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SUING RAILROADS:

The Train May Win the Battle, But You Can Win The War

By: Michael J. Warshauer

I. INTRODUCTION

Lawsuits against railroads are among the most complex, most vigorously defended, yet most rewarding endeavors with which a trial lawyer can be involved. The complexities include a hundred years of case law, special state statutes covering everything from venue to duty, federal preemption, federal statutes and regulations, complex mechanical issues and terms which are foreign to most lawyers and jurors, and extraordinarily talented defense counsel. Despite the obstacles, the fact remains that many people are willing to hold railroads liable and when they do, the verdicts are often surprisingly large.

Most tort cases against railroads are either pedestrians who are hit by trains, motorists who are hit by trains, or railroad employees who are covered by the Federal Employers' Liability Act ("FELA"). The complete dynamics of handling each of these types of cases exceeds the allotted time and space available for this presentation. Accordingly, the focus will be on answering the basic questions of what constitutes a *prima facie* case, what defenses are available, and some of the traps that exist for the unwary.

II. IDENTIFYING THE RAILROAD DEFENDANT

Identifying the correct railroad is often difficult. For example, the Norfolk Southern flying horse logo appears on the locomotives of not less than five separate railroads that operate in Georgia. But if suit is brought only against Norfolk Southern Railway Company ("NS"), the wrong defendant has probably been named - this is especially true south of Atlanta. However,

except for a handful of short line railroads, there are only two primary carriers in Georgia - Norfolk Southern Railway Company ("NS") and its subsidiaries and CSX Transportation, Inc. Of course, AMTRAK, the National Railroad Passenger Corporation, also operates in Georgia but always on the tracks of either CSX or NS and thus whenever a case involves AMTRAK, it is a good idea to look closely at CSX and NS also. If you have no idea which railroad caused the incident you are investigating, the Georgia Secretary of State publishes a railroad map which shows all of the tracks in Georgia and the identity of each railroad that uses it. Always contact the likely railroad to determine if it operated a train at the given location and time. This can be accomplished by contacting the railroad's dispatch or claims office.

III. VENUE ISSUES

In Georgia, venue in cases against railroads is governed by a special statute. Venue in actions against railroad companies is in the county in which the injury occurred if the railroad maintains an agent in that county.[1] Venue is jurisdictional in nature and cannot be waived.[2] The railroad venue statute also contains a jurisdictional quality. O.C.G.A. §46-1 2(e) provides that: "In any cause of action described in this Code section, any judgment rendered in any county other than one designated in this Code section shall be void. The provisions of the railroad venue statute 'are jurisdictional in their nature and cannot be waived.'"[3]

It should be noted that if the railroad in question was organized under the Georgia Business Corporation Code,[4] the general venue statute for actions against corporations is the applicable statute.[5] This allows the plaintiff to choose the county in which the event occurred, or

[1] O.C.G.A. §46-1-2(c).
[2] *Georgia, A.S.&C. Railroad v. Atlantic Coastline Railroad*, 88 Ga. App. 426, 76 S.E.2d 724 (1953), *cert. denied*, 350 US 887, 76 S.Ct. 142, 100 L.Ed. 782 (1955); *Southern Railway v. Luten*, 110 Ga. App. 6, 137 S.E.2d. 696 (1964).
[3] *Southern Railway Co. v. Wooten*, 110 Ga. App. 6, 7 (1964).
[4] O.C.G.A. §14-2-510.
[5] *Driskell v. Georgia Power Company*, 260 Ga. 488, 489, 397 S.E.2d 285 (1990).

the county where the registered agent is located, even if there is an agent in the county in which the injury occurred.[6]

There is an argument that in cases against a foreign railway company, suit can be brought in any county in which it maintains its registered agent *and* in any county in which it maintains an office. This is because "[a] person who is not a citizen of this state, passing through or sojourning temporarily in the state, may be subject to an action in any county thereof in which he may be found at the time when the action is brought."[7] The theory is that the general corporations code is not exclusive as to venue.[8] Several older cases allow the plaintiff great latitude in choosing a venue - particularly for torts which occur outside of Georgia.[9] It should be noted that these cases and O.C.G.A. §9-10-33 have never been reversed or limited in any fashion but, most likely because of the general judicial distaste for foreign suits, most trial courts will not buy this argument. And when it has been presented to the Court of Appeals, the entire argument, the statutes, and the cases were completely ignored.[10]

In cases involving multiple defendants, the plaintiff is allowed to choose venue in the county in which any of the defendants reside.[11]

IV. <u>FEDERAL COURT</u>

As noted above, the two primary railroads in Georgia are CSX Transportation, Inc. and Norfolk Southern Railway Company. Both are foreign corporations and in most cases, initial suit in federal court is a possibility. FELA cases are not removable and thus the employee can

[6] *WBC Holdings, Inc. v. Thornton*, 213 Ga. App. 48, 443 S.E.2d 686 (1994).
[7] O.C.G.A. §9-10-33.
[8] O.C.G.A. §14-2-510; *WBC Holdings, Inc. v. Thornton*, 213 Ga. App. 48, 443 S.E.2d 686 (1994).
[9] *Louisville & Nashville Railroad Company v. Meredith*, 66 Ga. App. 488 (1941); *Louisville & Nashville Railroad Company v. Meredith, on certiorari*, 194 Ga. 106 (1942); *Southern Railway Company v. Parker*, 194 Ga. 95 (1942); *Reeves v. Southern Railway Company*, 121 Ga. 561 (1904); *Williams v. East Tenn., Virginia and Georgia Railway Co.*, 90 Ga. 519 (1892).
[10] *Neal v. CSX Transportation, Inc.*, 213 Ga.App. 707, 445 S.E.2d 766 (1994).
[11] *Southern Railway v. Luten*, 110 Ga. App. 6, 137 S.E.2d 696 (1964); *Atlanta-Nashville Motor Express v. Dolly,* 78 Ga. App. 265, 50 S.E.2d 822 (1948).

choose state or federal jurisdiction and there is nothing the railroad can do about it. An FELA case may be brought in either federal or state court. Jurisdiction is concurrent.[12]

Federal court can, of course, be avoided by including a non-diverse defendant such as the engineer or conductor as a defendant. The disadvantage to this is the engineer and conductor bring a human element to a defendant that is otherwise just a huge railroad. It also makes the crew members more hostile as they often take lawsuits against them personally. Instead, consider painting the crew as victims of the railroad's bad conduct as well as the injured plaintiff. When deciding whether to sue the engineer, or other crew members on a train, as a party defendant(s), keep in mind that if the engineer is exonerated, the railroad might be, too.[13] If the engineer is not liable, the railroad may still be held liable for the acts which are unrelated to the engineer's conduct such as obstructions at the crossing.[14]

V. <u>NON-FELA TORT CASES</u>

A. Train Crew Duties

Engineers must blow the horn using a sequence consisting of two long blasts, one short blast, and one loud blast beginning at the blow post which is 400 yards from the crossing.[15] Engineers and train crews are required to "maintain a constant and visual lookout along the track . . . [and] exercise due care in approaching the crossing, in order to avoid doing injury to any person or property which may be on the crossing or upon the line of railway at any point within 50 feet of the crossing."[16] Train crews have a duty to "keep a proper lookout ahead and warn the public of the approach of the train to the crossing" and to slow the train or take whatever precautions are necessary once it is known that someone is approaching or about to use the crossing.[17] This duty is not preempted by federal regulations setting accepted train speeds for particular tracks. Inside city limits, by statute, blow posts are not necessary but instead,

[12] 45 U.S.C. §56.
[13] *Seaboard Coastline R. Co. v. Harris*, 124 Ga. App. 126, 129 (1971).
[14] *Seaboard Coastline R. Co. v. Harris*, 124 Ga. App. 126, 129 (1971).
[15] O.C.G.A. §46-8-190.
[16] O.C.G.A. §46-8-190; *Southern Railway v. Healy*, 382 F.2d 752 (5th Cir. 1967).
[17] *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 852, 410 S.E.2d 437 (1964).

locomotives must constantly ring a bell when approaching a crossing.[18] Relief from having to blow the whistle does not mean the railroad has no duties - only that the whistle is no longer mandatory inside city limits.

B. Basic Negligence Principles

The liability of a railroad for injury to persons or property, whether to its passengers, to trespassers, licensees, and those on its rights-of-way and crossings depends on the usual showing of a breach of duty and proximate cause.[19] Additionally, the usual defenses of comparative negligence and assumption of the risk are available to the railroad. Railroads are liable for injuries to individuals and property "damaged or destroyed, by the carelessness, negligence, or improper conduct of any railroad company or an officer, agent, or employee of such company, and/or by the running of the cars or engines of the company. . . ."[20] Companies may not limit their liability.[21]

(i) Presumption of Negligence.

"In all actions against railroad companies for damages to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be *prima facie* evidence of the lack of reasonable skill and care on the part of the servants of the companies in reference to such injury."[22] If the railroad cannot explain how the injury occurred by producing facts which are, as a general rule, peculiarly within its knowledge, it is presumed to be negligent.[23] Despite this presumption, the plaintiff cannot rely solely upon this and must nevertheless prove their case.[24] The railroad can rebut the presumption that it is liable by

[18] O.C.G.A. §46-8-91.
[19] *Black v. Georgia Southern & Florida R. Co.*, 202 Ga. App. 805, 806, 415 S.E.2d 705 (1992).
[20] O.C.G.A. §46-8-290.
[21] O.C.G.A. §46-8-290.
[22] O.C.G.A. §46-8-292.
[23] *Seaboard Coastline Railroad v. Wroblewski*, 138 Ga. App. 793, 227 S.E.2d 438 (1976).
[24] *Houston v. Georgia Northeastern Railroad Co., Inc.*, 193 Ga. App. 687, 688, 388 S.E.2d 762 (1989).

introducing evidence to show that it was not liable.[25] The plaintiff is not entitled to a charge on O.C.G.A. §46-8-292 once the presumption is rebutted by introduction into evidence of all the facts touching upon the injury and how it occurred.[26]

(ii) Horns, Lights and Right-of-Way Visibility.

