

NO. A12-1327

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State of Minnesota  
**In Court of Appeals**

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Sean Gallagher,

*Appellant,*

v.

BNSF Railway Company,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

BNSF's responsive brief is riddled with factual assertions that are unsupported or false, and with arguments that either misstate the law or represent a fundamental misunderstanding of how it is to be applied in this case. More importantly, BNSF's submission fails to refute the fact that there is ample (and indisputable) evidence in the record establishing that BNSF used rail cars equipped with couplers that failed to couple "automatically by impact" in violation of the FSAA (49 U.S.C. § 20302(a)(1)(A)), and that it used a rail car equipped with an "inoperative" knuckle pin in violation of 49 CFR §215.123(d)(2). While Gallagher believes the facts establishing BNSF's statutory/regulatory violations are undisputed, thus entitling him to summary judgment, it is clear that, at the very least, fact questions remain in this regard.

The record is also replete with evidence that BNSF negligently failed to provide Gallagher with a safe place to work in violation of the FELA. Specifically, BNSF neglected to properly inspect, maintain and repair its rail cars; neglected to properly train Gallagher on, or even inform him about, the existence of equipment that would have assisted him in aligning drawbars; failed to comply with its own practice of building trains that included cars with long drawbars on straight tracks; and failed to provide sufficient personnel to ensure that the tasks it assigned to Gallagher could be performed safely. Accordingly, the District Court erred in granting summary judgment to BNSF.

## ARGUMENT

### **I. STANDARD OF REVIEW.**

While it is typically not necessary to devote additional pages in a reply brief to discussing the standard of review, BNSF has mischaracterized the applicable standard,

thus necessitating a short review. As Gallagher explained in his opening submission, this Court has long recognized that “a plaintiff’s burden of proof to present a case to the jury is significantly lighter under FELA than it would be in an ordinary negligence case.” *Smith v. Soo Line R. Co.*, 617 N.W.2d 437 (Minn. Ct. App. 2000), *rev. denied* (Nov. 21, 2000). Indeed:

Although the Act expressly requires proof of negligence, the United States Supreme Court has applied the statute in the most liberal manner “by reducing the quantum of proof required for a plaintiff-employee to reach a jury to the absolute minimum.” (Citation omitted).

*Hauser v. Chicago, M., St. P., and Pac. R. Co.* 346 N.W.2d 650, 653 (Minn. 1984).

While BNSF concedes that the FELA “vests the jury with broad discretion to engage in common sense inferences regarding issues of causation and fault,” it nevertheless alleges (without acknowledging *Hauser* or *Smith*) that “this very court has already considered and rejected the suggestion that the great accommodation to be afforded to an FELA claimant facing summary judgment on issues of causation and fault be extended to FELA claimants facing summary judgment on any of the other essential elements of negligence.” *Resp. Brief at 24-25*. However, even a cursory review of the lone case BNSF cites in alleged support of this contention – *Pauly v. Burlington Northern Santa Fe Ry.*<sup>1</sup> – reveals this claim to be untrue.

In *Pauly*, the plaintiff filed suit asserting an occupational hearing loss claim under the FELA and an employment discrimination claim under the Minnesota Human Rights Act. *Pauly*, Minn. App. LEXIS 1386 at \*1-2. The trial court granted summary judgment to BNSF, holding, in relevant part, that Pauly’s FELA claim was barred by the terms of a prior release and by the FELA’s three year statute of limitations. *Id.* Pauly appealed,

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<sup>1</sup> No. A-04-812, 2004 Minn. App. LEXIS 1386 (Minn. Ct. App. Dec. 14, 2004). A copy of the *Pauly* decision is included in Respondent’s Appendix at R.A. 24-31.

arguing, in part, that “the standard for granting summary judgment in favor of an employer is stricter under FELA and that the case must go to the jury if there is ‘any evidence – even circumstantial – to support an inference that employer negligence might have caused an injury.’” *Pauly*, 2004 Minn. App. LEXIS 1386 at \*9 fn.4 This Court appropriately distinguished (without specifically identifying) the cases Pauly cited in support of that contention, finding them to be “inapposite” because Pauly’s claim did not involve questions of negligence or fault, but rather raised only legal questions relating to “the validity of the release and the accrual date of the statute of limitations.” *Id.*

In light of the obvious differences between that case and this one, which obviously does involve questions of negligence and fault, it is evident that to the extent BNSF is claiming that *Pauly* requires (or even supports) the application of a more stringent standard of review to Gallagher’s FELA (or FSAA) claims, that assertion constitutes an affirmative misstatement of the law. Indeed, this Court’s published, and thus precedential, opinions conclusively confirm that the FELA employs an “extremely low burden of proof,” and that therefore “[a] FELA plaintiff need only present a scintilla of evidence tending to show negligence to survive summary judgment.” *Smith*, 617 N.W.2d at 440 (emphasis added).

