FEDERAL EMPLOYERS' LIABILITY ACT

FELA Reporter

and Railroad Liability Monitor

Since 1989 the Nation's Only Journal of Railroad Safety and Liability

Vol. 29, No. 11 **November, 2016**

HIGHLIGHTS

Section 1: Current Developments

Section 2: FELA Appellate Cases

Section 3: FELA Verdicts and Settlements

Highlights continue on page 3

FELA Reporter & Railroad Liability Monitor

The Nation's only Independent Source for FELA and Railroad Liability cases.
Our Editorial Policy Guarantees You Factual, Unbiased Reporting.

Statement of Editorial Policy

FELA Reporter and Railroad Liability Monitor seeks to raise the standard of railroad liability litigation and promote railroad safety in the United States by publishing relevant, timely information about cases and research. Its purpose is to enhance the likelihood that persons injured upon or by the nation's railroads will receive adequate compensation for injuries and that railroads will be protected from fruitless lawsuits brought by uninformed persons. FELA Reporter and Railroad Liability Monitor is not affiliated with any law firm, professional organization of plaintiff's lawyers, or labor union. It is not affiliated with any railroad, consulting organization, professional organization of defense lawyers, or railroad association. We encourage submission of factual information about recent cases including verdicts and settlements as well as special articles and inquiries from readers. This publication takes no editorial position regarding legislation; we urge readers who have diverse viewpoints to offer news and insights that will foster railroad safety especially where the subject matter concerns litigation; however, we reserve the right to edit material which may be construed as a personal attack upon any person including litigants, lawyers, or railroad employees/officials.

email: wbi@triplelpublications.com

__Yes! Please enter my subscription to FELA Reporter and Railroad Liability Monitor. Send me an invoice for $385 for a year's service.

A Prepaid Subscription Saves Even More!

__I'm a new subscriber and want to save even more. Enclosed is my check for $350 - it's the same deal as above. Only I'm saving the cost of billing and making sure that I don't miss an issue while my order is being processed!

To Use Your MasterCard, Visa, or American Express Card, Call (844) 825-5501

Name_____

Address_____

City_____State_____Zip_____

Phone _____

Signature_____

Guarantee

If you are dissatisfied at any time with FELA Reporter and Railroad Liability Monitor let us know and we'll refund the unused portion of your subscription.

Send To:

FELA Reporter
P.O. Box 308
Selma, AL 36702-0308
(844) 825-5501 or (334) 431-5093

Section 4: Railroad Liability Litigation

Section 1: Current Developments

Amtrak Settles Train 188 Crash Claims for $265 million. On October 27 Amtrak reached a $265 million settlement for pending claims in connection with a May 2015 train derailment in Philadelphia that killed eight people and injured more than 200 others. Under the agreement, a federal judge will appoint two masters to evaluate the plaintiffs' claims to determine how the settlement should be divided. "Amtrak appreciates the guidance and involvement of the Court in this matter. Because of the ongoing nature of the litigation Amtrak will have no further comment at this time," Amtrak spokesman Craig Schulz said in a prepared statement. Last year, Congress raised the limit to $295 million from a $200 million cap on what Amtrak could pay in settlements involving crashes.

The Philadelphia crash occurred on May 12, 2015, when Amtrak Train No. 188 was traveling from Washington, D.C., to New York. The train had left the Philadelphia station with 258 people on board when it entered a curve traveling at 106 mph where the speed limit was 50 mph. The National Transportation Safety Board (NTSB) determined that the accident occurred as a result of a loss of situational awareness by the train's engineer after his attention was diverted to an emergency involving another train. The section of track where the crash occurred was not equipped with positive train control technology, the NTSB noted in its findings. "It's widely understood that every person, no matter how conscientious and skilled, is fallible, which is why technology was developed to backstop human vulnerabilities," said NTSB Chairman Christopher Hart in a statement released in May. "Had positive train control been in place on that stretch of track, this entirely preventable tragedy would not have happened."

NTSB Issues Early Findings in West Virginia Chlorine Cas Tank-Car Incident. On October 17 the National Transportation Safety Board released its preliminary report on a tank-car leak that spilled liquified compressed chlorine at the Axiall Corp. rail-car loading facility in West Virginia in August. Tank car AXLX 1702, which had a DOT-105J500W specification, experienced a sudden tank shell crack shortly after it was filled with the hazardous material at the company's facility in New Martinsville, West Virginia., on August 27. About 2.5 hours after the crack developed, the entire 90-ton load of chlorine gas released from the crack and formed a large vapor cloud that moved south from the Axiall facility along the Ohio River Valley. Five Axiall and three contractor employees were treated for exposure injuries and released; two people were transported to the hospital. The release caused "significant" vegetation damage downwind from the release, although no water contamination was reported. Chlorine gas is a toxic hazard that may be fatal if inhaled or absorbed through the skin.

NTSB investigators completed on-scene work at the site and at the Rescar Co. tank-car repair facility in Dubois, Pennsylvania. The tank car was built by ACF Industries in 1981. The NTSB's Executive Summary noted that the Federal Railroad Administration has previously noted defects in some tank cars equipped with ACF 200 stub sills, including tank head cracks, pad-to-tank cracks, sill web cracks, and tank shell buckling that in some instances has led to hazardous materials incidents. Here, Rescar received tank car AXLX 1702 in January 2016 for a 5-year interior inspection required on chlorine tank cars by Axiall Corporation's maintenance instructions. The inspection revealed numerous corrosion pits in the bottom section of the tank shell. Rescar repaired the tank car between January and June 2016 before returning it to Axiall Corporation for its first post-repair loading. The work included interior cleaning, ultrasonic thickness testing, removing internal corrosion, weld buildup intended to restore the shell thickness in corroded locations, and post-weld stress-relief heat treatments. Preexisting cracks were found at the toe of two fillet weld repairs made in 2010 to the stub sill reinforcement pad. The added welds extended beyond the inboard end of the reinforcement pad. One of the preexeisting cracks from the 2010 weld repairs was the origin of the tank shell crack. At one end, the crack arrested near a region of the tank shell that exhibited internal surface thermal scaling and tested softer than surrounding steel. Investigators found buckling in the tank shell between the end of the stub sill reinforcing pad and the adjacent girth weld, as well as several areas of repair to the tank shell that measured below the minimum allowed thickness of 0.7438 inch.

AAR Says STB's Proposed Competitive Switching Rules Are 'Unlawful.' Late last month the Association of American Railroads said that the Surface Transportation Board's proposed new reciprocal or "competitive" switching rules are unlawful. AAR was one of a number of organizations to file comments on the proposal for reciprocal switching, which refers to a situation in which a railroad that has physical access to a specific shipper facility switches rail traffic to the facility for another railroad that does not have physical access, according to the STB. The second railroad pays the railroad that has physical access, typically in the form of a per-car switching charge. In its comments, the AAR said the proposed rules are "contrary to the established law dating back well before the Staggers Act and providing that a shipper must show 'actual necessity' to obtain an order of forced switching."

The rules also would ignore statutory language that requires a showing of necessity for a switching order, the AAR stated in its comments. "The rules give no weight to provisions of the Rail Transportation Policy directing the agency to allow market forces to govern railroad commercial activity to the maximum extent possible and to minimize regulatory intervention into the market," according to the AAR filing.

