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HIGHLIGHTS

Section 1: Current Developments

- NTSB Says Improperly Used Train Approach Warning Led to LIRR Worker's Death, p. 3
- BNSF Seeks Relief From 49 CFR 215.13 Pre-Departure Inspection Requirement, p. 3
- FRA Says New Jersey Transit Is One of Four Railroads at Risk of Failing to Meet PTC Deadline, p. 4
- FRA Extends Temporary Waiver of Safety Regulations, p. 5
- FRA Approves Union Pacific Request to Suspend Track Safety Regulations in Order to Test Autonomous Track Geometry Measurement Systems, p. 5
- Amtrak Seeks Relief Regarding Smoke Emission Requirements in 49 CFR Part 23, p. 5
- *Warren Cowles Grade Crossing Safety Act* Would Add \$250 Million for Grade Crossing Safety Projects, p. 6
- PHMSA Says Federal Law Preempts Washington State's Crude-By-Rail Measure, p. 6

Section 2: FELA Appellate Cases

- Alabama Great Southern Conductor Trainee Crushed Between Two Cars During Coupling Operation — Divided Fifth U.S. Circuit Court of Appeals Panel Affirms Grant of Summary Judgment to Railroad, p. 10
- Transfer of Sheet Piling Results in Injury to CSX Bridge Mechanic — Alabama Supreme Court Affirms Grant of Summary Judgment to Defense, p. 12
- Who Owns Premises Near Trash Compactot Bay of Loading Dock 1 at Grand Central Station? — New York Trial Court Quashes Plaintiff's Notice to Admit on That Issue, p. 17

Section 3: FELA Verdicts and Settlements

- Springfield Terminal Railway Conductor Blames Disabling Fall on Slippery Substance — Massachusetts Jury Returns \$676,689.77 Verdict, p. 18

Highlights continue on page 3

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Section 4: Railroad Liability

- FRSA — BNSF Track Inspector Fired After Refusing to Falsify Report and Then Calling FRA — Colorado Federal Court Awards \$539,010 in Attorney Fees, p. 19

Section 1: Current Developments

NTSB Says Improperly Used Train Approach Warning Led to LIRR Worker's Death. On May 14 the National Transportation Safety Board issued the final report for its investigation of the June, 10, 2017, Queens Village, New York, railroad accident in which a railroad roadway worker was struck and killed by a train. The accident occurred when a Long Island Rail Road train, on track three in multiple track territory, approached a five-member crew of roadway workers in the Queens Interlocking. The foreman and two roadway workers were conducting a walking inspection and making repairs on track one. They were accompanied by the watchman. The fifth roadway worker was clear of the tracks. The watchman noticed the train approaching on track three, sounded a handheld horn, called out to the other workers and raised a paddle as a visual signal to the LIRR's locomotive engineer to sound the train's horn. When the engineer sounded the horn, three of the roadway workers remained on track one but the foreman stepped into the path of the traveling train on track three and was struck and killed. The train was traveling about 78 mph when the locomotive engineer applied the emergency brakes just before impact.

The NTSB noted in its report the train approach warning method was particularly dangerous for the crew working on the Queens Village Interlocking. Several factors, such as the multiple tracks at the interlocking, trains operating at high speeds in both directions, and the crew having limited areas to clear trains, combined with the additional train traffic due to the Belmont Stakes, increased the risk of the work crew being struck by a train. The watchmen on duty at the time should have given the workers timely warning of approaching trains and all workers should have cleared to the tracks before the train's arrival, the NTSB concluded. "Using the train approach warning method, LIRR management did not properly assess the hazards the roadway workers were exposed to while conducting their tasks," said NTSB Chairman Robert L. Sumwalt. "If adopted, the recommendations highlighted in this report, can help to mitigate the risks associated with this work and provide better protection to workers across all railroads."

Contributing to the accident was the railroad's and union's allowance of overtime work schedules without properly considering and mitigating workers' risk of fatigue. The NTSB noted the watchmen and foreman had consecutive overtime shifts that disrupted their opportunities for restorative sleep during the 48 hours prior to the accident.

The NTSB issued five safety recommendations with two recommendations each issued to the Federal Railroad Administration and the Metropolitan Transportation Authority. One recommendation was issued to the International Association of Sheet Metal, Air, Rail and Transportation Workers.

[A copy of the report is available upon request]

BNSF Seeks Relief From 49 CFR 215.13 Pre-Departure Inspection Requirement. On April 17, 2020, BNSF Railway Company petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 215, Railroad Freight Car Safety Standards, and part 232, Brake System Safety Standards For Freight And Other Non-Passenger Trains And Equipment; End-Of-Train Devices. [85 Fed.Reg. 31850]. FRA assigned the petition Docket Number FRA-2020-0033. Specifically, BNSF requests relief from 49 CFR 215.13, Pre-departure inspection, which requires an inspection when combining two separate consists including one or more cars and one or more locomotives that have been properly inspected and tested in compliance with all applicable regulations, meaning that both consists have had a Class I brake test (§232.205), Class IA brake test (§232.207), or have been designated as extended haul trains and are compliant with all requirements of §232.213. BNSF said that the requested relief will allow combining two existing and operating trains without additional inspections, besides a Class III brake test. It further states that the relief will allow subsequent separation of two trains without additional inspections, besides a Class III brake test, provided that a record of the original consist remains intact.

In support of its petition, BNSF stated that trains to be combined will include both trains operating with head-end locomotives and trains operating with locomotives equipped with LOCOTROL or Radio Controlled Distributed Power Technology (DP), which was developed by GE Transportation Systems. DP technology allows locomotives to be placed strategically in a train and controlled remotely by a leading locomotive at the head of the train. Once trains are combined,

BNSF will operate the combined train as a DP train (if it is longer than 10,000 feet) until the train is separated or reaches its destination. The combined train will be allowed one pick-up and/or set-out with the inclusion of the separating event, and the air slips for both trains that were combined will be maintained from the point of combining through the duration of the trip.

BNSF explained that an additional inspection when combining trains is redundant because each train to be combined has had a brake test and inspection and a §215.13 pre-departure inspection. Further, BNSF states that the combined train will continue to receive designated inspection(s) as required or pre-designated prior to the combining event and that no cars will exceed the brake test mileage for which they were originally inspected.

BNSF also said that the requested relief will reduce exposure to potential hazards faced by train crews or mechanical inspectors when walking both sides of a pre-tested train being combined. It also contends that the relief will encourage greater utilization of trains under DP configuration across its network, which may improve engineers' ability to control in train forces and improves overall braking characteristics by having multiple locations within a train with cut-in brake valves. This allows brake pipe reductions to occur simultaneously at multiple points within a train promoting smoother brake applications and keeping in train forces at a minimum. These benefits are also gained with an emergency brake application which propagates more rapidly when occurring simultaneously from multiple points within the train.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- Website: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Fax: 202-493-2251.
- Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12-140, Washington, DC 20590.
- Hand Delivery: 1200 New Jersey Ave. SE, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m.

FRA Says New Jersey Transit Is One of Four Railroads at Risk of Failing to Meet PTC Deadline. During the week of May 18 the Federal Railroad Administration released a first-quarter 2020 status report on railroads' progress in implementing positive train control (PTC) systems as required by Congress. As of March 31, 98 percent of the nearly 58,000 route miles subject to the federal mandate were either in revenue service demonstration or in revenue service. About 63 percent of all commuter railroads' cumulative required route miles were PTC-governed as of March 31, a nearly 9 percent increase since the previous quarter. In addition, interoperability has been achieved in nearly 49 percent of the 229 applicable, host-tenant railroad relationships as of March 31, a 10 percent increase since Q4 2019.

However, the agency noted, four host railroads are currently at risk of not fully implementing a PTC system on all required main lines by December 31: New Jersey Transit, TEXRail, Metra and New Mexico Rail Runner Express. To evaluate the risk of noncompliance, the FRA considered the percentage of mandated route miles currently governed by a PTC system; unresolved technical issues; the percentage of a host railroad's tenant railroads that have achieved required interoperability; and a host railroad's expected date to submit its PTC safety plan to FRA, as required to obtain PTC system certification.

The FRA continues to direct additional staff resources to railroads at risk of not fully implementing an FRA-certified and interoperable PTC system on their required main lines by the deadline, FRA officials said. In addition, the FRA is encouraging state departments of transportation and governors to help any at-risk commuter railroad within their states to ensure they have sufficient technical resources and support to meet the end-of-year deadline. "I'm pleased with the growing number of railroads that have reached critical milestones, and continue to encourage all of them to help each other overcome any remaining challenges from their respective lessons learned," FRA Administrator Ronald Batory said.