## **II. THE DISTRICT COURT ERRED IN DETERMINING AS A MATTER OF LAW BNSF DID NOT VIOLATE THE FSAA OR FEDERAL REGULATIONS ON JULY 24, 2010.**

There are two recognized methods of demonstrating a violation of the FSAA. First, “[e]vidence may be adduced to establish some particular defect,” and second, “the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.” *Myers v. Reading Co.*, 331 U.S. 447, 483 (1947). In this case, Gallagher has presented evidence of both a “particular

defect” (an inoperative knuckle pin) and of a “failure to function” (the couplers’ failure to couple on impact). The District Court ignored this evidence and dismissed Gallagher’s FSAA claim based entirely on its wholesale acceptance of BNSF’s unfounded contention that the drawbars with which Gallagher was working were never properly aligned, and its corresponding misunderstanding or misapplication of the United States Supreme Court’s decision in *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996).

**A. The District Court misapplied the law and ignored a wealth of evidence establishing that the drawbars were placed in a position to couple, but failed to do so due to an inoperative knuckle pin.**

In its brief, BNSF clings to the District Court’s inappropriate reliance on *Norfolk & W. Ry. Co. v. Hiles*, contending that “[t]he United States Supreme Court considered – and ultimately rejected – an identical claim” in that case, and concluding that “[i]t is on the conclusive authority of *Hiles* that the District Court dismissed Appellant’s FSAA claim.” *Resp. Brief at 26-27, 28*. Unfortunately for BNSF, even a passing review of the *Hiles* decision reveals that the plaintiff’s claim in that case was anything but “identical” to the one Gallagher asserts here.

In *Hiles*, the plaintiff was working as a member of a switch crew when he, like Gallagher, suffered back injuries while aligning a draw bar. That, however, is where the similarities end. Indeed, in sharp contrast to Gallagher, the plaintiff in *Hiles* did not allege a failed coupling caused by defective equipment. Instead, he argued that a misaligned drawbar was, in and of itself, sufficient to establish the railroad’s violation of the FSAA as a matter of law regardless of the underlying reason for the misalignment. *Hiles*, 516 U.S. 400, 409 (1996). The Supreme Court rejected that argument, holding that duty imposed by the FSAA’s coupler provision “is not breached as a matter of law when a

drawbar becomes misaligned during the ordinary course of railroad operations.”<sup>2</sup> *Id.* The Court’s holding in this regard was hardly a surprise, as it simply reiterated a principle laid down nearly 50 years prior in *Affolder v. New York, C. & St. L. R. Co.*, where the Court held that the imposition of liability under the FSAA’s coupler provision “assumes that the coupler was placed in a position to operate on impact.” 339 U.S. 96, 99 (1950). In *Hiles*, the Court explained this concept further, stating:

In *Affolder*, we predicated failure-to-perform liability on placing the coupler “in a position to operate on impact.” 339 U.S., at 99, 70 S.Ct., at 511. We implicitly recognized that certain preliminary steps, such as ensuring that the knuckle is open, are necessary to proper performance of the coupler and that a failure to couple will not constitute an SAA violation if the railroad can show that the coupler had not been placed in a position to automatically couple. . . . *Hiles* could not reasonably complain that an otherwise working electrical appliance failed to perform if he had neglected to plug in the power cord. Similarly, a court cannot reasonably find as a matter of law that an otherwise nondefective coupler has failed to perform when the drawbar has not been placed “in a position to operate on impact.” We think *Affolder*’s restriction on failure-to-perform liability logically extends to every step necessary to prepare a nondefective coupler for coupling, . . . including ensuring proper alignment of the drawbar.

