide insight as to what actions were taken inside the cab during these accidents. According to the Union Pacific Railroad, combining IFCs with TIR/Event Recorder data is another step toward preventing the most catastrophic incidents. Video reviews of accidents and performance can increase understanding of crew behaviors to improve training and coaching (Safety Technology). The installation of these IFCs is nothing more than a safety measure and tool to be used in the investigation of rail accidents and injuries. Canadian Northern CEO, Luc Jobin, said in a statement, "Regulators on both sides of the border recognize the value of these devices. We believe this technology is a powerful and important tool in the investigative process to get to a better understanding of causation, which will lead to improved safety practices — something we all want" (Stephens). What is the common underlying factor in the installation of these devices? Safety. "By implementing IFCs as a preventative, proactive, behavior-changing tool we can promote safe behaviors and improve safety," Creel said (Stephens). IFCs will not prevent accidents from happening; however, they can be training tools for employees to prevent future accidents from occurring. IFCs have also increased the ease and efficiency of investigating accidents and injuries and can determine whether or not the misuse of personal cellular devices was a key factor in the incident.

Cellphone Detectors — Hand-In-Hand With IFCs

With the new implementation of IFCs across Class I railroads' fleet of locomotives, another form of technology is also being installed; cellphone detectors or CPDs. A CPD is a device that is used to detect the use of a cellular device and is triggered whenever a mobile device is turned on and available to a cellular network (Gunnoe). The primary purpose of the CPDs does not necessarily have a direct effect on the way claim departments will handle or investigate claims, but do help transportation departments hold their crew members accountable for their actions

during tours of duty. It is something like a "big brother," which will always be watching and making sure crew members are abiding by rules set forth by their company and the FRA. After the Chatsworth, CA incident in 2008, the FRA banned the use of personal electronic devices by on duty train crews. The use by train crew of electronic devices while on duty – such as cell phones, texting devices, and electronic games – was deemed a deadly risk made horrifically clear after the 2008 incident (Wilner). In October 2008, the FRA issued the operative terms of Emergency Order 26, which set forth prohibitions and restrictions that applied to railroad operating employees and their use of mobile devices (Impact). The EO 26 order stemmed from an investigation of the use of personal devices by operating employees. The order investigated the misuse of these devices in various incidents across railroads all the way back to the year 2000. The report referenced various accidents and circumstances where FRA inspectors observed operating employees use personal electronic devices while on duty. It's no surprise after the findings in the report that railroads began to take a serious approach towards preventing the use of cellphones among their crew members and the cab of locomotives. After this report was published it was clear that railroads had to do something. The first step was the IFCs and then came the installation of CPDs on board locomotives. Now, in 2017, it seems CPDs are being installed at the same time and hand-in-hand with the IFCs. Laura Phelps, CSX's Media Relations Manager said, "As they are expanding the use of inward facing cameras we will also equip locomotives with cellphone detection technology as they install the new cameras" (Gunnoe). Also, NS representative, Susan Terpay, said "active cell phone detection technology was added to a small number of locomotives in 2016, and we will continue this program in future years" (Gunnoe).

Claim Handling of IFCs and CPDs – Derailments, Crossing Accidents & Injuries

There is no surprise that the installation of these devices is sure to change the way claims are handled. It will bring forth new processes in the transfer of materials, the way data is collected and stored, how long the data must be retained, and how the information is used in the investigation process of claims. Some ways the new technology installed in cabs of locomotives can assist in the handling of claims such as derailments & train collisions, crossing & trespasser incidents, and employee-injuries are below:

- Assist in the recreation of the incident
- Detail facts leading up to the causation of an incident
- Note preventative actions taken prior to incident occurring
- Lead to new training strategies to reduce future incidents from occurring
- Address rule violations involved in incidents
- Identify humane actions taken by crew members
- Used to compare inward footage of cab to outward footage & event recorder data
- Documentation of real-time incident
- Determine severity of injuries sustained to crew members on board
- Used as evidence in cases that go to trial
- Verify allegations of violations under the Locomotive Inspection Act

- Determine witnesses or lack-there-of
- Liability of railroad operations involved in incidents
- Resolve issues with train handling
- Accountability of crew members
- Identifying safety issues before they lead to injuries
- Assist in evaluating railroad fatigue, distraction, and crew interactions

In our line of duty as claim agents for the railroad industry, we rely on various outlets of information to gather facts. The best type of data that showcases what happens in catastrophic and even minor incidents is actual video footage. The IFC will be beneficial in the future handling of claims when employee injuries stem from derailments, train collisions, crossing accidents, and anything else that can happen while inside the cab of a locomotive. We will be able to download or possibly even watch the footage remotely and get an understanding of what happened inside the cab of a locomotive when an incident occurs. The most common thing I say to claimants when speaking with them is that I was not physically at the scene when an incident occurred, and my job is to ask questions to determine what happened and the basis of how it happened.

For me, IFCs have already helped in some of the claims I have had in FELA and crossing accident cases. There is no doubt we have claims from crew members who say they were injured in way that does not really add up and some of them happen in the cabs of locomotives. IFCs will certainly help to determine whether they are being honest or fabricating a claim against the railroad. The IFC footage in a claim from an incident of mine helped the railroad from a liability standpoint and was able to verify claims about alleged injuries that occurred when a remote control engine collided with another train. With crossing accidents, it has shown me how crew members react in fatal accidents and can assist with determining the actual handling of the train by the crew members on board. Often times when crossing accidents are litigated; plaintiff attorneys try to put blame on our crew members. They will claim the crew was inattentive leading up to the crossing where an accident happened. These IFC devices will certainly help assist in disproving such claims.

The vision of all railroads is to be the safest railroad and to avoid claims whenever possible. I truly believe CPDs will start to eliminate future claims from ever becoming actual claims. Operating employees who use personal electronic devices will hurt someone if they continue to use these devices without any repercussions and without being held accountable for following operating rules and procedures put in place by the FRA and railroad companies. By disciplining and making these employees accountable for their actions, I believe it will eliminate future mistakes and accidents from happening. I look at it like driving a motor vehicle, a police officer can pull me over for being on my cell phone while driving, and therefore, railroads should be able to handle operating employees for misusing personal cellular devices while operating locomotives.

Safety – A Vision With Everyone In Mind

At the forefront of everything that is done within the railroad industry, safety is always top of mind. Every rule in our rule books is there because something was done unsafely before and needed to be addressed. As mobile device technology has evolved over the years, railroad employees, like any other employee, have become attached to the ease of use and mobility it gives them in connecting with family members and staying in touch with friends while on their tour of duty. We all know in our industry, tours of duty can often be long, drawn out, and have long periods of time where there is nothing to do besides sit and wait. In these circumstances, the use of cell phones became a way to pass the time. This has especially become more common as the railroad industries workforce has become substantially younger and the need to maintain a social network has become a priority in the younger generation's lifestyle. However, these distractions have made employees unable to perform their job duties safely while engaging in the activity of using a personal cellular device. This has caused the industry to re-evaluate the use of personal devices and put rules, strategies, and devices in place that can halt and even prevent the use of them. An IFC or CPD does not guarantee that incidents such as Chatsworth or Frankfurt Junction will ever happen again. However, the IFCs and CPDs will decrease the probability of these events happening in the future. They will also be another tool for claim agents to use as we strive to investigate claims to discover the truth and facts in the cases we handle. I know that whatever new technology comes out in the future that makes the working environment at the railroad safer and our line of road safer for the public, I fully support.

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Looking Back

Prior to our current General Claims Conference, which was resurrected in 1977, our predecessors were members of the Association of Railway Claim Agents (ARCA), founded in 1890. Members of the Canadian Pacific Railway General Claims Division found a box of dusty old *Bulletins*, which contained interesting reading of another era. We continue reprinting some of the articles from the last century in *The Bulletin*.

In this issue, we feature an article titled, *"The Eternal Triangle: Doctor – Patient – Claim Agent."* It is the 64th article in the *Looking Back* series. The article was written by Thomas K. Ballard, M.D. Jackson, TN, and appeared in *The Bulletin's* September 1964 issue. The paper was originally presented on May 6, 1964, at the Seventy-Fifth Annual Meeting of the General Claims Division, Association of American Railroads, in St. Louis, MO.

Dale M. Cisecki, Publications Committee

The Eternal Triangle: Doctor – Patient – Claim Agent

I have chosen for my topic this afternoon the subject which to me has been quite intriguing, a subject which we in the practice of medicine are confronted with daily and which we must meet head on. It is the Eternal Triangle of a doctor, claim agent, patient. I am sure that you may think of the eternal triangle in many other respects but as I think back over my medical practice I can visualize mistakes I have made, mistakes which claim agents have made and mistakes patients have made which have been detrimental not only to the close relationship which must exist between these people but to the railroad itself.

Let us consider individually the three people involved in the eternal triangle. First, let us consider the physician. Here is a man who works through long arduous hours, as if you don't, in an attempt to fulfill a desire to practice good medicine. He has accomplished a great deal in a relatively short period of time. As a general rule he is a college graduate as well as a graduate of an approved medical school, followed by internship and/or residency training from one to six years. Now, he is ready to inflict himself upon the poor unsuspecting public and open a practice, whether it be urban or rural and to fulfill the role which he has accepted in society. Whether this man is a General Practitioner or a Specialist confining his practice to removal of the left great toe is of little consequence. However, there is a great deal of difference in the practice of medicine as postulated by the general practitioner and the highly specialized specialist.

The public image of the physician has changed greatly in the past few years. We've seen a swing from the time of the old country doctor when ninety percent of the practitioners were general practitioners and only ten percent specialists to today when they are approximately evenly divided. We have about one hundred eighty-six thousand physicians. In the so-called horse and buggy days the physician was next to God. He spent as much time traveling from house to house, possibly more than he did at his office. His day began early and closed late. He spent many hours at the patient's bedside counseling, cajoling, dispensing a limited amount of

medication. He knew his patients, he knew their families, their problems and their surroundings. This in many ways gave him a head start on their illnesses because of the knowledge of the patient's family. His limited educational qualifications may have ranged from formal medical school training to a practitioner by association where he worked as an understudy to another physician until he became proficient enough to pass an examination and be licensed as a physician in the state which he resided. This man was usually a hardy sole whose life I do not envy.

Today we find a change in this physician. He still must be a jack of all trades. He must be a man of good moral character with integrity and a wholesome attitude towards civic, economic and social life. Our knowledge of medicine as compared to the old country doctor is much greater. We can depend upon superior laboratory, X-ray and diagnostic tests where the country doctor had to depend upon his eyes, his ears and his hands. But do not get me wrong, we are trained to be alert with our eyes, our ears and our hands but too often we depend upon aids where a diagnosis could be made if we were only to open our ears or if we were to feel or if we were to listen with our stethoscope.

The physician must be adaptable to all types of situations which may arise. He must be able to deal with the Presidents of railroads, of banks, of colleges and yet be able to see the sides of the common laborer in the fields or on the nation's by-ways. We must never lose sight of the fact that he must deal with these people with a sense of fairness and a sense of humility.

The physician must abide by high standards of personal and ethical conduct. He lives by a code of ethics which is about as rigid as any in our nation today. The traditional pattern of medical practice depends on a personal, intimate and confidential relationship between the practitioner and the individual whom he serves. It is a privilege for me to practice medicine but the tax on this privilege becomes high in its toll upon my life. If I may say so I am married to my profession to such an extent that a divorce from it is practically impossible. As each year goes by the practice of medicine becomes more complex and we have a correspondingly high complexity in related legal problems. We have seen a tremendous change in the traditional patient-physician relationship. This has been brought about by the practice of dividing the responsibility for the diagnosis, care and treatment of patients with other physicians, the advent of group practice, the great increase in health insurance and of contract practice, the growing number of circumstances in which the physician examines the patient, makes a diagnosis but does not treat the patient, and an increase in the number of patients cared for under governmental and public funds.

I would like to digress for a moment and say something about the so-called Medicare bill pending in Congress which is being pushed down the throats of an unsuspecting public. Some of you who were present at the Southeastern Claim Association some two years ago will remember my feeble remarks about the King-Anderson Bill or name it what you will, the Foran Bill, the Murray Dingledangle Bill, it's nothing but plain socialized medicine whichever way you want to put it. The lady in England went to the physician, a harassed individual seeing one hundred twenty-five patients a day-day in and day out. She said "Doctor, I have a headache." He says "Sit down right here in the chair." He puts his hand on her forehead, puts his hand on her belly, and says "You are three months pregnant." Nurse takes her into the next room and with a rubber

stamp, stamps something on her abdomen and tells her to go home. Now, she tries to see what was stamped on her abdomen. Unfortunately she couldn't see so she called her husband. "What did the doctor say?" "Said I was three months pregnant, go home." "What did he do?" "He felt my head and felt my belly and he put the stamp there and –" "Let me see the stamp." He couldn't read it either until he got the magnifying glass and looked at it and this is what it said: "When you're able to read this without the use of a magnifying glass take your wife to the hospital because she's ready to deliver."

And that's just about what this King-Anderson Bill is going to be. Impetus is going to be placed upon its passage in Congress today. Gentlemen, I will fight this bill with tooth and nail and why we as individuals will stand for this I do not understand. I feel that certainly it is our moral responsibility to care for elderly individuals and to provide them with adequate health insurance. However, the inclusion of this under a social security measure as far as I'm concerned is unjustified and is impractical. We in our modern day system of living have provided an adequate measure for the cares of these individuals under local and private enterprise. Many of these individuals do not want it, they do not understand it. Why we cannot learn from other governments which have a similar situation I cannot understand. I'll tell you this: If the lawyers were to be socialized instead of the doctors I'm sure there would be a howl you could hear completely around the world and you have to remember that some of you may be next.

Let me turn to the second portion of the eternal triangle, that is the claim agent. As far as I am concerned, a claim agent is a professional person just as surely as is the doctor. It is a very important profession and one that is coming more to the fore each day. The claim agent is a man upon whom a burden falls heavily, an individual who in representing his Company is responsible for the adjustment of claims satisfactorily both to the employer and the claimant. He must have a wide and varied interest. He must be concerned with legal science. He must have a thorough knowledge of psychology because his investigations and final disposition of claims involve the interactions of the mind. He must have a sound knowledge of the medical and surgical sciences. This enables him to deal satisfactorily with injured persons. He also must be ethical in his approach to claimant, to business and professional people and he must be ever mindful of the claimant or injured employee's feelings. He must have a wide and varied knowledge of all aspects of the activity of the railroad down to the last minute detail. Attention to these details may save his company countless dollars. In the final analysis he must be a gregarious individual who meets people easily and who makes friends even easier. He must be able to adjust to all situations where they arise, whether they are favorable or unfavorable. He must build complete confidence in all that he comes in contact with whether they be employees or claimant. He must be resourceful, adaptable, independent, and should be able to protect his company against fraud.

The claim agent must be a publicity agent because his contact with others in allied fields should promote a feeling of harmony between his company and outsiders. He must be honest above all else and to me this is one of the most important features he must have. He must have an unerring sense of justice that cannot be swerved. He must be a super duper salesman because too frequently an excellent investigation has gone for naught simply because the one making the investigation has not sold himself along with the investigation or has not instilled a sense of complete confidence which would enable him to convince the claimant of these things which he has been able to develop.

He must be a stickler for details because the supposedly insignificant things can mean much in the successful handling of an adjustment of claims. He must be ready and willing to go beyond the realm of what the claim agent might reasonably be called on to do in order to bring about a satisfactory conclusion of a particular case. Usually this little extra effort pays great dividends by reaping a harvest of satisfactory settlements. The claim agent finds that his day to day calls change with kaleidoscopic rapidity from crossing accidents to dermatitis, from train wrecks to false imprisonment, from falling baggage to defective stairs, from unionized employees to passengers, from invitees to trespassers and on and on. Rarely are there any two cases exactly alike in all respects. The claim agent must be efficient, he must have an insatiable curiosity and very sound judgment and must be able to use that judgment to great advantage. He must be able to see both sides of a situation as well as take a long look down the middle of the road. He must be diligent, competent, he must be affable yet stern.

Probably the most valuable undisclosed service is his influence with the rank and file members of the railroad's employees. He must by his day to day actions and contact with these men and women instill the confidence which enables him to make settlements of claims advantageous to company and to the employees alike.

As you can see I have laid down some certain criteria for you and for my profession. These criteria may be difficult to live up to but I feel strongly that we in our daily contacts one with the other must strive to live up to these criteria to the best of our ability. I think that this can best be done by each of us knowing the other.

We've talked about the physician and we talked for a moment about the claim agent. We know what to expect from each other. But now we turn to the unknown, the injured claimant or the third portion of our eternal triangle. This may be a relatively minor injury or may be a serious injury. There would be no need for the claim agent or the doctor if there were not. It is the physician's responsibility in this case to treat the patient medically and mentally to rehabilitate the patient with the least possible delay to attempt to restore him to the same gainful occupation in which he was employed before the accident, to give his knowledge to the worker, to the claim agent and to the company involved.

It is a responsibility of the claim agent to ascertain the true facts surrounding the injury, to then establish a rapport with the patient so as to gain his confidence and to make him realize that he has his condition at heart to present to management and to the patient the true facts so that an amicable settlement may be reached without litigation to protect management as well as the patient. This seems to be a very rash statement to make but when you think it through you see that he must do this in order to arrive at a just solution. If litigation arises, to present his facts to his trial attorney while continuing to work toward a settlement.

I believe you can see from my discussion that I consider the physician and the claim agent both to be stable individuals. Some of you might not think that. But maybe we are. Let's hope that we're all stable. We must realize that the injured claimant will not be a stable individual early in his injury. I don't think that we can think of him as any one individual but he must be a composite of all people. He has a body and a soul just as you or I have. His body may take any form, man or woman, long or short, fat or thin, old or young, healthy or already ridden with

disease, depending on the person. However, his soul is reflected in the personality which responds to distress of injury fully as much as his body. His personality may be placid or excitable, mature or immature, introvert or extrovert, and the necessity of these basic characteristics will influence his emotional response to his injury. Every personality remains adjusted to his environment by a buffer system of hopes and fears, triumphs and disappointments, aims and frustrations. These emotions must remain in balance in order to have a preservation of pride, of self-respect and dignity. Consequently an unstable balance may be disturbed profoundly by a relatively insignificant minor injury while a more mature and stable personality may take a serious injury without the disastrous results. Disturbances of emotional equilibrium following injuries commonly are manifested by signs and symptoms which are without organic basis and which we must be aware of and evaluate each case separately with this in mind. We must evaluate our feelings and not be too critical if we see a patient with complaints which have no organic basis.

We must learn this individual as well as we would memorize a verse. It is here that close cooperation between claim agent and physician becomes real because working as a team the psychic complaints may be sifted, then the basis for such complaint removed so the patient makes early complete recovery. We will find there are some complaints which we cannot find organic basis for. I must realize and not tell the patient that it's all in his mind. Likewise the claim agent must hesitate a moment before instituting his policy of getting tough. The primary cause of such complaints are usually anxiety, suggestion, and litigation. In the early hours of injury a great burden, responsibility falls upon me. I must diagnose, I must treat and care for the acutely ill patient. Here also is a great responsibility upon the claim agent to assure the patient, to assure the patient's family, to help with any details however small to show the patient that the employer is greatly interested in him even though his injury is relatively minor.

Let us turn for a moment to the convalescent state after the initial shock of his injury is over. He knows that he will get well but there enters into his mind doubts and fears concerning his future with the company. We see here emotional changes within the individual which I must recognize as each arises. The patient is often filled with anxiety concerning permanent disability, complications of injuries, failure to recover, loss of work and of earning capacity and the welfare of his family. The physician who dispels as many of these as possible is wise indeed but he cannot do it all. It is not within my province to reassure the man about his job, that his wife and children will be taken care of. This is for management. These things should be seen to by the individual employer and are obligations which cannot be repudiated. Here we see the claim agent busily implementing these ideas. Such efforts are the best insurance available against a long drawn out Claim. They should begin as soon as possible in order to forestall uncertainty which is the mother of anxiety. The claim agent can do this with little or no effort but it does pay a large dividend.

If patients are allowed to worry without recourse to either physician or claim agent many harmful effects may be expected. Chronic anxiety when neglected can produce feelings of inadequacy and guilt. There is a subconscious desire for revenge and other recompensatory emotional reactions. If the personality is well stabilized, well content, he adjusts well to his injury -- however, the unstable personality will be overwhelmed and must resort to some escape

mechanism in order to satisfy his ego. And in the majority of cases some type of compensation must be forthcoming to support his claim or we'll wind up with attorney and eventual litigation.

During this period suggestion plays a large role in the patient's emotional turmoil. Friends and relatives, bless their dear little hearts, who have had similar episodes are indeed well meaning but can often be disastrous in their suggestions of what happened to them, regardless of their type of injury. Here again we must see that each claim is individualized. I realize that we in my profession may at times be the chief cause of keeping an injured worker off work or sometimes preventing his early recovery by my suggestion. We must be extremely careful in discussing cases with the patient, his family or even whisper it to the nurse as we make our daily rounds. For us to tell him that his is the worst fracture we have ever seen may do him immeasurable harm. We must take great care to not say things that may be misinterpreted. Suggestion when used right may work to a great advantage, to instill in patients a desire to get well and to further enhance his recovery. For us to tell the patient nothing is by far the worst thing we could do. This will leave a patient chronic anxiety from which he can only recover with great difficulty. Somewhere in between there exists a happy medium which the physician must learn to follow by experience. Of necessity the rehabilitation of the injured worker will vary with the individual and the injury concerned. We must attempt to return the worker to work as soon as possible with a minimum of effort, seeing that all possible measures are accomplished to have him in top physical condition.

We must deal with each injury scientifically but with a singular purpose in mind. All factors must be taken into consideration so that the worker will realize his interest is taken to heart and so that he will understand why he needs to return to work. Again, I reiterate, each claim must be individualized, taking into consideration his medical and emotional condition as well as the impact that his return to work will have upon his ego.

I do not wish to dwell this afternoon with the unhappy prospects of litigation. Unfortunately some claims come to this. It has befallen me on numerous occasions to testify both by deposition and in the Courtroom concerning injuries. I find here a world that is completely foreign to me. One in which 1 do not particularly care to live, but as my wife frequently reminds me, to each his own, so I leave the trials up to some of you while I continue to practice medicine. True, litigation often cures many ills, whether they be imaginary or not. Especially when the claimant receives a greenback poultice. I think we must realize if the claimant loses he may emerge with quite a bitter attitude and soured on the world as a whole and looking for the slightest excuse to again place claim against management. This man can be extremely dangerous and we should be extremely careful in our dealings with him because he will have a chip on his shoulder, for the remainder of his employment. We are faced squarely with our eternal triangle and we find medicine, management and labor broken down into its fundamental ingredients, doctor, claim agent and injured worker. We are three individuals faced with different aspects of a single problem. We have a common objective, to see that the claimant returns to work as quickly and as nearly normal as possible. It is inevitable, gentlemen, that we will have differences of opinion. However, these differences should be reconciled easily and quickly in the light of the common goal. It would be a pity indeed if any of these three ever should become opponents. There must be a spirit of cooperative teamwork between us and where that does not exist then the satisfactory conclusion may not be reached. There must be clear lines of

communication between the physician and the claim agent concerned in order to promote a better understanding.

To summarize and emphasize I have attempted to show you the physician, the claim agent and the injured claimant. I have laid down certain criteria for each. Of necessity these criteria are high. We must try to follow them however so that a better working relationship may exist between the doctor, the claim agent and the claimant. There is a great need for a better understanding between claim agents and physicians. It is easy for me to say to you as members of claim departments to know your physicians better. It's even harder to implement this idea. In my dealing with the claim agents and insurance adjustors of the companies which I represent I attempted to establish a clear line of communication with these people so that we may work together for a common goal. I would like for you to take the time to personally know each physician with whom you deal so that there will exist a closer spirit of teamwork in the treatment and rehabilitation of the injured claimant. Each of us must know the injured claimant concerned so that he may be quickly rehabilitated. Prompt attention must be given to the injured worker's emotional as well as physical needs.

In recent years there have come about between the American Bar Association, the American Medical Association, meetings to help us better understand each other's problems. I have recently participated in such a meeting in our own locality. The ideas gleaned from this meeting have helped me greatly in my daily practice of medicine. I was better able to understand the problems posed by each profession and to answer within my own mind many questions mutual to each other. As I did in a meeting of the Southeastern Claims Association several years ago, may I propose here a meeting between physicians and claims departments on your roads to establish a closer contact between claim agents and physicians before the eternal triangle emerges. We are busy individuals, sure, but a few hours taken by such a meeting would greatly benefit all concerned, particularly the injured claimant. It would help us to meet the criteria which I have laid down. It would help us to fulfill the measure of a man. Not how did he die, but how did he live. Not what did he gain, but did he give. These are the units to measure the worth of a man as a man regardless of birth. Not what is his station but had he a heart and how well did he play his God given part. Was he ever ready with the word of good cheer to bring back a smile to banish a tear. Not what was his church nor what was his creed but had he befriended those really in need. Not what did the sketch in the newspaper say but how many were sorry when he passed away.