FRA Extends Temporary Waiver of Safety Regulations. Late last month the Federal Railroad Administration extended for 60 days temporary waivers of certain safety regulations for freight railroads, according to letters the agency sent to the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA). The FRA also sent a similar letter to the American Public Transportation Association (APTA) addressed to commuter railroads on May 15. The waivers grant the associations' requests on behalf of their members to renew the waivers so that the railroads can address issues related to the COVID-19 pandemic. On March 25, the FRA initially granted the temporary "emergency relief, with certain exceptions, to railroads facing constraints related to the public health emergency. The waivers were initially set to expire beginning May 24, May 29 and June 9. The waivers and their extensions are opposed by two of the nation's largest rail unions, the SMART Transportation Division (SMART-TD) and the Brotherhood of Locomotive Engineers and Trainmen (BLET). In letters to the AAR and ASLRRA.

FRA Approves Union Pacific Request to Suspend Track Safety Regulations in Order to Test Autonomous Track Geometry Measurement Systems. On March 23, 2020, UP petitioned FRA under Title 49 Code of Federal Regulations (CFR) Section 211.51 to suspend certain requirements of FRA's track safety regulations to conduct a program to test new track inspection technologies (i.e., autonomous track geometry measurement systems) and new operational approaches to track inspections. UP also submitted a written Test Program providing a description of the proposed tests and the geographic scope of the testing territory. The Test Program specified that the tests will be conducted on approximately 1,700 miles of main line track in 5 subdivisions of UP's SPSC and Sunset routes. According to UP, the Test Program is designed to test autonomous track geometry measurement systems and decreased Start Printed Page 25507 manual visual inspections as an alternative to FRA's inspection frequency requirements. UP indicates that it will continue to use other inspection technologies during the Test Program, including: (1) Vehicle Track Interaction monitoring systems; (2) ultrasonic rail inspection systems; and (3) optical joint bar inspection systems. The Test Program will be carried out in two separate phases over the course of 12 months.

After review and analysis of UP's petition for a Test Program, subject to certain conditions designed to ensure safety, FRA approved UP's Test Program and suspended the requirements of 49 CFR 213.233(c) as necessary to carry out the Test Program. A copy of FRA's letter approving UP's Test Program and granting the requested limited temporary suspension of 49 CFR 213.233(c), as well as a copy of the Test Program, is available in docket number FRA-2020-0031 at www.regulations.gov. [85 Fed.Reg. 25506] As explained more fully in its approval letter, FRA found that the temporary, limited suspension of 49 CFR 213.233(c) is necessary to conduct the approved Test Program, which is specifically designed to evaluate the effectiveness of new automated track inspection technologies and operational methods. Furthermore, FRA also finds that the scope and application of the granted suspension of 49 CFR 213.233(c) as applied to the Test Program are limited to that necessary to conduct the Test Program. Finally, FRA's approval letter outlines the conditions of the Test Program that will ensure standards sufficient to assure safety.

Amtrak Seeks Relief Regarding Smoke Emission Requirements in 49 CFR Part 238. On April 30, 2020, National Railroad Passenger Corporation (Amtrak) petitioned the Federal Railroad Administration to renew a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 238, Passenger Equipment Safety Standards. [85 Fed.Reg. 28137] FRA assigned the petition Docket Number FRA-2009-0104. Specifically, Amtrak seeks to renew the relief previously granted regarding flammability and smoke emission requirements for passenger car and locomotive cab materials as outlined in Appendix B of 49 CFR 238.103. Amtrak stated that its current fleet of 205 operating diesel locomotives is comprised of the Genesis P42-8 model manufactured by General Electric (GE). These locomotives were manufactured between 1996 and 2002, when the manufacturing and the material selection process were based on the 49 CFR part 229 regulations. However, due to the inclusion of all locomotives on passenger trains under the 49 CFR part 238 regulations, some materials in the human-occupied areas have since become non-compliant under the latest smoke and flame requirements (49 CFR 238.103).

Amtrak and GE have collectively found alternate manufactures and materials to eliminate the non-compliant materials from the locomotive cab. However, due to the small fleet of passenger locomotives compared with freight locomotives, the cost, and the manufacturing feasibility of these materials, Amtrak has been unable to obtain alternates for the components in question. Therefore, Amtrak seeks a continued waiver for use of these materials in the locomotive cab. Several of these materials need to be replenished in the locomotive cabs; however, due to the non-compliance, Start Printed Page 28138 Amtrak has not been able to order these items from vendors. Amtrak listed 13 items in its petition and

provided descriptions and analyses about these items as support. Since the original waiver was granted in 2010, Amtrak has not had any safety-related incidents because of the grandfathered materials used in the locomotive cabs.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

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Communications received by June 26, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Warren Cowles Grade Crossing Safety Act Would Add \$250 Million for Grade Crossing Safety Projects. In the latter half of May U.S. Sen. Edward Markey (D-Mass.) introduced legislation that would add \$250 million annually to an existing rail-safety program starting in fiscal-year 2021. The *Warren Cowles Grade Crossing Safety Act* would modify the federal Consolidated Rail Infrastructure and Safety Improvements Program to increase funding available each year for grade-crossing safety improvement projects. The bill is named after Warren Cowles, a town worker who was struck and killed by an Amtrak train in 2017 while he was plowing snow at the Tina Lane and Birnie Road grade crossing in Longmeadow, Massachusetts. The increased funding will prevent unnecessary deaths by allowing for the installation of grade separations, crossing signals, gates, lights and other barriers or cautionary signage at grade crossings nationwide. Thirty-three percent of rail-related fatalities occur at grade crossings, according to Markey's office. Cowles' death was the fifth fatality and seventh collision at the Longmeadow crossing since 1975, Markey said. Safety improvements were completed there last year after Markey helped secure a joint funding arrangement between Amtrak and Massachusetts that allowed for installation of a new gate and warning lights.

PHMSA Says Federal Law Preempts Washington State's Crude-By-Rail Measure. On May 11 the U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a ruling that preempts Washington State's crude-by-rail law, allowing for the transport of crude by rail nationwide. PHMSA announced federal hazardous material transportation law preempts Washington state's vapor pressure requirement for transportation of crude by rail, agency officials said in a press release. A study conducted by Sandia National Laboratories concluded that imposing vapor press limits would not reduce the risks of transporting crude oil and other flammable liquids by rail, PHMSA officials said. On April 28, the U.S. Department of Energy submitted its report on the Sandia lab's "*Crude Oil Characterization Research Study*" to Congress. U.S. Sens. John Hoeven and Kevin Cramer and U.S. Rep. Kelly Armstrong, all Republicans representing North Dakota, previously made the case to PHMSA and U.S. Transportation Secretary Elaine Chao for preempting Washington's law. They said the law would effectively block Pacific Northwest refineries as a destination for North Dakota Bakken crude. They also wrote to Washington Gov. Jay Inslee asking him to veto the law, claiming it lacked a scientific basis or solid legal foundation.

At the same time, PHMSA announced it has withdrawn its January 2017 advanced notice of proposed rulemaking (ANPRM) regarding vapor pressure for unrefined petroleum products and other flammable liquids. The agency's decision also stemmed from the Sandia study, as well as the review of public comments about the role PHMSA preempts Washington state's crude-by-rail law. "In its decision to withdraw the ANPRM, PHMSA is no longer considering vapor pressure limits for the transport of crude oil by rail," agency officials said.

Trump Nominates Feinberg, Koos for Amtrak Board. On May 18 President Donald Trump nominated Sarah Feinberg, interim president of MTA New York City Transit (NYCT), and Chris Koos, mayor of Normal, Illinois, to serve on Amtrak’s board. Feinberg has filled the role of NYCT’s interim president since February, following the resignation of Andy Byford. She is also a member of the Metropolitan Transportation Authority’s board. Feinberg served as administrator of the Federal Railroad Administration from 2015 to 2017 during President Barack Obama’s second term. Koos was recommended for the position by U.S. Sen. Dick Durbin (D-Ill.). “Mayor Koos understands the importance of passenger rail to communities in Illinois and across the country,” Durbin said. “He will be an important voice for Illinois and the Midwest in support of growing and protecting Amtrak’s national network, and I look forward to supporting his nomination.” U.S. Sen. Tammy Duckworth (D-Ill.) and former U.S. Transportation Secretary Ray LaHood also expressed support for Koos’ nomination. LaHood also is a former congressman from Illinois whose district included Normal.