*Hiles*, 516 U.S. at 410 (emphasis added). To be clear, Gallagher has never taken issue with *Hiles* (or *Affolder*). Quite the contrary, in fact. Indeed, he agrees that drawbars must be “placed in a position to automatically couple” – as the evidence conclusively

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<sup>2</sup> Courts have interpreted the phrase “ordinary course of railroad operations” to include such things as “the normal jarring and vibration of the railroad car or when the car is uncoupled on a different track.” *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570, 575 (6<sup>th</sup> Cir. 1994).

establishes they were in this case – before liability will lie under the FSAA’s coupler provision.<sup>3</sup>

In sharp contrast to *Hiles*, the evidence in this case establishes that the couplers were “placed in a position to operate on impact” in connection each attempted coupling, and that they failed to do so because of “a particular defect in a safety appliance;” i.e., an inoperative knuckle pin. In his deposition, Gallagher explained that when he first came upon the subject rail cars after they were sent down the hump, the drawbars were aligned and the cars appeared to be coupled. *Gallagher Dep.*, 146:16-20 (App. 19). He also testified – without equivocation – that despite proper alignment and the fact at least one knuckle was open, the cars failed to couple on a number of subsequent occasions because the knuckle pin on the trailing car was inoperative and would not drop. *See Gallagher Dep.*, 146:16-148:19, 184:21-186:9 (App. 19, 26-27). There he stated:

- Q. So when you got to the car where you got injured, did you approach it just like you had the others, you saw it was out of line?
- A. It wasn’t out of line. It was on the curve and I thought it was knuckled. When I stretched it out, it wasn’t knuckled and then backed it up, tried to reknuckle it and it didn’t reknuckle and then I pulled it out again and then – when it tried to knuckle it that time it flung them both away from me and then I had to separate them 50 feet again and straighten it out and tried to redo it again and it didn’t work.
- Q. So—

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<sup>3</sup> Gallagher does not, however, agree that he bears the burden of proving proper alignment. Indeed, the courts have consistently held that in order to refute the “nearly irrebuttable presumption” of an FSAA violation that obtains when cars fail to couple automatically on impact on even a single occasion, the burden of proof rests squarely on the defendant to prove that the drawbars were not properly aligned. *See Lisek v. Norfolk & W. Ry. Co.*, 30 F.3d 823, 829 (7th Cir. 1994); *Kavorkian v. CSX Transp., Inc.*, 117 F.3d 953, 957 (6<sup>th</sup> Cir. 1997); *DeBiasio v. Illinois Cent. R.*, 52 F.3d 678, 684 (7<sup>th</sup> Cir. 1995).

- A. There was multiple attempts.
- Q. All right. So you thought they were together and discovered they were not and they were on a curve.
- A. Yes.
- \*\*\*
- Q. And if I am understanding you correctly, it looked like the drawbars were straight and so you tried again to couple them, correct?
- A. Yes.
- Q. And you tired one more time or two more times after that to couple them?
- A. I tried a few times.
- Q. And then on the last attempt the drawbars on both cars got pushed away from you toward kind of the far rail, if you will?
- A. Yes.
- Q. And then you needed to get 50 feet again?
- A. Yes.
- Q. So you did that?
- A. Yes.
- \*\*\*
- Q. And then what did you do?
- A. I tried to align it again and go back and it did not connect again and then it sent them [the drawbars] in the opposite direction.
- \*\*\*
- A. . . . I was going through and I had to do multiple moves on this car and I couldn't get the pin to drop, it wasn't on the car I hurt myself on the drawbar. It was the other car. It was the north side car.
- Q. How do you mean?
- A. That's why I kept having to retry to couple it because I couldn't get the pin to fall. Every time I make a connection it wouldn't work so I would have to separate it out . . . . . So there was a malfunction, it just wasn't on the car that I hurt myself on.
- \*\*\*
- Q. So there was a defect on the other car, the one you hadn't touched?
- A. It's a defect. I mean they [the knuckle pins] should drop. The pin should drop, make a connection.
- Q. And if it doesn't drop that's a defect?
- A. They have to connect and couple so that you can pull them. If it doesn't - - if the pin doesn't fall, the knuckle doesn't stay closed so you can't pull them.
- Q. Will they connect if they are not properly aligned?
- A. Yes. No, the they have to be properly aligned.