♦ ♦ ♦ ♦ ♦

Case Notes

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Mark Bullock vs. BNSF Railway Company

- ***FELA — Evidence — Jury Verdict***
- ***Employee introduced evidence of discipline of co-worker to prove railroad negligence and rebut contributory negligence***
- ***On appeal, railroad argued that discipline is a "subsequent remedial measure," not admissible under both state and Federal rules***
- ***HELD — Both Kansas Court of Appeals and then Kansas Supreme Court hold that rule against evidence of subsequent remedial measures bars evidence of co-worker discipline, judgment REVERSED and REMANDED for new trial***

Plaintiff attorneys frequently attempt to introduce evidence that after an accident, the railroad assessed discipline against a co-worker, hoping to convince the jury that this shows the railroad thought there was fault on its part. The Supreme Court of Kansas, in *Mark Bullock vs. BNSF Railway Co.*, 2017 Kan. LEXIS 399, 2017 WL 3318024, says this is not permissible under state rules of evidence, which are modeled on the Federal Rules and it says that the Federal Rules of Evidence would require the same result. Nor, the court says, can plaintiff use this evidence to rebut the railroad's defense of contributory negligence. Consequently, the jury verdict in favor of plaintiff was vacated and a new trial was ordered. Arguing successfully for BNSF were Craig M. Leff, Gregory F. Maher, and Spencer L. Throssell of Yeretsky & Maher LLC, Overland Park, KS. Chris Hawk, BNSF Sr. Claim Representative, located in Kansas City, KS, handled the claim and assisted at trial. Representing plaintiff were Daniel J. Cohen, Law Offices of Daniel J. Cohen, St. Louis, MO, and Davy C. Walker, Law Offices of Davy C. Walker, Kansas City, MO. The unanimous decision of the court was written by Chief Justice Nuss, who stated, in part, as follows:

Bullock worked as a cab carpenter for BNSF. While working on coupled locomotives at a maintenance facility he walked through what he recognized to be diesel fuel. After calling to report the spill, Bullock continued his duties. As he stepped from the running board of one locomotive to another, his foot slipped, and he fell in the gap and was injured. It was later discovered that the fuel had been spilled by Bullock's coworker, Chris Wise, while changing fuel filters. BNSF Mechanical Foreman, Levi McNeely, conducted an injury investigation, and the ensuing "McNeely report" listed two causes of Bullock's injuries: (1) Wise left fuel on walkways creating a slip, trip, and fall hazard; and (2) Bullock's "inability to perform a proper risk assessment after walking through the fuel."

Bullock sued BNSF for negligence under FELA, and BNSF's defenses included a claim that he was contributorily negligent. At trial, evidence was introduced showing Bullock was not disciplined for his conduct. Evidence was also introduced regarding the injury investigation and showing that Wise was later subjected to a disciplinary process — "alternative handling" that would not appear in his personnel record. Relevant to this appeal, BNSF objected to the evidence that Wise was subjected to alternative handling, arguing the discipline was a subsequent remedial measure barred by K.S.A. 60-451. This objection encompassed testimony from Wise and his supervisor, General Foreman Mark Stockman, concerning the alternative handling as well as several documents. Some of these documents included:

- A letter BNSF sent to Wise after he "acknowledged accountability" and accepted disposition by alternative handling. The letter outlined the disciplinary details, including a requirement that he "accept full responsibility" because his actions were in "clear violation" of rules and his "failure to clean up the residual fuel contributed to the injury of a fellow worker." It further required that he work with Stockman to create an alternative handling plan and encouraged Wise to make this a "learning experience that will help eliminate at risk behavior and prevent future incidents."

- An email drafted by Stockman containing a script Wise was required to read to his fellow employees as part of the alternative handling. Through that script, Wise admitted, "[M]y negligence contributed to an injury to another employee." Among other things, the script also expressed: "In the future, it is my hope that each employee remembers this statement, and by my speaking to you today, will help draw attention to the need to protect yourselves and your coworkers against slip, trip and fall hazards."

The district court overruled BNSF's objection, holding that evidence of post-accident employee discipline was not a subsequent remedial measure prohibited by the statute.

The jury found that BNSF negligently caused Bullock's injuries and that he was not contributorily negligent. It awarded $1,720,000 in damages — composed of $136,500 for economic loss to date; $1,208,500 for future economic loss; $230,000 for noneconomic loss to date; $145,000 for future noneconomic loss; and $0 for future medical expenses.

BNSF filed a motion for new trial, again arguing — in part — that Wise's discipline was a subsequent remedial measure. BNSF claimed this evidence was overly prejudicial because Bullock contended this discipline was "tantamount to an admission of liability" in contrast to BNSF's decision not to discipline Bullock. The district court denied the motion, holding, among other things, that Wise's disciplinary proceedings were relevant to BNSF's defense that Bullock was contributorily negligent.

The Court of Appeals panel held the evidence of Wise's discipline was a subsequent remedial measure barred by K.S.A. 60-451 when admitted to prove negligence or culpable conduct. The panel also held that this evidence was not admissible to show lack of Bullock's contributory negligence, to show causation, or for impeachment purposes. Because the panel held a reasonable probability existed that the jury would have apportioned the parties' fault differently absent admission of such evidence, it ruled the error was not harmless. So it reversed and remanded for a new trial. *Bullock*, 2015 Kan. App. Unpub. LEXIS 644, 2015 WL 4879054, at *8-13.

Bullock petitioned for this court's review of some of the issues presented to the panel. Those petitioned issues and our analysis appear below. Bullock's cause of action arises under FELA. Under this federal law, evidentiary and procedural questions are determined by the law of the forum, so Kansas law governs them here. *St. Louis Southwestern R. Co. vs. Dickerson*, 470 U.S. 409, 411, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985) (As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal).

K.S.A. 60-451 prohibits the admission of subsequent remedial measures to prove negligence or culpable conduct:

> When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

Two primary reasons have been given for this exclusion. First, "[s]ubsequent remedial measures do not constitute admissions of culpability, and evidence of such conduct is inherently unreliable." *DiPietro vs. Cessna Aircraft Co.*, 28 Kan. App. 2d 372, 378, 16 P. 3d 986 (2000). Second, public policy should "encourage potential defendants to remedy hazardous conditions without fear that their actions will be used against them." 28 Kan. App. 2d at 378 (citing *TLT-Babcock, Inc. vs. Emerson Elec. Co.*, 33 F.3d 397, 400 [4th Cir. 1994]).

Previous Kansas appellate courts have not addressed the specific question of whether post-accident employee discipline constitutes a subsequent remedial measure under K.S.A. 60-451. Perhaps for this reason, the panel focused on federal court decisions interpreting Federal Rule of Evidence 407 which concerns the same subject. *Bullock*, 2015 Kan. App. Unpub. LEXIS 644, 2015 WL 4879054, at *5-6 (discussing, *e.g.*, *Specht vs. Jensen*, 863 F.2d 700, 701-02 [10th Cir. 1988]). Bullock takes exception to this federal caselaw reliance by the panel.

We start our analysis with a focus on K.S.A. 60-451. Adopted in 1964, this statute is identical to

Rule 51 of the uniform rules committee of the National Conference of Commissioners on Uniform State Law. The committee was chaired by Kansan, Spencer A. Gard, and its only comment to the rule was, "This states the well[-]settled common law rule." Uniform Rules of Evidence Rule 50, comment (1953) (later renumbered as Rule 51). The well-settled common law rule appeared to include prohibiting admission of post-accident employee discipline:

> The [subsequent remedial measures] rule finds its most common application in respect to evidence of subsequent repairs . . . , but it has been applied as well to changes in operating rules *and to the discharge of an employee charged with causing an injury*. As drawn, Rule 51 appears broad enough to cover any situation which, *by existing law*, is within the sweep of the exclusionary principle. (Emphases added.) Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 591 (1956) (citing cases at n.74).

We observe, for example, in one of the law review article's cited cases, the Washington Supreme Court stated in 1893 that, "We are also of the opinion that the court should not have permitted the respondent to show that the car driver was discharged by appellant soon after the accident occurred." *Christensen vs. Union Trunk Line*, 6 Wash. 75, 83, 32 P. 1018 (1893); see also, *e.g.*, *Hewitt vs. Taunton St. Ry. Co.*, 167 Mass. 483, 486, 46 N.E. 106 (1897) (employer's taking precaution of a virtual discharge of employee driver after accident is not admissible as employer's implied admission for purpose of showing negligence; "[t]o hold otherwise would tend to discourage the adoption of additional safeguards, by improving the quality and raising the standard of the service"; accord *Rynar vs. Lincoln Transit Co.*, 129 N.J.L. 525, 30 A.2d 406, 410 (N.J. 1943) (Evidence that a driver has been discharged soon after an accident is not competent as an implied admission that the driver had been careless.); *cf. Turner vs. Hearst*, 115 Cal. 394, 401, 47 P. 129 (1896) (error to allow plaintiff to prove newspaper's discharge of reporter in libel case; analogous to proof of precaution taken post-accident).

Based upon the well-settled common law rule incorporated in Rule 51 — and thus incorporated in Kansas' adoption of Rule 51, *i.e.*, K.S.A. 60-451 — we conclude post-accident employee discipline constitutes a subsequent remedial measure barred by the statute when used to prove negligence or culpable conduct in connection with Bullock's event. It therefore must be excluded from evidence.

In addition to this statutory analysis and resultant conclusion, we agree with the panel's analysis that considered how federal courts have addressed the question under Federal Rule of Evidence 407. That rule states:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or

- a need for a warning or instruction.

> But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

This rule and K.S.A. 60-451 have been viewed as embodying the same requirements, although Rule 407's language admittedly is not identical. As one noted commentator on K.S.A. 60-451 has concluded: "Federal evidence rule compared. Federal Rule 407 is the same, but it adds the obviously implied provision that such evidence is not excluded when it tends to prove facts other than negligence or culpable conduct." 4 Gard, Casad, & Mulligan, Kansas C. Civ. Proc. 5th Annot. §60-451 (2012); accord, Advisory Committee Notes to Fed. R. Evid. 407 (For comparable rules, see Uniform Rule 51; . . . Kansas Code of Civil Procedure §60-451.).

The fundamental purposes underlying the Kansas statute and the federal rule are essentially the same. As Gard, Casad, and Mulligan provide in the commentary to K.S.A. 60-451:

> Even though the subsequent conduct of a party may seem to support an inference of consciousness of wrong, or amount to an admission of negligence, public policy stands in the way of the subsequent measures taken to prevent further injuries from being used as evidence for such purpose. The policy considerations are strong and very generally recognized. 4 Gard, Casad, & Mulligan, Kansas C. Civ. Proc. 5th Annot. §60-451 (2012).

In the same vein, the Advisory Committee Notes to Rule 407 provide: "The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault." And the advisory committee cites with approval the same law review article that supports Rule 51. Specifically, the subsequent remedial repair principle has been applied to exclude evidence of "changes in company rules, *and discharge of employees*, and the language of the present rule is broad enough to encompass . . . them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 590 (1956)." (Emphasis added.) Fed. R. Evid. 407, advisory committee notes.

Similarly, the federal rule favors "encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407, advisory committee notes. And per Rule 51, and thus K.S.A. 60-451, "The tenable basis for exclusion is, therefore, not lack of probative worth, but the impact of an extrinsic social policy, that of encouraging, or not discouraging, the taking of immediate steps to prevent further harm by the offending instrumentality." 10 Rutgers L. Rev. at 590-91.

While we are not bound by federal interpretations of the federal rule, we may consider federal authority when it is based on a similar rule of evidence. See *State vs. Robinson*, 303 Kan. 11, 222, 363 P.3d 875 (2015) (considering federal and similar state counterparts to analyze what constitutes "the writing itself" under the best evidence rule when the evidence is stored electronically). Given these similarities between the two in language and purpose, federal court decisions evaluating whether post-accident employee discipline is a subsequent remedial measure is quite informative to our view of K.S.A. 60-451.

As the *Bullock* panel observed, the Tenth Circuit held evidence of post-accident employee discipline was properly excluded under Rule 407 in *Specht*, 863 F.2d at 701. *Specht* was a civil rights action against police for an allegedly illegal search and seizure of plaintiffs' home and office. The city investigated the events underlying the lawsuit and summarized its findings in a press release that concluded "the officers involved exercised poor judgment in failing to read the writ of assistance thoroughly, and that appropriate disciplinary action would be taken." 863 F.2d at 701. The Tenth Circuit found no abuse of discretion in excluding the press release because the release "sets out remedial measures taken by the City to prevent the recurrence of the poor judgment the investigation revealed, and is therefore within the ambit of Rule 407." 863 F.2d at 701; see also *Nolan vs. Memphis City Schools*, 589 F.3d 257, 273-74 (6th Cir. 2009) (citing *Hull vs. Chevron U.S.A., Inc.*, 812 F.2d 584, 586-87 [10th Cir. 1987]); *Hull*, 812 F.2d at 587; *Maddox vs. City of Los Angeles*, 792 F.2d 1408, 1417 (9th Cir. 1986) (disciplinary proceeding constituted inadmissible remedial measures under Rule 407); *Rocky Mountain Helicopters. vs. Bell Helicopters*, 805 F.2d 907, 918-19 (10th Cir. 1986); *Hochen vs. Bobst Group, Inc.*, 193 F.R.D. 22, 24 (D. Mass. 2000) (if defendant had discharged the bus driver after the accident, or required him to undergo additional safety training, evidence of these steps would fall squarely within the rule excluding evidence of subsequent remedial measures); 23 Wright & Graham, Federal Practice and Procedure: Evidence §5284) (1980).

More recently, as the panel observed, the United States District Court for the District of Kansas excluded the post-accident suspension and termination of an employee as subsequent remedial measures under Rule 407. *Caravan Ingredients, Inc. vs. Azo, Inc.*, No. 13-2592-JTM, 2015 U.S. Dist. LEXIS 34906, 2015 WL 1279531, at *5-6, 8 (D. Kan. 2015) (citing *Hull*, 812 F.2d at 586-87). And the United States District Court for the District of Columbia excluded evidence of disciplinary proceedings against a bus driver involved in an accident as subsequent remedial measures under Rule 407. *Mahnke vs. Washington Metropolitan Area Transit*, 821 F. Supp. 2d 125, 150-52 (D.D.C. 2011).

So like the panel, we conclude from the federal caselaw addressing the similar Rule 407 that evidence of post-accident employee discipline is a subsequent remedial measure prohibited by K.S.A. 60-451 when offered to show negligence or culpable conduct.

And like the panel, we further observe that employers may choose to not administer discipline if they know such evidence will be admitted to show their culpability. Such a reaction would be contrary to K.S.A. 60-451's purpose of encouraging potential defendants to take remedial action without fear that their actions will be used against them. 2015 Kan. App. Unpub. LEXIS 644, 2015 WL 4879054, at *6; see *Columbia Railroad Co. vs. Hawthorne*, 144 U.S. 202, 208, 12 S. Ct. 591, 36 L. Ed. 405 (1892) (allowing subsequent changes as evidence of prior negligence "'virtually holds out an inducement for continued negligence'); see also *DiPietro*, 28 Kan. App. 2d at 378.

The employer's refusal to administer discipline under such circumstances can cause the employer another set of problems. Deciding not to discipline can mean the problem repeats, subjecting the employer to the possibility of punitive damages. Under K.S.A. 60-3701(d)(1), punitive damages are allowed against an employer when an employee's conduct is authorized or ratified by persons expressly empowered to do so on behalf of the employer.

This court has noted with approval that "jurisdictions with statutes similar to 60-3701(d)(1) have held that knowledge of an employee's wrongful conduct, *coupled with failure to discipline the employee*, amounts to implied ratification or authorization." (Emphasis added.) *Smith vs. Printup*, 254 Kan. 315, 340, 866 P.2d 985 (1993) (citing cases). Among other things, the *Smith* court concluded:

> Ratification under the provisions of 60-3701(d)(1) may be either express or implied and may be accomplished before, during, or after the employee's questioned conduct. It may be based on an express ratification or *based on a course of conduct indicating the approval, sanctioning, or confirmation of the questioned conduct*. (Emphasis added.) 254 Kan. at 342.

We acknowledge that the federal courts have unanimously held that punitive damages are not recoverable in FELA cases. *McBride vs. Estis Well Serv., L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (No case under FELA has allowed punitive damages, whether for personal injury or death.). But failing to discipline Wise could subject BNSF to the added risk of punitive damages in future cases, *e.g.*, should a visitor slip in spilled liquids and fall — while actually disciplining him could have subjected BNSF to a greater risk of liability for compensatory damages in the instant case. These are the makings of a dilemma.

Although evidence of subsequent remedial measures to establish negligence or culpable conduct is barred by K.S.A. 60-451, "it is admissible when offered for other relevant purposes." *Siruta vs. Hesston Corp.*, 232 Kan. 654, 668, 659 P.2d 799 (1983). We have previously recognized that evidence of subsequent remedial measures can be admitted to show feasibility of design, the condition at the time of the event, who bore responsibility for repairs, or who was in control. 232 Kan. at 668 (feasibility of design changes); *Huxol vs. Nickell*, 205 Kan. 718, 723, 473 P.2d 90 (1970) (condition at time of accident, responsibility for repairs, or control).

Bullock asks us to hold that subsequent remedial measures also are admissible to prove causation and to rebut a contributory negligence defense. We disagree for the reasons stated below.

A plaintiff seeking recovery under FELA must "prove the *traditional common-law negligence* elements of duty, breach of a duty, foreseeability of injury, *and causation* with its attendant relaxed burden." (Emphasis added.) *Smart vs. BNSF Railway Co.*, 52 Kan. App. 2d 486, 491, 369 P.3d 966 (2016); see also *CSX Transp., Inc. vs. McBride*, 564 U.S. 685, 691-92, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011) (comparing tort litigation causation with relaxed causation standard under FELA). In Kansas, plaintiffs alleging negligence bear the burden of proving the same basic four elements: (1) existence of a duty, (2) breach of that duty, (3) injury, and (4) "a *causal connection* between the duty breached and the injury suffered." (Emphasis added.) *Thomas vs. Board of Shawnee County Comm'rs*, 293 Kan. 208, 220-21, 262 P.3d 336 (2011).
Recognizing that K.S.A. 60-451 prohibits admission of this evidence when offered to "prove negligence or culpable conduct," Bullock agrees the statute is meant to exclude evidence admitted to show the negligence elements of duty and a breach of that duty but argues it is admissible to establish the element of causation. The panel did not reach the merits of the issue because it held that causation was not in dispute. The panel held:

> [H]ere there is no causation issue that evidence of Wise's discipline could rebut. The parties agree that the accident was caused by Bullock's stepping in diesel fuel that

> Wise had spilled on the locomotive's running board, then attempting to move to another locomotive. Wise does not dispute that he spilled the diesel fuel, nor does Bullock show that BNSF asserted another cause of Bullock's accident that admission of Wise's discipline could rebut. 2015 Kan. App. Unpub. LEXIS 644, 2015 WL 4879054, at *8.

In Bullock's petition for this court's review, he argues that the panel erred because causation was disputed. He principally refers to an expert witness BNSF did not call to testify at trial and he cites remarks from his counsel during motions hearings. Neither argument is persuasive because it is a fundamental principle in our justice system that the jury may only consider evidence that is admitted. PIK Civ. 4th 102.03 (2010 Supp.). And counsel's remarks are not evidence. *State vs. Bennington*, 293 Kan. 503, 530, 264 P.3d 440 (2011) (noting that remarks made during voir dire, opening statements, or closing arguments are not evidence); see also *Gannon vs. State*, 298 Kan. 1107, 1126, 319 P.3d 1196 (2014).

Finally, Bullock cites testimony that BNSF employees could not recreate the slip as described by Bullock given the configuration of the locomotives. Specifically, McNeely testified that he reported to the scene immediately after Bullock was injured. He visited with Bullock to try to determine what happened and then tried to reproduce the injury through a reenactment while the locomotives were in the same position. McNeely testified that the locomotive's coupler prevented him from falling all the way down between the two units. He concluded that he was unable to determine how Bullock could have fallen as he described.

BNSF's counsel's closing argument demonstrates that the McNeely testimony was admitted at least in part to dispute causation:

> Now, how did he fall? There is only one witness to that incident, and it is Mr. Bullock. And in *judging whether he fell, how he fell, what his body did, what hurt, you again have one source of information*, and that's Mr. Bullock.
>
> [Bullock's counsel] said we didn't bring anyone in here to say that it couldn't have happened the way Mr. Bullock described. We didn't need to. Mr. Bullock did that for us. *He sat up and described a series of body movements and contortions that defies physics*. You know, after this accident, and the railroad investigated it, they took Mr. Bullock at his word. They scratched their head, and wondered if it could have happened that way. *They tried to recreate it and they couldn't . . . .*

Consequently, the panel erred by holding BNSF did not dispute causation. So we review the merits of Bullock's claim that subsequent remedial measures are admissible to prove that element. We begin by addressing the cases forming his primary reliance for the argument: *Brazos River Authority vs. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006), and *Wetherill vs. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983).

The authorities are split on whether the federal rule, Rule 407, or its analog in our sister states prohibits admission of subsequent remedial measures when admitted to prove causation. Compare *Brazos*, 469 F.3d at 429 (evidence admissible to rebut theory of proximate cause but not to prove culpability in a breach of warranty case), and *Bailey vs. Kawasaki-Kisen, K.K.*, 455 F.2d 392, 395-96 (5th Cir. 1972) (evidence of remedial measures admissible in limited

circumstances, such as when exclusion resulted in false impression of causation), with *Werner vs. Upjohn Co., Inc.*, 628 F.2d 848, 853-54, 856, 858-59 (4th Cir. 1980), and *McIntyre vs. Colonies-Pacific, LLC*, 228 Cal. App. 4th 664, 673-74, 175 Cal. Rptr. 3d 440 (Cal. App. 2014). As explained below, we conclude the weight of authority prohibiting admission is more persuasive. And we note this conclusion is consistent with recent trends. See 2 McCormick on Evidence §267, p. 346 (7th ed. 2013) (The older cases allowed such evidence to prove that the faulty condition later remedied was the cause of the injury by showing that after the change the injurious effect disappeared, but recent cases are more skeptical that this is an appropriate use of such evidence).

In *Brazos*, a river development authority contracted with the defendants to retrofit equipment used to reduce the water's salt content. Problems occurred after the retrofit that culminated in fires, and Brazos sued for breach of warranty. The defendants argued Brazos caused the fires through poor maintenance, and the district court excluded evidence rebutting that claim under Rule 407. Without much analysis, the Fifth Circuit held that "subsequent remedial measures can be introduced on the issue of causation if that is in controversy," and the evidence should have been admitted. 469 F.3d at 429. The *Brazos* court relied exclusively on the Fifth Circuit's earlier decision in *Bailey*.

In *Bailey*, the issue was whether a falling boom that caused injury dropped because a ship's crew was negligent or if it resulted from some other cause. Plaintiff sought to admit evidence that the boom fell again shortly after he was injured, under conditions which a jury could infer were identical to those existing at the time he was injured. Because the trial judge excluded evidence of repairs done after a second fall as a subsequent remedial measure, the jury knew only that the boom dropped once and had only one explanation for that — the crew's negligence. The Fifth Circuit reversed. Although "the general rule [is] that evidence of subsequent corrective measures is not admissible," the court found this case one of a number of "very limited situations [in which] the policy favoring repair must be subordinated to the necessity for getting at the truth." 455 F.2d at 395-96. The court cautioned that jurors should be instructed as to the purpose for which such evidence is admitted. 455 F.2d at 396.

This analysis stands in contrast to a recent California case, *McIntyre vs. Colonies Pacific, LLC.* California, like Kansas, adopted Uniform Rule of Evidence 51 (1953). Therefore, that state's court considered statutory language virtually identical to the Kansas statute. Leonard, The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility §2.5, p. 155 n.3 (2002) (comparing California's and Kansas' enactment of Uniform Rule of Evidence 51 (1953) on subsequent remedial measures, noting California differs only in "punctuation and in the substitution of 'inadmissible' for 'not admissible').”

The *McIntyre* court rejected an argument that "negligence" as used in California's subsequent remedial measures rule referred only to the existence of a duty and breach of duty, but not causation. *McIntyre*, 228 Cal. App. 4th at 670-74. The court found the term "negligence" could be interpreted either as meaning only the existence and breach of duty or as including all elements of the tort. The court first considered the history of the statutory provision, which codified common law, and second the public policy behind the provision, which encourages remedial conduct. The court then rejected plaintiffs' argument that subsequent remedial

measures should be admissible to establish causation because "[w]hether the issue is couched in terms of the due care or causation aspect of a negligence cause of action, admission of evidence [of subsequent remedial measures] would discourage others similarly situated from undertaking such measures, an outcome that would thwart public policy." 228 Cal. App. 4th at 673.

The California court is not unique in its approach. The United States Court of Appeals for the Fourth Circuit also rejected the argument that an exception should exist for proof of causation, reasoning that such an exception "would promote substance over form and subvert the policy behind excluding evidence of subsequent remedial measures." *Werner*, 628 F.2d at 858-59; see also *Chesapeake Louisiana, L.P. vs. Innovative Wellsite Systems, Inc.*, No. 12-2963, 2015 U.S. Dist. LEXIS 8017, 2015 WL 339022, at *2-3 (W.D. La. 2015) (unpublished opinion) (refusing to allow evidence of subsequent remedial measures as proof of causation and distinguishing *Brazos*); *Kendall vs. Bausch & Lomb, Inc.*, No. Civ. 05-5066-KES, 2009 U.S. Dist. LEXIS 52454, 2009 WL 1740008, at *8 (D.S.D. 2009) (unpublished opinion) (The court will not read into Rule 407 an exception for causation, especially in cases where jurors may easily draw inferences from the post-accident remedial measures to a party's negligence or the defectiveness of a product).

The Supreme Judicial Court of Maine similarly rejected a request to extend an exception to allow evidence of subsequent remedial measures to establish causation:

> Evidence of causation is a necessary element of a negligence claim [citation omitted], and, therefore, any evidence used to prove causation is also used to prove negligence. Thus, evidence of subsequent repairs intended to prove causation *is* evidence offered to prove negligence. The plain language of Rule 407(a) bars use of evidence of subsequent remedial measures to prove negligence. *Freeman vs. Funtown/Splashtown*, USA, 2003 ME 101, 828 A.2d 752, 754 (Me. 2003).

We are persuaded by the reasoning of sister courts that the plain meaning of the statute precludes the use of subsequent remedial measures to prove causation — an essential element of the tort of negligence. Thus, as the Maine court concluded, "evidence of subsequent repairs intended to prove causation *is* evidence offered to prove negligence," and as such should be excluded. 828 A.2d at 754. This approach supports the policy underlying K.S.A. 60-451 and similar state and federal rules of evidence:

> The tenable basis for exclusion is, therefore, not lack of probative worth, but the impact of an extrinsic social policy, that of encouraging, or not discouraging, the taking of immediate steps to prevent further harm by the offending instrumentality. 10 Rutgers L. Rev. at 590-91.