The president picks eight out of Amtrak’s 10 board members. They are subject to U.S. Senate confirmation.

U.S. Rep. Moulton Calls for National High-Speed Rail Network. During the week of May 18 U.S. Rep. Seth Moulton (D-Mass.) rolled out a national plan that calls for spending \$205 billion to build a national high-speed rail network. Construction of a high-speed rail network would help get the economy back on track, create competition in transportation and give U.S. residents cleaner, faster and more reliable commutes, Moulton said. His plan calls for building a national system by:

- investing \$41 billion in high-speed and higher-speed rail through grants administered by the Federal Railroad Administration over five years, with incentives of \$38 billion or more in nonfederal funding;
- expanding metrics used by states and cities for transportation planning to include wider economic benefits for more informed investments;
- creating funding flexibility and transit-oriented development incentives for nonfederal partners, including state and local transportation agencies and private partners; and
- developing performance-based safety regulations and standards for high-speed rail to reduce project costs and expedite development.

If passed by Congress, the plan would create more than 2.6 million direct jobs over five years and make high-speed rail a competitive option against road and air travel — two modes that Congress heavily subsidizes, he said. Moulton previously worked for the private-sector effort underway in Texas to build a bullet train route between Dallas and Houston

Amtrak Requests Another \$1.5 billion in FY2021. On May 25 Amtrak submitted a letter to Congress seeking an additional \$1.475 billion in supplemental funding in fiscal-year 2021 to help the railroad operate minimum service levels and continue capital investments. The funds also would support Amtrak’s 17 state partners on the national network and nine commuter and state partners on the Northeast Corridor. “As the severity and duration of this pandemic and its economic fallout become clearer, we are seeking supplemental funding for the next fiscal year,” Amtrak President and Chief Executive Officer Bill Flynn said in the letter. To help offset the impact of revenue losses during the pandemic, Amtrak has reduced operating costs by about \$500 million, including temporarily reducing train capacity across the system to match demand, restructuring its workforce and controlling discretionary spending, Amtrak officials wrote.

When Amtrak submitted its annual grant request to Congress in February, the railroad was on track to have its first break-even year in the company’s history. The railroad’s request of \$2.04 billion for the NEC and national network for FY2021 was based on projected needs before the pandemic hit the United States. Since then, Amtrak officials have determined the railroad needs the additional discretionary funds. “Amtrak now projects that a full-year 50 reduction in systemwide revenue is a prudent estimate for FY2021 compared to our original projections for the year,” Flynn wrote. “While generating estimates of future demand is incredibly challenging, given the unprecedented nature of our current circumstances and the unknowable trajectory of the pandemic, the data available to us support this assumption.” Amtrak has seen a dramatic decline in demand for service since the pandemic began, and is expecting ridership to return to about 50 percent, or just over 16 million riders, in FY2021, Flynn wrote. “Today, many of our routes are struggling to reach 10 percent of the ridership levels we had only months ago,” the letter stated.

Be Careful What You Ask For, You Might Just Get It: Texas Central Praises Court Ruling Declaring It a Railroad. On May 6 Texas Central officials hailed a Texas Appeals Court ruling yesterday that determined the bullet-train

company is both a railroad and an interurban electric railway. The company is developing a high-speed rail line between Houston and Dallas. Yesterday's court decision stems from a legal challenge from landowners along the route in Leon County who argued that Texas Central was not a railroad and therefore did not have the rights associated with a railroad, including eminent domain and access to property for surveyors. The court's ruling is rooted in state law that allows survey access and use of eminent domain by railroads, pipelines, electrical lines and other industries that provide for the public good, said Texas Central Chief Executive Officer Carlos Aguilar. "This decision confirms our status as an operating railroad and allows us to continue moving forward with our permitting process and all of our other design, engineering and land acquisition efforts," Aguilar said. In 2019, the company completed a portion of the land surveys required by federal agencies conducting the environmental review of the proposed project, Texas Central officials said. The Federal Railroad Administration is scheduled to issue the final environmental impact statement on the project later this month.

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:

- **Dong, K., et al. "Non-Linear Soil Behaviour on High Speed Rail Lines," 112 Computers and Geotechnics 302 (August 2019).** paper describes non-linear subgrade behavior on high speed railroad track dynamics. The methodology for analyzing this behavior is described. Different subgrade characteristics and loads have varying interactions with various kinds of subgrades. The results are significant for railroad track-earthwork designers because they often use 70% of the traditional linear critical velocity as a design limit. This work shows that designs close to that limit may still be in risk of failure.

- **El-Ghandour, Al, and C.D. Foster. "Coupled Finite Element and Multibody Systems Dynamics Modelling for the Investigation of the Bridge Approach Problem," 233 Proceedings of the Institution of Mechanical Engineers: Journal of Rail and Rapid Transit, Part F: 1097 (November 2019).** The finite element method has been used for more than three decades to model parts of a railroad system, such as rails, sleepers and substructure, and to investigate problems with rail mechanics. The multibody system dynamics has been used to model the cars and wheels. The authors propose a system which integrates both models to study the bridge problem – a sudden change in stiffness under the rails at the entry and exit to a bridge. High levels of stress can cause damage over time. Using their system, the authors investigate the effects of different ways to mitigate the stress.

- **Esmaeili, Mortemmadza, and Mohammad Siahkouhi. "Tire-Derived Aggregate Layer Performance in Railway Bridges as a Novel Impact Absorber: Numerical and Field Study," 26 Structural Control and Health Monitoring (Online) 1 (October 2019).** A short concrete slab bridge was used to test the effects of tire-derived aggregate (TDA) layer as a novel impact absorber. Effects of a train crossing the bridge were collected with and without the TDA layer, between the deck slab and ballast layer. A comprehensive study of the effects of the TDA layer was conducted to study the impact of train wheel load, moving speed, and TDA layer thickness.

- **Islam, Nazrul, et al. "Air Quality and PM₁₀-Associated Poly-Aromatic Hydrocarbons Around the Railway Traffic Area: Statistical and Air Mass Trajectory Approaches," 41 Environmental Geochemistry and Health 2039 (October 2019).** Diesel railroad engines' exhaust emissions cause pollution which can be harmful to passengers and workers. Air quality and pollution concentrations were evaluated around a railroad station in India. Advanced analysis, such as X-ray diffraction, were used to analyze air samples, to verify not only the level of pollution, but also to identify the source of the pollution. In the past, models were used to simulate the origins of the pollution.

- **Jiang, Lizhong, et al. "The Shear Pin Strength of Friction Pendulum Bearings (FPB) in Simply Supported Railway Bridges," 17 Bulletin of Earthquake Engineering 6109 (November 2019).** Friction pendulum bearings (FPB) are used in railway bridges in China to help prevent damage in earthquakes. The shear pins of the FPB must be strong enough to withstand the forces under normal train service, but weak enough to break under the impact of a large earthquake. This paper attempts to provide guidance of what that shear strength must be. Models were developed, with different heights of piers and under different amounts of stress.

- **Kajjuka, Precious Lorraine, et al. "Model-Based Controller Design for a Lift-and-Drop Railway Track Switch Actuator," 24 IEEE ASME Transactions on Mechatronics 2008 (2019).** Track switches are essential to railroad operations, but they are also the largest single cause of failure on the railroad network. New initiatives are developing improved switches. This article profiles a new type of switch, with two different designs. Both were found to work satisfactorily, and included redundant elements essential to prevent failures.

- **Lanwer, Jan-Paul, et al. "Bond Behavior of Micro Steel Fibers Embedded in Ultra-High Performance Concrete Subjected to Monotonic and Cyclic Loading," 20 Structural Concrete 1243 (August 2019).** Ultra-high

performance fiber-reinforced concrete (UHPFRC) has excellent mechanical properties and is often used for railroad tracks. However, it is susceptible to oscillations due to cyclic loading from passing trains. This article reports on results of testing to identify fatigue in the UHPFRC, and on an improved nonlinear bond model.

● **Lin, Sheng, Feng Ding, and Xiaojun Sun.** “**Traction Power-Supply System Risk Assessment for High-Speed Railways Considering Train Timetable Effects,**” **68 IEEE Transactions on Reliability 810 (2019).** A traction power-supply system (TPSS) is the only power source for electric locomotives. Its operation is of critical importance to reliable, high-speed operation. This article presents a method of evaluating risk factors in TPSSs. Indices for failure risk, along with risks from power-quality problems are presented. The resulting risk assessment method can identify high-risk operation, avoiding the potential for severe accidents and informing maintenance and operational plans.