Railroad crews have a duty to keep a look out ahead when approaching a crossing.[27] Trains must blow their whistles in compliance with state law.[28] Failure to blow a train whistle as required by the Code section is negligence per se.[29] However, it is for the jury to determine whether the failure is the proximate cause of the collision.[30] Expert testimony is available for the proposition that the horn makes no difference to the likelihood of a crash as well as for the proposition that the lack of a horn certainly contributed to the cause of a crash.

"In Georgia, 'there must be unusual or special circumstances at a crossing before a railroad has the duty to warn of something as starkly obvious as a train; or conversely, before a driver is excused from not seeing something plainly visible within the range of the statutory headlighs requirement. In the absence of such special circumstances, the duty to warn does not arise and the sole proximate cause of the collision is the negligence of the driver.'"[31] The fact that the train is stopped on the crossing does not alone establish an unusual or special circumstance constituting negligence.[32] Proof of smoke, fog, or other matters which impair visibility of the train will present jury issues as to the railroad's duty to warn of a stationary

[25] *Central of Georgia Railway v. Hester*, 94 Ga. App. 226, 94 S.E.2d 124 (1956); *Ellis v. Southern Railway*, 89 Ga. App. 407, 79 S.E.2d 541 (1953), *later appealed*, 99 Ga. App. 687, 101 S.E.2d 230 (1957).
[26] *Atlantic Coastline Railroad v. Paulk*, 104 Ga. App. 316, 121 S.E.2d 688 (1961); *Atlantic Coastline Railroad v. Parker*, 90 Ga. App. 251, 82 S.E.2d 706 (1954).
[27] *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 852, 410 S.E.2d 437 (1964).
[28] O.C.G.A. §46-8-190.
[29] *Gross v. Southern Railway*, 414 F.2d 292 (5th Cir. 1969).
[30] *Savannah & Atlanta Railroad Co. v. Ward*, 110 Ga. App. 529 (1964).
[31] *Pate v. Georgia Southern and Florida Railway Co.*, 196 Ga. App. 211, 214, 395 S.E.2d 604 (1990); *Seaboard Coastline v. Sheffield*, 127 Ga. App. 580, 581, 194 S.E.2d 484 (1972).
[32] *Pate v. Georgia Southern and Florida Railway Co.*, 196 Ga. App. 211, 214, 395 S.E.2d 604 (1990).

train.[33] Leaving cars on side tracks which obstruct the view of persons entering the crossing may be considered by the jury as a separate act of negligence contributing to the injury in addition to failure to signal.[34] "While a railway company has generally the right to [stop] cars upon its sidetracks, it is a jury question whether the [stopping] of cars upon a particular sidetrack, under stated circumstances, is negligence as related to one whose injury may have been caused or contributed to by the improper or untimely placing of such cars."[35] A railroad may be held liable for obstructing a crossing with its cars on a sidetrack even if the train of another railroad is the one involved in the collision which actually causes the injuries.[36]

By federal regulation, all road locomotives carry "black boxes" which show the train speed and braking. Many also show when the bell and horn were sounded. Do not accept the results of these devices as gospel. Sampling rates vary, sometimes the lead unit's tape is "unreadable", and the results are believed by many to vary greatly depending on whether the recorder and the reader are of the same make.

There is no specific legal direction as to the extent to which the area surrounding a crossing must be free of obstructions. Railroads will not accept responsibility for obstructions which are on adjacent property outside their right-of-way. *Georgia Northern Railway Company v. Dalton*[37] holds that obstructions which "were not located on the defendant's right-of-way, were beyond its control, and can afford no basis for holding the defendant liable". If trackside vegetation interferes with the crew's ability to work, and that includes seeing dangers such as pedestrians or cars, 49 CFR §213.37 imposes particular duties on railroads with respect to vegetation adjacent to railroad tracks. Violation of §213.37 can impose negligence per se.

(iii) Crossing Roadway Maintenance.

[33] *Atlantic Coastline R. Co. v. Marshall*, 89 Ga. App. 740, 743 (1954).
[34] *Western & Atlanta R. Co.v. Davis*, 116 Ga. App. 831, 159 S.E.2d 134 (1967).
[35] *Wall v. Southern Railway Co.*, 196 Ga. App. 483, 484, 396 S.E.2d 266 (1990).
[36] *Western & Atlantic R. Co. v. Davis*, 116 Ga. App. 831, 836 (1967).
[37] 133 Ga. App. 34, 35 (1974).

Crossings must be maintained by the railroad. This includes the roadway and the crossing protection devices installed at the crossing. "Any railroad whose track or tracks cross a public road at grade shall have a duty to maintain such grade crossings in such condition as to permit the safe and convenient passage of public traffic. Such duty of maintenance shall include that portion of the public road lying between the track or tracks and for two feet beyond the ends of the cross ties on each side of such crossing."[38] The railroad's duty to maintain the crossing under O.C.G.A. §32-6-190 may extend beyond the two feet mentioned in the statute.[39] The railroad has a duty to maintain the overpasses and underpasses of its railroad tracks.[40] If the overpass is a county road, the railroad is not liable for defects in it. The installation of crossing signs adjacent to a private crossing is not equivalent to the railroad maintaining the crossing and inviting the public to use it.[41]

The railroad must maintain its crossing so that it can be safely crossed and used.[42] The digging of a hole, even if by an independent contractor, one to one and one half feet deep between the rails, in the middle of a crossing, and the failure to protect the public from injury caused by the hole, may be considered a breach of the railroad's duties.[43] Where the road and track form a hump which is likely to catch a "low boy" trailer, it is for the jury to determine whether the cause of a crash between a hung up tractor trailer and train is because of the maintenance of the crossing or because of the low clearance of the vehicle.[44] In cases in which a hump in the crossing catches a trailer, one should look carefully at the signage at the crossing, as well as the railroad's knowledge of prior problems at the crossing.

C. Negligence Per Se

[38] O.C.G.A. §32-6-190.
[39] *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991), *affirmed,* 113 S.Ct. 1732, (1993).
[40] O.C.G.A. §32-6-197.
[41] *Gazaway v. Seaboard Coast Line R. Co.*, 131 Ga. App. 588, 590 (1974).
[42] *Southern Railway Co. v. Brooks*, 112 Ga. App. 324, 327 (1965).
[43] *Southern Railway Co. v. Brooks*, 112 Ga. App. 324, 327 (1965).
[44] *Seaboard Coastline R. Co. v. Toole*, 128 Ga. App. 24, 26 (1973)

The Federal Safety Appliance Acts establish minimum safety standards for certain equipment including, but not limited to, locomotives, brakes, and coupling devices.[45] These Acts protect all persons, including the public, from defective railroad equipment. A violation of these Acts establishes negligence per se in claims brought by the public and absolute liability in favor of railroad employees in FELA cases.[46] The violation of a Federal Railway Administration regulation is equivalent to the violation of a Federal Safety Appliance Act.[47] A violation of a Safety Appliance Act or a Federal Railway Administration regulation by the railroad is equivalent to negligence per se for the benefit of the public. Accordingly, counsel should be familiar with the Automatic Coupler Act, the Hand Brake Act, the Train Brake Act, the Boiler Inspection Act (all now found at 49 U.S.C. §20302 *et. seq*.) and Title 49 of the Code of Federal Regulations. For example, the Train Brake Act is often applicable in crossing cases as defective train brakes can prevent the engineer from effectuating a controlled stop.

Engine lights (a center light and ditch lights which flash when the horn is blowing) must be on at all times. In 1993, the FRA enacted interim regulations requiring the installation of a triangular three-light arrangement on most locomotives. These lights are often referred to as ditch lights, but the regulations allow other options such as oscillating and strobe lights.[48] Failure to have such lights will be negligence per se.

D. Federal Preemption Issues

Railroad tort law literally fills the case books in Georgia. It seems that just about every rule of tort law ever considered had its start in a case against a railroad. Unfortunately, many of the common law duties imposed on railroads have been wholly or partially preempted by federal law. Although Georgia had pretty much put the issue to bed itself in *Central of Georgia Railroad Company v. Markert,*[49] in *CSX Transportation, Inc. v. Easterwood*,[50] a case that started

[45] 45 U.S.C. §20302 *et. seq*. and including the Boiler Inspection Act, 49 U.S.C. §20701 *et. seq*.
[46] *Bass v. Seaboard Airline Railroad Company*, 205 Ga 458, 53 S.E.2d 895 (1949).
[47] 45 U.S.C. §437(c).
[48] 49 CFR §229.133.
[49] 200 Ga. App. 851, 852 (1991).
[50] 1993 U.S. 2982 (1993)

in the Northern District of Georgia, many of Georgia's broad common law obligations on railroads ended. To handle cases against railroads, this case, and its progeny, must be read and understood.

(i) Train Speed.

It used to be that the railroad had a duty to operate its train at a "moderate and safe rate of speed,"[51] and what constituted a moderate rate of speed was for the jury to determine.[52] Times have changed.

With the passage of the Federal Railroad Safety Act (FRSA) in 1970,[53] the Secretary of Transportation was given broad regulatory power over railroad safety. National uniformity was required to the extent practicable.[54] In order to assure that national uniformity was not eroded by a hodgepodge of conflicting state laws, the FRSA contains an express preemption provision at 45 U.S.C. §434 (49 U.S.C. §20106). Thus, with one rare exception for unique local conditions, a state may enforce its laws relating to railroad safety only until such time as the Secretary of Transportation has adopted a federal regulation covering the same subject matter. Train speed limits are governed by the federal regulations. 49 CFR §213.9 sets up six different classifications of track and establishes a "maximum allowable operating speed" for each classification as follows:

Over track that meets all of the requirements prescribed in this part for---	*The maximum allowable operating speed for freight trains is---*	*The maximum allowable speed for passenger trains is---*
Class 1 track	10 mph	15 mph
Class 2 track	25 mph	30 mph
Class 3 track	40 mph	60 mph
Class 4 track	60 mph	80 mph
Class 5 track	80 mph	90 mph
Class 6 track	110 mph	110 mph

[51] *Gay v. Sylvania Railway Company*, 79 Ga. App. 362, 367 (1949).
[52] *ACL Railroad Co. v. Hansford*, 85 Ga. App. 507, 510 (1952).
[53] 45 U.S.C. §421 (recodified in 1994 at 49 U.S.C. §20101).
[54] 45 U.S.C. §431, §434 (49 U.S.C. §20103, §20106).