At trial, BNSF claimed Bullock was contributorily negligent. In FELA cases, contributory negligence does not bar an employee's recovery. But it does diminish the amount of recoverable damages "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. §53 (2012). Bullock argues, and the district court held, that evidence of Wise's discipline was admissible to prove Bullock was not contributorily negligent. Bullock's apparent strategy was to contrast his lack of discipline with Wise's receipt of discipline in an attempt to show that BNSF — the entity deciding whether discipline is to be imposed — believes only Wise was negligent,

despite McNeely's report listing two causes for the accident.

Whether subsequent remedial conduct is admissible to rebut a comparative fault defense, *i.e.*, the plaintiff was contributorily negligent, is an issue of first impression for this court. But our Court of Appeals rejected its admissibility for that purpose in *DiPietro vs. Cessna Aircraft Co.*, 28 Kan. App. 2d 372, 16 P.3d 986 (2000). There, DiPietro fell into a drainage ditch while examining an airplane. He sued, alleging Cessna was negligent for not providing protective measures. Cessna defended by arguing DiPietro was fully aware of the ditch because it was an open and obvious hazard.

After DiPietro's fall, Cessna erected a fence around the ditch. DiPietro argued that evidence was admissible to rebut Cessna's allegation of his comparative fault, even though it was a subsequent remedial measure. The panel held that exceptions to the general rule "should be allowed with great caution" so the policy will remain intact: "to encourage potential defendants to remedy hazardous conditions without fear that their actions will be used against them. *TLT-Babcock, Inc. vs. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994)." 28 Kan. App. 2d at 378.

With this in mind, the *DiPietro* panel reasoned that "evidence that tends to exculpate plaintiff in a comparative fault case," *i.e.*, rebutting the defendant's claim that plaintiff was contributorily negligent, "places fault upon the defendant, and evidence of subsequent remedial conduct to prove negligence is prohibited by K.S.A. 60-451." 28 Kan. App. 2d at 378.

Bullock attempts to distinguish *DiPietro* because its cause of action did not arise under FELA. He argues FELA cases are different because the employer has control of both employees so the discipline or lack thereof is evidence of who the employer believes was at fault. He cites two older FELA cases: *Panger vs. Duluth, W. & P. Ry. Co.*, 490 F.2d 1112 (8th Cir. 1974); and *Hval vs. Southern Pacific*, 39 Or. App. 479, 592 P.2d 1046 (1979). Neither case is persuasive.

We conclude that the rationale of *DiPietro* remains valid. Specifically, when a plaintiff argues that the evidence of discipline is admissible to rebut defendant's claim of plaintiff's contributory negligence, this particular use of the evidence can have the effect of proving defendant's negligence, *e.g.*, degree of negligence. We reach this conclusion because negligence is a zero sum game when only two parties are involved. *DiPietro*, 28 Kan. App. 2d at 378 (Evidence that tends to exculpate plaintiff in a comparative fault case places fault upon the defendant.). Per K.S.A. 60-451, "evidence of such subsequent measures is not admissible to prove [defendant's] negligence or *culpable conduct* in connection with the event." (Emphasis added.) And FELA is a comparative negligence statute. *Bullock*, 2015 Kan. App. Unpub. LEXIS 644, 2015 WL 4879054, at *9 (citing 45 U.S.C. §53 [2012]) ([T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee).

Accordingly, claims of contributory negligence in a FELA case do not relax the requirements of K.S.A. 60-451.

♦♦♦♦♦

Alan Barry Cole, Executor vs. Norfolk Southern Railway Co.

- ***FELA — Occupational Disease — Release — Plea in Bar***
- ***Employee settled asbestosis claim in 2000, lung cancer wrongful death suit subsequently filed by his executor***
- ***NSRC argued that prior release included release for risk of cancer, therefore suit was barred***
- ***Plaintiff sought to apply "Babbitt" rule limiting effect of prior releases***
- ***HELD — Supreme Court of Virginia chooses the "Wicker" rule for effect of releases in FELA cases***

Faced with a choice of adopting one of two Federal court of appeals decisions on releases of claims in occupational cases in the absence of controlling U.S. Supreme Court precedent, the Supreme Court of Virginia decides that the "*Wicker"* is the better course and so it becomes the rule in Virginia state courts. The case is *Alan Barry Cole, Executor of the Estate of Aaron Jethro Cole vs. Norfolk Southern Railway Company*, 2017 Va. LEXIS 109. Appearing for plaintiff were Charles R. Allen, Jr., Roanoke, VA, Russell N. Brahm III, Norfolk, VA, and John E. Guerry III, Motley Rice LLC, Charleston, SC, and for the victorious railroad, James Jennings Jr., Elizabeth G. Perrow, Frank K. Friedman; Woods Rogers PLC, Roanoke, VA, and David A. Damico, BurnsWhite LLC, Pittsburgh, PA. Jackie Peets, Assistant Manager, in the Norfolk, VA, office handled the initial investigation. Lynne Craig, Assistant Manager, also in the Norfolk, VA, office assisted at trial. Justice Mims authored the court's unanimous opinion, which reads, in part:

For more than 35 years, Aaron J. Cole worked as a machinist for Norfolk Southern Railway Company (NSRC). During this time, he was regularly exposed to toxic substances and dust, including asbestos. In 1996, he filed a complaint in the circuit court alleging that he contracted "occupational pneumoconiosis, including but not limited to asbestosis" as a result of NSRC's negligence. His complaint also alleged that he suffered from extreme nervousness, mental anxiety and fear of contracting mesothelioma, lung cancer and/or other cancers and/or other conditions caused by exposure to harmful and toxic dust and/or conditions including, but not limited to, cor pulmonale. In addition, [Cole], because of his occupational pneumoconiosis, now has an increased risk of contracting mesothelioma, lung cancer, and/or other cancers and/or other conditions.

On May 15, 2000, the parties entered into a settlement agreement whereby Cole, who was 78 years old and represented by counsel, signed a release of liability in exchange for $20,000. In pertinent part, the release states that Cole:

> [d]oes hereby RELEASE AND FOREVER DISCHARGE [NSRC] . . . from all liability for all claims or actions for pulmonary-respiratory occupational diseases and/or other known injuries, physical, mental or financial, suffered or incurred by [Cole], including, but not limited to: (a) medical, hospital and funeral expenses, (b) pain and suffering, (c) loss of income, (d) increased risk of cancer, (e) fear of cancer, (f) any and all forms of cancer, including mesothelioma[,] (g) and all costs, expenses and damages whatsoever, [*3] including all claims, debts, demands, actions, or causes of action of any kind, in law or equity, which [Cole] has or may have at

> common law or by statute or by virtue of any action under [FELA] . . ., in whole or in part, arising out of: Exposure to toxic substances, including asbestos, silica, sand, coal dust, work place dust and all other toxic dusts, fibers, fumes, vapors, or mists used by NSRC during [Cole's] employment by NSRC.

On February 16, 2009, Cole was diagnosed with lung cancer; he died on November 14, 2010. Alan B. Cole, as the executor of Cole's estate, filed a complaint in the circuit court alleging under FELA that Cole's death was the direct and proximate result of NSRC's negligence. In a plea in bar, NSRC argued that the complaint should be dismissed because the claim was released as part of the settlement of Cole's 1996 asbestosis action. Cole responded that the release was void under §5 of FELA, which states that:

> [a]ny 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 act . . . shall to that extent be void. 45 U.S.C. §55.

Upon consideration of an evidentiary stipulation submitted by the parties, the circuit court granted NSRC's plea in bar. It acknowledged that a federal circuit split has resulted in two tests for evaluating the validity of releases under §5 of FELA, but concluded that the release was valid under either test. We granted Cole this appeal.

FELA renders common carrier railroads liable in damages to any person suffering injury while employed by the carrier if the injury resulted in whole or in part from the carrier's negligence. 45 U.S.C. §51. When FELA was enacted in 1908, "[t]he injury rate among railroad employees . . . was horrific — the average life expectancy of a switchman was seven years, and a brakeman's chance of dying from natural causes was less than one in five." Thomas E. Baker, Why Congress Should Repeal the Federal Employers' Liability Act of 1908, 29 Harv. J. on Legis. 79, 81-82 (1992). FELA therefore was designed to "shift[] part of the 'human overhead' of doing business from employees to their employers." *Conrail vs. Gottshall*, 512 U.S. 532, 542, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994) (quoting *Tiller vs. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444, 87 L. Ed. 610 (1943)). To that end, "Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Id.* As cataloged in *Gottshall*, FELA "abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of . . . comparative negligence," and, in a 1939 amendment, "abolished the assumption of risk defense."

At issue in the present case, Congress also "prohibited employers from exempting themselves from FELA through contract." As noted, §5 of FELA provides that:

> [a]ny 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 act, shall to that extent be void.

45 U.S.C. §55. This section was primarily aimed at two specific practices. First, many railroads required employees to sign "a contract of employment which by its terms released the company from liability for damages arising out of the negligence of other employees." H.R. Rep. No.

1386, 60th Cong., 1st Sess. 6 (1908). Second, it was common for railroads to utilize relief agreements, whereby the railroad would provide benefits to injured workers conditioned on a waiver of any claims against the railroad. *Philadelphia, Balt. & Wash. R.R. vs. Schubert*, 224 U.S. 603, 612, 32 S. Ct. 589, 56 L. Ed. 911 (1912) (The practice of maintaining relief departments, which had been extensively adopted, and of including in the contract of membership provision for release from liability [by] employe[e]s who accepted benefits, was well known to Congress when it enacted §5 of FELA.).

"Shortly after FELA's adoption, the [United States] Supreme Court began to establish the boundaries of §5." *Wicker vs. Conrail*, 142 F.3d 690, 696 (3d Cir. 1997). In *Schubert*, for example, an employee contributed a portion of his salary to a relief fund established by his railroad employer until he was injured. After accepting benefits from the relief fund, he filed an FELA claim against the railroad for damages related to his injury. The railroad argued that his claim was barred because his acceptance of benefits from the relief fund was conditioned upon the release of all claims against the railroad. The Supreme Court held that the release directly violated §5 of FELA because its purpose was to provide the railroad with immunity from liability.

The Supreme Court revisited the issue in *Duncan vs. Thompson*, 315 U.S. 1, 62 S. Ct. 422, 86 L. Ed. 575 (1942). There, an injured employee signed a contract whereby he accepted $600 to cover living expenses upon the condition that he return the money before bringing any claim against the employer. He nevertheless filed an FELA claim without refunding the $600, and the employer raised the contract as a defense. The Supreme Court held that the contract was void under §5 of FELA because, in light of the employee's dire financial circumstances, the contract's "purpose or intent" was "to exempt [the railroad] from any liability" under FELA.

However, §5 of FELA is not without limitations. In *Callen vs. Pennsylvania Railroad Company*, 332 U.S. 625, 626, 68 S. Ct. 296, 92 L. Ed. 242 (1948), an employee brought an FELA action after injury to his back in the course of his employment. After his injuries, but prior to filing suit, the employee executed a general release freeing the railroad from liability in exchange for $250. While the primary issue on appeal was the accuracy of certain jury instructions, the Court also dismissed an argument raised by the employee that the release was void under §5 of FELA. The Court held that:

> [i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Application of §5 of FELA remains unclear in many respects. The United States Supreme Court has not clarified what constitutes a "controversy" that parties may settle without litigation. *Wicker*, 142 F.3d at 698 (Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts). Courts have diverged when a release attempts to extinguish claims for known injuries and also for known risks of future injuries that have yet to, and may never, manifest. That is the question we address here.

A circuit split has developed regarding the validity of such releases. In *Babbitt vs. Norfolk & Western Railway Company*, 104 F.3d 89 (6th Cir. 1997), the United States Court of Appeals for the Sixth Circuit employed what has become known as the "bright-line test." In that case, several employees of a railroad signed a general release of claims as part of a voluntary separation program terminating their employment. They subsequently sued, alleging that the railroad negligently exposed them to excessive noise levels, causing hearing loss. The district court granted the railroad's motion for summary judgment on the ground that the release barred the claims. On appeal, the court reasoned that:

> [W]here there exists a dispute between an employer and employee with respect to an FELA claim, the parties may release their specific claims as part of an out-of-court settlement without contravening the Act. However, where the release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. §55 precludes the employer from claiming the release as a bar to liability. To be valid, a release must reflect a bargained-for settlement *of a known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries *known or unknown* by him.

(emphases added) (internal citations omitted). The court then reversed the grant of summary judgment and remanded the case for a determination of "whether the [r]elease was executed as part of a settlement for damages sustained for the [employees'] specific [hearing loss] injuries."

However, this bright-line test was rejected by the United States Court of Appeals for the Third Circuit in *Wicker*. 142 F.3d at 701. In *Wicker*, five employees sued their former employer under FELA for injuries resulting from exposure to toxic chemicals. Each employee had previously executed a general release in the course of settling *unrelated* FELA claims. These releases "appeared to settle all claims for all injuries past and future." In addressing the validity of these releases, the court acknowledged that for a release to be valid under FELA, it must "at least have been executed as part of a negotiation settling a dispute between the employee and the employer." It then stated that in such a negotiation:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement . . . . To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is *no present manifestation* of injury. (emphasis added).

Accordingly, the court implemented a fact-intensive approach that has become known as the "risk of harm" test. Under this test:

> [A] release does not violate [FELA] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute "controversies," and may not be waived under §5 of FELA.

(citing *Callen*, 332 U.S. at 631). The *Wicker* court then provided significant guidance for the application of its risk of harm test. It noted that determining whether a "known risk" was released is a "fact-bound" inquiry that must examine the "parties' intent at the time the agreement

was made." It observed that the language of a release may be "strong, but not conclusive, evidence of [this] intent." Thus, "where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boilerplate, not reflecting his or her intent."

As both the *Babbitt* and *Wicker* courts acknowledged, for a release to survive §5 of FELA, *Callen* requires that it be executed pursuant to the settlement of an existing controversy. *Wicker*, 142 F.3d at 700 (To be valid under FELA, a release must at least have been executed as part of a negotiation settling a dispute between the employee and the employer.); *Babbitt*, 104 F.3d at 93 ([W]here [a] release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. §55 precludes the employer from claiming the release as a bar to liability.). That is, the release must relate to a specific claim, such as a railroad's liability for injuries caused by asbestos exposure, as opposed to a broad release exempting a railroad from liability for any occupational illness. The opinions in *Schubert* and *Duncan* confirm that releases executed outside of this context are void.

However, *Babbitt*'s bright-line test also dictates that even if executed in this context, a release may not "extinguish potential future claims the employee might have arising from injuries known or unknown by him," but rather only "*the specific injur[y] in controversy*." *Babbitt*, 104 F.3d at 93 (emphasis in original). Due to this broad wording, courts have interpreted *Babbitt* as holding that a release must relate to a settlement for specific injuries caused by a particular accident or exposure and that the employee must be suffering from the injury sought to be released when the release is executed. *Jaqua vs. Canadian Nat'l R.R.*, 274 Mich. App. 540, 734 N.W.2d 228, 234 (Mich. App. 2007) (observing that *Babbitt* requires that the employee "must be suffering from the precise injury raised in the later FELA action" when the release is signed); *Wicker*, 142 F.3d at 700 (A bright line rule like the one set forth in *Babbitt*, limit[s] the release to the *injuries known to the employee* at the time the release is executed.) (emphasis added); *Illinois Cent. R.R. vs. Acuff*, 950 So.2d 947, 960 (Miss. 2006) (*Babbitt*'s rule barring the release of *future claims* unfairly restricts the ability of an employer and employee to knowingly and voluntarily settle both current and future claims, should the parties so desire) (emphasis added).

In other words, under the bright-line test, a release executed as part of a negotiated settlement for a specific injury or claim cannot release a future claim for an additional injury that may develop from the same accident or exposure, even if the additional injury is contemplated by the parties and explicitly contained in the release. *Jaqua*, 734 N.W.2d at 234. However, nothing in *Callen*, *Duncan*, or *Schubert* suggests that §5 of FELA was intended to have such a limiting effect on the ability of parties to settle their FELA claims. Indeed, the bright-line test:

> [r]equires an unrealistic view on how parties compromise claims . . . . This is particularly true with respect to claims based upon exposure to asbestos, where effects of the exposure may be latent for a considerable period of time. If a new claim were permitted for each and every new manifestation of the asbestos exposure, regardless of the extent of the parties' awareness of such risks, there would be no incentive on the part of the railroad defendant to ever compromise such claims. This result would not further the public policy of encouraging settlement of claims.

(quoting *Oliverio vs. Consolidated Rail Corp.*, 14 Misc. 3d 219, 822 N.Y.S.2d 699, 701-02 (2006)).

We therefore conclude that the risk of harm test provides the better rule, permitting the enforcement of a release not only for the specific injuries already manifested at the time of its execution, but also for known risks of future injuries from the same accident or exposure.

Under the risk of harm test, a release "does not violate §5 [of FELA] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute 'controversies,' and may not be waived under §5 of FELA." *Wicker*, 142 F.3d at 701.

The focus of this test is not on whether the language of a release explicitly includes a known risk of future injury, but whether the employee intended to release liability for this known risk. A release's language may be "strong, but not conclusive, evidence of" this intent. But "where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boilerplate, not reflecting his or her intent."

Determining the intent of the parties at the time a release is executed is necessarily "a fact-intensive process." In the present case, this question of fact was presented to the circuit court in the context of NSRC's plea in bar. "A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery." *Hawthorne vs. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010). Where, as here, facts are disputed, "the 'whole matter of law and fact' may be decided by the court." *Id.* at 578, 692 S.E.2d at 234. In such cases, "the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support." *Id.* at 577, 692 S.E.2d at 233 (citing *Jennings vs. Kay Jennings Family Ltd. P'ship*, 275 Va. 594, 600, 659 S.E.2d 283, 287 (2008)).

In this case, the circuit court found as fact that when Cole signed the release "he had contemplated his injuries; he knew of the possible future effects of his injuries [including the risk of developing cancer]; and he was ready and willing to release [NSRC] from those claims." This finding is binding on appeal because it is not plainly wrong or without evidentiary support. First, the release specifically purports to release NSRC from "all liability for claims or actions for pulmonary-respiratory occupational diseases . . . including . . . increased risk of cancer, . . . fear of cancer, . . . [and] any and all forms of cancer, including mesothelioma." While this language is not "conclusive," it is nonetheless "strong . . . evidence" that Cole intended to release all future cancer claims that might arise from his exposure to asbestos. *Wicker*, 142 F.3d at 701.

Next, and most significantly, the release's language is similar to much of the wording contained in Cole's 1996 asbestosis complaint. There, Cole specifically put at issue his "fear of contracting . . . lung cancer and/or other cancers" and "increased risk of contracting mesothelioma, lung cancer, and/or other cancers," demonstrating that he was aware of these risks. He then settled this claim with a release that specifically absolved NSRC from "any" liability related to Cole's "increased risk of cancer, . . . fear of cancer, . . . [and] any and all forms of cancer." Given this similar wording, it was reasonable for the circuit court to conclude that when the parties executed the release they knew, and intended to resolve, all the issues raised in Cole's complaint, including any future cancer claims arising from his exposure to asbestos.

Nevertheless, Cole argues that the circuit court should have determined that the release was invalid under the risk of harm test because it contains "boilerplate." However, the risk of harm

test does not dictate that all releases containing such commonly-used provisions are void. Rather, the Third Circuit merely said in *Wicker* that such a release may be attacked by an employee as not reflecting his intent. Cole did attack the release on this basis in the proceedings below, but the circuit court nevertheless found that the evidence demonstrated Cole's intent to release any future claim for lung cancer. The fact-intensive risk of harm test is intentionally designed to allow trial courts to resolve these sorts of factual questions. *Wicker*, 142 F.3d at 701 (We recognize that [the risk of harm test] is a fact-intensive process, but trial courts are competent to make these kinds of determinations.). In sum, the circuit court's factual conclusion that Cole intended to release all future cancer claims when he executed the release, including the present lung cancer claim, is not plainly wrong nor without evidentiary support. Thus, applying the risk of harm test, the release of this claim did not violate §5 of FELA.

In his second assignment of error, Cole argues that the circuit court erred by failing to hold that the release was void as a result of the United States Supreme Court's decision in *Norfolk & Western Railway vs. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). In *Ayers*, the Supreme Court indicated, in dicta, that a plaintiff who successfully recovers for an asbestosis claim "may bring a second [FELA] action if cancer develops," despite the fact that both diseases arose from the same asbestos exposure. From this comment, Cole reasons that the critical inquiry when determining whether a controversy exists is whether the claim sought to be released has accrued at the time the release is signed. If a claim has yet to accrue, Cole suggests that it is not a controversy that may be released under §5 of FELA.

This argument mirrors the approach taken by the Court of Appeals of Ohio in *Fannin vs. Norfolk & Western Railway*, 106 Ohio App. 3d 401, 666 N.E.2d 291 (Ohio Ct. App. 1995), a case upon which Cole heavily relies. In *Fannin*, the court began by acknowledging, in accordance with *Callen*, that "where controversies exist" parties may settle FELA claims without offending §5 of FELA. However, the court reasoned that *Callen*'s holding "only applies to claims which have already arisen *at the time the release is signed*." *Id.* (emphasis in original). That is, a "release is valid only . . . where it disposes of an accrued FELA claim." It therefore concluded that a release that attempts to waive a claim prior to its accrual is an attempt by the railroad to "exempt itself from liability" and void under §5 of FELA.

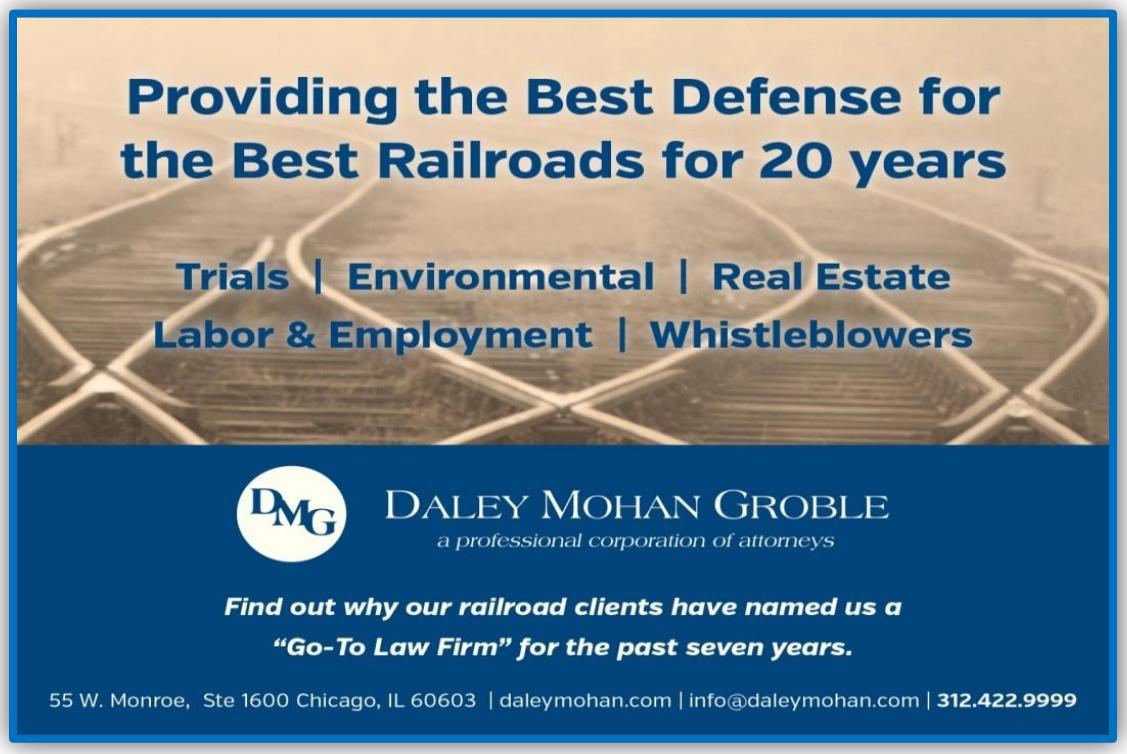
Cole's argument is not persuasive. First, in *Ayers*, the United States Supreme Court did not address the release of claims under §5 of FELA. Its primary holding was that a plaintiff may, after successfully prosecuting an *asbestosis* claim, recover damages for "mental anguish . . . resulting from the fear of developing cancer." 538 U.S. at 141. In reaching this conclusion, the Court seemed to affirm in dicta that asbestosis claimants may bring a second action if cancer later develops from the same asbestos exposure. But plainly, this dicta does not demand the result for which Cole advocates. While an employee who has previously recovered for asbestosis may bring a second claim if cancer later develops, this does not mean that he cannot settle his known risk of a future cancer claim as part of his initial asbestosis action if desired. This is especially true where, as here, the asbestosis complainant places the increased risk of future cancer at issue in his complaint. *See id.* at 153 (observing that the "asbestosis claimants [in *Ayers*] did not seek, and the trial court did not allow, discrete damages for their *increased risk* of future cancer) (emphasis in original).

As the opinion in *Ayers* does not compel us to adopt the approach taken by the Ohio Court of

Appeals in *Fannin*, we reject it for the same reasons we reject the bright-line test. It represents an overly narrow reading of *Callen* that requires an employee to be actually suffering from an injury before it can be released. There is nothing to suggest that §5 of FELA was intended to place such a limiting effect on the ability of parties to settle known risks of future claims without litigation. The approach taken in *Fannin*, like the bright-line test, requires an unrealistic view of how parties compromise claims. Under the risk of harm test, which we adopt as the rule of decision in the Commonwealth, a release does not violate §5 of FELA if it is executed as part of a negotiated settlement of a FELA claim and is limited to those risks that were known to the parties at the time of its execution. The focus of this test is not whether a release explicitly lists a potential future claim, but whether the parties intended to release such a claim. The evidence in the present case supports the circuit court's factual finding that Cole intended to release the present lung cancer claim as part of the settlement of his asbestosis action. Accordingly, applying the risk of harm test, the release in 2000 of the present lung cancer claim was not void under §5 of FELA. We therefore affirm the circuit court's judgment.