● **Moghadam, Matin Jalali, and Kiarash Ashtari.** “**Numerical Analysis of Railways on Soft Soil Under Various Train Speeds,**” **Transportation Infrastructure Geotechnolgy 1 (September 2019)** Instability and settlement of railroads on soft soils are a great risk for accidents, loss of life, and financial losses. One cause of risk is vibrations caused by high-speed trains. The authors tested the impact of a reinforcement layer under the track at various speeds. The reinforcement helped stabilize the track, especially at critical speeds, when the vibration forces were greatest.

● **Mu, Meijun, et al.** “**A Novel Locomotive Auxiliary Converter Control Strategy with Harmonic Suppression for Avoiding Resonance Voltage Accidents in an Electrified Railway,**” **14 IEEE Transactions on Electrical and Electronic Engineering 1532 (October 2019).** Recently, AC-DC-AC electric locomotives have been widely added to electrified railroads, deteriorating the current quality of network. Filters in the railways are essential, but their volume and weight makes them difficult to fit in locomotives. The authors use a locomotive auxiliary converter to control the current and prevent accidents. Their idea is supported by simulation and lab experiments.

● **Salehi, S.M., G.H. Farrahi, and S. Sohrabpour.** “**Dynamic Behavior of Worn Wheels in a Track Containing Several Sharp Curves Based on Field Data Measurements and Simulation,**” **26 Scientia Iranica. Transaction B, Mechanical Engineering 2854 (2019).** A study of wheel and rail wear phenomenon can provide optimal use of wheel profile, resulting in cost efficiency, dynamic stability, travel comfort, and safety to prevent derailment, especially in curves. The authors modeled how the amount of wheel wear can impact the behavior of rail cars in curves. They also developed an appropriate range of wheel flange thickness at which the wheel should be repaired or replaced.

● **Sardana, Sahil, et al.** “**Rock Slope Stability Along Road Cut of Kulikawn to Saikhamakawn of Aizawl, Mizoram, India,**” **99 Natural Hazards 753 (November 2019).** Landslides are natural hazards which threaten railroads and roads. Natural forces include earthquakes and heavy rainfall, while unnatural factors include human activities such as building and maintenance of roads, railroads, and bridges. The authors conducted stability analysis of rock slopes in India, to identify sections liable to landslide. Their methodology can be used by managers of railroads and roads to take steps to improve the safety of their lines.

● **Stern, Jurgen, and Markus Schuch.** “**1850 to 2019 – Experience with Retaining Structures at the OBB Infrastruktur AG,**” **12 Geomechanics and Tunnelling 534 (October 2019).** Years of experience with restraining walls on railroad lines have shown that stone or mass concrete gravity walls have the least expense for maintenance. Walls built up to 160 years ago require only removal of plant growth. On the other hand, anchored retaining walls of concrete require more maintenance, such as regular inspection and extensive repairs to the anchor heads. Costs of sustainable and safe railroad operations need to include infrastructure lifecycle costs.

● **Sun, Qideng, Buddhima Indraratna, and Ngoc Trung Ngo.** “**Effect of Increase in Load and Frequency on the Resilience of Railway Ballast,**” **69 Geotechnique 833 (September 2019).** Results of testing on ballast to determine the effects of increased loading and frequency of loading are presented. The resilience of the ballast is influenced by the frequency of loading. Both hardening and softening were observed at different frequencies. A correlation between stress and resilience is presented to aid planners in maintaining railroads.

● **Tejashree, Turla, Xiang Liu, and Zhipeng Zhang.** “**Analysis of Freight Train Collision Risk in the United States,**” **233 Proceedings of the Institution of Mechanical Engineers: Journal of Rail and Rapid Transit, Part F 817 (September 2019).** Rail accidents can have severe consequences, including economic, infrastructure damage, and environmental impacts. Most research in the United States has focused on train derailments and highway-rail grade crossing accidents. Little work has been done on train collisions. The authors studied collisions and found the most common reasons were failures to obey signals, speeding, and violations of operating rules. This analysis can provide information and decision support to implement risk mitigation strategies by railroads.

Section 2: FELA Appellate Cases

Alabama Great Southern Conductor Trainee Crushed Between Two Cars During Coupling Operation — Divided Fifth U.S. Circuit Court of Appeals Panel Affirms Grant of Summary Judgment to Railroad. On August 12, 2015, the plaintiff's decedent, a conductor trainee with 45 days experience, was assigned to an Alabama Great Southern train crew consisting of a conductor, M.A. Sillimon; a brakeman, J.D. Henderson; and an engineer, A.C. Clearman. As a part of that crew, decedent rode the train to a facility in Petal, Mississippi, in order to couple empty rail cars that would then be taken to a different facility. He rode on one side of the train to the Petal facility. Upon arrival, he safely crossed over the tracks on foot to the other side of the train, using a safety procedure called "3-Step Protection" for crossing between standing rail cars. As a wholly owned subsidiary of the Norfolk Southern Railway Company, Alabama Great Southern uses the same Operating Rules and Safety & General Conduct Rules as Norfolk Southern. Operating Rule 22 prohibits an employee from going between standing equipment on the tracks for any reason unless 3-Step Protection is first established. Going between moving equipment on the tracks is never permitted. To establish 3-Step Protection, an employee must first orally request passage between cars from the engineer. If the request is made via radio, the employee must provide his or her occupation, job symbol, and engine number. Once such a request is made, the second step is for the engineer to take the following action: "apply the independent brake"; next, "[p]lace the reverser lever in neutral position"; and finally, "[o]pen the generator field switch." Third, before the employee is permitted to go between equipment on the tracks, the engineer "must acknowledge to each requesting employee that '3-Step Protection' is established."

After decedent successfully established 3-Step Protection and crossed the tracks to the other side of the train, the train crew began to couple 11 rail cars. At the start, each rail car was approximately ten feet from the next one. The crew's train coupled the first uncoupled car waiting on the switch track, and the train was brought to a safety stop to ensure that coupling was successful. After the first coupling, Henderson was positioned at the north end of the line of cars and Sillimon was at the south end. Decedent was about one-half of a car length south of Henderson, who was supervising him that night. Henderson, while facing north toward the train coupled to the engine and away from decedent radioed the crew, "Everybody let me get big half to a bunch," meaning that the engineer should begin a "rolling coupling" of the remaining ten rail cars by slowly shoving the train south at a speed never exceeding two miles per hour, impacting and coupling each car, one right after the other, without stopping. As the train approached, Henderson walked backward while facing north toward the train to give "full attention on the engine coming down," then started to turn south to observe the couplings. At this time, for reasons unknown and without 3-Step Protection, decedent went between two rail cars during the rolling coupling. Henderson testified that as he was turning to the south, he noticed a "flash" and told Clearman to cease coupling by radioing, "That will do." Henderson could not see decedent so he began walking south and found decedent fatally injured, caught in the coupling between two rail cars, the second of three couplings made during the shove.

As co-administrators of decedent's estate, Shaquere Myleshia Gray and Hannah Lasha Hoze filed suit against the Alabama Great Southern Railroad Company. They claimed the railroad was negligent in failing to train, instruct, and supervise decedent, that the railroad also was negligent in failing to provide a safe place to work for decedent, and that it was foreseeable that decedent would go between rail cars, which was the cause of his death.

In granting a defense motion for summary judgment, the district court concluded that decedent's failure to establish 3-Step Protection before going between rail cars was the sole cause of his death, that his going between moving rail cars was unforeseeable, and that the plaintiffs failed to produce evidence of any negligent acts by the railroad attributable to causing decedent's death. Plaintiffs appealed, arguing that decedent's failure to establish 3-Step Protection was not the sole cause of his death because the railroad's negligence must also have had a role in the accident. They contended that there was "overwhelming evidence" of at least some negligence by the railroad. Among their arguments was the assertion that Henderson negligently supervised decedent.