*Gallagher Dep.*, 146:16-147:9, 147:17-148:6, 148:16-19, 184:25-185:14, 185:23-186:9 (App. 19, 26-27) (emphasis added).<sup>4</sup>

The United States Supreme Court has held, and numerous lower courts have recognized, that an injured employee's testimony, borne of experience and first hand perception of how the subject safety appliances functioned at the time of the incident, is, by itself, sufficient to at least establish the existence of a genuine issue of material fact with respect to the railroad's violation of the FSAA. *See Myers*, 331 U.S. at 483 (plaintiff's testimony that a safety appliance "was used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of insufficiency as to make an issue for the jury"); *Richards v. Consolidated R. Corp.*, 330 F.3d 428, 433 (6<sup>th</sup> Cir. 2003) (explaining that "[t]rial judges should not rule out plaintiffs' opinions as to why appliances functioned inefficiently, where the plaintiffs' opinions are based on their experience and perceptions at the time of their accident") (emphasis added); *Fritts v. Toledo Term. R.*, 293 F.2d 361, 363-64 (6<sup>th</sup>

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<sup>4</sup> BNSF tries to blunt the impact of Gallagher's testimony by noting that the defective knuckle pin is not specifically referenced in his Complaint. This fact is not material because "Minnesota is a notice pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." *Hansen v. Robert Half Intern., Inc.*, 813 N.W.2d 906, 917-18 (Minn. 2012); Moreover, the rules contemplate that "procedures for discovery will, by disclosing the facts, more adequately [than the pleadings] serve the purpose to particularize the existing issues." *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 422, 92 N.W.2d 96, 99 (1958). In this case, Gallagher's Complaint alleges injuries suffered as a result of being required to "physically align drawbars" on "railcars which had not coupled together upon initial impact," as well as alleging BNSF's violation of the FSAA and FRA regulations. *See Complaint*, ¶¶5, 6(c), (g) and (h), and 12 (App. 2-3). These allegations are sufficient to notify BNSF of the claim against it.

Cir. 1961) (reversing directed verdict for railroad, noting that there was evidence “that the plaintiff experienced the sensation of a lurching of his engine which he, from experience, attributed to a worn frog,” and holding that “the Supreme Court has permitted opinions of this nature to stand as evidence when they are given by experienced railroad men and are based on their perceptions at the time of the accident”); *Spotts v. Baltimore & O. R. Co.*, 102 F.2d 160, 162 (7<sup>th</sup> Cir. 1938) (“Assuming that the brake [a covered safety appliance] was properly set, as plaintiff testified, the fact that it did not work properly demonstrates, prima facie at least, its inefficiency.”).<sup>5</sup>

In light of the foregoing, Gallagher’s FSAA claims fall comfortably within the parameters set forth by the Supreme Court in *Hiles*. The District Court misapplied the applicable law in concluding otherwise and dismissing those claims. Accordingly, its Order should be reversed.

**B. The District Court improperly gave dispositive effect to the self-serving and unfounded affidavit of BNSF Superintendent Phillip Mullen.**

The District Court compounded its erroneous refusal to consider the wealth of evidence establishing BNSF’s FSAA and/or regulatory violations by giving dispositive

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<sup>5</sup> Although Gallagher’s testimony is sufficient to warrant a reversal, he presented additional evidence of BNSF’s FSAA and regulatory violations in the form of a report from Michael O’Brien, a railroad safety consultant with over 40 years of industry experience. O’Brien’s opinions are discussed at pages 12-13, 15, 33-34, and 41 of Gallagher’s opening brief. The District Court ignored O’Brien’s opinions, which BNSF tries to justify by arguing, for the first time on appeal, that they were inadmissible. *See Resp. Brief at 33-36*. BNSF did not object to O’Brien’s opinions below, and the District Court did not hold that they were inadmissible. This is fatal to BNSF’s position because “[i]t has long been established by the Minnesota Supreme Court that the admissibility of evidence cannot be questioned for the first time on appeal.” *State v. Heidelberger*, 353 N.W.2d 582, 587 (Minn. Ct. App. 1984).

effect to the unfounded and self-serving affidavit testimony of BNSF Superintendent Phillip Mullen. Although Mullen has not worked as a switchman in nearly a decade, and despite the fact that he was not present at the scene and did not inspect the subject equipment, he nevertheless felt comfortable speculating that:

. . . if, as Mr. Gallagher claims, the cars were truly coupled but the knuckle pin simply had not dropped when he first encountered them, there would have been no need for him to align either drawbar prior to attempting to recouple them, as they would have remained in alignment as the knuckles slipped apart. Likewise, if the only problem was that the knuckle pin failed to drop, the drawbars would have remained in alignment on each successive attempt, and he would not have needed to adjust them multiple times. The fact that the drawbars needed realignment after each coupling attempt establishes that it was their misalignment – and not a defective knuckle pin – that was preventing them from coupling. This is also evident from Mr. Gallagher’s testimony that the cars coupled together on the first attempt once he moved them to a straight stretch of track.