If the train was traveling greater than the maximum speed allowed for the type of track on which it was traveling, then excessive speed can be complained about. Otherwise, a plaintiff is prohibited from complaining about excessive speed, or even arguing that the crash would not have occurred had the railroad chosen a slower speed, except in the rare circumstance when there are unique local conditions demanding a slower speed. Local municipal train speed ordinances are not "unique local conditions" and are preempted.[55] Even if the railroad is in violation of its own timetable speed limit, if it is in compliance with the federal limit, preemption under the FRSA still applies.[56]

Of course, there is no reason to believe that the state law duty to "keep a proper lookout ahead and warn the public of the approach of the train to the crossing" and slow the train or take whatever precautions are necessary once it is known that someone is approaching or about to use the crossing is preempted.[57] This duty continues.

(ii) Crossing Protection.

The Federal Grade Crossing Safety Program specifies that a "public agency," *i.e.* the Georgia DOT, makes the decision as to which crossings will be signalized. The complexities of the program are really not that important here. However, what is essential to understand is that once the first dollar of federal funds is spent at a crossing, the adequacy of the particular signal devices used at the crossing is a preempted question. This is because 23 CFR §646.214 displaces state and private decision making authority:

> In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The regulations therefore cover the subject matter of state law which, like the tort law upon which respondent relies, seek to impose an

[55] *Southern Pacific Transportation Co. v. Baldwin*, 685 F.Supp. 601 (1987).
[56] *Michael v. Norfolk Southern Railway Co.*, 74 F.3d 271 (11th Cir. 1996).
[57] *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 852, 410 S.E.2d 437 (1964).

independent duty on a railroad to identify and/or repair dangerous crossings.[58]

It is unclear whether the federal funds actually have to be used for the erection of a signal device or merely the planning for such a device. In *Hatfield v. Burlington Northern Railroad Co.*,[59] preemption occurred when the "significant" federal funds for preliminary engineering were spent. In contrast, *St. Louis Southwestern Railway v. Malone Freight Lines. Inc.*[60] held that preemption does not occur until federally funded devices are actually installed and operating. Federal funding for the installation of passive traffic control devices, *e.g.* cross buck signs, advance warning signs and pavement markings, has also been held to trigger preemption.[61]

Even if the adequacy of the crossing protection cannot be challenged, there remains a duty on the railroad to maintain crossing protection once installed.[62] In fact, there are some duties which are rarely subject to preemption. For example, the railroad must install and maintain a reflectorized railroad cross buck sign at all crossings.[63] However, the railroad is liable for injuries associated with a defective crossing gate only when there is proximate cause between the defect and the injury.[64] Additionally, there is no statutory duty to install crossing protective devices at private crossings and any claim of railroad negligence for failure to install such devices is premised, not on the statute requiring cross bucks, but on common law negligence.[65] However, many "private" crossings are actually "public" crossings. Crossings used by the public for a period of over 20 years become prescriptive public crossings and the railroad's duty to maintain them is the same as its duty at regular public crossings.[66]

[58] *CSX Transportation, Inc. v. Easterwood*, 1993 U.S. 2982, 113 S.Ct. at 1741 (1993).
[59] 64 S.E.2d 559 (10th Cir. 1953).
[60] 39 F.3d 864 (8th Cir. 1994), *cert. denied,* _ U.S.__ 115 S.Ct. 1963, 131 L.Ed.2d 854 (1995).
[61] *Hester v. CSX Transportation. Inc.*, 61 F.3d 382 (8th Cir. 1995), *cert. denied*, __ U.S.__, 116 S.Ct. 815, 133 L.Ed.2d 760 (1996). *But see, Shots v. CSX Transportation Inc.*, 38 F.3d 304 (7th Cir. 1994).
[62] O.C.G.A. §32-6-200(b)(3).
[63] O.C.G.A. §46-8-194.
[64] *Black v. Georgia Southern & Florida R. Co.*, 202 Ga. App. 805, 806, 415 S.E.2d 705 (1992).
[65] *Central of Georgia Railroad v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895, 410 S.E.2d 437 (1991).
[66] *Atlantic Coast Line Railroad v. Layne*, 88 Ga. App. 674, 77 S.E.2d 565 (1953).

Just because there is a federal and state administered program for the identification and implementation of grade crossing improvement does not mean that the railroads are freed from liability for crossings with either no protection or inadequate protection. If preemption does not apply, there remains a very good argument that the railroad continues to have a common law duty to insure that its crossings are safe for use by the public. At present, it is unclear as to the extent of this preemption in light of the railroad's common law duty to exercise reasonable care. For example, if the otherwise preempted crossing protection flashes for a very long time because of a train parked on the triggering device, an argument can be made that the railroad is required, in the exercise of its duty of due care, to employ a watchman or flagman to protect the public in addition to the otherwise proper crossing protection device which it has installed.[67] The failure to employ additional precautions other than signals may amount to negligence even in the absence of a statutory duty to do so.[68]

VI. PARTICULAR CASES

As noted above, there is not enough time or space in this presentation to discuss all possible claims against railroads. Accordingly, this section will be limited to a very basic discussion of claims involving pedestrians, motorists, and employees.

A. Pedestrian Cases

A railroad and its servants are under a duty to take precautions to prevent injury to persons in the vicinity of the tracks where their presence is known or may be anticipated. *E.g.*, a place habitually frequented by the public would meet the requirements of ordinary care.[69] The railroad was found to owe a duty of ordinary care to a person who was fishing in a boat below a trestle. A log fell off of a railroad car and injured the person. The evidence established that the transportation department of the railroad was aware that persons regularly fished under the trestle.

[67] *Wall v. Southern Railway Co.*, 196 Ga. App. 483, 485, 396 S.E.2d 266 (1990).
[68] *Wall v. Southern Railway Co.*, 196 Ga. App. 483, 485, 396 S.E.2d 266 (1990).
[69] *Hicks v. Seaboard Coast Line, R. Co.*, 123 Ga. App. 95 (1970).

"Ordinarily the only duty owing by a railway company to a trespasser upon or about its property is not to wantonly or willfully injure him after his presence has been discovered."[70] The railroad's duty to trespassers does not exist until the railroad is aware of the existence of the trespasser and at that time, the duty is to not injure him willfully or wantonly.[71] "A person who crosses the tracks of a railroad company, not a public crossing, or at a private crossing established by law, or a crossing which the railroad keeps up or helps to keep up, but a place where people are accustomed to cross, and where the railroad has done nothing in an affirmative way, and has merely taken no action to prevent such customary crossing, is a trespasser. The mere fact that the public may have been accustomed to travel on foot along a certain portion of the right-of-way of a railroad company, and that no measures have been taken to prevent it, does not of itself operate to constitute a person so using the track a licensee of the company; and, in the absence of the company's permission for such use, such unauthorized custom does not change the relation of one so using the property of the railway company from that of a trespasser."[72] Railroads should observe more caution in "operating trains in an area where they know persons are likely to be on the track [which] was warranted by the evidence of the use of the pathway by the public over a period of years."[73] If a trainman sees an object in the tracks and is uncertain of what it is, he should immediately reduce the speed of the train and not wait until it is too late.[74]

Suicide is never presumed of a person hit by a train.[75]

(i) Notice Necessary for Pedestrian Cases.

The horrible specter of slip and fall law in Georgia is a reality in cases in which people are injured on railroad property. Therefore, your guess is as good as the next as to what law governs these cases. That having been said, the railroad will not be presumed to know of the

[70] *Munger v. Central of Georgia R. Co.*, 199 Ga. App. 301, 302, 404 S.E.2d 647 (1991).
[71] *Collett v. Atlanta, B.& C.R.R.*, 51 Ga. App. 637, 181 S.E. 207 (1935).
[72] *Munger v. Central of Georgia R. Co.*, 199 Ga. App. 301, 301-302, 404 S.E.2d 647 (1991).
[73] *Seaboard Coastline R. Co. v. Clark*, 122 Ga. App. 237, 241 (1970).
[74] *Seaboard Coastline R. Co. v. Clark*, 122 Ga. App. 237, 241 (1970).
[75] *Seaboard Coastline R. Co. v. Clark*, 122 Ga. App. 237, 241 (1970).

existence of a trespasser in a given location along its tracks unless those persons who are charged with operating the trains have such knowledge.[76] The knowledge of someone in the track department will not be imputed to the transportation department.[77] The *Munger v. Central of Georgia R. Co*.[78] case illustrates the importance to the plaintiff who is injured on the railroad's right-of-way, to find someone in the transportation department, (conductor, brakeman, flagman, trainman, fireman, engineer, or dispatcher or supervisor such as a trainmaster) who has actual or constructive knowledge that persons regularly cross the tracks in the location of the injury. A pathway which obviously leads across the tracks will be difficult for the railroad to ignore. Most train tracks are worked by several rotating crews and all should be interviewed for this information.

(ii) Pedestrian Cases are Hard to Win.