A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the action of the district court in a May 28 opinion. According to the majority, there was evidence that the railroad used a supervisor/trainee system for on-the-job training. On the night of the accident, Henderson was decedent's supervisor. Although Henderson was working as a brakeman that night, he was a certified conductor, making it appropriate for him to supervise a conductor trainee. Plaintiffs claimed that Henderson was negligent because "a mentor should know where his mentee is at all times as he is in charge of ensuring the mentee's safety." In plaintiffs' view, at the time of the incident "Henderson had his back to [decedent], did not know where he was, and did not know what [decedent] was doing at any point while the shoving move-

ment was occurring.” They also argued that Henderson violated the railroad’s procedure by failing “to observe the coupling that was occurring when [decedent] was injured.”

In the majority’s view, however, there was no record evidence of any policy requiring that a supervisor never stop looking at a conductor-trainee notwithstanding plaintiffs’ claim that such evidence in Sillimon’s deposition testimony that a trainee should always be “within eyesight” of the supervisor. “We do not interpret that testimony as supporting that the supervisor cannot as necessary look a different direction than the trainee during performance of the job. Instead, the supervisor must always be in a position to ‘keep an eye’ on the trainee, meaning no obstruction to the view, even though at times the supervisor must concentrate on other tasks,” the majority wrote. The majority noted that plaintiffs agreed that Henderson was required to observe the couplings, which means he would have had to take his eyes off decedent during the first coupling, apparently just before decedent went between the second set of rail cars.

The majority then turned to plaintiffs’ contention contend that the railroad negligently trained decedent because he “was never trained on the procedures of a rolling couple and the only evidence in the record suggests that he had never heard of such a move.” The plaintiffs also argued the failure of decedent’s crew members to adequately job brief this procedure . . . played a central role in bringing about this injury.” Thus, according to the plaintiffs, “[t]here is no evidence in the record to show that [decedent] had any reason to believe that the cars would continue to move or that he would be in danger if he needed to get between cars.”

According to the majority, the only evidence of a source for decedent’s knowledge was not identified by the railroad until oral argument: a portion of Sillimon’s deposition. Sillimon was asked about the coupling that had been completed by this same crew at other locations earlier on the night of decedent’s. He mentioned the first location but did not explicitly describe any rolling coupling there. The railroad’s counsel then asked Sillimon to describe what happened at the second location, which still was not the job site where decedent was fatally injured that same day:

Q: All right. And how many cars did y’all work that night [at the second location]? Do you know?

A: It was 20 — it was 20 in, 20 out.

Q. Okay. And y’all have to spot all 20 of them?

A. That’s correct.

Q. And how do y’all go about spotting these cars? How do y’all handle that?

A. You spot each car up one at a time.

Q. Okay. And take me through what you would do as the conductor, what the brakeman would do, and what the engineer would do in spotting these cars.

A. As far as the brakeman and the conductor, it can go either or.

Q. Okay.

A. I can walk down and do a C-100 [which he would later describe as checking each car prior to starting the coupling] and check everything, make sure the hoses are — make sure there’s no one in the tracks, make sure the hoses are down, make sure any chocks or anything that we couple up to — so it won’t derail anything. Or the brakeman can walk down and do a C-100. And after we do a C-100, I’ll be in position at the bottom. The brakeman be in position at the top. He will make the first coupling, and the rest of the couplings be run-in coupling.

Q. And you refer to that as a running couple?

A. That’s correct.

Q. And what — what is a running couple?

A. When you couple up to the — you got to make sure you coupled up to the first car. Once you coupled up to the first car, you bunch to the next car. Then you bunch and then you bunch until you get to the last two cars. You stop the move. You couple up to that second to the last car, and then you couple up to the next car.

In summary, the majority found, Sillimon started by saying it was necessary to ‘spot all 20’ cars at the earlier location. He then was asked how the crew would accomplish that spotting. Certainly, some of his lengthy answer could be taken as a general description of how the tasks are done, particularly in stating that either the brakeman or the conductor could perform certain of the functions. “The key to us, though, is that Sillimon testified that a series of rolling couplings had to be made at the job site preceding the one where [decedent] was fatally injured.” The majority continued, “Perhaps there were shortcomings in initial training or otherwise in making [decedent] aware of the dangers of a rolling coupling,

specifically that the train keeps moving as the closely spaced but not yet coupled cars are sequentially linked. Regardless of that possibility, Sillimon testified that [decendent] had just experienced that sort of coupling.”

The majority then addressed plaintiffs contention that “[i]t is wholly foreseeable that an employee will get between cars during the course of his work, especially when as here he is expecting the movement to stop for some period of time.” That argument, the majority found, was based on *Chicago Great W. R.R. v. Schendel*, 267 U.S. 287, 289 (1925) in which the decedent stepped between standing rail cars to detach a damaged car.) There, the rail cars sat on a downward grade and gravity caused the rail car to slide into the decedent, fatally injuring him. I

The Court held that although the decedent was partially negligent, the railroad was liable because there was evidence that the damaged rail car did not meet the statutory requirements to protect him, and that damage was the reason he had stepped between the cars. Unlike *Schendel*, the majority wrote, decedent was killed during continuous coupling of cars, a process he had just witnessed elsewhere, and during a time in which he knew not to cross between cars without following the described protocols. “In some circumstances it of course is foreseeable that railroad employees will get between cars. In the circumstances here, stepping between cars was prohibited and the reasons for the prohibition would have been clear,” the majority concluded.

A vigorous defense took the position that a reasonable jury could infer that the railroad’s negligence played a part, even the slightest, in producing the injury or death for which damages are sought, such that the case should proceed to a jury trial. The dissent expressed the view that while decedent might have been negligent in assuming only a single car was to be coupled and in moving between the railcars without requesting 3-Step Protection, it is well-established in FELA law that the railroad can still be liable if its negligence contributed in part to the danger even when the employee’s negligence was the more direct cause of the injury [citing *CSX Transportation, Inc., v. McBride*, 564 U.S. 685, (2011) (rejecting the argument that “the railroad’s part . . . was too indirect” a cause when compared to the employee’s negligence)]. “When executing a single car coupling that [decedent] was taught in the classroom, the engineer would stop after each coupling, and employees would go between each of the newly coupled cars to turn on the air and check the connection for the cars. A reasonable jury could conclude, then, that due to his lack of supervision, training, and experience, [decedent] went between the cars because he did not understand that the crew was executing a rolling coupling and that the impacts and movements of the rail cars would not stop after a single car had been coupled,” the dissent found. **Shaquere Myleshia Gray, et al v. Alabama Great Southern Railroad Co.**, U.S. Court of Appeals for the Fifth Circuit No. 17-60817.

Transfer of Sheet Piling Results in Injury to CSX Bridge Mechanic — Alabama Supreme Court Affirms Grant of Summary Judgment to Defense. The plaintiff went to work for CSX in August 2000. On April 17, 2017, he was assigned to a crew making repairs to a section of railroad track that had washed out near the Chef Menteur Bridge outside New Orleans. The crew’s specific job involved using a crane to load bundles of sheet piling — narrow 25-foot-long interlocking pieces of steel — onto a flatbed railcar, transporting that loaded railcar to the area where the railroad track had washed out, and then using a crane to unload the bundles. An outside contractor then installed the sheet piling by driving it into the ground alongside the base of the railbed, thus shielding the railbed from further erosion caused by the adjacent water. Plaintiff and his crew loaded and unloaded railcars throughout the day on April 17, and again on April 18, without incident.

In accordance with CSX policy, each work day began with a job briefing and safety meeting at which the crew members discussed issues that might arise in connection with the tasks they were performing that day. On April 19, plaintiff’s crew began their day with such a meeting, which was conducted by telephone with their supervisor Brian May, who was working in Evergreen. The crew then proceeded to load, transport, and unload two more railcars of sheet piling. After loading and transporting a third railcar, they began unloading it in the same manner they had unloaded the previous railcars that day and over the two previous days. One crew member, operating a crane mounted to the end of the railcar, maneuvered the boom of the crane over a bundle of sheet piling while Mohr and another bridge mechanic, William Laufhutte, stood on the railcar at opposite ends of the bundle and attached crane cables to the chains that bundled several pieces of sheet piling together. Laufhutte also attached a ‘tag line’ to his end of the bundle, which was used to control the load once it was lifted so that it could be guided to its destination without uncontrolled rotation. CSX’s safety rules required employees working with suspended loads to use tag lines when moving loads that were to be lifted higher than knee level, but no rule dictated the number of tag lines that must be used.