♦♦♦♦♦

"You take people as far as they will go, not as far as you would like them to go."
~ Jeannette Rankin



Shawn T. Ezell vs. Kansas City Southern Railway Company

- ***Grade Crossing Collision — Occupied Crossing — Summary Judgment***
- ***Plaintiff struck a standing train, argued that railroad blocked crossing for excessive amount of time, failed to provide adequate warning***
- ***Railroad said ICCTA preemption overrides "blocked crossing" statute's time limits, and no uniquely dangerous conditions existed***
- ***HELD — ICCTA preempts Mississippi statute limiting time for stopped trains, plaintiff failed to demonstrate special circumstances to require additional notice, Summary Judgment AFFIRMED***

The U.S. Court of Appeals for the Fifth Circuit reaffirms its prior holding that ICCTA preempts a Mississippi statute limiting the amount of time a train may be stopped on a crossing, and also holds that darkness and fog were not "peculiar or unusually dangerous" conditions which would require the railroad to provide additional notice of the stopped train. The decision is *Shawn T. Ezell vs. Kansas City Southern Railway Co.*, 2017 U.S. App. LEXIS 13883. Plaintiff's counsel was Angela Turner Lairy;Turner & Associates, P.L.L.C., West Point, MS, and KCS was represented by Charles Edwin Ross and Dennis Jason Childress; Wise Carter Child & Caraway, P.A., Jackson, MS. Kenyatta Cropper, Claim Agent, in the Pearl, MS, office investigated the claim and assisted at trial. The panel decision of the court was unanimous and was written by Judge Stephen A. Higginson. It reads, in part, as follows:

In the early morning hours of July 12, 2011, a train operated by KCSR temporarily stopped in West Point, Mississippi, so the crew could perform a switching operation.

The operation required the train to fully occupy and block three West Point traffic crossings. Ezell's expert estimates that the train was stopped in West Point for approximately 24 minutes.

While the crew was performing its switching operation, Ezell approached one of the blocked crossings in his car. He passed a reflectorized advanced warning sign, a reflectorized railroad crossing sign, and a yield sign. Although Ezell testified at his deposition that he does not recall seeing the signs on the night of the accident, he acknowledged that knew they were there because he had passed through the crossing many times and was familiar with it. Ezell also testified that the night was dark and "kind of . . . foggy." He described the road as having "a little dip" and then an incline leading to the tracks, which were elevated in comparison to the approaching road. Because of the incline in the road and the position of the black train car on the track, Ezell says his headlights shone under the train as he approached and that he could see beneath the stationary train car to the road on the other side.

According to Ezell, he did not see the train blocking his path until it was too late to stop. He crashed into its side, his car lodging beneath the train car he struck. Ezell was airlifted to a medical center for treatment and rehabilitation. He suffered horrific injuries and remained hospitalized for two months followed by a long rehabilitation process. As a result of the accident, Ezell is an "incomplete quadriplegic," meaning he suffers from severe paralysis throughout his body, but is not completely paralyzed and is able to walk with a walker, though not for long periods of time.

Ezell filed a lawsuit in Mississippi state court against KCSR, seeking damages based on various Mississippi common law negligence theories. Ezell alleges that the KCSR train crew "was careless, negligent and partially at fault" because the crew: (1) blocked the crossing for longer than permitted by Mississippi law; (2) blocked the crossing for longer than permitted by KCSR's internal operating rules; and (3) failed to adequately warn approaching drivers of the obstructed crossing.

KCSR removed the case to federal court based on federal question jurisdiction, arguing that Ezell's two blocking claims were completely preempted by the federal ICC Termination Act (ICCTA).

KCSR then moved for summary judgment on all of Ezell's claims. In addition to urging that Ezell's two blocking claims are preempted, KCSR argued that Ezell's failure to warn claim is barred by Mississippi's Occupied Crossing Rule. The district court granted KCSR's motion, and Ezell timely appealed.

Two of Ezell's negligence claims are based solely on the allegation that KCSR's train blocked the three crossings for an impermissible amount of time. The first is a negligence per se claim based on KCSR's alleged violation of Mississippi's Anti-Blocking Statute, which prohibits trains from blocking crossings for longer than five minutes. The second is a Mississippi common law negligence claim premised on KCSR's violation of its own internal operating rules, specifically General Code of Operating Rules 6.32.4, which directs crews to avoid blocking crossings in excess of ten minutes "when practical." The district court held that both claims are preempted by the ICCTA. We agree.

The ICCTA, 49 U.S.C. §10101, *et seq.*, overhauled federal railroad regulatory policy and established the Surface Transportation Board (STB), which is tasked with regulating rail transportation throughout the United States. *PCI Transp. Inc. vs. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 538 (5th Cir. 2005). "The purpose of the ICCTA is to 'build[] on the deregulatory policies that have promoted growth and stability in the surface transportation sector,'" and, specifically, "to implement a '[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation,' and to retain only regulations 'that are necessary to maintain a safety net or backstop of remedies to address problems of rates, access to facilities, and industry restructuring.'" *Elam*, 635 F.3d at 804 (quoting H.R. Rep. No. 104-311, at 93, 96 (1995); 1995 U.S.C.C.A.N. 793, 805, 808).

Section 10501(b) of the ICCTA "defin[es] the authority of the STB in dealing with the fundamental aspects of railroad regulation, and bar[s] others from interfering with those decisions by making the jurisdiction exclusive." *Franks*, 593 F.3d at 410. Section 10501(b) additionally makes clear that the "remedies available at the STB dealing with 'rates, classification, rules, . . . practices, routes, services, and facilities of such carriers,' are exclusive." *Id.* at 409; *accord Elam*, 635 F.3d at 805. We have observed that "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of . . . train operations, as well as the construction and operation of . . . side tracks, is under the exclusive jurisdiction of the STB unless some other provision of the ICCTA provides otherwise." *Friberg*, 267 F.3d at 443. Thus, we have held that §10501(b) expressly preempts "laws that have the effect of managing or governing rail transportation[.]" *Franks*, 593 F.3d at 410. Further, "[t]o the extent remedies are provided under laws that have the effect of regulating [i.e., managing or governing]

train transportation,' they too are expressly preempted." *Elam*, 635 F.3d at 805 (quoting *Franks*, 593 F.3d at 410) (alterations in original).

We have emphasized that "Congress was particularly concerned about state *economic* regulation of railroads when it enacted the ICCTA." *Id.* On the other hand, §10501(b) "does not expressly preempt generally applicable state laws that have a mere 'remote or incidental effect on rail transportation." *Id.* (quoting *Franks*, 593 F.3d at 410).

Nonetheless, a state law claim that is not expressly preempted by the ICCTA may be impliedly preempted, such as when, as applied in a particular case, the claim has "the effect of unreasonably burdening or interfering with rail transportation." *Franks*, 593 F.3d at 414.

Based on the scope, purpose, and jurisdictional statement of the ICCTA, we have previously invalidated state laws and claims that regulate the amount of time trains block crossings. *See, e.g., Friberg*, 267 F.3d at 443-44.

We explained that "[r]egulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length, and scheduling, the way a railroad operates its trains, with concomitant economic ramifications . . . ." *Friberg*, 267 F.3d at 443. Indeed, in *Elam vs. Kansas City Southern Railway*, we held that a negligence per se claim based on the precise Mississippi Anti-Blocking Statute at issue here was completely preempted by the ICCTA. 635 F.3d at 807-08. We agree with the district court that *Elam* squarely forecloses Ezell's negligence per se claim based on the Mississippi Anti-Blocking Statute.

Our analysis in *Elam* makes clear that Ezell's blocking claim based on KCSR's internal operating rules is preempted by the ICCTA as well. Like his negligence per se claim, Ezell's second blocking claim is based solely on the amount of time that KCSR's train blocked a crossing, and "the effect of [such a] claim is to economically regulate KCSR's switching operations." *Id.* at 807; *see also id.* ([A] state law tort remedy that would directly regulate a railroad's switching rates and services falls squarely under §10501(b) . . . [because] a rail operator's decisions about switching rates and services are economic decisions.) (citing *Friberg*, 267 F.3d at 444)); *Franks*, 593 F.3d at 411 (It is clear that a tort suit that attempts to mandate when trains can use tracks and stop on them is attempting to manage or govern rail transportation in a direct way[.]); *Friberg*, 267 F.3d at 443 ([N]or does the all-encompassing language of the ICCTA's preemption clause permit the federal statute to be circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions such as those pertaining to train length, speed or scheduling).

Ezell has not attempted to distinguish *Elam* or this court's other ICCTA preemption caselaw. Instead, he cites the preemption clause of a different federal railroad regulatory statute, the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20101, *et seq.*, as his sole argument for why his blocking claim based on KCSR's operating rules is not preempted by the ICCTA. The FRSA's preemption clause clarifies that a state law claim is not preempted by that statute if the claim is based on operating rules adopted pursuant to an order or regulation issued by either the Secretary of Transportation or the Secretary of Homeland Security. 49 U.S.C. §20106(b)(1)(B). Ezell does not explain how or why the FRSA's preemption clause would bear on our ICCTA preemption analysis, nor does he acknowledge that the preemption exception he relies on to rebut KCSR's ICCTA argument is from a different statute. Notably, even if Ezell were to

convince us that the FRSA's preemption exception could save his blocking claim from ICCTA preemption, he has failed to show that the KCSR operating rule he cites qualifies as a "plan, rule, or standard that is created pursuant to a regulation or order of the Secretaries." 49 U.S.C. §20106(b)(1)(B). Ezell's FRSA argument is unavailing, and we conclude that both blocking claims are preempted by the ICCTA.

Ezell also alleges that KCSR "failed to adequately warn motorist[s] on North Division Street of the obstructed crossing by a train." We agree with the district court that this claim is barred by Mississippi's Occupied Crossing Rule. "Under Mississippi law, 'ordinarily a train legitimately stopped or standing over a public crossing because of its tremendous size is all the warning the traveling public is entitled to.'" *King vs. Ill. Cent. R.R.*, 337 F.3d 550, 553 (5th Cir. 2003) (quoting *Clark vs. Columbus & Greenville Ry. Co.*, 473 So. 2d 947, 950 (Miss. 1985)). Under this doctrine, the Occupied Crossing Rule:

> [A] railroad company may leave its train, or any part of it, standing over a public crossing, night or day, and whether light or dark, without any light or warning of any kind to the traveling public; that the presence of the car or cars themselves is all the warning the traveling public is entitled to unless the conditions were unusual.

Miss. Exp. R.R. Co. vs. Summers, 194 Miss. 179, 11 So. 2d 429, 430 (Miss. 1943).

However, there is an exception to the rule when "the railroad should foresee that a motorist using ordinary care may not see the train because of a peculiar environment or hazardous condition." *King*, 337 F.3d at 553. Put another way:

> A railroad has the right to occupy a crossing for its legitimate purposes, and, while so occupying it, the carrier is not required to maintain lights on its cars or to station a man with a lantern at the crossing to give warning that it is obstructed . . . by cars, *unless the conditions and circumstances are such that the employees of the railroad know, or in the exercise of reasonable care and caution should have known*, that a person driving upon the highway at a reasonable rate of speed in an automobile properly equipped with lights, and carefully operated, could not see, or might not be able to see, the cars in time to avoid a collision with them.

Owens vs. Int'l Paper Co., 528 F.2d 606, 609 (5th Cir. 1976) (quoting *Ill. Cent. R.R. vs. Williams*, 242 Miss. 586, 135 So. 2d 831, 834 (Miss. 1961)) (emphasis added).

To invoke this exception, the Mississippi Supreme Court has emphasized that plaintiffs must show the existence of "unusual hazards" and "peculiar conditions," *Boyd vs. Ill. Cent. R.R. Co.*, 211 Miss. 409, 52 So. 2d 21, 25 (Miss. 1951), and the court has described the factual inquiry as one to determine "whether [the] crossing was more than ordinarily hazardous or dangerous," *Williams*, 135 So. 2d at 835. We have interpreted this exception to be narrow, explaining that "there must be some peculiar environment which renders the crossing unusually dangerous." *Owens*, 528 F.2d at 609 (internal quotation marks omitted). Further, we have cautioned that Mississippi courts set the bar high and "have only found the exception applicable where extraordinary physical environments or landscapes make the crossing difficult to see." *King*, 337 F.3d at 553.

Ezell argues that the Occupied Crossing Rule should not bar his failure to warn claim because of the conditions present on the night of the accident. In sum, the conditions described by Ezell are a "kind of" foggy night, darkness around the area of the track, a small dip in the road followed by an incline to the track, a black train car, and that he could see a traffic light beyond the railroad track. Although the conditions described by Ezell do resemble facts present in some of the cases in which Mississippi courts applied the exception, those cases involved a number of additional hazardous conditions that are not present here and which rendered the conditions more clearly "peculiar" and "unusually dangerous." *See, e.g.*, *Boyd*, 52 So. 2d at 22 (observing that, in addition to a "slight dip" in the road, there was also no warning of any kind of the approaching crossing (in violation of state law), and the only visible part of the train blocking the crossing was the narrow, 15-18 inch bed of an empty flatcar with its wheels positioned so that they were not visible to approaching drivers and there was no light at all); *Williams*, 135 So. 2d at 835 (observing that the approach to the crossing was an "abruptly steep and varied incline," which, combined with the unusually high grade of the crossing, created a particularly hazardous approach).

We agree with the district court that, even taking all of Ezell's allegations to be true, his summary judgment evidence fails to show that the conditions on the night of the accident were "peculiar" and "unusually dangerous" such that application of this narrow exception is appropriate. *Owens*, 528 F.2d at 609. As explained, the bar for the exception is high, and Ezell's evidence does not show "extraordinary physical environments or landscapes." *King*, 337 F.3d at 553. The relatively ordinary conditions described by Ezell do not meet this threshold. Thus, the Occupied Crossing Rule bars his failure to warn negligence claim.

Accordingly, we AFFIRM the district court's judgment.

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Corey White vs. Union Pacific Railroad Company

- ***FELA — Occupational Injury — Statute of Limitations***
- ***Locomotive engineer filed suit for back pain due to "rough track"***
- ***Evidence showed plaintiff had pain more than three years prior to suit, but had not seen a doctor***
- ***Railroad argued that statute of limitations barred claim***
- ***HELD — Court says medical diagnosis not required if plaintiff has knowledge of a condition and associates it with his work, Judgment as a Matter of Law AFFIRMED***

When does a cause of action for occupational injury accrue under FELA? It is a common question and the U.S. Court of Appeals for the Eighth Circuit makes an important point, holding that a doctor's diagnosis is not necessarily the triggering factor where an employee has sufficient knowledge of his physical condition and associates it with his work. In *Corey White vs. Union Pacific Railroad Company*, 2017 U.S. App. LEXIS 15185, that is the factual situation, resulting in judgment for the railroad. Appearing for Union Pacific were Brody E. Dawson, Thomas Hayden of UP's Law Department in Chicago, IL. Patrick Larm, Manager Occupational Claims, in Omaha, NE, and John Kuebler, Sr. Analyst Risk Management, in Des Moines, IA, investigated and handled the claim. Appearing for plaintiff were George T. Brugess and Michael Terranova, Cogan & Power, Chicago, IL. Chief Judge Smith wrote the opinion for a unanimous panel of the court. It state, in part:

White first injured his back in a work-related mishap in 1999. As White pulled a work implement for a concrete company, he felt burning and tingling down to his hands and his knees. The injury kept him from working for seven or eight months. His chiropractor "thought maybe there were some dis[c] issues." But White believes that he healed from that injury "[f]or the most part."

In 2001, White began working for the Iowa Missouri Rail Link (IMRL) as a switchman and conductor. He passed a physical examination and had no back problems while with IMRL. In 2004, White went to work for Union Pacific. He passed a Union Pacific medical exam. He worked as a switchman and conductor from 2004-2006, mostly on the "road" but sometimes in the yard. During this time, White had no back problems.

In 2006, Union Pacific promoted White from conductor to engineer. Engineers receive better pay and have different responsibilities. As an engineer, White was responsible for the brake and the throttle — in White's words, "the movement of that train." The nature of the engineer's job means that he pays close attention to the feel of the train. "[A]s an engineer," White said, "you feel these jarring dips and bumps," which White compared to "a pothole in the street." White noted that an engineer who was not prepared for a pothole would find the contents of his desk in his lap. And when the train would bottom out, "you would feel that through the bottom of the seat into your rump all the way up your back, just a jarring, tingling, sharp pain sensation."

Beginning in 2007, White worked frequently on the Clinton subdivision — a part of the railroad that runs from Boone, Iowa, to Chicago, Illinois. White's run began at Boone, in central Iowa, and ended at Clinton, on the Illinois border — about 200 miles away. On this run, several trains

moved constantly back and forth over two sets of track, making this a high-density traffic section. White considered the Clinton subdivision track to be in the worst condition of any track that he traveled. White testified that during 2007 and 2008, he regularly experienced bottoming-out situations caused by irregularities in the track. The worst ones — which occurred at least once a run — caused him to feel pain in his lower back.

In 2010, White first saw a doctor for his lower-back pain. After seeing other doctors for further treatment, White left Union Pacific in 2011. In August 2012, he sued Union Pacific under FELA, alleging that its work conditions caused his lower-back injury.

At trial, White testified about his injury and its cause. He affirmed that beginning in 2007 and 2008, at least once every run his train would bottom out on the track. He affirmed that these situations would cause the type of lower-back pain for which he later sought medical treatment. Sometimes this "pretty bad pain" would run into his buttocks and down his leg as a sharp burning sensation. White attributed his pain to these bottoming-out situations — he said that he made this connection in his mind every run, day after day.

Based on that testimony, the district court granted judgment for Union Pacific as a matter of law, concluding that White's claim accrued before August 2009 and was therefore time-barred. The court noted that "both the record facts and the applicable law ha[d] evolved" since the court had earlier denied Union Pacific's summary judgment motion. White appeals, arguing that the district court should have allowed the jury to determine when his claim accrued.

Here, the court decided as a matter of law that White's suit was untimely. "No action shall be maintained under [FELA] unless commenced within three years from the day the cause of action accrued." 45 U.S.C. §56. When the injury is not a single traumatic one with immediate symptoms, but rather a latent one with symptoms appearing over time, "the cause of action does not accrue until the employee is aware or should be aware of his condition." *Fletcher vs. Union Pac. R.R. Co.*, 621 F.2d 902, 906 (8th Cir. 1980) (citing *Urie vs. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)). In addition to knowing of his condition, the employee must also know — or have reason to know — the condition's cause. *Courtney vs. Union Pac. R.R. Co.*, 713 F. Supp. 305, 308 (E.D. Ark. 1989). "Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause." *Fries vs. Chi. & Nw. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990); *see also Sweatt vs. Union Pac. R.R. Co.*, 796 F.3d 701, 707 (7th Cir. 2015).

White contends that he was not on notice about the aggravation of his lower-back injury until he saw a doctor in October 2010. Citing *Fletcher*, he discerns a rule in this circuit that a latent injury manifests itself "when a plaintiff first seeks medical treatment." This rule is necessary, according to White, because to hold that "garden variety aches and pains" trigger the statute of limitations would encourage laborers to rush to their doctors — and lawyers — with every minor ache. The premise is that such aches ordinarily would not cause a reasonable person to seek treatment, and thus are not serious enough to put someone on notice of an injury worth suing over.

While we have held that seeking medical treatment is a *sufficient* sign that a claim has accrued, we have never held that it is a *necessary* sign. Thus, in *Fletcher*, we held that the employee's cause of action accrued, at the latest, on the date that his back problem was medically diagnosed.

Fletcher, 621 F.2d at 907. But we also noted that "[i]f his back bothered him constantly from [an earlier date], his cause of action accrued on that date." *Id.* at 907 n.7. Thus, a formal diagnosis is not required. *See also Sweatt*, 796 F.3d at 708 ([A] plaintiff cannot wait until he receives a medical diagnosis to begin pursuit of his claim." (discussing *Fries*, 909 F.2d at 1095)).

Fries, a Seventh Circuit case, is instructive. There, the court held that as a matter of law the plaintiff should reasonably have known about his hearing problems and their cause by 1981, four years before a diagnosis. *Fries*, 909 F.2d at 1095-97. The plaintiff had testified that in 1981 the frequency of the ringing in his ears would increase toward the end of the work day, worsen during the work week, and improve only on the weekend. He also said that the only cause he could think of was his work. The court noted that even though the plaintiff lacked actual knowledge of his injury, and the injury had not reached maximum severity as of 1981, his symptoms as of that date imposed a duty to investigate. Otherwise, the court said, a plaintiff could "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact of and cause of his injury." (quoting district court opinion). The plaintiff's suit was therefore time-barred because if he had exercised reasonable diligence, he would have known both his injury and its cause many years before he first saw a doctor and filed suit.

Sweatt is a similar case. 796 F.3d 701. It involved a plaintiff who noticed hand and shoulder pain in May or June 2009, saw a nurse practitioner for hand pain in mid-November 2009, and saw a doctor in late November 2009. His lawsuit — filed exactly three years after the doctor's visit — was held untimely. Despite the plaintiff's attempt to characterize his pain as the intermittent result of a minor injury and nothing more than muscle soreness, he had also testified that his pain was "unbearable" and had sought help from coworkers. Relevant to our case, the court noted two things: (1) the plaintiff's failure to miss work was not controlling, because "his effort in working in the face of injury does not forestall the date of accrual"; and (2) the plaintiff's "plea of ignorance" about the seriousness of his injury was insufficient, because "a plaintiff cannot wait until he receives a medical diagnosis to begin pursuit of his claim."

For one more example, in *Campbell vs. Grand Trunk Western Railroad Co.*, the plaintiff testified that beginning in 1993 or 1994, he experienced daily tingling and pain when working with power tools on the railroad and that the pain would subside when he stopped using the tools. 238 F.3d 772, 775 (6th Cir. 2001). Beginning in 1994 or 1995, he would wake up with numbness in his hands. In 1998, when his symptoms worsened, he saw a doctor and was diagnosed with carpal tunnel syndrome. *Id.* His suit, filed six months later, was time-barred. Notwithstanding his attempts to minimize or claim ignorance about his injuries, his daily symptoms triggered a duty to investigate.

White contends that *Green vs. CSX Transportation, Inc*. is the more factually similar precedent. 414 F.3d 758 (7th Cir. 2005). In that case, more than three years before filing a FELA claim, Green had mentioned shoulder pain and discomfort to her doctor three times and been treated with a mild anti-inflammatory for it once. A coworker had also noted Green's shoulder discomfort in a letter to their employer. The court determined that Green's pain complaints and symptoms were not serious enough to put her on notice: "[H]er shoulder pain prior to [the statute-of-limitations period] may have been little more serious than a scratch, failing to put a reasonable person on notice that she had suffered a cognizable injury and must sue or risk losing her right to do so." There was thus a fact issue on when Green's claim had accrued.

As the district court recognized, White's case is more like *Fries*, *Sweatt*, and *Campbell* than it is like *Green*. At trial, White acknowledged that in 2007 and 2008 he experienced "pretty bad pain" in his lower back at least once a run; that this was the same pain for which he later saw several doctors; that this pain would sometimes run into his buttocks and down his legs as a "sharp burning sensation"; and that this pain was connected to irregularities in the railroad track. This information put White on notice to investigate "his known physical problem," i.e., his frequent, serious, track-induced pain. *See Campbell*, 238 F.3d at 777. This is true even if White did not actually think that he was injured before seeing a doctor in 2010. "Actual notice is not required for accrual. After a condition manifests itself, the question becomes whether the plaintiff knew or, through the exercise of reasonable diligence, *should have known* of the cause of his injury." *Sweatt*, 796 F.3d at 707 (citation omitted). A medical diagnosis is certainly sufficient to put an injured party on notice, but it is not always required where, as here, the plaintiff acknowledges injury awareness before a medical diagnosis occurs. The better rule is that a claim accrues when one reasonably should know that his symptoms are fairly attributable to a workplace injury. The district court correctly concluded, as a matter of law, that White's symptoms were serious enough in 2007 and 2008 to raise a duty to investigate. Because White did not investigate and file suit within three years of the accrual of his claim, the claim is time barred.

Accordingly, we AFFIRM the district court's judgment.

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Catherine Stouffer et al. vs. Union Pacific Railroad Company

- ***Grade Crossing — Wrongful Death — Summary Judgment***
- ***Train strikes truck during Veteran's Day Parade, causing multiple fatalities***
- ***Plaintiff alleged that active warning system didn't provide adequate warning time, that crew should have slowed or stopped the train***
- ***UP argued that warning system met FRA minimum standard, so warning-time claim is preempted, also that no "local hazard" existed to override "Easterwood" speed preemption***
- ***HELD — Warning system met FRA requirements, so warning-time claim is preempted, crew not on notice of a specific local hazard so no requirement to slow or stop train, Summary Judgment is AFFIRMED***

In a case that was featured on national news broadcasts, a UP train struck a Veteran's Day parade float at a grade crossing protected by active warning devices which functioned as intended, but plaintiffs claimed that additional warning time should have been provided. The Court of Appeals of Texas, Eleventh District, said no, if the warning time meets Federal minimums, the claim is preempted, so UP was victorious. The case is *Catherine Stouffer, Individually and on behalf of Gary Lee Stouffer, et al. vs. Union Pacific Railroad Company*, 2017 Tex. App. LEXIS 8326. Plaintiffs were represented by a team of attorneys too numerous to cite. The UP defense team was led by Kent Rutter, Haynes Boone LLP, Houston, TX; John W. Proctor, Brown, Dean, Wiseman, Proctor, Hart & Howell LLP, Ft. Worth, TX, and William H. Hoffman, Jr., Hoffman Law Office, Eastland, TX. The initial investigation and claim handling was done by Mark Baeza, Sr. Analyst Risk Management, located in El Paso, TX. The unanimous panel opinion was written by Justice John Bailey, reading, in part, as follows:

On November 15, 2012, during the "Show of Support — Hero Parade 2012" in Midland, two tractor-trucks pulling flatbed trailers served as floats in the parade. Each tractor-trailer carried twelve veterans and their wives sitting in folding chairs on top of the trailers. The tractor-trailers traveled southbound on South Garfield Street.

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

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

the tractor-trailer. The train, traveling at approximately 62 miles per hour, crashed into the last 39 inches of the second tractor-trailer. Four of the veterans riding on the second tractor-trailer were killed in the collision, and several other riders were injured. Appellants are survivors of three of those veterans.