While nothing is impossible, it is very nearly impossible to win a case against a railroad where a pedestrian is hit by a train. After all, the train never ever swerves off the track to hit the victim. It is the grossest kind of negligence to walk upon a long and very high trestle of a railroad over which trains are constantly passing.[79] To do so constitutes assumption of the risk and bars recovery.[80] However, if the railroad is aware that the trestle is regularly used, it would owe a duty. One who climbs over or under a temporarily stopped train does so at his own peril and such conduct is such a want of ordinary care so as to preclude recovery as a matter of law.[81] However, if there is evidence that the cars are not going to be moved, and are not stopped only for a short time, it is for the jury to determine the effect of the injured party's conduct.[82] Jumping off of a moving train, unless induced to do so by the train crew in circumstances when

[76] *Munger v. Central of Georgia R. Co*., 199 Ga. App. 301, 301-302, 404 S.E.2d 647 (1991).
[77] *Munger v. Central of Georgia R. Co*., 199 Ga. App. 301, 301-302, 404 S.E.2d 647 (1991).
[78] 199 Ga. App. 301, 404 S.E.2d 647 (1991).
[79] *Munger v. Central of Georgia R. Co*., 199 Ga. App. 301, 302-304, 404 S.E.2d 647 (1991).
[80] *Munger v. Central of Georgia R. Co*., 199 Ga. App. 301, 404 S.E.2d 647 (1991).
[81] *Atlantic Coastline R. Co. v. Dickson*, 70 Ga. App. 590, 594 (1944).
[82] *Atlantic Coastline R. Co. v. Dickson*, 70 Ga. App. 590, 594 (1944).

the jumping would not be so obviously dangerous as to constitute assumption of risk, is the proximate cause of the jumper's injuries.[83]

However, these defenses are not perfect and if counsel can get the case to a jury, there is always the chance of success. For example, in one Georgia case, as a train rounded a curve approaching a crossing, the crossing signals were working, and the train crew was properly sounding the horn. A pedestrian, with child in tow, nevertheless ran toward the track in an effort to cross the track before the train. The jury awarded damages for the death of the pedestrian and child. This was affirmed because the question of the railroad's conduct and the victim's assumption of risk and contributory negligence were for the jury.[84] It should be noted that this is a preemption case and the speed of the train was almost certainly an issue. Of course, that is not possible now.

B. Automobile Collisions

Automobile collision cases are only slightly better than pedestrian cases and usually come down to visibility issues. If the train is clearly visible from a crossing for several hundred feet, it is highly unlikely that a case involving that crossing can be won. This is true no matter how much the track needs crossing protection and even if the train did not blow its whistle at the crossing. Railroads simply have too much ammunition to lose this battle very often. At crossings, the right-of-way between the car and the train is determined by reference to the general rules of law regarding intersections.[85] Simply put, the train almost always has the right-of-way.

At an unsignalized crossing, the driver's ability to have seen the train approaching is of primary significance. A motorist has a statutory duty to stop whenever "(a)n approaching train is plainly visible and is in hazardous proximity to such crossing."[86] Whether there was an

[83] *Giargari v. National Railway Passenger Corp.*, 185 Ga. App. 723, 725, 365 S.E.2d 875 (1988).
[84] *Seaboard Coastline R. Co. v. West*, 155 Ga. App. 391, 392, 271 S.E.2d 36 (1980).
[85] *Central of Georgia Railway Company v. Wooten*, 163 Ga. App. 622, 624 (1982).
[86] O.C.G.A. §40-6-140(a)(3).

obstructed or unobstructed view of the train is of critical importance to the driver's exercise of ordinary care for his own safety.

In crossing cases, qualified expert testimony is almost a necessity. There are a great number of experts around the country who claim to have the know-how to provide assistance in crossings cases. In reality, there are only a few who really know what they are doing. Get references from people who have actually used the expert n the courtroom. Railroad defense lawyers really do know how trains work, how crossing protection is designed, and how to ruin a good case by destroying a weak expert. It takes a combination of human factors expertise, train handling expertise, MUTCD expertise, as well as basic engineering skills.

Keep in mind that in preparing a crossing case, proof of prior accidents at a crossing is relevant and admissible to show the existence of dangerous conditions and the railroad's knowledge of the dangers at the crossing.[87] Even subsequent accidents may be relevant.[88] This information can be difficult to obtain. Use open records statutes to get information from the Georgia DOT, the local police, the Federal Railway Administration, and even the National Transportation Safety Board.

(i) Motorist Duties.

The driver has far more duties imposed on him than is imposed on the railroad's crew. The unexcused violation of any one of these duties can spell the end of the plaintiff's case. The usual Georgia law of comparative negligence is available to railroads.[89] The burden of proof on contributory negligence is on the railroad.[90] The railroad escapes liability under this defense only if its negligence did not equal or exceed that of the plaintiff.[91]

[87] *Wright v. Dilbeck*, 122 Ga. App. 214, 217 (1970).
[88] *Wright v. Dilbeck*, 122 Ga. App. 214, 217 (1970).
[89] *Southern Railway. Co. v. Florence,* 81 Ga. App. 1, 11 (1950).
[90] *Southern Railway Co. v. Neely*, 284 F.2d 633 (5th Cir 1963).
[91] *Underwood v. Atlanta and West Point Railroad*, 105 Ga. App. 340, 124 S.E.2d 758, *affirmed in part and reversed in part*, 218 Ga. 193, 126 S.E.2d 785 (1962); *Southern Railway v. Brunswick Pulp and Paper Company*, 376 F.Supp. 96 (1974).

Usually, persons approaching a railroad crossing have a duty to look for trains.[92] If the evidence does not disclose whether a person failed to look and listen, it is presumed that he did so.[93] This presumption is essential in cases in which the motorist dies in the crash and there are no witnesses as to what s/he was doing immediately prior to the impact. Someone approaching a crossing in a car is not, as a matter of law, negligent in running over the crossing unless they are aware of the approach of a train.[94] Even though a motorist has a duty to stop their car for approaching trains, and in response to signals, the jury can consider their conduct in failing to do so in light of any evidence. For example, the motorist may have been familiar with the railroad's practice of placing its trains so as to make the automatic signal devices operate even when no train is actually going to go through the crossing.[95] When there are obstructions to the crossing, it does not matter that the injured person is aware of the obstructions as the question of contributory negligence in such a situation is for the jury.[96] When there are obstructions along the roadway, it will never be presumed by an appellate court that the injured person did not look as was their duty to one's self to do.[97]

In addition, the following duties apply:

Under the basic rule, all drivers must approach and cross railroad grade crossings at "a reasonable and prudent speed."[98] A motorist's duty to stop at grade crossings is governed by two statutes. The general duty is provided by O.C.G.A. §40-6-140(a) and, where stop signs have been erected, the duty is governed by O.C.G.A. §40-6-141. Under the general duty to stop, the issue is not whether the driver saw the train. Rather, the duty to stop is present if the driver could have seen the approaching train regardless of whether or not s/he did in fact see it.[99]

[92] *Southern Railway. Co. v. Florence*, 81 Ga. App. 1, 11 (1950).
[93] *Wall v. Southern Railway Co.*, 196 Ga. App. 483, 485, 396 S.E.2d 266 (1990).
[94] *Wright v. Dilbeck*, 122 Ga. App. 214, 220 (1970).
[95] *Southern Railway. Co. v. Florence*, 81 Ga. App. 1, 11 (1950).
[96] *Farmers Mutual Exchange v. Milligan*, 156 Ga. App. 38, 39 (1980).
[97] *Wall v. Southern Railway Co.*, 196 Ga. App. 486, 396 S.E.2d 266 (1990); *Seaboard Coastline R. Co. v. Micham*, 127 Ga. App. 102, 104 (1972).
[98] O.C.G.A. §40-6-180.
[99] *Atlanta & West Point Railroad Co. v. Armstrong*, 138 Ga. App. 577 (1976).

A specific statutory duty to stop also applies to school buses and vehicles carrying passengers for hire and certain types of hazardous materials.[100]

A driver is required to look and listen for a train as they approach a crossing and to bring their vehicle to a stop if one is detected. Approximately 50% of the grade crossing collisions in the United States occur at crossings equipped with automatic signal devices. It is improper to cross a track if there is an operable crossing device.[101]

It is almost impossible to win a case in which a car hits the side of a train. The Eleventh Circuit has noted that "(t)he Georgia Courts have uniformly denied recovery in these 'car hits train' cases."[102] In the absence of "unusual or special circumstances," a driver is expected to see the train in front of them at least within the statutory low beam distance of 100 feet and to bring their vehicle to a stop short of the crossing. If they fail to do so, then as a matter of law, the driver's own negligence is deemed the sole proximate cause of the collision.[103]

VII. FELA TORT CASES

Whereas the railroad has the decided advantage in pedestrian and motorist cases, the playing field is more level when the plaintiff is an injured railroad employee. However, representing an injured employee against his railroad employer is far from the "shooting fish in a barrel" world that some believe it to be. Railroad workers do not have workers' compensation as do other employees in the United States. This does not stop the employees from thinking that they are entitled to compensation just because they were injured at work. These workers have high expectations and when these cases are accepted, a trial is far more likely than in most other kinds of plaintiff's work. Preparation, knowledge of the applicable law (FELA, FRA and RRB), and knowledge of railroading practices and terminology is essential for success.

[100] O.C.G.A. §40-6-142. *See also* the Federal Motor Carrier Safety Regulations at 49 CFR §392.10 and §392.11.
[101] O.C.G.A. §40-6-140(b).
[102] *Easterwood v. CSX Transportation. Inc.*, 933 F.2d 1548, 1559 (11th Cir. 1991), *aff'd.*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).
[103] *Seaboard Coast Line Railroad Company v. Sheffield*, 127 Ga. App. 580 (1972).

The basic section of the FELA provides that railroads shall be liable in damages to any person suffering injury while he is employed by a railroad for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such" railroad or by reason of defect in the railroad's equipment or premises.[104] In passing this law, Congress sought to shift the cost of the "human overhead" of railroading from the injured employees to the railroad.[105] Under the FELA, a railroad is liable to its employees for any injuries which are the result of its negligence.[106]

A. Some Unique Aspects of an FELA Case

(i) The FELA Covers Railroad Employees.

