

NO. A12-1327

State of Minnesota
In Court of Appeals

Sean Gallagher,

Appellant,

v.

BNSF Railway Company,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

- I. Whether the District Court erred as a matter of law in granting Respondent's motion for summary judgment, and denying Appellant's motion for same, on Appellant's claim under the Federal Safety Appliance Act because he failed to produce any evidence of a violation of the Act.**

The District Court held that Appellant failed to produce evidence sufficient to create a question of fact with respect to his claim of a safety appliance defect and therefore granted Respondent's motion for summary judgment on Appellant's Federal Safety Appliance Act claim.

Apposite Authority:

Federal Safety Appliance Act, 49 U.S.C. §§ 20301 – 20306.
Norfolk & W. Ry. Co. v. Hiles, 516 U.S. 400 (1996).
Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950).

- II. Whether the District Court erred as a matter of law in dismissing Appellant's claim under the Federal Employers' Liability Act given the complete absence of any evidence upon which a jury could reasonably conclude that Respondent acted negligently.**

The District Court found that Appellant failed to produce evidence sufficient to create a question of fact on the elements of breach of duty and foreseeability of harm and therefore dismissed Appellant's negligence claim under the Federal Employers' Liability Act.

Apposite Authority:

Federal Employers' Liability Act, 45 U.S.C. §§ 51 – 60.
Eckenrode v. Penn. R. Co., 335 U.S. 329 (1948).
Lager v. Chi. N.W. Transp. Co. 122 F.3d 523 (8th Cir. 1997).

STATEMENT OF THE CASE

Appellant Sean M. Gallagher (“Appellant”) initiated this lawsuit against Respondent BNSF Railway Company (“Respondent”) via service of his Summons and Complaint on July 7, 2011, alleging an injury “to his back and other parts of his body” as a result of having to “physically align several drawbars” on July 24, 2010, while in the course and scope of his employment as a switchman in Respondent’s Northtown rail yard. (A.A.2.)¹ In his Complaint, Appellant alleged violations of both the Federal Employers Liability Act (“FELA”), 45 U.S.C. §§ 51–60, and the Federal Safety Appliance Act (“FSAA”), 49 U.S.C. §§ 20301 – 20306. (*Id.*)

Throughout the pendency of this lawsuit, Appellant has acknowledged that he sustained his alleged injury while in the process of straightening misaligned drawbars, an activity which the United States Supreme Court has already held cannot give rise to strict liability under the FSAA. Appellant belatedly raised the speculative possibility that a piece of defective equipment – namely, an inoperative knuckle pin – was responsible for his alleged injury. He did not include this essential fact in his Complaint. Nor did he include it in the accident report completed with his assistance just days after the incident occurred. He cannot now – nor could he at any time – identify this allegedly defective pin. By the time he reported the incident to his employer, no inspection was possible. The “pin” theory was not raised until the time of his deposition. But by that time, he had

¹ “A.A.” refers to the appendix attached to Appellant’s brief; “A.Ad.” refers to Appellant’s addendum. Pursuant to Minn. R. Civ. App. P. 130.01, Respondent will not reproduce anything already produced by Appellant in his appendix or addendum.

already given under oath a factual account of how his injury occurred – an account that precludes any finding that the pin failed to operate as intended.

Upon completion of discovery, Respondent moved for summary judgment, arguing that Appellant had failed to produce evidence sufficient to raise genuine issues of material fact with respect to both his negligence claim under the FELA and his strict liability claim under the FSAA. Appellant also filed a cross-motion for summary judgment on his FSAA claim. Both motions were briefed extensively and argued before the Honorable Susan M. Robiner of the Fourth Judicial District of the State of Minnesota, Hennepin County, on April 6, 2012. By Order dated May 29, 2012, Judge Robiner denied Appellant's motion and granted Respondent's, dismissing Appellant's claims in their entirety. (A.Ad.15.) Judge Robiner issued a second Order on June 27, 2012 that incorporated a detailed memorandum of law to explain her decision. (A.Ad.1-14.) This appeal followed.

