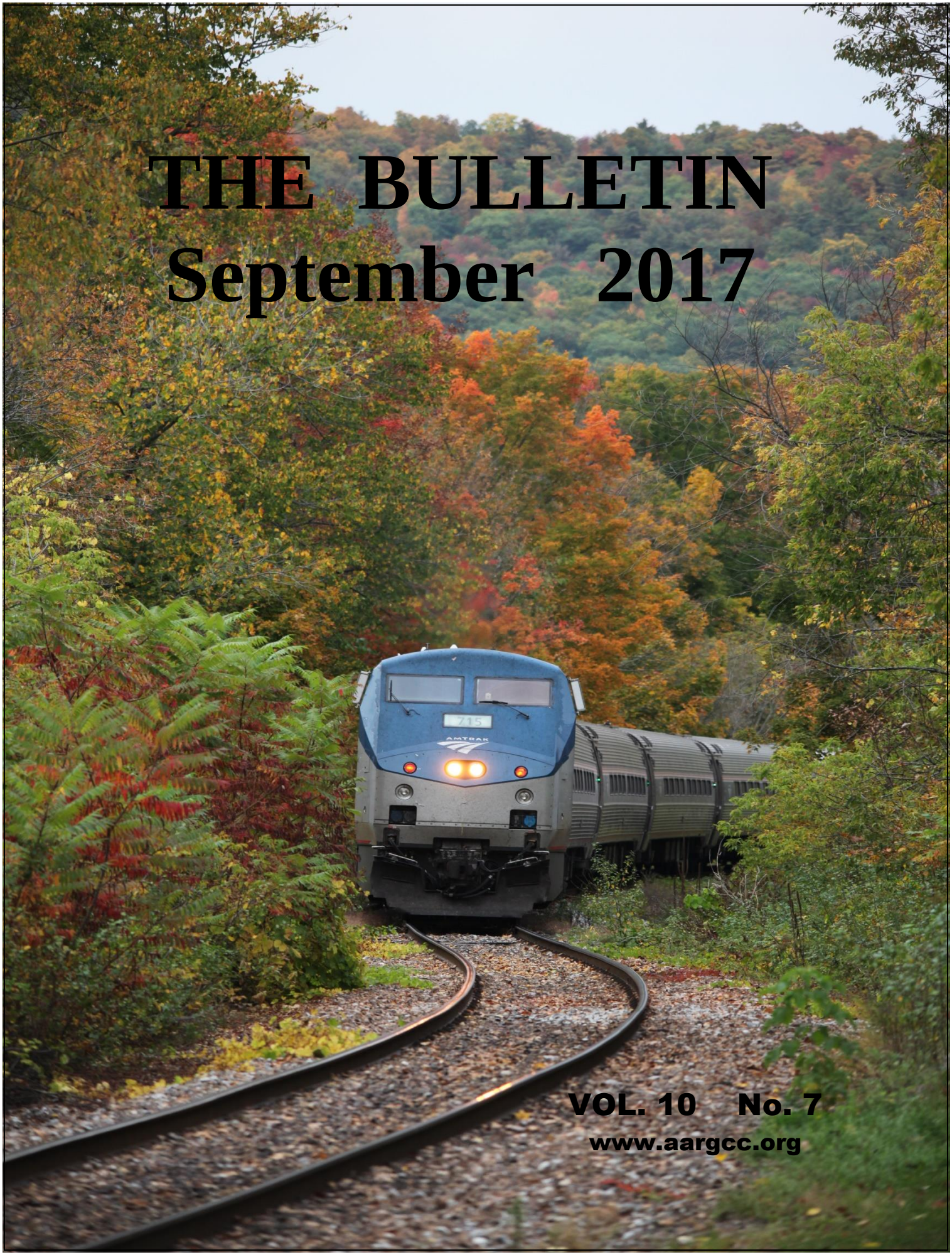
THE BULLETIN
September 2017



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Case Notes by *Stuart A. Schwartz*, Legal Editor

THE BULLETIN

September 2017

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Send articles for publication, communications, e.g., personnel changes, changes of address, requests for subscriptions, etc. to the Managing Editor. Articles submitted for publication are subject to the editorial license of the editors. The articles, information, and opinions set forth in this publication are not necessarily accepted or adhered to by any particular railroad, its management, the General Claims Conference, or the Association of American Railroads. This information is disseminated for the purpose of promoting thought and interest in topics related to the railroad industry.

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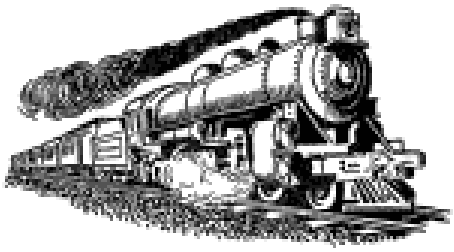

Mission Statement

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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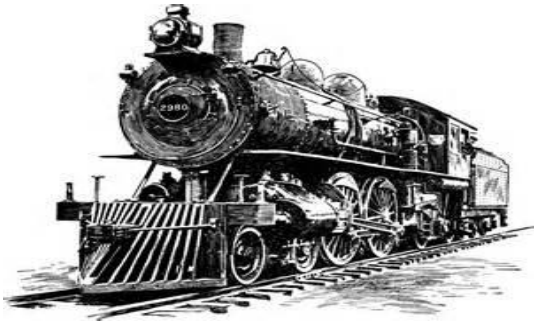

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Personalities

In this issue, we are pleased to feature ***Armando Castillo***, Claim Agent for The Kansas City Southern Railway Company in Laredo, TX.

Armando Castillo was born in San Antonio, TX, and has dual citizenship from Mexico and the United States. He has lived in many places around the world including Mexico, Turkey, Peru, and Bolivia, where he graduated high school in the City of La Paz. The different cultures and personalities of these places gave Armando a broad understanding of people and customs and how to approach them. Later, he moved with his family to Laredo, TX, where he received his Associate's Degree in Business from the Laredo Community College before obtaining his BS in business administration from Kaplan University Online. Armando married Daniella in 2012; they have two daughters, Regina and Romina, and one son, Patricio. Armando credits his family as the motivation propelling him towards completing a competitive master's degree in international business and commerce from Texas A&M University. Prior to joining the railroad, he worked in the logistics industry specializing in import and export operations, mainly with Mexico.

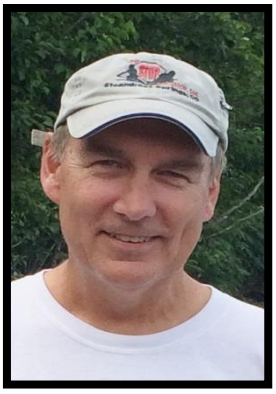
Armando started with KCSR in 2013 as an Assistant Trainmaster in Laredo, TX. He demonstrated his abilities and bilingual skills at the Laredo, Texas Serrano Yard by building excellent relationships among managers and the mechanical, signal and transportation crafts in both the US and with the KCSM team across the border. In his role as Trainmaster, Armando traveled frequently within the KCSR territory, taking advantage of training programs and learning opportunities, affording him the chance to familiarize with people and operations system wide. This, combined with his logistics experience, education, global existence, and current residence in one of the busiest commerce borders of the world, built a strong background for his current role in the claims department.

Armando joined the KCSR Claims Department in 2015, covering the same south Texas territory he learned as a Trainmaster. He credits his success to the support and training provided by the claims department, including attendance in 2016 at the AAR Claims School in Overland Park, KS; group and specialized training; and individual interaction with other claim agents. He plans to continue training and participating in future AAR sessions, and if possible, be on an "officer on a train" event. He finds that the relationships he builds in his territory are very helpful from a teamwork perspective. Armando is always looking for better ways to implement technology into his claims role while maintaining the high quality and standards of the KCSR. He is instrumental in helping the team when they encounter Spanish-speaking claimants. His excellent Spanish fluency and vocabulary make the interviewing and translation process very smooth. Armando knows that he still has many new things to learn about his role and expects to grow professionally within the department in the coming years. He balances out the demands of the job with family togetherness, enjoying taking trips to different places and spending family time playing sports and doing activities together.

Jeri Wright, Publications Committee

Keeping Track

In this issue, we are pleased to feature ***Rick Vest***, former Senior Claims Representative for BNSF Railway Company in Lincoln, NE.



After two-and-a-half-years of retirement, Rick Vest summarizes his present lifestyle as full of "opportunities to explore new paths." "When you're working, you're required to fit certain molds and parameters; but when you retire, you get to look around and choose activities that add meaning to your life or add meaning to the lives of others."

Rick grew up in Greenwood, NE, a "Mayberry RFD" kind of town, "with less Andy Taylors and more Barney Fifes." He launched his railroad career in 1974, at the age of 20, as a carman apprentice at Havelock Shops—BNSF's largest car repair facility. He progressed to a journeyman carman and held various supervisory positions. He then obtained a Bachelor of Science Degree in human relations from Doane College. In 2001, Rick accepted a Claims Representative position in Lincoln, and was later promoted to Senior Claims Representative. After forty-and-a-half years of service, Rick retired from the railroad on January 31, 2015.

The best part about being retired for Rick is spending time with his wife, Dawn, and their large family. Between Rick and Dawn's nine children and 18 grandchildren, you can imagine just how busy his life is. He is engaged in an enormous amount of sporting events, music programs, and shuffling kids. He especially loves to catch movies with his grandkids on "$5 Tuesdays." Rick and Dawn love to travel as well; since retiring, they have vacationed in Jamaica, France, Florida, Alaska, and Mexico. They also partake in live performances and concerts.

Rick volunteers in his church and is currently on the Pastoral Visitation Team, making sure the sick and elderly members of his church "know that they have not been forgotten." He also volunteers for the Salvation Army, delivering lunches during the summer to kids who may not eat otherwise. He takes his grandkids along with him so that they may understand and appreciate what they have. Rick's favorite pastime is reading, and he enjoys playing duplicate bridge and pickle ball. After a lifetime of playing and coaching basketball, Rick has finally given it up, exclaiming, "I was tired of playing with 30 year olds."

If that weren't enough, Rick still enjoys acting as a mediator for the State of Nebraska Department of Justice, something he has done for years. In addition, he serves as the Chairman of the Beatrice Resolution Center. He mediates mostly small claims court cases involving family matters and small business claims. He has also taken courses through the University of Nebraska's lifelong learning institute and belongs to a book club. Last but not least, Rick dabbles in politics and shortly after retiring, ran for a state legislative office. He didn't win the election, but ran a smart campaign and takes consolation in the fact that he won by "cost per vote." And who knows, perhaps that will become an effective talking point in a future political endeavor.

Lorri Savidge, Publications Committee

Meet Some of Our Newest Members

Kareem Jackson, Senior Claims Specialist, joined the Amtrak Claims Department in the Philadelphia, PA, office on May 8, 2017. Kareem grew up in Newark, NJ, and attended Drew University earning a bachelor's degree. Prior to coming to Amtrak, Kareem worked with Liberty Mutual Insurance in New Jersey. In his free time, Kareem enjoys playing and watching sports, catching up on his favorite shows, enjoying time with friends and family, and playing video games on his Xbox.

Daniel Davis joined the KCSR Claims Department as a Senior Claims Agent in Houston, TX, on July 3, 2017. Prior to KCSR, Daniel worked eight and a half years with the CSXT Risk Management Department, and was promoted to District Manager in 2013. Daniel earned a Bachelor of Science Degree in justice and public safety from Auburn University, and has nine years of law enforcement experience as a criminal investigator. Daniel has two children and enjoys exercising, sports, and the outdoors.

Damien Gallegos, Senior Claims Specialist, joined the Amtrak Claims Department in New York, NY, on April 24, 2017. Damien grew up in New Jersey and attended Centenary College (now Centenary University) earning a Bachelor's Degree in criminal justice. Prior to coming to Amtrak, Damien worked with Progressive Insurance in New Jersey. He has also worked as a private investigator, is an avid dog lover, and a volunteers at his local fire department.

John David Miller, Senior Claims Specialist, joined the Amtrak Claims Department in the Chicago, IL, office on July 10, 2017. John grew up in Versailles, KY, and attended Tusculum College, earning a business degree. Prior to coming to Amtrak, John worked with CSX Transportation Inc., in Florence, KY. In his free time, John enjoys hiking and fishing.

♦♦♦♦♦

"Never choose a friend without complete understanding, and never lose a friend because of a small misunderstanding."

~ Anonymous

Members Moving Up

BNSF Railway Company

Nate Mclaughlin: On July 17, 2017, was promoted from Claims Representative in Minneapolis, MN, to Claims Manager in Vancouver, WA.

Union Pacific Railroad

Lashanda Del Balso: On July 1, 2017, was promoted from Manager Risk Management, in City of Industry, CA, to Director Risk Management in City of Industry.

Lucas Melendez: On July 1, 2017, was promoted from Senior Risk Management Representative in Tucson, AZ, to Senior Risk Management Specialist in Tucson.

Elisa Tubbs**:** On July 1, 2017, was promoted from Senior Risk Management Representative, in Addis, LA, to Senior Risk Management Specialist in Addis.

Angela Craik: On July 1, 2017, was promoted from Risk Management Representative, in Roseville, CA, to Senior Risk Management Representative in Roseville.

Andy Redick: On July 1, 2017, was promoted from Risk Management Representative, in Fresno, CA, to Senior Risk Management Representative in Fresno.

Morgan Fiut: On July 1, 2017, was promoted from Risk Management Trainee, in Roseville, CA, to Risk Management Representative in Roseville.

Amber Read**:** On July 1, 2017, was promoted from Risk Management Analyst, in Council Bluffs, IA, to Risk Management Analyst II in Council Bluffs.

Melissa Harding: On July 1, 2017, was promoted from Risk Management Analyst II, in Omaha, NE, to Risk Management Analyst III in Omaha.

Sabrina Hughes: On July 1, 2017, was promoted from Risk Management Analyst II, in Omaha, NE, to Risk Management Analyst III in Omaha.

Joseph Larson: On July 1, 2017, was promoted from Risk Management Analyst II in Omaha, NE, to Risk Management Analyst III in Omaha.

Angela Slaughter: On July 1, 2017, was promoted from Risk Management Analyst II, in Omaha, NE, to Risk Management Analyst III in Omaha.

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Members Moving On

BNSF Railway Company

Bill Renney began his railroad career with BN in Gillette, WY, in ***1976*** in the signal department. He retired on ***June 1, 2017,*** as Senior Claim Representative of Evidence Preservation at BNSF Railway in Billings, MT. He took a brief hiatus to attend college at Montana State University at Bozeman, where he graduated in 1979 with a B.S. in criminal justice and a minor in history. After graduation, Bill returned to BNSF Railway on June 5, 1979, in the signal department, working in the states of Montana, North Dakota, and Minnesota.

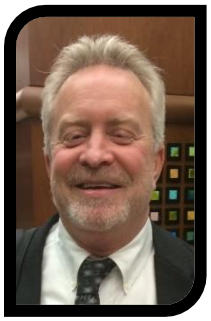
Bill began as a Claims Representative in January 1982 in Superior, WI. He enhanced his claim knowledge by enrolling in graduate-level anatomy and physiology courses at the University of Minnesota at Duluth. In 1985, he was promoted to Senior Claim Representative in Sioux Falls, SD, followed by a promotion to Manager in 1991 in Fargo, ND. He was promoted to Director in Billings, MT in 2005.

It seems Bill never left room for boredom between traveling, volunteering, and extra projects. Bill's many activities included serving as the director on the South Dakota Safety Council, becoming Chairman of that council, working as an assistant manager on two city political campaigns, helping build a zoo in Fargo, and then serving as a Director and President of the Red River Zoological Society, becoming a Cub Scout master, and being a member of the Chairman's Club of BNSF Railpac. By 2002, he had added getting involved with the AAR when he taught the direct case handling course at the AAR Basic Claim School. Finally, in 2005, he became chairman of the education committee, organizing both the Basic and Advanced AAR Claim Schools. Bill has received numerous awards throughout his career — the most notable being our industry's prestigious Paul C. Garrott Award in 2010.

Bill plans on continuing his travel plans, which have included Vietnam, Cambodia, and Costa Rica. He is also looking forward to reading and hopefully convincing his children to make him a grandfather. He has enjoyed his long, eventful, and memorable career with BNSF Railway and says he will miss us all. He is looking forward to all of the uninterrupted nights of sleep!

38 Years

Union Pacific Railroad



Gary Gregory began his railroad career in ***June 1975***, at age 17, at the Chicago Rock Island and Pacific Railroad as a set up carman, in El Reno, OK. He retired from the Union Pacific Railroad on ***April 30, 2017***, as Region Director Risk Management - Southern, in Spring, TX. At age 20, Gary was promoted to Assistant Division Mechanical Officer in Des Moines, IA, and recounts his move to the Quad Cities as where he learned the most about the workings of a railroad.

On February 7, 1982, he went to the Missouri Kansas Texas Railroad (KATY) as a Claim Agent. In October of 1989, Union Pacific acquired the KATY, and he was promoted to Senior Claim Agent. Gary was promoted to Manager Accident Analysis, and moved to San Antonio, TX, in 1991. By 1993 he was promoted to Director of Claims, and moved to Spring, TX, then moved to Kansas City, Missouri in 1997 and was promoted to Central Region Director in 2000. In 2008, he moved again, this time back to Spring, TX, to become Region Director Risk Management – Southern, where he finished his railroad career.

Gary has four children; two sons (James and Andrew) and two stepdaughters (Ashley and Kelsey). He and his wife Paula also have four grandchildren; Charlotte, Aria, Adrian, and Eleanor. Gary and Paula recently sold their Spring home and are now living in Fort Worth, TX.

42 Years

TRIAL SUMMARIES

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

Soo Line Railroad Company d/b/a Canadian Pacific, Third-Party Plaintiff
vs.
Knoedler Manufacturers, Inc., Knoedler Manufacturers Canada, LTD., Atwood Mobile Products, LLC, and Atwood Mobile Products, Inc., Third-Party Defendants.

This contribution and indemnity action arose out of three separate incidents in which three Canadian Pacific (CP) employees suffered career-ending injuries as a result of the in-service collapse of their locomotive seats. The locomotive seats were manufactured by Knoedler Manufacturers, Inc. and Knoedler Manufacturers Canada, LTD (collectively Knoedler) and equipped with a defective recliner mechanism from a defunct component supplier, Atwood Mobile Products, Inc. Atwood Mobile Products, LLC, purchased that entity's assets in a sale pursuant to §363 of the Bankruptcy Code after the manufacture of the seats at issue.

Following the injuries, the three employees filed lawsuits against CP under the Locomotive Inspection Act (LIA) and the Federal Employers' Liability Act (FELA). Each employee alleged that his locomotive seat, suddenly and without warning, collapsed backward at the point of recline, causing serious injury. CP admitted violation of the LIA in those cases and settled for a total of approximately $2.5 million dollars.

The LIA, of course, mandates that a locomotive and its "parts and appurtenances" must be in "proper condition and safe to operate without unnecessary danger of personal injury." Relevant to this case, it specifically requires that locomotive cab seats "be securely mounted and braced." Accordingly, CP brought third-party contribution and indemnity actions against Knoedler and both Atwood entities in Minnesota state court for their failures to design and manufacture a locomotive seat and recliner that complied with LIA requirements.

Ultimately, the court found that the bankruptcy sale shielded Atwood Mobile Products, LLC, from liability and it entered a default judgment against Atwood Mobile Products, Inc. After nearly 30 depositions that spanned the United States and Canada, Knoedler moved for summary judgment. Knoedler claimed that CP's third-party claims were preempted by the LIA, and

further claimed that its US-based corporation did not design, manufacture, or sell the seats at issue. The court denied Knoedler's motion in its entirety. Because CP properly based its state claims on the LIA's standard of care, the court correctly ruled that the LIA did not preempt its claims against Knoedler. The court also agreed with CP that it raised an issue of fact concerning the role that Knoedler's US-based arm played in the design, manufacture, and sale of the seats at issue. Nevertheless, Knoedler refused to take part in meaningful pre-trial settlement efforts.

Prepared to try its case, CP brought its claims against Knoedler before the Honorable Nancy E. Brasel and a jury from the Circuit Court of Hennepin County, Minnesota, on March 13-21, 2017. In a hard fought trial, Knoedler presented evidence that indicated CP had been aware of the defective seat recliner mechanisms for several years before the seat failures at issue, but did not replace all the affected seats. Knoedler and its experts further blamed CP and its employees for the seat failures, arguing that CP's employees misused and abused the seats and that CP failed to properly test, maintain, and replace the seats, even after learning of the defective components in the years prior to the injuries. However, CP effectively crossed Knoedler's experts, eliciting that the Knoedler seats were not suitable for the locomotive environment in the first place.

CP's experts held up under cross, and explained that Knoedler did not perform any design or engineering analysis on its seats before selling them to CP as "Railroad Seats" for use in locomotives operated by CP, as required by product design engineering principals. Neither did Knoedler perform any design or engineering analysis on the recliner mechanism before installing it on seats sold for use in locomotives operated by CP. Lastly, in one of the final pieces of evidence presented to the jury, Knoedler's president admitted that the seats at issue were not designed for locomotive use and were not securely mounted and braced.

On March 21, 2017, the jury awarded CP a **verdict in favor of defendant*** in the amount of approximately $1.25 million dollars, plus costs, in contribution from Knoedler for the FELA/LIA employee injury suits settled by CP. Knoedler did not appeal the judgment. The award was nearly $500,000 more than Knoedler's final settlement offer. CP's post-judgment motions for costs, prejudgment interest, and attorneys' fees from the underlying injury cases remain pending.

CP's victory was the first jury verdict to award damages to a third-party plaintiff railroad against a third-party defendant manufacturer for contribution for railroad employee injuries in the wake of *Delaware & Hudson vs. Knoedler Manufacturing, Inc.*, 781 F. 3d 656 (3rd Cir. 2015). In that opinion, the Third Circuit held that the LIA did not preempt a railroad's third-party product liability-type claims against a manufacturer because the claims were premised on standards of care prescribed by the LIA itself, and not any state law standards.

CP was represented by Daniel J. Mohan and Matthew J. Hammer of Daley Mohan Groble, Chicago, Illinois, and Randall J. Pattee and Alex L. Rubenstein of Fox Rothschild, Minneapolis, Minnesota. Greg Simmons, Director, Casualty Management – US, and Denise Reuter, Manager, Litigation Risk, Casualty Management – US, managed the case for CP.

Knoedler was represented by Peter W. Wanning and R. John Wells of HKM Law Group, Minneapolis, Minnesota, and James T. Smith of Huffman, Usem, Crawford, & Greenberg, Minneapolis, Minnesota. Readers with questions about these cases or the LIA should contact

Dan Mohan, 312.422.0786, mohan@daleymohan.com, or Matthew Hammer, 312.422.5874, mhammer@daleymohan.com.

Daniel J. Mohan and ***Matthew J. Hammer***, Daley Mohan Groble

Larry Scullark vs. Canadian Pacific Railway

On January 4, 2012, conductor Larry Scullark was 57 years old with 35 plus years of service with Canadian Pacific (CP). He was working with an engineer on a transfer job, transferring three Union Pacific (UP) locomotives from CP's yard to UP's yard. Prior to transferring the locomotives, the engineer had inspected all of the restrooms on the locomotives, and did not note any safety issues, defects, or tripping hazards. After about ten hours of work, Mr. Scullark decided that he needed to use the restroom on one of the three UP locomotives. He alleged that one of the restrooms was dirty, and he did not check the restroom on the second locomotive, but instead used the restroom on the third locomotive. He walked backward down a bathroom passageway and then backward down one step into the restroom, with his back to the toilet. Daylight lit the restroom compartment so Mr. Scullark could see the floor, the toilet, and the interior of the compartment. He did not know exactly what his foot caught on, but he assumed that when he picked up his right foot and tried to pivot to turn to face the toilet, his right foot caught on the toilet or step in the restroom. He caught himself against the wall of the compartment, and then proceeded to use the restroom. He finished the other two hours of his shift and then complained that he hurt himself in this restroom. So Mr. Scullark and the engineer inspected the restroom and again found no defects, tripping hazards, or other safety concerns. Two other inspections of the restroom were done by CP employees after the incident and they also found no defects, tripping hazards, or other safety concerns.

Mr. Scullark claimed that due to this incident, he needed to have a right knee arthroscopy and eventually a total right knee replacement, which prevented him from returning to work and prevents him from enjoying his retired life.

Mr. Scullark alleged that CP violated the Locomotive Inspection Act (LIA) and was negligent under the Federal Employers' Liability Act (FELA) because (1) of the unsanitary condition of the lead locomotive restroom; (2) the restroom that Mr. Scullark used was not safe and free from dangerous conditions; (3) CP failed to warn him of the unusual arrangement of this restroom on a foreign locomotive; and, (4) there was a defect or insufficiency in the restroom. UP was a former co-defendant in the case, but its motion for summary judgment was granted because the court found that UP was not Mr. Scullark's employer and, therefore, the FELA and LIA did not apply to it (Plaintiff failed to file a general negligence action against UP within the Statute of Limitations.). CP also filed a motion for summary judgment prior to trial that the LIA and federal regulations preempted any allegations regarding the design of the restroom, and that plaintiff failed to present evidence to support his remaining allegations, but that motion was denied. Trial began on June 20, 2017, in the Circuit Court of Cook County, Illinois. The Honorable Patrick Foran Lustig presided over the trial. Mr. Scullark was represented by Daniel J. Biederman, Jr., of Rhatigan Law Offices, LLC. CP was represented by Daniel J. Hronek, Christopher T. Scolire, and Maureen A. McGuire of Anderson, Rasor & Partners, LLP. CP's

counsel was assisted by CP claims personnel Michael Schmidt and Chad Barron during trial. Former co-defendant UP was represented by Tanya E. Springman and Elizabeth Graham.

CP argued that the inspections of the restrooms on this consist all revealed no unsanitary conditions, defects, tripping hazards, or any other safety concerns. During trial, the evidence revealed that the restroom that Mr. Scullark used was the same design as the restroom commonly seen on this same type of locomotive, which was manufactured in the 1970's and commonly used on the railroad. During trial, three CP employees and one UP employee all testified that there was nothing unsafe about the restroom or its design, and there were no modifications or changes to this restroom. Additionally, those employees testified that there was no reason to back into this restroom compartment, and it was unsafe for plaintiff to do so. Mr. Scullark originally complained that the lighting and light switch in the restroom were insufficient and unsafe, but on cross-examination, he conceded that the daylight sufficiently lit the restroom and he did not need the artificial lighting.