Before the FELA "can come into play, there must exist the relation of employer and employee between the one who is injured and the railroad allegedly causing the injuries."[107] The railroad has a continuing non-delegable duty to provide its employees with safe working conditions.[108] To establish an FELA case, the plaintiff must prove that the defendant is a common carrier by a railroad engaged in interstate commerce; that the plaintiff was employed by the defendant in furtherance of interstate commerce; that the plaintiff's injuries were sustained while he was employed by the defendant; and that the injuries were the result of the negligence of the defendant railroad company.[109]

Independent contractors of the railroad are not covered under the FELA.[110] The question of whether a plaintiff is an employee or independent contractor is determined by federal law.[111]

(ii) No Loss of Consortium.

[104] 45 U.S.C. §51
[105] *Tiller v. Atlantic Coast Line RR Co.*, 318 U.S. 54 (1943).
[106] *Southern Railway Company v. Montgomery*, 192 Ga. App. 308, 309, 384 S.E.2d 907 (1989).
[107] *Southern Railway Company v. Allen*, 88 Ga. App. 435, 443, 77 S.E.2d 277 (1953).
[108] *Hepner v. Southern Railway Company*, 182 Ga. App. 346, 347 356 S.E.2d 30, *cert. denied,* (1987)
[109] *Fowler v. Seaboard Coastline Railroad Company*, 638 F.2d 17 (5th Cir. 1981).
[110] *Moss v. Central of Georgia Railroad Company*, 135 Ga. App. 904, 219 S.E.2d 593, *cert. denied*, 425 U.S. 907, 96 S.Ct. 1501, 47 L. Ed. 758 (1975).
[111] *Moss v. Central of Georgia Railroad Company*, 135 Ga. App. 904, 219 S.E.2d 593, *cert. denied*, 425 U.S. 907, 96 S.Ct. 1501, 47 L. Ed. 758 (1975).

There is no loss of consortium claim under the FELA.[112] However, if a railroad worker dies after he is injured, his claim survives and it may be prosecuted by his personal representative.[113] Additionally, if a railroad worker is caused to die because of an on-the-job injury for which the railroad is liable, the FELA recognizes the loss of guidance and companionship to his or her minor children and the damages for these losses is similar to loss of consortium damages.[114]

(iii) Wrongful Death.

Georgia wrongful death damages include the whole value of the life of the deceased which takes into consideration both the economic losses and the general loss of the joy of life.[115] The FELA allows only the economic loss to those supported by the deceased worker, plus the loss of guidance and companionship to the minor children.[116]

(iv) Statute of Limitations in FELA Cases.

The statute of limitations in FELA cases is three years.[117] The Georgia statute permitting a case to be renewed within six months after discontinuance or dismissal does not apply in FELA cases.[118] A plaintiff must be very careful with FELA cases. For example, a case premised on Georgia common law can be dismissed and refiled, within six months, in Georgia even after the statute of limitations has expired.[119] However, if an FELA case is dismissed after the statute of limitations has expired, it cannot be renewed or refiled. The claim will be forever lost,[120] and plaintiff's counsel may be facing a very difficult malpractice claim.

[112] *Gilbert v. CSX Transportation, Inc.*, 197 Ga. App. 29, 397 S.E.2d 447, *cert. denied* (1990); *Louisville & Nashville R. Co. v. Lunsford*, 216 Ga. 289 (1960).
[113] 45 U.S.C. §59.
[114] *Norfolk & Western R. Co. v. Holbrook*, 235 U.S. 625, 629; *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 73.
[115] *Buloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242 (1971).
[116] *Norfolk & Western R. Co. v. Holbrook*, 235 U.S. 625, 629; *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 73.
[117] 45 U.S.C. §56; *Robb v. CSX Transportation, Inc.*, 204 Ga. App. 690, 420 S.E.2d 370 (1992).
[118] *Parham v. Norfolk Southern Railway Company*, 206 Ga. App. 772, 426 S.E.2d 597 (1992).
[119] O.C.G.A. §9-2-61(a).
[120] *Parham v. Norfolk Southern Railway Company*, 206 Ga. App. 772, 426 S.E.2d 597 (1992).

B. Federal Law Controls

FELA cases arise under and are governed exclusively by the FELA. The FELA and the decisions construing the FELA constitute the controlling federal law governing the issues raised in a case.[121]

[121] *Brown v. Western Ry. of Alabama*, 338 U.S. 294; *Arnold v. Panhandle and Santa Fe Ry. Co.*, 353 U.S. 360; *Maynard v. Durham and Southern Railroad Co.*, 365 U.S. 160.

(i) Representative Trial Brief/Overview of the FELA.

Plaintiffs can travel under negligence and strict liability in an FELA case. Set out below are portions of a trial brief in which the plaintiff fell and injured his knee. The brief covers just about every issue which commonly arises in an FELA case except for those discussed above.

A. Federal Employers' Liability Act and Judicial Interpretations

Plaintiff is traveling under the negligence section of the FELA and the Federal Safety Regulations, the violation of which, for all practical purposes, is proof of negligence (exposing the violator to strict liability) and the same rules of causation and damages apply. The basic section of the FELA, 45 U.S.C. § 51 provides:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

The first fundamental principle which controls the disposition of all issues under the FELA concerns the quantum of proof necessary for the submission of the issues in the case to the jury. That rule is this: The issues of a case arising under the FELA must be submitted to the jury if there is evidence "of any probative value" showing that some negligence of the railroad caused, in any part, the injuries for which damages are being sought, even if such a conclusion must necessarily be based upon speculation and conjecture.[122]

Next is the controlling judicial interpretation of the statutory words set forth in the above quoted sections, namely, "in part". On this point, the United States Supreme Court has held that a case must be submitted to the jury if a conclusion can be reached with reason from the evidence that the railroad employer's negligence "played any part, even the slightest, in producing" the injuries for which damages are sought. It makes no difference, moreover, if the evidence will support other or contrary conclusions denying liability. The leading case announcing and setting forth this controlling principle, which has been applied and followed consistently, is that of *Rogers v. Missouri-Pacific Railroad Co.*, 352 U.S. 500 (1957).

[122] *Lavender v. Kurn*, 327 U.S. 645 (1946).

The *Rogers* case involved a trackman injured when a passing train fanned some burning weeds causing Plaintiff to react thereby losing his footing in a walkway area. The walkway area was described in the Court's opinion as "loose . . . and sloping" instead of the usual flat surface giving firm footing for workmen. This loose and sloping condition was a basis for negligence which the Court held caused in whole or in part the injury to the Plaintif.

Further in the opinion the *Rogers* Court more importantly refuted the term of *proximate* cause as being an improper test in an FELA action and then defined the test for a jury issue as:

[W]hether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employees injury. . . . *Id. at* 500.

Thus, the controlling test for a jury case is whether there is evidence of any probative value that some negligence of the railroad "played any part, even the slightest, in producing" the injuries for which damages are sought.[123] The jury should be charged accordingly on the issue of causation.[124]

B. Federal Safety Regulations

The liability of a railroad in an FELA action for an injury resulting from the violation of a Federal Safety Regulation is not based upon the railroad's negligence. Violation of a safety regulation imposes strict liability upon the railroad just as does violation of a Federal Safety Appliance Act. Regulations issued by the Secretary of Transportation shall have the same force and effect as a statute.[125] "If plaintiff proves violation of the regulations and causation, defendant is absolutely liable." [126]

The relevant safety regulations at 49 CFR §§213.103 and 213.33, issued by the Secretary of Transportation, in this case, relate to ballast and drainage. These rules read, in relevant part, as follows:

49 CFR §§213.103 Ballast shall "[p]rovide adequate drainage for the track . . .".

[123] *Gallick v. Baltimore & Ohio Railroad Co.*, 372 US 108 (1963).
[124] *DeLima v. Trinidad Corporation*, 302 F.2d 585, 587-588 (2d Cir. 1962).
[125] 45 U.S.C. §437(c); *Kernan v. American Dredging Co.,* 355 U.S. 426 (1958); *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985); *Central of Georgia RR Co. v. Lightsey*, 198 Ga. App. 59, 400 S.E.2d 652 (1990).
[126] *Pratico*, 783 F.2d at 264.

49 CFR §§213.33 Drainage facilities "must be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned."

(i) Contributory Negligence is Irrelevant.

Where a railroad employee is injured because a railroad violated a statute enacted for the safety of railroad employees, no such employee shall be held to have been guilty of contributory negligence.[127] The same holds true if the railroad violates a regulation issued by the Secretary of Transportation.[128]

As noted above, one of the most important aspects of a case resting on a violation of a Federal Safety Regulation is that contributory negligence is irrelevant as a matter of law.[129] If the slipping hazard caused by the inadequate ballast and drainage contributed to the cause of Plaintiff's injury, any contributory negligence by him cannot be allowed to diminish the amount of his recovery.[130] This is true no matter how negligent the railroad employee was with respect for his own conduct. The best example of this is found at *Coray v. S. Pacific Co.*, 335 US 520 (1949) in which a railroad employee was following a train down the track in a one-man motorized car when the train stopped unexpectedly. The employee could have stopped in time had he been paying attention. The Court held that the employee's negligence could have no effect on his rights to recover because the injury was caused in whole or in part by a violation of a Safety Appliance Act.

(ii) Assumption of Risk.

It is mandatory that the Defendant railroad not be permitted to interject into this action the forbidden defense of assumption of risk under the guise of contributory negligence. In cases arising under the FELA, the 1939 Amendment removed as a matter of law the defense of assumption of risk and every vestige of it.[131] Contributory negligence, also irrelevant here, presents the issue of whether the Plaintiff performed his duties with reasonable care under all the facts and circumstances present, while assumption of risk involves the knowledge of plaintiff that he performed his job under circumstances which he well may have known to involve risks. Knowledge of such a risk on the part of the Plaintiff is not contributory

[127] 45 U.S.C. §53.
[128] 45 U.S.C. §437.
[129] *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985); *Central of Georgia RR Co. v. Lightsey*, 198 Ga. App 59, 400 S.E.2d 652 (1990); 45 U.S.C. §53; 45 U.S.C. §437(c).
[130] *Bass v. Seaboard Air Line R. Co.*, 205 Ga. 458 (1949).
[131] 45 U.S.C. §54; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943).

negligence, but involved the assumption of risk, which doctrine has absolutely been abolished as a defense under the FELA. In this case, the Defendant railroad must be prevented from arguing that Plaintiff should be barred from recovery because he knowingly undertook the dangerous task of being in a zone of danger and walking in mud.