STATEMENT OF THE FACTS

I. Appellant's Claim of Injury Based on Straightening Misaligned Drawbars

Appellant's Complaint contains allegations of injuries arising out of his employment as a switchman in Respondent's employ; specifically, he claims to have "suffered severe and disabling injuries to his back and other parts of his body when he was required to physically align several drawbars"² on July 24, 2010. (A.A.2.) His Complaint did not identify any other allegedly defective equipment or appurtenance which he alleged caused or contributed to his injury. (*Id.*) The initial discovery therefore focused on this claim

A. Appellant's training and employment history with Respondent

Appellant is a 30-year-old gentleman who began his career as a switchman³ with Respondent in May of 2008. (R.A.2-3.) As a switchman, his duties included "[t]hrowing switches[,] tying hand brakes and putting air hoses together," as well as adjusting misaligned drawbars. (R.A.3.) He worked primarily in the rail yard at Respondent's Northtown facility from May of 2008 through January of 2009, at which point he was furloughed for approximately fourteen months. (A.A.8.) When he returned from

²A drawbar is "[a] mechanism for semipermanently coupling together cars or locomotive units. A term formerly used synonymously with coupler, it has been used indiscriminately to designate both the old link and pin drawbars and the modern automatic car coupler." *Railway Age's Comprehensive Railroad Dictionary*, 2nd Ed. (2002).

³A railroad switchman performs the same functions as a conductor. (A.A.8.) The only difference lies in the location of the work: a conductor's job is performed over the road, whereas a switchman's work is done in the rail yard. (*Id.*)

furlough in March of 2010, he resumed his former position as a switchman at Northtown. (R.A.4.)

As a new hire in May of 2008, Appellant completed fifteen weeks of training, which consisted of equal parts classroom instruction and hands-on exercises. (R.A.5.) Following an initial three weeks of classroom training at the Northtown facility, the trainees were taken out to various parts of the yard to practice application of their new skills. (*Id.*) They were shown how to safely get on and off equipment, how to change knuckles,⁴ how to communicate with crew members through the use of hand signals and radios, and how to adjust misaligned drawbars in order to effectuate couplings between rail cars. (*Id.*) In addition to this initial fifteen-week training period, Appellant received approximately a week and a half of additional training when he returned from furlough in March of 2010. (R.A.4.)

A drawbar is essentially a long metal bar that connects the coupler mechanism to a rail vehicle. (R.A.6.) Drawbars are designed to pivot from side to side in their housings

⁴A knuckle is “[t]he pivoting casting that fits into the head of a coupler to engage a mating coupler.” *Railway Age’s Comprehensive Railroad Dictionary*, 2nd Ed. (2002).

to some degree, in order to facilitate safe travel on curved track.⁵ (*Id.*) When cars are uncoupled, however, these drawbars remain motionless. (A.A.40.) Unless some outside force acts upon them, they remain in the same position in which they stood at the moment of uncoupling. (*Id.*) But because these outside forces can cause misalignment, during switching operations switchmen are required to align these drawbars manually, as the knuckles fastened to their ends will fail to engage if they are not properly aligned during coupling attempts. (A.A.18.)

With respect to his training regarding this process, Appellant testified as follows:

Q. Did they teach you how to ... align couplers?

A. Yes.

Q. And when you learned that, was that something that you learned off of a video or in a class?

A. It was out there.

Q. That was a hands-on thing?

A. Yes.

⁵ In its 1996 case *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996), the United States Supreme Court offered the following description:

Railroad cars in a train are connected by couplers located at both ends of each car. A coupler consists of a knuckle joined to the end of a drawbar, which itself is fastened to a housing mechanism on the car. A knuckle is a clamp that interlocks with its mate, just as two cupped hands - placed palms together with the fingertips pointing in opposite directions - interlock when the fingers are curled.... When cars come together, the open knuckle on one car engages a closed knuckle on the other car, automatically coupling the cars. The drawbar extends the knuckle out from the end of the car and is designed to pivot in its housing, allowing the knuckled end some lateral play to prevent moving cars from derailing on a curved track.