At the same time a coalition of organizations that oppose the STB's proposed reciprocal switching rules wrote to members of Congress asking that they stop the STB from enforcing them. The rules would return the rail industry to pre-Staggers Act days of heavy regulaton by the federal government, the coalition said. "We believe that freight rail deregulation—culminating in the Staggers Rail Act of 1980—represents one of the most significant economic policy successes in the history of the United States and that these reforms must be protected," stated the letter from the Competitive Enterprise Institute (CEI). "The regulatory proceeding regarding revised reciprocal switching rules that was recently opened by the STB reverses three decades of precedent," CEI wrote. "Many industry observers have expressed concern that imposing forced access and reducing railroad rate freedom will come at the expense of network investment. This unprecedented action threatens railroads, shippers, and consumers with degraded service quality and higher goods prices that would naturally follow the resulting reduction in railroad investment."

Schumer Seeks Federal Grant for PTC Installation in New York. Late last month, FRA Administrator Sarah Feinberg accompanied U.S. Sen. Charles Schumer on a visit to Schenectady, New York to discuss positive train control. During the visit Schumer (D-N.Y.) made a pitch for a $33 million federal grant that would help fund a positive train control (PTC) system on a 94-mile stretch of track that includes the northern section of Amtrak's Rensselaer-to-New York City route. The October 23 visit included the aging Amtrak station in Schenectady. The senator said he wants the grant to help pay for PTC installation on the track, which New York State leases from CSX between Poughkeepsie and Amsterdam. "Once put into action, PTC can help prevent fatal crashes and derailments — and so it's of the utmost importance that all of our rail lines have this life-saving technology installed as soon as possible," he said in a press release.

Schumer was among lawmakers that pushed for the creation of the PTC Implementation Funding Program as part of last year's FAST Act. Under the federal Rail Safety Improvement Act of 2008, Congress required PTC to be installed on many of the nation's tracks, including the Amtrak Empire Corridor's Hudson Line. That line runs from New York City through the Hudson Valley into the state's Capital Region, where it turns west and proceeds to Buffalo and beyond. MTA Metro-North Railroad, which operates the New York City to Poughkeepsie section, has its own PTC implementation plan. In addition, CSX, which operates the track from Amsterdam to western New York, has plans to implement PTC for that track section. However, the state is responsible for PTC implementation on the portion from Poughkeepsie to the area between Schenectady and Amsterdam, according to Schumer. Schumer noted that PTC installation on that section of track is even more critical considering it's a federally designated high-speed rail corridor.

Shell Drops Proposed Crude-By-Rail Facility in Washington. Early last month, Shell, doing business as Equilon Enterprises LLC, announced that it is suspending the permit process of its planned crude-by-rail project in the state of Washington. he announcement came less than a week after the state's Department of Ecology and Skagit County released a draft environmental impact statement for the proposed unloading facility at the Shell Puget Sound Refinery. "When we look at current crude oil supplies, prices and markets globally, and the cost of the project, it just doesn't make economic sense to move forward at this time," said Shirley Yap, the refinery's general manager. "We are committed to investing in this facility and there will be other ways to do that." The refinery currently receives its crude oil via tankers that unload at its dock, and via pipeline that serves Canadian oil fields. Shell sought the rail project so that it could tap new crude-oil supplies in the Midwest that are not served by pipelines, according to a company press release. "We are confident with current crudes now available that we can continue supplying the refinery," said Yap. "The Puget Sound Refinery will continue to produce the fuels that power life in the Pacific Northwest."

Material Worth Reading. No one, your editor included, could possibly read all of the available literature regarding railroad safety and technology. Here are some recent highlights:

● **Clark-Reyna, Stephanie E., Sara E. Grineski, and Timothy W. Collins. "Residential Exposure to Air Toxics is Linked to Lower Grade Point Average Among School Children in El Paso, Texas, USA," 37 Population and Environment 319 (March 2016).** Toxic substances in the air can harm children's health and their school performance. Particulates from diesel engines, including those from trains, have been identified among these toxics. Testing with children in El Paso found a significant relationship between exposure to diesel toxics and lower school performance.

● **El-Hashemy, Mohammed Abd El-Samea, and Ahmed Abdel Nazeer. "Impact of Soil and Air Contaminants on the Composition of Rail-Head Surface-Rust," 63 Anti-Corrosion Methods and Materials 116 (2016).** The rust on rails in the Nile Delta of Egypt was studied, along with nearby soil and air contaminants. Researchers found that the materials which made up the contaminants could increase the corrosive effects of the rust, thereby speeding up the failure of the rails. Railroads must take these environmental factors into consideration when planning for repairs and replacements.

● **"Fluids and Structures: Study Results From Southwest Jiaotong University Broaden Understanding of Fluids and Structures (Investigation of Aerodynamic Effects on the High-Speed Train Exposed to Longitudinal and Lateral Wind Velocities)," Technology & Business Journal 245 (April 5, 2016).** This article reports on studies of the effects of wind from different directions on the stability of high-speed trains in China. Different design features of the trains affects how the trains respond.

● **Gunnoe, Chase. "2-Mile Trains Trending: Drag Freights," 76 Trains 22 (June 2016).** Railroads claim that distributed power allows them to operate heavier and longer trains more safely by distributing forces throughout the train. Operations engineers contradict that by saying the actual size and weight of a train is governed by maximum drawbar force, limited by the mechanical strength of the couplers and draff gear.

● **Inanloo, Bahareh, et al. "Cargo-Specific Accidental Release Impact Zones for Hazardous Materials: Risk and Consequence Comparison for Ammonia and Hydrogen Flouride," 36 Environment Systems & Decisions 20 (March 2016).** The impact of hazardous material releases during rail transport depends on the cargo, the location, time, weather conditions, and land use. Two common hazardous materials were studied and the impact zones were determined, depending on weather and exposure levels. The resulting methodology can be used to help first-responders during accidents.

Section 2: FELA Appellate Cases

Norfolk Southern Conductor Injured in Attempt to Manually Align Dreawbar — Intermediate Georgia Appeals Court Reverses Grant of Summary Judgment to Defense on FELA and FSAA Claims. On January 23, 2008, the plaintiff, a conductor, was working with an engineer and a brakeman, to prepare and couple train cars for transport. As the conductor, plaintiff oversaw the coupling and several train cars were coupled without incident. He then noticed a misaligned drawbar on a car that needed to be coupled. Like all Norfolk Southern conductors, plaintiff had been trained to straighten a misaligned drawbar manually using the "backup method," in which the employee plac[es] his back against [the drawbar] and use[es] his lower body to move it into place." The railroad instructed employees not to overexert themselves while aligning a drawbar. As plaintiff's supervisor testified: "If an employee cannot move a drawbar using reasonable effort, then the employee is required to seek assistance from a fellow employee."

Plaintiff described his initial effort to move the drawbar as follows: "I went over - same thing that we were taught to do - and got my back behind it. One arm on one side of the knuckle, the other one on the draw[bar]. And using your legs for leverage, pushed on it and pushed up and pushed at the same time with your back against it to try to get it moved. So you're trying to kind of lift up on it a little bit and push at the same time. And I did that at first, and it didn't move."

When the drawbar failed to move, plaintiff considered asking Julia Wise, the crew's brakeperson, to help him. But, he asserted: "[S]he's a female. And I'll say she didn't look like she was a person to be lifting a draw[bar] knuckle. . . . And so I went back and tried to exert a little more pressure to see if I could get it moved again." As he applied additional pressure, he felt pain in his lower back. Although plaintiff finished moving the drawbar, coupled the car, and completed his other tasks, he was in excruciating pain by the end of the day. He told his supervisor about the injury and completed an incident report. Following the incident report, a Norfolk Southern mechanic inspected the train car and coupler at issue.