*Mullen Aff.*, ¶5 (App. 65).

In its brief, BNSF implicitly concedes that Mullen’s affidavit is insufficient to prove its entitlement to judgment as a matter of law, arguing that it is evidence “from which the District Court or any other tribunal reviewing the record can conclude that the drawbars were misaligned.” *Resp. Brief at 32* (emphasis added). Of course, BNSF has to do much more than present evidence from which a fact finder “can” conclude that the drawbars were never properly aligned. Indeed, because summary judgment is only appropriate where “the material facts are undisputed and as a matter of law compel only one conclusion,”<sup>6</sup> BNSF is required to present evidence from which the fact finder “must” conclude that the drawbars were never properly aligned. Mullen’s affidavit does

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<sup>6</sup> *Sauter v. Sauter*, 244 Minn. 482, 486, 70 N.W.2d 351, 354 (1955).

not “compel” any conclusion, much less the one BNSF advocates and the District Court accepted.

In apparent recognition of the affidavit’s infirmity, BNSF tries to minimize the role it played in the District Court’s decision, stating disingenuously that Judge Robiner “took note of the affidavit of Phillip Mullen . . .” *Resp. Brief at 29* (emphasis added). However, a review of the District Court’s Order reveals that Judge Robiner did far more than simply “take note” of Mullen’s affidavit. Indeed, she predicated her entire ruling on it, holding that “[t]he testimony of Superintendent Mullen establishes that the drawbars would not have become misaligned if the cars to be coupled had been aligned properly from the beginning and in a position to couple upon impact.” *Order Granting Summ. Judg. at 9* (Add. 9) (emphasis added). As noted in Gallagher’s opening submission, there are a number of factors that render the District Court’s wholesale acceptance of Mullen’s affidavit inappropriate.

First, Mullen’s contention that the drawbars were never properly aligned is refuted by Gallagher’s testimony that when he initially came upon the subject cars after they had been sent down the hump, the drawbars were aligned, the couplers had engaged, and the cars appeared to be “knuckled.” *See Gallagher Dep., 146:16-147:9* (App. 19). If the drawbars were never aligned, the knuckles never would have mated, either on the initial trip down the hump or in connection with Gallagher’s subsequent coupling attempts. However, the knuckles did mate, thus establishing proper alignment. Indeed, the only reason Gallagher had to make multiple attempts to effectuate the coupling is that he could not get the pin to fall. As noted previously, Gallagher testified:

That's why I kept having to retry to couple it because I couldn't get the pin to fall. Every time I make a connection, it wouldn't work so I would have to separate it out . . .

*Gallagher Dep., 185:7-10* (emphasis added) (App. 26).

Second, Mullen's hypothesis that the drawbars would have remained in alignment after the cars failed to couple is factually unsound because Gallagher was working on a curved track. After each failed coupling, Gallagher had to pull the engine ahead along the curve for a distance of at least 50 feet,<sup>7</sup> which would affect the alignment of the drawbars and force Gallagher to move them back into position.

Third, the assertions Mullen makes in his affidavit are belied by testimony he gave in his deposition, where he admitted that employees may indeed have to manually adjust coupling equipment in situations where the knuckles come together yet fail to mate (i.e. couple) because the pin does not fall. *See Mullen Dep., 109:16-25* (App. 63).

Fourth, Mullen made no attempt to quantify the forces inherent in a failed coupling (nor is there any reason to believe that he is qualified to comment on such matters), or to explain how the impact is invariably insufficient to move the drawbars out of alignment when working on a curved track.

Fifth, Mullen's claim that drawbars cannot become misaligned from the force of an unsuccessful coupling is directly contradicted by testimony from numerous BNSF employees with extensive experience in coupling cars, including Gallagher, former hump foreman Gary Hawley (who explained that after an unsuccessful coupling, an employee has to separate the cars and "readjust the drawbars before attempting to couple the cars

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<sup>7</sup> See *Gallagher Dep., 146:16-147:9* (App. 19).

together”),<sup>8</sup> and BNSF Trainmaster Derek Huffaker (who, like Gallagher, has personally experienced such occurrences). *Huffaker Dep.*, 27:17-28:4, 28:9-11 (App. 68).

