IN THE CIRCUIT OF GREENE COUNTY, MISSOURI,
DIVISON 1

TRAVIS L. DUNCAN	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 2131-CC00861
	)	
BNSF RAILWAY CO.,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MOTION FOR NEW TRIAL WITH INCORPORATED SUGGESTIONS IN SUPPORT

COMES NOW THE PLAINTIFF, Travis L. Duncan, by and through undersigned counsel, and herewith respectfully submits Plaintiff's Motion for New Trial with incorporated suggestions in support.

The grounds for this motion are that Defendant BNSF Railway Co. was improperly allowed to submit a prohibited assumption of risk defense to Plaintiff's negligence claim. As a result, the Jury found that Defendant was not liable to Plaintiff because Defendant's duty for the safety of Plaintiff's workplace had been delegated to Plaintiff.

In order to provide the Court trial transcript support for this motion, Plaintiff did two things. The first was that it asked the Court's Court Reporter to prepare those portions of the transcript that he had time to prepare before the deadline for this motion. The Court Reporter graciously agreed to do so, and he also agreed to do so in an order that focused first on the portions of the transcript relevant to the

assumption of risk issue. At the same time, Plaintiff obtained the audio recordings of the trial and had a private court reporting company transcribe those.

For purposes of simplicity, in this motion Plaintiff cites only to the complete transcription. Plaintiff cites to that transcription as "Trial Day" followed by the day of trial and the page and line number of the portion of the transcript being cited. For example, "Trial Day 7, 83:12-17." Plaintiff has checked the complete transcription against the Court's transcription, and any discrepancies are noted.

A highlighted copy of the portions of the transcript cited in this motion is attached as Exhibit A.

Table of Contents

I. Purpose and Design of the FELA

The purpose of 45 U.S.C. §§ 51, *et sequitur* (the FELA) is to remedy employee injuries and deaths negligently caused by railroad negligence. To do this, Congress examined the special exigencies of the railroad industry and tailored the relative responsibilities of the railroad and its employees to fit those special exigencies.

> This statute, an avowed departure from the rules of the common law, cf. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431, 438. The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." S. Rep. No. 460, 60th Cong., 1st Sess. 3.

Sinkler v. Mo. Pac. R. Co., 356 U.S. 326, 329-330 (1958).

Under the FELA, the railroad has a non-delegable duty to provide its employees a reasonably safe place to work. By operation of specific statutes such as 45 U.S.C. §§ 51, 54, and 55, and by the interpretation and application of these laws in United States Supreme Court authority, the FELA ensures that railroads will not be allowed to delegate their responsibility for workplace safety to anyone, including and especially to the very employees the law is designed to protect.[1] *Sinkler, supra*; *Payne v. Baltimore & O. R. Co.*, 309 F.2d 546, 549 (6th Cir. 1962)

[1] Exhibits B (45 U.S.C. § 51), C (45 U.S.C. § 54), and D (45 U.S.C. § 55).

("If the jury found liability by virtue of defendant's independent negligence in sending the boxcar on a track having a dangerous condition present which could have been foreseen, the verdict is sound. If it found liability by virtue of imputing the negligence of SUCO to defendant, based on defendant's nondelegable duty regarding safety for its employees, the verdict is sound. Regardless of the rights between themselves, of defendant and of SUCO, defendant may not legally delegate to another its duty to its employee, and thereby escape liability to such employee. This is the basis for the FELA," emphasis added); *Birchem v. Burlington N. R. Co.*, 812 F.2d 1047, 1049 (8th Cir. 1987) (distinguishing between duty to provide a reasonably safe place to work and duty to work reasonably safely in the workplace provided, "The Railroad believes that Birchem's violation of safety rules is sufficient evidence to establish his negligence and make it a jury question. The district court properly admonished the jury during the trial that the Railroad's theory was an impermissible effort to transfer to Birchem its nondelegable duty to provide safe equipment and a safe working environment"); *Pepin v. Wis. Cent. Ltd.*, 2021 U.S. Dist. LEXIS 171788*, 11*-12* (D.C. W.D. Mich., Northern Div. 2021) ("WCL cannot avoid liability under the FELA by delegating to its employees the responsibility to avoid unsafe conditions created by WCL"); *Nectaux v. Kansas City S. R. Co.*, 18 F.2d 681 (D.C. W.D. La., Shreveport Div. 1926) ("I cannot conceive that an employer may thus shift responsibility for its duty to its employees to see that its tracks are kept open for the movement of trains upon which they are employed"); *St. Louis-San Francisco Ry. Co. v. King*, 368 P.2d 835, 842 (Okla. 1961) ("Defendant's Requested

Instruction No. 12 would have told the jury, in substance, that, where an employee is free to follow the method he chooses in performing a task, he assumes the risk of being injured in using that chosen method. Such an instruction was not applicable to this case. It would have tended to mislead the jury into believing that an employer may delegate to the employee a duty that is a nondelegable one under the FELA").

In addition to its remedial purpose, the non-delegable nature of the FELA duty serves a deterrent effect. It deters railroads from negligently causing employee injuries and deaths by ensuring that railroads know they will be legally responsible for them.

> Independent of the railroad's obligations under its CBA, the FELA provides railroad workers not only with substantive protection against negligent conduct by the railroad, but also affords an injured worker a remedy suited to his needs, untrammeled by many traditional defenses against tort liability. *Buell*, 480 U.S. at 565. This statute thus serves to provide an injured worker with an expeditious recovery and also gives a railroad the incentive to maintain vigilance over the safety of its workers and, concomitantly, the conditions in which they must work.

Kuvalic v. Chicago & Ill. M. Ry. Co., 1 F.3d 507, 512 (7th Cir. 1993).

This is simple you-break-it-you-pay-for-it deterrence. "Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. ***When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee***." *Payne*, 309 F.2d at 549 (emphasis added).