The mechanic found that the coupler mechanism, including the drawbar, was in good condition with "no defects," and he was able to move the drawbar easily using the backup method.

Thereafter plaintiff filed suit against Norfolk Southern under FELA and the FSAA, alleging that the drawbar was defective and the workplace was unsafe, causing him injury and resulting damages. The trial court granted summary judgment to Norfolk Southern on both claims.

An intermediate appeals court reversed the judgment of the trial court on October 17. With respect to the FELA claim, the court noted that plaintiff had asserted that he was not given adequate tools to safely straighten the drawbar. It pointed out that he had presented evidence that alternative tools/methods for realigning a drawbar were available in the industry and at certain Norfolk Southern train yards, but not offered to him. Unlike the backup method, at least one of those alternatives allowed an employee to realign a drawbar without placing stress on the employee's back. Such evidence, the court found created a jury question regarding the reasonableness of the backup method - the procedure Norfolk Southern required plaintiff to use for drawbar realignment.

On the issue of foreseeability, the court noted that while Norfolk Southern argued below that it lacked knowledge of any defect in the drawbar, precluding a foreseeability finding, plaintiff did offer expert evidence that lubrication is necessary for a drawbar to function properly. Moreover, the mechanic who inspected the coupler after plaintiff's injury testified that the drawbar was not lubricated, explaining that "you're not supposed to lubricate [it]" and that, to his knowledge, Norfolk Southern had stopped lubricating coupler mechanisms. While the mechanic later amended this testimony, asserting that a photograph of the railcar shows that "there was lubricant on the drawbar," the court found that the record did not establish when the referenced photograph was taken. Even if the photograph revealed the coupler's condition at the relevant time, the court continued, it did not unequivocally demonstrate that the drawbar was lubricated. Rather than resolving the foreseeability issue, the court ruled, the mechanic's contradictory testimony raised jury questions regarding the existence of lubrication, whether the drawbar was able to perform as intended, and Norfolk Southern's knowledge of the alleged defect.

The court then noted the "extremely relaxed." standard of causation in FELA cases under which a claimant survives summary judgment by "producing evidence from which the jury could justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought," [citing *Norfolk Southern R. Co. v. Zeagler*, 748 S.E.2d 846 (2013)]. Despite this relaxed standard, Norfolk Southern arguesd that it was entitled to judgment as a matter of law because plaintiff proximately caused his own injuries in that he should have asked another crew member for help moving the drawbar when he was unable to realign it on his first attempt. According to the railroad, plaintiff violated Norfolk Southern's instructions regarding the backup method, thereby injuring himself. The court rejected this argument as it concluded that the evidence showed that Norfolk Southern instructed employees (1) to use only reasonable effort when aligning a drawbar, (2) not to overexert themselves, and (3) to seek assistance if more than reasonable effort was needed. Without dispute, the court continued, plaintiff did not request assistance after he initially failed to move the drawbar, choosing instead to try to realign it a second time. Even so, he testified that he used appropriate effort in this second attempt, force that he did not believe would result in injury. Construed favorably to plaintiff Norfolk Southern's instructions did not forbid a second attempt. They only prohibited plaintiff from overexerting himself and his testimony was that he used appropriate force in both his first and second realignment efforts. Given such testimony, the court ruled, material questions of fact existe as to his compliance with the backup method.

Turning to the FSAA claim, the court noted that railroad cars must be equipped with automatic couplers that allow cars to "couple on impact" and the statute "creates an absolute duty requiring not only that automatic couplers be present, but also that they actually perform," [pointing to *Norfolk & Western R. Co. v. Hiles*, 516 U.S. 400 (1996)] Here, plaintiff presented expert testimony that part of the coupler mechanism - specifically, the drawbar - did not perform as intended and was defective. Material questions of fact regarding defect remained for the jury the court concluded. **Bisnott v. Norfolk Southern Railway**, Court of Appeals of Georgia No. A16A1199.

Illinois Central Retiree Dies to Lung Cancer Brought on By Asbestos Exposure — Illinois Appeals Court Agrees That Statute of Limitation Question Was Properly Resolved By Jury — $2.9 Million Award Vacated Due to Lack of Proof of Loss By Children and Grandchildren. In September 2003, the plaintiff's decedent, a former Illinois Central Railroad employee, was diagnosed with lung cancer. He succumbed to the cancer in December of that same year. In December 2008, the administrator of his estate, filed a 13-count complaint seeking damages from various defendants because of decedent's lung cancer and resulting death. Count IV of that complaint sought damages under the FELA, alleging that decedent had worked for the railroad and he was exposed to asbestos as a result of

railroad negligence, which caused his lung cancer and resulting death. In February 2009, the railroad moved to dismiss count IV, arguing that the claim outside the three-year statute-of-limitations period provided by section 56 of FELA The trial court denied that motion.

In February 2015, a jury trial began on count IV. After the close of evidence, the trial court conducted a jury instruction conference, at which the railroad tendered several jury instructions on the following issues: (1) the applicable statute of limitations; and (2) damages. The court denied the instructions tendered by the defense on those issues and, instead, granted and gave the instructions tendered by plaintiff. In addition, the jury received the following special interrogatory: "Was the complaint filed within three years from the date on which the estate's administrator knew, or reasonably should have known both a death occurred and that the death was wrongfully caused?" The jury answered the interrogatory in the affirmative and returned a verdict for plaintiff and against the railroad, awarding a total of $3,452,500 in damages ($2,055,833 for "pecuniary loss" to decedent's family members because of the death and $1,396,667 for pain, suffering, and loss of life to decedent). The jury had been charged that,

> "As to defendant [Central], if you decide for [Brian], on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Barbara McGowan, [Brian], Doug McGowan, [Paul], Derek Duckett, Daniel Duckett, Dylan Duckett, Bruce McGowan, and Mathew Hooper, for the pecuniary loss proved by the evidence to have resulted to [Barbara], [Brian], [Doug], [Paul], [Derek], [Daniel], [Dylan], [Bruce], and Mathew Hooper from the death of [Paul]. 'Pecuniary loss' may include loss of money, benefits, goods, services.
>
> In determining pecuniary loss, you may consider what the evidence shows concerning the following:
>
> 1. What money, benefits, goods, and services the decedent customarily contributed in the past;
> 2. What money, benefits, goods, and services the decedent was likely to have contributed in the future;
> 3. The decedent's personal expenses;
> 4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his children had he lived;
> 5. His age;
> 6. His sex;
> 7. His health;
> 8. His habits of industry, sobriety, and thrift;
> 9. His occupational abilities.
>
> The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused [to] any survivor by the death of [Paul]."

The trial court later reduced the damages award to $2,940,583 in response to a railroad post-trial motion for setoff.

The railroad appealed, raising multiple arguments concerning both the statute of limitations and damages. With respect to te former, those arguments were in two general categories: (1) issues of law concerning the content of the special interrogatory and the jury instructions; and (2) issues of fact concerning whether the jury's interrogatory finding that Brian's claim complied with the statute of limitations was against the manifest weight of the evidence. According to the railroad, the special interrogatory the railroad asserted that it improperly described the law surrounding the FELA statute of limitations. Second, as to the facts, the railroad argued that, even if the interrogatory accurately reflected the statute-of-limitations law, the jury's "Yes" finding was against the manifest weight of the evidence. As to damages, the defense claimed that the court abused its discretion by instructing the jury that, should the jury find for plaintiff on the issue of liability, the jury must award damages for the pecuniary loss to the following people: decedent's wife, plaintiff (decedent's son), decedent's other living children at the time of trial, deceedent's grandchildren whose parents (decedent's daughters) had died by the time of trial. As a result, Central argues that the jury's original award of $2,055,833 in pecuniary damages (before the court reduced it for contributory negligence and setoff) was erroneously inflated and must be vacated.