The trial court . . . granted summary judgment on this matter, which resulted in a final judgment in favor of Union Pacific on all claims asserted by Appellants. On appeal, Appellants assert that the trial court erred by (1) granting summary judgment against their warning-time claims based on federal preemption grounds, (2) granting summary judgment against their train-crew negligence claim based on federal preemption grounds, and (3) granting summary judgment on their gross negligence claims. We affirm.

Union Pacific asserted that Appellants' warning-time claim was preempted because federal regulations cover the timing operation of a railroad's warning systems. Appellants contend that their warning-time claim is exempt from preemption because Union Pacific violated federal regulations that establish a federal standard of care. Specifically, Appellants assert that Union Pacific failed to comply with federal regulations pertaining to "designed-warning-time" and "frequency-overlap" claims.

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

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

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

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

moving downward sooner. Under Section 234.223, the downward movement of the gates is triggered by the flashing lights beginning to operate. Accordingly, we direct our analysis toward Section 234.225, the warning-time regulation.

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

The resolution of Appellants' first issue requires an interpretation of Section 234.225. The construction of a federal regulation is a question of law. *See Nakimbugwe vs. Gonzales*, 475 F.3d 281, 284 (5th Cir. 2007). Accordingly, our review is de novo. *See State vs. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). In construing a statute, we would first look to the plain meaning of the text, giving undefined terms the ordinary meaning unless a different or more precise definition is apparent from the context. *See Greater Houston P'ship vs. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). We would only resort to rules of statutory construction or extrinsic aids when a statute's words are ambiguous. *See id.* We apply these same rules to our interpretation of Section 234.225, with one notable exception. *See Elgin Nursing & Rehab. Ctr. vs. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 494-95 (5th Cir. 2013) (applying rules of statutory construction to the interpretation of regulations). The exception arises from the fact that Section 234.225 is a federal regulation promulgated by the Federal Railroad Administration (FRA), an agency within the Department of Transportation. *See* Grade Crossing Signal System Safety, 61 Fed. Reg. 31802-01 (June 20, 1996). "An agency's interpretation of its own regulation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Elgin Nursing & Rehab. Ctr.*, 718 F.3d at 492 (quoting *Bowles vs. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)). In this regard, an agency's opinion letters, handbooks, and other published declarations of its views are authoritative sources of the agency's interpretation of its own regulations. *Id.*

As originally proposed, Section 234.225 simply provided that "[a] highway-rail grade crossing warning system shall activate to provide a minimum of 20 seconds warning time before the grade crossing is occupied by rail traffic." Grade Crossing Signal System Safety, 59 Fed. Reg. 3051-01, 3066 (January 20, 1994). The commentary that accompanied the originally proposed rule indicated that a 20-second minimum was consistent with the Manual on Uniform Traffic Control Devices (MUTCD) issued by the Federal Highway Administration and that it was consistent with "current industry practices." *Id.* at 3059; *see Oliver vs. Ralphs Grocery Co.*, 654 F.3d 903, 909 (9th Cir. 2011) (The federal MUTCD is a regulation promulgated by the Department of Transportation (DOT) that sets 'the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel.) (quoting 23 C.F.R. §655.603(a))). MUTCD Section 8C.08 provides that "[f]lashing-light signals shall operate for at least 20 seconds before the arrival of any rail traffic." U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS 775 (2009).

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

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

49 C.F.R. §234.225. The addition of the phrase "the design of the warning system" is significant to this appeal because this phrase is the source of the conflict in the parties' interpretation of Section 234.225. The FRA indicated in its notice that accompanied this change that the additional language was added on the recommendation of "[t]he labor/management group" to reflect "a maintenance, rather than a design requirement." *See* Grade Crossing Signal System Safety, 59 Fed. Reg. 50086-01, 50099 (Sept. 30, 1994). The FRA further indicated that the 20-second minimum was retained in the regulation to "maintain a minimum activation standard for warning systems." *Id.*

The FRA has issued other publications addressing Section 234.225. The FRA's Office of Railroad Safety has issued a "Signal and Train Control (S&TC) Technical Manual."

The overview portion of the Technical Manual addressing 49 C.F.R. Part 234 indicates that it provides "authoritative guidance regarding the correct application of the Federal requirements." It also states that:

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

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

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

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

The Technical Manual also provides guidance about the defect classification for when the crossing warning time is not in compliance with the designed warning time. "This defect applies in instances where the system warning time differs significantly from the prescribed warning time . . . ." It defines a "significant difference" as "one that is meaningful or important to the safety and/or credibility of the warning system and a situation in which an expected corrective action must be taken." It further suggests an acceptable range of "plus or minus 5 seconds or more."

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

Union Pacific acknowledges that the original design plans called for 30 seconds of active warning time; however, it contends that it was permissible for it to reprogram the warning system to provide a designed warning time of 25 seconds, which included five seconds of buffer time. Union Pacific asserts that, since Section 234.225 was adopted after the execution of the master agreement, the regulation supplanted the terms of the master agreement. Union Pacific contends that "the design of the warning system" is the current setting of the warning time system as reflected by the plans located at the crossing. Union Pacific cites 49 C.F.R. §234.201 in support of this proposition. This regulation provides that "[p]lans required for proper maintenance and testing shall be kept at each highway-rail grade crossing warning system location." Union Pacific further argues that Section 234.225 sets a federal minimum warning time of 20 seconds, which they complied with by providing at least 20 seconds of warning time at the Garfield crossing at the time of the accident.

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

We disagree with Appellants' contention that the original design for the warning system as reflected in the 1979 Master Agreement is the controlling "design of the warning system" under Section 234.225. Neither Section 234.225 nor any of the other documents issued by the FRA support this conclusion. The final "notice" documentation pertaining to 49 C.F.R. Part 234

indicated that "maintenance, inspection, and testing and timely response to warning device malfunctions is a *new regulatory field*." Grade Crossing Signal System Safety, 61 Fed. Reg. 31802-01, 31802 (June 20, 1996) (emphasis added). The FRA promulgated Section 234.225 in the mid-1990s, approximately fifteen years after the execution of the Master Agreement. That section is contained within Subpart D, which contains regulations directed at railroads rather than other entities or governmental units. As indicated in one of the summaries issued by the FRA pertaining to Part 234: "FRA is issuing a final rule requiring that *railroads* comply with specific maintenance, inspection, and testing requirements for active highway-rail grade crossing warning systems." Grade Crossing Signal System Safety, 59 Fed. Reg. 50086-01, 50086 (September 30, 1994) (emphasis added).

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

Our conclusion is supported by the few cases that have addressed Section 234.225. Some of these cases have simply determined that a warning that provides at least 20 seconds of warning time satisfies the federal standard of care required by the regulation. *See Nunez vs. BNSF Ry. Co.*, 936 F. Supp. 2d 969, 977-78 (C.D. Ill. 2012), *aff'd*, 730 F.3d 681 (7th Cir. 2013). We note that this construction is consistent with the statement in the FRA Technical Manual that "FRA and State inspectors can enforce only the minimum standards set forth in Title 49 CFR Part 234." From an analytical perspective, the case that comes the closest to the contentions in this appeal is *Gafen vs. Tim-Bar Corp.*, No. 01-7626-CIV, 2002 WL 34731033 (S.D. Fla. Oct. 25, 2002). The plaintiffs in *Gafen* asserted that the warning system did not provide "as much warning time as it was designed to provide." *Gafen*, 2002 WL 34731033, at *4. In reliance upon Section 234.225, the trial court held as follows in *Gafen*:

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

Id. at *4. Thus, the allegation in *Gafen* was almost identical to Appellants' allegation of a design warning time being in excess of the 20-second minimum. The court rejected the contention that the failure to achieve a design warning time in excess of 20 seconds constituted a violation of Section 234.225.

As noted previously, the MUTCD provides that "flashing-light signals shall operate for at least 20 seconds before the arrival of any rail traffic." U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN.,

MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS 775 (2009) [*19] . The MUTCD provides two exceptions: a shorter signal operating time when all rail traffic operates at less than 20 miles per hour and additional warning time when determined by an engineering study. *Id.* at 775-76. Thus, a signal warning time greater than 20 seconds is the exception rather than the rule. The Federal Highway Administration's Railroad-Highway Grade Crossing Handbook notes that "[c]are should be taken to ensure that warning time is not excessive . . . . Excessive warning time has been determined to be a contributing factor in some collisions." U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 125 (2007). Excessive warning time may cause a motorist to cross the track despite the operation of the flashing light signals. *Id.* Accordingly, a longer warning time does not necessarily result in greater safety.

We overrule Appellants' first issue pertaining to the summary judgment on their warning-time claims. In doing so, we do not reach Union Pacific's cross-points asserting that Appellants cannot satisfy the tort elements of duty and causation with respect to the warning-time claims. Appellants assert in their third issue that the trial court erred in granting Union Pacific's motion for summary judgment on their gross negligence claims. They premise this claim on their warning-time claims addressed in their first issue, relying upon their frequency-overlap claim to establish the objective and subjective elements of a gross negligence claim. *See Columbia Med. Ctr. of Las Colinas, Inc. vs. Hogue*, 271 S.W.3d 238, 248 (Tex. 2008). Accordingly, our resolution of Appellants' first issue is dispositive of their gross negligence claims. We overrule Appellants' third issue.

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

The U.S. Supreme Court has not defined what constitutes a specific, individual hazard. *Anderson vs. Wis. Cent. Transp. Co.*, 327 F. Supp. 2d 969, 977 (E.D. Wis. 2004). Courts have generally interpreted the exception narrowly. *Partenfelder vs. Rohde*, 2014 WI 80, 356 Wis. 2d 492, 850 N.W.2d 896, 899 (Wis. 2014). A specific, individual hazard is a unique occurrence that could cause an accident to be imminent, rather than a generally dangerous condition. *Hightower vs. Kan. City S. Ry. Co.*, 2003 OK 45, 70 P.3d 835, 847 (Okla. 2003). The exception almost always relates to the "avoidance of a specific collision." *Hesling vs. CSX Transp., Inc.*, 396 F.3d 632, 640 (5th Cir. 2005) (quoting *Armstrong vs. Atchison, Topeka & Santa Fe Ry. Co.*, 844 F.Supp. 1152, 1153 (N.D. Tex. 1994)). The classic examples of a specific, individual hazard are a child standing on the tracks or a motorist standing on the tracks. *See Driesen vs. Iowa, Chicago & E. R.R. Corp.*, 777 F. Supp. 2d 1143, 1156 (N.D. Iowa 2011). "Imminence and specificity are crucial components of the specific, individual hazard exception to preemption."

Appellants rely on *Anderson* to support their argument that the first tractor-trailer constituted a specific, individual hazard. In *Anderson*, the court found that a prior vehicle that passed through the railroad crossing could constitute a specific, individual hazard even though it was not involved in the collision between the train and the following vehicle. *Anderson*, 327 F. Supp. 2d at 977-79. The prior vehicle unsuccessfully attempted to stop at the crossing after the warning lights started flashing and then accelerated across the tracks prior to the train reaching the crossing. *Id.* The plaintiff argued that, based on the first vehicle's failed attempt to stop, the train crew should have been alerted that there was a problem at the crossing that should have caused the train crew to slow or stop the train. *Id.* at 977. The court found that, if "the movements of the [first] vehicle should have alerted the crew that something was wrong . . . and created a duty to slow or stop the train, such duty would be a duty to avoid a specific, individual hazard." *Id.* at 978-79.

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

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Delaware vs. Surface Transportation Board

- ***Miscellaneous — Regulation of Locomotive Idling — Declaratory Order***
- ***Delaware law limits nighttime idling of locomotive***
- ***NS sought relief from STB, arguing that statute was regulation of railroads prohibited by ICCTA***
- ***STB granted order and state sought review***
- ***HELD — Idling limitations in state statute constitute regulation of railroad operations prohibited by ICCTA, STB order UPHELD***

Railroads frequently face claims, both from state or local agencies seeking to enforce laws or ordinances and from adjacent property owners alleging damage to health and property, arising from the necessary idling of locomotives. When the Surface Transportation Board decided that a Delaware law prohibiting "unnecessary" idling of locomotives at night, NS sought a determination that this was preempted by ICCTA and after the STB agreed, Delaware appealed to the U.S. Circuit Court for the District of Columbia. In *State of Delaware vs. Surface Transportation Board*, 2017 U.S. App. LEXIS 10262, the court agreed with NS and the STB. W. Eric Pilsk, Allison I. Fultz, Steven L. Osit, and Charles A. Spitulnik, all of Kaplan Kirsch Rockwell LLP, Washington, DC, represented Delaware, and the STB was represented by Charles H.P. Vance, Craig M. Keats, and Theodore L. Hunt, of the STB and Robert B. Nicholson and Sean Sandoloski, of the U.S. Department of Justice. Our industry, through the Association of American Railroads participated as *amicus curiae*, represented by Kathryn D. Kirmayer, AAR, Washington, DC. The court's unanimous opinion is by Judge Rogers, and reads in part:

The State of Delaware has attempted to limit nighttime noise caused by idling railroad locomotives in residential areas. Under Delaware Senate Bill 135 (SB 135) "[n]o person may permit the nonessential idling of a locomotive under its control or on its property between 8 p.m. and 7 a.m.," except in non-residential areas zoned for industrial use. Del. Code tit. 21, §8503(a), (c). Acknowledging the need of locomotives to idle nonetheless, the statute exempts idling caused by: (1) traffic conditions; (2) the direction of a law-enforcement officer; (3) the operation of defrosting, heating, or cooling equipment to ensure the health or safety of the driver or passenger; (4) the operation of the primary propulsion engine for essential work-related mechanical or electrical operations other than propulsion; or (5) required maintenance, servicing, repairing, diagnostics, or inspections. *Id.* at §8503(b). A violation is punishable by a civil fine between $5,000 and $20,000 for each offense. *Id.* at §8505.

Delaware now petitions for review of the Order of the Surface Transportation Board based on its determination that SB 135 is categorically preempted under 49 U.S.C. §10501(b) of the Interstate Commerce Act, as broadened in the Interstate Commerce Commission Termination Act of 1995 (ICCTA). It emphasizes that SB 135 is a public health and safety regulation that is narrowly tailored to avoid unduly burdening or interfering with interstate rail transportation. The Board concluded that SB 135 "has the effect of directly managing and governing the operation of locomotives that are essential parts of rail transportation." Bd. Dec. 4 (Feb. 29, 2016). For the following reasons, we must deny the petition.

Under the ICCTA, the remedies "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b). (The parties do not suggest any exception in Chapter 105 is applicable. *See id.*) "Transportation" is defined under the ICCTA as "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement." *Id.* at §10102(9)(A) & (B).

Notwithstanding the "expansive" definition of transportation, all of the circuits have concluded that it "does not encompass everything touching on railroads." *Emerson vs. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007); *see also Fayus Enters. vs. BNSF Ry. Co.*, 602 F.3d 444, 451, 390 U.S. App. D.C. 213 (D.C. Cir. 2010); *Wedemeyer vs. CSX Transp., Inc.*, 850 F.3d 889, 894-95 (7th Cir. 2017); *City of Ozark, Ark. vs. Union Pac. R.R. Co.*, 843 F.3d 1167, 1171 (8th Cir. 2016); *Grosso vs. Surface Transp. Bd.*, 804 F.3d 110, 118 (1st Cir. 2015). That is, the ICCTA preempts "all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *N.Y. Susquehanna & W. Ry. Corp. vs. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quoting *Fla. E. Coast Ry. Co. vs. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001); *see also Adrian & Blissfield R. Co. vs. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008). As summarized by the Second Circuit, states retain certain traditional police powers over public health and safety concerns, such as "[e]lectrical, plumbing and fire codes, direct environmental regulations . . . and other generally applicable, non-discriminatory regulations and permit requirements," provided "the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain R.R. Corp. vs. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *see Island Park, LLC vs. CSX Transp.*, 559 F.3d 96, 105-06 (2d Cir. 2009). This power to impose "rules of general applicability," *Ass'n of Am. R.Rs. vs. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010), includes authority to issue and enforce regulations whose effect on railroads is "incidental," *Franks Invs. Co. vs. Union Pac. R.R. Co.*, 593 F.3d 404, 410-11 (5th Cir. 2010), and which "address state concerns generally, without targeting the railroad industry," *N.Y. Susquehanna*, 500 F.3d at 254; *see also Fla. E. Coast Ry. Co.*, 266 F.3d at 1331; *Norfolk S. Ry. Co. vs. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010).

But state or local statutes or regulations are preempted categorically if they "have the effect of 'managing' or 'governing' rail transportation." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331 (alterations omitted); *see Norfolk S. Ry. Co.*, 608 F.3d at 157; *Franks Inv. Co.*, 593 F.3d at 410; *Green Mountain R.R. Corp.*, 404 F.3d at 642. Categorical preemption under the ICCTA precludes such regulation regardless of its practical effect because "the focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation." *Green Mountain R.R. Corp.*, 404 F.3d at 644 (internal quotation omitted); *see also New Orleans & Gulf Coast Ry. Co. vs. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008); *Adrian & Blissfield R. Co.*, 550 F.3d at 540. State statutes or regulations that are not categorically preempted may still be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation. *Franks Inv. Co.*, 593 F.3d at 414; *Adrian & Blissfield R. Co.*, 550 F.3d at 541.

In response to Delaware's enactment of SB 135, the Norfolk Southern Railroad Company filed a petition with the Surface Transportation Board in 2015 for a declaratory order that the statute was preempted under the ICCTA. It argued that SB 135 was categorically preempted because its restrictions "specifically *prohibit* rail transportation" and that "sort of *direct* regulation, specifically targeting railroads[,] has never survived a preemption challenge." Pet. of Norfolk S. Ry. Co. for Expedited Declaratory Order 7 (Aug. 3, 2015) (emphasis in original). Alternatively, in the Railroad's view, SB 135 was preempted as applied because it "necessarily interfere[s] with rail transportation." *Id.* at 9.

The Railroad submitted the verified statement of Baron K. Emery, its superintendent for operations in Delaware. He explained that, "[i]n order to promote its transportation objective, [the Railroad] idles locomotives for a variety of reasons," Emery Statement 2 (July 30, 2015), and gave three examples. The Railroad must idle trains: (1) to maintain the air line, a process necessary to the braking system, because if the airline is not maintained for more than four hours, a multi-hour air test is required by federal law, *id.* at 2-3; (2) "due to unforeseen conditions, such as train crew shortages or scarce rail capacity," because shutting down and then re-starting trains in those circumstances "consumes a significant amount of time," while idling "avoids network congestion and delays that would result from fully shutting down and restarting the train," *id.* at 3; and (3) when the temperature falls below 35 degrees Fahrenheit "to prevent freezing or automatic dumping of the locomotive cooling system, which could result in damage to the train and thus impair rail service and network operations." *Id.* Delaware filed a Notice of Intent to Participate in the proceedings, and it replied that the State "fully acknowledges that broad regulation of a railroad's activities by state or local authorities is preempted by federal law," and that SB 135 is permissible because it "is narrowly and precisely tailored to avoid such wholesale regulation." Reply of the State of Del. 2 (Oct. 23, 2015).

The Board granted the railroad's petition for declaratory relief, concluding that SB 135 is categorically preempted by the ICCTA "because it has the effect of directly managing and governing the operation of locomotives that are essential parts of rail transportation." Bd. Dec. 4; *see also* 49 U.S.C. §10501(a) & (b)….

The State of Delaware challenges the Board's order granting declaratory relief principally on the ground its decision fails to acknowledge that although "preemption under the ICCTA is broad, it 'does not categorically sweep up all state regulation that touches upon railroads' and does not displace states' ability to act under their traditional police powers to protect its citizens from harm." Pet'r's Br. 16 (quoting *Island Park, LLC*, 559 F.3d at 104). States may, it contends, impose limitations on railroad-related activities in order to protect the public from harm so long as they do not unreasonably burden rail transportation. But the latter relates to as-applied preemption, *see, e.g., Adrian & Blissfield R. Co.*, 550 F.3d at 540-41, while the Board determined SB 135 is categorically preempted as well.

There is some legal uncertainty in this circuit about the appropriate level of deference a court owes to an agency's determination of its own preemption. In *Wyeth vs. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), the Supreme Court observed, with regard to the impact of tort law on federal objectives, that even in technical matters and where the history is complex and extensive, that:

> [W]e have not deferred to an agency's *conclusion* that state law is preempted[, but] attended to an agency's explanation of how state law affects the regulatory scheme. While agencies have no special authority to pronounce on preemption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 576-77 (internal citation omitted). The Court applied the standard of *Skidmore vs. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944); *see United States vs. Mead Corp.*, 533 U.S. 218, 234-35, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). *Wyeth*, 555 U.S. at 577.

Since *Wyeth*, this court concluded that it is "an open question in this circuit" whether "an agency decision against preemption of a state or local law receives *Chevron [U.S.A., Inc. vs. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)] deference," noting that *Wyeth* "obviously puts the *Chevron* deference claim in further doubt." *Fayus Enters.*, 602 F.3d at 446-47. Delaware urges that the *Skidmore* standard should be applied, pointing out that other circuits have interpreted *Wyeth* to accord deference to agency preemption determinations based on that standard, deferring to the agency's reasoning only where it is persuasive. *See Grosso*, 804 F.3d at 116-17; *Steel Inst. of N.Y. vs. City of N.Y.*, 716 F.3d 31, 39-40 (2d Cir. 2013); *Franks Inv. Co.*, 593 F.3d at 413-14. The Board, on the other hand, maintains *Chevron* deference is appropriate because Section 10501(b) contains an express preemption provision, and as two of our sister circuits have concluded, the Board "is uniquely qualified to determine whether state law is preempted by Section 10501(b)." Resp't's Br. 14 (quoting *N.Y & Atl. Ry. Co. vs. Surface Transp. Bd.*, 635 F.3d 66, 70 (2d Cir. 2011)); *see also Emerson*, 503 F.3d at 1130.

The court need not decide the precise level of deference owed to the Board's preemption determination because it survives under either standard of review. The Board looked to the plain text of SB 135 in light of the Railroad's undisputed need to carry out its transportation objective. *See Friberg vs. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). The ICCTA preempts state or local statutes that regulate rail transportation, which is defined broadly to include locomotives and equipment "related to the movement of passengers or property." 49 U.S.C. §10102(9)(A); *Norfolk S. Ry. Co.*, 608 F.3d at 157. SB 135 directly regulates rail transportation by prohibiting locomotives from idling in certain places at certain times, in essence requiring that at night, in residential neighborhoods, they either shut down or keep moving (unless one of the exceptions in Chapter 85 of Delaware Code Title 21 applies). This is a regulation of rail transportation under the ICCTA, and Delaware's challenges to the Board's determination that SB 135 is categorically preempted by the ICCTA are unpersuasive.

As Delaware sees it, SB 135 "applies, literally, only to the *non-movement* of passengers and property," and "does not therefore constitute the regulation of rail transportation." Pet'r's Br. 31 (internal quotation omitted). Delaware did not make this argument to the Board, and it is forfeit. The "hard and fast rule of administrative law, rooted in simple fairness, [is] that issues not raised before an agency are waived and will not be considered by a court on review." *Nuclear Energy Inst., Inc. vs. EPA*, 373 F.3d 1251, 1297, 362 U.S. App. D.C. 204 (D.C. Cir. 2004). Even so, the ICCTA's definition of "transportation" belies any requirement of movement at the time of regulation; it preempts regulation of immovable objects including "warehouse[s], whar[ves],

pier[s], dock[s and] yard[s]." 49 U.S.C. §10102(9)(A). The precedents on which Delaware relies in attempting to distinguish SB 135 are unhelpful to it. *Grosso*, 804 F.3d at 117-19, vacated the Board's decision that regulating property before it was loaded on trains was categorically preempted because the Board had not focused sufficiently on whether the activity "facilitated the physical movement of passengers or property." *Id.* at 119. *Emerson*, 503 F.3d at 1129-30, involved tort claims arising from the railroad's disposal of railway ties in ditches that were not preempted because the disposal was not "transportation" under the ICCTA. In other words, regulation of activities that occur before or after "transportation" and are incidental to such transportation may not be preempted. By contrast, SB 135 limits how and when locomotives operate and thereby directly affects the movement of trains. To the extent SB 135 includes exceptions, Delaware has decided for the Railroad how it shall operate.

Similarly unavailing is Delaware's view that SB 135 is not preempted because it is "narrowly tailored" and "seeks only to limit non-essential idling that has a deleterious public health effect," and is thus analogous to cases where courts found no preemption. Pet'r's Br. 33, 36. The precedents on which it relies are inapposite. In *Island Park LLC*, 559 F.3d at 98, 103-04, a state regulation closing a private, unpaved road across train tracks was not preempted because it would have no effect on the railroad except by "removing a potential hazard" of vehicles on the tracks at the crossing; in other words, it facilitated or enhanced railroad movement. *Id.* at 103-04. In *Franks Investment Company*, 593 F.3d at 411, a railroad crossing dispute "governed by [state] property laws and rules of civil procedure that have nothing to do with railroad crossings" was not preempted, in contrast to "a tort suit that attempts to mandate when trains can use tracks and stop on them," thereby "attempting to manage or govern rail transportation." *Id.* SB 135 directly and exclusively applies to railroad operations by deciding, as the Board observed, operational issues for the railroads and thereby, as illustrated by the Emery Statement, posing potential obstacles to rail "transportation."

Delaware fails to meaningfully distinguish precedent that supports the Board's decision that SB 135 is categorically preempted. In *Friberg*, 267 F.3d at 443-44, a state statute limiting when trains could block streets was held categorically preempted. Delaware points out that in *Friberg* the statute "directly and indiscriminately target[ed] aspects of rail transportation related to the movement of passengers or property." Pet'r's Br. 25. That SB 135 is more narrowly drawn does not mean that it does not impermissibly target rail transportation and railroad operations. In *Association of American Railroads*, 622 F.3d 1094, state rules that "apply exclusively and directly to railroad activity" and "requir[e] railroads to reduce emissions" were "plainly" preempted because they "have the effect of managing or governing rail transportation," *id.* at 1098 (quoting *N.Y. Susquehanna*, 500 F.3d at 252). Delaware points out that the regulation in *Association of American Railroads* imposed reporting requirements that SB 135 does not, *id.* at 1096, 1098. That is not dispositive, however. Even so, by limiting times and places for idling, and providing exceptions, SB 135 directly regulates the rail transportation of passengers or property by limiting permissible idling time, subject to exceptions whose applicability can turn on the discretion of local law enforcement. *See* Del. Code tit. 21, §8504(a).