Id. at 401-402.

...

Q. Where did they teach you? Was it in the car shop or was it somewhere else at Northtown?

A. It was in the car shop.

Q. And when they showed you how to do it, did they just show you, ... or did they have you try it yourself?

A. Yes, they had us all try it.

(Pl. Dep. pp. 106-107; R.A.1.) From his training, Appellant understood that if he ever encountered a drawbar that he could not move on his own, he was to call for assistance.

(A.A.11.)

During his deposition, Appellant testified that he had aligned drawbars prior to the date of his alleged injury. (A.A.10.) He might “go three or four days without having to align one,” but he generally encountered misaligned drawbars in need of alignment on a weekly basis. (*Id.*) Although he was unable to offer an estimate of the total number of drawbars that he aligned throughout his roughly thirteen months of railroad employment, he asserted that he always aligned them in accordance with the methods he had been taught during his initial training. (*Id.*) He also testified that he had never injured himself while aligning a drawbar at any time prior to the occasion which forms the basis of this action. (*Id.*)

Although a certain amount of physical effort is required to move a drawbar, Appellant testified that at no time during his career did he ever encounter one that he was unable to align on his own. (A.A.12.) Nor did he ever call for help in aligning a drawbar

or “bad-order”⁶ a car for having a faulty or defective drawbar. (*Id.*) He testified further that he had never had to resort to using any sort of mechanical device to assist him in aligning drawbars; in fact, despite their inclusion in the safety rules applicable to track and yard employees – and Appellant’s admitted familiarity with those rules⁷ – he claims never to have known that such devices even existed. (A.A.10–11.) He professed ignorance with respect to the existence of and procedure for using a device called a knuckle-mate to help align drawbars, and claimed that its use “was not part of [his] training.” (A.A.11.) Moreover, he testified that no one had ever told him there were knuckle-mates available at the Northtown facility to assist him in the performance of his duties. (A.A.12.) Nevertheless, he did know that he was supposed to call for assistance in the event that he encountered a drawbar that he could not move on his own. (*Id.*)

B. Appellant’s description of the July 24, 2010, incident

On the date in question, Appellant arrived for work at approximately 7:00 or 7:30 a.m. (A.A.12.) It was a clear, dry summer day. (*Id.*) He was assigned to work the “pull-out job” in the Northtown classification yard, which is primarily responsible for pulling groups of rail cars out of various classification tracks and then “shoving” them onto the departure tracks, where the completed trains are assembled prior to departing to their

⁶ A “bad-ordered” car is one that has been removed from service because of a defect or malfunction. Both Rule 1.1.4 of the General Code of Operating Rules and Rule S-1.4.1 of Respondent’s safety rules require continuous inspection of the condition of tools and equipment and require employees to report and/or remove from service any defective equipment. (R.A.18.)

⁷ Appellant had been given his own copy of the General Code of Operating Rules and the TY&E Safety Rules, which he kept in his locker at work. (A.A.11.) In addition, he has been tested on their content on at least two separate occasions. (*Id.*)

destinations. (A.A.13.) Each pull-out crew is assigned a locomotive, which they control via remote-control units worn by each crew member. (*Id.*) Appellant was familiar with the work performed by the pull-out crews, as he had worked that particular job on previous occasions. (*Id.*) The work is accomplished by several two-member crews working simultaneously in the yard; on the date of the accident, Appellant's crew member was fellow switchman Jack Barbier. (*Id.*)

Following a job safety briefing, Appellant and Mr. Barbier discussed the manner in which they planned to accomplish the pull-out job. (A.A.13–14.) They agreed that Mr. Barbier would be responsible for collecting the first group of cars to be shoved onto the departure track, with Appellant protecting the “head end” of the movement.⁸ (*Id.*) They planned to alternate the tasks thereafter, with Appellant taking responsibility for gathering the second group of cars to be shoved onto the departure track, Mr. Barbier for the third, and so forth until the work was completed. (*Id.*) The classification yard at Northtown contains 63 separate tracks for sorting rail cars. (*Id.*) Appellant explained that pull-out crews “always work a lot of tracks” on each shift and “go back and forth to multiple different ones on each move.” (*Id.*) He could not remember which track he was on when the injury happened or how many cars were on that particular track at the time. (*Id.*)