On October 18 an intermediate appeals court found no error with respect to the trial court's disposition of the statute of limitations question, but vacated the damage award and remanded the case for a new damages hearing. As to the stat-

ute of limitations, the court pointed out that in its brief, the railroad failed to include any citations to the record to establish that the court ""appl[ied] an Illinois state law discovery rule." so that the brief was in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), which provides that the appellant's brief must include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Turning to the assertion that the jury's answer was against the weight of the evidence, the court ruled that sufficient evidence was presented to support the jury's answer to the interrogatory: decedent was diagnosed with lung cancer in September 2003, which killed him in December 2003. He had no duty to investigate the cause of his lung cancer while on his deathbed. Other testimony established that neither plaintiff nor decedent's widow knew that decedent worked around asbestos until 2008. Plaintiff filed the complaint in 2008. The jury's finding that plaintiff filed his claim "within three years from the date on which the estate's administrator knew, or reasonably should have known *** that the death was wrongfully caused" was therefore not unreasonable or arbitrary and, instead, was based on evidence.

On the question of damages, the court found that no evidence was presented to show that decedent's children or grandchildren suffered any pecuniary loss as a result of decedent's death. Because FELA provides for pecuniary damages only, none of the children or grandchildren were entitled to recover, the court found. As a result, the trial court's decision granting plaintiff's instruction No. 18 was an abuse of discretion because it clearly misled the jury and resulted in prejudice to the railroad. **Brian McGowan v. Illinois Central Railroad Co.,** Appellate Court of Illinois No. 4-15-0848.

Pennsylvania Appeals Court Says Trial Judge Erred in Granting Defense Motion to Transfer Case From Philadelphia County to Blair County. The plaintiff filed his FELA complaint in Philadelphia County on August 21, 2013, alleging he had worked for the defendants, or their corporate predecessors, from 1970 through 2005. During the course of that employment, plaintiff claimed that he was exposed to various toxic substances that caused bladder cancer. The defense moved to transfer venue to Blair County on March 20, 2015, based on *forum non conveniens* [pointing to Pa.R.C.P. 1006(d)(1) "For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought."]. The motion was supported by the affidavit of Rodney S. Tatum, currently employed as a claims manager for Norfolk Southern. In that capacity, he is responsible for monitoring legal claims involving both Norfolk Southern and Conrail. Tatum's affidavit stated that plaintiff resided in Blair County and that he worked for Penn Central from June 1970 to March 1976, for Conrail from April 1976 to May 1999, and thereafter for Norfolk Southern from June 1999 to April 2005. Tatum identified two former supervisors (including Jon Freas) and five former co-workers of plaintiff anticipated to testify at trial. Tatum's affidavit stated that all of those individuals resided in Blair County. Tatum also stated that the defendants would incur expenses and disruptions in their ongoing business operations if current employees were called to testify at trial in Philadelphia. Tatum did not identify any current employees by name, however. Finally, Tatum listed three medical providers that offered services to plaintiff in Blair County, noting that witnesses from these entities would be required to travel extensively in order to provide testimony at a trial in Philadelphia.

The defendants also submitted the affidavit of Jon Freas. Freas' affidavit stated that he worked as a supervisor at certain Blair County job sites from 1980 through the present. Freas and plaintiff worked at a Blair County job site at the same time. According to his deposition testimony, Freas retired shortly after executing his affidavit. He also testified that attending trial in Philadelphia for more than a day would be a hardship since he takes care of his elderly father, frequently babysits for his young granddaughter, and owns two dogs

Plaintiff filed an answer and brief in opposition of the defendants' motion supported by affidavits from five co-workers, who will be called to testify by [Appellant], indicating that they would not be vexed or oppressed by testifying in Philadelphia, identifying five [former] executives of the [d]efendants who would be subpoenaed as witnesses and called to testify, four living in the immediate Philadelphia area and the fifth in Atlanta, Georgia, all obviously finding Philadelphia a more convenient forum than Blair County, a four hour drive away. The trial court entered an order granting the defense motion on April 17, 2015 and thereafter denied plaintiff's motion for reconsideration on June 3, 2015. Plaintiff filed a timely notice of appeal on May 7, 2015 and the trial court filed an opinion in support of its ruling on July 13, 2015.

On appeal, plaintiff asserted that the trial court action was an error of law and a manifest abuse of discretion when the defendants [Penn Central, Conrail and Norfolk Southern] did not identify any witnesses who would be vexed or oppressed by testifying in Philadelphia rather than Blair County.

An appeals court vacated the judgment of the trial court and remanded the matter for further proceedings on September 30. It noted that the decision in *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997) describes the moving party's burden under Rule 1006(d)(1):

> "[T]he defendant may meet its burden of showing that the plaintiff's choice of forum is vexatious to him by establishing with facts on the record that the plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience to the plaintiff himself. See, [Gulf Oil v. Gilbert, 330 U.S. 501 (1947)]. Alternatively, the defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof, or to the ability to conduct a view of premises involved in the dispute. [T]he defendant must show more than that the chosen forum is merely inconvenient to him."

Moreover, the court continued, in order to resolve a forum non conveniens question, a trial court must examine the totality of circumstances [*citing Fessler v. Watchtower Bible and Tract Society of New York, Inc*., 131 A.3d 44, 49 (Pa. Super. 2015)]. Factors such as distance, burden of travel, time away from family or work, disruption to business operations, difficulty in obtaining witnesses, and access to proof are relevant to the court's inquiry [under *Lee v. Thrower*, 102 A.3d 1018, 1022-1023 (Pa. Super. 2014)] while no single factor is dispositive.

The court said that it was unable to agree with the trial court's conclusion that trial in Philadelphia would be oppressive or vexatious to te defendants. First, the court found, defendants had not identified any current employees who will be called to testify at trial in this matter. Thus, the defendants would not incur expenses associated with trial attendance by current employees and the defendants would not experience disruptions in their ongoing business operations because of a trial in Philadelphia. Second, according to the court, for the vast majority of retired, non-medical fact witnesses, there was no information of record showing that those individuals would experience a hardship or oppression in attending trial in Philadelphia. The court pointed out that plaintiff last worked for the defendants ten years ago and all of his identified former supervisors and co-workers had retired. Moreover, five former co-workers had submitted affidavits in opposition to the defendants' transfer motion and all five affiants (now retired), stated that traveling to Philadelphia for trial would not be vexatious, oppressive, burdensome, or inconvenient. The court also noted that in responding to the defendants' motion to transfer, plaintiff had listed five former executives of the defendant corporations whom he intended to subpoena for trial. Four of these individuals resided in the Philadelphia area and the other individual resided in Atlanta, Georgia. The proximity of those witnesses to the Philadelphia area and the accessibility of the area via multiple methods of transportation led the court to conclude that a trial in Philadelphia presented no hardship to former employees of the defendants. **Robert O. Finch v. American Premier Underwriters, Inc., et al**, Superior Court of Pennsylvania No. 1416 EDA 2015.

One CSX Trains Strikes Another From the Rear — Seventh U.S. Court of Affirms Defense Verdict. According to the plaintiff, he was driving a mile-long freight train comprised of two locomotives and 69 empty cars when he was ordered to halt the train briefly on a parallel track to enable a train with a higher priority to pass. Plaintiff duly halted his train. Unfortunately another train, which was also supposed to wait on the parallel track, failed to stop at a red stop signal and collided with plaintiff's train from behind. Because of the length of his train and the weight of its locomotive (212 tons), the collision caused the locomotive to lurch forward. That action, plaintiff claimed, resulted in a back injury because the locomotive "bounced." and he was somersaulted.