Still, Delaware insists that the Board's determination is owed no deference because the exceptions in SB 135 "narrowly restrict[] only *unnecessary* locomotive idling," Pet'r's Br. 36, and would allow the necessary idling identified in the Emery Statement. *See id.* at 38-39. The Emery Statement offers examples, not an exhaustive list of necessary idling, and the Board

focuses principally on the fact that Delaware, not the Railroad, was making operational decisions about when, where, and how long locomotives could idle. Categorical preemption does not depend on whether the practical application of the statute or regulation is narrowly tailored. *Adrian & Blissfield R.R. Co.*, 550 F.3d at 540; *New Orleans & Gulf Coast Ry. Co.*, 533 F.3d at 332; *Green Mountain R.R. Corp.*, 404 F.3d at 644. Even under *Skidmore*'s limited deference standard, the question for the court is not whether SB 135 would prohibit any specific instances of "essential" idling, Pet'r's Br. 37; rather the question is whether an operation or service is "transportation" at all. *See, e.g.*, *N.Y. Susquehanna*, 500 F.3d at 247. The Board persuasively concluded that SB 135 regulates rail transportation.

Accordingly, we deny the petition for review.

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Michael L. Holloway vs. Union Pacific Railroad Company

- ***FELA — Lifting Injury — Summary Judgment***
- ***Plaintiff moving heavy equipment by himself when injured, claims lack of training, lack of assistance***
- ***Railroad's defense — plaintiff could have assigned others to help, had done the same task on his own previously without incident***
- ***HELD — No evidence of insufficient assistance, unsafe workplace or inadequate training, Summary Judgment GRANTED***

Our thanks to William Hakes of Thompson Coburn for notice of UP's successful motion for summary judgment in a case where plaintiff was injured while doing a task he had done without incident on previous occasions and where he could have assigned others to assist if he felt it was necessary. In *Michael J. Holloway vs. Union Pacific Railroad Company*, 2017 U.S. Dist. LEXIS 108551, Mr. Hakes was joined by Nicholas J. Lamb, also of Thompson Coburn LLP, St. Louis, MO, in defense of Union Pacific. Stephen McCartney, Analyst Risk Management, in the St. Louis claims office handled the claim. Plaintiff was represented by Louis E. Jungbauer; Yaeger & Jungbauer, St. Paul, MN, and Theodore D. Dearing; Dearing & Hartzog, Clayton, MO. The opinion is by Judge Henry Autrey, and reads, in part, as follows:

Plaintiff claims to have suffered the injury at issue in this case on December 17, 2012, while moving a generator from Union Pacific's depot in Scott City, Missouri, to another building. Plaintiff alleges in his complaint that Union Pacific was negligent in that it (1) failed to provide a reasonably safe place to work; (2) failed to provide reasonably safe equipment; (3) failed to properly instruct, educate, or train its employees; (4) failed to warn plaintiff of dangers that confronted him; (5) failed to provide proper supervision and training; (6) failed to adopt or enforce safe customs and practices; and (7) assigned plaintiff work that was unsafe.

Plaintiff began his career with defendant in 1979. He joined the signal department in 1988. In 2011, he became a Signal Forman.

Before his incident occurred, plaintiff had been told to move several generators out of the depot at Scott City because they contained gasoline and should not be kept in an occupied building. He was first told to move the generators in June or July of 2012, which was about six months before his incident. Plaintiff was again told in a meeting on December 13, 2012, that the generators needed to be moved.

When plaintiff started work on December 1 7, 2012, he did not initially plan on moving any generators. Plaintiff arrived at work at around 7:00 a.m., participated in a conference call that lasted about ninety minutes, and then checked his email and filled out an expense report and some other paperwork. It was not until about 10:00 or 10:30 a.m. on December 17, 2012, when he decided to move one of the generators. Plaintiff decided to move the generator on December 17, 2012, because he was worried about being disciplined and he wanted to be able to say that he had at least started on the task of moving the generators.

Plaintiff decided to move one of the two small generators that he thought he could move by himself. To move the generator, plaintiff first got it out of the depot and loaded it onto his

pickup truck, using a pallet as a "makeshift ramp" to help him get the generator into the bed of the truck. After loading the generator in his truck, plaintiff then drove his truck one hundred yards or so over to the signal cabinet where he had decided to put the generator. He then slid the generator out of the pickup and dropped it on the ground. After dropping the generator on the ground, plaintiff dragged the generator over to the door of the signal cabinet, got beside it, and pushed it up to the edge of the door. He was going to lift the generator and drag it inside the signal cabinet but, as he squatted down, he felt pain in his back.

Plaintiff testified that he had sufficient time to do the job of moving the generator safely. At the time of his incident, plaintiff was moving at a safe speed and was not rushing. He was alert, attentive, and focused on the task of moving the generator.

Plaintiff claims that the railroad should have provided a ramp or assistive devices like a boom on his truck, a two-wheeled dolly, or a forklift. He also claims that he should have been provided with additional help.

Plaintiff assigned the task of moving the generators to himself. No one at the railroad gave plaintiff instructions on how to move the generators, or said that they had to be moved by a certain day. No one at the railroad prevented plaintiff from getting help, a boom, a ramp, a dolly, or a forklift, for the purpose of moving the generators. All decisions on how the generator was going to be moved were made by plaintiff.

Before his incident, plaintiff did not anticipate any problems with the task of moving the generator. Plaintiff completed a "lone worker job briefing" before his incident in which he determined that he did not need any special tools or lifting devices to do the job safely. The only risk plaintiff identified in his "lone worker job briefing" was the need to use proper lifting techniques-he did not identify risks like the lack of a ramp or the need for additional help or assistive devices.

Before his incident occurred, plaintiff had never complained that he needed a ramp, boom, dolly, forklift, or additional help, to move the generator. Plaintiff did not try to obtain any special tools before moving the generator. He did not try to obtain a ramp, boom, dolly, or forklift, before moving the generator. Even though there were about ten members of a maintenance-of-way gang in the depot on the morning of his incident, plaintiff did not ask anyone to help him move the generator.

At the time of his incident, plaintiff was a supervisor over numerous employees and had authority to direct them to do the work or to assist him in doing the work. Plaintiff believed before he started moving the generator on the day of his incident that he could move the generator by himself, without any special tools, and do so safely without injuring himself.

Before his incident, plaintiff had moved generators by himself, and he did so without injuring himself. Plaintiff believed he could move the generator safely on the day of his incident, just as he had done in the past. According to plaintiff," . . . I've moved generators before by myself, I didn't see any reason I couldn't move it at this time by myself. . . . I didn't see any reason that it would be different this time."

Plaintiff's FELA claim is premised on his December 2012 injury, in which he allegedly hurt his back while moving a generator. According to plaintiff, that injury was due in whole or in part to Defendant's negligence in failing to provide him with adequate assistance; in failing to provide him with proper tools or equipment; in removing two wheels from the generator; using threats to apply unreasonable pressure to plaintiff; and in storing the generators in an unsafe location, thus making it necessary for plaintiff to move them. Defendant moves for summary judgment, arguing that it was not negligent in any respect and that the injury was not reasonably foreseeable, and therefore not actionable.

Plaintiff testified in his deposition that he had previously moved generators by himself without injury. He did not anticipate any trouble in moving the generator, and that he could move it safely. He admits he had sufficient time to move the generator and that at the time, he was moving at a safe speed at the time of his injury. He further testified that no one told him how to move the generator, nor that he could not use additional equipment or help. He did not ask for help nor did he assign employees whom he supervised the task of moving the generator or helping him move the generator. He completed a "lone worker job briefing" in which he determined that he did not need any special tools or lifting devices to perform the job safely. Plaintiff cannot, in hindsight reassess his decisions in order to establish defendant's liability.

Likewise, plaintiff fares no better on his claim that defendant removed the wheels from the generator. There is no evidence that this particular generator originally had wheels. Plaintiff's sole support for this claim is an unauthenticated parts list which indicates that certain generators could have wheels. Speculation can never overcome facts; plaintiff's argument is pure speculation with respect to defendant's "removal" of the wheels.

Plaintiff admits he had sufficient time within which to move the generators. He did not do so from June or July, 2012 until December 17, 2012. Plaintiff's claim that he was being pressured into moving the generators is belied by the facts regarding the assignment of transporting the generators to the actual performance of the task.

Similarly, plaintiff's claim that he was being unreasonably pressured is neither supported by admissible evidence nor reasonable in light of his testimony that he had had sufficient time within which to move the generators. Nowhere does plaintiff explain the lack of movement prior to December, 2012. Rather, plaintiff attempts to blame defendant for the lack of movement, while the record establishes that plaintiff began moving the generator because he was confronted by Johnson for his procrastination. He wanted to at least show some action in moving the generators when he attempted to move the first generator on December 17, 2012.

Finally, plaintiff argues that the generators should not have been stored in an unsafe location, which in turn required the movement of the generators to an unoccupied building. As defendant correctly argues, this first time argument in response to summary judgment cannot carry plaintiff's shifted burden. This claim was not included in the allegations of negligence in plaintiff's Complaint. As such, plaintiff cannot now set out a newly alleged claim to avoid summary judgment. *Holman vs. Coca-Cola Enterprises, Inc.*, 4:05CV1032 HEA, 2006 U.S. Dist. LEXIS 59668, 2006 WL 2460795, at *5 (E.D. Mo. August 23, 2006), *aff'd*, 258 F.App'x 919 (8th Cir. 2007).

Furthermore, even assuming plaintiff could raise the storage issue, this fact has nothing to do with the cause of plaintiff's injury. The injury would have occurred regardless of where the generators were stored and whether that storage was a safe location or not.

Plaintiff's claim of foreseeability also fails. Plaintiff had previously moved generators by himself. He admitted that he did not think he needed additional help or additional equipment. Defendant had provided training on proper lifting techniques. While plaintiff argues that this demonstrates that defendant could have foreseen his injury, defendant's position is clearly correct. Because defendant provided the training, it would be reasonable to believe that plaintiff would have assessed the situation and asked for help if he thought, through the training he had previously had, that he needed assistance by way of equipment or manpower. Plaintiff himself decided when and how to move the generator. Plaintiff believed moving the generator himself was safe; defendant cannot therefore be regarded as having been able to foresee something for which plaintiff made the salient decisions.

Viewing the facts in the light most favorable to plaintiff, clearly there are no disputed facts that could give rise questions for a jury to resolve. The facts establish that defendant was neither negligent nor could have foreseen plaintiff's injury. Under the FELA, defendant is entitled to judgment as a matter of law.

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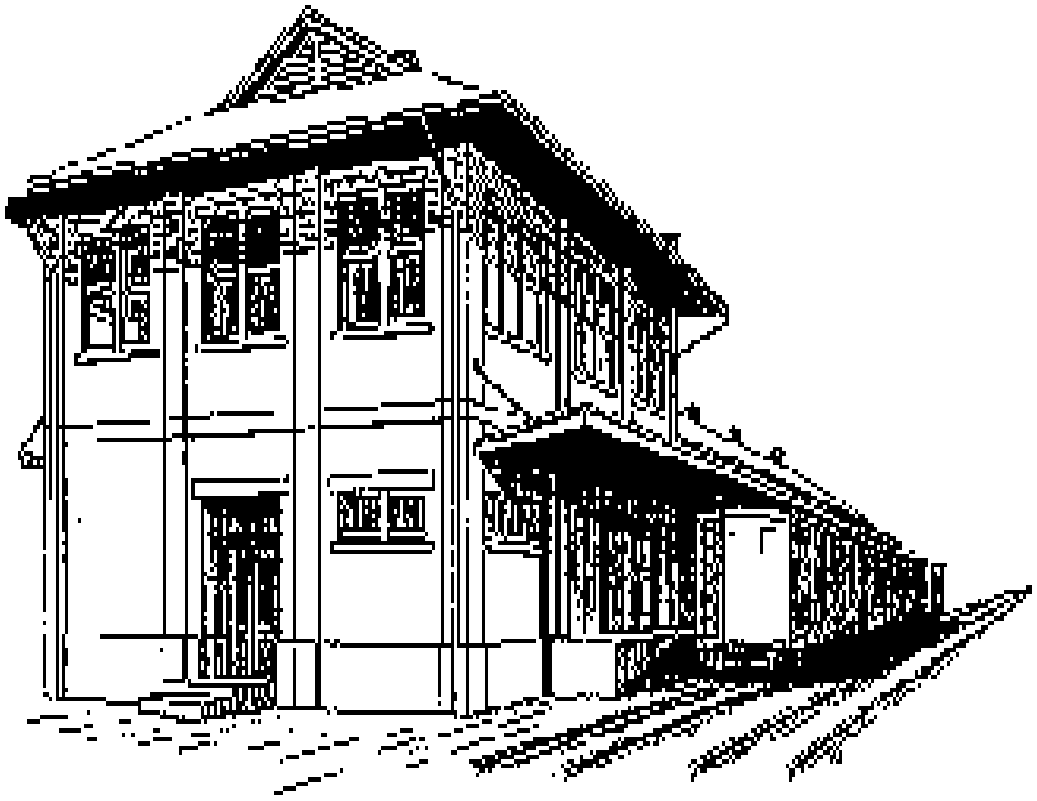

Evanston Insurance Co. vs. Sandersville Railroad Co.

- ***FELA — Defense and Indemnification — Summary Judgment***
- ***Railroad sued by employee for occupational injury, tendered defense and indemnification of claim to insurance company***
- ***Insurer's response was ambiguous, agreed to pay for defense but reserved right to seek reimbursement of defense costs***
- ***In action for declaratory judgment, insurer sought reimbursement of costs***
- ***HELD — Insurer's "reservation of rights" letter was defective, so it cannot be reimbursed, motion for summary judgment DENIED***

In a textbook discussion of an insurance carrier's obligation to defend and indemnify its railroad insured, and the difference between those two separate obligations, the U.S. District Court for the Middle District of Georgia, Macon Division holds that if the carrier's refusal to denial of the duty to defend is not "clear and unambiguous," it must pay for the railroad's defense, even if it has no obligation to pay the underlying claim itself. In *Evanston Insurance Company vs. Sandersville Railroad Company*, 2017 U.S. Dist. LEXIS 115686, plaintiff insurance carrier was represented by Joseph C. Gebara and Paul L. Fields, Jr.; Fields Howell LLP, Atlanta, GA. Sandersville was represented by our friends, Donald McMinn, Hollingsworth LLP, Washington, DC, and Mark Toth, Walker S. Stewart and J. Steven Stewart; Hall, Bloch, Garland & Meyer LLP, Macon, GA. The railroad's defense was supported by an amicus brief filed on behalf of the American Short Line and Regional Railroad Association by Richard K. Hines V; Nelson, Mullins, Riley & Scarborough, Atlanta, GA. Judge Marc Treadwell wrote the opinion of the court, of which portions follow:

Sandersville Railroad purchased a comprehensive general liability (CGL) policy from Evanston that provides coverage for FELA. The policy has a standard pollution exclusion. On January 4, 2013, Flowers's attorney provided Sandersville Railroad with notice of a FELA claim, and on January 7, 2014, Flowers's attorney sent Sandersville Railroad a demand letter regarding the claim. Sandersville Railroad notified Evanston of the claim, and Evanston sent a reservation of rights letter in April 2014. In this letter, Evanston noted that Flowers was "making a claim for occupational illness from welding fume exposure during his employment at [Sandersville Railroad]" — namely that he had "contracted 'welder's lung' disease from occupational exposure to welding fumes while welding railroad cars owned by Sandersville Railroad." Evanston stated its position that the policy did not cover the claim because of the pollution exclusion and reserved its rights "as to whether the pollution exclusion applies to bar coverage for this claim," and "with respect to the investigation, settlement, and defense of the claim." As to the latter, Evanston stated that "[u]pon exhaustion of [Sandersville Railroad's] self-insured retention, [Evanston] will pay the reasonable costs of defense for [Sandersville Railroad's] chosen defense counsel, subject to a reservation of rights to withdraw from providing the defense upon a determination that there is no coverage[,]" and subject to a reservation of "the right to reimbursement of costs paid if it establishes that it owes no coverage to [Sandersville Railroad]." Evanston also reserved the right, should Flowers file suit, "to file a declaratory judgment action to obtain an adjudication that [Evanston] does not owe any defense or indemnity for the claims alleged." The letter concluded by stating that neither Evanston nor Sandersville Railroad waived any rights under the policy or the law. Sandersville Railroad did not object to this letter. The

parties agree that the policy itself does not give Evanston the right to recover defense costs. On June 17, 2014, Flowers filed suit against Sandersville Railroad under FELA. In his complaint, Flowers alleged:

> In early 2012, [he] developed shortness of breath and was diagnosed with advanced lung disease. He was advised to avoid further exposure to workplace toxins, including welding fumes. As a result, [he] lost wages and benefits . . . suffered reduced earning capacity . . . sustained mental and physical pain and suffering and . . . [incurred] medical bills and other costs associated with his care and treatment.

Flowers alleged that Sandersville Railroad was negligent by failing to:

> provide a reasonably safe place to work . . . , by failing to provide him proper personal protective equipment in the form of adequate breathing protection; by failing to adequately ventilate the areas where Mr. Flowers was required to weld; by failing to promulgate and implement proper procedures and safeguards for Mr. Flowers [sic] proper breathing protection; by failing to properly warn and train Mr. Flowers of the dangers and signs of occupational lung disorders, and by failing to provide proper supervision.

Flowers further alleged that Sandersville Railroad's negligence "posed an unreasonable risk of illness and injury" and "caused or contributed, in whole or in part, to Mr. Flowers' injuries and damages as . . . alleged." When Flowers filed his complaint, Evanston did not, by supplement to its reservation of rights letter or otherwise, address whether, based on the allegations of the complaint, it owed Sandersville Railroad a duty to defend. After Sandersville Railroad exhausted its self-insured retention in early 2015, it tendered the defense of the lawsuit to Evanston. Evanston did not, as Georgia law allows, seek a stay of Flowers's lawsuit so that it could seek declaratory relief determining whether its policy covered the Flowers claim or whether it was obligated to defend Sandersville Railroad. Rather, on May 18, 2015, Evanston issued a second reservation of rights letter.

It is clear that Evanston's second letter was, subject to a very few changes, a "cut-and-paste" of the first. The letters each contained an introduction and four sections: Section I. *Factual Background*; Section II. *Policy Details*; Section III. *Reservation of Rights*; and Section IV. *Conclusion*. In its introduction and Section I. *Factual Background*, the second letter added to the first that it was "a supplemental bilateral reservation of rights with respect to coverage issues on this claim," noting the first letter was sent in April of 2014. Otherwise, the second letter provided less factual background regarding Flowers's claim than the first. While the first letter provided a few sentences describing the claims made by Flowers's attorney in his initial demand letter on Flowers's behalf, this information was omitted, without replacement, in the second letter. Although the second letter stated that Evanston's adjuster had been "advised" that a lawsuit had been filed, the letter made no mention of Flowers's complaint or any particular allegation of the complaint.

Section II. *Policy Details* was identical, word-for-word, in the two letters, though it should not have been. Due to Evanston's cut-and-paste drafting, the second letter replicated coverage provision A.1.a.(1) — addressing defense obligations prior to the exhaustion of Sandersville Railroad's self-insured retention — from the first letter, instead of substituting the then-

applicable coverage provision A.1.a.(2) — addressing defense obligations after the exhaustion of Sandersville Railroad's self-insured retention. Accordingly, the policy provision stating Evanston's defense obligations following the exhaustion of the self-insured retention was never mentioned in the letter.

Section III. *Reservation of Rights*, as in the first letter, contained the following subsections: A. *Applicable Policy*; B. *Pollution Exclusion*; C. *Investigation, Settlement and Defense of the Claim*; D. *Reimbursement of Defense Costs*; E. *Declaratory Judgment Action*; and F. *Other Insurance*. Of these, A. *Applicable Policy*; C. *Investigation, Settlement and Defense of the Claim*; D. *Reimbursement of Defense Costs*; and F. *Other Insurance* were identical in the two letters. Evanston changed a few phrases of B. *Pollution Exclusion* in the second letter — "his attorney alleges" was replaced with "he alleges," "this claim is under investigation" was omitted, and "however" was omitted — otherwise it was identical to the first letter. Evanston omitted "if and when the claimant files a lawsuit against the insured" from E. *Declaratory Judgment Action* in the second letter, but otherwise it, too, was identical to the first letter. Evanston added to the second letter a subsection — G. *Cooperation and Consent* — describing the duties of Sandersville Railroad to inform and cooperate with Evanston in the defense of the suit, as well as reserving Evanston's rights "in respect to Sandersville Railroad's compliance with the conditions of the policy." Lastly, Section IV. *Conclusion* was identical in the two letters.

In short, the second letter, sent after the filing of Flowers's complaint and accordingly representing Evanston's first opportunity to address whether it owed Sandersville Railroad a duty to defend based on the allegations of Flowers's complaint, did not recognize this in any fashion, either by describing allegations of the complaint or explaining why they did not implicate a duty to defend by Evanston. Rather, all of the operative reservation or rights language and facts in the second letter mirrored the first letter, which, being sent before Flowers filed his complaint, could not address any duty to defend. As with the first letter, Sandersville Railroad did not object to the second letter.

On June 24, 2015, Evanston filed this declaratory judgment action seeking a determination that its policy did not provide coverage for Flowers's lawsuit and that it was entitled to recoup any defense costs paid in regard to the lawsuit. Doc.1. Sandersville Railroad settled with Flowers with no contribution from Evanston on November 20, 2015. The parties thereafter filed cross motions for summary judgment in this action. Docs. 18; 20.

The court, in its September 28, 2016 order, granted Evanston's motion in part, ruling that Evanston had no duty to indemnify Sandersville Railroad and no further duty to defend against the action. By the time the parties filed their cross-motions for summary judgment in this action, it was undisputed that Flowers claimed that he suffered from siderosis, or "welders' lung," and that his occupational lung disease was caused by exposure to welding fumes containing iron. But these facts were not alleged in Flowers's complaint. The court ruled that "based on the summary judgment record, the pollution exclusion" in the policy excluded coverage for Flowers's lawsuit. As the court noted then: "The relevant facts . . . *significantly*, are not limited to the allegations of the Flowers complaint. Rather, the parties have put additional facts in the record to assist in the determination of whether Evanston's pollution exclusion excludes coverage for Flowers's claims." The court denied summary judgment on the parties' cross motions regarding Evanston's attempt to recoup its defense costs, noting that the parties failed to address

whether Evanston had a duty to defend based on the allegations of Flowers's complaint. The court stated that "[t]he parties may renew their motions for summary judgment on these issues by way of motions filed with briefs addressing these remaining issues."

Evanston has now moved for summary judgment "[a]s to Count 1," that "Evanston owed no duty to defend defendant Sandersville Railroad Company for Mr. John Larry Flowers' Complaint against Sandersville Railroad Company," and "[a]s to Count 3," that "Evanston is entitled to reimbursement from defendant Sandersville Railroad Company for all defense fees and costs paid in connection with" Flowers's lawsuit.

Under Georgia law, "an insurer's duty to pay and its duty to defend are separate and independent obligations." *Penn-Am. Ins. Co. vs. Disabled Am. Veterans, Inc.*, 268 Ga. 564, 565, 490 S.E.2d 374, 376 (1997) (citation and quotation marks omitted). "The insurer may be obligated to defend, even though it was not ultimately liable for any judgment . . . ." *Id.* at 565, 490 S.E.2d at 376-77 (citation, quotation marks, and alteration omitted). "[T]he insurer is obligated to defend where . . . the allegations of the complaint against the insured are ambiguous or incomplete with respect to the issue of insurance coverage." *Id.* at 565, 490 S.E.2d at 376. And "it is only where the complaint sets forth true factual allegations showing no coverage that the suit is one for which liability insurance coverage is not afforded and for which the insurer need not provide a defense." *Id.* "Where the claim is one of potential coverage, doubt as to liability and [the] insurer's duty to defend should be resolved in favor of the insured." *Id.* (citation and quotation marks omitted).

Accordingly, the question is whether, as a matter of law, the allegations of Flowers's complaint unambiguously exclude coverage.

(To excuse the duty to defend the [complaint] must unambiguously exclude coverage . . . ." (citation and quotation marks omitted)). On a practical level, this question boils down to whether Flowers's complaint is unambiguous and complete in alleging that Flowers's injuries arose "out of the . . . discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"

Flowers's three-page complaint is not a model of clarity. In relevant part, he alleges that as a welder he worked "in very close and poorly ventilated conditions." He then alleges he "developed shortness of breath[,] . . . was diagnosed with advanced lung disease[,] [and] was advised to avoid further exposure to workplace toxins, including welding fumes." Immediately following this allegation, he claims "[a]s a result," he lost wages, sustained pain and suffering, and incurred medical expenses. Flowers then alleges that Sandersville Railroad was negligent because it failed to provide a safe place to work, failed to provide adequate breathing protection, failed to ventilate the areas where he welded, failed to adopt procedures and safeguards for breathing protection, failed to warn and train him regarding the dangers and signs of occupational lung disorders, and failed to provide proper supervision.

No doubt because of Flowers's spare allegations, Evanston massages and supplements these allegations. Evanston asserts that "Flowers alleged that he contracted 'welder's lung' disease from exposure to welding fumes during the course of his employment for Sandersville." This is not true. Flowers' complaint does not mention "welder's lung disease," a phrase that suggests some causal connection to his work as a welder at Sandersville Railroad. Rather, the complaint simply alleges that Flowers "was diagnosed with advanced lung disease." Evanston doubles

down on this incorrect assertion with its next — that "Flowers *specifically* alleged he was injured from 'exposure to workplace toxins, including welding fumes.'"

That specific allegation is not in the complaint. To the contrary, the complaint does not allege, "specifically" or generally, that Flowers's advanced lung disease was caused by workplace toxins, such as welding fumes. As noted above, Flowers simply alleged that he was "advised to avoid further exposure to workplace toxins, including welding fumes."