(iii) Sole Proximate Cause is Not A Defense.

In cases resting on violations of Safety Appliance Acts and Safety Regulations, the defense of sole proximate cause is looked upon with disfavor by the courts.[132] A sole cause or sole proximate cause defense is an effort to engraft common law principles onto the FELA.[133] This is inappropriate because under the FELA, railroads are held to a much higher standard than under the common law.[134] The liberal standards of the FELA are "an avowed departure from the rules of the common law."[135]

This departure from the common law is particularly apparent in the area of causation. Under the FELA, causation is established if the railroad's conduct "played any part, even the slightest, in producing" the injury.[136] Indeed, under the FELA, causation can be established "when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."[137] In the face of this standard of causation, a defense which focuses on the plaintiff's conduct as the sole cause or the sole proximate cause of the injury have a great likelihood of being confusing or misleading. This is especially true where, as here, the Defendant railroad is prohibited from arguing that the Plaintiff's negligence should be considered. Sole proximate cause serves only to insert this illegal defense where it cannot be inserted.

The best explanation of why sole proximate cause jury instructions are viewed with disfavor by the courts was given in *Paige v. S. Louis Southwestern Railway Co.*[138] That Court explained:

[132] *Almendarez v. Atchison, Topeka & Santa Fe Railway Co.*, 426 F.2d 1095, 1098 (5th Cir. 1970).
[133] *Almendarez, supra*, at 1097.
[134] *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Urie v. Thompson,* 337 U.S. 163 (1949).
[135] *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958).
[136] *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957).
[137] *Rogers, supra*, 352 U.S. at 508.
[138] 349 F.2d 820 (5th Cir. 1965).

> [O]rdinarily in FELA cases there is really no place for this issue in the jury submission . . . this effort to cross examine the jury . . . leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar. . . .

Of course the substantive law recognizes that if the negligence of the employee is the sole cause of the injury or death, there is no liability. This is sometimes spoken of as the employee's contributory negligence being the sole proximate cause, but this is both an inaccurate use of the term "contributory" and seems to be wholly unnecessary since a jury, honestly determining that the injured employee's actions were the sole cause of injury, necessarily finds (either on a general charge or by special interrogatories) that no act of the railroad, even though found to be negligent, played any part in bringing about the injury. . . . We ought to avoid those practices which "distract the jury's attention from the simple issue of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury."[139]

In the present case, the sole proximate cause defense and instruction is particularly inappropriate. First, this case will be submitted to the jury on the strict liability issue of the Federal Safety Regulation violation in addition to negligence. Safety regulations impose an absolute, imperative, and unqualified duty upon the railroad.[140] Negligence is not an issue. Indeed, the railroad is not excused for a violation of these acts by any showing of care, regardless of how assiduous.[141] Given this background, it is inappropriate to give a jury instruction, or allow much latitude in defense, which injects negligence issues into strict liability aspects of the case and asks the jury to determine whether the plaintiff was "careless" or "negligent." At best, this is confusing. At worst, it is an improper introduction of the prohibited defense of contributory negligence into the strict liability aspects of this case.

C. Issues of Damage and Evidence

The usual rules of damages in personal injuries will apply. Namely, a plaintiff is to be compensated fully and adequately for their injuries and all consequences and losses resulting therefrom. In connection with the issue of damages, as well as perhaps other issues in this case, certain questions may arise with

[139] 349 F.2d 826-287.
[140] *Shields v. Atlantic Coast Line Railroad Co.*, 350 U.S. 318 (1956); *Tiller v. Atlantic Coast Line Railroad Co.*, 323 U.S. 574 (1945); *Baltimore & Ohio Railroad Co. v. Hooven*, 297 F. 19 (1924).
[141] *Myers v. Reading Co.*, 331 U.S. 477 (1947); *Brady v. Terminal Railroad Association of St. Louis*, 303 U.S. 10 (1938).

respect to evidence. We do not attempt to and cannot anticipate all such issues. We do point out the following, however, which may arise.

(i) Evidence and Quantum of Proof in Medical Issues.

Medical issues, such as the nature and extent of injuries and any aggravation of any pre-existing condition, the consequences therefrom and the causes are under the controlling federal law for the ultimate decision by the jury. There is no requirement under that law for any particular forms of medical words by the testifying physicians, such as "reasonably probable", or "with reasonable medical certainty", etc. The leading case on this point is *Sentilles v. Inter-Caribbean Shipping Corp.*[142], which dealt with a seaman under the Jones Act which is in *pari materia* with the FELA. The seaman was thrown to the deck of a ship during heavy seas and carried a considerable distance by the wash of the wave. Shortly thereafter he developed a severe case of tuberculosis. The Court in its opinion clearly stated that:

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the questions of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration.

However, while it is true that no particular words be used, it is also true that regardless of the words used, they must be spoken by a physician. In *Bowles v. CSX Transportation, Inc.*,[143] the railroad successfully argued that because the plaintiff did not offer expert testimony linking his hearing injury to his work his claim could not stand.

> Bowles has not offered any medical evidence of the etiology of his complaint. Expert testimony is required where the disposition of a "medical question"

[142] 361 U.S. 107 (1959).
[143] 206 Ga. App. 6, 424 S.E.2d 313 (1992).

> controls the resolution of a case.[144] The same standard applies in FELA cases.[145]

Once Plaintiff has met this burden by showing the causal link, by medical testimony, between the Defendant's violation of the Safety Regulations or negligence and his injured back the railroad can only be allowed to rebut this causal link with similar medical testimony. Unless it produces some surprise witness and medical theory, it will totally fail to do so in this case.

(ii) Aggravation of Disease or Defect.

The law regarding the aggravation of a disease or defect in an FELA case is governed by federal common law. It is best expressed in the following jury charge:

> If you find for Plaintiff, you should compensate him for any aggravation of an existing disease or physical defect (or activation of any such latent condition), resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

The last sentence allowing the jury to award damages for the entire condition is an essential aspect of the applicable federal common law. There is no specific statute covering this issue, but the federal common law provides unequivocal guidance.[146] This court can look to several locations to determine the federal common law which controls this issue. First and foremost are the decisions of the various courts which have ruled on the issue - particularly the Supreme Court of the United States. The leading case on aggravation of damages is *Sentilles v. Inter-Caribbean Shipping Co*.[147] In *Sentilles,* a seaman brought a Jones Act case seeking damages for his tuberculosis. As previously cited, the seaman plaintiff was washed about on the deck of his ship by a wave. He alleged that this aggravated a pre-existing tuberculosis from which he was suffering. The United States Supreme Court allowed the plaintiff

[144] *Eberhart v. Morris Brown College*, 181 Ga. App. 516, 518(1), 352 S.E.2d 832 (1987); *Cherokee County Hosp. Auth. v. Beaver*, 179 Ga. App. 200, 204(2), 345 S.E.2d 904 (1986).
[145] See *Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3rd Cir. 1991); *Moody v. Main Central R. Co.*, 823 F.2d 693 (1st Cir. 1987).
[146] *Seaboard System Railroad v. Taylor,* 196 Ga. App. 847, 850, 338 S.E.2d 23, 26 (1985)(citing *Norfolk & Western R. Co. v. Liepelt,* 444 US 490 (1980); *Chesapeake & Ohio R. R. Co. v. Kelly*, 241 US 485 (1916)).
[147] 361 US 107 (1959).

to recover all of the damages caused by the defendant. This is consistent with the general rule that "if the jury cannot apportion damages between the pre-existing and aggravating disability, the defendant is liable for the total disability."[148] Similarly, it is generally accepted that "if the accident activated an injury to which an injured person was predisposed the defendant is liable for the entire damages which ensued."[149]

In an FELA case very closely on point, a brakeman with pre-existing back problems was injured on the job.[150] The Michigan Court of Appeals found that a jury charge instructing the jury to hold the defendant railroad liable for the whole injury if the loss could not be apportioned was the proper statement of law and denied Defendant relief.[151]

The burden of proof for the apportionment of damages between the existing disease or defect and its aggravation lies squarely on the party who benefits from the apportionment, the Defendant. It is persuasive to note that at least one court has made it clear that shifting this burden to the plaintiff would constitute reversible error.[152]

(iii) Income Taxation and Instructions Thereon.

If so requested, the jury should be instructed that the lump sum award for personal injuries or wrongful death is not subject to federal income tax.[153] Plaintiff has offered a simple and effective jury charge to answer these tax issues. The jury should be told that "any amounts it allows for damages shall not be subject to income tax, and therefore, it should neither add nor subtract for income tax in arriving at your verdict."

(iv) Net Income is Defined as Gross Income Minus State and Federal Income Taxes.

Plaintiff is seeking past lost wages. The wage loss which is recoverable in an FELA case is the net present value of the net wage and benefit loss - not gross wage loss. Defendant is expected to agree that Plaintiff must seek only his net wages. Net wages, for purposes of calculating wage loss in an FELA action, are gross wages

[148] 22 *Am Jur 2d* §282 p. 231-232.
[149] 22 *Am Jur 2d* §282 p. 231-232.
[150] *Mason v. Chesapeake and O. Ry. Co.*, 312 N.W.2d 167 (Mich. Ct. App. 1981).
[151] *Id.* at 172-3.
[152] *Blaine v. Byers*, 429 P.2d 397, 406 (Idaho 1967).
[153] *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490 (1980).

less state and federal income taxes and any employment related expenses which will not be incurred by virtue of being unable to work.

The Defendant railroad must be prohibited from attempting to inject into the trial, through the guise of attempting to adjust net wage loss, the issue of railroad retirement taxes.