When the case proceeded to trial, plaintiff testified that when the lurch occurred he hat just risen from his seat in the locomotive cab and begun to walk down the three stairs to the locomotive's bathroom. The stairwell faced forward, so someone walking down the stairs would be facing the front of the train. Plaintiff claimsed that as he began to walk down, the lurch from the impact caused him to fall forward—almost indeed to somersault—down the stairs, causing a serious injury to his back which aggravated a condition that he had called "spondylitic spondylo-listhesis"—the forward slippage of a vertebra—which had been asymptomatic before the accident but afterward required surgery.

The railroad conceded that the accident was caused by the negligence of its employees—the crew of the second train who ran the red light. It disputed whether that negligence caused the injuries of which plaintiff complained. A mechanical engineer testifying for the railroad compared what a forward-facing video camera attached to the front of plaintiff's locomotive showed to what was shown by a video camera attached to another locomotive of the same make and model. That locomotive was placed in the same location on the tracks as the locomotive of plaintiff's train when it had begun its lurch, and was then moved slowly forward so that the video from its camera could be compared with the video from the camera attached to the front of plaintiff's locomotive. The comparison indicated that the lurch forward could not have

exceeded seven or eight inches, or lasted more than a third of a second—numbers that the engineer testified indicated that the train had accelerated as a result of the collision at an average of 13.5 feet per second squared. A biomechanical engineer testified for the railroad that the forward lurch of the locomotive should have pushed plaintiff ackward rather than forward, since he was facing the front of the train at the time of the accident. The engineer further testified that if the lurch had pushed plaintiff backward without causing him to hit the back wall of the locomotive cab, it would have been too weak to injure him.

The railroad also adduced testimony that the train conductor sitting next to plaintiff in the locomotive cab did not see him fall when the locomotive lurched. There was also testimony that for days after the accident plaintiff told no one that he had fallen, even though he spent a good deal of that time with coworkers, supervisors, and medical personnel. Plaintiff had no bruises or any other visible injuries from the fall, even though he testified that at the end of the somersault his back and neck were against a bulkhead door and his feet were over his head..

After the jury returned a verdict in favor of the railroad, plaintiff appealed. He argued that the biomechanical engineer had ignored the "bounce and shudder" and assumed he had been positioned upright at the time of the accident, while he claims that he was learning forward, that the studies cited by the engineer of how people who are standing on a platform react when the platform moves did not apply to someone who was walking down stairs, and that the engineer did not cite studies on the aggravation of spondylitic spondylolisthesis specifically. Plaintiff also complained that the engineer compared the two videos by eye rather than by mathematical calculations, did not measure the height of the camera on the comparison locomotive, and did not account for the "bounce and shudder" movement of the train

A panel of the U.S. Court of Appeals for the Seventh Circuit affirmed the judgment on October 27. With respect to the alleged errors with respect to expert testimony, the panel agreed that the district court correctly ruled that plaintiff's objections could be explored on cross-examination, and the jury was not required to believe plaintiff's testimony. The court also found that the claim that the locomotive "bounced" vertically was implausible given the locomotive's weight and the slightness of the lurch, and while plaintiff pointed to testimony from the other conductor in the cab at the time of the accident, that the locomotive "bounced ... back and forth," that was not the same as bouncing up and down.

While the court found that there was no question that plaintiff had serious back pain, it also noted that the railroad presented evidence that the pain preexisted the forward lurch of his train. Indeed plaintiff began complaining of back pain in 2007, four and a half years before the collision, and the pain had worsened over time. An MRI on October 5, 2009 revealed a herniated disc and a bulging disc, along with the spondylitic spondylolisthesis. On the recommendation of an orthopedic surgeon he was given a "nerve root block" (a strong anesthetic) a week later and in the following months received epidural steroid injections from a pain management specialist. A few weeks after the nerve root block he complained of pain and obtained prescriptions for morphine and Vicodin—opioid pain medications—and had continued to receive and fill prescriptions for the drugs up until the time of the accident, including five times in the five months immediately preceding it. Moreover, the court continued, plaintiff's pre-accident doctor conceded in a deposition that the spondylitic spondylolisthesis, which plaintiff claimed became symptomatic only after the accident, could have been responsible for some of his pre-accident symptoms. **Chance T. Kelham v. CSX Transportation, Inc.**, U.S. Court of Appeals for the Seventh Circuit No. 16-1544.

Section 3: FELA Verdicts and Settlements

Illinois Central Conductor Steps into Path of Moving Train — Confidential Settlement Follows $4.9 Million Tennessee Verdict. The plaintiff was working as a conductor in defendants Woodstock Yard in Memphis in the early morning of September 5, 2012, when he engaged in a 'shove' movement. As he exited locomotive, and looked both ways before crossing an adjoining track, plaintiff failed to notice an oncoming train that was proceeding at 40 m.p.h. The train struck plaintiff, causing severe injuries: below-the-knee amputation of the left leg and multiple arm fractures. He was permanently disabled from railroad work. His complaint faulted the railroad for failing to provide a reasonably safe place in which to work. Specifically, the claimed that the oncoming train was unscheduled so that he had no reason to suspect that it was coming and that his vision was obscured by trees. The defense denied liability, asserting that no reasonable conductor would have walked into the path on a oncoming train. The defense also argued that plaintiff's reaction time was affected by the presence of Ambien in his system. An initial trial was declared a mistrial after plaintiff's relative (a local fire chief) attempted to contact a juror. Retrial spanned two weeks. The jury allocated fault 50% to each party and assessed damages of $4,036,048: $1 million for past suffering; $1.7 million for future medical expense; $1,859,666 for future lost earnings; and $376,382 for past lost earnings. After entry of a

$2.468,024 million judgment, the parties settled for a confidential sum. **Plaintiff'‘s Expert:** George Gavailia, train safety. **Defendant's Expert:** Foster Peterson, train safety, Marietta, GA; Maryland Dulaney, toxicology, Tallahassee, FL. **Shawn Hall v. Illinois Central Railroad**, Shelby Co. (TN) Circuit Court No. CT-00530-12. F. Tucker Burge, Birmingham, AL; Stephen R. Leffler, Memphis, TN for plaintiff. S. Cmaille Reifers, Thomas R. Peters, Brooks E. Kostakis of Boyle, Brasher, Memphis, TN for defendant.

Amtrak Worker Suffers Torn Rotator Cuff Throwing Mattress onto Upper Bunk — Chicago Jury Returns $1,132,700 Gross Verdict. On July 18, 2012, the plaintiff, a fifty-eight year-old train attendant, suffered a torn rotator cuff when she threw a mattress onto an upper bunk in the crew car. The mattress had previously been removed from the car and placed into storage so that the bunk could be used as a luggage shelf (notwithstanding an express prohibition of the practice). Plaintiff did not report the injury at the time. Instead, she saw her primary care physician three days later. She did not tell him that the injury was work related. She finally reported the injury two months after the incident. Two surgical attempts at repair were undertaken. Ultimately, should replacement was required. Plaintiff was not able to return to duty. Instead, she went to work as a nursing home receptionist. The defense took the position that the injury did not take place on the job. The defense also argued that the tear was due to a long-standing should condition. After a week long trial, the jury found in favor of plaintiff for $1,132,700, less thirty percent comparative negligence. **Plaintiff's Experts:** Mark Veenstra, M.D., orthopedics; Anthony Romeo, M.D., orthopedics. **Defendant's Expert:** David Brown, M.D., family practice. **Kathleen Domalgalski v. National Railroad Passenger Corp.**, Cook Co. (IL) Circuit Court No. 13L-13744. Peter F. Higgins, Lipkin & Higgins, Chicago, IL for plaintiff. Susan K. Laing, Christopher T. Scolire, of Anderson, Rasor, Chicago, IL for defendant.