II. Plaintiff's Claim

Defendant's duty is prescribed by 45 U.S.C. § 51. The statute specifically provides that "Every common carrier by railroad… shall be liable in damages to any person suffering injury while he is employed by such carrier… for such injury… resulting in whole or in part… by reason of any defect or insufficiency, due to its negligence, in its… appliances… works… or other equipment." The ladder at issue in the case before the Court was "equipment" within the meaning of the statute. Under the statute, Defendant had a duty not to put an unsafe cantilever signal mast ladder in Plaintiff's workplace for him to use.[2]

Plaintiff claimed and presented evidence that the signal mast ladder was dangerously high above the ground.[3] He claimed that it was deceptively dangerous because it was not so high that an employee could not use it without an assistive device, but it was not so low that an employee would not risk injury if he used it

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[2] Trial Day 2, 187:9-12 (Defendant's Signal Manager, Mr. Brad Hollaway, testified that for the railroad to be a safe place, Defendant must give employees reasonably safe equipment); Trial Day 6, 308:9-12 (Defendant's corporate representative testified that Defendant has a duty to provide employees reasonably safe equipment).

[3] Trial Day 3, 94:12-97:18, 127:6-13 (testimony of Plaintiff's liability expert, Dr. Miller, that under industry standards, for a ladder to go "all the way to the ground" it should "be no more than like 12 or 14 inches off the ground for that first step;" if employees comply with the railroad's three-point-contact rule when using the signal mast ladder they risk musculo-skeletal over-exertion injury as supported in the industrial literature; the signal mast ladder at issue presented "a situation I consider to be hazardous… I think that there would be a higher probability of someone falling or some type of an injury")

without an assistive device.[4] Its height was in a deceptively dangerous "Goldilocks Zone."[5]

Plaintiff further claimed and presented evidence that Defendant obscured the deceptively dangerous nature of the ladder by designating it as the ladder Plaintiff was required to use,[6] and by instructing Plaintiff that its height above the ground was not to be considered and reported as a safety problem when Plaintiff performed his inspections of it.[7]

Plaintiff claimed and presented evidence that Defendant was negligent because: 1) Defendant placed the signal mast ladder in his workplace at the dangerous height. 2) Defendant knew or should have known that the ladder was at a dangerous height. 3) Despite its actual or constructive knowledge of the dangerous height of the signal mast ladder, Defendant placed it in Plaintiff's workplace anyway. 4) Defendant did so despite admitting and conceding that it did not have to choose between protecting against unauthorized use and employee safety. It

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[4] Trial Day 3, 78:10-79:24 (Dr. Miller: height of the signal mast ladder "might create quite a risk" to ascend or descend if the ladder is climbed or descended, and this is a danger that an assistive device would remove).
[5] Trial Day 2, 34:16-35:11, 42:12-43:17 (Plaintiff's opening statement). Defendant's evidence supported the Goldilocks theory. *See* footnote 7, below.
[6] In its written training materials, Defendant instructed employees that, "When climbing on or off of elevated platforms or equipment, utilize designated ladders or steps where available." Exhibit E (Trial Exhibit 293). Repeatedly throughout the course of trial Plaintiff established the signal mast ladder at issue was the ladder Plaintiff was required to use under this training. Trial Day 2, 132:20-133:20; Trial Day 3, 167:16-170:1, 205:14-19.
[7] Trial Day 2, 131:13-18 (Defendant's Signals Manager, Mr. Hollaway); Trial Day 3, 454:21-455:12; Trial Day 6, 299:13-300:5 (Defendant through its Corporate Representative's testimony).

could have made the signal mast ladder a reasonably safe height above the ground and used a ladder guard to protect against unauthorized use of the ladder.

Defendant claimed that the reason the signal mast ladder was installed at the dangerous height was to deter unauthorized use. However, this deterrence only applied to people of a certain height. Small children would be prevented from climbing onto the ladder, but taller children and adults up to a certain height would simply find it difficult. Adults who are tall enough would not have a problem with it.[8]

In response, Plaintiff presented evidence and argument that there was no reasonable reason why one would install the ladder at the dangerous height to deter unauthorized use when the patent for the cantilever,[9] Defendant's own engineering diagram for the cantilever,[10] and Defendant's own practice as demonstrated across the street from the ladder where Plaintiff was injured,[11] was to deter unauthorized

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[8] Defendant's liability expert, Mr. Dustin Bell, testified that the height of the signal mast ladder was not high enough to prevent someone from climbing onto it, it only made it difficult. Trial Day 5, 242:15-243:4; *see also* Trial Day 2, 158:16-21 (Defendant's Signals Manager, "They made it harder to get on so the public wouldn't get on them"). Through its Corporate Representative, Defendant testified that the signal mast ladder height not only did not prevent people who were tall enough from climbing onto the ladder, it might not be an "issue" at all for a taller person. Trial Day 6, 215:1-15 ("It really depends upon the individual and the height because everybody's built a little differently. Some people are taller"), 317:20-318:4 ("somebody taller might not have the issue"). In its closing argument, Defendant reduced the class of people the signal ladder height was intended to deter to "kids." "What you did hear was that the kit was installed as it came from the manufacturer and the kits were designed to have the ladder off the ground to keep kids off." Trial Day 7, 70:13-16.

[9] Exhibit F (Trial Exhibit 300C).

[10] Exhibit G (Trial Exhibit 300D).