Sixth, as a matter of law Mullen’s conclusion that misalignment is proved by the fact that the cars subsequently coupled is immaterial to the question of BNSF’s FSAA violation. BNSF knows this, and thus tries to downplay District Court’s reliance on that fact by alleging it was not “central in any way to her [Judge Robiner’s] conclusion.” *Resp. Brief at 29* (emphasis added). The District Court’s Order tells a different story, however, emphasizing the subsequent coupling no fewer than six times,<sup>9</sup> and finally concluding that “Gallagher’s ability to ultimately couple the two cars successfully after aligning the drawbars indicates [i.e., is evidence of] efficient coupling equipment.” *Order Granting Summ. Judg. at 9* (Add. 9).

While this Court is obviously capable of determining for itself whether the District Court’s reliance on the subsequent coupling was “central” to its ruling, it ultimately does not matter because any reliance by the District Court on that fact renders its ruling infirm. Indeed, as explained at length in Gallagher’s opening submission, BNSF’s duty to provide couplers that couple automatically upon impact “is an absolute one requiring performance on the occasion in question” (in this case, the couplers failed on multiple occasions). *Affolder*, 339 U.S. at 98-99. Accordingly, the United States Supreme Court has consistently held that “[t]he fact that the coupler functioned properly on other occasions is immaterial.” *Carter v. Atlanta & St. A. B. Ry. Co.*, 338 U.S. 430, 433-34

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<sup>8</sup> *Hawley Aff.*, ¶6 (App. 31).

<sup>9</sup> See *Order Granting Summ. Judg. at 4, 6* (two references), *9* (two references), and *10*. (Add. 4, 6, 9, 10).

(1949); *see also Myers*, 331 U.S. at 483 (explaining that the finding of an FSAA violation “will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently and properly both before and after the occasion in question”).

In light of the foregoing, it is evident that when viewing the evidence most favorably to Gallagher, there is at the very least, a genuine issue of material fact with respect to BNSF’s violation of the FSAA and federal safety regulations. Therefore, District Court’s summary judgment order should be reversed.

### **III. THE DISTRICT COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT BNSF WAS NOT NEGLIGENT IN CONNECTION WITH THE INCIDENT OF JULY 24, 2010.**

Under the FELA, railroad employers owe their employees a non-delegable duty to provide them with a reasonably safe place to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352 (1943). Inherent in that duty is an obligation to provide safe premises, safe equipment, proper training, sufficient assistance, and suitable methods and tools to perform the assigned tasks. *See Staisor v. National R. Passenger Corp.*, 19 F. Supp. 2d 835, 844 (N.D. Ill. 1990); *Kalanick v. Burlington N. R. Co.*, 788 P.2d 901, 905 (1990). The railroad is also required to make inspections, and it will be held to have constructive notice of dangers it could have discovered through those inspections. *See Beattie v. Elgin, J. & E. Ry. Co.*, 217 F.2d 863 (7<sup>th</sup> Cir. 1954); *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5<sup>th</sup> Cir. 1951); *Sears v. Southern Pac. Co.*, 313 F.2d 498 (9<sup>th</sup> Cir. 1963).

**A. BNSF negligently failed to provide Gallagher with safe equipment, sufficient training, and proper tools.**

BNSF concedes that it owes Gallagher a duty to provide him with reasonably safe equipment, training and tools, but argues there is no evidence that it breached that duty in this case, citing “Appellant’s own testimony that the drawbar he was moving at the time of his alleged injury was ‘perfectly fine,’” and claiming “that he experienced no difficulty whatsoever in moving it.” *Resp. Brief at 40*. Although Gallagher did describe the drawbar as “perfectly fine,” a review of his testimony makes it clear that he was talking about the physical condition of the drawbar itself, which was indeed “fine” (i.e., there is no evidence that it was cracked, bent, etc.). This is not material, however, because the problem in this case was not with the physical condition of the drawbar, but rather with the housing mechanism, which was not properly lubricated and which had become contaminated with dirt (thus rendering the drawbar stiff and difficult to move), and with the internal components of the coupler, i.e., the inoperative knuckle pin.