As for Mr. Scullark's claimed injuries, CP contended that he would have needed a total knee replacement regardless of any alleged incident because of his severe pre-existing osteoarthritis and chondromalacia, and that he had not seen any healthcare provider since July 2013 for any right lower extremity pain or limitations. The evidence at trial also revealed that he lives in Florida, owns a boat, fishes and performs his normal activities with no (or very limited) restrictions.

During closing arguments, plaintiff asked for $2,595,622 ($395,622 lost wages; $200,000 disfigurement; $2,000,000 past and future pain and suffering). On June 30, 2017, the jury returned a unanimous **defense verdict**.* The jury answered special interrogatories that CP did not violate the LIA and was not negligent under the FELA. Prior to deliberation, the verdict forms were contested considering the strict liability of the LIA and the potential for contributory negligence to still be applied to the FELA count. CP offered multiple different verdict forms in the attempt to avoid any issue where the jury may have returned a verdict for the plaintiff and found that CP violated the LIA, but still also found that Mr. Scullark was contributorily negligent. Those different verdict forms were rejected, but, ultimately, it did not affect the defense verdict. Plaintiff has not filed any post-trial motions or an appeal at this time.

Christopher T. Scolire, Anderson, Rasor & Partners, LLP

George Miller vs. BNSF Railway Company

George Miller, a 51-year-old Maintenance of Way (MOW) employee with less than two years of service with BNSF, claimed he suffered a labral tear in his right shoulder while using a claw bar to remove a spike on October 24, 2012. On the date of the accident, Miller and another trackman were tasked with replacing a 40-foot piece of rail in the Golden, CO, yard, and Miller claimed that neither a foreman nor any other supervisor was present at the job site. After undergoing two surgeries to correct the injury, he returned to work in August 2013; however, in December 2013, he went out on medical leave due to continued shoulder pain. After extensive rehabilitation and medical treatment, Miller's doctors were unable to resolve his shoulder complaints, and Miller claimed that he could no longer work for BNSF.

Plaintiff claimed that BNSF failed to provide Miller with proper training for the use of a claw bar and proper supervision while on the jobsite. When Miller hired on with BNSF in June 2011, he received both classroom and on-the-job training. However, the use of a claw bar was not addressed in the classroom training. Miller admitted that when he was injured, he was using the claw bar in violation of BNSF's rules, but he was unfamiliar with the rules for the proper use of a claw bar. Had he been familiar with such rules, he would not have been injured. Additionally, he claimed that BNSF's training materials and rules for using a claw bar were inconsistent and incorrect. He also claimed that no one at BNSF correctly used claw bars to remove spikes. For over 18 months, Miller improperly used the tool, and had a supervisor been present on the date of the injury, Miller's improper technique would have been corrected. Thus, BNSF was negligent in its training and supervision of Miller.

A five-day trial took place in Federal Court in Denver, Colorado, before Judge William Martinez. Plaintiff was represented by Jeff Seely of Gordon, Elias & Seely, L.L.P, in Houston, TX. BNSF was represented by Keith Goman and Chris Gatewood of Hall & Evans. Plaintiff's experts included Joe Lydick, a railroad safety consultant and former FRA inspector. Lydick reviewed Miller's testimony and training materials, and he concluded that BNSF failed to properly train Miller to use a claw bar and that had a supervisor been present at the jobsite, Miller would have used the claw bar correctly, which would have prevented his injury.

BNSF defense theme was that Miller was properly trained to use a claw bar and that a supervisor was not required to be present at the work site. When Miller was hired by BNSF, a senior MOW employee trained him to properly use a claw bar. Miller's co-workers were likewise properly trained to use a claw bar, and their routine use of claw bars was in accordance with their training and BNSF's rules. His co-workers felt reasonably safe replacing a 40-foot piece of rail without a supervisor, and the trackman working with Miller on the date of the accident felt that BNSF had provided him with a reasonably safe place to work. Miller also received training on BNSF's rules when he was hired, and employees are required to know and follow BNSF's rules while working. Thus, Miller was injured because he disregarded his training and used the claw bar in violation of BNSF's rules. Moreover, Miller's pain complaints after August 2013 were not related to the accident.

BNSF's experts included Dr. Thomas Noonan, Miller's treating orthopedic surgeon. Dr. Noonan testified that the method in which Miller used the claw bar would not have caused a labral tear; that Miller's pain complaints could be the result of degenerative conditions; and the pain symptoms Miller experienced after the accident were resolved when he returned to work in August 2013. Thus, BNSF argued that Miller's injuries were not caused by the accident, and his current pain complaints were not attributable to BNSF. Plaintiff demanded between $1.1 million to $1.5 million in closing. The jury returned a **verdict in favor of defendant*** finding no negligence.

Chris S. Gatewood, Hall & Evans, LLC

*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.

Basic and Advanced
2017 Railroad Claims Schools Review

A total of 34 students attended the AAR School this year in Kansas City, KS.

Another year, another great AAR School experience! Once again, Johnson Community College hosted students from several railroads during the week of May 8 through 12, 2017. The educational opportunity that this school provides claim representatives from many areas of the continent is valuable in not only the technical training, but the sharing of best practices as well.

The work we do is multifaceted and complex at times, but I saw representatives building relationships and networking all week in an attempt to relate to others that have similar experiences. The group was very engaged, and although the week gets long, they all stuck with it like the professionals they are, right up to the very end.

With smaller class sizes this year, the students experienced more one-on-one attention and great interaction during presentations. Speakers were really able to engage with the students in meaningful ways. The smaller classes also helped to build a strong cohort of people from all over. These relationships will hopefully help us all in our daily work. We know a full week is a large commitment, so we thank all of the students and railroads for their dedication to the school.

This year also brought several changes to the agenda and format for the advanced students. Instead of having them take the anatomy class again, we filled the first day with current topics of

interest, such as The Reptile Theory and Voir Dire. We also added classes that covered PTSD, Medicare handling, and technology (including drones). The new agenda items were a huge success and will definitely be considered next year as well.

Students completed field exercises that included activities such as throwing switches, taking measurements, and tying hand brakes.

Students also learned important photography skills and best practices.

Education Committee Members:

- Melissa Daly (Amtrak)
- Lorri Savidge (BNSF)
- Mark Acosta (CP)
- Chris McDonald (CSX)
- Deana Smith (KCS)
- Rodney Tatum (NS)
- Sabrina Hughes (UP)

The AAR Education Committee worked hard for months to provide a meaningful experience for students. They did an outstanding job! I look forward to next year's school — and what both our Education Committee and railroads can develop together. Hope to see you there!

Cathy Price, Education Committee Chair

Basic Railroad Claims School
Class of 2017

(L-R) Row 1: Jason Billings (CN), Jennifer Lee (UP), Patrick Mostasia (Amtrak), Terri Kwasny (NS), Joe Hovanec (Amtrak), and Education Chair: Cathy Price (UP).

Row 2: Brennan Gibson (CN), Chad Stewart (NS), Shaun Alcodray (CN), Nicole Bruno (Amtrak), Johnathan Buxton (KCS), Maryann Woodard (UP)

Row 3: Facilitator: Rodney Tatum (NS), Michael Davis (NS), Charles Bailey (NS), Angie Slaughter (UP), Tom Montgomery (Amtrak), Aaron Baker (UP)

♦♦♦♦♦

Advanced Railroad Claims School
Class of 2017

(L-R) Row 1: James Higgins (NS), Brandon Arrington (NS), Maryanna Sare (UP), Vivianna Maldonado (UP), and Heather Rudd (NS).

Row 2: Kenyatta Cropper (KCS), Dustin Caldwell (NS), Cathy Garner (Amtrak), Charmeka Stewart (Amtrak), Mary McClarnon (UP), and Education Chair: Cathy Price (UP).

Row 3: Curtis Williams (KCS), Brenda Severinsen (UP), Jeri Wright (KCS), Gary Lopez (UP), Robyn Klar (UP), and Facilitator: Sabrina Hughes (UP).

Row 4: Nick Igusky (NS), Damian Vaesa (UP), Matt Turner (CN), and Will Underwood (UP).

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New Claim Agents Forum
A Perspective on Claims Work

We are pleased to feature an article by ***Brian DiMaio***, Manager Field Investigations with CSX Transportation, Inc., and chair of the AAR New Agents Committee.

The point of mediation is to settle the claim before having to go to trial. In some states, courts mandate mediations before a trial can move forward. In other states, mediation is just one more opportunity for companies and the injured party to meet to try and reach an agreement, but with a disinterested third party in the room who wants to see a resolution, before both sides spend more time and money at a trial, and one side is typically disappointed with the outcome.

The best outcome of mediation, actually, is where both sides walk away from the table unhappy. One side ended up paying more than they wanted to, and the other side got less than they wanted. But the mediation settled. The bottom line is that an agreement was reached and the claim is closed. In my opinion the mediator did his or her job if both sides walk away happy about the fact that the claim is over with, but unhappy with the numbers involved. The tips below are suggestions that may help you have more successful mediations in the future.

First, do your homework. It may sound like a no-brainer, but it is important to know the facts of the case forwards and backwards before going into mediation. Review the facts of the case and the numbers involved with your counsel before going to mediation. Clamoring for facts or looking for a note written months or years earlier slows down the process and can disrupt negotiations.

Get together with your counsel prior to the mediation to develop a game plan and ensure you are on the same page. In theory, you would have been working with your attorney for some time on this matter, but that is not always the case. Meet with the attorney face to face before the mediation to discuss the key points you want to cover.

If your company still has draft books or check books, bring one with you and set it on the table in front of the mediator and the other side. Show everyone in the room that you came to the mediation with the intent to reach an agreement and settle the claim. Even if you end up sending a printed check from your home office in another state, seeing that you brought along the book will put the idea in the other side's head that you have come to the table willing to settle.

Make sure if you do not have the full authority to settle the claim that you can reach someone who does on the phone. It makes no sense to show up to mediation with the goal being to settle, if you do not have that authority or cannot make contact with the person who does. Know what you have approval to agree to, and be certain if the numbers are above your authority, that you can quickly get ahold of someone in your company who can approve the settlement.

Treat the other side with respect. That may seem difficult going in, especially if you have had an arduous time working with the other side leading up to mediation. But even if you have

evidence proving they are misrepresenting the truth, being disrespectful will not accomplish anything. Be patient, be respectful, and remember that the whole point of going to mediation is to get the claim resolved. You do not have to like the parties on the other side, but questioning the integrity of the other side in front of the mediator does not resolve anything.

Not every claim will settle at mediation; the gap in negotiation figures may just be too big. Despite your best efforts, you still may leave the mediation without an agreement. Or the case may settle a week later with a phone call or on the courthouse steps as trial begins. But it is my belief that using some or all of these suggestions will help you reach an agreement during mediation.

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Spotlight on our Advertisers
Thanks for the Support

The Advertisers in *The Bulletin* play a major role in keeping this publication in print. In appreciation of their longstanding support, the Publications Committee would like to acknowledge the law firm of ***Stuart & Branigin LLP;*** they have been advertisers and supporters of *The Bulletin* for 20 years.

Stuart & Branigin is a full-service law firm with 25 lawyers serving clients and institutions in several industries and practice areas. Since the founding of the law firm in 1878 in Lafayette, Indiana, Stuart & Branigin has represented railroads. One of their founding partners, Thomas A. Stuart, carried on his father's representation of the Wabash Railroad. (W. Z. Stuart was the first "chief solicitor" of the Wabash, after he had served on the Indiana Supreme Court from 1853-58). Ever since, they have had the honor, and great opportunity to represent several class I, regional, and short line railroads.

Over the years, the firm has been involved in significant cases involving the railroad industry. For example, retired partner John Bodle, representing Norfolk Southern predecessor Wabash Railroad Company, argued *Link vs. Wabash Railroad Company,* 370 U.S. 626; 82 S.Ct. 1386 (1962) before the Supreme Court of the United States. More recently, their attorneys have obtained favorable results in several cases in Indiana, and have argued successfully before the state and federal appellate courts:

- In a groundbreaking case, *Waymire vs. Norfolk & Western Railway Company,* 218 F.3d 773 (7th Cir. 2000), the court held that FELA claims based on inadequate warning devices at crossings were preempted by the Federal Railway Safety Act and accompanying regulations.

- In *Thiele vs. Norfolk & Western Railway Company,* 68 F.3d 179 (7th Cir. 1995), a crossing accident case, the court found that under Indiana law, an injured motorist's claim failed because the motorist was more than 50 percent at fault.

- In *Holbrook vs. Norfolk Southern Railway Company,* 414 F.3d 739 (7th Cir. 2005), the court affirmed summary judgment for the railroad, holding that the plaintiff failed to show, as a matter of law, that a dangerous condition existed and that the railroad had notice of such condition.

- In *Darrough vs. CSX Transportation, Inc.,* 321 F. 3d 764 (7th Cir. 2003), the court affirmed a trial court judgment for the railroad, finding the plaintiff failed to prove the railroad's negligence in his fall between ties on a railroad bridge.

- In *Chance T. Kelham vs. CSX Transportation, Inc*., 840 F.3d 469 (7th Cir. 2016), the court of appeals affirmed a district court judgment for the railroad, finding the testimony of defendant's mechanical and biomechanical expert admissible.

- In *Larry Arnold vs. Norfolk Southern Railway Company*, No. 4-15-0655, 2016 WL 6837026 (Ill. App. Ct. Nov. 18, 2016), the court affirmed summary judgment for the railroad, finding the sole proximate cause of the crossing accident was the decedent driver's failure to look and yield to the approaching train.

The firm's railroad lawyers include:

John Duffey (J.D., Georgetown University, 1982)

David Locke (J.D., Indiana University, Bloomington, 1995)

Barry Loftus (J.D., Indiana University, Indianapolis, 1998)

Sarah Dimmich (J.D., Indiana University, Indianapolis, 2002)

Heather Emenhiser (J.D., Indiana University, Bloomington, 2000)

David Stupich (J.D., Indiana University, Bloomington, 2014)

Mark Molter (J.D., University of Notre Dame, 2013)

A. Shane Hobson (J.D., Indiana University, Bloomington, 2015)

Stuart & Branigin has also had the privilege of being affiliated with the General Claims Conference and its publication, *The Bulletin*.

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AAR/RRB Committee Report

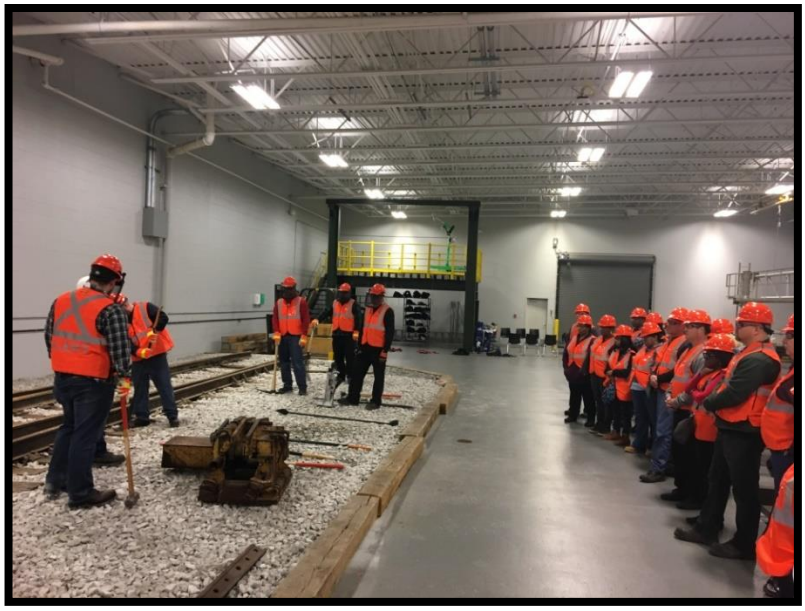
RRB Employees Receive Classroom and Field Training in Chicago

As part of the ongoing RRB disability reform program, over 70 disability review examiners from the RRB took part in a two-day training session in Chicago on March 29 and 30, 2017. The agenda for the program was designed through a collaborative effort of the RRB's Management and Labor Members' offices; representatives from Norfolk Southern, CN, and Union Pacific; and representatives of BMWE, BRS, and IBEW.

The first day of training was held at the RRB's headquarters in Chicago, and consisted of three 90-minute classroom sessions, each dealing with specific job tasks within the maintenance of way, communication and signals, and electrical crafts. Presentations for each topic were led in unison by Management and Labor. Examiners were able to ask questions throughout the 90-minute session as they gained valuable insight to job tasks performed by maintenance of way, signal, and electrical employees on a daily basis.

The second day of training was held at CN's training campus in Homewood, IL. All of the RRB examiners took a one-hour bus ride from downtown Chicago to CN's facility for a day of hands-on training of various job tasks within the same crafts as seen the previous day. Representatives from CN's Operations Training and Development, Safety and Emergency Response, Law, and Risk Management departments arranged and oversaw the day's activities. Again, the examiners were divided into three groups, with each group focusing on specific job tasks such as thermite welding, on-track equipment, fall protection, track components, switches, and crossing protection.

In the below photo, RRB examiners on the right observe a maintenance of way gang demonstrate the use of various track-related tools and activities.



In the photo above, RRB examiners and CN representatives walk past several wheel sets on the way to learn about fall protection.

While the weather outside shortened some of the planned instruction, there was no lack of valuable information and learning for the examiners. Feedback from the examiners was very positive and the teamwork between Management and Labor was top notch.

A heartfelt "THANK YOU" to the staff and representatives of CN for offering up their training facility for this effort.

Going forward, additional classroom and field training will be held for Transportation and Mechanical crafts. Look for articles on these sessions in future editions of *The Bulletin*.

Will Harden, NS, Chair RRB Subcommittee
Brenda Gunn, CN

♦♦♦♦♦

2017 Don Lord Writing Competition

All entries submitted by the June 1, 2017, due date have undergone the judging process. There will be a change in the release of the names of the winners and the presentation of their awards this year. Due to a change in the conference format, there will not be an awards ceremony this year. Traditionally, the winners are first announced and presented with their awards by the AAR Executive and Publications Committee Chairs at the conference. However, this year the winners will be notified and receive their awards from a member of their claim department. The names of the winners will be published in the December 2017 issue of *The Bulletin*.

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* will receive a *certificate…and*	*$250.00*

*The number of Honorable Mention winners will be based on ten percent of the number of essay entries.

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Honorable Mention
2016 Don Lord Writing Competition

"Problematic Interactions"

Michael Christian
Claim Representative
Norfolk Southern Corporation

Michael Christian, a Claim Representative, joined Norfolk Southern Claims Department on September 28, 2015, as a Casualty Claim Trainee in Harrisburg, PA. Michael began his career with Norfolk Southern as a conductor in 2011. Prior to the railroad, Michael worked as a corrections officer for the state of West Virginia. He attended Glenville State College, where he majored in criminal justice. He has been married to his wife, Nikki, for 12 years and they have three sons; Cole, Caleb, and Brady. In his spare time, Michael enjoys spending time with his family, coaching his son's baseball team, fishing, and playing the mandolin. He is proud to represent Norfolk Southern in the Don Lord Writing competition and hopes to be honored with this opportunity in the future.

Problematic Interactions

Ah-took, the caveman, gazed across a plush, green, picturesque meadow that seemed to stretch on for days. He stared in awe at its beauty as butterflies danced over the flowing foliage and honeybees buzzed from flower to flower gathering the nectar to be used for their sweet spoils. Deer were leaping in the distance as they gathered under the apple trees whose limbs were drooping from the weight of their bright-red bounty. Pheasants could be seen in the distance as well, pecking at berry bushes that were exploding with colors of purple, blue, and red. His stomach growled beneath his fur loin cloth, and his mouth began to water with the anticipation of gorging on all of the gastronomic abundance that his eyes beheld. He started toward the apple trees, first at a walk, and then his legs seemed to take on a mind of their own. With each step he gained speed until he was at a full sprint, the deer scattering in all directions upon his approach.

> *Finally, Ah-took reached a low-hanging branch so full of fruit that it resembled a bunch of grapes, with apples so glossy he could see his reflection in each one. He reached out his hand, and just as he was about to touch one of the ripened treasures he felt a sharp pain in his hand, and a kick to his torso so strong that it sent him rolling on the ground away from the tree. He shook his head clear of dizzy confusion and there, standing over him was another fur-clad caveman holding a large, wooden club poised for attack. "MINE!" screamed the bearded behemoth.*

What I have described above I think would definitely qualify as a problematic interaction! This land of milk and honey is certainly enough for two, but the man that Ah-took has encountered wants to keep it all for himself… and Ah-took is hungry! He is faced with the age-old question: fight or flight?

This mechanism, if you will; the fight or flight response, has been a part of our genetic make-up since the days of the cave man. Whenever we feel threatened, this response kicks in…and all rationale seems to be kicked out! An emotional stimuli (for instance, getting kicked in the gut) first triggers a flood of adrenaline into our bloodstream from the adrenal glands that are seated above our kidneys. Our bodies don't stop there, however. Next, our brain diverts blood flow from non-essential operations to the muscles that control physical defense, or a quick escape. This means that in critical situations, extra blood flow is pumped into our arms and legs giving necessary strength to these larger muscle groups. This is a very handy operation if you need to fight off would-be attackers, or run from a large animal that intends to make you his next meal. Not so handy however, if the emotional stimuli happens to be a person shouting at you because you previously denied his property damage claim or when office negotiations have reached a livid impasse. Regardless, the emotional stimuli is still present in much the same way, and when we find ourselves in a professional situation in which we must deal with problematic interaction we are ultimately left with a body jacked up on adrenaline, muscles ready for action, and the conversation skills of a cave man. This occurs because of what I stated earlier; the brain diverts blood flow <u>from</u> what it deems non-essential operations. So while all the extra blood flow is going to the muscles that control hitting and running, the regions of the brain that control higher reasoning and rational thought are deprived! While most of us (hopefully) still maintain enough self-control to refrain from throwing punches or running away screaming like a banshee, we generally can then muster little more mental capability than the amount it takes to manage a complete sentence. How many times have you walked away from a heated exchange, later to ask yourself: Why did I say that? Or, why didn't I say this? That is essentially because the lack of blood flow to the higher functions of your brain wasn't allowing you to process the situation properly. So then, once you have had a chance to calm down and think rationally, you get all of these brilliant notions about what you should have said or done. The goal needs to be roping in our emotions and controlling situations involving problematic interactions before we lose control.

Before we can hope to overcome the effects of the fight-or-flight response, we must to recognize when it is happening. Often our emotions get the better of us and the adrenaline is flowing before we know it. The emotional stimulus that engages this response would be easy to pick out if a bear suddenly leapt out of the bushes and came running toward you, but not as easy to

pinpoint if it is a snide remark from a claimant or an insinuation from an attorney that you're not proficient in your job duties. The telltale signs can be different for each of us, so the trick is to be self-aware. Maybe the hair stands up on the back of your neck, or maybe you can sense the quickening of energy that comes with the release of adrenaline. It may take some practice, but usually you can start to perceive the downward spiral as it begins. However, even if you feel that the situation involving a problematic interaction has already gone south, de-escalation can often be achieved by keeping your brain engaged.

If you begin to feel threatened, whether the feeling skulks in from something as subtle as a backhanded compliment (i.e. "I love your shirt — I remember when those were in style!") or it is as blatant as someone shouting at you, a good tool to use is to start asking yourself questions. If you begin to internally ask yourself questions, you force your brain to allow the necessary blood flow back to the areas of higher function. Some good models could be: what was it that this person said or did that caused me to be angry?; what is this person hoping to get out of this conversation?; what am I hoping to get out of this conversation?; did I do or say something to cause this person to react in this way? The point of this is two-fold: not only will these questions act as a defibrillator to shock the brain back into rational thought, but they will also set the stage for what needs to come later — dialogue. In order to deal with a problematic person in a positive way, we have to get to a meaningful dialogue in which we try and work out underlying problems that are the root cause of this difficulty. The path to attaining this dialogue begins with asking questions, first of yourself and then of the other party. Before you start drilling the other person with questions though, however well-meaning they may be, it is a good idea to take a strategic recess.

Most often, before a productive conversation can occur once we have been offended, we need to reboot. There is nothing wrong with taking a step back when faced with a problematic interaction. Not necessarily a retreat, but simply a pause and an opportunity to begin again. You might say, "I'm sorry, I have obviously said or did something that has upset you. That was not my intention. Can we start again?" It is also perfectly acceptable (and in some cases even appreciated) to admit your own frustration. So try this; "Look, I can feel myself getting angry right now, and that is going to get us nowhere. Is it okay if we just start over?" A statement such as this will give both parties a needed break to clear the air, engage the brain, and start communicating. It may even serve to prompt the other person into internal questioning, allowing that essential blood flow back into their own regions of rational thought. Regardless of whether or not they are asking questions of themselves, hopefully you may now begin to calmly request some feedback from them.

By now the friction should be starting to wane and the venues of constructive dialogue may be traversed. It is important not to assume that you already know what the other person is feeling. We frequently fall into the practice of telling ourselves stories as to the motives behind another's actions that may not be so accurate. This sort of presumption only further complicates these delicate interactions, so the key is to be inquisitive. Most people aren't in the practice of firing off insults or going off on a raging rant for no reason, so the objective now should be finding that reason. You do this by asking questions, listening to the answers, and paraphrasing those answers with a follow-up question so that the other person knows you are invested in the

conversation. Once this information is on the table, then you may be able to work out a resolution that is beneficial to the both of you.

At face value the catalyst for the problems you are experiencing may appear obvious, for example; the denial of property-damage claims. Still, a calculated question could serve to calm the savage beast. "Do you feel as if you're being treated unfairly?" When they give their answer, it is then important to paraphrase the response and ask a follow-up question so that clear understanding is established. "So when you drove underneath the railroad bridge and something hit your vehicle, you assumed that it had to be because of some railroad negligence and that our company should be liable for your damages. Do I understand you correctly?" Now you should be able to state your case with clarity so that the other person can rationalize it. You can be assertive in your reasoning, without being aggressive. Frustration could then still be present, but at least the person may walk away with your view being made distinct. Other times however, the reason behind a problematic interaction isn't so easy to see. In that case, you may have to do some digging. It could have been the expression on your face. It may have been a comment you unwittingly blurted out that the other person took offensively. It might have even been the tone of voice that you used. Regardless, you won't know unless you ask. "Did I say something that offended you?" "Is there something else going on here that I don't know about?" These types of questions could open the door to dialogue and assist you in getting to the base of the problem. And again, use paraphrasing and follow-up questions when answers are given so that the other person feels that you understand them and their feelings are validated. Once this emotional state has been brought into the open, then each of you will be able to calmly discuss the real issues that need to be addressed.