After plaintiff and Laufhutte finished attaching the crane cables and tag line to a bundle, they backed away and a signal was given to the crane operator to lift the bundle approximately two to three feet high. In accordance with CSX safety rules, plaintiff and Laufhutte then used their gloved hands as needed to steady the bundle and to keep it parallel to the

railcar as the crane began swinging the bundle to the side. Once plaintiff and Laufhutte reached the edge of the railcar, they removed their hands from the bundle and a crew member on the ground, who took possession of the tag line after it was attached by Laufhutte, assumed control over the bundle, rotated it 90 degrees, and guided it as the crane placed it on the riprap covering the sloped side of the elevated railbed.

As the crew was unloading the third bundle from the third railcar on April 19, plaintiff and Laufhutte attached the crane cables and tag line, and the bundle was lifted approximately knee high. As the crane swung the bundle toward the unloading site, plaintiff steadied the bundle with his left hand and walked it to the edge of the railcar. At some point, however, the cuff of the leather work glove on plaintiff's left hand became caught in the bundle of sheet piling and, as the bundle swung over the riprap covering the sloped side of the railbed, plaintiff was pulled off the railcar with it. While he was suspended approximately 10 feet above the riprap, the glove tore and plaintiff fell headfirst onto the rocks below; he was knocked unconscious and his left arm was fractured. His coworkers thereafter loaded him onto an airboat, which the contractor installing the sheet piling had on-site, and he was taken to shore and transported by ambulance to a hospital.

On November 6, 2017, plaintiff sued CSX under the FELA, alleging that his injuries were caused by CSX's negligent failure to provide a safe workplace. He alleged that CSX had acted negligently by: (1) not providing proper safety gloves; (2) not mandating the use of an additional tag line to better control the suspended bundles; (3) not having sufficient employees on-site to safely unload the railcars; (4) not properly training its employees; and (5) not properly supervising its employees.

With respect to the assertion that the standard leather work gloves provided by CSX were not suitable for the task he was performing when he was injured plaintiff alleged the cuffs on the gloves were loose and susceptible to getting snagged on items. He asserted that CSX should have instead provided him with tighter-fitting mechanic-style gloves that have a Velcro strap around the cuff, which, he argued, are less likely to get caught on items like the bundles of sheet piling he was unloading when he was injured.

In the course of discovery, plaintiff was asked multiple times by the attorney for CSX to describe any specific complaints he had made about the leather work gloves before his accident:

"Q. At any point in time before the accident, did you request a different set of gloves?

"A. We had — we had talked about it before. We had heard other people [were] getting gloves that strap over. And we [were] talking about, wondering, you know, if we could get some, but nothing ever happened about it.

"Q. Did you ever complain to anyone that it was unsafe to do the job you were doing with the gloves you were wearing?

"A. No, sir, never reported it.

"Q. Okay. Did anyone?

"A. No, sir.

"....

"Q. Are you aware of anyone ever having a glove get caught on a sheet pile before your incident?

"A. Not as I know of.

"Q. Are you aware of anyone ever complaining that these gloves, the ones you were wearing, were unsafe to use to unload sheet piling before the incident?

"A. Not as I know of.

"....

"Q. Did you at any point in time before the accident ask anyone for a different type of gloves for this job?

"A. We've — we've — like I said earlier, we mentioned it about getting some because we heard other guys were getting [the mechanic-style gloves] and we [were] wondering why we weren't getting them.

"Q. Okay.

"A. But I never got an answer from that.

"Q. That was a discussion amongst your crew, is what you told —

"A. Right.

"Q. — me, right? Did you ever — did you ever complain to anyone that the gloves you were using were unsafe for that job?

“A. Yeah, I told them these gloves — these gloves were loose.

“Q. Who did you tell that to?

“A. My foreman, Jeremy Davis, at the time.

“Q. Okay. All right. Did you ever tell anyone that using those gloves was unsafe to use?

“A. No, I never told anyone.

“Q. Okay.

“A. Because that’s what they furnished us with, so I figured they knew what they were doing.

“Q. Okay. Did anyone, to your knowledge, before your accident complain that using those gloves to do this job was unsafe?

“A. I never heard any- — never heard anyone.

“....

“Q. What did you say to Jeremy Davis about gloves?

“A. I li- — I told him that, you know, had mentioned to him that we were — that other people were getting these [mechanic-style] gloves, you know — you know, why — why couldn’t we get them.

“....

“Q. Why did you say that to him? What prompted it?

“A. It was a — like I said, I heard other people were getting them and — and I think they were more safe and that — that we should have got them, too.

“Q. And what did he say to you?

“A. He would check into it.

“Q. Was that the first time you ever mentioned it to him?

“A. Uh-huh.

“Q. Okay. Did you tell him you didn’t want to perform the job you were performing without those gloves?

“A. No.

“Q. Did you tell him you didn’t want to perform the job you were performing with the gloves you had?

“A. No.

“Q. Okay. Did anyone tell Jeremy Davis or anyone else, to your knowledge, these gloves that you were using are unsafe for this job?

“A. Not to my knowledge.

“Q. Okay. Did you say anything else to Jeremy Davis other than mentioning to him that other people are getting these Velcro-strap gloves ... can you get them?

“A. We talked amongst ourselves.

“Q. And by that you mean you and Bill and —

“A. Our — our gang.

“....

“Q. And what did y’all — when you talked amongst yourself, what did y’all say?

“A. That — that was — we — it was — we just stopped after that, after we, you know, mentioned it.

“....

“Q. Just so I’m clear, was it only the one time that you asked Jeremy or mentioned to Jeremy about those gloves?

“A. Yes.

“Q. Just the one time?

“A. Just the one time.

“Q. Okay. Have you ever mentioned it to anybody else before the accident?

“A. No, sir.”

Laufhutte’s deposition testimony regarding gloves was as follows:

“Q. Did you ever complain to anyone about ... the equipment that you were using or anything about the job that you felt affected safety?

“A. I’ve been saying it personally for years. The gloves we use aren’t — they’re not worth having.

“Q. The what?

“A. They’re not worth having. They’re terrible.

“Q. The gloves?

“A. The loose cuff gloves are just useless.

“Q. Did you — did you complain that the leather gloves were unsafe?

“A. I — well, I mean, they weren’t — I don’t think I ever said they were unsafe.

“Q. Okay. What was your complaint about the leather gloves.

“A. The cuff’s loose. It has a tendency to get caught on things. There’s — we’ve seen some in the — in the system, I guess you’d call it. We’ve seen some of the bigger production gangs — system production gangs have a knot on them. It’s like a Velcro, like a mechanic’s glove.

“Q. Uh-huh.

“A. And we’ve seen those and I know we’ve asked for them.

“Q. Let me ask you, with regard to this job did you ever tell anyone that it’s unsafe to use these leather gloves on this job?

“A. No.

“Q. Okay. Did anybody to your knowledge?

“A. I don’t — I don’t know.

Q. Did you ever complain to anyone with regard to the job that y’all were doing the day of the accident that anything about that job was unsafe?

“A. Me personally, no.

“Q. Do you know anyone that did?

“A. I don’t know.

“Q. And the gloves that you’re talking about, the standard leather gloves, who did you complain to about those?

“A. Just about every supervisor I’ve worked with — worked for.

“Q. And Bill, what was the nature of your complaint?

“A. That first off, when you get them, when they come to you out of the package, they have a tendency to be dry rotted. The first time you put them on, they split. It doesn’t take long for them to wear out. The fingers are real — the material is thin. They’re just not — not a good — not a good glove in my opinion.

“Q. Are there any other complaints that you had about the glove other than what you’ve just said —

“A. I don’t think so.

“Q. — about being dry rotted?

“A. No. Like I said, the cuff is just — the cuff is loose.

“Q. Okay.

“A. ... I normally wear a size large in gloves. But I take the smallest one because they’re tighter. And if you get a smaller glove, they’ll actually fit like a — it doesn’t help. The cuff is still big. But the glove itself will fit like a — like a batting glove.

“Q. Yeah.

“A. But you need, in my opinion, I’ve been telling them you need that Velcro piece on the side to tighten the glove.

“Q. For — why?

“A. That cuff. It leaves your wrist exposed and has a tendency to get hung up on stuff.

[The next page of the deposition transcript was not included in the record.]

“A. ... I never actually thought about [the gloves] being an actual — saying they were a safety hazard, but looking back, that’s what it was.

“Q. Okay. But you never said that to anyone. Isn’t that right?

“A. No. No. I never said these gloves present a safety hazard.

“Q. Okay.

“A. I never — I’ve always said these gloves — the other gloves would be better to have.

“Q. Okay. Who have you said that to? What supervisor specifically?