[11] Exhibit H (Trial Exhibit 300A).

use by putting a guard plate on the ladder. Defendant presented no reason whatsoever as to why it installed the ladder at a dangerous height when the guard would have made it unnecessary to do so. Defendant's response was only that it had a right to use the guard and also to install the ladder at the dangerous height if Defendant wanted to. In other words, Defendant did not answer the question.[12]

Plaintiff claimed and presented evidence that the dangerous signal mast ladder height injured him. When he was attempting to dismount the ladder while complying with Defendant's three-point-contact rules, as he was reaching for the ground with his right foot, ligaments and tendons in his left ankle were injured.[13]

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[12] In its closing argument Defendant specifically addressed the question why one would use the guard and also install the signal mast ladder at a height that was dangerous for its employees. But instead of providing an answer, Defendant reframed the question to, "why have one way to do it? Why not have two?" Trial Day 7, 69:17-70:12. Defendant then did not answer the reframed question but put the onus on Plaintiff to answer it. "The reason that they want to talk about the shield is a little bit unclear to me, honestly. It really seems to be to suggest that BNSF didn't have a purpose for this, this ladder being the way it was. We'll come to that in a bit. But what you haven't heard is any explanation for why the ladder was off the ground. We haven't heard about a ladder shortage. We haven't heard that it was cheaper to install a ladder that didn't go a little bit farther to the ground." *Id.* Defendant did not then "come to that in a bit," and Defendant did know Plaintiff's answer to the question. The answer, of course, was that the reason the ladder was dangerously high off the ground was because Defendant negligently installed it that way. Defendant did not have to. The ladder guard was the intended means to prevent unauthorized use, and it sufficed for this purpose. By sidestepping the question in its closing argument, Defendant confirmed that it had no evidence or argument to justify creating this danger when the guard sufficed.

[13] Trial Day 2, 230:19-232:2 (Dr. Griffith); Trial Day 4, 311:13-312:24 (Dr. Hicks, referred to in the transcript by the name of the person who read Dr. Hicks' deposition testimony at trial).

Plaintiff claimed and presented evidence that his injury resulted in damages.[14]

III. Defendant's Admissions and Concessions

Defendant admitted and conceded the following:

1. That it had a duty to provide Plaintiff a reasonably safe place to work, [15] including by providing him reasonably safe equipment such as and including the signal mast ladder.[16]

2. That Defendant intentionally put the signal mast ladder in Plaintiff's workplace, and that it put it there at the height that it was when Plaintiff was injured.[17]

3. That Defendant put the signal mast ladder in Plaintiff's workplace for him to use there. In fact, it designated the signal mast ladder as the ladder for him to use there. [18]

4. That the signal mast ladder was not reasonably safe because its height above the ground was not reasonably safe.[19] Defendant admitted and conceded that

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[14] The Court will recall the testimony of Plaintiff's vocational rehabilitation expert, Mr. Greene, and Plaintiff's economist, Dr. Stan Smith.

[15] Trial Day 7, 83:12-17 (Defendant's closing argument, "BNSF absolutely has a duty to provide a reasonably safe place to work…").

[16] *See* footnote 2, above.

[17] Trial Day 5, 188:17-21,190:9-191:1 (Defendant's liability expert, Mr. Bell: BNSF installed the ladder. Yes, the did install the ladder," "BNSF installed the ladder, it's a, you know, they installed the ladder and they installed it to their specifications…").

[18] *See* footnote 6, above*, citing* Trial Day 2, 132:20-133:20; Trial Day 3, 167:16-170:1, 205:14-19.

[19] Trial Day 5, 184:3-7 and 185:10-14 (Defendant's liability expert, Mr. Bell: the 42" height of the ladder was not reasonably safe, this is why an assistive device was necessary, and it was negligence for BNSF to allow employees to climb the ladder without an assistive device). Defendant testified through its Corporate Representative that Defendant did not prevent employees from climbing the signal mast ladder at the 42" height. Defendant left it up to them. A taller employee, for instance, might not have "an issue." Trial Day 6, 215:1-15, 317:20-318:4. It was up to the employee to do what he was "comfortable" with. Through its Corporate Representative, Defendant testified that the employee's estimation of whether he is "comfortable" was the standard. Defendant referred to this "comfortable" standard

this not only was a dangerous condition, but that it was an open and obviously dangerous condition. Defendant made the open and obviously dangerous nature of the signal mast ladder height an element of its contributory negligence defense.[20] In that defense Defendant claimed that Plaintiff should have known that the ladder was dangerously high because the fact that it was dangerously high was open and obvious.[21]

5. That Defendant was not required to put the signal mast ladder in Plaintiff's work area at the height Defendant did. Defendant admitted and conceded this as part of its defense to liability wherein it put on evidence and argued that there was no law, statute, regulation, or industry standard that required it to put the ladder at any height or prevented it from putting the ladder at any height.[22] Therefore, it was wholly Defendant's voluntary decision to put the ladder in Plaintiff's workplace at the height it did. Defendant made this point with evidence that in other employee workplaces, Defendant installed

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ten (10) times in its Corporate Representative testimony. Trial Day 6, 216:23-218:11 (four (4) times, the last being by Defendant's counsel in her question), 223:12-224:3 (twice), 224:22-225:20 (once), 256:10-257:1(three (3) times). Both parties agree that the 42" height of the signal mast ladder was not reasonably safe. Plaintiff claims that Defendant was negligent for putting the unsafe condition in his workplace. Plaintiff claims that there was no reasonable reason why Defendant did so, and Defendant concedes that it did not have to but voluntarily chose to do so. Plaintiff claims that Defendant either should have installed the ladder a reasonable height above the ground or made it a reasonable height by extending it as Defendant did after Plaintiff's injury. Defendant disputes none of this. It simply claims that Plaintiff should have removed the danger for himself by using an assistive device if he did not feel "comfortable."

[20] The Court specifically inquired whether Defendant was claiming as foundation for its defense that the danger was open and obvious, and Defendant informed the Court that it was. Trial Day 6, 329:22-331:18.