Of course, this brief dissertation isn't all encompassing. Each scenario is different, and there will be many issues that come up when dealing with problematic interactions. Also, there will be times when there is nothing you can do to make the situation any better. The harsh reality is; some people just simply can't be gotten along with! If that is the case, it is best just to walk away. My hope though, is that by practicing these skills you will be able to ascertain when a communication is reaching a problematic state and what steps to take to halt the escalation, or regain control once intercommunication has reached critical. These techniques will need some tweaking in order to mesh with your own personality, but mastering the art of reaching meaningful dialogue is the key to success when dealing with problematic interaction.

Now, I wouldn't want to leave you hanging by wondering what happened with our friend Ah-took! He lay there for a second, his stomach still rumbling with hunger. Over the brawny shoulder of his newly made foe, the sun reflected off the shiny red apples that graced the limbs of the boundless tree. Ah-took hadn't had a meal for days, and the thought of leaving this bountiful paradise empty handed (and empty stomached) was more than he was willing to accept. He rose up to his elbows and stared at the muscle bound giant over the tops of his own deer skinned moccasins, and began sizing up the hulking figure. The notion of taking this beast in a fair fight didn't look very promising. Massive shoulders were perched atop a strapping chest that expanded back and forth with each breath he took. The six-pack of abdominals stacked underneath his chest heaved in and out as he panted, ready for combat. His legs were the size of tree trunks, postured in a ready stance over top of bare feet that were scratched and scarred from the rough terrain in which he had grown accustomed. Ah-took's heart sank at the

thought of engaging this monster in battle, but his hunger would not let him run away. He stood to his feet, and once more looked the mammoth from head to bare foot…then an idea struck him!

A few hours later, Ah-took was walking the familiar path back to his own camp. Behind him he dragged a fresh kill of venison, and on each of his hips hung a pheasant bouncing side to side as he stepped. In one hand, he held a half-devoured, bright-red apple that he happily gnawed on during his journey. About every other step though, Ah-took would wince with discomfort as his feet treaded over the stony terrain. He missed his deer skinned moccasins, but he would have more than enough hide for another pair; and the pain he was experiencing was little in comparison to the elation he was feeling in having won a battle. Not a physical struggle, but a mental triumph: The Compromise.

♦♦♦♦♦

"For good ideas and true innovation, you need human interaction, conflict, argument, debate."

~ Margaret Heffernan

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, *"Overtreatment of Accident Patients."* It is the 63rd article in the *Looking Back* series. The article appeared in *The Bulletin's* March 1967 issue. It was written by Kent L. Brown, M.D., who was a practicing surgeon in Cleveland, OH, at the time. The article was re-printed from the publication Excessive Medical Treatment in Personal Injury Cases of the Defense Research Institute, Inc., with permission of the author and publisher.

Dale M. Cisecki, Publications Committee

Overtreatment of Accident Patients

A. Introduction

The patient's disability, which was caused by an accident, and for which money compensation is sought, may be significantly enlarged by overtreatment or unnecessary treatment by the physician. This situation poses a medical-legal problem which is of sufficient magnitude to warrant an in-depth study.

B. Definition of Overtreatment

For the purposes of this article, overtreatment or unnecessary treatment, is defined as that medical care or treatment which is intentionally or unintentionally administered beyond the period when: (a) medically treatable symptoms and signs have disappeared; or (b) maximum repair and rehabilitation have been reached; or (c) the best possible cure has been effected.

This definition encompasses only the actual services rendered by the treating physician. Any ulterior motive for overtreatment originating from the patient, physician or lawyer and the serious consequences of such unnecessary treatment which prolongs or aggravates the condition of the patient have a direct bearing on this definition and will also be discussed.

The definition should be further clarified. Maximum repair means the best possible cure when there is definite disability such as loss of limb, function, or deformity. Legitimate treatment beyond this state would include - prostheses, rehabilitation, and essential medical care to keep the individual in a functional state. Of course, the extent of overtreatment depends upon many factors. Human factors such as dishonesty, emotional effects of disfigurement, psychiatric problems of many types, and economic pressure, all have a bearing on the patient's reaction to his injury or disease and, therefore, affect his treatment.

The physician may be a charlatan, who intentionally administers exaggerated or excessive treatment in collusion with the patient or the lawyer, or he may be completely sincere and honest, but in his attempt to render competent medical treatment, he actually over treats his patient.

In formulating such a definition, other factors must be considered. The most important of these is "intentional overtreatment" which applies more to the type of problem considered in this article. Occasionally, it is apparent that the aim of excessive treatment is to build up a personal injury case for greater legal damages, or a physician may promote overtreatment when he sees a lucrative source of compensation upon which he can rely.

Unintentional overtreatment may occur under legitimate circumstances. For example, there are many subjective complaints, neuroses, or manifestations, or unrecognized malingerers which create unusual or deceptive diagnostic problems. Honest physicians may be fooled by the patient who is exaggerating or falsifying his problem. Occasionally, the patient may be overzealous and will excessively treat himself. There is also the possibility that the physician who has cared for a patient from the original injury may become such a part of the problem, or so fond of the individual, that he loses objectivity and overtreats an injury to give the patient what he thinks is the best possible opportunity for recovery.

C. Iatrogeny

A physician, by his remarks, mannerisms or other indication, may knowingly or unknowingly, suggest mental or physical conditions to a patient which are adopted and needlessly magnified by him. The patient is often an eager and willing recipient. Direct suggestion or inference may be used to build up the medical problem in the mind of the patient. Excessive treatment may suggest to the patient that his condition is worse than it really is. Applying unneeded physical devices such as supporting collars, canes, belts, crutches, braces, or reapplying casts no longer needed, may give the patient the impression that he has a more serious condition than he actually has or is sicker than he really is.

Remarks or suggestions made by a physician directly, or even in an offhand way, can induce a pathological psychiatric condition in the patient. This process is known as iatrogeny. The patient takes a minimal suggestion and builds it to great proportion. He may develop a limp or adopt some other abnormal physical or mental response to adequately play the role he thinks he ought to assume. In fact, his whole personality may be warped to a degenerated state, which does not always revert to complete normality, even after the settlement of his case.

D. "Whiplash" Injuries

In general and traumatic surgery, I have examined a number of personal injury cases, some of whom I treated since surgery. Others are referred for single examination, evaluation and report for plaintiff or defense attorney. Many of these cases involved injuries pertaining to the neck and back, where overtreatment and misdiagnoses seem to occur more often than elsewhere. The so-called "whiplash" of neck and spine, which is actually a mechanism, but which is used as a diagnosis, is so prevalent and overworked for compensation purposes that it has been the subject of numerous critical articles by many doctors.

E. General Case Problems

I shall cite some general surgical problems which are suggestive of willful misdiagnosis, mistaken diagnosis, or overtreatment.

The problem of establishing causal relationship often rests squarely upon the physician. To justify an affirmative answer, the physician must be certain that the evidence at hand, or to be satisfactorily developed, proves with reasonable medical certainty that the alleged single traumatic experience did bring about the specific condition or symptom complex the patients presents. It is at this stage that the morals of the physician may first be tried. Certain illustrative cases are presented:

1. Trauma To The Abdomen

A woman was seen for continuing epigastric pain some months following a rear end collision in which the upper abdomen struck a steering wheel. The ribs and cartilages were described as negative during a medical work-up. It was found, however, by routine X-rays that the patient had a small paraesophageal diaphragmatic hernia. When her lawyer learned of this, he was struck with the idea that there was a causal relationship between the abdominal contusion and the hernia. There were no previous X-rays which might have shown this defect to be pre-existent. The patient, a highly nervous individual was extremely tense and an excellent candidate for pylorospasm or so-called "nervous stomach."

X-rays of the esophagus and the stomach showed retention of the barium in the stomach and poor emptying, a characteristic finding in this condition. There was no evidence of duodenitis, gastritis or ulceration. This type of diaphragmatic hernia could not result from a single mild blow to any part of the abdomen.

The esophagus and upper stomach are held loosely in this area, and are well protected by the chest cage and abdominal wall. Even a severe depressing blow could scarcely cause this kind of a diaphragmatic hernia. Furthermore, this type of hernia is quite common in the general population and is usually of congenital origin.

2. Trauma and Cancer

A similar case involved a male. The patient had already been surgically explored through a thorocoabdominal incision prior to any thought of litigation. Cancer had been found pre-operatively, by X-ray, in the upper part of the stomach at the cardio-esophageal junction. The lesion had progressed beyond operability and the patient was sewn up without removing the tumor. He was dead in a few weeks. The widow saw her attorney, and an attempt was begun to prove that there was causal relationship between a single traumatic experience, at work, and the cancer.

The attorney stated that, while the patient was at work constructing a wall, a brick fell hitting him on the head. He was said to have been rendered unconscious and fell

striking his chest on stone or brick. It was further stated that the blow to the chest had indirectly traumatized the esophago-gastic junction, causing the cancer.

As in the case of the woman just mentioned, it can be reasonably stated that even a severe blow to the thorax would have very little possibility of transmitting any effective traumatic force to this protected area. Furthermore, no one has ever proven in a responsible medical report that a single incident of trauma can or does cause cancer in any part of the body, even when the tissue is directly contacted.

3. Hernia

A recent case involved a man who had stepped from an elevator, the floor of which was not flush with the floor of the building. Not noticing this 3 or 4 inch drop, he overstepped in such a way that he "strained" his groins. The mechanism of injury was not too clear, but it was stated that he threw himself into a slightly extended position. The man and his attorney felt that this single incident caused two large inguinal hernias. He saw his family physician who immediately sent him to a surgeon and the hernias were repaired within two weeks of the incident. At surgery, two direct hernias and one indirect hernia was found. There was no record of a previous examination for hernia nor was there admission by the patient, that he already had hernias.

Acute hernia is a rare condition and usually results only from a severe strain. When it occurs, there is probably marked weakness in the tissues involved. Such weakened fascia and muscle is sometimes spoken of as "potential hernia" when the external ring is large and weakened. It is generally associated with a stinging sensation in the area or actual pain and is often accompanied by the appearance of a lump. There may be some blue discoloration in the adjacent soft tissues due to hemorrhage. There was said to be some groin pain, and nothing else in this man. If operated relatively soon, the hernial sac, which is removed at surgery, should show evidence of an inflammatory-like reaction on microscopic examination, or possibly even on gross observation. Unfortunately, there was no microscopic examination of the tissue in this individual.

This particular case illustrates a man having dreams of a free herniorrhaphy and a compensation for his recuperative period. Treating physicians in such a case have a moral obligation to honestly report the facts if called upon when claims are made since they are fully aware of the fact that another examination of the pre-operative pathology will not be possible for the defense.

This cannot truly be categorized under misdiagnosis, but it could fall into the classification of excessive treatment insofar as its legal implication is concerned. I would call this the case of an elective surgical procedure which was probably unnecessarily performed on an emergency basis, and which was then improperly used as the "medical" procedure most likely to support the legal claims made in this instance.

4. Treatment for Litigation Purposes

There are records of a patient who suffered a wound to some part of his body and the physician or clinic applied dressings with a frequency far beyond any recognized reasonable need. This is most likely to occur when there is a routine fee per visit. The more often the physician or group sees the patient, the larger the fee. This is not only improper and excessive treatment, but it builds up the importance of the case in the mind of the patient. Also, if such a case is involved in litigation, it is more impressive and remunerative to the patient, lawyer and, occasionally, the "treating" physician, because of the size of the jury award may depend upon the number of office calls or clinic visits.

The patient readily boasts about how many treatments or dressings he has had, and feels that this provided an index for the degree of damage. Actually, it does not; but, unfortunately, it may persuade a jury to return a verdict which improperly and unjustly enriches the patient, his lawyer, and the "cooperative'' physician.

5. Psychic Trauma

A lady found a large insect in the last inch of pop at the bottom of the bottle from which she was drinking. She claimed that this traumatic incident caused her to vomit for two years thereafter. She said she became nervous as a result of seeing this bug in her drink and developed difficulty in swallowing any solid foods at all as a result of the experience. She blamed this on this single psychic traumatic experience. She had numerous X-ray studies, was hospitalized more than once, saw a number of physicians and ran-up sizeable medical bills. She felt that she should be fully compensated for medical care and should also receive further compensation for the difficulty and unhappiness it had caused her.

When a search was made into previous hospital records, it was found that her dysphagia (difficulty in swallowing) and nervousness had antedated the "bug incident." This was a clear case of an attempt to make money on a pre-existing condition, and it was very apparent that she had no difficulty in getting a few seemingly responsible people to ''go along" with her unjustified claims.

There are a few individuals who are always finding insects or foreign material in their food or drink, and who sue at every possible opportunity because of the alleged psychic and physical trauma they suffer. I recall an incident which points up the ridiculousness of these claims. In Saipan, during World War II, a young sailor came to me and complained that there were insects in the rice. At that particular time, rice was one of the two remaining foods we had available. After registering his complaint, I simply told him the insects were well cooked, but assured him he did not have to eat the food. Being practical and realizing that no harm could result, he did eat the food, insects and all, as we all did. To this day, I am not aware of this young man or anyone else suffering any misfortune mentally or physically from such an experience.

6. Trauma and Diabetics

Diabetics are prone to have ulcers about the ankles and feet due to poor circulation. They are naturally susceptible to infection. In an occasional case, it has been alleged by diabetics that some trauma or freezing weather has caused their ulceration and cellulitis, or, if complicated, also the accompanying lymphangitis, adenitis and or phlebitis.

In one such instance, a man who had been exposed to a temperature of 4°F for about one and a half hours alleged that frostbite had caused an ulcer on his toe with cellulitis of the foot and ascending infection, even though he wore socks, shoes and galoshes. History from his hospital records showed the presence of diabetes and, also, that he had severe chronic athlete's foot infection. This latter condition, especially if chronic and severe, alone is a potent source of complicating infection. There was no actual causal relationship in this case, but his doctor signed out his hospital record as frostbite of the foot with cellulitis, lymphangitis and the works. His lawyer apparently felt that they could prove a causal relationship and a case was started against his company for compensation. A careful clinician would have instructed both patient and lawyer as to the unlikelihood of this possibility and averted the strife between this employee and his company.

This incident represents an attempt to defraud the company. Treatment in this case to be beneficial to the patient, should have been directed toward the athlete's foot and the diabetes, and the true etiology should have been recognized. There should not have been an attempt to conjure up a phony frostbite diagnosis in a situation where it could not possibly occur in either a diabetic or a person with arterial insufficiency of any type.

7. Use of Specialists

In reviewing files, it is sometimes apparent that attempts are made to increase the seriousness, the importance or impact of a medical case or situation by calling in numerous specialists. This can occur in lawsuit, where the medical problem is really minimal, but before long, the file is thickened with surgical and medical consultations. The claimant proceeds in this manner to build his case which requires the defense to do the same to counter the claims of the plaintiff by having the support of several "specialists." Such a claimant may have a highly questionable I.V. disc syndrome, so he may ask or be persuaded to see a general practitioner, radiologist, orthopedist, neurosurgeon, psychiatrist, and others with the hope that verification of his claims will be obtained.

In many such problems, it might have been better to have called the psychiatrist first. Unfortunately, this "specialist padding" has been developed to some degree because of the results of the trial of such cases in the courts. The more renowned the specialist, the more impressive he appears on the witness stand. The greater the quantity of these people, the more impressive to the jury. The actual necessity for all

this "long hair" is of considerable question. In many instances, it is a waste of money, talent and time that could be spent by these men in a useful way by taking care of sick people.

F. Conclusion

I have covered some facets of the seamy side of the medical-legal problem of "overtreatment." I would hasten to add that the majority of the cases involve legitimate medical problems that need specialist evaluation and clear explanation of the problem at hand, and prognosis, so that the patient can be justly compensated.

I could cite many more incidents which appear to represent fraud, but this area is heavily cloaked by the protective doctrine of "privileged communication." It involves the prestige of two great professions, medical and legal, and a jury system where, too often histrionics, prejudices, and legal technicalities have much to do to sway the verdicts of twelve average individuals who want to be good and true jurors. The trial of these cases requires the lawyer for the injured to become a "salesman.'' The more he can picture his client as a poor, beaten, bedraggled portion of residual flesh who is being "taken" by a capitalistic vulture (often the employer who has provided his living), the better position his client is in to obtain a "more adequate" award rather than a reasonable or justifiable verdict. Let it be understood that I do not wish to deprecate the lawyers who commence legitimate causes of action or the honorable professional practitioners who handle cases ethically.

Today, some people feel that any personal injury case involving an insurance company, a large industry, the state, or in fact, almost any type of legal action amounts to a cornucopia overflowing with money. It is in these categories that the moral structure of individuals involved may go askew. It involves not only the problem of the charlatan, but occasionally persons with apparent high community standing. Such people seem to feel justified in attempting to bilk or punish such public or private institutions and corporations in our society, yet they would feel it wrong to steal a loaf of bread.

The problem is basically one of dual morality. Individuals who are apparently honest suffer some types of an ethical and moral breakdown in certain legal cases. The physician who has had excellent training and is a superb surgeon on the one hand, may be persuaded to color his legal reports and to "go along" in "building" these cases by making fancy or questionable diagnoses and to require the use of braces, collars, traction, or therapy with no real medical basis for such action. These "knowledgeable" physicians usually are found treating their regular "non-legal" patients one way and their "legal" patients another. These individuals rely in part upon the public acceptance of the philosophy that the utility, insurance company, or employer involved in the litigation is "loaded" and "won't miss the money!"

The grass-root causes of this sorry situation can be cured by a more strict application of the rules of evidence by the courts and by an extensive education of the public. As potential jurors, the public will then be able to recognize fraudulent cases and justly deny compensation.

Fortunately, the number of doctors and lawyers who participate in these questionable practices is very small. However, the number of people who use their services is large. The few professionals who subscribe to or countenance the procedures which are criticized here should take a look at their records and ascertain just what contribution they think they are making to society for the betterment of the country. Physicians and lawyers are regarded as educated community leaders, and the average man in the street has historically admired and trusted the members of these professions. The questionable practices indulged in by a few of each of these professionals, if permitted to continue or allowed to spread, will soon destroy their honorable images.

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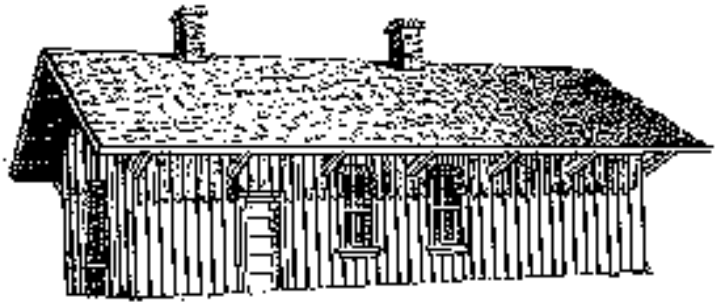

Case Notes

Stuart A. Schwartz
Legal Editor

Please send recent legal decisions of interest to Stuart via email at
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BNSF Railway Co. vs. Kelli Tyrrell et al.

- ***FELA — Personal Jurisdiction — Motions to Dismiss***
- ***Non-resident plaintiffs sued in Montana for injuries occurring in other states***
- ***BNSF sought dismissal on grounds that Montana did not have general jurisdiction***
- ***Plaintiffs argued that Sec. 56 of FELA grants jurisdiction where railroad is "doing business"***
- ***HELD — U.S. Supreme Court says that Sec. 56 is not a grant of personal jurisdiction and BNSF did not conduct sufficient business in Montana to satisfy "due process" jurisdictional requirements, so cases are DISMISSED***

It is not often that the U.S. Supreme Court decides a railroad case, but when it does, it is usually a big one, and this case easily satisfies that description, so we begin this edition of Case Notes with *BNSF Railway Company vs. Kelli Tyrrell, Special Administrator for the Estate of Brent Tyrrell et al.*, 2017 U.S. LEXIS 3395. Here, the Supreme Court holds that 45 USC §56 establishes only venue, and not jurisdiction, in FELA cases. Arguing the case for the victorious BNSF was Andrew S. Tulumello, Gibson, Dunn & Crutcher LLP, Washington, DC, and for the plaintiff was Julie A. Murray, also at Washington, DC. The United States of America was *amicus curiae* and was represented by Nicole A. Saharsky. This is a case to remember and is worth close reading. The 8-1 decision of the Court was authored by Justice Ruth Bader Ginsburg, and reads, in part, as follows:

The two cases we decide today arise under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §51 *et seq.*, which makes railroads liable in money damages to their employees for on-the-job injuries. Both suits were pursued in Montana state courts

although the injured workers did not reside in Montana, nor were they injured there. The defendant railroad, BNSF Railway Company (BNSF), although "doing business" in Montana when the litigation commenced, was not incorporated in Montana, nor did it maintain its principal place of business in that State. To justify the exercise of personal jurisdiction over BNSF, the Montana Supreme Court relied on §56, which provides in relevant part:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

In March 2011, respondent Robert Nelson, a North Dakota resident, brought an FELA suit against BNSF in a Montana state court to recover damages for knee injuries Nelson allegedly sustained while working for BNSF as a fuel-truck driver. In May 2014, respondent Kelli Tyrrell, appointed in South Dakota as the administrator of her husband Brent Tyrrell's estate, similarly sued BNSF under FELA in a Montana state court. Brent Tyrrell, his widow alleged, had developed a fatal kidney cancer from his exposure to carcinogenic chemicals while working for BNSF. Neither plaintiff alleged injuries arising from or related to work performed in Montana; indeed, neither Nelson nor Brent Tyrrell appears ever to have worked for BNSF in Montana.

BNSF is incorporated in Delaware and has its principal place of business in Texas. It operates railroad lines in 28 States. BNSF has 2,061 miles of railroad track in Montana (about 6% of its total track mileage of 32,500), employs some 2,100 workers there (less than 5% of its total work force of 43,000), generates less than 10% of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4%). Contending that it is not "at home" in Montana, as required for the exercise of general personal jurisdiction under *Daimler AG* vs. *Bauman*, 571 U. S. ___, ___, 134 S. Ct. 746, 187 L. Ed. 2d 624, 633 (2014) (internal quotation marks omitted), BNSF moved to dismiss both suits for lack of personal jurisdiction. Its motion was granted in Nelson's case and denied in Tyrrell's.

After consolidating the two cases, the Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF. Section 56, the court determined, authorizes state courts to exercise personal jurisdiction over railroads "doing business" in the State. In addition, the court observed, Montana law provides for the exercise of general jurisdiction over "[a]ll persons found within" the State. In view of the railroad's many employees and miles of track in Montana, the court concluded, BNSF is both "doing business" and "found within" the State, such that both FELA and Montana law authorized the exercise of personal jurisdiction. The due process limits articulated in *Daimler*, the court added, did not control, because *Daimler* did not involve an FELA claim or a railroad defendant.

Nelson and Tyrrell contend that §56's first relevant sentence confers personal jurisdiction on federal courts, and that the section's second relevant sentence extends that grant of jurisdiction to state courts. Neither contention is tenable. Section 56's first relevant sentence concerns venue; its next sentence speaks to subject-matter jurisdiction.

The first sentence of §56 states that "an action may be brought in a district court of the United States," in, among other places, the district "in which the defendant shall be doing business at

the time of commencing such action." In *Baltimore & Ohio R. Co.* vs. *Kepner*, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28 (1941), we comprehended this clause as "establish[ing] venue" for a federal-court action. *Id.*, at 52, 62 S. Ct. 6, 86 L. Ed. 28. Congress, we explained, designed §56 to expand venue beyond the limits of the 1888 Judiciary Act's general venue provision, which allowed suit only "in districts of which the defendant was an inhabitant." *Id.*, at 49, 62 S. Ct. 6, 86 L. Ed. 28; see Act of Aug. 13, 1888, §1, 25 Stat. 434. Nowhere in *Kepner* or in any other decision did we intimate that §56 might affect personal jurisdiction.

Congress generally uses the expression, where suit "may be brought," to indicate the federal districts in which venue is proper. See, *e.g.*, 28 U. S. C. §1391(b) (general venue statute specifying where "[a] civil action may be brought); J. Oakley, ALI, Fed. Judicial Code Rev. Project 253-290 (2004) (listing special venue statutes, many with similar language). See also *Kepner*, 314 U. S., at 56, 62 S. Ct. 6, 86 L. Ed. 28 (Frankfurter, J., dissenting) (The phrasing of [§56] follows the familiar pattern generally employed by Congress in framing venue provisions.).

In contrast, Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process. See, *e.g.*, 15 U. S. C. §22 (Clayton Act provision stating that "all process in [cases against a corporation arising under federal antitrust laws] may be served in the district of which [the defendant] is an inhabitant, or wherever [the defendant] may be found); §53(a) (under Federal Trade Commission Act, "process may be served on any person, partnership, or corporation wherever it may be found). See also *Omni Capital Int'l, Ltd.* vs. *Rudolf Wolff & Co.*, 484 U. S. 97, 106-107, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987) (discussing statutes that authorize (or fail to authorize) nationwide service of process). But cf. *Schlanger* vs. *Seamans*, 401 U. S. 487, 490, n. 4, 91 S. Ct. 995, 28 L. Ed. 2d 251 (1971) (though "Congress has provided for nationwide service of process" in 28 U. S. C. §1391(e) (1964 ed., Supp. V), that statute was meant to expand venue, not personal jurisdiction). Congress uses this terminology because, absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction. See *Omni Capital*, 484 U. S., at 104, 108 S. Ct. 404, 98 L. Ed. 2d 415.

Nelson and Tyrrell, however, argue that §56 relates to personal jurisdiction. In their view, the 1888 Judiciary Act provision that prompted §56's enactment, 25 Stat. 434, concerned *both* personal jurisdiction and venue. According to House and Senate Reports, they contend, two cases had brought to Congress' attention the problem with the prior provision—namely, that in federal-question cases, it authorized suit only in the district of the defendant's residence. Brief for Respondents 16-18. See H. R. Rep. No. 513, 61st Cong., 2d Sess., 6 (1910) (citing *Macon Grocery Co.* vs. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 30 S. Ct. 184, 54 L. Ed. 300 (1910); *Cound* vs. *Atchison, T. & S. F. R. Co.*, 173 F. 527 (WD Tex. 1909)); S. Rep. No. 432, 61st Cong., 2d Sess., 4 (1910) (same). In both cases, the courts had dismissed FELA suits for "want of jurisdiction." *Macon Grocery*, 215 U. S., at 510, 30 S. Ct. 184, 54 L. Ed. 300; *Cound*, 173 F., at 534. To avert such jurisdictional dismissals, they urge, Congress enacted §56.