Supervisors Admit That Area Where Fall Took Place Needed Grading — Conductor's Knee Injury Case Settles for $400,000. During March 2013, plaintiff, a forty-one year-old woman, worked as a conductor during the day shift. In the course of a monthly "7Cs" meeting prior to March 21, plaintiff complained of conditions of the roadway and the working surface of the railroad yard: numerous potholes and depressions. Weather conditions were icy and cold on March 21 and both the roadway and the yard were covered with several inches of new snow. At about 12:45 p.m. plaintiff was threw the South #1 switch and then walked towards her engine, some 400-500 feet away at the West #5 switch. As she did so, she slipped and fell on an ice-covered pothole that was concealed by a layer of snow. At the time of the incident, plaintiff was wearing railroad-issued safety equipment, including steel-toe work boots and ice cleats. Although plaintiff's engineer did not witness the fall, he did observe her getting up and then limping. He inquired if she was all right. When plaintiff reported for work the following day, she had a significant limp and severe pain. She formally reported the fall. At a hospital, plaintiff was diagnosed with a contusion of the knee. MRI revealed osteoarthritis of the patella femoral joint consistent with a direct blow to the kneecap. Thereafter plaintiff began to complaint of low back pain due to an altered gait. Lumbar MRI undertaken in August 2013 showed asymmetrical disc bulge at L4-5, compressing the L4 nerve root. The doctor attributed this to the fall. Chondroplsty of the patella and debridement of the retro-patella fat pad was undertaken.

In her suit plaintiff claimed that the railroad failed to furnish her with a reasonably safe place in which to work. During depositions, several supervisors admitted that the area in question was in need of grading and presented an unsafe place to work. Two other employees testified that the ice cleats issued by the railroad failed to prevent slipping and falling in icy conditions. The case settled for $400,000. **Anonymous Conductor v. Anonymous Railroad**, U.S. District Court E.D. Michigan No. _____. Dennis M. O'Bryan for plaintiff.

Metra Electrician Blames Knee Injury on Ballast — Chicago Jury Returns Defense Verdict. Plaintiff's work at defendant's 18th Street Yard required him to walk on ballast along the tracks in order to access various train cars. He claimed that he twisted his left knee when he stepped on a large rock that was located on smaller pieces of ballast on September 27, 2011. Plaintiff reported the incident and then finished his shift, although his knee was severely swollen. A torn ACL and torn medial meniscus were subsequently diagnosed. Partial menisectomy was undertaken and thirty percent of the meniscus was removed. Fluid drainage was later required. In addition plaintiff had eight viscosupplementation injections. His suit charged that te railroad failed to provide him with a reasonably safe place in which to worki. The defense denied liability, claiming that the railroad made reasonable decisions about the type of walkway appropriate for use and that one large rock on top of walkway ballast did not create an unsafe place to work. At the conclusion of week long trial the jury returned a defense verdict. **Plaintiff's Expert:** Mark R. Nikkel, D.O., orthopedics. **Defendant's Expert:** G. Klaud Miller, M.D., orthopedics. **John Frencher, Jr., v. Northeast Illinois Re-**

gional Commuter Railroad Corp., Cook Co. (IL) Circuit Court No. 2013-L-011607. Stephen G. Goins, Metra Law Dept., for defendant.

Section 4: Railroad Liability Litigation

FRSA — BNSF Track Foreman Blames Firing on Filing of Injury Report — $425,000 Verdict Falls as Seventh U.S. Circuit Court of Appeals Says District Court Erred in Finding, as a Matter of Law, That Plaintiff Would Not Have Been Fired for Taking Ties Without Permission. As a track foreman, plaintiff supervisied crews of 50 to 100 employees responsible for track maintenance. On September 9, 2010, he was supervising a crew assigned to remove and reinstall crossing planks on a segment of the railroad's line. As is well known, crossing planks are pieces of timber installed at railroad crossings to enable cars and trucks to drive over the tracks. They are fastened to the track bed by means of large wooden screws called 'lags' that are removed with a hydraulic tool before a crossing plank is lifted (the purpose of lifting the crossing plank being to allow maintenance work on the track). On the day in question the crew had difficulty removing one of the planks in the usual way, and with the plaintiff's approval a member of the crew named Zielke used a front-end loader to remove the plank. The procedure caused the plank to fly loose just as the plaintiff was walking into the center of the track, and to strike one of his legs. Though at first he thought he'd just bruised his leg, several days later he went to his doctor and learned that he'd fractured his tibia. The plaintiff had an x-ray and was given a walking boot. That was the extent of his medical treatment. After first lying to two of his coworkers that he'd been injured at home, on advice of a union official and a lawyer affiliated with the union he told his supervisor, Veitz, that he'd been injured by the plank and was going to fill out an injury report. Veitz told him to submit the report to someone in management, which he did. The company accepted the report and paid his medical bills.

In accordance with BNSFa policy of investigating all reported injuries by staging a reenactment of the accident in order to learn how it happened. Veitz staged the reenactment and concluded that the plaintiff had been careless in walking into the crossing in which the front-end loader was busy trying to remove the plank, thus placing himself in danger of being hit by the plank as it came off the ground. A week after the reenactment a member of the crew that the plaintiff had been supervising told Veitz that he thought the plaintiff might have been injured ten days before the front-end loader fiasco—while removing railroad ties from railroad property.

Veitz then requested a preliminary investigation of the theft allegation, which concluded that theft charges were warranted. Pursuant to the railroad's collective bargaining agreement with the plaintiff's union, the company conducted a formal investigation presided over by railroad managers who had een trained to serve as hearing officers and had not themselves been involved in the alleged mis-conduct of the employee being investigated. [Actually there were two investigations: one of the plaintiff's taking the railroad ties without permission and the other of his carelessness with regard to the front-end loader—carelessness that had resulted in the medical expenses that the railroad had paid and did not seek reimbursement for from him.] At the hearing plaintiff argued that Veitz had given him permission to take the ties, which he planned to give to a friend who had a farm. Veitz testified that he'd never given such permission. It would have been especially irresponsible for Veitz to have given such permission because the railroad ties were soaked in creosote, and as another manager at BNSF testified without contradiction, "we do not give or sell creosote products to employees or the general public and there's reasons for it. That's bold letters. We don't do it. " [As the U.S. Environmental Protection Agency explains, "products containing creosote as the active ingredient are used to protect wood against termites, fungi, mites and other pests that can degrade or threaten the integrity of wood products. These treated wood products are used in outdoor settings such as in railroad ties and utility poles. ... [But] creosote is not approved to treat wood for residential use, including landscaping timbers or garden borders," because materials coated with creosote can be hazardous. EPA, "Creosote," www.epa.gov/ingredients-used-pesticide-products/creosote (visited Oct. 28, 2016)].

For his carelessness (which had cost the company the medical expenses), the company decided that a 30-day suspension would be adequate punishment. That decision quickly became moot because the company also decided that he should be discharged because of the theft, consistent with "a zero tolerance policy for theft" and indeed "in all cases" the "sanction [for theft] ... is dismissal ... regardless of [the employee's] length of service" or "the monetary value of whatever was stolen.""