[21] Trial Day 5, 187:24-189:3 (Mr. Bell: "So when you go onto a ladder like this and when you're performing, you know, a climbing inspection or a climb on this type of ladder, the first thing you see is, 'This ladder is high.' So it is a risk for, you know, for an employee or for myself to get on this type of ladder without some assistance… An employee walks up to it and sees it, they should know it's a risk")

[22] Trial Day 2, 131:13-18 (Defendant's Signals Manager); Trial Day 5, 170:19-171:1 (Mr. Bell: "There are no industry standards that I'm aware of as far as the height of the, the bottom rung and what it's allowed to be"); Trial Day 7, 84:16-86:1 (Defendant's closing argument: referring to Plaintiff, "They haven't provided any applicable standards… That's an important fact to consider as well. The government has decided, despite the fact that these are common, not to issue a regulation dictating the height of these things… How many industry standards did they give you that actually apply to this matter? Zero").

some ladders that were higher, some that were the same height, and some that were closer to the ground.[23]

6. That Defendant's intention in putting the signal mast ladder at the height it did in Plaintiff's workplace was to deter unauthorized use, but at the same time, Defendant admitted and conceded that the ladder guard was the method for deterring unauthorized use that was referred to in the patent for the cantilever, that was depicted in Defendant's engineering diagram for the cantilever, and that Defendant actually used on the signal mast ladder across the street from the one on which Plaintiff was injured.[24]

    a. Defendant offered no evidence or argument why the guard was not sufficient for deterring unauthorized use or why the guard did not obviate any need to make the ladder dangerous for employees.

    b. Defendant's only response to the point was that it could do both if it wanted to, but Defendant offered no evidence or argument why it reasonably would want to do both when one of the conditions, the ladder height, would be a danger to its employees.

7. That Plaintiff was injured using the signal mast ladder. Defendant told the Jury that Defendant was not claiming that Plaintiff was not injured on the ladder the way he testified he was.[25] At the same time, Defendant suggested that the Jury could conclude that Plaintiff jumped from the ladder.[26] Defendant did not present evidence or argument that, if Plaintiff

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[23] Trial Day 2, 69:17-22 (Defendant's opening statement: "I also want to mention that, you know, there's been a lot of talk about this particular cantilever mast and how it's installed 42 inches off the ground. There are some across BNSF's system that are higher. There's some that are far lower"); Trial Day 2, 158:12-14 (Defendant's Signals Manager: "Well, we did look into this, and we found that some of them are higher than this"); Trial Day 5, 54:24-55:12 (Defendant's former Safety Assistant: cantilever mast ladders that are elevated at different heights are across the system "Everywhere", he never took issue with the 42" height "because they're, they're everywhere")

[24] *See* footnote 12, above.

[25] Trial Day 5, 138:10-19, 139:10-14, 140:5-10 (Defendant's biomechanical expert, Mr. Weaver: not claiming Plaintiff was injured on some other date, that Plaintiff was lying about the fact that he was injured on the signal mast ladder, or that Plaintiff was not injured when he was attempting to get off of the signal mast ladder).

[26] Trial Day 4, 171:22-25 (Defendant's medical expert, Dr. Kleiber, explains that Plaintiff's injury is the kind basketball players get from jumping); Trial Day 7 108:4-25 (Defendant's closing argument, "Whether he jumped from the signal mast

did so, it was for any reason other than the ladder's height above the ground.[27] Under either scenario, it was admitted or conceded that the dangerous height of the ladder was a cause, in whole or in part, of Plaintiff's injury. 45 U.S.C. § 51 (causation standard is "in whole or in part").

8. That the injury caused Plaintiff damages. Defendant's defense conceded that Plaintiff was injured and suffered damages but contended that the injury only affected Plaintiff and caused him damages for a limited period of time.[28]

The foregoing admissions and concessions served to prove Paragraphs First (notice), Second (that the signal mast ladder was not reasonably safe equipment), and Fourth (injury and causation) of the liability verdict director that submitted Plaintiff's claim, Instruction No. 9.[29]

IV. Defendant's Defense: Defendant Absolved Itself of § 51 Responsibility for the Danger it Put in Plaintiff's Workplace by Making Plaintiff Responsible to Remove the Danger

Defendant directed its liability defense to the negligence element of Plaintiff's claim as submitted in Paragraph Third of the liability verdict director and defined in the definition of negligence.[30]

As set out above, and shown in the citations to the trial transcript in footnote 12 and Exhibits F through H, Defendant presented no evidence or argument why it was reasonable for Defendant to make the signal mast ladder dangerously high for

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ladder. I'm not going to tell you… If he jumped, that would be another category here, I'm not telling you that he did").

[27] Footnote 25, above (Mr. Weaver: not claiming that Plaintiff was not injured when he was attempting to get off of the signal mast ladder).

[28] Trial Day 7, 146:22-147:21.

[29] Exhibit I.

[30] Exhibit I (Instruction No. 9, liability verdict director); Exhibit J (Instruction No. 7 (definition of negligence).

employees when it could have installed the signal mast ladder at a reasonably safe height and used the ladder guard to prevent unauthorized use.

Instead of presenting evidence and argument to prove that it was reasonable to make the signal mast ladder unsafe for employees when it did not have to, Defendant shifted the question from a) whether it was reasonable for Defendant to make the signal mast ladder unsafe to b) whether it was reasonable for Plaintiff not to have made the signal mast ladder safe for himself. Specifically, Defendant argued that Plaintiff had a duty to remove the danger Defendant placed in his workplace, and that because Plaintiff had this duty, Defendant had a right to place that danger in Plaintiff's workplace and to "trust"[31] and "rely"[32] upon Plaintiff do use his "common sense"[33] and remove the danger Defendant placed there.

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[31] Trial Day 2, 69:11-16 (Defendant's opening statement); Trial Day 3, 305:7-17 (Defendant's cross-examination of Plaintiff); Trial Day 5, 213:3-8 (Mr. Bell); Trial Day 7, 81:11-12 (Defendant's closing argument).