Driving today's decision, we have long read the 1888 Judiciary Act provision to concern venue only. See *Green* vs. *Chicago, B. & Q. R. Co.*, 205 U. S. 530, 532-533, 27 S. Ct. 595, 51 L. Ed. 916 (1907) (analyzing personal jurisdiction separately, after concluding that venue was proper under 1888 Judiciary Act provision). See also *Lee* vs. *Chesapeake & Ohio R. Co.*, 260 U. S.

653, 655, 43 S. Ct. 230, 67 L. Ed. 443 (1923) (noting that materially identical successor to 1888 Judiciary Act provision, Act of Mar. 3, 1911, §51, 36 Stat. 1101, "relates to the venue of suits). Indeed, reading the 1888 Judiciary Act provision to authorize the exercise of personal jurisdiction would have yielded an anomalous result: In diversity cases, the provision allowed for suit "in the district of the residence of either the plaintiff or the defendant." 25 Stat. 434. Interpreting that clause to provide for jurisdiction would have allowed a plaintiff to haul a defendant into court in the plaintiff's home district, even if the district was one with which the defendant had no affiliation, and the episode-in-suit, no connection.

The second §56 sentence in point provides that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." Nelson and Tyrrell argue that this sentence extends to state courts the first sentence's alleged conferral of personal jurisdiction on federal courts. But, as just discussed, the first sentence concerns federal-court venue and confers no personal jurisdiction on any court.

We have understood §56's second sentence to provide for the concurrent *subject-matter* jurisdiction of state and federal courts over actions under FELA. See *Second Employers' Liability Cases*, 223 U. S. 1, 55-56, 32 S. Ct. 169, 56 L. Ed. 327 (1912). As Nelson and Tyrrell acknowledge, Congress added the provision to confirm concurrent subject-matter jurisdiction after the Connecticut Supreme Court held that Congress intended to confine FELA litigation to federal courts, and that state courts had no obligation to entertain FELA claims. See Brief for Respondents 23 (citing *Hoxie* vs. *New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 A. 754 (1909)). As Justice McKinnon recognized in her dissent from the Montana Supreme Court's decision in Nelson's and Tyrrell's cases, "[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." 383 Mont., at 436, 373 P. 3d, at 13. See, *e.g.*, *Mims* vs. *Arrow Financial Services, LLC*, 565 U. S. 368, 372, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) (federal and state courts have concurrent jurisdiction over private suits arising under the [Telephone Consumer Protection Act of 1991, 47 U. S. C. §227]); *Claflin* vs. *Houseman*, 93 U. S. 130, 133-134, 23 L. Ed. 833 (1876) (State courts retain "concurrent jurisdiction" over "suits in which a bankrupt" party is involved, notwithstanding exclusive federal jurisdiction over bankruptcy matters).

Pointing to a quartet of cases, the Montana Supreme Court observed that this court "consistently has interpreted [§]56 to allow state courts to hear cases brought under FELA even where the only basis for jurisdiction is the railroad doing business in the forum [S]tate." 383 Mont., at 421-423, 425-426, 373 P. 3d, at 4-7 (citing *Pope* vs. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094 (1953); *Miles* vs. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129 (1942); *Kepner*, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28; *Denver & Rio Grande Western R. Co.* vs. *Terte*, 284 U. S. 284, 52 S. Ct. 152, 76 L. Ed. 295 (1932)).

None of the decisions featured by the Montana Supreme Court resolved a question of personal jurisdiction. *Terte* held that an FELA plaintiff, injured in Colorado, could bring suit in Missouri state court against a railroad incorporated elsewhere. 284 U. S., at 286-287, 52 S. Ct. 152, 76 L. Ed. 295. The dispute, however, was over the Dormant Commerce Clause, not personal jurisdiction; the railroad defendants argued that the suit would unduly burden interstate commerce, and the decision rested on two Commerce Clause decisions, *Michigan Central R. Co.* vs. *Mix*, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470 (1929), and *Hoffman* vs. *Missouri ex rel.*

Foraker, 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 905 (1927), not on an interpretation of §56. See *Terte*, 284 U. S., at 285, 287, 52 S. Ct. 152, 76 L. Ed. 295. In *Kepner* and *Miles*, this court held that a state court may not, based on inconvenience to a railroad defendant, enjoin its residents from bringing an FELA suit in another State's federal (*Kepner*) or state (*Miles*) courts. *Kepner*, 314 U. S., at 54, 62 S. Ct. 6, 86 L. Ed. 28; *Miles*, 315 U. S., at 699-700, 704, 62 S. Ct. 827, 86 L. Ed. 1129. *Pope* held that 28 U. S. C. §1404(a)'s provision for transfer from one federal court to another did not bear on the question decided in *Miles*: A state court still could not enjoin an FELA action brought in another state's courts. 345 U. S., at 383-384, 73 S. Ct. 749, 97 L. Ed. 1094.

Moreover, all these cases, save *Pope*, were decided before this court's transformative decision on personal jurisdiction in *International Shoe Co.* vs. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). See *Daimler*, 571 U. S., at ___, n. 18, 134 S. Ct. 746, 187 L. Ed. 2d 624, 640 (cautioning against reliance on cases "decided in the era dominated by" the "territorial thinking" of *Pennoyer* vs. *Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878)).

Because FELA does not authorize state courts to exercise personal jurisdiction over a railroad solely on the ground that the railroad does some business in their States, the Montana courts' assertion of personal jurisdiction over BNSF here must rest on Mont. Rule Civ. Proc. 4(b)(1), the State's provision for the exercise of personal jurisdiction over "persons found" in Montana. See *supra*, at 2-3. BNSF does not contest that it is "found within" Montana as the State's courts comprehend that rule. We therefore inquire whether the Montana courts' exercise of personal jurisdiction under Montana law comports with the Due Process Clause of the Fourteenth Amendment.

In *International Shoe*, this court explained that a state court may exercise personal jurisdiction over an out-of-state defendant who has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U. S., at 316, 66 S. Ct. 154, 90 L. Ed. 95. Elaborating on this guide, we have distinguished between specific or case-linked jurisdiction and general or all-purpose jurisdiction. See, *e.g.*, *Daimler*, 571 U. S., at ___, 134 S. Ct. 746, 187 L. Ed. 2d 624, 633; *Goodyear Dunlop Tires Operations, S. A.* vs. *Brown*, 564 U. S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011); *Helicopteros Nacionales de Colombia, S. A.* vs. *Hall*, 466 U. S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404, nn. 8, 9 (1984). Because neither Nelson nor Tyrrell alleges any injury from work in or related to Montana, only the propriety of general jurisdiction is at issue here.

Goodyear and *Daimler* clarified that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler*, 571 U. S., at ___, 134 S. Ct. 746, 187 L. Ed. 2d 624, 633 (quoting *Goodyear*, 564 U. S., at 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796). The "paradigm" forums in which a corporate defendant is "at home," we explained, are the corporation's place of incorporation and its principal place of business. *Daimler*, 571 U. S., at ___, 134 S. Ct. 746, 187 L. Ed. 2d 624 (slip op., at 18-19); *Goodyear*, 564 U. S., at 924, 131 S. Ct. 2846, 180 L. Ed. 2d 796. The exercise of general jurisdiction is not limited to these forums; in an "exceptional case," a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render the corporation at home in that state." *Daimler*, 571 U. S., at ___, n. 19, 134 S. Ct.

746, 187 L. Ed. 2d 624, 640. We suggested that *Perkins* vs. *Benguet Consol. Mining Co.*, 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952), exemplified such a case. *Daimler*, 571 U. S., at ___, n. 19, 134 S. Ct. 746, 187 L. Ed. 2d 624, 640. In *Perkins*, war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio. 342 U. S., at 447-448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146. Because Ohio then became "the center of the corporation's wartime activities," *Daimler*, 571 U. S., at ___, n. 8, 134 S. Ct. 746, 187 L. Ed. 2d 624, 635, suit was proper there, *Perkins*, 342 U. S., at 448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146.

The Montana Supreme Court distinguished *Daimler* on the ground that we did not there confront "a FELA claim or a railroad defendant." 383 Mont., at 424, 373 P. 3d, at 6. The Fourteenth Amendment due process constraint described in *Daimler*, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued.

BNSF, we repeat, is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana "as to render [it] essentially at home" in that State. See *Daimler*, 571 U. S., at ___, 134 S. Ct. 746, 187 L. Ed. 2d 624, 633 (internal quotation marks omitted). As earlier noted, BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana. But, as we observed in *Daimler*, "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts." *Id.*, at ___, n. 20, 134 S. Ct. 746, 187 L. Ed. 2d 624, 641 (internal quotation marks and alterations omitted). Rather, the inquiry "calls for an appraisal of a corporation's activities in their entirety"; "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Ibid*. In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana.

For the reasons stated, the judgment of the Montana Supreme Court is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

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Kevin M. Winder vs. Union Pacific Railroad Company

- ***Safety Appliance Act — Defective Handbrake — Defense Verdict***
- ***Conductor was injured turning handbrake wheel after "quick-release lever" failed to operate***
- ***At trial, plaintiff sought directed verdict on SAA claim, alleging that non-operative quick release lever was a basis for liability***
- ***Court denied motion, jury returned a defense verdict***
- ***HELD — Failure of quick release lever to operate is not "per se" evidence of "inefficient handbrake," so denial of motion was proper and defense verdict is AFFIRMED***

The Supreme Court of Nebraska weighs in on the subject of what constitutes a defective, or "inefficient" handbrake sufficient to establish liability for violation of the Safety Appliance Act. In *Kevin M. Winder vs. Union Pacific Railroad Company*, 296 Neb. 557, 2017 Neb. LEXIS 69, a unanimous court holds that plaintiff can't meet his burden simply by showing that the quick release lever didn't operate to release the handbrake. Representing plaintiff were William Kvas, Richard L. Carlson, and Jayson D. Nelson; Hunegs, LeNeave & Kvas, P.A., Omaha, NE, and appearing for UP were our friends Anne Marie O'Brien and Daniel J. Hassing, of Lamson, Dugan & Murray, L.L.P., Omaha, NE and Andrew Reinhart, now of Burns White LLC, Pittsburgh, PA. The claim investigation and handling was provided by Jason Davis, Senior Risk Management Specialist, located in North Platte, NE. Writing for the court is Justice Stacy, who stated, in part:

On October 28, 2012, Winder was working as a conductor for UP in North Platte, Nebraska. Part of his job was to manually release the handbrakes on railcars. Handbrakes are used to secure railcars to the track when a train is not in motion. The handbrake is manually applied by using a brake wheel and turning it clockwise. The handbrake is manually released one of two ways: by either turning the brake wheel counterclockwise or using a quick-release lever. Not all handbrakes have quick-release levers, but the ones Winder was releasing did. Winder testified he was trained "to first try the quick-release lever [and] [i]f that does not work, then you turn the wheel."

Winder successfully released the handbrake on the first railcar. When he attempted to use the quick-release lever on the next railcar, the lever pulled easily but the brake did not release. Winder then began turning the wheel in a counterclockwise direction to release the brake. According to Winder, as he did so, he suddenly felt a sharp pain in his back and stopped working.

Winder eventually brought this action against UP, alleging claims under FELA and FSAA. FSAA does not by its terms confer a right of action on injured parties, but if a plaintiff proves a violation of FSAA, he or she may recover under FELA without further proof of negligence by the railroad.

"In short, [FSAA] provide[s] the basis for the claim, and . . . FELA provides the remedy." As will be explained in more detail later, FSAA requires that railroads may use a vehicle, including

a railcar, only if it is equipped with "efficient hand brakes." Winder alleged UP violated this provision of FSAA, because the quick-release lever on the handbrake was inefficient.

The case was tried to a jury. At the close of the evidence, Winder moved for a directed verdict in his favor on the question of whether UP violated FSAA. The district court overruled the motion, and the jury returned a general verdict in favor of UP. Winder filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.

The relevant portion of FSAA provides that railroad carriers may use a vehicle, including a railcar, only if it is "equipped with . . . efficient hand brakes."

The U.S. Supreme Court has interpreted this provision to impose "an absolute and unqualified prohibition against [a railroad's] using or permitting to be used, on its line, any car not equipped with 'efficient hand brakes.'"

In *Myers vs. Reading Co.* the U.S. Supreme Court analyzed FSAA's efficient handbrake requirement. *Myers* held there are two ways an employee may show the inefficiency of handbrakes: (1) Evidence may be adduced to establish some particular defect in the handbrake or (2) inefficiency may be established by showing the handbrake failed to function, when operated with due care, in the normal, natural, and usual manner.

Myers established that "'[e]fficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate.'"

Winder makes no claim in this appeal that the handbrake had any particular defect. Instead, he points to undisputed evidence that when he pulled the quick-release lever, it failed to release the handbrake. He argues this evidence was sufficient as a matter of law to prove the handbrake failed to function in the normal, natural, and usual manner.

No party disputes that when Winder pulled the quick-release lever it failed to release the brake, requiring him to use the wheel to release the brake. The question is whether this evidence entitled Winder to a directed verdict, that, as a matter of law, the handbrake failed to function, when operated with due care, in the normal, natural, and usual manner. On this record, we find no error in denying the motion for directed verdict.

Case law from other jurisdictions demonstrates that when there is conflicting evidence regarding whether a handbrake failed to function in the normal, natural, and usual manner, the question of inefficiency is one for the jury. In *Strickland vs. Norfolk Southern Ry. Co.*, a railroad worker attempted to release a handbrake by using the quick-release lever. The quick-release lever did not release the brake, which the record showed was not “an out-of-the-blue thing.”

The worker then attempted to release the handbrake using the brake wheel, which would not turn. He injured himself attempting to exert more pressure on the wheel. The district court granted summary judgment in favor of the railroad, in effect finding the handbrake was not inefficient as a matter of law. The 11th Circuit reversed, finding the worker's testimony about the level of force exerted in turning the wheel created a fact issue for the jury to resolve in determining whether the handbrake was inefficient.

An unpublished opinion from the U.S. District Court for the District of Nebraska also illustrates that when there is conflicting evidence on whether a handbrake failed to function normally, the question of inefficiency cannot be decided as a matter of law. In *Chapp vs. Burlington Northern Santa Fe R. Co.*, a railroad worker attempted to release a handbrake by pulling the quick-release lever. When the quick-release lever failed, he attempted to release the brake by turning the wheel and alleged he was injured while doing so. The worker moved for summary judgment on his FSAA claim, arguing, among other things, that the handbrake was inefficient as a matter of law. The court denied the motion, reasoning there was conflicting evidence on whether the handbrake failed to function in the normal, natural, and usual manner, and inefficiency could not be determined as a matter of law.

Here, there was conflicting evidence at trial regarding whether it was common or usual for a quick-release lever to fail to release a handbrake. Winder testified that in his work as a conductor, he recalled only two occasions when the quick-release lever failed to release the handbrake, and an expert witness called on Winder's behalf testified that if a quick-release lever failed to work, the handbrake operation was inefficient. But a UP trainman testified that quick-release levers fail to release the handbrake "on a fairly regular basis," and he opined they worked about "half the time." He testified it was very common and usual in the industry for the quick-release levers not to work. Another witness, a UP supervisor, testified that quick-release levers failed to work "quite a bit." And a railroad consultant hired by UP testified it was "not at all uncommon" for the quick-release lever not to work.

A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.

Here, there was conflicting evidence on whether the handbrake failed to function in the normal, natural, and usual manner, and the district court properly denied the motion for directed verdict and submitted that issue to the jury.

We find no merit to Winder's assignment of error and affirm the judgment of the district court.

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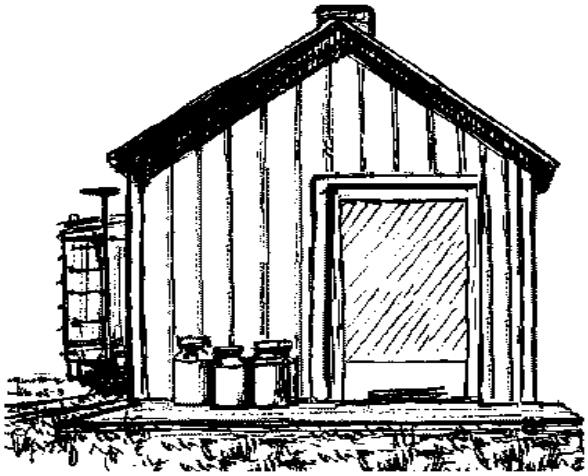


Carrie L. Jackson vs. Consolidated Rail Corporation et al.

- ***FELA — Heart Attack — Defense Verdict***
- ***Track foreman suffered on-the-job heart attack, refused offers of medical assistance***
- ***Plaintiff claims railroad had a duty to provide medical care, should have insisted that he obtain immediate treatment***
- ***Railroad argued that it did everything it could, but had no affirmative duty to provide care***
- ***HELD — Plaintiff's own choice to refuse offers of medical assistance were responsible for his condition and railroad violated no duty, defense verdict AFFIRMED***

In *Carrie L. Jackson, Personal Representative for the Estate of Robert A. Jackson vs. Consolidated Rail Corporation and Norfolk Southern Railway Company*, 2017 Pa. Super. Unpub. LEXIS 1132, the Superior Court of Pennsylvania upholds a defense verdict where the evidence shows that plaintiff refused all reasonable efforts to get him medical care after a possible heart attack, and also says that the railroad had no further affirmative duty to diagnose a medical emergency necessitating immediate care. Carrying the ball for the railroad defendants was Richard K. Hohn, Hohn & Scheuerle, Philadelphia, PA, who was opposed by plaintiff's counsel Thomas J. Joyce III, Cappelli Mustin LLC, Conshohocken, PA. The claim was originally investigated by Jason Bartko, now District Claim Agent, in the Chicago, IL, office. Helen Nicolosi, District Claim Agent, and Claim Agent, Matt D'Elia, in the Mount Laurel, NJ, office assisted through trial and the appeal. The court panel rendered a unanimous decision, which was written by Judge Platt, and reads in part, as follows:

On Monday, March 28, 2011, Mr. Jackson was employed by Conrail as a foreman of a tie gang at its depot in Bayonne, New Jersey. In the late afternoon of that day, Mr. Jackson picked up a hydraulic jackhammer to replace tie spikes which had previously been removed from the track. When he picked up the jackhammer, he felt something in his chest. Mr. Jackson took an aspirin from a co-worker and tried to "walk it off." He thought he might have pulled a chest muscle. He felt sick to his stomach. He had "no idea" what was the matter, but he couldn't catch his breath, and he felt that he was coughing too much. "I didn't know what it was." Mr. Jackson did not think he was having a heart attack. His co-workers took him back to Conrail's local headquarters in Elizabeth, NJ.

At the Elizabeth office, Mr. Jackson turned down offers of immediate nearby medical care from his fellow employees, several times, including calling an ambulance, visiting a nearby hospital, and repeated suggestions by his supervisor, John Falcao, to go to Concentra, a walk-in urgent care medical facility half a block from the Elizabeth Conrail office where they were, or to a nearby hospital.

Mr. Jackson later testified that he wanted to go to a "regular hospital" near his home. "I told him I wanted to go to a hospital by my house," After refusing repeated offers by various Conrail employees of nearby medical help, Mr. Jackson requested to be taken home.

A co-worker drove Mr. Jackson home. Before arriving home, however, after talking with his wife by cell phone, he decided to go to the emergency department of the Jersey Shore University

Medical Center in Neptune, New Jersey. Mr. Jackson was familiar with the Jersey Shore Medical Center, which was located near Route 33, the road he used on the way to his home in Freehold, NJ. He thought of it as a "good hospital."

Medical staff at Jersey Shore diagnosed a heart attack (myocardial infarction). Mr. Jackson underwent surgery and post-surgical treatment.

Mr. Jackson later filed suit. At his deposition, he admitted to a history of heart problems going back to 2002, including an angioplasty, which he did **not** disclose in his medical history when applying to Conrail. Mr. Jackson also admitted to a half-a-pack a day cigarette smoking habit.

Mr. Jackson was eventually put on a waiting list for a heart transplant, but kidney issues made it more difficult for him to get one. After various complications, still awaiting a transplant, he died three years later, on July 12, 2014, of congestive heart failure. Medical records at the time of his death confirmed that Mr. Jackson had had a heart attack eight years earlier.

The essence of the complaint was that Conrail was negligent under FELA for failure to provide Mr. Jackson with "timely and adequate emergency medical care," by calling 911, an ambulance, or taking him to "the closest hospital." The complaint alleged that Conrail's negligence contributed to or aggravated the severity of Mr. Jackson's heart attack, resulting in permanent damage to his heart.

The jury rendered a defense verdict of no negligence. Appellant's counsel filed a rambling, twenty-five point post-trial motion, which, *inter alia*, included a challenge to the weight of the evidence. The motion also asserted that "[t]he [c]ourt ruled as a matter of law that defendant had a duty to provide medical assistance based upon the special circumstances of Robert A. Jackson post heart attack."

The trial court denied the motion, after a hearing. Notably, in denying the post-trial motion, the trial court rejected counsel's numerous inter-related assertions that the court had ruled explicitly that Conrail had a specific duty to assist Mr. Jackson. This timely appeal followed.

Here, Appellant first claims defense counsel disregarded a ruling and instructions from the trial court. We disagree.

Preliminarily, we are compelled to note that counsel for Appellant misstates the record. In Appellant's Statement of the Case, counsel asserts that the trial court "**ruled as a matter of law that defendant had a duty to provide timely medical assistance based upon the special circumstances of Robert Jackson post heart attack** [sic]." (emphasis added).

This is demonstrably inaccurate; the trial court never made the ruling defense counsel allegedly ignored. All the trial court did in the cited passage was to deny the defendants' motion to preclude evidence that Conrail allegedly failed to provide medical assistance, in effect leaving the issue for the jury. On this first claim, counsel for Appellant otherwise fails to identify any specific ruling or instruction defense counsel supposedly disregarded.

To the contrary, in a rambling argument consisting mostly of deposition excerpts with no further analysis, counsel **never** raises the issue of disregarded rulings at all. At the end, counsel quotes defense counsel's final argument, referencing the duty of care, in anticipation of the trial

court's jury charge. Counsel did not object at trial, and raises no objection on appeal. Accordingly, Appellant's first argument is waived.

Moreover, it would not merit relief. It is certainly true that the trial court charged the jury that:

> Under the Federal Employers' Liability Act, Conrail, the defendant, had an affirmative non[-]delegable duty to use **reasonable care** to furnish the plaintiff Robert A. Jackson with a **reasonably safe** place to work and provide him with safe, **reasonably safe** [sic] working conditions.
>
> This duty to provide a safe workplace is an affirmative one.
> The trial court also instructed the jury, in pertinent part, as follows:
>
> [5] In this case the plaintiff has the burden
> [6] of proving that each of the following is more
> [7] **likely true than not**: First, that the defendant
> [8] Conrail was negligent; and, second, that the
> [9] negligence of Conrail was a cause or contributed **[*9]** to
> [10] bringing about the harms and damages that
> [11] Mr. Jackson had.
> [12] The plaintiff also has the burden of
> [13] proving the extent of any damages caused by the
> [14] defendant's negligence.
> [15] In your determination of the facts you
> [16] consider only the evidence which has been presented
> [17] in court and the inferences which flow and can be
> [18] derived from that evidence. You don't rely on
> [19] supposition. You don't guess on any matters that
> [20] are not in evidence. And you will not regard as
> [21] true any evidence that you find to be incredible
> [22] even if it wasn't contradicted in court.
> [23] Your determination of the facts — I know
> [24] that you already know this — should not be based
> [25] on empathy for any party or prejudice against any
> [26] party in this case. (emphasis in original).

Later in its instruction the trial court added:

> In this case, the plaintiff claims injury by the negligent conduct of the defendant. **You know that the plaintiff has the burden of proving those claims**.
>
> The defendant in this case denies the plaintiff's claims. Defendant asserts that the plaintiff was negligent and the plaintiff's own negligence caused or contributed to his injuries. The

> defendant has the burden of proving this affirmative defense. The issues for you to decide as a jury in accordance with the law as I am instructing you is: Was the defendant negligent? Did the defendant's conduct cause or contribute to injury to the plaintiff? Was the plaintiff negligent? Did the plaintiff's conduct cause or contribute to his own injury? (emphasis added).

What the trial court indisputably did **not** do, is decide the ultimate issue for the jury. In point of fact, the trial court never ruled, as a matter of law or otherwise, that Conrail had a duty to provide timely medical assistance "based upon the special circumstances of Robert Jackson post heart attack [sic]." (Appellant's Brief, at 10). Indeed, if the trial court had done so, it would have improperly usurped the role of the jury as fact-finder. We also note that the foregoing (proper) instructions are incompatible with counsel's claim that the trial court had already precluded consideration of the issues as a matter of law. Appellant's first issue is waived and would not merit relief.

Appellant's second claim fails for similar reasons. Appellant argues the jury disregarded the trial court's instructions. We disagree.

We observe that the trial court's instructions cover almost thirty pages of the trial transcript. It is well-settled that we review a trial court's charge to the jury in its entirety. On independent review, we find no support for Appellant's assertion that the trial court ruled or instructed the jury that Conrail had a plaintiff-specific duty as a matter of law.

The jury did not disregard the trial court's proper and correct instructions. There is no basis in the record to conclude otherwise. The trial court never gave the dispositive instruction counsel for Appellant would have us assume it did. Appellant's second claim is waived, and, lacking any basis in the facts or the law, would not merit relief.

We note that the trial court, in an apparent effort to address Appellant's rather convoluted twenty-two item statement of errors, concluded that "the gravamen of Appellant's appeal" was a challenge to the weight of the evidence.

We are sympathetic to the commendable efforts of the trial court to impose some order on such consistently unfocused claims. Nevertheless, we are compelled to note that counsel for Appellant failed to include a weight claim in the statement of questions presented. Furthermore, he failed to develop even a semblance of an argument in support of this claim. Accordingly, the weight claim would be waived as well.

Moreover, it would not merit relief.

The decision of whether or not to grant a new trial based upon a claim that the verdict is against the weight of the evidence rests with the trial court. On appeal the test is not whether the appellate court would have decided the case in the same way but, rather, whether the jury's verdict was so contrary to the evidence as to shock one's sense of justice and to make the award of a new trial imperative, so that right may be given another opportunity to prevail.

Vattimo vs. Eaborn Truck Serv., Inc., 777 A.2d 1163, 1164-65 (Pa. Super 2001), *appeal denied*, 796 A.2d 319 (Pa. 2002) (citations and internal quotation marks omitted). "[T]he fact finder is free to believe all, part or none of the evidence, and the credibility of and the weight to be

accorded the evidence produced are matters within the province of the trier of fact." *Rose vs. Annabi,* 934 A.2d 743, 747 (Pa. Super. 2007) (citation omitted).