Additionally, Gallagher did not testify that he experienced “no difficulty” moving the subject drawbar. In fact, he consistently testified to the contrary, explaining that it was not adequately lubricated, and s that it was “stiff,” “tough,” “difficult,” and “hard to move.” *Gallagher Dep., 150:21-151:5, 198:24-200:1* (App. 20, 29).<sup>10</sup>

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<sup>10</sup> BNSF also contends that Gallagher testified “that he actually had adjusted this particular drawbar multiple times before he experienced the popping sensation in his back and found it to move freely on each occasion.” *Resp. Brief at 41*. Gallagher never said the subject drawbar moved “freely” (as noted above, he testified that it did not). In his deposition, BNSF’s counsel asked if one of the drawbars Gallagher had aligned that day moved “freely,” to which Gallagher responded, “you have to put your body weight into it a little.” *Gallagher Dep., 142:5-9* (App. 18). Importantly, counsel’s question did not

Gary Hawley and Tom Kuduk, two longtime, now-retired, BNSF employees with extensive experience working in the Northtown yard, confirmed BNSF's lackadaisical attitude toward coupler maintenance. Hawley, for example, testified that "up to 75% of the time" drawbars "were not properly lubricated and would have dirt, grit, and other material that would make lining them more difficult." *Hawley Aff.*, ¶10 (App. 32). Kuduk testified similarly, explaining that "[d]uring my years at the BNSF, including 2010" (when Gallagher suffered injuries) "drawbars were very often not properly maintained," in that "they lacked lubrication," and were corrupted by "[d]irt, rust, and other materials," which would "make adjusting them much harder." *Kuduk Aff.*, ¶11 (App. 35). All of this is evidence from which a jury could infer that BNSF breached its duty properly inspect, maintain and repair the equipment it required Gallagher to work with.

BNSF has also conceded it has mechanical devices (e.g., knuckle mates or alignment straps) to assist in aligning drawbars. BNSF further admits that "there is conflicting evidence in the record" as to whether it made Gallagher aware of such assistive tools or trained him with respect to their use. *See Resp. Brief at 41*. It tries to avoid the impact of this fatal admission, arguing that the existence of these devices is "immaterial and ultimately inconsequential" because they are purportedly "specifically designed to assist in the alignment of equipment that human exertion alone cannot move." *Id.* BNSF fails to cite any evidence in the record that would even arguably tend to

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pertain to the drawbar Gallagher was moving when he was injured, but rather to the first drawbar he had moved that day, which was on a different car. *See Gallagher Dep.*, 139:3-144:4 (App. 17-18). Accordingly, BNSF's attribution to Gallagher of a purported admission that the subject drawbar moved "freely" is false.

support this claim (and a review of the record reveals none). Even more significant, however, is the fact that BNSF's unfounded assertion directly contradicts a concession it made to the District Court; specifically, that knuckle mates and/or alignment straps are to be used when aligning a drawbar that "does not move with the application of minimal force." *BNSF Memo. in Supp. of Mot. for Summ. Judg. at 21* (emphasis added).

BNSF's admission that there is "conflicting evidence in the record" as to whether it informed Gallagher about and/or adequately trained him on the use of assistive devices precludes summary judgment. Indeed, the courts have held that where an injured FELA plaintiff presents evidence that assistive equipment is available but not provided the question of defendant's negligence is one for the jury. *See Rodriguez v. Delray Connecting Railroad*, 473 F.2d 819 (6<sup>th</sup> Cir. 1972); *Heater v. The Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1245 (7<sup>th</sup> Cir. 1974).

**B. BNSF utilized unsafe job procedures and failed to provide sufficient personnel at the Northtown Yard.**

At the time of his injuries Gallagher was working with the drawbar on a bulkhead flat car located a curved track. He has presented evidence that building trains which include cars with long drawbars (as bulkhead flat cars do) on curved tracks "make[s] it more difficult to align drawbars and increase[s] the failure of pins dropping even though the drawbars are properly aligned." *Hawley Aff.*, at ¶9 (App. 32). This, in turn, increases the need for employees to go in between rail cars and manually align drawbars, which, by BNSF's own admission, increases the risk of injuries. *Mullen Dep.*, 48:23-49:1, 50:6-9 (App. 60-62). Gallagher has also presented evidence that because of the difficulties

associated with coupling cars with long drawbars on curved tracks, BNSF has a practice of building trains that include such cars on the higher numbered tracks in the Northtown yard, which are straight or have more gradual curves. *Dingmann Dep.*, 17:5-18, 45:10-46:9 (App. 39, 40-41); *Hawley Aff.*, ¶8 (App. 31); *Kuduk Aff.*, ¶10 (App. 35).