Both the Railway Labor Act, 45 U.S.C. § 153(i), and the applicable collective bargaining agreement with the plaintiff's union, entitled him to appeal the 30-day suspension, plus his discharge from the railroad's employment, to the National Railroad Adjustment Board (NRAB). The plaintiff did appeal, and the union supported him, but the Board denied both appeals, remarking that the railroad had proved that the plaintiff had "failed to be alert and attentive when he did not

safely remove a crossing board" and that the plaintiff had "failed to prove that ... Veitz gave him permission to remove the ties.

Plaintiff the filed a complaint with OSHA, but OSHA rejected his complaint on the same grounds on which the adjustment board had rejected it. The plaintiff appealed OSHA's finding, which was preliminary. When OSHA did not issue a final administrative decision within 210 days after his initial complaint, plaintiff filed suit under the FRSA, accusing the railroad of having retaliated against him for his having notified the railroad that he has suffered a work-related personal injury, incurring medical expenses that the railroad might be required to cover.

The case proceeded to trial. The district court concluded that plaintiff had established, as a matter of law, that the injury report was a "contributing factor" in regard to the termination. The judge remarked that the plaintiff's "injury report initiated the events that led to his discipline, and was therefore a contributing factor to the adverse actions that he suffered." Consequently, jury questions were narrowed to reflect that view. After deliberating, the jury returned a verdict in favor of plaintiff for $425,724.64. The railroad appealed after its requests for post-trial relief were denied.

A panel of the U.S. Court of Appeals reversed the judgment and ordered dismissal on October 31. It rejected the district court's conclusion that plaintiff established show that his injury report was a "contributing factor" in his termination. According to court, the district judge failed to distinguish between causation and proximate causation, The former term embraces causes that have no legal significance, the court found, i.e, had plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that did not mean, the court continued, that his being born or his being employed by the railroad were legally cognizable causes of his being fired. In contrast, proximate causation creates legal liability. There are different definitions of "proximate cause," the court quickly noted. In *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630, 2638 (2011), the Supreme Court rejected a definition that required that the defendant's negligence be "the sole, efficient [or immediate] producing cause" of the injury in order to be actionable. That would be a pertinent consideration in this case were the plaintiff arguing that he was injured by the **negligence** of his employer. That, the court found, was not what he was arguing. Plaintiff "caused himself to be injured by being careless, and to be fired for stealing railroad property—causal acts that the law deems to have legal consequences if the conduct in question—in this case carelessness and theft—is lawfully forbidden, as it was by a combination of the railroad's announced employment policies and the terms of its collective bargaining agreement with the union that represents employees such as the plaintiff." the court wrote.

The Federal Railroad Safety Act does not punish railroads for disciplining (including firing) employees unless the discipline is retaliatory, the court noted. There was no evidence of that in this case: no evidence of the usual forms of employment discrimination, certainly, and no evidence that the suspension and discharge of the plaintiff were motivated by animus, the court concluded. While it was is true that a workman who was standing near the plaintiff when the plank soared was not disciplined for carelessness, that worker was npt injured at all, which allowed the company to infer that he was npt careless, or at least not sufficiently careless to warrant an investigation. As for the argument in the plaintiff's brief that it was "common for employees to take used railroad ties" without being disciplined for doing so, the record contained no instances of BNSF's declining to discipline an employee who was found to have taken tes without permission. Finally, the court noted, plaintiff did not argue that BNSF believed that he was permitted to take the railroad ties, in which event the stated reason for his being fired would have been pretextual.

With respect to the district court's grant of partial summary judgment to plaintiff, the court found that the district judge believed this narrowed trial to two issues. The first was whether the injury report had been prepared and submitted by the plaintiff in good faith, and the second whether the railroad would have fired him had he not filed it. On both those issues the jury sided with the plaintiff. The court found that the jury rightly sided with plaintiff on the first issue inasmuch as there was no indication that the injury report was not submitted in good faith: plaintiff had after all been injured, and the report described the injury accurately.

As for the second issue, whether the railroad would have terminated the plaintiff had he not made an injury report, the court found the jury's answer to be incorrect because there was no evidence that the railroad's decision to fire plaintiff was related to his having made the report. The railroad provided unrebutted evidence that it believed that the plaintiff had stolen the ties, the plaintiff pointed to no evidence that BNSF would fail to fire an employee whom it discovered to have stolen from the company and there was no evidence that BNSF disbelieved Veitz's account, the court concluded. "BNSF thus proved its affirmative defense to the charge that it fired the plaintiff because he filed (with his superior's agreement) an injury report citing negligible medical expenses. Consistent with language in its rules of employment quoted earlier, the company appears to have a firm policy of firing employees discovered to have stolen company property. What it does not have, so far as appears, is a policy of singling out for discipline an employee who submits an injury

report. There is no basis in the record for supposing that had the plaintiff not submitted an injury report but BNSF had nonetheless discovered the stolen railroad property, he wouldn't have been fired." **Michael Koziara v. BNSF Railway Co.**, U.S. Court of Appeals for the Seventh Circuit No. 16-1577.

Third-Party Liability — Seat Failure Causes Injury to Soo Line Engineer — Railroad Filed Third-Party Complaint Against Manufacturer After Defending FELA Complaint for Three Years — Illinois Appeals Court Affirms Dismissal of Third Party Action. The plaintiff, a locomotive engineer for the defendant, Soo Line Railroad Company d/b/a Canadian Pacific Railway, was injured on June 20, 2011, when the locomotive seat he was in broke, causing him to fall and sustain various back and neck injuries. He filed suit on April 30, 2012, seeking to recover for those injuries, advancing claims under both FELA and the Locomotive Inspection Act.. Protracted discovery ensued. On September 13, 2013, the railroad company amended its answer and admitted liability under the relevant portion of the LIA. As a result the parties proceeded with discovery as to damages alone. Subsequently, the trial court entered a trial date of June 23, 2015. On March 13, 2015, the railroad company filed a third-party complaint against Knoedler Manufacturing,(amended on May 14, 2015). As a result, the trial date in the LIA action was vacated upon the railroad company's motion.

In the amended third-party complaint against Knoedler, the railroad sought to lessen its damages by alleging: (1) contribution (count I); (2) breach of contract (count II); (3) breach of express warranties (count III); (4) breach of implied warranties (count IV); and (5) breach of implied indemnification (count V). According to the railroad company's third-party complaint, sometime in the 1990s, prior to the incident involving Tooke, the railroad company had entered into a contract with GE under which GE agreed to manufacture railroad locomotives for it, including seats allegedly made and installed by Knoedler. The railroad company alleged that prior to entering into this contract with GE for new locomotives it analyzed a number of potential locomotive seats, including seats manufactured by Knoedler. At this time, Knoedler provided the railroad company with a variety of verbal and written information, and a quote for the purchase of the seats. Accordingly, as part of its subsequently executed contract with GE, the railroad company directed GE to install the Knoedler seats in its new locomotives.

Soo Line further alleged that "upon information and belief" there was a contract between GE and Knoedler for the purchase of those seats (including specifically the seat which malfunctioned and injured plaintiff) under which the railroad company was an intended beneficiary. With respect to this contract, the railroad company alleged that "upon information and belief" it "included GE's Terms and Conditions," obligating Knoedler to, inter alia: (1) warrant that the seats would be of merchantable quality, free from all defects in design and fit for the particular purpose for which they were intended; (2) warrant that Knoedler would comply with all laws applicable to the seats, including the LIA; (3) warrant that Knoedler would comply with good industry practices, including the exercise of that degree of skill, diligence, prudence and foresight which could be reasonably expected form a competent seller engaged in the same type of manufacture (and which would include compliance with the LIA); and (4) agree that Knoedler would be liable, as a result of any breach of contract, warranty or tort, for any special, consequential, incidental, indirect or exemplary damages relating to the goods, which would include any breach of duty under the LIA.