Here, the trial court decided that the jury's verdict was not contrary to the weight of the evidence and did not shock the conscience of the court. On independent review, we discern no basis to disturb the trial court's decision. There was ample evidence in the trial record for the verdict in favor of Appellee and against Appellant.

It bears continuing strong emphasis that the record supports a finding that Mr. Jackson refused multiple offers of local medical care in North Jersey in favor of going home and visiting his own doctor, or a hospital he preferred. Conrail had no duty to impose local medical care on him against his will, under FELA or otherwise. It could have been liable if it did.

Appellant claims that Mr. Jackson was so "out of it," that he could not make decisions for himself. In the first place "out of it" is neither a qualified medical diagnosis, nor, without more, proof he was "helpless" under FELA. Furthermore, the jury was entitled to infer from the evidence that the claim is belied by the choices Mr. Jackson made about his own treatment. He refused local treatment, and, far from claiming helplessness, defended that refusal in his deposition a year later.

He re-assessed his choices as he proceeded back home and ultimately decided, in talking by cell phone with his wife, to go to an emergency room instead of going directly home. Appellant failed to prove that Mr. Jackson was "helpless" under the FELA such as to impose a duty on Conrail to provide him with involuntary medical treatment.

Appellant also argues that some of the Conrail employees had CPR training and should have known the signs and symptoms of a heart attack. But CPR training, however beneficial, does not convert a railroad track employee into a medical diagnostician, let alone a certified cardiologist, such as to permit him or her to override the will of an employee who declines treatment.

Notably, Dr. Howard Cobert testified it was inappropriate to expect rail employees to diagnose someone who was acutely ill and required emergency intervention.

While on the job, Mr. Jackson suffered what was later diagnosed as a heart attack. He did not think he was having a heart attack (even with his own undisclosed cardiac history). He adamantly refused any and all offers from his supervisor and fellow employees, of immediate medical help, including to a clinic just down the street. He asked for a ride home and was given one. On the way, he decided to visit a hospital emergency room instead.

Any delay in Mr. Jackson's obtaining medical treatment was the direct result of the choices he made to decline treatment near work, and finally to go to a hospital of his choice closer to home. The jury had ample evidence to conclude Conrail violated no duty it had to Mr. Jackson. The jury did not disregard the trial court's instructions. The trial court properly denied Appellant's challenge to the weight of the evidence.

Judgment affirmed.

♦♦♦♦♦

Liberty Surplus Insurance Corp. vs. Norfolk Southern Railway Co.

- ***Crossing collision — Indemnification/Insurance — Summary Judgment***
- ***Motorist injured at grade crossing covered by a vegetation control maintenance agreement***
- ***Insurance company for maintenance company sought to apply "completed work" exclusion to coverage***
- ***NS argued that work was ongoing, not completed, so coverage applied***
- ***HELD — The only reasonable description of the work covered by contract and insurance brought it within the terms of coverage, summary judgment in favor of NS AFFIRMED***

In the September 2016 issue of *The Bulletin*, we reported on decision by the Federal District Court in favor of NSRC in this case, finding that NSRC was entitled to insurance coverage for a grade crossing collision at a crossing subject to a vegetation control contract, which included a requirement for the contractor to obtain insurance coverage in favor of NSRC. That decision was appealed to the U.S. Court of Appeals for the Eleventh Circuit, which has now ruled to affirm the District Court decision, in *Liberty Surplus Insurance Corp. vs. Norfolk Southern Railway Co.*, 2017 U.S. App. LEXIS 5763. Because the issue is one that arises with some regularity and is of great significance in the successful handling of crossing-collision claims, we include herein portions of the appeals court's opinion, which are striking in their simplicity. The successful NSRC defense team consisted of Jay C. Traynham, J. Steven Stewart and Walker S. Stewart; Hall, Bloch, Garland & Meyer LLP, Macon, GA, and Donald R. McMinn, Hollingsworth LLP, Washington, DC. Plaintiff was represented by Joseph P. Pozen, Bates Carey LLP, Chicago, IL, Robert D. Howell, Howell Law Firm, Moultrie, GA, and Michael A. Caplan, Caplan Cobb LLP, Atlanta, GA. The initial claim investigation was by District Claim Agent, Tom Birmingham, based in Macon, GA. The claim was later handled by Wayne Freeman, Claim Agent, based in Columbia, SC, and Kenneth Conleay, Senior Claim Agent, based in Macon, GA. The unanimous panel opinion is by Judge Harvey Schlesinger.

Before the court is, once again, the classic case of the insurer requesting relief from the consequences of the inartfully drafted, yet plain, terms of its insurance policy. Liberty Surplus Insurance Corporation appeals an adverse summary judgment granted by the District Court, which found, among other things, that the Completed Work Exclusion provisions contained within Liberty's insurance agreement did not operate to preclude the insured from coverage. We affirm.

The parties in this appeal are Norfolk Southern Railway Company (Norfolk Southern), the insured, and Liberty Surplus Insurance Corporation (Liberty), the insurer. On June 1, 2011, a motorist was struck by an oncoming train at a crossing owned by a subsidiary of Norfolk Southern. Her resulting injuries were severe. In 2012, the motorist filed suit against Norfolk Southern and its subsidiary, alleging that, among other things, overgrown and improperly maintained vegetation at the railroad crossing impaired her ability to see an approaching train. In 2013, the motorist amended her complaint to add NaturChem, Inc. (NaturChem) as a defendant in the litigation.

In 2005, NaturChem and Norfolk Southern entered into a Crossing Maintenance Agreement, (the

Crossing Contract). The parties agree that the Contract was in effect at the time of the motorist's accident. The Crossing Contract provided that NaturChem would apply herbicide to each crossing on Norfolk Southern's Georgia Division a minimum of twice per year. The Contract further required NaturChem to "monitor each of the crossings and perform required maintenance as often as necessary to maintain the crossing appropriately." Additionally, the Crossing Contract obligated NaturChem to purchase a Railroad Liability Policy (the Policy). NaturChem purchased the required Policy from Liberty, which was in effect from May 19, 2011, to May 19, 2012.

Upon learning of the motorist's litigation, NaturChem alerted Liberty. Liberty confirmed with Norfolk Southern that it had been sued and desired coverage under the Policy. Under a reservation of rights, Liberty agreed to pay 50% of the total cost of defending the defendants. As the litigation progressed, Liberty became aware of certain facts it believed eliminated coverage under the Policy.

In September, 2014, Liberty filed a Complaint for Declaratory Judgment in the United States District Court for the Middle District of Georgia, and requested the District Court determine its obligations under the Policy. In October 2015, Liberty and Norfolk Southern filed cross motions for summary judgment. One of the arguments made by Liberty in support of its motion was that the motorist's injury was sustained after NaturChem's "work" (as defined by the Policy) had already been completed, and was therefore excluded from coverage.

The Policy excludes coverage for "Completed Work," which is defined in the Policy as:

"Bodily injury" or "property damage" occurring after the "work" is completed. The work will be deemed completed at the earliest of the following times:

(1) When all the "work" called for in the "contractor's" contract has been completed.

(2) When all the "work" to be done at the "job location" has been completed.

(3) When that part of the "work" done at the "job location" has been put to its intended use by you, the governmental authority or other contracting party.

Liberty argued that NaturChem completed its herbicide application at the crossing involved on March 3, 2011-90 days prior to the motorist's accident. Thus, according to Liberty, NaturChem's "work" at the "job location" (the crossing) had been returned to its intended use, and subsection (2) or (3) of the Competed Work exclusion applied.

After a hearing, the District Court rejected Liberty's argument and granted summary judgment in favor of Norfolk Southern. It did so on the basis that the term "work" referred to NaturChem's ongoing maintenance and monitoring obligations, not just the herbicide application, which NaturChem had not completed at the time of the motorist's accident. The only challenge Liberty raises on appeal is whether the District Court's determination that the Policy's Completed Work Exclusion did not apply was incorrect.

At just over twenty pages, the Policy itself is relatively short and uncomplicated. It provides coverage for "bodily injury" or "property damage" if the claimed injuries arise "out of acts or omissions at the 'job location' which are related to or are in connection with the 'work' described

in the Declarations." The "Declarations" section of the Policy describes "work" as comprising the following: "Description of Operation (Work): Crossing Maintenance - GA Division AN4H00[.]" "Work" is also defined elsewhere in the Contract, circularly, as "work or operations performed by the 'contractor' including materials, parts or equipment."

Thus, we conclude, as did the District Court, that the Policy defines "work" as it is described in the Crossing Contract. The Crossing Contract's description of work is extensive:

1. Description of Work

1.1. Work.

Contractor shall . . . perform and complete the following work on the GEORGIA Division:

Contractor will provide a Crossing Maintenance program inclusive of herbicides required to maintain acceptable control on the territory covered by this contract. Vegetation will be controlled on all quadrants of the crossings to maintain adequate site distance for the length of this contract.

Contractor will conduct an approved vegetation management program utilizing various methods to control brush and other undesirable vegetation that may obstruct visibility at the designated crossings. The Contractor's chemical program will be designed to promote low growing desirable species in order to establish desirable grasses that will compete with and limit tall growing undesirable species. The chemical program will be designed to eliminate all broad leaf weeds, woody plants, Johnson Grass, herbicide resistant species, and other grasses that could obstruct visibility. The application formula will be specific to the type of brush, weeds, and small trees in each area. Contractor will pay particular attention to difficult species including but not limited to Mimosa, Paradise Trees, Mare's Tail, Johnson Grass, broad leaf weeds, woody plants and other herbicide resistant species.

Contractor will provide maintenance for the areas outlined for each crossing in Appendix B, "Crossings for 2005 Maintenance," spreadsheet included with this Contract. Maintenance will be provided utilizing off track equipment. **Contractor will be responsible for maintenance of each crossing throughout the length of the contract. Contractor will monitor each of the crossings and perform required maintenance as often as necessary to maintain the crossing appropriately.** (emphasis added).

By its plain language, the Crossing Contract describes-as the District Court found-an ongoing and continuous maintenance and monitoring obligation, rather than a contract for a series of limited and discrete tasks, such as defoliation of vegetation. Liberty acknowledges that this characterization of the Crossing Contract is correct. ((Subsection (1) [of the Completed Work Exclusion] focuses on the work 'called for in the contractor's contract,' i.e., ***NaturChem's ongoing obligation to monitor vegetation at the crossings***." (emphasis added))). Nevertheless, Liberty argues that the Policy's Completed Work Exclusion operates to remove the claim from coverage.

The Policy's Completed Work Exclusion excludes coverage for:

"Bodily injury" or "property damage" occurring after the "work" is completed. The work will be

deemed completed at the earliest of the following times:

> (1) When all the "work" called for in the "contractor's" contract has been completed.
>
> (2) When all the "work" to be done at the "job location" has been completed.
>
> (3) When that part of the "work" done at the "job location" has been put to its intended use by you, the governmental authority or other contracting party.

The District Court rejected this argument, as do we. As the District Court correctly explained, "the very essence of the Crossing Contract is for NaturChem to provide ongoing observation and maintenance of each of the railroad crossings listed [in the Crossing Contract,]" for the duration of the Contract period. Because NaturChem had an ongoing duty to maintain the vegetation at the crossing, the "work" had not been completed or returned to its intended use:

As the District Court reasoned:

Nowhere in the exclusion is there language explicitly stating that in order for there to be coverage under the Policy, NaturChem's employees must be physically present and working on the tracks. Additionally, that part of the exclusion upon which Liberty relies states that "work" is deemed completed when the "work" at the "job location" has been put to its intended use, not when the "job location" has been put back to use by the railroad as Liberty advocates.

Liberty suggests that this interpretation is error in that it "gives no effect to the parties' decision to use a different concept of work in subsections (2) and (3)."

Liberty's argument on this point is fatal to its case. "Work" is defined in the Policy as it is described in the Crossing Contract, without any limitation or proviso. Although Liberty insists that subsections (2) and (3) focus on the "work done at the job location," all three subsections set out the term "work" on its own, bounded in its own quotation marks, and without any means of distinguishing one subdivision's "concept" of "work" from any other.

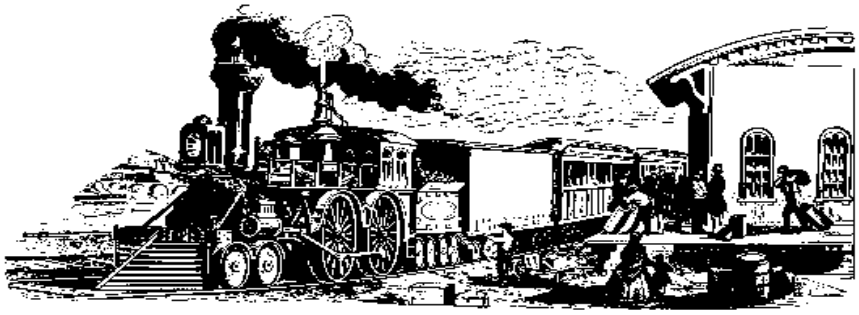
In other words, there is nothing within the language of the Policy, or the Exclusion itself, which suggests distinguishing between "different concepts of work" within the same provision is appropriate. Moreover, even if the court permits itself to consider evidence outside the four-corners of the Policy, no evidence that the parties contemplated an alternative definition of "work" exists in the record, and Liberty does not suggest otherwise.

As the court is required to strictly construe exclusions in favor of coverage, the court is not permitted to adopt Liberty's strained and unnatural construction of the Completed Work Exclusion. *Neisler*, 779 S.E.2d at 59; *see also State Farm*, 675 S.E.2d at 537 (explaining that any coverage exclusions "must be defined clearly and distinctly."); *Smith*, 784 S.E.2d at 424 ([T]he policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney). That is, the court is precluded from reading into the Policy a "curious, hidden meaning which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover." *Reed*, 649 S.E.2d at 844. The court's job here "is simply to apply the [unambiguous] terms of the contract as written, regardless of whether doing so benefits the carrier or the insured." *Id.*

In sum, the plain and unambiguous language of the exclusion requires the court apply the same definition and concept of "work" to subsections (2) and (3) of the Completed Work Exclusion as Liberty agrees applies to subsection (1). And under that definition-which describes an ongoing inspection and maintenance program-the "work" was neither completed in part, nor put to its intended use. Thus, the Completed Work Exclusion cannot be interpreted as precluding coverage under the circumstances presented in this case.

Here, it is indisputable that the "work" contemplated by the Crossing Contract extends, by any reasonable construction, far beyond the mere spot checking or twice-yearly applications of herbicide. It is also indisputable that no language within the Policy limits "work" to anything less than what is described in the Crossing Contract itself. As such, the Completed Work Exclusion does not apply to preclude coverage under these circumstances. If Liberty contemplated narrower coverage than what is apparent from the Policy's language, it was its responsibility to draft the Policy to reflect a narrower scope, which it did not do in this instance.

♦♦♦♦♦



Patricia Gousgoulas vs. National Railroad Passenger Corporation

- ***FELA — Evidence — Motion in Limine***
- ***Plaintiff sustained career-ending injury, sought to testify as to her intended retirement age***
- ***Amtrak moved to introduce evidence of ability to retire at an earlier age with partial RRB benefits***
- ***Plaintiff moved to exclude evidence as a "collateral source"***
- ***HELD — Evidence of potential receipt of retirement benefits is NOT a collateral source and not barred by US Supreme Court's Eichel decision, therefore admissible and plaintiff's motion in limine is DENIED***

As occurs frequently in FELA cases, plaintiff planned to introduce evidence at trial of how long she would have continued to work for the railroad had she not been injured. Amtrak sought to counter this with evidence of plaintiff's eligibility for retirement at an earlier age. The United States District Court for the Southern District of New York says that's permissible in *Patricia Gousgoulas vs. National Railroad Passenger Corporation*, 2017 U.S. Dist. LEXIS 61941. Plaintiff is represented by Michael H. Zhu, Michael H. Zhu, P.C., New York, NY, and Samuel Jay Rosenthal, Barish Rosenthal, Philadelphia, PA. Amtrak is represented by Ronald E. Joseph, Landman, Corsi, Ballaine & Ford PC, New York, NY. The initial claim investigation was by Gregory Gibilaro, Associate Claims Specialist, assigned to the New York, NY, claims office. The author of the opinion is District Judge Naomi Buchwald, who wrote, in part:

Plaintiff sued her employer, "National Railroad Passenger Corporation d/b/a Amtrak (Amtrak)," under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, et seq., for injuries sustained when she fell at work. In advance of trial, the parties filed motions in limine. Oral argument on the record addressing the motions in limine was held on April 20, 2017.

One issue concerning evidence addressing plaintiff's retirement age remained following argument. Plaintiff's counsel has informed the court that she will testify that she intended to work until age 66 and 3.5 months had she not been injured. To challenge that testimony and plaintiff's credibility, defendant seeks to introduce evidence that plaintiff would have been entitled to retire with partial benefits at age 62 and full benefits at approximately age 67 if she had continued working for Amtrak. Plaintiff argues that such evidence is barred under the collateral source rule. For the reasons set forth below, we find that defendant may introduce evidence concerning plaintiff's retirement options at different ages.

"The collateral source rule is a substantive rule of law that bars the reduction of an award by funds or benefits received from collateral or independent sources." King vs. City of N.Y., No. 06 CIV. 6516SAS, 2007 U.S. Dist. LEXIS 43173, 2007 WL 1711769, at *1 (S.D.N.Y. June 13, 2007). "The rule is intended to ensure that the availability of independent sources of income providing compensation does not reduce plaintiff's recovery." Id.

In Eichel vs. New York Central Railroad Company, the Supreme Court applied the collateral source rule to a FELA case to exclude evidence of collateral benefits offered for purposes other than mitigating damages. The issue was whether the defendant railroad could introduce evidence

that plaintiff was receiving disability payments in order to impeach plaintiff's testimony as to the permanency of his injuries and his motive for not returning to work. The Supreme Court held that the evidence was inadmissible:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension . . . . It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.

375 U.S. at 255-56 (citations omitted) (footnotes omitted). Thus, the "the general rule in FELA cases is that evidence of payments made to plaintiff from collateral sources is not admissible, though such evidence may be admissible if the plaintiff puts his financial status at issue." Santa Maria vs. Metro-N. Commuter R.R., 81 F.3d 265, 272-73 (2d Cir. 1996).

Here, the issue is whether defendant may introduce evidence that plaintiff would have been entitled to retire at age 62 with partial benefits in order to impeach her testimony that she would have worked until age 66 and 3.5 months. As noted earlier, plaintiff argues that defendant's proffered evidence is barred by the Supreme Court's decision in Eichel and subsequent case law.

Eichel does not address the issue presented here. Eichel is a true collateral source case, and, even assuming that we could, we would not reach a different result. Rather, as some of the cases citing Eichel recognize, future, hypothetical retirement benefits are not paradigmatic collateral source benefits. See, e.g., Griesser vs. Nat'l R.R. Passenger Corp., 2000 PA Super 313, ¶ 23, 761 A.2d 606, 612 (2000) (noting that "evidence at issue is not 'classic' collateral source evidence"); see also Evans vs. Union Pac. R.R. Co., No. 13-CV-1732-WJM-BNB, 2015 U.S. Dist. LEXIS 56073, 2015 WL 1945104, at *2 (D. Colo. Apr. 29, 2015) (finding that "plaintiff does not explain how evidence of the hypothetical possibility of retirement constitutes impermissible evidence of a receipt of benefits from a collateral source").

Nonetheless, we recognize that there is a split in the cases. Compare Lee vs. Consolidated Rail Corp., No. CIV. A. 94-6411, 1995 U.S. Dist. LEXIS 18199, 1995 WL 734108, at *5 (E.D. Pa. Dec. 5, 1995) (excluding evidence of age at which plaintiff could retire with full retirement benefits under Eichel), Norfolk S. Ry. Corp. vs. Henry Tiller, 179 Md. App. 318, 944 A.2d 1272 (2008) (same), and Griesser, 2000 PA Super 313, 761 A.2d at 609 (same), with Cowden vs. BNSF Ry. Co., 980 F. Supp. 2d 1106, 1127 (E.D. Mo. 2013) (admitting evidence), Stevenson vs. Union Pac. R.R. Co., No. 4:07CV00522BSM, 2009 U.S. Dist. LEXIS 22835, 2009 WL 652932, at *3 (E.D. Ark. Mar. 12, 2009) (same); and Gaskins vs. CSX Transp., Inc., No. 1:04-CV-2952-WBH, 2006 U.S. Dist. LEXIS 100826, 2006 WL 6864633, at *9 (N.D. Ga. Sept. 5, 2006) (same).

However, we find that the above-cited cases excluding evidence of retirement benefits are distinguishable. Those cases all involved efforts by defendants to introduce evidence that the plaintiff would be entitled to receive *full* retirement benefits at an age earlier than the plaintiff had maintained he would have retired. Thus, as the court in Griesser noted, the introduction of

evidence on early retirement benefits could create a significant danger of misuse and jury confusion to plaintiff's prejudice. Griesser, 2000 PA Super 313, ¶ 24, 761 A.2d at 612.

In contrast, here, the evidence provides an incentive for plaintiff to continue working until 66 and 3.5 months, as she proposes, since additional years of working will not only bring her additional earnings but will also increase her retirement benefits. Moreover, even the cases that rejected the proffered evidence acknowledge that defendants should be able to challenge a plaintiff's stated intended retirement age. Id. at 2000 PA Super 313 ¶ 27, 761 A.2d at 613 (We agree that Amtrak should be able to present evidence tending to show that Appellant would not work beyond age 60.).

Having found that Eichel is inapplicable, we find that the evidence is admissible under Federal Rule of Evidence 403. There is no question that the evidence is highly probative to the question of when plaintiff would have retired, which is the central issue in calculating plaintiff's lost future wages. In contrast, we do not find it likely that the evidence will confuse the jury or prejudice plaintiff. Since the retirement benefits are hypothetical rather than actual, there is no reason for the jury to offset plaintiff's award by the benefits she might have received if she had not been injured. More importantly, as noted earlier, the evidence is in some ways helpful to plaintiff, since it provides a justification for her working beyond the minimum retirement age, namely, that she wished to retire with full rather than partial benefits. To the extent that the jury finds the evidence undermines plaintiff's credibility as to her intended retirement age, there is no unfair prejudice because such credibility determinations are well within the province of the jury.

Accordingly, we find that defendant may introduce evidence concerning plaintiff's retirement options at different ages. See Cowden, 980 F. Supp. 2d at 1127; Stevenson, 2009 U.S. Dist. LEXIS 22835, 2009 WL 652932, at *3.

♦♦♦♦♦

Sharon McDonald vs. Kansas City Southern Railway Company

- ***FELA — Occupational injury/death — Settlement — Summary Judgment***
- ***Unrepresented plaintiff agreed in writing to settle claim, then refused to sign settlement documents and filed suit instead***
- ***Railroad argued that written agreement to settle was a binding contract***
- ***Plaintiff said settlement is not final and binding until release is signed***
- ***HELD — Written agreement to settle is binding, summary judgment GRANTED***

A common occurrence, claimant negotiates a settlement with the railroad's claim agent and confirms the agreement in writing (email), but then has second thoughts. The U.S. District Court for the Eastern District of Louisiana says "a deal is a deal" and dismisses plaintiff's subsequent lawsuit. The case is *Sharon McDonald, Individually and as Personal Representative of the Estate of Johnnie McDonald, deceased vs. Kansas City Southern Railway Company*, 2017 U.S. Dist. LEXIS 67124. Plaintiff was represented by James P. Lambert, James P. Lambert, ALC, Lafayette, LA; and Shawn M. Sassaman, Ber Cappelli LLP, Conshobocken, PA. Defendant railroad was represented by Patrick A. Talley, Jr., and Jeremy T. Grabill, Phelps Dunbar, LLP, New Orleans, LA. Initial claim investigation and handling by Deana Smith, General Claims Specialist, in Pearl, MS. District Judge Sarah Vance wrote the opinion, which states in part, as follows:

Plaintiff alleges that Johnnie McDonald, her late husband, worked as a diesel mechanic and laborer for defendant KCS from 1970 to 2005.

Plaintiff further alleges that during that time, defendant negligently exposed Mr. McDonald to various carcinogenic or toxic substances, ultimately causing his premature death from lung and colon cancer.

On October 7, 2015, plaintiff sent an email to a KCS employee demanding ten million dollars as compensation for the loss of her husband and the suffering he endured as a result of his exposure to harmful substances while working for KCS.

On November 10, 2015, the KCS employee emailed plaintiff to say:

> This is to confirm our telephone conversation today (Nov. 10, 2015) and our verbal agreement to settle Mr. Johnnie L. McDonald's claims regarding alleged career exposure and/or injury and "all claims" related to Mr. McDonald's employment with the Kansas City Southern Railway Company (KCSR) for a gross amount of $135,000.00.
>
> Plaintiff replied on November 2, 2015, by email stating: "This is an acknowledgement of receipt of the proposed settlement of $135,000.00 in which I accept."
>
> The KCS employee responded that written documents reflecting the settlement would be sent to plaintiff for her signature. Plaintiff did not sign any documents, but rather,

after about two months, attempted to reject the settlement.

On October 31, 2016, plaintiff sued defendant seeking recovery under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 (2012), personally and on behalf of her deceased husband.

Defendant now moves to dismiss plaintiff's claim under Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiff entered into a binding settlement agreement that bars plaintiff's suit. Plaintiff responds, and argues in part that defendant's motion should be converted to a motion for summary judgment, and plaintiff should be given additional time for discovery.

The court finds that conversion to summary judgment will "facilitate the disposition of the action" by allowing the court to resolve the question of whether a binding settlement agreement was reached.

"The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence and [the right] is part and parcel of the remedy afforded railroad workers under [FELA]." *Dice vs. Akron, C&YR. Co.*, 342 U.S. 359, 363, 72 S. Ct. 312, 96 L. Ed. 398, 63 Ohio Law Abs. 161 (1952) (internal quotations omitted). Nonetheless, the court has the inherent power to recognize, encourage, and enforce settlement agreements reached by the parties. *Bell vs. Schexnayder*, 36 F.3d 447, 449-50 (5th Cir. 1994) (citing *CIA Anon Venezolana de Navegacion vs. Harris*, 374 F.2d 33, 35-36 (5th Cir. 1967)). Accordingly, a FELA plaintiff is free to settle and release her claims rather than proceed to trial. *See, e.g., Maynard vs. Durham & S. Ry. Co.*, 365 U.S. 160, 161, 81 S. Ct. 561, 5 L. Ed. 2d 486 (1961). The "validity of releases under [FELA] raises a federal question to be determined by federal rather than state law." *Id.*; *see also Mid-South Towing Co. vs. Har-Win, Inc.*, 733 F.2d 386, 389 (5th Cir. 1984) (Questions regarding the enforceability or validity of [settlement] agreements are determined by federal law—at least where the substantive rights and liabilities of the parties derive from federal law.).