[32] Trial Day 7, 84:2-6 ("Mr. Duncan has a duty to work safely too. He has a duty to exercise ordinary care as well. Right? And it's reasonable for BNSF to rely on him to exercise ordinary care").

[33] Trial Day 2, 59:4-60:6, 61:20-62:2, 70:20-24 (Defendant's opening statement); Trial Day 3, 117:20-118:18 (Defendant cross-examination of Dr. Miller), 305:18-20 (cross-examination of Plaintiff); Trial Day 5, 56:14-21, 71:3-12, 101:11-21 (Defendant's former Safety Assistant: Defendant relied on employee common sense to excuse its failure to train and failure to promulgate rules; his current railroad relies upon employee common sense to excuse its failure to train also; gives opinion that Plaintiff did not use common sense when he climbed the signal mast ladder); Trial Day 5, 129:3-11 (Defendant's biomechanical expert); Trial Day 5, 172:15-173:2, 251:15-252:4 (Mr. Bell); Trial Day 6, 231:25-232:15, 252:25-253:16 (Defendant through its Corporate Representative and the questioning of him: "we've heard a lot the last week and a half about, you know, using good judgment, using common sense, maintaining the safe course"); Trial Day 7, 81:7-84:7 (in its closing argument, Defendant directly argues that its reliance on Plaintiff's duty to work safely means Defendant was not negligent, "Mr. Duncan has a duty to work safely too. He has a duty to exercise ordinary care as well. Right? And it's reasonable for BNSF to rely

Based upon this alleged right to "trust" and "rely" upon Plaintiff to remove the danger Defendant placed in Plaintiff's workplace, Defendant made numerous further contentions. Defendant contended that this right to "trust" and "rely" upon Plaintiff's "common sense" to remove the danger Defendant put in his workplace meant that Defendant did not know that Plaintiff would not remove the danger. In fact, according to Defendant, because Defendant had a right to "trust" and "rely" upon Plaintiff to remove the danger Defendant put in his workplace, the danger Defendant claimed was open and obvious actually was no danger at all. The fact that it was no danger at all was another reason why Defendant had no notice that the signal mast ladder height was not reasonably safe. It was the reason why the signal mast ladder height was reasonably safe. And, combined with Defendant's right to "trust" and "rely" upon Plaintiff to remove the danger, it was the reason that Defendant was not negligent under Paragraph Fourth of the liability verdict director.

Because the defense deflected the question instead of answering it, Defendant provided no answer to the question whether it was reasonable for Defendant to place the unsafe condition in Plaintiff's workplace when it did not have to. It also created numerous non-sequiturs and contradictions among Defendant's positions:

1. The proposition that Defendant did not know Plaintiff would not remove the danger Defendant put in his workplace does not meet the notice question submitted to the Jury in Paragraph First of the liability verdict director. That paragraph was: "First, conditions for work were not reasonably safe and defendant knew or by using ordinary care could have known of such

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on him to exercise ordinary care. And he can only recover the damages that are caused by the negligence of BNSF").

conditions and that they were not reasonably safe." A statement that Defendant did not know Plaintiff would not remove the danger from the workplace does not state that Defendant did not know the condition was dangerous. To the contrary, a statement that Defendant had a right to "trust" and "rely" upon Plaintiff's "common sense" to remove the danger is an assertion that Defendant's knowledge of the danger was the basis for Defendant's "trust" and "reliance" upon Plaintiff's "common sense."

2. The proposition that the signal mast ladder height was no danger because Defendant had a right to "trust" and "rely" upon Plaintiff's "common sense" to remove it is both a non-sequitur and a contradiction. It is a non-sequitur because whether the signal mast ladder height was a danger is a fact independent of whether or not Defendant "trusted" or "relied" upon someone to remove it from Plaintiff's workplace. The proposition is a contradiction because the assertion that Defendant had a right to "trust" and "rely" upon Plaintiff recognizing the signal mast ladder height as a danger is based upon the assertion that the signal mast height was, in fact, a danger.

3. Because the proposition that the signal mast ladder height was no danger is premised upon the assertion that Defendant had a right to "trust" and "rely" upon Plaintiff's "common sense" to remove it, the proposition is not valid. It is invalid both as a non-sequitur and as a contradiction. Therefore, the Defendant's propositions that depend upon it are not valid either.

From the perspective of the design of the FELA, when Defendant deflects a) the question whether it was reasonable for Defendant to place the unsafe condition in Plaintiff's workplace to b) the question whether it was reasonable for Plaintiff not to remove the unsafe condition Defendant placed there, Defendant authorizes the Jury to find that if Plaintiff did not satisfy his contributory negligence duty by removing the danger, then Defendant is absolved of its negligence duty not to have put the danger in Plaintiff's workplace in the first place. This defense allows Defendant to claim it satisfied its 45 U.S.C. § 51 duty to the employee by entrusting that duty to the employee to fulfill. If the employee does not fulfill Defendant's § 51 duty under this delegation, then the employee assumes the risk and liability for any

injury or death that may result. This is a delegation of Defendant's non-delegable duty through an assumption of risk defense.

Referring to the specific terms of the FELA statutes and authorities, a defense under which the railroad delegates its 45 U.S.C. § 51 duty to the employee to fulfill violates the plain language of the statute that provides that the "common carrier… shall be liable" for meeting the duties prescribed by the statute. A defense under which the railroad delegates its 45 U.S.C. § 51 duty to the employee to fulfill is a "device… which shall enable any common carrier to exempt itself from… liability created by this act" in violation of 45 U.S.C. § 55. A defense under which the railroad delegates its 45 U.S.C. § 51 duty to the employee to fulfill and that requires the employee to assume the risk and liability for any injury if he does not fulfill it is an assumption of risk defense that violates 45 U.S.C. § 54.