The most recent decison on this point is *Norfolk Southern Railway Co. v. Perkins*[154], in which the court held that the correct formula to derive net wages is indeed gross wages less state and federal income taxes. *CSX Transp., Inc. v. Levant*[155] and *Norfolk & Western v. Chittum*[156] reach the same conclusion.

(v) Mitigation of Damages.

Defendant has the burden to prove that Plaintiff failed to mitigate his damages. For Defendant to satisfy this burden it has to do so with sufficient facts so that the jury will not be required to guess or speculate as to the income Plaintiff would have earned had he used reasonable care to satisfy his duty to mitigate his damages.

The concept that the Defendant has the burden of proving its affirmative defenses is embodied in the United States Eleventh Circuit, District Judges Association, *Pattern Jury Instructions, Civil Cases*, which provides at 6.1 in the FELA section regarding contributory negligence that "[t]his is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant . . .".

The concept is equally applicable to the affirmative defense of failure to mitigate. The burden for this defense is also on the Defendant. It is not Plaintiff's duty to establish alternative work which might have been available to him. That burden is on the Defendant and will not be met in any fashion.[157]

Without being provided with the wages and benefits which the Plaintiff would have enjoyed had he found another job, there is no way the jury can calculate the reduction in damages which Defendant claims it is entitled to as a result of the alleged failure of the Plaintiff to exercise reasonable care in mitigating his damages. The jury cannot be allowed to guess at the amount it should use to reduce the damages. Because wage loss is a special damage, as opposed to a general damage, it

[154] 224 Ga. App. 552, 481 S.E.2d 545 (1997).
[155] 200 Ga. 856, 859-60 (1991).
[156] 251 Va. 408, 468 S.E.2d 877 (1996), *cert. denied* U.S. (1996).
[157] W. Prosser, *Law of Torts*, 4th Ed., §65, pp. 416, 422-424.

must be proved with some degree of specificity. Defendant will offer no proof at all to establish the net present value of the benefits and wages of any job which Plaintiff might have obtained following his surgery. Without this data, the amount which will be shown by Plaintiff stands unchallenged as Plaintiff's future wage loss.

The jury is authorized to look only to actual data in reducing Plaintiff's damages.

> [T]he plaintiff is prima facie entitled to the stipulated compensation for the whole time. If so, the burden of proof in regard to his employment elsewhere, or his ability to obtain employment, must necessarily rest on the defendant. All evidence in mitigation is for the defendant to give. In its nature it is affirmative, and hence it is for him to prove who asserts it.[158]

Jurors cannot be allowed to guess about wage issues in damages cases. For example, in *Ballentine v. Central Railroad of New Jersey,*[159] the sole question was whether the jury in an FELA case was given sufficient guidance to allow it to reduce lost earnings to their present worth. The court held that the jury must be provided sufficient evidence so that it can "act rationally and 'not upon mere conjecture and guess'".[160] Consistent with this holding is the opinion of the Georgia Court of Appeals in *Glenn McClendon Trucking Co., Inc. v. Williams*,[161] in which it held that "'[t]he burden is upon the party asserting that the opposite party could have lessened his damages, and such proof must include sufficient data to allow the jury to reasonably estimate how much the damages could have been mitigated.'"[162]. (Contrary to Defendant's expected assertion that the duty to show specific saving by mitigation applies only to contract cases, the *Glenn McClendon, id.*, case stands solidly for the proposition that this principle is also applicable in bodily injury claims.) In order to avoid conjecture, guessing, and to allow reasonable estimates, the jury must have "sufficient data".

It is the Defendant's burden to prove that alternative work, of a kind which Plaintiff could perform, was available. This is consistent with "[t]he universal rule is

[158] *McAleer v. McNally Pittsburgh Manufacturing Co.,* 329 F.2d 273 (3rd Cir. 1964).
[159] 460 F.2d 540 (3rd Cir. 1972).
[160] *Id*. at 544.
[161] 183 Ga. App. 508, 359 S.E.2d 351 (1987).
[162] Cit.

that an employee's damages will be mitigated only if the employer proves that a similar employment opportunity was available."[163]

(vi) Pain and Suffering; Nature and Extent of Injuries.

Plaintiff is entitled to damages for pain and suffering and the nature, extent and duration of the injuries incurred and the consequences therefrom. This includes, of course, any mental or emotional damage or disorder.

Such damages, as proved by the evidence, should be awarded for the past, that is, from the date of the injuries to the date of trial, and for the future.

It should be pointed out that the requirement of finding the present value of future loss of earnings and fringe benefits does not apply to future pain and suffering, and the jury should be so instructed.[164]

(vii) Collateral Source Rule.

Under the controlling decisions of the United States Supreme Court, the receipt of or the availability of collateral benefits and any reference thereto are not admissible for any purpose in an action under the FELA.[165]

In actions under the FELA, the issue has arisen as to whether the collateral source rule applies to medical expenses which have been paid by insurance, the premium for which has been paid by the Defendant railroad. There is a split of authority on this issue. In this case, however, if Plaintiff chooses to put into evidence the amount of his medical bills he will agree to an instruction that medical expenses either paid by the defendant railroad or paid by insurance, the premium for which has been paid by the defendant railroad, are not to be included as damages. Those expenses not covered by the policy or not paid by the railroad, however can be claimed as damages. Plaintiff may present evidence, moreover, that the coverage extends only for a limited time after the year when the employee last performs actual work and is paid by the railroad employer. All further medical expenses to be

[163] *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 905 (5th Cir. 1975); *see also* Dobbs, *Remedies* § 12.25, at 925; Annotation, *supra*, § 6, at 646; *Restatement (Second) of Agency* § 918, Comment (d) (1957).

[164] *Waterman Steamship Corp. v. Rodriquez*, 290 F.2d 175 (1st Cir. 19610); *Torres v. Hamburg-Americka Line*, 353 F.Supp. 1276 (D. Puerto Rico 1972); *Culley v. Pennsylvania R. Co.*, 244 F.Supp. 710 (D. Del. 1965); *Hanson v. Reiss Steamship Co.*, 184 F.Supp. 545; *Texas & Pacific Ry. Co. v. Buckles*, 232 F.2d 257 (5th Cir. 1956); *Chicago & N.W.Ry. Co. v. Candler*, 282 F. 881 (8th Cir. 1922); and *Taylor v. Denver & Rio Grande Western R. Co.*, 438 F.2d 351 (10th Cir. 1971).

[165] *Eichel v. New York Central R. Co.*, 375 U.S. 253; *Tipton v. Socony Mobile Oil Co.*, 375 U.S. 34; *Caughman v. Washington Terminal Co.*, 345 F.2d 434.

incurred after that date, therefore, are properly included and should be considered in the award of damages.

(viii) Evidence of Discipline.

As a result of this incident, the Defendant railroad fired Plaintiff This is irrelevant to Plaintiff's claim for lost railroad wages as at the time he was injured his craft was railroading and he is entitled to recover the wages he would have earned as a railroader but for the injury. The decision of the United States Court of Appeals for the Seventh Circuit in *Kulavic v. Chicago & Illinois Midland Railway Co.*[166] is exactly on point. The only difference is that in *Kulavic*, it was the railroad that filed the motion in limine to preclude its fired worker from proving lost railroad wages after the date of his discharge. In *Kulavic*, the court carefully considered the interrelation between the Railway Labor Act (RLA), which addresses employee discipline, and the FELA. In doing so, the court considered the purpose of the RLA, and the procedural remedy it affords, versus the rights guaranteed to injured workers under the FELA. First, the court determined, consistent with the holdings of the United States Supreme Court in *Atchison, Topeka and Sante Fe Ry. v. Buell*,[167] that the two acts have different purposes and that "[a]s far as a worker's right to damages under the FELA is concerned, Congress' enactment of the RLA has had no effect."[168] The court then determined that the procedures followed in the course of a RLA disciplinary investigation "do not provide sufficient guarantees for reliable fact finding under the FELA".[169] The end result of this extensive discussion was the court's holding that "[t]he arbitral award by the PLB should not have been given preclusive effect in Mr. Kulavic's subsequent FELA action."[170]

Plaintiff will not seek or attempt to re-litigate the issue of his discharge before this Court. Plaintiff acknowledges that his remedy for lost wages *which relate exclusively to the discharge* is controlled by the Railway Labor Act.[171] But this case is not about the Plaintiff's discharge. The jury should only hear evidence about the damages Plaintiff suffered as a result of the injuries to his knee. The fact that Plaintiff was disciplined by the railroad following this incident, does not limit his

[166] 1 F.3d 507 (7th Cir. 1993).
[167] 480 U.S. 557, 566-567 (1987).
[168] *Id.* at 513.
[169] *Id.* at 517.
[170] *Id.* at 520.
[171] 45 U.S.C. §153. *Kulavic* similarly admitted that his discharge could not be re-litigated in his FELA trial. *Id.* at 510.

claim for damages directly related to this incident. In other words, if the Plaintiff employee was unable to work for reasons unrelated to disciplinary action and directly related to physical injuries sustained in the on the job incident, he is still entitled to the full amount of damages caused in whole or in part by those injuries. The Supreme Court explained the rationale for this position in *Atchison, Topeka and Sante Fe Ry. v. Buell:*[172]

> [I]t is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion . . . "the Railway Labor Act . . . has no application to a claim for damages to the employee resulting from the negligence of an employer railroad."[173]

In this case, the medical testimony, and Plaintiff's own testimony, will establish that for a period of time following this incident Plaintiff was completely unable to perform any kind of employment, including railroad work. Thus, the Plaintiff's employment status with Defendant at any time following the incident is irrelevant to his wage loss claim, except to the extent that he has been able to return to work for some period of time, which Plaintiff acknowledges limits his wage loss.