Under federal law, settlement agreements and compromises are contracts. *Guidry vs. Halliburton Geophysical Services, Inc.*, 976 F.2d 938, 940 (5th Cir. 1992). The interpretation of an unambiguous contract, whether written or oral, is a question of law. *Id.* Courts accord the words of an unambiguous contract their plain meaning. *Roberts vs. Williams-McWilliams Co., Inc.*, 648 F.2d 255, 264 (5th Cir. 1981). A determination that a contract is ambiguous is a question of law. *Guidry*, 976 F.2d at 940. Although the validity of federal settlements must be determined under the federal law of settlement agreements, that law is "undeveloped" and "largely indistinguishable from general contract principles under state common law." *In re DEEPWATER HORIZON*, 786 F.3d 344, 354 (5th Cir. 2015). Accordingly, treatises and state contract law cases are instructive in interpreting purported settlements of federal claims. *Id.*

A binding agreement exists only when there is a manifestation of mutual assent, which ordinarily takes the form of an offer and its acceptance. Restatement (Second) of Contracts §22 (Am. Law Inst. 1981); *E.N. Bisso & Son, Inc. vs. World Marine Transport & Salvage*, 1996 U.S. Dist. LEXIS 757, 1996 WL 28520, *3 (E.D. La. 1996) (It is indisputable that, after an offer is made, a voluntary expression of assent by the offeree is all that is necessary to create a contract.). Whether the parties intended to and did enter into a contract is generally an issue of fact. *Scaife vs. Associated Air Center, Inc.*, 100 F.3d 406, 410 (5th Cir. 1996) (applying Texas law); *Casielles vs. Taylor Rolls Royce, Inc.*, 645 F.2d 498, 502 (5th Cir. 1981) (applying Florida law).

But where, as here, the parties' writings are purported to embody a binding agreement, then "the question of whether an offer was accepted and a contract was formed is primarily a question of law for the court to decide." *Scaife*, 100 F.3d at 410.

The uncontroverted facts confirm that plaintiff entered into a binding settlement agreement with KCS. A KCS employee emailed plaintiff to "confirm" the parties' "verbal agreement to settle Mr. Johnnie L. McDonald's claims regarding alleged career exposure and/or injury and 'all claims' related to Mr. McDonald's employment . . . for a gross amount of $135,000.00."

Plaintiff responded: "This is acknowledgment of receipt of the proposed settlement of $135,000.00 in which I accept." This written communication evinces the manifestation of mutual assent required to bind the parties.

To resist this conclusion, plaintiff describes the agreement as "preliminary" and notes that she never signed a formal release. But under federal law "a settlement is valid and enforceable even if it contemplates the parties signing a release at a later date unless the parties explicitly provide that a valid contract will not be formed until the parties execute a formal, finalized agreement." *In re DEEPWATER HORIZON*, 786 F.3d at 355. Accordingly, "[e]ven if one party ultimately fails to execute or sign the final[,] formal release documents, that does not void the original agreement or render it deficient from the outset." *Id.*

This principle is illustrated by the Third Circuit's decision in *Good vs. The Pennsylvania Railroad Company*. 384 F.2d 989 (3d Cir. 1967). In that case, after plaintiff's attorney consulted with his client, he telephoned acceptance of a settlement offer to defense counsel. *Id.* at 990. Later, "when defendant transmitted the customary form of release, plaintiff refused to sign it and disavowed the settlement." *Id.* The case went to trial, resulting in a substantial verdict for the plaintiff. *Id.* The trial court nonetheless entered judgment N.O.V. on the ground that the settlement barred recovery. *Id.*

The Third Circuit upheld this decision, finding that the parties' oral settlement agreement "expressed the intention to settle the case for the agreed amount and was valid and binding despite the absence of any writing or formality." *Id.* That plaintiff sued under FELA did not alter the result because "[t]he obligation to remain bound by a valid agreement of settlement duly entered into by counsel with the authority of his client is one which pervades the law and applies to injured railroad employees as well as all other contracting parties." *Id.*; *see also Callen vs. Pennsylvania R. Co.*, 332 U.S. 625, 630, 68 S. Ct. 296, 92 L. Ed. 242 (1948) ([T]he releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.).

Finally, plaintiff argues that the jury should decide whether she entered into a binding settlement agreement. In support, she cites *Turner vs. Burlington Northern Railroad Company*. 771 F.2d 341 (8th Cir. 1985). In *Turner*, the plaintiff brought personal injury claims under FELA and defendant counterclaimed for specific performance of an alleged settlement agreement. *Id.* at 342. Plaintiff contested the settlement on the grounds that his attorney had settled his case without authorization. *Id.* at 345.

The Eighth Circuit held that the trial court did not err in granting a jury trial on defendant's counterclaim. *Id.* at 345. In doing so, the court rejected the defendant's argument that because its counterclaim "sought specific performance [of the settlement agreement], an equitable remedy, [the issue] was properly triable to the court and not to a jury." *Id.* at 343. *Turner* does not stand for the proposition that *all* disputes concerning FELA releases must be tried before a jury. Moreover, *Turner* involved a factual dispute over whether plaintiff gave his attorney authority to settle his claim. *See id.* at 345 (Reasonable persons could differ as to whether Turner's statements and actions constituted an express authorization to his attorneys to accept Burlington Northern's settlement offer). In this case, plaintiff unambiguously gave her consent to the settlement. Because the uncontroverted evidence before the court demonstrates that the parties entered into a binding settlement agreement, defendant is entitled to summary judgment.

For the foregoing reasons, defendant The Kansas City Southern Railway Company's motion to dismiss is GRANTED. Plaintiff's claims are DISMISSED WITH PREJUDICE.

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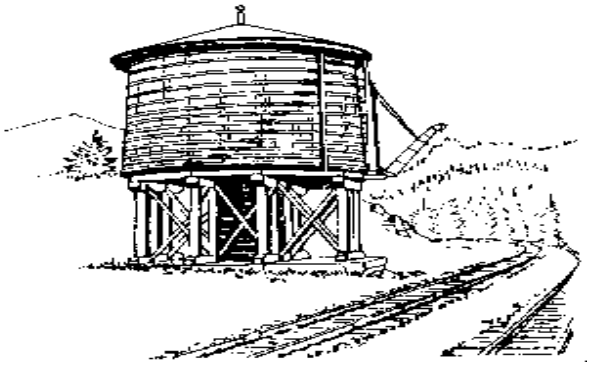

Shawn Royal et al. vs. Missouri & Northern Arkansas Railroad Co. et al.

- ***FELA — Contractor Injury — Summary Judgment***
- ***Contractor employee injured while operating track machine, alleged that he was an employee of the railroad entitled to pursue FELA claim***
- ***Railroad argued that it didn't exercise sufficient control of contractor or his work to make him an employee***
- ***Lower court held that establishment of safety rules, and scheduling of work were not sufficient level of control to establish employment relationship***
- ***HELD — Plaintiff failed to establish existence of an employment relationship, so summary judgment on FELA claim AFFIRMED***

As often occurs, an injured contractor employee brought an FELA claim, alleging that it exerted sufficient control over his work that it made him an employee of the railroad itself. The U.S. Court of Appeals for the Eighth Circuit, affirming a District Court decision, held otherwise in *Shawn Royal & Regina Royal vs. Missouri & Northern Arkansas Railroad Co., RailAmerica, Inc. and Genessee & Wyoming, Inc.*, 2017 U.S. App. LEXIS 8904. Appearing for plaintiff was Chester H. Lauck, III, Lauck Law Firm, Little Rock, AR and for defendant railroads were Martin Aaron Kasten and Joseph P. McKay, Friday & Eldredge, Little Rock, AR. The panel decision was unanimous and was written by Judge Gruender. It states, in part:

Shawn Royal, a North American Railway Services (NARS) employee, and his wife, Regina Royal, sued Missouri & Northern Arkansas Railroad Company (MNA) for injuries he sustained while working on MNA's railroad tracks. They sought relief pursuant to the Federal Employers' Liability Act (FELA) and under Arkansas negligence law. The district court granted MNA's motion for summary judgment, and the Royals appealed. For the reasons discussed below, we affirm.

In February 2012, NARS entered into a Master Service Agreement with RailAmerica Transportation Corporation (RailAmerica) to provide track-related services to RailAmerica's affiliated and subsidiary railroads. At the time, MNA was a wholly owned subsidiary of RailAmerica. The Agreement stipulated that NARS "is not an agent, representative, or employee of [RailAmerica] or any of its Railroads, but rather is an independent contractor." The Agreement also stated that NARS "shall be responsible for all actions of its employees, subcontractors, agents and representatives" while working at the railroad sites and that RailAmerica and its subsidiaries had the right to inspect and test NARS's work and direct NARS to make corrections as needed.

NARS employed Shawn Royal to operate a ballast regulator and sent him to perform maintenance work at several different railroad locations. NARS provided Royal with safety training and equipment instruction, furnished his personal protective and service equipment, and was responsible for all of his compensation. Pursuant to his employment with NARS, Royal did maintenance work on MNA's railroad tracks, which involved operating a machine that picked up and spread ballast, the stone or material placed around railroad tracks that provides structural support, drainage, and erosion protection. While working as a NARS employee on MNA's railroad tracks, Royal was required to abide by RailAmerica-MNA safety guidelines. For

example, the safety guidelines directed NARS employees to refrain from drug or alcohol use while on the job. Furthermore, for certain forms of railroad maintenance work, the safety guidelines mandated job briefings with MNA employees or for an MNA employee to be present. An MNA employee would also coordinate locations and schedules for work assignments. Nonetheless, Royal's chain of command consisted only of NARS employees, and NARS maintained sole authority to discipline or fire Royal. While Royal testified that MNA often told him to "hurry up," he also stated that MNA did not rush him on the day of the incident and never directed or controlled how he was to perform his work.

On September 25, 2012, Royal was operating his ballast regulator on MNA's railroad tracks when his machine picked up and struck a piece of "rip-rap," a large rock mixed in with the smaller ballast. In certain areas around railroad tracks, rip-rap is commonly placed for structural integrity. However, rip-rap can also be dangerous because if it is pulled onto the railroad tracks, a ballast regulator may run over it, abruptly stopping the machine and injuring the driver. Royal often encountered rip-rap while working on his ballast regulator; was trained to spot it; and had struck a piece three weeks prior, bringing his machine to a sudden stop. This time, Royal struck the rip-rap and was thrown forward, causing back injuries.

The Royals sued MNA claiming that MNA supervised and controlled Shawn Royal's work, and as such, he was MNA's employee and entitled to hold MNA liable under FELA. Additionally, the Royals alleged that MNA was liable for negligently placing rip-rap in the ballast section near its railroad tracks. The district court granted MNA's motion for summary judgment, and the Royals now appeal.

FELA allows employees of interstate railroads to recover against railroads for injuries sustained in the course of employment. *Cowden vs. BNSF Ry. Co.*, 690 F.3d 884, 889-90 (8th Cir. 2012). FELA states that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. §51. Thus, in order to maintain a FELA action against MNA, the Royals must demonstrate that Royal was employed by MNA.

While the Royals concede that Royal was formally an employee of NARS, not MNA, they are correct that our inquiry does not end there. In *Kelley vs. Southern Pacific Co.*, the Supreme Court noted that for FELA purposes, "employment" describes a master-servant relationship "determined by reference to common-law principles." 419 U.S. 318, 323, 95 S. Ct. 472, 42 L. Ed. 2d 498 (1974). Under the common law, a plaintiff can establish employment with a railroad carrier even while nominally employed by another if he can show he is (1) a borrowed servant, (2) a dual servant, or (3) a subservant. *Id.* at 324. Determining whether a plaintiff constitutes a borrowed servant, dual servant, or subservant turns on whether the railroad controlled or had the right to control the plaintiff's performance of his job. *Vanskike vs. ACF Indus., Inc.*, 665 F.2d 188, 198-99 (8th Cir. 1981) (citing *Kelley*, 419 U.S. at 322-26).

Royal does not qualify as MNA's employee because the evidence shows that NARS was the sole entity that had the right to control his work. Royal's chain of command consisted only of NARS employees. NARS hired him, trained him, and sent him to do maintenance work on railroads. NARS was responsible for all of Royal's compensation and maintained sole authority to discipline or fire him. Furthermore, NARS provided all safety training and equipment instruction to Royal and furnished all his personal protective and service equipment. Royal

responds that MNA nonetheless controlled or had the right to control his work because MNA employees often told him to "hurry up," he was required to abide by RailAmerica-MNA safety guidelines, MNA employees inspected his work, and an onsite MNA employee coordinated locations and schedules for work assignments. These facts, however, are immaterial because they would not allow a reasonable jury to find that MNA controlled or had the right to control Royal's work.

First, Royal's testimony that MNA employees told him to hurry up is not a material fact when examined against the backdrop of his entire testimony. Elsewhere, Royal testified that nobody rushed him on the day of the incident and that MNA never directed him on how to operate his ballast regulator. Thus, Royal's lone reference to being hurried is not enough to allow a reasonable jury to find that MNA controlled or had the right to control Royal's work. *See Brunsting vs. Lutsen Mountains Corp.*, 601 F.3d 813, 820 (8th Cir. 2010) (A mere 'scintilla of evidence' is insufficient to defeat summary judgment." (quoting *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Second, the mere existence of safety guidelines does not suggest that MNA had the right to control Royal's work. The obligation to conform to safety requirements was a "mutually agreed upon practice[] that merely insured worker and premises safety." *Campbell vs. BNSF Ry. Co.*, 600 F.3d 667, 669, 674 (6th Cir. 2010) (holding that adherence to a railroad's safety protocols is not enough to show a contractor's employees were railroad employees). The agreement to abide by certain safety regulations is a reasonable request necessary to safeguard against dangerous work and does not constitute control or supervision. *See id.* at 674.

Finally, MNA's inspection of NARS's and Royal's work and its coordination of locations and schedules for work assignments are likewise insufficient to indicate that MNA had the right to control Royal's work. "[M]inimum cooperation necessary to carry out a coordinated undertaking . . . cannot amount to control or supervision," *Shenker vs. Baltimore & O. R. Co.*, 374 U.S. 1, 6, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963) (citation omitted), because evidence of contacts between a railroad's employees and a contractor's employees "may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation," *Kelley*, 419 U.S. at 329. As a result, "[t]he mere fact that a railroad reserves the right to assure performance in accordance with the specifications of the contract does not render [the] contractor a railroad employee." *Morris vs. Gulf Coast Rail Grp., Inc.*, 829 F. Supp. 2d 418, 424 (E.D. La. 2010). Accordingly, we conclude that no reasonable jury could find that MNA controlled or had the right to control Royal's work and therefore affirm the district court's grant of summary judgment on the Royals' FELA claim.

The Royals next assert that the district court erred in dismissing their claim that MNA negligently placed rip-rap in the ballast section near its railroad tracks.

"[A]n employer of an independent contractor owes a common law duty to the contractor's employees to exercise ordinary care for their safety and to warn against any hidden dangers or unusually hazardous conditions." *Jackson vs. Petit Jean Elec. Co-op.*, 270 Ark. 506, 606 S.W.2d 66, 68 (Ark. 1980). This duty, however, "does not contemplate a duty to warn of obvious dangers which are an integral part of the work the contractor was hired to perform." *D.B. Griffin Warehouse, Inc. vs. Sanders*, 349 Ark. 94, 76 S.W.3d 254, 262 (Ark. 2002). The Royals do not disagree with these statements of law or even MNA's contention that rip-rap is an obvious danger

in this line of work. The Royals do claim, however, that the dangers posed by rip-rap in this case are not obvious because MNA negligently placed rip-rap in a section of the tracks where it did not belong. We are not persuaded by their argument.

In *Chew vs. American Greetings Corp.*, we applied an Arkansas Supreme Court case, *D.B. Griffin Warehouse, Inc. vs. Sanders*, 349 Ark. 94, 76 S.W.3d 254 (Ark. 2002), and found that an employer of independent-contractor electrical workers owed no duty to warn of the danger in approaching a transformer with improper equipment because the work necessarily implicated these obvious hazards. 754 F.3d at 639. The plaintiffs argued that the defendant failed to warn them of the "unique nature of its transformers, [which] caused [the plaintiff's] incorrect assumptions about the [transformer's voltage]." *Id.* at 635. We held that "though some details about [the] transformers may have been hidden, . . . the ultimate hazard the transformer posed was obvious, and the contractors retained the ultimate responsibility to assess these risks." *Id.* at 639 ([The] duty to warn of latent or hidden dangers . . . does not encompass an obligation to warn of the latent characteristics of an obvious hazard that arises because of the nature of the contractor's work.).

This logic applies here with equal force. The dangers posed by rip-rap were obvious. Royal testified that he was trained to operate his machine in an area with rip-rap, that he had noticed there was rip-rap along the railroad in the area where he was operating, that it was a common occurrence to pull rip-rap from outside the rails to inside the rails, and that he had previously struck a piece of rip-rap on this same MNA railroad line. Thus, "[t]hough some details about [the rip-rap] may have been hidden, . . . the ultimate hazard [the rip-rap] posed was obvious, and [Royal] retained the ultimate responsibility to assess these risks." *See id.* at 639. We determine that MNA did not owe Royal a duty to warn of the well-known dangers of rip-rap and that the Royals' negligence claim therefore fails as a matter of law.

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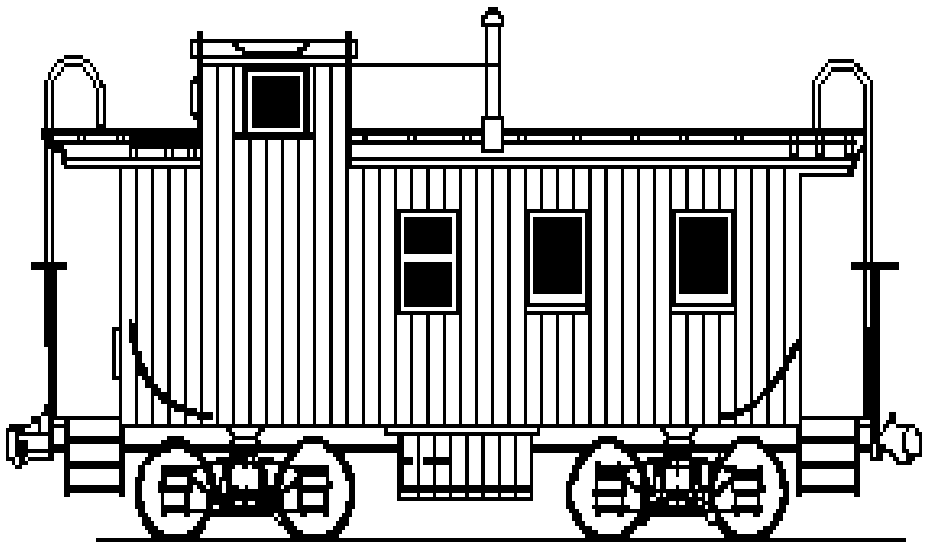

Wesley Andrews vs. Norfolk Southern Railway Co.

- ***FELA — Set-Off from Jury Verdict — Post-Trial Motion***
- ***Injured employee received substantial advances prior to retaining counsel***
- ***Following jury verdict in his favor, railroad sought to recoup or set-off advances against verdict, which would leave him with nothing***
- ***Plaintiff's counsel asserted that his fees and expenses took priority over advances***
- ***HELD — Post-Trial order giving railroad priority for advances over counsel fees under 45 U.S.C. §55 AFFIRMED***

It is not uncommon for railroad claim agents to provide cash advances to injured employee claimants, in return for agreement to repay such advances from the proceeds of settlement or judgment. In *Wesley Andrews vs. Norfolk Southern Railway Company*, 2017 IL App (1st) 153007, 2017 Ill. App. LEXIS 183, the question was whether the railroad's claim of set-off for the advances would take priority over plaintiff counsel's claim for his counsel fees and expenses, in either event leaving plaintiff with nothing at all. In a detailed and well-reasoned discussion of the provisions of 45 U.S.C. §55 pertaining to set-offs from FELA judgments, the Illinois Appellate Court, First District held that Federal law was supreme over state law regarding payment of counsel fees, so the railroad gets its money back, leaving plaintiff and his lawyer empty-handed. The unlucky plaintiff's lawyers were Steven Garmisa and Richard Haydu, Hoey & Farina, Chicago, IL. Representing NSRC were our friends and colleagues Evan B. Karnes II and Everardo Martinez, Karnes Law Chartered, Chicago, IL. The claim was investigated by Ruth Cullison, District Claim Agent (Retired), located in the Chicago, IL, office. The claim was later handled by Jason Bartko, District Claim Agent, also in the Chicago, IL, office through trial and the appeal. The opinion of the appellate panel was unanimous and was written by Justice Lavin. It states, in part:

Plaintiff was a conductor who suffered a spinal injury while operating a mechanical track switch lever. Unbeknownst to him, Norfolk Southern had installed a new locking device, which allegedly caused his injury in May 2006. Following his injury, plaintiff was unable to work, so pursuant to §55 of FELA (45 U.S.C. §55 (West 2006)), Norfolk Southern paid plaintiff 38 separate advances, totaling some $75,000, from June 2006 through October 2008 to compensate plaintiff for his lost time. Plaintiff signed a form whenever he received an advance, stating "I agree that the total amount of advance shall be credited against any settlement made with or any judgment rendered against my said employer or others on account of this accident."

In November 2008, counsel for plaintiff notified Norfolk Southern that the firm had been retained on plaintiff's negligence claim and provided a notice of an attorney's lien. Norfolk Southern suspended the advance payments, and several months later, in April 2009, plaintiff filed suit.

On April 28, 2014, following trial, the jury assessed 75% of the fault to plaintiff, and 25% to Norfolk Southern resulting in a net judgment of $37,500. Norfolk Southern filed a post-trial motion seeking a setoff for its advances under §55 of FELA and ultimately filed a petition to satisfy and release the judgment under §12- 183(b) of the Illinois Code of Civil Procedure

(Code) (735 ILCS 5/12-183(b) (West 2006)). Norfolk Southern asserted both a statutory and contractual right to setoff, claiming that in accepting the advances, plaintiff had agreed to repay Norfolk Southern from any judgment against his employer related to the accident. Norfolk Southern argued that there were no sums due plaintiff, and asked that the judgment be declared satisfied or fully paid. See *Klier vs. Siegel*, 200 Ill. App. 3d 121, 124 (1990) (noting, that is the essential purpose of §12-183).

The legal expenses incurred in representing plaintiff were some $58,000, exceeding the judgment. In particular, plaintiff's attorneys claimed a 25% contingency fee lien on the judgment with the rest being litigation expenses.

Plaintiff also received about $23,000 in benefits from the Railroad Retirement Board while he was off work for his May 2006 injury. See 45 U.S.C. §362(o) (West 2006). In a written letter, plaintiff's attorney requested that the Retirement Board relinquish its lien under §341.5 of the Code of Federal Regulations (20 CFR 341.5 (eff. Jan. 5, 1984)) (CFR) in light of the pending legal expenses and attorney's fees. Section 341.5 explicitly states the Retirement Board is to be reimbursed by the "damages paid to the employee for the infirmity," *but only after* subtracting litigation costs, including the attorney-client fee. See also 45 U.S.C. §362(o) (West 2006). Given the amount due the attorneys in this case, the Retirement Board responded by letter that it would have no claim for reimbursement.

Norfolk Southern, on the other hand, did not relinquish its right to setoff, and the post-trial issue that developed was whether to use the $37,500 judgment as a setoff against Norfolk Southern's advances or to cover the litigation expenses and fees of plaintiff's attorneys. In the first scenario, Norfolk Southern would be able to deduct the $37,500 judgment from its $75,000 advanced, resulting in a loss to Norfolk Southern of $37,500. Plaintiff's attorneys would then be out $67,000. In the second scenario, plaintiff would turn over his $37,500 judgment to his attorneys, resulting in a loss to the attorneys of $20,500 and to Norfolk Southern of $75,000. In either scenario, plaintiff himself wouldn't get any additional funds.

On February 23, 2015, following a hearing in the matter, the trial court granted Norfolk Southern's petition, ruling the railway was entitled to a full credit or to set-off of the advances it made to plaintiff up to the amount of the judgment. The court ruled the judgment for $37,500 and costs was fully satisfied and all liens released. Plaintiff filed a motion to reconsider, which was denied.

Plaintiff now contends §12-178(5) of the Code (735 ILCS 5/12-178(5) (West 2006)), mandates that his attorneys be paid first before any other creditor such as Norfolk Southern and argues this is a procedural matter controlled by state law. Section 12-178 states that "set-off shall not be allowed *** as to so much of the first judgment as is due to the attorney in that action for his or her fees and disbursements therein." *Id.* Plaintiff maintains that under this statute, his claim for attorney's fees and expenses should take primacy over any federal provision to the contrary, including §55 of FELA, which says:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter,*

> *such common carrier may set-off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought*." 45 U.S.C. §55 (West 2014) (emphasis added).

In interpreting §55, Norfolk Southern responds that FELA explicitly grants a federal right to setoff by railroad employers against any judgment obtained by the employee for employer-paid sums towards the injury. State courts therefore must first apply the federal setoff provision in a case like the present. We agree.

Section 55 allows employers to set-off money paid to an injured employee because of his injury as long as the employer is not seeking to totally avoid liability. *Clark vs. Burlington Northern, Inc*., 726 F. 2d 448, 451 (1984). The purpose of the FELA setoff provision is to prevent the imposition upon an employer of double liability, as the employer need not pay twice for the same damages. *Welsh vs. Burlington Northern, Inc., Employee Benefits Plan*, 54 F. 3d 1331, 1337 (1995). It has also long been settled that questions concerning the measure of damages in FELA actions are federal in character. *Norfolk & Western Railway Co. vs. Liepelt*, 444 U.S. 490, 493 (1980); see also Black's Law Dictionary, 10th ed. 2014 (defining "damages" as "Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.). This is true even if the action is brought in state court given the congressional intent to encourage uniformity between federal and state court FELA cases. *Id.* 493, n. 5. Moreover, a federal statute, such as FELA, overrides state law when the scope of the statute indicates that Congress intended to "occupy the field" or when the state law is in actual conflict with the federal statute. *Starks, III, vs. Northeast Illinois Regional Commuter* Railroad *Corporation*, 245 F. Supp. 2d 896, 899 (N.D. Illinois 2003). Also, state law is nullified to the extent that it might stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 899-900; see also *Felder vs. Casey*, 487 U.S. 131, 138 (1988), citing *Free vs. Bland*, 369 U.S. 663, 666 (1962) (any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.).