It should be noted that such a defense not only is legally untenable, it displays cynical contempt for the FELA and for the employees the FELA is designed to protect. According to this defense as Defendant has designed and presented it, when an employee is injured or killed by a danger the railroad places in his workplace, the employee is not the victim. It is the railroad that is the victim. The railroad is the victim of the employee's failure to live up to the "trust" and "reliance" the railroad put in him to remove the danger the railroad placed in his workplace. It would be a miscarriage of justice for a jury to hold the railroad responsible for placing the danger in the employee's workplace when the employee is the one who

violated the railroad's "trust" and "reliance." It would be a miscarriage of justice to hold the railroad responsible under its 45 U.S.C. § 51 duty.

V. Defendant's Defense Was an Assumption of Risk Defense

The assumption of risk defense is a form of delegation of the railroad's non-delegable duty to the employees themselves. Under the assumption of risk defense, the railroad delegates liability for injury or death caused by unsafe conditions in the workplace from itself to the employee who is injured or killed by them. The defense makes it the employee's responsibility to either make the workplace safe himself, avoid the dangers the railroad creates there, decline to work there at all, or be liable himself for those dangers. *See generally Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1276-1280 (3rd Cir. 1995) (exhaustive, historical exploration of different articulations of the defense). Because it is a form of delegation of the nondelegable duty the railroad owes its employees, the assumption of risk defense is abolished under the FELA. 45 U.S.C. § 54.

Under the FELA, employees do not assume the risks of their employment, including the risks of open and obvious dangers. 45 U.S.C. § 54 (no exception for open and obvious dangers); *Cazad v. Chesapeake & O. R. Co.*, 622 F.2d 72, 75 (4th Cir. 1980) (comparing state law liability for open and obvious dangers to that of the FELA, "C&O's liability under the FELA, however is a different matter, for it had the nondelegable duty to provide Cazad and its other employees with a safe place to work even when their duties required them to go onto property owned by a third party… although the danger was not hidden from the plaintiff, there was, as noted

by the district court, sufficient evidence to support the conclusion that Cazad was distracted by the performance of his work when he fell into the culvert. In going about his duties, Cazad had a right to assume that C&O had taken reasonable precautions to eliminate potential hazards from the work site," emphasis added). Whereas in a comparative fault system such as Missouri's a person assumes the risk of an open and obvious danger, this is not the case for an employee under the FELA. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 192-193 (Mo. 2014) ("implied secondary assumption of risk" abolished as bar but retained as "fault" that may reduce a plaintiff's recovery).

Under the FELA, the distinction relevant to assumption of risk is not whether the danger was open and obvious. The distinction is whether the danger was new or additional to the one created by the railroad. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986) *Birchem, supra*, 812 F.2d at 1049; *Fashauer, supra*, 57 F.3d at 1275.

A. The New or Additional Danger Test

At the hearing on Plaintiff's motion for directed verdict, the Court correctly noted that it can be difficult to distinguish between contributory negligence and

assumption of risk.[34] The Court correctly observed that it is a question of application in argument under the particular facts of the case.[35]

In this case, Defendant would make the concepts of contributory negligence and assumption of risk extraordinarily confusing by applying them to the question of Defendant's duty. Defendant's argument is that it had no duty not to put the danger in Plaintiff's workplace or to remove the danger from Plaintiff's workplace itself because Plaintiff had a duty to realize that Defendant put the danger in his workplace and to remove it for himself. According to Defendant, Plaintiff's contributory negligence duty produced in Defendant a right to "rely" upon and to "trust" Plaintiff to remove the danger Defendant put in Plaintiff's workplace. Because this is an argument that Defendant can put a dangerous condition in the employee's workplace and then shift its duty to provide a reasonably safe place to work to the employee by making it the employee's duty to remove the danger Defendant put there or assume the risks of injury if he does not, this is an assumption of risk defense.

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[34] Trial Day 6, 333:15-334:1 (oral argument upon Plaintiff's assumption of risk motion for directed verdict, Court observed: "The subtleties between assumption of risk and contributory negligence in this context cannot be ignored. They are, in fact, in this particular theory, in my opinion, very subtle").

[35] *Id.* (the Court: "I think there are elements, ***depending on how it's argued***, that could be assumption of the risk. There are elements, ***depending upon how it's argued***, that could be contributory negligence," emphasis added). The Court recognized the assumption of risk in Defendant's arguments directed to Plaintiff's "common sense." Trial Day 6, 335:5-9 ("***If the focus is on his failure to use common sense in a given situation, I'm sorry, that is assumption of the risk, whether you have it in a rule or not. And the cases are very clear on it***," emphasis added).

Defendant's argument is a testament to how creative railroads can be when attempting to avoid their FELA duty to their employees. When railroads are so creative, the question is whether courts will be confused and mistakenly authorize delegation of the railroad's duty under a disguised assumption of risk argument, or whether they will be able to detect the attempt to delegate the non-delegable duty and prohibit it.

In order to assist courts in this work, the authorities have developed a test for detecting assumption of risk defenses. The test discerns whether the defense would delegate liability for the danger the railroad created away from the railroad (where §51 requires it to be and remain) to the employee (where §54 would prohibit the delegation). This is the New or Additional Danger Test. *Taylor, supra*, 787 F.2d at 1316; *Birchem, supra*, 812 F.2d at 1049; *Fashauer, supra*, 57 F.3d at 1275.