“A. I know I told — Zack Amna. ... He no longer works for CSX. Brian May.

“Q. Zack Amna and Brian May?

“A. Yes.

“Q. Any other supervisors, Bill?

“A. No.5

“Q. When did you tell Zack Amna?

“A. Probably maybe a year before. Probably a — two years ago maybe.

“....

“Q. Okay. And what specifically did you say to Zack Amna?

“A. Oh, I just — in a safety overlap, I said I’d like to have the Velcro cuffed gloves, the mechanic-style gloves.

“Q. Did you say anything other than that?

“A. No.

“....

“Q. Other than telling them you’d like to have the Velcro strapped glove, did you say anything else about the glove to Zack Amna?

“A. No, just that.

“....

“Q. What did you say to Brian May?

“A. Same thing. I think we need to have the Velcro mechanic-style gloves if we can get them.

“Q. What did Brian May say in response?

“A. He’d send it up the chain. It would be a pass-up item.

“Q. Okay. When did you say that to Brian May?

“A. The exact day, I don’t remember. One of our safety overlaps. ... Maybe a couple of months before [Mohr’s accident].”

Following the completion of discovery, CSX moved the trial court to enter a summary judgment in its favor, arguing there was no evidence to support the claims that it breached its duty to provide a safe workplace. Plaintiff filed a response opposing CSX’s summary-judgment motion, to which CSX filed a reply.

On December 14, 2018, the trial court heard oral arguments on CSX’s summary-judgment motion, and, four days later, the trial court entered a summary judgment in favor of CSX. In its order, the trial court noted that plaintiff had acknowledged during his deposition both that his crew was well trained, experienced, and knew how to properly unload sheet piling from the railcars and that they were not improperly supervised on the day of the incident. The trial court further noted that plaintiff had apparently abandoned his claim that CSX had failed to provide a sufficient number of employees to safely unload the railcars because he failed to address that claim in his response to CSX’s summary-judgment motion. Accordingly, the trial court held that CSX was entitled to a summary judgment on plaintiff’s claims that CSX had acted negligently by failing to provide proper training, proper supervision, or a sufficient number of employees for the crew to safely perform their job duties.

The trial court subjected plaintiff’s other two claims to further analysis:

“As for [plaintiff’s] remaining claims — regarding the number of tag lines and type of gloves provided for the job — [he] has failed to submit evidence that [CSX] breached its duty. The FELA imposes a duty on employers to provide a reasonably safe workplace. *Tootle v. CSX Transp., Inc.*, 746 F. Supp. 2d 1333, 1337 (S.D. Ga. 2010). This does not mean that an employer must eliminate all workplace dangers. *Id.* It requires only that they eliminate dangers ‘that can reasonably be avoided in light of the normal requirements of the job.’ *Id.* (quoting *Stevens v. Baner & Aroostook R.R. Co.*, 97 F.3d 594, 598 (1st Cir. 1996)). Reasonable foreseeability, i.e., notice of a potential hazard[,] is an essential ingredient in FELA liability. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963). See also *Barger v. CSX Transp., Inc.*, 110 F. Supp. 2d 648, 653 (S.D. Ohio 2000). Thus, to establish FELA negligence, Mohr was required to establish that [CSX] ‘knew or should have known of a potential workplace hazard’ and failed to remedy it. *Tootle*, 746 F. Supp. 2d at 1337.

[Plaintiff] has failed to establish that [CSX's] use of standard leather work gloves and use of one tag line caused a potential hazard of which [CSX] either knew or should have known. [Plaintiff] has, moreover, not established a violation of any statute, regulation, standard, or practice that required different gloves or an additional tag line. [Plaintiff] was required to establish not that some other equipment or method was safer, but that the actual equipment or method used was not reasonably safe. *Tootle*, 746 F. Supp. 2d at 1338 (quoting *McKennon v. CSX Transp., Inc.*, 897 F. Supp. 1024, 1027 (M.D. Tenn. 1995)). He has failed to submit any such evidence. No jury could reasonably find that [CSX] failed to provide a reasonably safe place to work on these facts.

Moreover, notice is the cornerstone of FELA liability, and [plaintiff] has submitted no evidence whatsoever that [CSX] had notice of any potential hazard related to the standard work gloves or the use of one tag line for the job. See *Gallick*, 372 U.S. at 117.”

Plaintiff appealed, challenging the trial court's judgment only as it related to his claims involving the type of work gloves provided by CSX and CSX's policy for using tag lines. According to plaintiff, both his own and Laufhutte's deposition testimony constituted substantial evidence indicating (1) that the standard leather work gloves he was issued were not reasonably safe and (2) that CSX had knowledge of the danger posed by the gloves.

A unanimous Alabama Supreme Court affirmed the judgment on May 22. The court found that plaintiff “repeatedly testified both that he had never told any supervisor that the leather work gloves issued by CSX were unsafe and that he was unaware of any other CSX employee making that complaint. Mohr emphasizes the one time in his testimony when he told his supervisor the leather work gloves ‘were loose,’ but, when considering [plaintiff's] testimony as a whole, the only conclusion one can reasonably draw is that he never complained to CSX that the leather work gloves he had been provided were not reasonably safe. At best, [plaintiff] might have made an inquiry to his supervisor about receiving some mechanic-style gloves, but the record does not contain any evidence indicating that [he] told his supervisor that his request was motivated by safety concerns about the leather work gloves CSX had provided.”

As to Laufhutte's testimony, the court found that while it was evident that even before this incident, Laufhutte did not like the leather work gloves for a variety of reasons and that he would have preferred the mechanic-style gloves. However, the court quickly added, Laufhutte's testimony that he told unspecified individuals that the leather work gloves were “not worth having,” “terrible,” and “useless” and his testimony that he told his supervisors that mechanic-style gloves were preferable and “would be better to have” was insufficient to have put CSX on notice that the leather work gloves CSX provided were not reasonably safe. According to the court, “Every time Laufhutte was asked if he had ever specifically complained that the leather work gloves were unsafe he admitted that he had not — ‘I don't think I ever said they were unsafe’; ‘never said these gloves present a safety hazard.’ To be sure the court did acknowledge Laufhutte's testimony about the cuff on the leather work gloves being loose and having a tendency to get caught on things. Even so, while that testimony might be relevant to the question of whether the gloves were reasonably safe, “because Laufhutte could not identify even a single instance when he complained to a supervisor about the loose cuff posing a safety hazard, that testimony does not support the conclusion that CSX knew or should have known about that safety concern. In sum, a fair-minded person in the exercise of impartial judgment could not conclude on the basis of Laufhutte's deposition testimony that CSX had notice of the alleged safety hazard presented by the leather work gloves.” **Jerry Mohr v. CSC Transportation, Inc.**, Supreme Court of Alabama No. 1180338.

Who Owns Premises Near Trash Compactot Bay of Loading Dock 1 at Grand Central Station? — New York Trial Court Quashes Plaintiff's Notice to Admit on That Issue. On September 11, 2018, plaintiff was near the trash compactor bay of loading dock #1 at Grand Central Station, when he slipped and fell. He filed suit under FELA on April 23, 2019, against MTA, LIRR, Metro-North and MTA-Long Island Railroad, alleging that the accident and the resulting injuries were the result of the “careless and negligent manner in that [sic] the defendants owned, operated, maintained, managed and controlled the aforesaid premises” The complaint alleged that defendants managed, maintained, controlled, operated and supervised the premises and that defendants were the “lessee[s]/lessor[s].” The complaint further stated that defendants had actual and/or constructive notice of this condition and that they violated the FELA by failing to provide plaintiff with a safe place to work. Defendants answered the complaint and, for the majority of the allegations, denied “knowledge of information sufficient to form a belief as to the truth of the allegations” On July 2, 2019, plaintiff served defendants with a notice to admit. Defendants argued that the notice to admit should be stricken, as it “goes to the heart of the matters at issue” and was palpably improper. Specifically, according to defendants, whether they owned, leased, managed, maintained, operated, supervised and controlled the pre-

mises are admissions regarding ultimate factual and/or legal conclusions. In response, plaintiff withdrew paragraphs 4,7,8,12,15, 16, 20, 23, 24, 28, 31 and 32 of the notice to admit. He stated that he was “withdrawing his request that Defendants admit management, operation, and supervision.” However, according to plaintiff, the remaining issues of ownership, maintenance, control and tenancy were factual matters that did not concern material issues in this case and would not be disputed at trial. Plaintiff continued that defendants clearly knew who owns, controls and maintains the premises described in the complaint. Further, this case does not turn on who owned, maintained, controlled, leased the premises . . .” Defendants moved to quash the notice to admit.