Evanston does not argue what perhaps it could have argued. Perhaps it should have conceded that a literal reading of Flowers's complaint does not unambiguously lead to the conclusion that he is alleging that he contracted lung disease as a result of workplace exposure to toxins and then argued that, if considered in a more practical light, it can be inferred from Flowers's allegations that he is alleging an injury that falls within the pollution exclusion. While that argument is certainly preferable to reworking Flowers's complaint to make it allege something it does not, that argument too runs afoul of Georgia law. Again, the question is whether the allegations of the complaint "unambiguously exclude coverage." Even if Flowers's allegations are examined in such a practical light, an inference of a claim within the pollution exclusion is not the only inference that can be drawn. For example, it can be inferred that Flowers is complaining about Evanston's response to a lung disease that was not caused by workplace toxins. Again, he simply asserts that he has a lung disease and that "as a result of that lung disease," he was advised to avoid further exposure to workplace toxins. Evanston's interpretation of Flowers's complaint is accordingly not the only reasonable interpretation, and, it must be remembered, the court must resolve the ambiguity in favor of the insured — Sandersville Railroad. *Cf. Hoover vs. Maxum Indem. Co.*, 291 Ga. 402, 408, 730 S.E.2d 413, 418 (2012); *Penn-Am. Ins. Co.*, 268 Ga. at 565, 490 S.E.2d at 376. Accordingly, the court cannot say, as a matter of law, that the allegations of Flowers's complaint establish that Evanston did not owe Sandersville Railroad a duty to defend.

Even if Evanston had no duty to defend Sandersville Railroad, Evanston has not shown as a matter of law that it is entitled to reimbursement of defense costs.

Courts are divided on whether an insurer that has defended an insured under a reservation of rights is entitled to recoup its defense costs when it is thereafter adjudicated that the insurer was not obligated to defend. *See Ill. Union Ins. Co. vs. NRI Constr., Inc.*, 846 F.Supp.2d 1366, 1374 (N.D. Ga. 2012). Courts following what is often referred to as the "majority rule" allowing recoupment hold that an insured can defend the insured and create a right to recoup its defense costs, but only "where the insurer (1) timely and explicitly reserves its right to recoup the costs; and (2) provides specific and adequate notice of the possibility of reimbursement." Courts following the minority rule do not allow recoupment even where the insurer timely provides such a reservation of rights. The Georgia Court of Appeals recently noted this split and stated that this question remains unresolved in Georgia. *Ga Interlocal Risk Mgmt. Agency*, 337 Ga. App. at 346, 788 S.E.2d at 79.

Evanston urges the court to follow *Illinois Union*, a Northern District of Georgia case (cited above), in its prediction that Georgia will follow the majority rule. Evanston contends that Georgia will follow the majority rule because it is consonant with Georgia law — case law governing the effect of bilateral reservations of rights as to coverage defenses, Georgia unjust enrichment and implied contract law, and Georgia public policy. The court need not predict

whether Georgia will follow the majority rule or the minority rule because Evanston has not demonstrated that it has properly reserved its rights as required by the majority rule.

If Georgia follows the majority rule, the court predicts, as it appears that Evanston itself concedes, a reservation of rights as to defense obligations must meet Georgia's requirements for a reservation of rights as to coverage obligations (recognizing that the insurer must "fairly inform" an insured of the insurer's position regarding defense obligations). But Evanston's letter attempting to reserve a right to defense cost recoupment does not meet these requirements. Under Georgia law:

> In order to inform an insured of the insurer's position regarding its defenses, a reservation of rights must be unambiguous. If it is ambiguous, the purported reservation of rights must be construed strictly against the insurer and liberally in favor of the insured. A reservation of rights is not valid if it does not fairly inform the insured of the insurer's position.

Hoover, 291 Ga. at 406, 730 S.E.2d at 417 (citations, quotations, and alterations omitted). The reservation of rights should also "inform the insured of the specific basis for the insurer's reservations . . . ." *World Harvest Church, Inc. vs. GuideOne Mut. Ins. Co.*, 287 Ga. 149, 152, 695 S.E.2d 6, 10 (2010) (citations, quotations, and alterations omitted). "[A] mere allegation that the insurer contend[s] that the insured was not covered by the policy, without more, does not show any reservation on its part of a right to insist that the coverage of the policy was not extended to him." A reservation of rights that does not meet these requirements is disregarded. *Hoover*, 291 Ga. at 406, 730 S.E.2d at 417; *World Harvest Church, Inc.*, 287 Ga. at 152, 695 S.E.2d at 9.

Sandersville Railroad notes: "Although Evanston now contends that it never had a duty to defend the underlying lawsuit . . . , it did not take that position at the time of the reservation of rights letter . . . ." Sandersville Railroad contends that Evanston's reservation of rights letters are ambiguous because, "Evanston did not deny that a duty to defend existed under the insurance contract, and Evanston's letters did not fairly notify Sandersville [Railroad] that Evanston was acting outside of the parties[']' contract to provide Sandersville [Railroad] defense funds that were subject to a recoupment obligation." The court agrees.

Throughout its dealings with Sandersville Railroad in this case, Evanston has overlooked, or at least muddled, the distinction between the duty to defend and the duty to indemnify as well as the importance of this distinction in relation to any recoupment of defense costs. This is best seen in the language Evanston used in its reservation of rights letters, by which it attempted to obligate Sandersville Railroad to reimburse the defense costs. In both letters, Evanston stated that it "reserves the right to reimbursement of defense costs paid if it establishes that it *owes no coverage* to the insured."

Georgia law clearly states that the duty to defend is broader than the duty to indemnify and there are accordingly many situations where the insurer has no coverage for the claim but nonetheless owes a duty to defend the insured against it. The distinction between the two is clearly illustrated by what has happened here. Evanston, based on evidence well outside of the complaint, established that it had no coverage for this occurrence. But, as Evanston acknowledges, that in no way establishes that it is entitled to reimbursement of defense costs

paid. Rather, it can recover its defense costs only if there was no duty to defend. Evanston's confusion is also highlighted by the very fact that the two letters it sent were nearly identical, the second letter attaching no substantive significance to the intervening filing of Flowers's complaint. Evanston's second letter was its opportunity to explain that it did not believe that it had a duty to defend because the allegations of Flower's complaint, taken as true, unambiguously fell within the pollution exclusion and accordingly excluded coverage. But the second letter does not even mention the Flowers's complaint. *See generally* Doc. 20-5. For that matter, nothing in the letter definitively indicates that Evanston had ever seen the complaint.

Evanston's second letter relied on the same facts relied on in the first letter — facts not pled in Flowers's complaint — to assert its position: that the pollution exclusion might negate coverage. Clearly, the first letter, because it was sent prior to the filing of Flowers's complaint, did not, and clearly could not, offer an informed position on Evanston's defense obligations. It did not attempt to. The first letter did not contest whether Evanston had a duty to defend or offer a basis for doing so. When Evanston resent that letter (despite the few, nonsubstantive changes noted above), the letter did not magically transform into a letter addressing these issues. To the contrary, the second letter demonstrates that Evanston was oblivious of its need to fairly inform Sandersville Railroad of its current position — that the allegations of the complaint, taken as true, unambiguously and completely exclude coverage because they fall within the pollution exclusion.

It seems that Evanston first realized these problems with its letters when it read Sandersville Railroad's response brief pointing them out. But instead of addressing the problems head-on, Evanston calls Sandersville Railroad's argument — that "Evanston did not deny that a duty to defend existed under the insurance contract, and Evanston's letters [accordingly] did not fairly notify Sandersville that Evanston was acting outside the parties contract" — "astonishing" and "blatantly wrong." Instead of acknowledging the problems with its reservation of rights letters, Evanston, much in the way it rewrote Flowers's complaint, rewrites the record stating: "The letters could not be more clear . . . . they *conspicuously and unambiguously* stated that Evanston owed *no defense* or indemnity." It is this statement that the court finds "astonishing" and "blatantly wrong." As noted above, Evanston's letters *never* state a position that Evanston did not owe Sandersville Railroad a defense, let alone why. To properly inform Sandersville Railroad in the reservation of rights letter what it was attempting to do, it was incumbent upon Evanston to advise Sandersville Railroad that it would have the right to reimbursement of defense costs paid if it established that the allegations of the complaint unambiguously exclude coverage because the allegations, taken as true, necessarily fall within the pollution exclusion. But, as explained, Evanston did not. Evanston cannot fix that problem now. *Cf. Hoover*, 291 Ga. at 407, 730 S.E.2d at 418 (holding that any reason to deny coverage not asserted in the reservation of rights is waived).

Accordingly, Evanston's letters are defective and ineffective to support any right to recoup the defense costs and, regardless of whether Georgia follows the majority or minority rule, Evanston is not entitled to summary judgment.

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Thomas R. Wilson vs. Union Pacific Railroad Company

- ***FELA — Train accident — Jury Verdict***
- ***Plaintiff's train struck a "blue-flagged" locomotive, causing it to roll away, plaintiff injured while running to catch it***
- ***Plaintiff alleged LIA violation and negligence***
- ***UP successfully argued locomotive not "in use," also entered evidence that plaintiff lost no time from work, retired without claiming injury***
- ***HELD — After defense verdict, plaintiff presented multiple points of error, but on appeal, court found no error before or during trial, defense verdict AFFIRMED***

In an opinion with well-reasoned discussion of multiple subjects, such as when a locomotive is "in use" for the purposes of the Boiler Inspection Act, and when evidence of an employee's retirement can be introduced, the Court of Appeals of Missouri, Eastern District, upheld a FELA defense verdict in *Thomas R. Wilson, Appointed Trustee of the Chapter 7 Estate of James E. Johnson vs. Union Pacific Railroad Company*, 509 S.W.3d 862, 2017 Mo. App. LEXIS 107, 2017 WL 490467. Plaintiff Trustee was represented by Joseph L. Bauer, Jr., The Baebler Firm LLC, St. Louis, MO, and plaintiff Johnson was represented by Philip C. Denton, in St. Louis. UP's defense was presented by Nicholas J. Lamb and William D. Hakes; Thompson Coburn LLP. Charles Spell, Sr., Analyst Risk Management, in Lake Charles, LA, investigated and handled the claim. Randy Philp, Analyst Risk Management in Shreveport, LA, assisted at trial. The opinion of the panel was unanimous, authored by Judge Angela Quigless, and reads in part:

Thomas R. Wilson, Appointed Trustee of the Chapter 7 Estate of James E. Johnson (Johnson), appeals from the judgment of the circuit court following partial summary judgment and a subsequent jury verdict rejecting his negligence claims brought against Union Pacific Railroad Co. (Union Pacific) under the Federal Employers' Liability Act, the Locomotive Inspection Act, and the Safety Appliance Act. We affirm the judgment.

Johnson was a railroad worker with Union Pacific for forty-six years, from the time he graduated high school in 1962 until his retirement in 2008. Johnson initially worked as a railroad fireman, eventually worked his way up to brakeman, and finally was promoted to conductor. In 2007, one year before his retirement, Johnson was working as a brakeman on a Union Pacific train with James Bradshaw (conductor) and Bradley Hurst (engineer). They were taking a train through Louisiana from Alexandria to Livonia. When the train entered the Livonia Yard, it had several railcars and two locomotive engines ("Johnson's Engine").

The crew entered the Livonia yard on the receiving tracks and left their railcars at the north end of the yard. The yardmaster then instructed Johnson's crew to put their two engines onto one of the four Diesel Service Tracks at the south end of the yard. These tracks diverge from the main receiving tracks and lead towards a building known as "the shed" or diesel shop, where locomotive engines are repaired. This is a service area under "blue flag protection" and secured by derails, which are locked except when an engine is authorized to enter the area. In this area, the locomotive foreman controls all activity, and train crews, like Johnson's, must get authorization from the locomotive foreman prior to entering the area or interacting with any of the other engines located there. When Johnson's Engine entered the Diesel Service Track, two

other locomotives were already on the track between Johnson's Engine and the diesel shop, the UP 9484 and the UPY 106. Both of these locomotives were stationary, parked near the shed about fifty feet apart, unattended, with their lights and engines turned off. As Johnson's Engine moved towards the diesel shop, engineer Hurst and conductor Bradshaw were together in the front cab, while Johnson was on the rear. The engineer's job was to operate the engine's controls, while Johnson's job as the brakeman was to be the engineer's eyes, watching the track and relaying instructions to the engineer by radio. Johnson saw the UP 9484, and started relaying the distance to the engineer in railcar lengths . . . five cars, two cars, one-half car. Johnson testified he called for the engineer to stop. However, the engineer testified he never heard Johnson say "stop" until after Johnson's Engine made contact with the UP 9484. When the engines made contact, they did not couple upon impact, and the UP 9484 began rolling towards the diesel shop. Johnson testified the failure to couple was probably due to misalignment of the couplers. Johnson jumped down, and ran towards the UP 9484 to set the handbrake. In the process, Johnson fell and asserts he injured his neck and back.

At trial, Union Pacific introduced evidence of three rules governing procedures for coupling with other engines. First, under Rule 5.13F of Union Pacific's General Code of Operating Rules (Operating Rules), Johnson was prohibited from coupling his engine to any other engine in an engine service area, such as the Diesel Service Track, without first being instructed to do so by the locomotive foreman. Johnson admitted he never received this authorization. Second, under Livonia's "50 foot rule," Johnson was required to stop fifty feet away from another engine prior to coupling. The evidence indicated Johnson's Engine did not stop fifty feet away from the UP 9484 prior to attempting to couple. Third, under Operating Rule 7.4, Johnson was required to verify that an engine is properly secured and can be coupled and moved safely prior to coupling. Johnson admitted he failed to follow this rule because he never set the handbrake on the UP 9484 or checked the alignment of the couplers prior to attempting to couple. Upon returning to Alexandria, Johnson reported the accident and his injury to his supervisor and filled out an injury report. Johnson was initially treated two months later by Dr. Gordon Webb, who ordered tests and released him back to work. Johnson never missed a day of work from the day of the accident in 2007 until his retirement a year later in 2008. Johnson retired when eligible based on his age and years of service. Johnson never mentioned anything about retiring due to any injury or disability. Johnson received no medical treatment for his neck or back for a period of nearly two years following his initial treatment from Dr. Webb. Then, in January of 2010, Johnson sought treatment from Dr. George Schoedinger, a surgeon in St. Louis, who performed neck surgery and continued treating him until 2012.

In May of 2010, Johnson filed a petition against Union Pacific, alleging negligence under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* (2007), the Locomotive Inspection Act (LIA), 49 U.S.C. §20701 *et seq.* (2007), and the Safety Appliance Act (SAA), 49 U.S.C. §20302 *et seq.* (2007). Count I alleged negligence under FELA, claiming Union Pacific's negligence caused the accident and Johnson's injuries by failing to provide a safe workplace, equipment, and procedures. Counts II and III alleged negligence *per se*, claiming Union Pacific violated the LIA and the SSA because the UP 9484 was defective in that it did not "automatically couple" upon impact. Counts IV, V, and VI alleged negligence, claiming Union Pacific failed to provide safe working conditions over the course of Johnson's career. Prior to trial, Union Pacific filed a motion for partial summary judgment on Counts II and III, arguing that neither the LIA nor the SAA applied to this accident because the UP 9484 was not "in use" at the time of the

accident, that there was no evidence of a violation of either act because the failure to couple due to misalignment is not a statutory violation, and that these claims were barred by the statute of limitations. The circuit court granted this motion, finding that the UP 9484 was not "in use." Johnson then voluntarily dismissed Counts IV, V, and VI.

A jury trial was held on the remaining count, alleging negligence under FELA. Union Pacific denied Johnson's allegations of negligence. Specifically, regarding causation, Union Pacific argued Johnson was the "sole cause" of his own injuries because he violated multiple rules that would have prevented the accident. Concerning damages, Union Pacific argued Johnson did not suffer any compensable injury because he did not receive any medical treatment for his alleged injuries for a period of nearly two years prior to filing suit, and he never missed a day [**7] of work until his retirement, which was due to age and years of service, rather than any injury or disability. At the close of all the evidence, Johnson filed a motion for a directed verdict, which the court denied. The court allowed Johnson to submit two claims to the jury, FELA negligence and negligence *per se*. The jury returned a verdict in favor of Union Pacific. On the FELA negligence claim, the jury found Union Pacific zero percent at fault, instead attributing one hundred percent of the fault to Johnson. On the negligence *per se* claim, the jury found in favor of Union Pacific. The jury also determined Johnson suffered zero dollars in damages. The court entered judgment in favor of Union Pacific on both claims. Johnson then filed a motion for judgment notwithstanding the verdict, which the court denied. This appeal follows.

In his first point on appeal, Johnson argues the circuit court erred in granting Union Pacific's motion for summary judgment on Johnson's LIA claim. We disagree. In Point I, the issue is whether the UP 9484 was "in use" under the LIA at the time Johnson's Engine made contact with it. This is a question of law to be determined by the trial court. *Host vs. BNSF Ry. Co.*, 460 S.W.3d 87, 101 (Mo. App. W.D. 2015). If the UP 9484 was "in use," then the LIA applies and Union Pacific is strictly liable for injuries resulting from any defect on the engine. If the UP 9484 was not "in use," Johnson's claims asserting strict liability for the UP 9484's failure to automatically couple upon impact must fail as a matter of law, and summary judgment was proper. In the federal courts, there is a split of authority among the circuits regarding when a locomotive is "in use" under the LIA. *Id.* at 102; *Wright*, 574 F.3d at 620-21 (citing *Trinidad vs. S. Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991)). The Fifth Circuit established a bright-line test dependent upon a single factor, whether the locomotive at issue has completed its inspection and is released for use. *Trinidad*, 949 F.2d at 189. The Fourth and Eighth Circuits have adopted a multi-factor test that examines the totality of the circumstances and identifies two primary factors for consideration: "[1] where the train was located at the time of the accident, and [2] the activity of the injured party." *Wright*, 574 F.3d at 620-21 (adopting the Fourth Circuit's rule announced in *Deans vs. CSX Transp., Inc.*, 152 F.3d 326, 329 (4th Cir. 1998)).

In the Missouri Court of Appeals, there is no such split of authority. The only case addressing this issue is *Host vs. BNSF Railway Co.*, where the Western District held:

> The weight of authority has rejected bright-line tests for determining whether a locomotive is "in use" in favor of a more flexible test that explores a number of factors and looks primarily at "where the train was located at the time of the accident and the activity of the injured party."

Host, 460 S.W.3d at 102 (adopting the rule from the Eighth Circuit). We have found no

Missouri case applying a bright-line rule similar to the Fifth Circuit, nor has Johnson cited any authority. Although this court is not bound by precedent from the Eighth Circuit, we may consider it as persuasive authority, particularly where the law at issue is a federal statute that provides concurrent jurisdiction in both state and federal courts. Moreover, as recognized by the court in *Host*, this court should seek "consistency in the legal standards to be applied by our state courts and the Eighth Circuit if at all possible." We therefore adopt the rule announced by the Eighth Circuit in *Wright* and adopted by the Western District in *Host*. *Wright*, 574 F.3d at 620-21; *Host*, 460 S.W.3d at 102.

Reviewing the evidence presented in the light most favorable to Johnson, the non-moving party, the following facts were undisputed in the motion for summary judgment. Immediately prior to the accident, Johnson and his crew entered one of the Diesel Service Tracks at the Livonia Yard. These service tracks diverge from the main receiving tracks and lead towards the diesel shop. This is a service area under "blue flag protection" and secured by derails, which are locked except for when an engine is authorized to enter the area. The UP 9484 was in the service area for inspection the day before the accident, and had not yet been released for service. When Johnson's Engine made contact with the UP 9484, it was sitting immobile and unattended in a service area with its engine and lights turned off. Johnson was never instructed to couple with the UP 9484 by the locomotive foreman, the only individual authorized to give such an instruction. According to three applicable work rules, prior to coupling with another engine in this service area, Johnson was required to obtain authorization from the locomotive foreman, stop his engine fifty feet away, get out, and visually inspect the UP 9484 to ensure the couplers were aligned and the handbrake was set. Johnson failed to follow any of these rules prior to attempting to couple his engine with the UP 9484.

These facts were established by Union Pacific in its statement of uncontroverted facts, and were supported by the deposition testimony of Johnson himself as well as the affidavit and subsequent deposition testimony of John Valley (Mr. Valley), the trainmaster at the Livonia Yard and Union Pacific's representative. Johnson argues that "[t]he only facts which are uncontroverted in the record before the trial court are those which are admitted by Appellant, and not those which are denied or to which there is an objection." While Johnson did specifically deny some of these facts in his response to the motion for summary judgment, he did not actually submit any evidence bringing these facts into dispute or otherwise contradicting Union Pacific's evidence.

Based upon these facts and the totality of these circumstances, we find the UP 9484 was not "in use" at the time of the accident. Considering the first factor under *Wright*, the location of the train, we note the UP 9484 was located on the Diesel Service Track when Johnson's Engine made contact with it. All the evidence established this was a service area under blue flag protection. This fact was supported by the affidavit and subsequent deposition testimony of Mr. Valley. In addition, Johnson admitted he was told "to put [the engines] in the engine service track." Moreover, the UP 9484 was not simply located in a service area, it was sitting dead on the track, where it had been since its inspection the day before and had not yet been released for service. These facts alone strongly weigh in favor of finding the UP 9484 was not "in use" at the time of the accident under the first factor in *Wright*. *See Wright*, 574 F.3d at 619-22 (holding locomotive was not "in use" when it was parked on a repair track for inspection, was in a blue flag area, and had not yet been released for use following the inspection).

Considering the second factor under *Wright*, the activity of the injured party, Johnson was entering a service area and attempting to couple with the UP 9484 at the time of the incident. Johnson acknowledged in his deposition that he intended to couple his engine to the UP 9484. He stated he was instructed by the yardmaster to put his engine "all the way back" up to the diesel shop, which he understood as meaning he should couple with the UP 9484. However, Johnson also admitted he was never authorized to couple his engine with the UP 9484 by the locomotive foreman, the only person who could give authorization since the UP 9484 was in a service area. Moreover, three work rules prohibited Johnson from coupling with the UP 9484 under these circumstances, and it was undisputed that Johnson violated these rules by failing to set the handbrake on the UP 9484 or check the alignment of the couplers. Thus, under the second factor in *Wright*, we find the activity of Johnson in attempting to couple with an engine sitting dead on the tracks in a service area, in violation of work rules, and without proper authorization weighs strongly in favor of finding the UP 9484 was not "in use" at the time of the accident.

However, Johnson argues the UP 9484 was nevertheless "in use" for three reasons. First, the UP 9484 did not have blue flags placed on it, which Johnson argues should be dispositive, applying the Fifth Circuit's bright-line test from *Trinidad*, 949 F.2d at 189, yet relying on a different dispositive factor borrowed from *Wright*, 574 F.3d at 622. Second, Johnson argues the UP 9484 was not located within the diesel shop and was therefore still on its "unitary journey to the point of repair," citing *Brady vs. Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1938), and misquoting *S. Ry. Co. vs. Bryan*, 375 F.2d 155 (5th Cir. 1967) (holding a defective railroad vehicle is "in use" under the SAA where "hauling . . . is in progress or in immediate contemplation [because] the handling of it for that purpose is a part of its unitary journey from the point of discovery of disability to the repair shop). Third, Johnson argues his conduct necessarily put the UP 9484 "in use" because it was necessary for him to couple with the UP 9484 in order to follow his instructions to put his engines all the way back to the diesel shop, which "is the de facto meaning of a locomotive being in use," a proposition for which he cites no legal authority. We find these arguments unpersuasive.

First, the absence of blue flags placed on the UP 9484 is not dispositive. The courts in *Wright* and *Host* made it clear that in Missouri, the test for whether a locomotive is "in use" under the LIA depends on the totality of the circumstances, rather than a single dispositive factor, such as the presence or absence of blue flags. *Wright*, 574 F.3d at 620-21; *Host*, 460 S.W.3d at 102. Even if we accepted Johnson's argument, Mr. Valley testified the Diesel Service Track is a service area under blue flag protection, testimony that was undisputed in the motion for summary judgment. Moreover, even if this court applied the Fifth Circuit's bright-line test, the single, dispositive factor in *Trinidad* was whether the engine at issue had been "released following inspection." *Trinidad*, 949 F.2d at 189. In this case, the UP 9484 had not been released for use and was still located in the service area, sitting unattended on the Diesel Service Track with the engine and lights off. Therefore, Johnson's argument fails even under the more stringent bright-line test applied by the Fifth Circuit. Second, the UP 9484 was no longer on its "unitary journey from the point of discovery of disability to the repair shop." Johnson's reliance on *Bryan* and *Brady* is misplaced. *Bryan*, 375 F.2d at 157. *Bryan* is clearly distinguishable in that the railcars at issue in that case were involved in a collision, which caused them to derail and rendered them completely inoperable. At the time of plaintiff's injury, he was attempting to get these railcars back on the tracks and transport them to a service area for repairs. The Fifth Circuit held these

inoperable railcars were "in use" under the SAA because, "[w]here the hauling of a disabled or defective railroad vehicle is in progress or in immediate contemplation, the handling of it for that purpose is a part of its unitary journey from the point of discovery of disability to the repair shop." *Id.* at 157. Additionally, *Brady* is distinguishable in that the engine in that case was located on a *receiving* track and was stopped momentarily for the sole purpose of determining whether it would be accepted into the yard. *Brady*, 303 U.S. at 11. The Supreme Court held the engine was still "in use" because an "inspection for the purpose of discovering defects" does not mean it is no longer "in use" under the LIA. Here, the UP 9484 was already located in a service area at the time of the accident. Unlike the railcars in *Bryan*, the UP 9484 was not being transported from the location of a crash to a service area for repair. Unlike the engine in *Brady*, the UP 9484 was not located on a receiving track stopped temporarily for the sole purpose of determining whether it would be accepted into the yard. The UP 9484 ceased to be "in use," and its "unitary journey" ended the day before when it reached its place of repair, the service area of the Livonia Yard just outside the diesel shop.