Under the New or Additional Danger Test, the court looks to whether the defense alleges that the employee was injured by the danger the railroad created, or whether the defense alleges that the employee was injured by a new or additional danger that the employee created. If the defense alleges that the employee was injured by the danger the railroad created, then it is a defense that the employee should assume responsibility for a danger that the railroad created, and it is a prohibited assumption of risk defense. If, on the other hand, the defense alleges that the employee was injured by a new or additional danger that the employee himself created, then the defense does not attempt to shift to the employee responsibility for the danger the railroad created. It attempts only to hold the

employee responsible for the danger he created, and it is not an assumption of risk defense.

B. Application of the New or Additional Danger Test to This Case

In this case, the danger alleged in Plaintiff's liability theory was that ***the height of the signal mast ladder was dangerously high***. Plaintiff alleged that Defendant knew or should have known that the ladder was dangerously high, and therefore, defendant should not have installed the ladder at that height, or alternatively, Defendant should have removed that danger, for instance, by adding the extension Defendant added after Plaintiff's injury.

The danger alleged in Defendant's defense was that ***the height of the signal mast ladder was dangerously high***. It was so dangerously high that it was an open and obvious danger. Under this theory, Defendant alleged that Plaintiff should have recognized that the height of the ladder was dangerously high and removed that danger by using an assistive device such as another ladder.

The danger alleged in Plaintiff's liability theory and the danger alleged in Defendant's defense were the same. The danger alleged in both theories was that ***the height of the signal mast ladder was dangerously high***.

Through Defendant's corporate representative, Plaintiff established that there was no proof or argument that Plaintiff was injured by a new or additional danger that he created.[36] In redirect examination, Defendant got its corporate representative to say that the danger Defendant created when it put the unsafe

[36] Trial Day 6, 321:16-322:13.

ladder in Plaintiff's workplace was one danger, but that when Plaintiff failed to remove that same danger from the workplace it was a new or additional danger.[37] Upon re-cross examination, Defendant's corporate representative admitted that it was the same danger.[38] The Court was correct when it observed that this testimony was for its benefit in deciding the assumption of risk question.[39]

Defendant's defense does not allege that Plaintiff created a new or additional danger. It attempts to make Plaintiff liable for the danger Defendant put in his workplace. It attempts to make Plaintiff assume the risk of the danger Defendant put in his workplace. It therefore is a prohibited defense under the FELA, and the verdict it produced must be set aside.

VI. The Verdict Form Shows that the Defense Verdict was the Result of the Assumption of Risk Defense

Defendant directed its assumption of risk to the negligence element of Plaintiff's case. *See* Section V, above. Defendant also directed the defense to the question of contributory negligence, but Defendant specifically directed it to the question of negligence. Defendant told the Jury that the defense was directed to the question whether Defendant breached a duty it owed Plaintiff. Defendant told the jurors that they could apply the defense to that element and, if they found in

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[37] *Id.,* 323:6-324:4.
[38] *Id.,* 324:15-325:3
[39] Trial Day 6, 327:14-16 (the Court: "I had a feeling the last 10 minutes of testimony were directed to me and not the jury").

Defendant's favor under the defense, they would be finished with their work and would not need to consider the question of contributory negligence.[40]

At the jury instruction conference there was discussion whether the question of liability should be separated from the question of contributory negligence. The Court's concern was that doing so might result in an inconsistent verdict. [41]

Plaintiff urged the Court to present the question of liability as the first question and then to present the question of contributory negligence as the second question, a question that would only be reached if the Jury found in favor of Plaintiff in response to the first question. Plaintiff explained that the reason for this was because the verdict form would follow the structure of the FELA in which there is no question of contributory negligence unless there first is negligence on the part of the railroad that caused, in whole or in part, the injury or death under 45 U.S.C. § 51.[42] The word "contributory" in the term "contributory negligence" means that there first must be causal negligence on the part of the defendant railroad before there is any reason to ask whether there is causal negligence on the part of the plaintiff employee.

The language of 45 U.S.C. § 53 confirms that this is the meaning of the term "contributory" when the statute explicitly provides that "contributory negligence

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[40] After referring the Jury to the "ladders, straps, all sorts of ways" Defendant provided Plaintiff to remove the danger Defendant put in his workplace, Defendant told the Jury that Plaintiff had not proven negligence, and that the Jury could "write BNSF Railway Company at the top of this verdict form and your work is done." Trial Day 7, 106:9-25. This then was exactly what the Jury did. Exhibit K.
[41] Trial Day 7, 2:10-3:7.
[42] *Id.*, 3:8-20.

shall not bar a recovery."[43] If negligence on the part of the employee were an issue that could be decided in the absence of negligence on the part of the railroad and were not limited to circumstances in which the railroad is found to be negligent, then negligence on the part of the employee could bar recovery and would not be "contributory." In short, there first must be negligence before there can be "contributory" negligence.

Because the Court followed the structure of the FELA in the design of the verdict form, the verdict form makes clear that the Jury applied Defendant's assumption of risk defense to the negligence element of the case, not to the contributory negligence element, and that the Jury found in favor of Defendant as a result of that defense. Exactly as Defendant requested the Jury to do, the Jury applied the assumption of risk defense to the negligence element, found in favor of Defendant, and then had no reason to apply the defense to the contributory negligence element. It found in favor of Defendant on the question of negligence and then its "work (was) done."[44]

VII. The "Revenge Effect" of the Assumption of Risk Defense in This Case: Creation of a Verdict Against the Weight of the Evidence

In his classic book on design, *Design for the Real World* (Academy Chicago Publishers, 2d Ed. 1971), Victor Papanek explained how we often incur unfortunate, unintended consequences from things we design to benefit us. Edward Tenner popularized the term "revenge effects" for these unintended consequences. *Why*

[43] Exhibit L.
[44] Trial Day 7, 106:9-25.

Things Bite Back: Technology and the Revenge of Unintended Consequences (Knopf 1996).