The trial court granted the motion in a May 15 order. It found that ownership, has, under certain circumstances, been the proper subject of a notice to admit. However, in this situation, the court found that the requests included in the notice to admit were patently improper as they sought admissions and concessions that were related to the ‘heart of the matter at issue,’ [citing *Tolchin v Glaser*, 47 AD3d 922, 923 (2d Dept 2008) and *Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 (1st Dept 2014)] As this was a personal injury action, the court continued, admissions regarding ownership, tenancy, and whether defendants maintained or controlled the premises “are essential to the contested issue of negligence. Not only do the admissions address the ownership of a premises, but concern a specific portion of the premises; namely, the first level of the loading dock #1. These admissions also may relate to the ultimate issue of employer liability, as plaintiff alleges that defendants failed to provide him with a safe place to work. As a result, these admissions are palpably improper, as ‘[p]laintiff does not seek admissions with respect to ‘clear-cut’ matters of fact as to which he reasonably believes there can be no dispute or controversy,’” [quoting *Taylor v Blair*, 116 AD2d at 206;]. see also *Stanger v Morgan*, 100 AD3d 545, 546 (1st Dept 2012) (“the request for an admission that the defendant driver was on her cellular phone at the time of the accident was palpably improper, as the matter was in dispute and went to the heart of the issue of whether she was negligent in the operation of the subject vehicle”). **Derrick Boalds v. Metropolitan Transportation Authority, et al**, New York Co. (NY) Supreme Court No. 154218/2019.

Section 3: FELA Verdicts and Settlements

Springfield Terminal Railway Conductor Blames Disabling Fall on Slippery Substance — Massachusetts Jury Returns \$676,689.77 Verdict. The plaintiff worked for Springfield Terminal Railway Co. On October 9, 2015, he was working as a conductor near Track 1 in the North Bennington Yard, North Bennington, Vermont, when he slipped and fell due to a slippery substance. He suffered injuries to the back, shoulder, neck and head which resulted in disability. He filed suit advancing claims under FELA and the Locomotive Inspection Act. The matter proceeded to a four day trial in early March. The jury returned a verdict in favor of plaintiff for \$676,689.77: \$326,689.77 for loss of earnings; \$300,000 for past pain and suffering and \$50,000 for future pain and suffering. **Gene Sebastino v. Springfield Terminal Railway Co.**, U.S. District Court D. Massachusetts No. 3:16-cv-30007-MGM. Marc T. Weitzke, Garden City, NY; Robert T. Naumbes, Christopher C. Naumes, Boston, MA for plaintiff. Thomas M. Herlihy, Boston, MA for defendant.

Norfolk Southern Conductor/RCO Operator Hit By Car Inspector’s Truck — Undisclosed Settlement Reach in North Carolina Case. The plaintiff was working as an RCO train operator in Linwood, North Carolina, on February 1, 2017 when he was struck by a car inspector’s truck. According to plaintiff, the truck was being drive in reverse at a high rate of speed. The impact caused plaintiff to suffer a closed fracture of the transverse process of L1 and L2, a traumatic injury with scar and disfigurement, permanent change to the elbow bursa with a gritty fibrous posterior bursitis, numbness and tingling of the right hand, pain and weakness of t he right leg, lumbar sprain and disc injuries, acute left-sided low back pain and a collapsed lung. He was left with depression and various limitations and disabilities. The case settled for an undisclosed sum following a settlement conference on March 11. A stipulation of dismissal was entered on April 2, 2020. **Charles Mabe v. Norfolk Southern Railway Co.**, U.S. District Court M.D., North Carolina No.1:18-cv-004240WO-LPA. Daniel R. Francis, Lexington, NC for plaintiff. Andrew L. Rodenbough, Reid L. Phillips of Brooks, Pierce, McLendon, Humphrey & Leonard, Greensboro, NC for defendant.

New Jersey Transit Foreman When Ladder Fails — Undisclosed Settlement Concludes Federal Court Litigation. The plaintiff, a foreman, was working on a roof on October 3, 2014, when a ladder slipped out from under him. The fall left hin unable to continue his employment duties. The parties announced that a settlement was reached at a April 2, 2020 settlement conference. **Sergio Demusso v. New Jersey Transit Rail Operations**, U.S. District Court

D. New Jersey No. 2:17-03307-ES-CLW. Voci R. Bennett, James M. Duckworth, of Keller & Goggin, Philadelphia, PA for plaintiff. Edward J. Depascale of McElroy, Deutch, Mulvaney & Carpenter, Morristown, NJ for defendant.

Section 4: Railroad Liability Litigation

FRSA — BNSF Track Inspector Fired After Refusing to Falsify Report and Then Calling FRA — Colorado Federal Court Awards \$539,010 in Attorney Fees. This case was initially reported last month. Readers will recall that the plaintiff began working for BNSF in 2005 in the Maintenance of Way Department. He worked mostly as a track inspector responsible for determining if railroad tracks complied with the FRA regulations and BNSF track safety standards. As readers know, track inspectors report to track supervisors called roadmasters, and are required to comply with instructions from roadmasters. Roadmasters are authorized to instruct track inspectors to measure a track for defects. BNSF's employment policy, Policy for Employee Performance Accountability ("PEPA"), applies to all employees and has three categories of employee discipline. The most severe is "stand alone dismissible violations," which includes insubordination. Insubordination is also prohibited by BNSF's Maintenance of Way Operating Rule 1.6. Failure to follow a supervisor's instruction is not a stand-alone dismissible violation. The difference between failure-to-follow-instructions and insubordination is often subjective, but an employee can be charged with the former when he is asked to do something and does not do it, and an employee can be charged with the latter for refusing a direct order. A collective bargaining agreement allows an employee to participate in an investigation to determine whether a violation occurred. BNSF's 2016 Code of Conduct prohibits retaliation for reporting hazardous conditions, and BNSF maintains an anonymous hotline that allows employees to report behavior that conflicts with the Code of Conduct.

Against this backdrop, plaintiff became aware that Michael Paz (one of his roadmasters) and Mark Carpenter (another supervisor) were inappropriately reporting repairs to track defects when no repair had actually been made. According to plaintiff, he confronted Paz about the false reports and that Paz admitted it. Subsequently, on May 5, 2016, plaintiff claims that he spoke with Paz about another track defect requiring removing a track from service, that Paz told him to falsify the report, and that he (plaintiff) refused. Plaintiff called an FRA field agent to ask whether the defect should be changed. Later that afternoon, Paz and plaintiff met to discuss another alleged defect. They disagreed whether there was a defect, and whether Paz ordered plaintiff to measure the alignment of the track with a string-line. Plaintiff drove his truck away without measuring the possible defect, but later returned to find Paz and another employee measuring the track with a string-line.

That same day, Paz reported to Carpenter that plaintiff had, at a minimum, refused an instruction, and perhaps stated that plaintiff was insubordinate. Carpenter removed plaintiff from service pending an investigation, and later charged him with violating BNSF's policy prohibiting insubordination. At an investigatory hearing, plaintiff testified that he believed he was taken out of service in retaliation for confronting Paz about the defect reports. After the investigation, plaintiff was terminated on May 27, 2016. Plaintiff sued the railroad for retaliating against him for engaging in protected activity by terminating his employment, all in violation of the Federal Railroad Safety Act, 49 U.S.C. § 20109.

At the conclusion of a six day trial the jury returned a verdict in favor of plaintiff for \$800,000 as compensatory damages for emotional distress, pain, suffering, inconvenience, and mental anguish, and an additional \$250,000 in punitive damages. The issue of back pay and front pay did not go to the jury as the district court decided those issues were equitable issues to be decided by the court.

In a 16 page order entered March 20, the district court awarded \$539,010 in attorney fees, \$45,672 in costs and \$40,516 in expert witness fees. On April 15 the clerk awarded costs of \$15,119.47. **Brandon Freaquez v. BNSF Railway Co.**, U.S. District Court. D. Colorado No. 17-cv-0844-WJM-SKC. Jonathan L. Stone, Nicholas D. Thompson, Moody Law Firm, Portsmouth, VA for plaintiff. Andrew D. Ringel, Gillian Dale, Keith M. Goman of Hall & Evans, Denver, CO for defendant.

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 (_____) _____

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