Applying these rules to the facts of this case, §55 expressly provides that Norfolk Southern is entitled to set-off the monetary damages awarded to plaintiff against the $75,000 it is owed so as to avoid paying double for the same damage. Despite this rather clear mandate, plaintiff urges us to reach a contrary result, based on *Ries vs. National Railroad Passenger Corporation*, No. CIV. A. 89-51 (April 27, 1993) an unpublished case from the eastern district of Pennsylvania. In *Ries*, the court held that AMTRAK was not entitled to set-off some $8,000 of sickness benefits issued by its retained insurer without the plaintiff's attorney first being able to satisfy his attorney's lien from the approximate $9,000 judgment. The court noted that §55 of FELA is permissive but "does not create a lien entitling AMTRAK to priority over liens made against the net judgment." *Id.* at 2. The court reasoned that §55 does not specify a priority afforded to a setoff under §55 as compared to competing liens asserted against the judgment and, further, that "An attorney's claim for fees incurred in creating a fund is normally afforded priority over other claims against that fund." *Id.*

Hewing to the *Ries* holding, plaintiff now argues that §55's use of the permissive "may" rather than mandatory "shall," in reference to the railroad's ability to obtain setoff from the employee means that "a railroad's opportunity to request a setoff *** does not override the priority that

Illinois procedural law grants to attorneys and their clients for reimbursement of fees and litigation expenses." See 45 U.S.C. §§51, 52 (West 2006). Plaintiff argues Congress thereby accepted state procedural law and setoff mechanisms over the federal law. Plaintiff points to other FELA statutory provisions setting forth that the railroad "shall" be liable for its negligent acts (45 U.S.C. §51) or that the damages "shall" be diminished by the employee's contributory fault (45 U.S.C. §53) in further support of his above-stated interpretation. Plaintiff, in addition, points to §341.5 of the CFR, which as stated requires plaintiff's attorneys to be reimbursed from judgment damages paid to an injured employee before the Railroad Retirement Board recoups its sick-pay costs issued. See 45 U.S.C. §362(o) (West 2006); 20 CFR 341.5 (eff. Jan. 5, 1984). Plaintiff contends this CFR provision shows that reimbursing attorneys first is not an obstacle to FELA's federal objectives and encourages the result he seeks in this appeal. It is axiomatic that unpublished federal decisions are not binding or precedential in Illinois courts. *King's Health Spa, Inc. vs. Village of Downers Grove*, 2014 IL App (2d) 130825, ¶ 63. Although nothing prevents us from adopting an unpublished decision's reasoning and logic, we do not find *Ries* persuasive and reject plaintiff's arguments for several reasons.

First, even assuming §12-178(5) applied in this case, we conclude that it is not procedural in nature because it substantially affects the damages awarded to the plaintiff, which is a distinctly substantive federal matter. See *Monessen Southwestern Railway Co. vs. Morgan*, 486 U.S. 330, 335-36 (1988). Indeed, the U.S. Supreme Court has asserted federal control over a number of incidents of state trial practice that might appear to be procedural at first blush. See, *e.g.*, *Dickerson*, 470 U.S. at 411 (jury instruction on FELA damages is substantive and so determined by federal law); *Brown vs. Western Railway of Alabama*, 338 U.S. 294 (1949) (in FELA case, a state can't apply its usual rule that pleadings are construed against the pleader); *Dice vs. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state rule). In other words, state rules that interfere with federal policy are to be rejected even if they are characterized as procedural. See also *Boyd vs. BNSF Railway Co.*, 874 N.W. 2d 234, 239 (2016) (a state's designation of a rule as one of procedure is not dispositive of the substantive-procedural distinction under FELA). "[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Brown*, 338 U.S. at 299. Likewise, accepting plaintiff's argument as to 12-178(5) would disrupt the uniformity that FELA aims to sustain, encouraging litigants to file suit in Illinois state court rather than federal court just to obtain attorney's fees before setoff in the event the judgment is insufficient to cover both. See *Dice*, 342 U.S. at 361; *Brown*, 338 U.S. at 295.

Second, plaintiff's argument as to the Railroad Retirement Board strikes us as a red herring, since courts have long described those benefits paid out to the employee as a collateral source, which cannot be used to reduce the damages owed to the plaintiff by a defendant. *Eichel vs. New York Central Railway*, 375 U.S. 253, 254 (1963); *Sloas vs. CSX Transportation, Inc.*, 616 F. 3d 380, 387 n. 3 (4th Cir. 2010); *Friedland vs. TIC-The Industry Co.*, 566 F. 3d 1203, 1205-06 (1997) (defining collateral source rule). Fringe benefits and insurance programs paid out to the employee by the employer cannot be set-off under the collateral source rule because they are *not* considered double compensation for the same injury. *Clark*, 726 F. 2d 448 at 450-51; *U.S. vs. Price*, 288 F. 2d 448, 450 (4th Cir. 1961). Despite this longstanding practice, courts have specifically distinguished the railroad's voluntary indemnity compensation to an employee for a work-related injury under §55 of FELA as entitled to setoff. *Clark*, 726 F. 2d at 450-51. The

parties do not appear to dispute that the advances made here constitute such indemnity payments and thus are not fringe benefits subject to the collateral source rule.

Third, plaintiff's argument that attorney's fees take precedence over §55's setoff provision is inconsistent with both the history and plain language of the federal statute. For example, in *Philadelphia, Baltimore & Washington* Railroad *Co. vs. Schubert*, 224 U.S. 603, 612 (1912), the railroad company had tied the injured employee's acceptance of employment membership funds to a release from all claims for damages. On appeal, the U.S. Supreme Court held this stipulation was anathema to the statute's plain language and goal of holding railroads liable for negligence, in direct violation of what is now §55. The court further reasoned its interpretation was sound under the 1906 and 1908 FELA statutes, noting that while railroads could not tie the acceptance of such benefits to a plaintiff's relinquishment of recovery under FELA, the railroads still had the option of obtaining setoff from the judgment.

The current version of §55 allowing for setoffs has been on the books since 1908. Congress has amended FELA several times, yet FELA remains silent on the issue of attorney's fees. *Monessen*, 486 U.S. at 338-39 (noting Congress' inaction in amending FELA to provide for prejudgment interest, and concluding "If prejudgment interest is to be available under the FELA, then Congress must expressly so provide."). We can only interpret this silence as a means of upholding the "American Rule," which is a federal common law rule whereby each party is responsible for his or her own attorney's fees and expenses. See *id.* at 338; *Liepelt*, 444 U.S. at 495; *Buckhannon Board & Care Home, Inc. vs. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 602-03 (2001); *Alyeska Pipeline Service Co. vs. Wilderness Society*, 421 U.S. 240, 257 (1975); see also *Sorrell*, 549 U.S. at 168 (common law principles are entitled to great weight unless they are expressly rejected in the text of the statute). We note the same rule also applies in Illinois. *Kerns vs. Engelke*, 76 Ill. 2d 154, 166 (1979) (unless otherwise specified by statute or contractual agreement, the successful litigant is not entitled to attorney's fees or ordinary litigation expenses); *State Farm Fire and Casualty Co. vs. Miller Electric Co.*, 231 Ill. App. 3d 355, 359 (1992) (there is no common-law principle allowing attorney's fees either as costs or damages). As stated in *Liepelt*: "The FELA, however, unlike a number of other federal statutes, *** does not authorize recovery of attorney's fees by the successful litigant. Only if the Congress were to provide for such a recovery would it be proper to consider them in the amount to compensate survivors for their monetary loss. 444 U.S. at 495.

We also reject plaintiff's argument that because the language in §55 is permissive, (in so far as the railroad "may" seek its indemnity sum from plaintiff's FELA judgment award), the setoff provision lacks primacy as against attorneys' fees. Plaintiff appears to argue that paying the plaintiff's attorneys first is consistent with FELA's goal of promoting injured railroad workers due to their employers' negligence. We note that the statute's remedial purpose does not require us to interpret every uncertainty in the Act in favor of employees. *Sorrell*, 549 U.S. at 171. Moreover, even assuming it did require such interpretation, the permissive language in §55 appears to be less about the plaintiff's attorneys and more about encouraging the railroads perhaps in some instances *not* to seek setoff as against an injured employee. That is, the fact that railroads "may" seek setoff actually means they *need not* seek setoff should they so choose, which is in deep contrast to their mandatory obligation to cover injury caused by their negligence under FELA. Once railroads do seek setoff, the statute rather plainly provides that they should be paid back from the judgment. Thus, the mere fact that the right to setoff is permissive does not

does not diminish that this right and practice is federal in nature and therefore should be considered a subject of federal substantive law.

Lastly, we conclude that §12-178(5), on which plaintiff relies, simply does not apply in this case for several reasons. Initially, we observe §12-178(5) cannot be read without first considering its companion §§, 12-176 and 12-177. Section 12-176 says that "Judgments between the same parties may be set-off, one against another, if required by either party, as prescribed in the following Section." That "following Section" is 12-177, which goes on to say, "When one of the judgments is delivered to an officer to be enforced, the debtor therein may deliver his or her judgment to the same officer, and the officer shall apply it, as far as it will extend, to the satisfaction of the first judgment, and the balance due on the larger judgment may be collected and paid in the same manner as if there had be no set-off." Only after first considering these two sections can we interpret the list of five exceptions identified in 12- 178(5), specifically number five, which says "Such set-off shall not be allowed *** as to so much of the first judgment as is due to the attorney in that action for his or her fees and disbursements therein." The purpose of exempting attorney's fees from the set-off provision is to render the attorney's claim for fees preferred as against his client's judgment creditors. *Adam Martin Construction Co. vs. Brandon Partnership*, 135 Ill. App. 3d 324, 327 (1985).

Having considered the provisions together, it is clear that there must be more than one judgment at stake, as between two competing judgment lien holders. Here, we have only one judgment of $37,500 for plaintiff. The enforcement of Norfolk Southern's statutory right to set-off advance payments against an ultimate judgment by the injured party is not a matter contemplated under the plain language of §12-178(5) and its companion provisions. See *Bueker vs. Madison*, 2016 IL 120024, ¶ 13 (the primary rule of statutory construction is to ascertain and give effect to the legislature's intent, the most reliable indicator of which is the statutory language in its plain and ordinary meaning). Moreover, the trial court never determined the exact attorney's fees or litigation expenses that would be owed to plaintiff's attorneys. See *Adam Martin Construction vs.*, 135 Ill. App. 3d at 328 (for §12-178(5) to apply, the judicial body must specify the attorney's fees owed). While §12-178(5) would allow for attorney's fees under the right circumstances, we likewise question whether "disbursements" is the equivalent of general litigation expenses. See Black's Law Dictionary, 10th Ed. (Disbursement is "The act of paying out money, commonly from a fund or in settlement of a debt or account payable."). We conclude that §12-178(5) simply does not apply to the scenario we have before us. As stated, even if it did apply, §12-178(5) operates as a substantive provision that must first yield to §55's allowance of railroad setoff.

Additionally, we note that the railroad made the advances before plaintiff retained counsel and filed suit in this case. Plaintiff's attorneys have not denied that they knew of these advances that were due back to the railroad. We view the issue of setoff as just one more factor an attorney should consider before taking on a FELA negligence case. Based on the foregoing, we conclude Norfolk Southern is entitled to set-off the $37,500 judgment for plaintiff against the pre-suit advances it made to plaintiff. Accordingly, after costs are deducted, nothing is due on the judgment to plaintiff. It is fully satisfied or paid.

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Tammy Marsh vs. Norfolk Southern Railway Co. et al.

- ***Trespasser Fatality — Wanton Misconduct/Federal Preemption — Summary Judgment***
- ***Train fatally injured trespasser who did not respond to audible warning once seen by train crew***
- ***Plaintiff argued that crew didn't react soon enough, traveled too fast, sounded inadequate horn signal, that railroad should have fenced right-of-way***
- ***Defense said no evidence of "wanton or willful misconduct" required by PA law, railroad and crew complied with all relevant Federal regulations, so preemption applied***
- ***HELD — No evidence of wanton misconduct by crew, no evidence of failure to comply with Federal regulations, summary judgment GRANTED***

Decedent trespasser was struck by a train while walking on the tracks, after failing to respond to warning signals from the train. Needing to prove that the defendants engaged in "willful or wanton misconduct," plaintiff presented a laundry list of supposed improper acts but the court knocked them down, saying that most were preempted by Federal regulations and that even if there were possible violations, the railroad could not have avoided the accident anyway. The case is *Tammy Marsh, Administratrix of the Estate of Mahlon Christopher Mosher vs. Norfolk Southern Inc., Canadian Pacific Railway, and Jeffrey D. Boyd*, 2017 U.S. Dist. LEXIS 39442. Plaintiff's counsel were Jamie J. Anzalone and Kelly M. Ciravolo; Anzalone Law Offices, Wilkes-Barre, PA and the railroad defendants were represented by our friends Scott D. Clements and J. Lawson Johnston; Dickie, McCamey & Chilcote, PC, Pittsburgh, PA. The decision of the court was by Judge A. Richard Caputo, who wrote, in part, as follows:

This action arises out of an accident that occurred on the morning of December 11, 2012, between a northbound NSRC train operated by locomotive engineer Boyd and Mosher, who was walking to school along the single line railroad track owned by CPR, at approximately milepost 632.8 in New Milford, Pennsylvania. The train's other crew members were conductor Christopher Chesmore (Chesmore) and conductor trainee Aaron Willis (Willis). The train consisted of three (3) locomotives (NS 6713, NS 9138, and NS 9642), sixteen (16) loaded cars, and twelve (12) empty cars; it was 1,608 feet long and weighed 2,571 tons.

The train left Allentown, Pennsylvania on December 10, 2012, and was destined for Binghamton, New York. As the train traveled north toward Binghamton on the morning of December 11, 2012, the speed limit in the area of the accident was forty (40) miles per hour. As the train came around a set of curves and into a straightaway, the crew observed something ahead along or near the tracks. Boyd described the "something" as a "black blob I guess basically, just something black by the tracks," and did not realize at that time that it was a person. Chesmore described seeing "something that's basically like a shadow on the tracks up ahead," and, along with Willis, also did not initially realize that it was a pedestrian.

Willis testified that he said, "What's that?" as the train was in the straightaway, and a few seconds elapsed when he said, "it looks like someone walking along the tracks." Boyd and

Chesmore acknowledged there was "something" up ahead and, at that time, Boyd began blowing the horn.

According to the Railview video from the second locomotive of the train, Boyd began blowing the horn at 08:09:23 on the video, and continued blowing it for approximately sixteen (16) seconds until 08:09:39. Boyd initially testified that he was approximately eight (8) seconds into blowing the horn when he realized that "the blob" was a person. Later, Boyd testified that he did not know exactly at what point he recognized "the blob" as being a pedestrian, but, during the time the person came into focus, Boyd never stopped sounding the horn.

Boyd did not engage the emergency brakes at that time because, as he testified, he thought the person was going to get out of the way. Even when Boyd was 7 to 9 seconds into blowing the horn, Boyd testified that he still thought the pedestrian was going to vacate the tracks. At 8:09:39 on the Railview video, after continuously blowing the horn for approximately 16 seconds, Boyd stopped blowing the horn to engage the emergency brakes. It was apparently at that point when Boyd realized that the person was not going to step out of the train's path.

In the early part of his deposition, Boyd was asked to describe the accident and testified as follows:

> Early in the morning going north going into Binghamton coming around a -- two sets of corners [curves] and seeing something on -- you know, near the tracks, not sure exactly where it was at the point as far as where we're at; come around the corner and blew the horn and, as we got closer, it turned out to be an individual instead of an animal or an object or a tree or a bush or whatever it may have been at the time that we first seen the object. At that point, I stayed on the horn; and when I see that he was not going to move and immediate danger, I put the train in emergency.

Boyd stopped blowing the horn at 8:09:39 because he needed to use his left hand, which was operating the horn, to place the train into emergency. He then went back to blowing the horn with his right hand. It is undisputed that after the horn stopped blowing at 8:09:39 on the Railview video, the horn started to blow again at 8:09:42, and emergency brakes were engaged at 8:09:43. Boyd believes that the train's emergency brakes were engaged just before the pedestrian was struck.

NSRC Road Foreman Philip Koerner (Koerner) was present after the accident. He was unable to download the event recorder data from the lead locomotive, NS 6713, but was able to download the event recorder data from the second locomotive, NS 9138. Based on the data, it is undisputed that the train was in emergency mode at 8:04:32 when the automatic brake pipe pressure (ABK psi) was at 57. It is also undisputed that Boyd made a first service application of the brakes at least 4 seconds prior to the emergency application of the brakes.

When the train's emergency brakes were engaged at 8:04:32, the train was traveling at a speed of 39 miles per hour. Moreover, according to the event recorder data for NS 9138, in the two minutes leading up to the accident, the train's speed did not exceed 40 miles per hour, except for a period of approximately six seconds from 8:04:21 to 8:04:26. During that time, Boyd was already in "dynamic braking" (which is different from emergency braking), and increasing it. Koerner explained that the increase in dynamic braking could cause the "slack of the train to

come in" and give "a little boot from behind" that could cause speed to increase, which is confirmed by the Railview video, showing that the speed of the train slightly increased.

After the train struck the pedestrian, who never turned around to see the approaching locomotive, Boyd called dispatch and requested medical personnel, and the dispatcher called 9-1-1. The pedestrian was later identified as Mosher, who sustained fatal injuries due to blunt force trauma to the head.

Pennsylvania State Trooper John Oliver (Oliver) investigated the accident. He noted the presence of ear buds and an iPod at the scene, which, according to Oliver, appeared to be part of Mosher's personal belongings. Oliver concluded that Mosher may have been wearing headphones and listening to music at the time of the accident. There is no evidence in the record, however, that the train crew at any time became aware that Mosher may have been wearing headphones and/or listening to music and might not hear the approaching train.

Defendants NSRC and Boyd are entitled to summary judgment because plaintiff has failed to present a genuine issue of material fact that either Boyd or NSRC breached their duty to refrain from wanton misconduct. Moreover, many of plaintiff's claims are preempted by federal law and, thus, fail as a matter of law.

Both parties agree that Mosher was a trespasser and that under Pennsylvania law, the duty owed to trespassers is limited to preventing the wanton or willful infliction of injury. *42 Pa. C.S.A. §8339.1*. Plaintiff concedes that defendants' conduct was not willful; she argues, however, that it was wanton.

The burden is on the trespasser to prove willfulness or wantonness. *Ott vs. Unclaimed Freight Co., 577 A.2d 894, 897 (Pa. Super. 1990)*. In *Evans vs. Philadelphia Transp. Co., 418 Pa. 567, 574, 212 A.2d 440, 443 (1965)*, the Pennsylvania Supreme Court clarified the difference between willful and wanton misconduct:

> willful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue. This, of course, would necessarily entail actual prior knowledge of the trespasser's peril. Wanton misconduct, on the other hand, means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

The Pennsylvania Supreme Court further clarified that:

> [w]anton misconduct is ordinarily accompanied by a conscious indifference to the consequences and only exists where the danger to plaintiff is realized and is so recklessly disregarded that there is at least a willingness to inflict injury, if not the actual intent to do same. *Dudley vs. USX Corp., 414 Pa. Super. 160, 172, 606 A.2d 916, 922 (1992)*.

Here, plaintiff argues that the question of wantonness should be submitted to the jury. She points to the deposition testimony from Willis, the conductor trainee who witnessed the accident, who notified the train engineer, Boyd, that there was "foot traffic" up ahead and that Boyd acknowledged this. Therefore, plaintiff argues, Boyd had knowledge of the presence of Mosher.

Id. According to plaintiff, as soon as Boyd was notified that there was a pedestrian on the tracks, Boyd should have taken action to avoid striking him. Therefore, for plaintiff, the core issue in this case is the timing of the train operator's realization that there was a person on the tracks, and whether Boyd could have, or should have, taken action to avoid the accident, given that Mosher was not responding to the horn and never turned around. According to plaintiff, "a reasonable jury could conclude that [Boyd] had sufficient time in which he recognized [Mosher] on the tracks, and he could have taken action to slow the train and provide better warning to [Mosher]." In other words, plaintiff claims that Boyd should have realized at an earlier point that Mosher was in a position of peril, and, at that time, should have invoked measures to avoid the accident. After a careful review of the record in this case, I disagree.

As soon as the crew saw and acknowledged that something was ahead of the train, Boyd began to blow the horn. The horn was blown for approximately 16 seconds. At some point during the 16 seconds, the crew realized that there was a pedestrian walking along the tie butts (outside the rails), and Boyd never stopped sounding the horn in order to provide a warning, with the assumption that the pedestrian was going to vacate the tracks. Boyd did not apply the emergency brakes during this time because, as he testified at his deposition, he thought that Mosher was going to get out of the way, consistent with Boyd's prior experience.

Boyd did not manifest a reckless disregard of the existing or potential danger because it was reasonable for him to believe that Mosher would vacate the tracks after receiving sufficient warning from the approaching train. *See Moss vs. Reading Co., 418 Pa. 598, 602, 212 A.2d 226, 228-29 (1965)* (holding that a train operator was not guilty of wanton misconduct in failing to apply emergency brakes in time to avoid striking decedent, since the operator had a right to believe that decedent would vacate the tracks, even though decedent made no apparent reaction to warning whistles). "Although the engineman testified that decedent made no apparent reaction to his warning whistles, that fact is not sufficient to have given the engineman reason to believe that the warnings would have no effect on decedent's conduct and that decedent would place himself in a position of peril." *Moss vs. Reading Co., 418 Pa. 598, 602, 212 A.2d 226, 228-29 (1965). See also Kowaleski vs. Pennsylvania R. Co., 103 F.2d 827, 830 (3d Cir. 1939).*

"The mere fact that this action was too late to avoid the accident can in no way detract from the fact that the engineman took reasonable care to avoid the accident the minute he realized that decedent was in a position of peril." *Moss vs. Reading Co., 418 Pa. 598, 603, 212 A.2d 226, 229 (1965).* Moreover, according to plaintiff's expert, even if Boyd had applied the emergency brakes when he first began to blow the horn, the train would not have stopped in time to prevent the accident and Mosher would still have been struck in the head by a 2,571-ton train at a speed of seven to ten miles per hour. There was, of course, no obligation to apply the emergency brakes upon the first sight of Mosher because, first, the crew did not know at that time that a person, as opposed to an object, was present on the tracks, and second, there was no reason for the crew to suspect that Mosher was in a position of peril once they did identify the "blob" as a person, because of the reasonable and permitted by law assumption that a pedestrian will vacate the tracks. Thus, plaintiff's argument that "Boyd acted . . . recklessly in failing to apply brakes . . . at the first sight of [Mosher]," (Doc. 1, at 9), fails as a matter of law. *See Moss vs. Reading Company, 212 A.2d 226 (Pa. 1965), Kowaleski vs. Pennsylvania R. Co., 103 F.2d 827 (3d Cir. 1939)*; *Alvin J. Barr, Inc. vs. Consol. Rail Corp.*, 1999 WL 554598, at *4 (E.D. Pa. June 23, 1999) (Pennsylvania courts have determined that it is reasonable to expect trespassers to vacate the tracks after receiving sufficient warning from approaching trains.) (citations omitted);

Manfred vs. Nat'l R.R. Passenger Corp., 106 F. Supp. 3d 678, 687 (W.D. Pa. 2015) ([Train's engineer] simply did not have a duty to apply braking of any kind until after he determined that [the pedestrian] was not vacating the tracks based on the sounding of the train's horn.).

Moreover, to the extent that plaintiff argues that Boyd should have *sooner* realized that the "blob" on the tracks was a pedestrian,[4] such an allegation does not point to wanton misconduct. At most, it is evidence of inattention or inadvertence, which, as the Pennsylvania Supreme Court has repeatedly held, amounts to nothing more than negligence. *See Kasanovich vs. George, 348 Pa. 199, 203, 34 A.2d 523, 525 (1943).* After all, it is "not wanton negligence to fail to use care to discover the presence of an unanticipated trespasser." *Frederick vs. Philadelphia Rapid Transit Co., 337 Pa. 136, 140, 10 A.2d 576, 578 (1940).*

To the extent, however, that plaintiff argues that Boyd should have sooner applied the emergency brakes, I note first that it is not clear that Boyd was duty-bound to apply the emergency brakes at all. In the Third Circuit's *Kowaleski vs. Pennsylvania R. Co., 103 F.2d 827, 830 (3d Cir. 1939),* the train operator never endeavored to slow down or stop the train and, instead, merely sounded a warning signal, which proved to be insufficient to prevent a tragic accident. The court held that in light of the presumption that after the sounding of a warning signal a pedestrian will leave the tracks in time to escape any injury, the engineer's conduct could not be described as either willful or wanton. *See also Moss vs. Reading Co., 418 Pa. 598, 602, 212 A.2d 226, 228 (1965).*

Nevertheless, between the endpoints of applying the brakes at the very first sight of Mosher, which, as already explained, is not mandated by case law, and not applying the brakes at all, there exists a gray area of hypothetical scenarios encompassing Boyd's reaction time, and it is in that area where Boyd's wantonness apparently lies. I disagree. Mosher would have been struck by the 2,571-ton train no matter what, as plaintiff's expert reports: if the brakes were applied immediately, the speed of the train would have been seven to ten miles per hour; if the brakes were applied "10 seconds earlier, [the train] would come to a stop 10 seconds earlier;" "if the train was placed into emergency at a different point in time," "many hypothetical scenarios . . . can be analyzed to determine how the dynamics would be altered."

Following plaintiff's logic, at some point during the mere sixteen seconds, Boyd's conduct changed from reasonable, to negligent, to, apparently, wanton. Plaintiff would like to imbue the concept of wantonness with the sort of rigidity that is capable of manufacturing arbitrary segmentation of time in that liability somehow attached upon the passing of the second, or fourth, or seventh second following the identification of the "blob" on the tracks as a person. However, it is precisely the granularity of the data and the minute distinctions in time and conduct, where plaintiff seeks to capture wantonness, that I find wantonness to be elusive.

There is nothing in the record that points to Boyd's "willingness to inflict injury." *Kasanovich vs. George, 348 Pa. 199, 203, 34 A.2d 523, 525 (1943).* Nothing in the record is capable of ascertaining that Boyd exhibited "conscious indifference to the perpetration of the wrong" during the sixteen fateful seconds, or was "reckless" in his disregard of the danger. *Id.; Dudley vs. USX Corp., 414 Pa. Super. 160, 172, 606 A.2d 916, 922 (1992).*

Thus, plaintiff has failed to present a genuine issue of material fact that either Boyd or NSRC breached their duty to refrain from wanton misconduct.