Two federal cases provide further support for Plaintiff's position. In *Pharr v. Southern Railway Company*[174], the defendant railroad had discharged the injured employee who thereafter sought recovery against the railroad in an FELA action. The railroad then sought to rely on the discharge under the RLA to prevent the employee from introducing evidence of railroad wages lost during the period of time when the plaintiff was off work and discharged. The plaintiff countered this argument by showing that he was unable to perform his occupation of railroad work because of his injuries - not because of his discharge. The trial judge allowed the plaintiff to introduce evidence of his lost railroad wages attributed to his injury and prevented the railroad from introducing evidence that Mr. Pharr had been discharged. Similarly, in *Hall v. Norfolk Southern Railway Company*,[175] the plaintiff was allowed to present evidence of lost railroad wages even though the plaintiff had been discharged as a result of alleged rules violations arising from the incident which caused his injuries.

[172] 480 U.S .557 (1987).
[173] *Id*. at 1415 (cites omitted).
[174] The United States District Court for the Northern District of Georgia, Civil Action Number 1:90-CV-1837-WCO, *Aff'd* 959 F.2d 973 (11th Cir. 1992).
[175] 829 F.Supp. 1571, 1582 (N.D. Ga. 1993).

Lost wages caused by the injury which is the subject of this action are items of damages allegedly caused by Defendant's actions. Plaintiff has claimed such wages in his Complaint. Denying Plaintiff the opportunity to prove his lost railroad wages will unfairly prevent Plaintiff from collecting damages for lost wages as is allowed by the FELA.[176] The Act provides that the railroad shall be liable in damages to any person suffering injury while he is employed by the railroad if the railroad's failure to provide a safe place to work, or its violation of a Safety Appliance Act or regulation, caused the person's injuries.[177]

D. Cross Examination of Witnesses

Employees of the Defendant railroad are adverse witnesses.[178] As such, they can be cross examined. This is true even if the Plaintiff calls these witnesses in his case in chief. There is no requirement that Plaintiff show these witnesses to be hostile. This remains true even though these employee witnesses may be friends of the Plaintiff who have met with him and his counsel in preparation of his case.

Plaintiff is authorized by law to interview all witnesses to his injury. 45 U.S.C. §60 provides that the railroad cannot use any device or rule whatsoever to suppress the right of interested persons from obtaining voluntary information about an accident on the railroad. In passing the FELA, "[t]he intention of Congress was to see to it that an injured employee could readily obtain all available information from witnesses, particularly employees of the railroad company."[179] Congress wanted to insure that the FELA was a remedy which would work and it implemented 45 U.S.C. §60 "to equalize the access to accident information available to highly efficient claims departments and to individual FELA claimants."[180] Accordingly, it does not matter whether Plaintiff has met with the witnesses or not. He had a right to meet with them and under Georgia law, they remain adverse witnesses as a matter of evidentiary law.

E. Railroad's Non-delegable Duty

It is well-established that the railroad remains liable for an employee's injuries, even if the injury occurred by virtue of the negligence of a third party. The

[176] 45 U.S.C. §51.
[177] *E.g., Nashville, C. & St. L. Ry. v. Henry,* 158 Ky. 88, 164 S.W. 310 (1914).
[178] *CSX Transportation, Inc. v. Levant*, 200 Ga. App. 856, 860 (1991); O.C.G.A. §24-9-81.
[179] *Dugger v. Baltimore and Ohio Railroad Company,* 5 FR.D. 334, 336 (E.D. N.Y. 1946).
[180] Senate Report No. 661, 76th Congress, 1st Session 2,5 (193); *Sheet Metal Workers International Association v. Burlington Northern Railroad Co.*, 736 F.2d 1250, 1252 (8th Cir. 1984).

FELA renders the railroad liable for injuries resulting in whole or in part from the fault of "any officers, agents, or employees" of the railroad.[181] The Defendant railroad's duty to provide Plaintiff with a safe place to work is non-delegable. This means that the Defendant railroad's duty to provide Plaintiff with a safe place to work extends to the property of third parties even if the Defendant railroad has no control over those parties. The FELA requires the Defendant railroad to inspect the third party's property for hazards and to take precautions to protect its employees, such as Plaintiff, from possible defects on that property.[182] This rule is further consistent with the established doctrine that a railroad's duties towards its employees are not delegable to other entities.[183] Under this standard, that Plaintiff was injured on the property owned and maintained by a separate company will not insulate the railroad from liability.

C. A Sample Jury Instruction in an FELA Case

The key jury charge which is used in a case such as this one in which the plaintiff fell and injured his knee is also printed here in its entirety. This charge pretty much summarizes the applicable law:

> In this case, the Plaintiff's claims are asserted under the Federal Employers' Liability Act and violations of the Federal Safety Regulations governing ballast and drainage by the Defendant railroad.
>
> Plaintiff's first claim is based upon the FELA which provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any of its employees who are injured as a result of negligence by the railroad.
>
> In order to prevail on this claim, the Plaintiff must prove each of the following elements by a preponderance of the evidence:
>
> First: That at the time of the Plaintiff's injury, Plaintiff was an employee of the Defendant performing duties in the course of his employment - the Defendant has agreed Plaintiff has satisfied this element;

[181] 45 U.S.C. § 51.

[182] *Nivens v. St. Louis S. R. Co.*, 425 F.2d 114 (5th Cir. 1970) *cert. denied* 400 U.S. 879.

[183] *See, e.g, CSX, Inc. v. Snead*, 219 Ga. App. 491, 494, 465 S.E.2d 690 (1995). *See also Sinkler,* supra, at 329; *Shenker v. Baltimore Ohio R. Co.*, 374 U.S. 1, 10 L.Ed.2d 709, 83 S.Ct. 1667 (1963); *Kooker v. Pittsburgh & Lake Erie R. Co.*, 258 F.2d 876 (6th Cir. Ohio).

Second: That the Defendant was at such time a common carrier by railroad, engaged in interstate commerce - the Defendant has agreed Plaintiff has satisfied this element;

Third: That the Defendant was "negligent" as claimed by the Plaintiff; and

Fourth: That such negligence was a "legal cause" of damage sustained by the Plaintiff.

As noted above, in this case, the parties have stipulated or agreed that the first two of these requirements have been satisfied. Accordingly, the first issues for you to consider involve items three and four. That is, whether the Defendant, or any of its employees other than the Plaintiff, was "negligent" and, if so, whether such negligence was a "legal cause" of any damages sustained by the Plaintif.

Under the FELA, it was the continuing duty of the Defendant to use reasonable care under the circumstances in furnishing the Plaintiff with a reasonably safe place in which to work, and to use reasonable care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean that the Defendant was a guarantor of the Plaintiff's safety, and the mere fact that an accident happened, standing alone, does not require the conclusion that the incident was caused by anyone's negligence. The extent of the Defendant's duty is to exercise reasonable care under the circumstances to see that the place in which the work is to be performed is reasonably safe.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in *doing* something that a reasonably careful person would *not* do under like circumstances, or in *failing* to do something that a reasonably careful person *would* do under like circumstances.

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's negligence.

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You are also instructed that negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the Plaintiff's claim under the FELA. for negligence, then your verdict should be for the Defendant on that issue. If, however, a preponderance of the evidence does support the Plaintiff's claim, you will then consider the defense raised by the Defendant which is applicable to the negligence portion of Plaintiff's claims.

The Defendant contends that the Plaintiff was himself negligent and that such negligence was legal cause of his own injury. This is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant who must establish:

First: That the Plaintiff was also "negligent;" and

Second: That such negligence was a "legal cause" of the Plaintiff's own damage.

If you find in favor of the Defendant on this defense, that will not prevent recovery by the Plaintiff; it only reduces the amount of Plaintiff's recovery. In other words, if you find that the incident was due partly to the fault of the Plaintiff, that his own negligence was, for example, 10% responsible for his own damage, then you would reduce the amount of your award to him by that percentage. Such a finding would not prevent the Plaintiff from recovering; it will merely reduce the Plaintiff's total damages by the percentage that you find. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99% percent.

Plaintiff's second claim is based upon alleged violations of the Federal Safety Regulations concerning ballast and drainage. Specifically, Plaintiff claims that the railroad track and walkway on which he was required to work was not properly supported with ballast and drained with adequate ballast and drainage facilities for his safe use. In this regard, the applicable regulations provide:

49 CFR §§213.103 Governing Ballast: Unless it is otherwise structurally supported, all track must be support by material which will -

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface, and alignment.

49 CFR §§213.33 Governing Drainage: Each drain or other water carrying facility under or immediately adjacent to the roadbed must be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

If you should find from a preponderance of the evidence that the Defendant did violate the provisions of either of these Federal Safety Regulations as alleged by the Plaintiff, and that violation played any part, no matter how small, in bringing about or actually causing injury to the Plaintiff, then the Plaintiff is entitled to recover from the Defendant those damages which you find from a preponderance of the evidence that the Plaintiff actually sustained as a result of the violation without any requirement of a showing of negligence on the part of the Defendant.

For purposes of this action, the Defendant railroad's violation of a Federal Safety Regulation is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from the evidence in the case that any violation by the Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's violation.

You are also instructed that a violation of a Federal Safety Regulation may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the violation and if the violation played any part, no matter how small, in causing such damage.

You are further instructed that contributory negligence on the part of the Plaintiff himself is not a defense in whole or in part to damages caused by a violation of a Federal Safety Regulation.

If you find for the Plaintiff on any of his claims, you should award the Plaintiff an amount of money that will fairly and adequately compensate him for such damage, including any damage the Plaintiff is reasonably certain to expect in the future.

If you find for the Plaintiff on either of his claims, you will then consider the issue of Plaintiff's damages.

This is from the *Pattern Jury Instructions (Civil Cases)*, 11th Circuit, p. 67, ¶6.1, (1990).

VIII. CONCLUSION

Representing people who have been injured by railroads is difficult but demanding work. If care is taken to learn the law and the unique aspects of railroad terminology, full, fair and just compensation can be obtained for your clients. There are numerous sources for information and expertise. Membership in organizations of lawyers who regularly sue railroads is available from ARLA and ATLA. Join up and enjoy a truly fascinating field of law. But remember, if you are not willing to pay the fare, don't try to ride the train - it will cost you and your clients dearly.

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