In this case, Defendant designed a defense in which assumption of risk was disguised as a contributory negligence defense and then applied that defense to obtain a no-negligence verdict. This strategy was successful. Defendant obtained what it designed the defense to do for it. However, the defense produced two revenge effects that require new trial. One, discussed above, is that the verdict was based upon an impermissible assumption of risk defense requiring the verdict to be set aside. The other, discussed here, is that the defense produced a verdict against the weight of the evidence that should be set aside on this ground also.

Defendant's assumption of risk defense was based upon proving that the signal mast ladder danger was so open, obvious, and dangerous that Plaintiff should have recognized it and, as a matter of "common sense," removed it. The problem with such a defense is that the more open, obvious, and dangerous Defendant proved the danger to be, the more Defendant proved that Defendant itself was negligent for putting the danger in Plaintiff's workplace in the first place.

When Defendant combined its evidence of how openly obvious and dangerous the signal mast ladder was with the evidence it presented that it could put the signal mast ladder at any height it wanted to, and that it did, in fact, put signal mast ladders in other employee workplaces at all different heights, Defendant proved it was unnecessary for Defendant to endanger Plaintiff. Defendant proved it was unnecessary for it to so openly and obviously endanger Plaintiff.

When Defendant then presented no evidence or argument of any reasonable reason for unnecessarily endangering Plaintiff, Defendant provided the Jury with no evidence or argument that would support a finding that Defendant exercised reasonable care for Plaintiff's safety. Defendant presented the Jury no evidence or argument to find that Defendant was not negligent.

Defendant attempted to offer unauthorized use as a reason why it made the signal mast ladder dangerous, but this reason was refuted by the fact that Defendant did not make the signal mast ladders in all its employees' workplaces dangerous, and it was refuted by the fact that the ladder guard made it unnecessary to make the signal mast ladder dangerous. Defendant presented no evidence or argument why it was reasonable, let alone necessary, for Defendant to make the signal mast ladder dangerous in order to deter unauthorized use when the ladder guard served this purpose. Defendant presented no evidence or argument that or why the ladder guard was insufficient for this purpose.

There being no evidence or argument that or why the ladder guard was insufficient to deter unauthorized use, there was no evidence or argument that or why it was reasonable for Defendant to endanger Plaintiff. Absent evidence that the ladder guard was an insufficient deterrent for unauthorized use, the contention that unauthorized use was the reason Defendant endangered Plaintiff was just another non-sequitur in Defendant's case. It provided no basis for the Jury to find that it was reasonable for Defendant to put the openly obvious danger in Plaintiff's workplace. It provided the Jury no basis to find that Defendant was not negligent.

Defendant designed an assumption of risk defense that, directed to the negligence element of the case, was successful but produced a verdict that must be set aside. It must be set aside both because it is the product of an assumption of risk defense and because it is against the weight of the evidence.

VIII. Conclusion and Request for Relief

Sometimes it is clarifying to look at a question from a hypothetical perspective. Imagine that Defendant's rules specifically stated, and that Defendant specifically trained its employees, that Defendant has a right to put conditions it knows are dangerous in their workplace. Defendant has the right to do so even when it is not required to and could choose not to if it did not want to. Imagine if Defendant trained its employees that under its rules they are not supposed to report those dangerous conditions in their workplace inspections. Imagine that Defendant also explicitly told them that, because Defendant claims a right to voluntarily place dangerous conditions in their work areas, it is the employees' responsibility to become aware of those dangers and to remove those dangers themselves. Imagine if Defendant told its employees that if they do not remove those dangers Defendant knowingly and unnecessarily puts in their workplaces, then they assume the risk of any injury or death that may result.

Would such rules and training be permissible under 45 U.C.S. §§ 51, 54, 55, and the authorities that make Defendant's duty for workplace safety non-delegable? The answer, of course, is that they would not.

Given that such rules and training would not be permissible, is it permissible for Defendant to apply its rules and training to the same effect? The answer to this question also is no. The same authorities that would prohibit Defendant from devising rules and training that delegate Defendant's safety duty to its employees also prohibit Defendant from applying its rules and training to the same effect. The Court has recognized that "this is assumption of risk whether you have it in a rule or not."[45]

The trial transcript in this case clearly shows that Defendant presented evidence and argument contending that Defendant was and should be authorized to knowingly place danger in an employee's workplace and then to "rely" upon and "trust" the employee to use his "common sense" to remove the danger. This was assumption of risk evidence and argument that persuaded the Jury to allow Defendant to admittedly place the known danger in Plaintiff's workplace and then to make it Plaintiff's responsibility to remove it or assume liability for the injury caused by it.

Because the verdict form followed the structure of the FELA statutes and required the Jury to decide first whether Defendant was negligent, the Court is able to see that the Jury applied Defendant's assumption of risk defense to the question of Defendant's negligence and that the Jury did not apply it to the question of Plaintiff's contributory negligence. The Jury followed Defendant's instruction that if it applied the assumption of risk defense to the question of negligence and found

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[45] *See* footnote 35.

in Defendant's favor, then the Jury would be done and would not need to address the question of contributory negligence.

It is hard to imagine a more clear case of assumption of risk, and it is hard to imagine a case in which the effect of the assumption of risk defense could be more apparent. Defendant was so determined to persuade the Jury that Plaintiff assumed the risk of the danger Defendant put in his workplace that Defendant not only succeeded in its assumption of risk defense, it succeeded in proving Defendant's negligence. As a result, the verdict not only must be set aside as the product of the assumption of risk defense, it also must be set aside because it is against the weight of the evidence.

Plaintiff respectfully submits that the law as applied to the trial record in this case requires new trial.

WHEREFORE, upon the trial record, the verdict form, and the foregoing arguments and authorities, Plaintiff requests the Court to set aside the verdict and grant new trial.

Respectfully submitted,

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I hereby certify that on this 2nd day of July 2025, the foregoing was served via email to the following counsel of record:

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