Here, defendants argue that preemption applies to plaintiff's claims: (1) for failure to properly train, supervise, and instruct; (2) that the locomotive horn should have been louder; (3) that the

horn pattern was inadequate and should have been of longer duration; and (4) alleging excessive speed of the train. Defendants argue that they complied with the applicable federal standards, but that even if plaintiff could prove that defendants did not comply with federal law, such violations would still not rise to the level of wanton misconduct.

In paragraph 23(h) of the Amended Complaint, plaintiff alleges that NSRC failed "to properly train, supervise and/or instruct the train crew on stopping or slowing a train when the train crew is confronted with a pedestrian adjacent to and/or on the train tracks upon which the train is proceeding."

Plaintiff, however, is unable to show, as she must, that any certifications, training, policies, procedures, and practices for NSRC's engineers violated any of the federal standards contained in *49 C.F.R. §240*. The Secretary of Transportation has promulgated *Section 240 of the Code of Federal Regulations* "to ensure that only qualified persons operate a locomotive or train." *Id. §240.1(a)*. *Section 240* specifies standards for the "eligibility, training, testing, certification and monitoring of all locomotive engineers." *Id. §240.1(b)*. The regulations include a detailed scheme by which a railroad company must obtain Federal Railroad Administration (FRA) approval of its engineer and conductor certification programs, including its criteria for continuing education, testing, training, and monitoring of performance. *See §§240* & *242*. Moreover, pursuant to *Section 217*, railroads must periodically conduct operational tests and inspections to determine the extent of employees' compliance with its operating rules, timetables, and other special instructions. *Id. §217.9*.

Moreover, although plaintiff argues that Boyd and NSRC have breached federal regulations on railroad employee training, she does not articulate which regulations were violated and how NSRC's policies do not comply with them. Rather, plaintiff merely contends that "it is obvious that [NSRC's] subordinates were not trained and monitored properly in the areas of operational safety." However, plaintiff must do more than make conclusory allegations to meet her burden in opposing summary judgment--she must come forward with evidence in support of her claim for failure to train. *See Celotex Corp, 477 U.S. at 323*. She has not done so.

In fact, there is no dispute that Boyd was a certified locomotive engineer and that Chesmore was a certified conductor under NSRC's FRA-approved certification programs in accordance with the FRA regulations set forth in §§217, 240 and 242. Thus, plaintiff's claims for failure to properly train, supervise, or instruct are preempted by federal law.

In Paragraph 23(l) of the Amended Complaint, plaintiff alleges that NSRC failed to ensure that "the train's locomotive horn produced a minimum sound level of 96 db(a) at 100 feet forward of the locomotive in its direction of travel . . . . "

Pursuant to *49 C.F.R. §229.129*, the Secretary of Transportation has issued regulations that cover the subject matter of the volume level of locomotive horns, detailing the precise minimum and maximum decibel levels at which a horn should sound, as measured 100 feet forward of the locomotive, and specifying how to test for compliance.

Plaintiff, however, has not presented any evidence that the volume of the train horn failed to comply with *§229.129*. To the contrary, as set forth in the declaration of Sean Ogureck, a Senior General Foreman for NSRC, the locomotive at issue fully complied with federal regulations. A horn sound test was completed on August 27, 2012, which demonstrated that the decibel level of the locomotive met the requirements of *§229.129(a)*.

Thus, because plaintiff cannot point to any violations of the applicable federal regulations governing warning devices, her wanton claim is preempted.

Plaintiff alleges next that Boyd failed to warn Mosher of the train's approach and failed to comply with NSRC's internal rules. Specifically, plaintiff's expert Charles Culver opined that Boyd violated General Code of Operating Rules (GCOR) 5.8.2 by blowing the horn continuously instead of sounding the horn using a "succession of short sounds," as GCOR mandates.

The federal requirements for sounding the horn when not at a public crossing are set forth in *49 C.F.R. §222.23(a)*, which provides that "a locomotive engineer may sound the locomotive horn to provide a warning to . . . trespassers in an emergency situation if, in the locomotive engineer's sole judgment, such action is appropriate in order to prevent imminent injury, death, or property damage." Plaintiff does not claim, however, that Boyd was not compliant with federal regulations; rather, she alleges a failure to comply with NSRC's internal code.

Therefore, to the extent that plaintiff argues that her claims are not subject to preemption because the railroad failed to comply with GCOR, the court need only review whether the internal code was created pursuant to any federal regulation. It is simply not sufficient to allege a violation of the railroad's own rules. *Murrell vs. Union Pac. R.R. Co., 544 F.Supp.2d 1138, 1149-50 (D.Or. 2008).* Plaintiff does not cite to any federal regulation mandating the use of a succession of short sounds. *Section 222.23(a)* provides merely that a locomotive engineer has *discretion* in choosing to sound the horn in an emergency situation; it "does not preclude the sounding of locomotive horns in emergency situations, nor does it impose a legal duty to sound the locomotive horn in such situations." *Id.* Thus, federal law does not impose a legal duty on the engineer to sound the horn.

As such, plaintiff's argument that the railroad failed to comply with the internal rules "do[es] not save [plaintiff] from otherwise preempted claims." *Driesen vs. Iowa, Chicago & E. R.R. Corp., 777 F. Supp. 2d 1143, 1158 (N.D. Iowa 2011)*; *see also Michael vs. Norfolk S. Ry. Co., 74 F.3d 271, 273 (11th Cir.1996)* (holding that although violations of the railroad's own speed regulations may be evidence of negligence in state court, such regulations are preempted by federal law); *St. Louis Sw. Ry. Co. vs. Pierce, 68 F.3d 276, 278 (8th Cir.1995)*.

Even assuming that plaintiff's claim survives a preemption defense, and, if, indeed, Boyd violated the internal regulations requiring him to use a staccato horn pattern, plaintiff still must show that Boyd's failure to use the staccato pattern constituted wanton misconduct. As I have already explained, plaintiff is unable to present a genuine issue of material fact that either Boyd or his employer, NSRC, was guilty of wanton misconduct.

In paragraphs 23(a), (b), and (j) of the Amended Complaint, plaintiff alleges that the train was traveling at an excessive speed, which contributed to the accident.

The issue of whether state law, as applied to unsafe operating speeds, is preempted has long been decided by the Supreme Court. In addressing this claim, the court concluded that *49 C.F.R. §213.9(a)*, which sets the maximum allowable operating speeds for all trains, "covered" a state law claim based on unsafe operating speeds. *CSX Transp., Inc. vs. Easterwood, 507 U.S. 658, 674-75, 113 S. Ct. 1732, 1743 (1993)*.

Because plaintiff cannot point to any violations of the federal speed regulations, her claim is preempted.

Defendant CPR is entitled to summary judgment because, under Pennsylvania law, it did not owe a duty of care to warn, police, or prevent Mosher from accessing the railroad tracks, or to take any other precautions against his illegal access to CPR's property. *See Malischewski vs. Pennsylvania R. Co., 52 A.2d 215 (Pa. 1947)*; *Leithold vs. Philadelphia & Reading Railway. Co., 47 Pa. Super. 137, 144 (1911)*. Specifically, under *Scarborough by Scarborough vs. Lewis, 523 Pa. 30, 38, 565 A.2d 122, 126 (1989)*, CPR had no duty to fence its tracks, and under *Noonan vs. Pennsylvania R.R. Co., 128 Pa.Super. 497, 194 A. 212, 215 (1937)*, and *Dugan vs. Penn. R.R. Co., 387 Pa. 25, 127 A.2d 343, 348 (Pa.1956)*, there was similarly no duty to erect warning signs or patrol the tracks. *See also Laurie vs. Nat'l Passenger R.R. Corp., 105 F. App'x 387, 391 (3d Cir. 2004)* (Under Pennsylvania law, [a railroad] has no duty to erect or maintain fences on its right-of-way . . . . Nor does Pennsylvania law require a railroad to post guards or to police tracks to prevent trespassing.).

Finally, all three defendants are entitled to summary judgment on plaintiff's claim for punitive damages because there is no evidence of reckless indifference to the rights of others, outrageous conduct, or willful or wanton misconduct, as required by Pennsylvania law. As plaintiff concedes, analysis of "wanton conduct goes hand-in-hand with a discussion regarding punitive damages."

However, "[b]ecause punitive damages are only allowable where the defendant has acted with willful, wanton, or reckless conduct, and the court has held that defendants did not so act in this case, punitive damages are precluded as a matter of law." *Manfred vs. Nat'l R.R. Passenger Corp., 106 F. Supp. 3d 678, 689 (W.D. Pa. 2015)* (citation omitted).

Because plaintiff failed to establish that a genuine issue of material fact exists to support the claim that defendants acted wantonly, defendants' motion for summary judgment will be granted.

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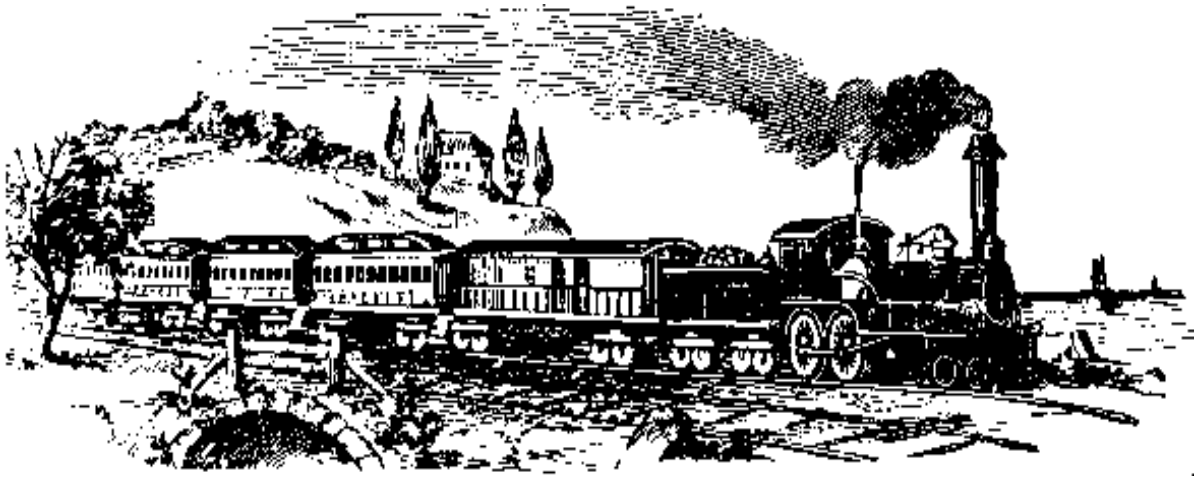

Josephine Smith et al. vs. CSX Transportation Inc.

- ***Miscellaneous — Personal Injury/Property Damage — Summary Judgment***
- ***Plaintiffs allege exposure to diesel fumes and damage to their home from idling locomotives***
- ***CSX asserts plaintiffs' claims would interfere with interstate commerce, thus preempted by ICCTA***
- ***HELD — Idling locomotives is operational activity, subject to STB jurisdiction and is preempted by ICCTA, summary judgment GRANTED***

Plaintiffs are unhappy that CSX finds it necessary to hold trains on tracks behind their home while waiting for signals or track authority through nearby interlockings, and allege damage to their home and exposure to diesel exhaust. The U.S. District Court for the Northern District of Illinois, Eastern Division says they have no claim, as this activity is transportation subject to the authority of the Surface Transportation Board pursuant to the ICC Termination Act. The decision is found at *Josephine Wade Smith and Rupert Smith vs. CSX Transportation, Inc.*, 2017 U.S. Dist. LEXIS 44051. Plaintiffs were represented by David A. Epstein; Brown, Udell, Pomerantz & Delrahim Ltd, Chicago, IL and CSXT was represented by Sean M. Sullivan and Kathryn M. Doi; Daley Mohan Groble PC, Chicago, IL. The claim was handled by Cesar Valdivia, Manager Field Investigations, in the Chicago, IL, office. Judge Sara Ellis wrote the opinion, which reads in part:

The Smiths have owned and lived in property at 8563 S. Rockwell, Chicago, Illinois since 1987. Their property abuts railroad tracks (running north/south) owned by CSX and used by CSX and other railroads. For operational reasons, CSX parks or idles locomotives on the tracks running adjacent to the Smiths' property, as well as at other locations on its rail network. For example, CSX sometimes parks trains on the tracks adjacent to the Smiths' property while waiting for permission to pass through an interchange at 75th Street, where Metra commuter trains and other freight trains regularly operate on east/west tracks. Metra commuter trains have priority over all other train traffic. Additionally, CSX does not control two other interchanges that the north/south tracks cross, requiring CSX to obtain permission to cross them. Because of the number of trains traversing the tracks, trains often wait for hours to cross these interchanges.

Additionally, CSX operates an intermodal rail yard at 59th Street, located north of the Smiths' residence. This yard operates twenty-four hours a day, conducting intermodal loading and unloading. CSX does not park trains at the yard, however, because doing so interferes with the loading and unloading of the trains at the yard. This means that CSX sometimes parks or idles trains destined for the yard along the tracks adjacent to the Smiths' property because the yard is not yet ready for the trains. CSX attempts to park trains as close as possible to their destination so as to quickly move them to the yard or through an interchange.

The Federal Railroad Administration (FRA) and the Surface Transportation Board (STB) oversee railroad operations. The government does not regulate how long trains can park or idle on the tracks. CSX sometimes leaves train engines running or idling when parked. For example, per CSX policy, diesel engines must be kept running when the temperature falls below forty degrees Fahrenheit so as to avoid freeze-ups or damage to the engine. Additionally, if a

locomotive is shut down, the train loses air pressure to its braking system. When this happens, FRA regulations require an air test before the train operates again, which could take several hours to complete. Thus, CSX typically keeps the locomotive running when parked to keep the air brake system pressurized.

In the early morning of September 2, 2012, a CSX train rear-ended another CSX train stopped at the 75th Street interchange. The trains were operating on the eastern-most section of the tracks running adjacent to the Smiths' property, with the impact of the collision occurring north of 83rd Street, approximately three-quarters of a mile from the Smiths' house. Several cars of one of the trains derailed, with containers rolling off the rail cars and landing on the north side of 83rd Street. No train cars derailed south of 83rd Street. CSX sent a locomotive to retrieve the cars south of 83rd Street, which were pulled away without issue. CSX did not receive any property damage claims from residents living near the site of impact or derailment, except that the homeowner, on whose property the containers landed claimed damage to his yard from the equipment CSX used to remove those containers.

The Smiths complain, however, that CSX's actions in parking and idling locomotives next to their property have caused damage to their property and exposed them to engine exhaust fumes. On May 12, 2011, Mrs. Smith called CSX to complain of damage to her home and physical ailments allegedly caused by the idling trains outside her home. In June 2011, she spoke to Michael Scully, then the manager of field investigations for CSX, telling him that, because of the trains: (1) the house had a cracked foundation, (2) the home flooded because of the cracked foundation, (3) the house had mold, (4) the living room walls were cracked and separating, (5) dishes in the china cabinet were cracked, (6) the driveway was cracked and not level, and (7) her car rattled and vibrated due to the uneven surface of the driveway. She also complained that both she and her husband suffered health issues. Mrs. Smith then filled out a CSX form detailing similar damage and health problems, including inability to sleep, nerve damage, depression, and hospitalization, providing the date of the incident as December 2009. Mrs. Smith also wrote to Scully on May 26, 2012, again complaining of damage to the home, including damage to the foundation, windows, antiques, lighting fixtures, and dinnerware. The Smiths included proposals from contractors for repairs, both in the May 26, 2012, letter to Scully and again after the derailment. The amounts and repairs reflected in the proposals did not change, however. As it did in its motion to dismiss, CSX argues that the ICCTA preempts Smiths' claims based on the idling of CSX trains. In ruling on the motion to dismiss, the court essentially deferred decision on the preemption issue, noting that the scope of ICCTA preemption depends on the factual circumstances of the claim. Now that the parties have completed discovery, however, the issue is ripe for decision.

The ICCTA provides the STB with exclusive jurisdiction over:

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State[.]

49 U.S.C. §10501(b). "Transportation" includes locomotives, property, facilities, and equipment "related to the movement of passengers or property, or both, by rail." 49 U.S.C. §10102(9)(A). The ICCTA's 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 fact that the Smiths seek damages under common law remedies and not injunctive relief makes no difference to the preemption analysis, for "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Cipollone vs. Liggett Grp., Inc.*, 505 U.S. 504, 521, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (alteration in original) (quoting *San Diego Bldg. Trades Council vs. Garmon*, 359 U.S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)); *see also Suchon vs. Wis. Cent. Ltd.*, No. 04-C-0379-C, 2005 WL 568057, at *4 (W.D. Wis. Feb. 23, 2005) (Allowing plaintiff to obtain a monetary or injunctive remedy by application of the state's nuisance law to defendant's actions is not significantly different from allowing the state to impose restrictions on defendant through laws and regulations.).

Although ICCTA preemption "has been recognized as broad and sweeping," *Union Pac.* R.R. *Co. vs. Chicago Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011), the factual circumstances of each claim must be considered to determine whether it is preempted by the ICCTA, *see In re Vermont Ry.*, 769 A.2d 648, 654 (Vt. 2000) (noting that ICCTA preemption determination is a fact-bound inquiry). More specifically, "[w]here a tort claim would interfere with 'rail transportation' or 'operation' of railroad tracks or facilities, the regulation or claim is expressly preempted." *Benson vs. Union Pac.* R.R. *Co.*, No. 2:08-cv-331-GEB-EFB, 2008 WL 2946331, at *3 (E.D. Cal. July 25, 2008) (collecting cases). On the other hand, "where a tort claim is premised upon a railroad's activities on its property that have only a remote or incidental connection to 'rail transportation' or 'operation' of railroad tracks or facilities, but rather are 'tortious acts committed by a landowner who happens to be a railroad company,' the claim is not expressly preempted by the ICCTA." *Id.* at *4 (quoting *Emerson vs. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007)).

Here, CSX has presented uncontroverted evidence that it parks and idles trains near the Smiths' property for operational reasons, not to harass the Smiths or any other landowners who abutted the railroad tracks. Specifically, trains stop on the tracks near the Smiths' property while waiting for signal clearance to cross nearby interchanges or to load or unload containers at the intermodal yard. CSX typically idles locomotives instead of shutting engines off because, **[*10]** at least when temperatures fall below forty degrees Fahrenheit, CSX policy requires engines to continue running to avoid freeze-ups or engine damage. Additionally, CSX usually keeps engines running to avoid operational delays if the air brake system loses pressure, which would require an air test before operating the train again. These operational concerns establish that the parking and idling of trains for extended periods of time on tracks adjacent to the Smiths' property is necessary to the operation of CSX's railroad business. As a result, the ICCTA preempts the Smiths' claims regarding property damage and personal injury caused by exposure to the idling locomotives. *See Guckenberg vs. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 956, 958-59 (E.D. Wis. 2001) (on a motion for summary judgment, finding nuisance claim for, among other things, "idling locomotive diesel engines" that lasted "as long as several hours per episode" preempted because it "*would* interfere directly with day-to-day railway operations" and "seeks to proscribe activity undertaken by [railway] employees while conducting and facilitating traffic on their side track"); *Norfolk S. Ry. Co. vs. Goldthwaite*, 176 So. 3d 1209, 1211-12, 1214 (Ala. 2015) (finding plaintiff's nuisance claims preempted by ICCTA where railroad presented evidence explaining reasons for storing

and idling trains on tracks of its choosing); *Jones vs. Union Pac.* R.R. *Co.*, 94 Cal. Rptr. 2d 661, 666 (Cal. Ct. App. 2000) (If the tooting of train horns and idling of train engines for long periods of time in front of plaintiffs' house was necessary to reduce congestion and operate Union Pacific's railroad business safely and efficiently, then plaintiffs' claim is federally preempted.). The court thus grants summary judgment for CSX on the Smiths' idling claims.

In their complaint, the Smiths also include allegations that the September 2, 2012, derailment caused damage to their property and their health. But, as CSX points out, the Smiths do not allege nor did they establish during discovery that the derailment caused any damage to them or their property separate and apart from any damage allegedly caused by the locomotive idling. Nor have the Smiths produced evidence that any alleged damage arose from the derailment itself. Instead, the evidence suggests that the alleged damages arose before the derailment occurred, with Mrs. Smith complaining to CSX about the same types of damage before the derailment and submitting estimates for repairs in the same amounts and for the same work both before and after the derailment. At summary judgment, the Smiths must rely on more than mere speculation to support their claim, but they have failed to respond to CSX's motion. *See Good vs. Univ. of Chicago Med. Ctr.*, 673 F.3d 670, 675 (7th Cir. 2012) ([G]uesswork and speculation are not enough to avoid summary judgment.), *overruled on other grounds by Ortiz vs. Werner Enters., Inc.*, 673 F.3d 670 (7th Cir. 2016); *Johnson vs. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (Summary judgment 'is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'" (quoting *Schacht vs. Wis. Dep't of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999). The only conclusion the court can draw from the record before it is that the alleged injuries the Smiths suffered to their health relate to the parking and idling of the locomotives, not to the September 2, 2012, derailment. Without any evidence to suggest that the derailment caused the Smiths' damages, the court grants summary judgment for CSX on the Smiths' claims arising from the September 2, 2012, derailment.

For the foregoing reasons, the court grants CSX's motion for summary judgment. The court grants summary judgment for CSX on the Smiths' complaint and terminates this case.

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Case Updates

Nami vs. Union Pacific Railroad Co.
(see *The Bulletin* December 16)

Plaintiff's Petition for Certiorari to the U.S. Supreme Court DENIED
2017 U.S. LEXIS 3040, 2017 WL 497388

Crystal Sells vs. CSX Transportation, Inc.
(see *The Bulletin* March 2015)

Plaintiff's Petition for Certiorari to the Supreme Court of Florida DENIED
2017 Fla. LEXIS 826

Midville River Tract LLC vs. Central of Georgia Railroad Co. et al.
(see *The Bulletin* March 2017)

Plaintiff's Petition for Certiorari to the Supreme Court of Georgia DENIED
2017 Ga. LEXIS 486

Larry Arnold et al. vs. Norfolk Southern Railway Co. et al.
(see *The Bulletin* March 2017)

Plaintiff's Petition to the Supreme Court of Illinois for Leave to Appeal DENIED
2017 Ill. LEXIS 344

Paul Welsh vs. Amtrak
(see *The Bulletin* March 2017)

Plaintiff's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania DENIED
2017 Pa. LEXIS 985, 2017 WL 1734228

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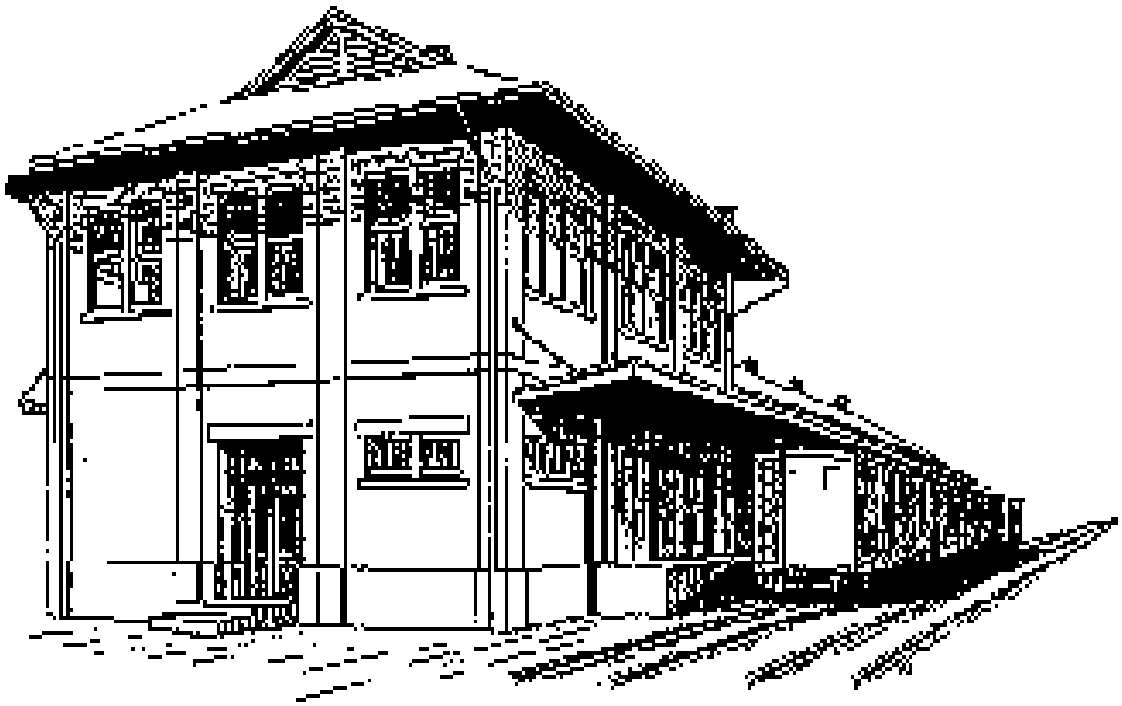

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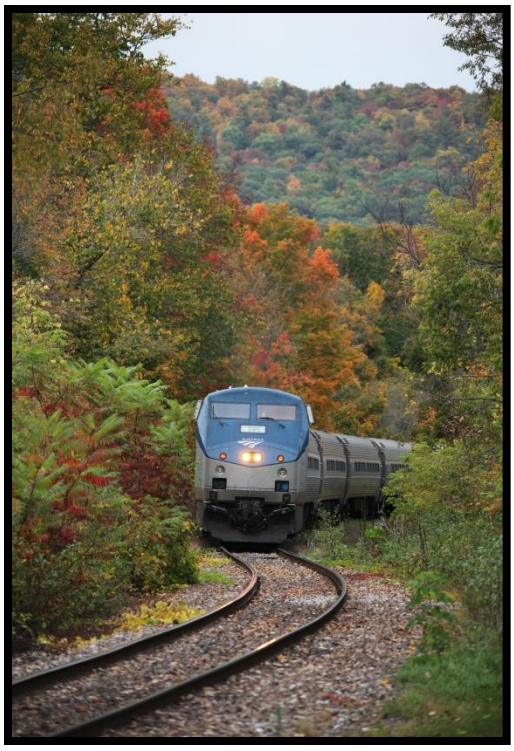

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The Ethan Allen Express winds its way through the fall foliage in Castleton, VT.