Finally, Johnson's decision to couple with the UP 9484 because it was in his way did not render the UP 9484 "in use" under the LIA. Here, it is undisputed that Johnson did not have proper authorization to couple with the UP 9484, whether or not it was in his way. Also, as discussed above, three work rules prohibited Johnson from attempting to couple with the UP 9484 under the circumstances of this case. Johnson's decision to couple with the UP 9484 without authorization and in violation of Union Pacific's rules does not alter our conclusion that the UP 9484 was not "in use" under the LIA.

The purpose of the "in use" limitation to the LIA is to encourage and allow railroad companies to take defective locomotives out of service for inspection and repairs by relieving them of strict liability for defects in those engines while they are being serviced. *Host*, 460 S.W.3d at 101-02. This is precisely what Union Pacific did when it took the UP 9484 out-of-service by placing it on the Diesel Service Track for inspection. If we allow Johnson's unauthorized coupling with this engine to bring an otherwise out-of-service engine into use and impose strict liability on the railroad, this would defeat the clear purpose of the LIA. For the foregoing reasons, we find the circuit court did not err in granting summary judgment against Johnson on his LIA claims because, as a matter of law, the UP 9484 was not "in use" at the time of the accident. Point I is denied.

In his second point on appeal, Johnson argues the circuit court erred in allowing the admission of evidence that railroaders like him "are eligible or receive retirement benefits at age 60 with thirty years of service," in violation of the collateral source rule as interpreted and applied in FELA cases. We disagree.

As a general rule in FELA cases, evidence that the plaintiff received payments from a "collateral source" is inadmissible for the purpose of impeaching the plaintiff's testimony as to his motive for not returning to work and the permanency of injuries. *Moore vs. Mo. P.R. Co.*, 825 S.W.2d 839, 842 (Mo. 1992) (citing *Eichel vs. New York Central R.R. Co.*, 375 U.S. 253, 254, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963) (per curium)). Disability or retirement benefits may be considered evidence of collateral source payments. *Moore*, 825 S.W.2d at 842; *Melton vs. Ill. C. G. R. Co.*, 763 S.W.2d 321, 326 (Mo. App. E.D. 1988). However, an exception to this rule allows the introduction of evidence of collateral source payments when the plaintiff voluntarily injects the

issue into the case by introducing evidence of his own financial condition. *Moore*, 825 S.W.2d at 842 (citing *Lange vs. Missouri P. R. Co.*, 703 F.2d 322 (8th Cir. 1983).

We find the trial court properly excluded any evidence of collateral source payments for Johnson's injury. Prior to trial, the court granted Johnson's motion *in limine* barring the introduction of evidence that Johnson was receiving retirement *benefits* unless Johnson opened the door to the issue by introducing evidence of his own financial condition. During trial, Johnson never opened this door, and the court never admitted any evidence concerning Johnson's retirement *benefits* or the amount of this compensation. Although retirement *benefits* were mentioned at trial, it was in reference to the retirement of a different railroad employee, not Johnson. Even then, the court excluded this evidence once objected to by Johnson. Johnson fails to identify any specific ruling by the trial court which erroneously admitted evidence concerning his retirement benefits.

While Johnson accurately states that Union Pacific references the timing of Johnson's retirement as part of its defense, we note Johnson first introduced evidence about his retirement during his case-in-chief. Johnson made his retirement an issue in the case by testifying he retired because he was afraid continuing to work might be dangerous due to his prior injury and "[i]t wasn't cause I wanted to." Johnson also introduced into evidence a letter to Union Pacific announcing his retirement. As a preliminary matter, we note the evidence Johnson now argues was erroneously admitted was in fact first introduced into evidence by Johnson himself. *See Stegner vs. Missouri K. T. R. Co.*, 333 Mo. 1182, 64 S.W.2d 691, 694 (Mo. 1933) (under the invited error doctrine, "a party may not invite and join in the commission of error and thereafter be heard to complain of it); *James vs. Kan. City Gas Co.*, 325 Mo. 1054, 30 S.W.2d 118, 125 (Mo. 1930) (holding invited error doctrine bars appellant from appealing the admission of evidence where appellant invited the error by being the first to introduce the evidence, thus injecting the issue into the case); *State vs. McFall*, 737 S.W.2d 748, 756 (Mo. App. S.D. 1987) (applying invited error in a criminal case, stating: "The invited error doctrine is that a party who has introduced evidence pertaining to a particular issue may not object when the opposite party introduces related evidence intended to rebut or explain.).

Even if the admission of evidence concerning Johnson's retirement was not invited error, we find this evidence was both logically and legally relevant because the timing and motivation for his retirement was directly at issue in this case. Johnson injected these issues into the case when he testified that he retired due to an injury caused by the accident. The fact that Johnson retired fourteen months after his alleged injury without missing a day of work undermined his testimony that he was injured due to the accident involving the UP 9484. Similarly, the fact that Johnson retired when eligible based on his age and years of service undermined his testimony that he retired due to an injury, making it less likely that he actually suffered any injury due to the accident. Although there are some circumstances where the facts surrounding a plaintiff's retirement could be unfairly prejudicial, such as introducing evidence of a plaintiff's retirement benefits to argue the plaintiff was malingering and had a financial motivation not to return to work, this is not one of those cases. *See Moore*, 825 S.W.2d at 842. Here, the judge eliminated any risk of prejudice by excluding all evidence of Johnson's retirement benefits. Thus, this evidence was both logically and legally relevant, and admissible as it did not constitute evidence of collateral source payments.

The collateral source rule only bars evidence of collateral *compensation* for a plaintiff's injury. *Payton vs. Union Pac. R.R.*, 405 S.W.3d 1, 6 (Mo. App. E.D. 2013); *see also Ford vs. Gordon*, 990 S.W.2d 83, 85 (Mo. App. W.D. 1999) (discussing the origin and purpose of the collateral source rule in Missouri, stating: "The theory behind the collateral source rule is that a wrongdoer should not enjoy the benefit of reduced liability by showing that the plaintiff has already been compensated for the loss from a collateral source, independent of the wrongdoer.). Evidence that an allegedly injured plaintiff never missed a day of work after his injury, then retired without mentioning any injury or disability, is not barred by the collateral source rule because it is not evidence of payments to compensate the plaintiff for an injury. *See Payton*, 405 S.W.3d at 6. Therefore, we find the trial court did not abuse its discretion in admitting evidence concerning Johnson's retirement. Point II is denied.

In his third point on appeal, Johnson argues the trial court erred in denying his motions for a directed verdict and judgment notwithstanding the verdict on the issues of negligence *per se* for Union Pacific's failure to set the handbrake on the UP 9484 while unattended, in violation of 49 C.F.R. 232.103(n) (2007) and Operating Rule 7.6. We disagree.

In order to prove Union Pacific was liable for negligence *per se*, Johnson was required to prove: (1) Union Pacific violated an applicable law or regulation; (2) Union Pacific's violation was the direct and proximate cause of Johnson's injury; and (3) Johnson suffered damages. *See Host*, 460 S.W.3d at 104 (in a claim based on negligence *per se*, "[w]hile the plaintiff is relieved of the burden of establishing the defendant's negligence, the plaintiff retains the burden 'to prove a causal relation between a violation and the injury for which he is suing') (quoting *Payton vs. Union Pac. R.R.*, 405 S.W.3d 1, 5 (Mo. App. E.D. 2013)). Pursuant to 49 C.F.R. 232.103(n), "[a] train's airbrake shall not be depended upon to hold equipment standing unattended *on a grade* . . . . Unattended equipment shall be secured in accordance with the following requirements: (1) A sufficient number of hand brakes shall be applied to hold the equipment . . ." 49 C.F.R. 232.103(n) (emphasis added). Operating Rule 7.6 required Union Pacific to set a handbrake on equipment whenever unattended.

It is undisputed that the UP 9484 was unattended and did not have a handbrake set on the day of the accident. However, Union Pacific argued there was no violation because the regulation only applies when a train is located *on a grade*. There is no dispute that the UP 9484 was located on "flat ground." Johnson admitted this fact at trial, and his expert testified this regulation applies when equipment is left unattended on a grade, and further agreed with the statement that "it's not an absolute rule that you need a hand brake at all times." Therefore, Johnson failed to establish his negligence *per se* claim based on a violation of 49 C.F.R. 232.103. Moreover, Union Pacific denied Johnson's allegations concerning causation and damages, arguing Johnson's own negligence was the sole cause of the accident and he suffered no injury as a result of the incident. This case is not one of the unusual circumstances where the defendant admitted all the essential elements of the plaintiff's cause of action. *See All Am. Painting*, 315 S.W.3d at 723. Johnson bore the burden of proof, and it was within the jury's discretion to find against Johnson, which it did by assigning zero percent of the fault to Union Pacific and one-hundred percent to Johnson. *See River City Dev., Assocs., LLC vs. Accurate Disbursing Co., LLC*, 345 S.W.3d 867, 872-73 (Mo. App. E.D. 2011) (Where a party bears the burden of proof, it is within the jury's prerogative to find against that party, even if that party's evidence is uncontradicted and unimpeached.). Therefore, Johnson was not entitled to either a directed verdict or judgment notwithstanding the

verdict. *All Am. Painting*, 315 S.W.3d at 723. The trial court did not err in denying Johnson's motions for a directed verdict and judgment notwithstanding the verdict. Point III is denied.

In his fourth point on appeal, Johnson argues the jury's verdict in favor of Union Pacific, the defendant, was against the weight of the evidence. We disagree, finding this point does not raise a question amenable to appellate review. In a negligence case, when the jury enters a verdict in favor of the defendant, the appellate court will not overturn the verdict and remand for a new trial on the ground the verdict was against the weight of the evidence. *Ratcliff vs. Sprint Mo., Inc.*, 261 S.W.3d 534, 542 (Mo. App. E.D. 2008); *see also River City*, 345 S.W.3d at 872-73 (same rule applied in a breach of contract case). In *River City*, this court held:

> Plaintiff's contention that the jury's verdict in favor of defendant is not supported by substantial evidence is without merit. Plaintiff bore the burden of proving its breach of contract case. Because plaintiff bore the burden of proof, "*a verdict in [D]efendant's favor need not be supported by any evidence*." Where a party bears the burden of proof, it is within the jury's prerogative to find against that party, *even if that party's evidence is uncontradicted and unimpeached*. It is well-settled that "the sufficiency of the evidence to support a defendant's verdict is not a question amenable to appellate review."

Id. (emphasis added) (internal citations omitted); *Warren vs. Thompson*, 862 S.W.2d 513, 514 (Mo. App. W.D. 1993); *see also Scott vs. Spears*, 441 S.W.3d 220 (Mo. App. S.D. 2014) (accord); *Giles vs. Riverside Transp., Inc.*, 266 S.W.3d 290, 300 (Mo. App. W.D. 2008) (accord); *Desselle vs. Complete Home Concepts, Inc.*; 211 S.W.3d 168 (Mo. App. W.D. 2007) (accord).

In *Ratcliff*, this court squarely rejected Johnson's argument that a verdict in favor of defendant is against the weight of the evidence when the jury is presented with undisputed evidence supporting all the elements of the plaintiff's cause of action. *Ratcliff*, 261 S.W.3d at 542 (affirming judgment in favor of defendant in a negligence case, and rejecting plaintiff's argument that judgement should have been entered in plaintiff's favor because "the evidence substantiated all of the elements of his cause of action).

This rule is based on the principle that determinations concerning the weight of the evidence and credibility of witnesses are within the sole province of the jury, who is entitled to believe or disbelieve any of the evidence presented. *Young vs. Kan. C. S. R. Co.*, 374 S.W.2d 150, 153 (Mo. 1964) ([A] jury may believe all of the testimony of any witness or none of it, or may accept it in part and reject it in part; just as the jury finds it to be true or false when considered in relation to the other testimony and the facts and circumstances in a case.); *see also Erdman vs. Condaire, Inc.*, 97 S.W.3d 85, 95 (Mo. App. E.D. 2002) (The difficulty for appellate courts and specifically here, is that we do not have the benefit of knowing who the jury believed or disbelieved, and we cannot make credibility determinations based on a cold record.).

Therefore, we find Johnson's argument that the jury's verdict in favor of the defendant was against the weight of the evidence does not raise a question amenable to appellate review. Point IV is denied.

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Harsco Corp. vs. CSX Transportation, Inc.

- ***Private Crossing — Indemnification — Jury Verdict***
- ***CSX train derails at private crossing, causing injury to employee***
- ***CSX seeks indemnity pursuant to private crossing agreement, licensee refuses***
- ***HELD — Crossing agreement is unambiguous, requires licensee to keep crossing clear and indemnify for claims for failure to maintain, judgment for railroad AFFIRMED***

It should always be held uppermost in the mind of a railroad claim agent that if the railroad must defend a claim, it's best to do so with someone else's money. That was the situation adjudged by the Supreme Court of Appeals of West Virginia in *Harsco Corporation vs. CSX Transportation, Inc.*, 2017 W. Va. LEXIS 633. The successful outcome for CSXT was achieved by Marc E. Williams, Melissa Foster Bird, and Megan B. Davis of Nelson, Mullins, Riley & Scarborough, Huntington, WV. Tyler Brown, District Manager, located in Columbus, OH, handled the claim and assisted at trial. Harsco was represented by James S. Crockett, Jr. and Rebecca D. Stevenson; Spilman Thomas & Battle PLLC, Charleston, WV. The 4-1 decision of the court states, in part, the following:

The parties herein are successors in interest to an August 1, 1987, private road crossing agreement (Crossing Agreement) governing the use of a railroad crossing near the American Electric Power (AEP) coal-fired power plant in Relief, Ohio. In 1987, petitioner's predecessor submitted the winning bid to AEP for removal of materials from a cooling pond, near the AEP plant, and transport of these materials to another location for cleaning and processing. The parties agree that their claims sub judice arise from the interpretation of the duties and responsibilities of the parties with respect to maintenance of the railroad crossing following a February 1, 2009, train derailment.

The Crossing Agreement between the parties herein contained the following relevant provisions:

> 4.1 Crossing (including the necessary appurtenances, approaches, roadway, curbs, gutters, shoulders, slopes, fills and cuts and drainage thereof) shall be constructed and maintained at the sole cost and expense of Licensee.
>
> 4.2 Because of Railroad's labor agreements, all construction and maintenance work to be performed on that portion of said Crossing between the rails of said track(s) and for two feet (2') on the outside of each rail thereof, and all work on Railroad's signal and communication facilities deemed necessary by Railroad to permit Licensee's use of Crossing, must be performed by Railroad, at the sole cost and expense of Licensee.
>
> 4.5 Licensee, at its sole cost and expense, shall maintain all approachways, and shall keep the Crossing at all times free and clear of all spilled materials, ice, snow, mud, debris and all other obstructions (including parked vehicles) to satisfaction of the Railroad.
>
> 14.2 Licensee . . . assumes all liability for, and releases and agrees to defend, indemnify, protect and save Railroad harmless for and against:

> (B) all loss and damage on account of injury to or death of any and all person (including but not limited to employees, invitees and patrons of the parties hereto) on the Crossing or adjacent thereto . . . .

From the time it secured its predecessor's interest in 1999, until the 2009 derailment, petitioner performed no direct maintenance or cleaning on the portion of the crossing between the rails of the tracks and for two feet on the outside of each rail. In the early morning hours of February 1, 2009, a locomotive pulling a CSX train derailed on the crossing at issue. The derailment allegedly occurred due to the accumulation of snowfall on the crossing and the surrounding area. As a result of the derailment, CSX train conductor Allen Waybright was injured. Respondent cleaned up the area following the derailment and put the locomotive back on the tracks without contacting petitioner.

On September 21, 2011, Mr. Waybright filed a lawsuit against petitioner, in the Circuit Court of Wood County, for his injuries allegedly related to the February 1, 2009, derailment. In his complaint, Mr. Waybright alleged that the condition of the crossing caused the derailment and, consequently, his injuries. Thereafter, on November 17, 2011, respondent's counsel wrote to petitioner's counsel requesting that petitioner, pursuant to the crossing agreement; accept the defense of respondent with respect to claims brought by Mr. Waybright relating to the February 1, 2009, derailment.

Petitioner refused the tender of defense and argued that maintenance of the portion of the crossing where the derailment occurred was not petitioner's responsibility under section 4.2 of the crossing agreement. Consequently, respondent filed a third-party action against petitioner in the Waybright case. Respondent settled the claims of Mr. Waybright on May 5, 2013, for $200,000.

The parties filed corresponding motions for summary judgment. In its motion for summary judgment petitioner advanced three arguments. First, petitioner alleged that it was entitled to summary judgment due to the application of an Ohio anti-indemnity statute, Ohio R.C. §2305.31. Second, petitioner argued that the area where the derailment occurred was not part of the crossing and, thus, not its responsibility to maintain. Third, petitioner alleged that respondent's own fault defeated its implied indemnity claim.

At an October 15, 2013 pre-trial conference hearing, the circuit court discussed the outstanding motions and requested additional briefing by the parties. In response, petitioner filed a supplemental motion for summary judgment and argued that the parties' agreement was clear and unambiguous. Petitioner argued that maintenance for the portion of the crossing where the derailment occurred was subject to respondent's labor union agreement, as noted in paragraph 4.2 of the crossing agreement. Specifically, petitioner alleged that the labor union language in paragraph 4.2 of the agreement created a specific and explicit exception to the maintenance obligations that the crossing agreement otherwise placed upon petitioner. Respondent opposed the motion and argued that the word maintenance in the crossing agreement did not include cleaning of the tracks, which was the responsibility of petitioner.

By order dated January 29, 2015, the circuit court denied petitioner's motion and found that genuine issues of material fact existed as to whether the derailment occurred at the crossing, and how the word "maintenance" was defined in the parties' agreement and through application.

Three days prior to trial, the circuit court advised the parties, by letter, of the court's intent to discuss paragraph 4.5 of the crossing agreement and whether it imposed an obligation upon petitioner, in light of the restrictions in paragraph 4.2 of the crossing agreement. On the first day of trial, prior to jury selection, the court, after hearing the additional arguments of counsel, ruled that paragraph 4.5 of the crossing agreement specifically obligated petitioner to maintain all approachways and keep the crossing at issue free and clear at all times, regardless of the less specific language of paragraph 4.2 of the crossing agreement.

The trial of the case commenced. At the conclusion of trial, the jury found that respondent proved by a preponderance of the evidence that petitioner failed to keep the crossing at issue free and clear of all spilled materials, ice, snow, mud, debris and all obstruction to satisfaction of respondent. Further, the jury found that the derailment was proximately caused by petitioner's failure to keep the crossing free and clear. The jury awarded respondent $124,493.03 in damages, representing respondent's out-of-pocket losses resulting from the accident apart from the settlement with Waybright and respondent's attorney's fees incurred in defending the Waybright claim.

Following the conclusion of trial, the parties submitted briefing to the trial court on the issue of whether respondent could recover its attorney's fees and expenses in an indemnity claim against petitioner, separate from recovery of the fees respondent incurred in enforcing petitioner's duties under the crossing agreement. By order dated November 5, 2015, the circuit court, applying Ohio law, ruled that respondent could recover reasonable attorney's fees and expenses.

In the final judgment order, entered June 21, 2016, the circuit court ruled that respondent could obtain pre-judgment interest on the attorney's fee and expenses award. Further, the court found that the pre-judgment interest began to run with the filing of Waybright's complaint against respondent.

It is from the circuit court's January 29, 2015, order denying petitioner's motion for summary judgment; the November 5, 2015, order awarding respondent attorney's fees and expenses related to its third-party claim for indemnity against petitioner; and the June 21, 2016, final judgment order that petitioner now appeals.

In its first assignment of error, petitioner argues that the circuit court erred in concluding that paragraph 4.5 of the crossing agreement was inconsistent with paragraph 4.2 of the crossing agreement. Specifically, petitioner alleges the circuit court incorrectly found that because paragraph 4.5 was more specific in its parameters than paragraph 4.2, the duties imposed upon petitioner by paragraph 4.5 controlled, and required petitioner to keep the entire crossing free and clear from all obstructions at all times.

Petitioner contends that paragraph 4.2, with its language requiring that respondent's employees' were required to repair certain areas of the track, per a collective bargaining agreement, was not limited in scope and applied to all maintenance, including ice and snow removal, which reportedly led to the February 1, 2009, derailment. Such a construction gives full effect to all of the crossing agreement's provisions in accord with Ohio law. *See Alts. Unlimited-Special, Inc., vs. Ohio Dep't of Educ.*, 168 Ohio App. 3d 592, 602, 2006 Ohio 4779, 861 N.E.2d 163, 170-71 (2006).

We disagree and find that the circuit court committed no error in its interpretation of crossing agreement. Specifically, we adopt the circuit court's finding that paragraph 4.5 of the crossing agreement was more specific than paragraph 4.2, as it contained the express requirement that petitioner keep the crossing free from obstructions, at all times. *See Garofoli vs. Whiskey Island Partners, Ltd.*, 2014 Ohio 5433, 25 N.E.3d 400 (Ohio Ct. App. 2014). Accordingly, we find no error in the circuit court's refusal of petitioner's motion for summary judgment on this issue.

Petitioner alleges, in its second assignment of error that the circuit court's denial of petitioner's motion for summary judgment was improper, as there was a genuine issue of material fact as to how the word "maintenance" was defined in the crossing agreement. Petitioner contends that to accept respondent's broad characterization of the term maintenance to include "any interaction with the tracks whatsoever" would give no effect to paragraph 4.2 of the agreement.

Respondent argues, and we agree, that the clear language of paragraph 4.5 of the crossing agreement requires that petitioner be responsible for keeping the crossing free from all obstructions, at all times. Further, we agree that petitioner's proposed construction would give no effect to paragraph 4.5 and lead to the absurd result of stripping petitioner from its duty to keep the crossing clear. Such a finding is in accord with Ohio precedent that "a court should give effect to every provision contained within a contract unless to do so results in absurdity." *Alts. Unlimited-Special, Inc.* We find no error in the circuit court's ruling.

In his fourth assignment of error, petitioner contends that the circuit court erred in awarding attorney's fees to respondent for work related directly to pursuit of its third-party claim for indemnity against petitioner. We review an award of attorney's fees under an abuse of discretion standard. *See Sanson vs. Brandywine Homes, Inc.*, 215 W. Va. 307, 599 S.E.2d 730 (2004). Further, we have noted that the decision to either award or not award attorney's fees "rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." *Beto vs. Stewart*, 213 W. Va. 355, 359, 582 S.E.2d 802, 806 (2003).

Here, petitioner argues for the application of West Virginia law to this issue as "[i]n the absence of a statute, the law of the forum where suit is brought governs the remedy." Syl. Pt. 1, *Selected Kentucky Distillers vs. Foloway*, 124 W. Va. 72, 73, 19 S.E.2d 94, 95 (1942). As a rule in West Virginia, "each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syl. Pt. 2, in part, *Sally-Mike Props. vs. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986). Petitioner argues that West Virginia limits the liability of the indemnitor to "the attorney fees and costs incurred by the indemnitee in the defense of the original action." *State ex rel. Vapor Corp. vs. Narick*, 173 W. Va. 770, 775, 320 S.E.2d 345, 350 (1984).

Thus, petitioner contends it is liable only for the payment of respondent's attorney's fees in defense of the claims of Mr. Wilkinson, not those incurred by respondent to enforce the indemnity provision in the Crossing Agreement. Based upon our review, we disagree.

Given that the crossing agreement was "made" and was to be performed in Ohio, and because the indemnity provision within the crossing agreement is a matter of substantive contractual interpretation, we find that Ohio law applies. *See Mattingly*, 158 W.Va. at 622, 212 S.E.2d at 756. Paragraph 14.2 of the crossing agreement expressly provides for the award of costs and

expenses to those injured on the crossing at issue. Thus, construing, interpreting, and applying paragraph 14.2 is substantive a determination. Under Ohio law, when an indemnitor refuses to honor its obligation under a contract, the indemnitee may recover its legal expenses whether or not the contract explicitly allows for the recovery of attorney's fees. *See Worth vs. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 241, 513 N.E.2d 253, 257 (1987). Further, Ohio law provides that when an indemnitor wrongfully fails in its duty to defend a legal action, this failure should not require the indemnitee to incur expenses that it cannot recover. *See Allen vs. Standard Oil Co.*, 2 Ohio St.3d 122, 125, 2 Ohio B. 671, 443 N.E.2d 497, 500 (1982). Per paragraph, 14.2 of the Crossing Agreement petitioner agreed to indemnify respondent against personal losses resulting from petitoner's acts or omissions. Because petitioner's rejection of the tender necessitated respondent to incur legal expenses the circuit court's award of attorney's fees to respondent was proper.

Petitioner further argues, in its final assignment of error that the circuit court erred in awarding pre-judgment interest on the award of attorney's fees to respondent. We have stated that "[p]rejudgment interest is a part of a plaintiff's damages awarded for ascertainable pecuniary losses, and serves 'to fully compensate the injured party for the loss of the use of funds[.]" *Miller vs. Fluharty*, 201 W. Va. 685, 700, 500 S.E.2d 310, 325 (1997). West Virginia Code §56-6-31(a), provides, in part, that:

> [E]very judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof . . . *Provided*, That if the judgment or decree . . . is for special damages . . . or for liquated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued . . . Special damages includes lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court.

Petitioner alleges that pre-judgment interest is not proper on attorney's fee awards as such expenses are not similar out-of-pocket expenditures and are unliquidated until the court awards them. *See Graham vs. Nat'l Union Fire Ins. Co., of Pittsburgh, Pa.*, 556 F. Appx. 193, 198 (2014). Petitioner advocates an award of pre-judgment interest only on the attorney's fees awarded directly by the jury.

Conversely, respondent argues that the circuit court's ruling regarding pre-judgment interest was proper as the underlying expenses were incurred as a direct result of the crossing agreement language permitting the recovery of costs and expenses. We agree with respondent and find that pursuant to West Virginia Code §56-6-31(a) and the explicit terms of the crossing agreement, the circuit court did not abuse its discretion in awarding prejudgment on the award of attorney's fees.

For the foregoing reasons, we affirm the circuit court's January 29, 2015, November 5, 2015, and June 21, 2016, orders. Affirmed.

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