The railroad then alleged that Knoedler designed, built and installed the specific seat that injured plaintiff, in violation of the LIA, the express purchase contract terms it entered into with GE to build and provide the seats, and the implied warranties and indemnification created by its action of supplying those seats to GE. In support of that contention, the railroad company did not attach a copy of the agreement between Knoedler and GE. Instead, it attached a generic GE Terms and Conditions form for third-party vendors that its attorney found on the internet and that it termed an "exemplar contract." In addition, the railroad company attached an affidavit signed by its attorney, stating that "as a third-party beneficiary to the contract" the railroad company did "not have access" to the GE purchase orders or the contract between GE and Knoedler that would have referenced the specific GE Terms and Conditions with Knoedler. However, according to the attorney's affidavit, "upon information and belief" the Terms and Conditions of the attached generic GE third-party vendor contract were "substantially similar to, or identical" to the ones contained in the actual contract between GE and Knoedler

The trial court granted Knoedler's motion to dismiss the third-party complaint, holding that the breach of contract, express and implied warranty and indemnification actions were all premised on the existence of a contract between Knoedler and the railroad company's locomotive supplier, General Electric (hereinafter GE) of which the railroad company was the intended beneficiary, but that the railroad company had failed to attach this contract to its pleading, as required by section 2-606 of the Illinois Code of Civil Procedure [735 ILCS 5/2-606 (West 2012)]. With respect to the contribution action, the trial court held that the claim was barred by the applicable two year statute of limitations for such

actions set forth in section 13-204(b) of the Code [735 ILCS 5/13-204(b) (West 2012))]. The court further held that the affidavit by the railroad company's attorney did not excuse the failure to attach the contract, because the attorney lacked personal knowledge pertaining to the authenticity and relevance of the internet document, as well as the contract allegedly executed by GE and Knoedler. As the court explained, the attorney "had nothing to do with the drafting of [that] contract." The trial court also rejected the railroad company's argument that the contract was inaccessible to it without the benefit of written discovery. As the court explained, "It was [the railroad company's] own inaction for years in failing to bring the third-party complaint that resulted in the lack of a contract." The court noted that the railroad company had the ability to obtain the document during the pendency of discovery in defending its action against Tooke, but had failed to do so. The court further noted that the railroad company should have been placed on notice of the existence of any alleged contract between GE and Knoedler, so as to be able to obtain it by the nearly identical action it had filed against Knoedler in the Western District of Pennsylvania as early as December 2011, and which had recently been decided by the Third Circuit in *Delaware & Hudson Railway Co. v. Knoedler Manufactures,* Inc., 781 F. 3d 656 (3rd Cir. 2015) cert. denied 136 S. Ct. 54 (2015)). Finally, the court rejected the railroad company's argument of third party beneficiary status as speculative and unsupported by the record. With respect to the railroad company's contribution claim, the court held that the claim was barred by the two-year statute of limitations in section 13-204(b) of the Code [735 ILCS 5/13-204(b) (West 2012)].

The railroad appealed, arguing that the trial court erred in dismissing its complaint: (1) by misinterpreting section 2-606 of the Illinois Code of Civil Procedure and refusing to permit it to proceed with discovery so as to subpoena the necessary written instrument upon which a majority of its counts were premised; and (2) by finding that the contribution claim was time-barred under section 13-204(b) of the Code.

An intermediate appeals court affirmed the judgment on September 28. With respect to the breach of contract claim, the court concluded that the case was similar to the decision in *Cahill v. Eastern Bemefot Systems Inc*., 236 Ill. App. 3d 517 (1992) where the plaintiff filed a complaint against his employer, the medical insurance company and the insurance administrator used by the employer, when they failed to provide insurance coverage for the hospitalization of his son. The plaintiff alleged that he was entitled to such coverage pursuant to a contract between the employer and the insurance company under which he alleged he was a direct beneficiary. The plaintiff, however, failed to attach the applicable contract to his complaint, and instead attached a document titled 'Special Benefit Addendum.' In affirming the dismissal of the plaintiff's complaint, the *Cahill* court held that the plaintiff's failure to attach the contract between his employer and the insurance company was fatal to his contract claim. Just as in *Cahill*, in the present case, the attached generalized internet document, and the recited portions of that document in the railroad company's complaint, with no direct connection to Knoedler, to the railroad company, to railroads or locomotive seats in general, were insufficient to establish Knoedler and GE's intent with respect to the plaintiff. Accordingly, the requirements of section 2-606 simply had not been met, the court ruled.

With respect to the contribution claim, the court rejected Soo Line's assertion that application of the "discovery rule" in Section 13-214(b) was warranted. According to the court, the undisputed facts established that the railroad company had information about its potential third party claim against Knoedler, from the day that plaintiff's complaint was filed against it on April 30, 2012, and served on May 1, 2012. The extensive discovery that occurred for three years in that underlying action certainly provided the railroad company with "enough information" to be obligated to "inquire further." "What is more," the court continued, "the decision in *Delaware & Hudson,* affirmatively establishe[d] that the railroad company should reasonably have been aware of potential acts or omissions by Knoedler so as to be placed on notice of any potential contribution claims. In **Delaware & Hudson** the railroad company initiated an identical contribution law suit against Knoedler in the Western District of Pennsylvania, as early as December 2011, as a result of injuries sustained by four of its employees when the locomotive seats they were sitting in broke. .... That action was entirely based on the premise that the railroad company had directed GE to install seats purchased from Knoedler, and that Knoedler had 'agreed to provide seats of suitable quality to prevent seat failures for use in the railroad company's locomotives.' The action *in Delaware & Hudson* was filed five months before plaintiff filed the cause of action in this case (on April 30, 2012), and five months after plaintiff was injured as a result of the seat failure. As such, there is absolutely no basis for the railroad company to contend that it did not have sufficient information of potential acts or omissions by Knoedler, at the very least by May 1, 2012, to file a third-party contribution claim against Knoedler in the cause at bar." **Troy Tooke v. Soo Line Railroad Company d/b/a Canadian Pacific Railway v. Knodeler Manufacturing, Inc.**, Appellate Court of Illinois No. 1-15-3514.

FELA Reporter and Railroad Liability Monitor

Verdicts and Settlements Report Form

Please use this form, or a photocopy of it, for reporting verdicts and settlements. If you prefer to dictate a letter, please use the form as a guide.

PLAINTIFFS: DEFENDANTS:

COURT (include name of court, e.g., circuit, superior, U.S. District, city and county, and the complete docket number):

PLAINTIFFS' ATTORNEYS: DEFENDANTS' ATTORNEYS:

FACTS (Please describe in detail. Explain how proper operating standards were breached. Explain defenses. Use extra pages, if necessary.):

PLAINTIFFS' EXPERTS:

DEFENDANT'S EXPERTS:

OUTCOME OF SUIT:

Settlement: Amount _____ Date _____
Verdict: Amount _____ Date _____
Defendant's Verdict: Comment

You are encouraged to include interesting information about the case such as novel evidentiary or procedural problems, settlement negotiations, and trial techniques.

Submitted by _____ Phone (_____)_____

Return this form to: FELA Reporter • P.O. Box 308 • Selma, AL 36702-0308