Unable to refute the existence of this evidence, BNSF creates a straw man, which it knocks down by arguing that Gallagher has not “provided any data from which a jury could compare the rate of failed couplings on straight track to that on curved tracks, or the length of time it might take to align a drawbar on a straight track versus doing the same work on a curved track.” *Resp. Brief at 43*. There are at least two fatal flaws with BNSF’s argument: (1) Gallagher “is not required to demonstrate or prove [his] claim in order to avoid summary judgment;”<sup>11</sup> and (2) BNSF cites no authority to support a claim that Gallagher is required to present such comparative data to either survive summary judgment or ultimately prevail on his FELA claims.

The relevant inquiry here is not, as BNSF contends, “how much ‘more likely’ a failed coupling was, or how much ‘more difficult’ it was to get cars with long drawbars to couple on curved tracks.” *Resp. Brief at 42*. Instead, it is simply whether the railroad “‘knew or by the exercise of due care should have known,’ that prevalent standards of conduct were inadequate to protect [Gallagher] and similarly situated employees.” *Urie v. Thompson*, 337 U.S. 163, 178 (1949) (citations omitted). In light of BNSF’s knowledge knows that building trains which include cars with long drawbars on curved tracks increases both the incident of failed couplings and the need for employees to go between

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<sup>11</sup> *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 202 (Minn. Ct. App. 2010).

cars to manually align drawbars, and in further consideration of BNSF's admission that injuries are foreseeable any time a coupler fails and an employee has to manually drawbars, the answer to that question is clearly "yes." Accordingly, the District Court erred in granting summary judgment to BNSF on Gallagher's negligence claims.

Finally, there is evidence that BNSF failed to provide sufficient personnel in the Northtown yard. Indeed, retired BNSF Training Coordinator Kuduk explained that switch crews used to consist of four workers, two of whom worked on the ground lining and adjusting drawbars. *Kuduk Aff.*, ¶15 (App. 36). This additional assistance "made the job considerably easier and lessened the risk of injury." *Id.*

With respect to hump operations, Kuduk and Hawley noted that for the last several years, BNSF has used only one pin puller at Northtown. *Kuduk Aff.*, ¶3 (App. 34); *Hawley Aff.*, ¶4 (App. 31). When only one pin puller is working, they operate the pin lifter from the west side of the hump, which "opens the knuckle on the south end of the cars" but leaves the knuckle on the north end closed as they car roll down into the bowl. *Kuduk Aff.*, ¶¶3-4 (App. 34); *Hawley Aff.*, ¶6 (App. 31). Thus, when hump operations are conducted using only one pin puller, only one knuckle is opened, which "significantly increases the likelihood of unsuccessful couplings." *Hawley Aff.*, ¶6 (App. 31); *Kuduk Aff.*, ¶6 (App. 34). Unsuccessful couplings, in turn, require employees to manually align drawbars, which, as noted above, BNSF's concedes elevates the risk of injury.

The question of whether the railroad has provided sufficient personnel is "peculiarly one for the jury." *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407, 409 (1953). In this case, there is evidence that had BSNF provided additional personnel,

either at the top of the hump to pull pins and open the closed knuckles, or in the yard to help align drawbars (as it used to do), Gallagher would not have been placed in a position to be injured. Accordingly, this is not one of those “extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee.” *Pehowic v. Erie Lackawanna R. Co.*, 430 F.2d 697, 700 (3d Cir. 1970). Therefore, the District Court’s Order should be reversed.

### CONCLUSION

The evidence in this case establishes that BNSF used rail cars equipped with couplers that failed to couple “automatically by impact” in violation of the FSAA (49 U.S.C. § 20302(a)(1)(A)), and that it used a rail car equipped with an “inoperative” knuckle pin in violation of 49 CFR §215.123(d)(2). The record is also replete with evidence that BNSF negligently failed to provide Gallagher with a safe place to work in violation of the FELA.

In denying summary judgment to Gallagher and granting it to BNSF, the District Court engaged in improper fact finding, inappropriately gauged the credibility of witnesses, ignored overwhelming probative evidence tending to show that the couplers “failed to couple automatically on the single impact in question” despite having been placed “in a position to automatically couple,” and misapplied the law in virtually every relevant respect. Therefore, Gallagher respectfully requests that the District Court’s Order be reversed and the case remanded with instructions for the District Court to enter judgment as a matter of law in Gallagher’s favor on his FSAA claims. Alternatively, the District Court’s Order should be reversed and the case remanded for a trial of Gallagher’s FSAA and FELA negligence claims.

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