Although Appellant could not recall whether he had to align any of the drawbars between the first five cars on the track, he did testify that he was able to successfully

⁸ Essentially, “protecting the head end” means to ride on the locomotive and watch for obstructions in its path while it is under the remote control of an operator who is on the ground and thus unable to do so. (A.A.14.)

couple them to the engine. (A.A.16.) He then “started walking back and slowly moving the engine up” to determine whether the remaining cars were coupled. (*Id.*) As he was doing this, Mr. Barbier was riding on the locomotive, protecting the head end. (A.A.17.) There were no other workers in Appellant’s vicinity. (*Id.*) As the locomotive moved forward, Appellant observed some “gaps” in the string of cars; upon walking back to investigate, he noticed that several of the drawbars had “bypassed” and thus failed to couple. (*Id.*) Appellant cannot recall precisely how many bypassed drawbars he found, but stated at his deposition “[t]here was a lot of them. I am not sure of the exact number.” (*Id.*) He did claim, however, “[p]retty much every bulkhead flat was bypassed.” (*Id.*) He testified that each of the bulkhead flat cars was equipped with a “long” drawbar, though he was unable to provide any estimate of their actual length. (A.A.18.) Each misaligned drawbar needed to be moved approximately one to one-and-a-half feet to be brought into alignment. (*Id.*)

Appellant then went about adjusting the drawbars and coupling the cars as he had been trained to do. (A.A.17.) After communicating to Mr. Barbier that he needed to go in between the cars and receiving a confirmatory response, he separated the cars by 50 feet as required by his employer’s safety rules and aligned the first drawbar by “[p]ush[ing] it straight.” (*Id.*) He adjusted the next drawbar the same way. (A.A.18.) He spent “maybe an hour or more” adjusting drawbars prior to his alleged injury, but he has no recollection of the exact number of drawbars he needed to adjust that morning. (*Id.*) He estimated that, in that one hour, he adjusted anywhere between six and eight drawbars:

- Q. Can you give us any estimate of how many [drawbars you adjusted]? You did 20 and then you got hurt and then you did 20 more?
- A. No, maybe three, four. I am not 100 percent sure.
- Q. So maybe three, four and then got hurt and then three or four more?
- A. Yes.
- Q. And that would take an hour?
- A. Yes. It was - - there was a lot of drawbars.
- Q. How long would it take you to adjust each one?
- A. It depends on the one. It could take anywhere from 30 seconds or, you know, 15 minutes. You have to make sure you get the separation. You have to - - *if you don't get them lined up perfect again, you're going to have to separate it again.* You're in between. It all takes time.

(*Id.*, emphasis added.) After each alignment, Appellant would have to reverse the locomotive to couple the cars, and then pull it forward again to find the next gap. (*Id.*) “[S]omewhere in the middle” of that hour, he encountered the drawbar upon which he sustained his alleged injury. (*Id.*)

With respect to the incident, Appellant testified as follows:

- 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 re-knuckle it and it didn't re-knuckle and then I pulled it out again and backed it up again and then – when it tried to knuckle 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. ...
There was multiple attempts.

(A.A.19, emphasis added.) Appellant attempted one last time to align the drawbars and couple the cars, but on this attempt the drawbars were pushed in opposite directions. (*Id.*) He again obtained 50 feet of separation between the cars and began to push on the drawbar, at which point he claims to have both heard and felt a "pop" in his lower back. (*Id.*)

Appellant did not inspect the drawbar at any time, either before or after he sustained his alleged injury. (A.A.20.) During his deposition, he admitted that he "wouldn't even know what to look for" had he inspected the equipment, thus highlighting the purely speculative nature of any comment he might make about its condition. (*Id.*) He also admitted that, while "all" drawbars are somewhat "tough" to move, he had already adjusted this particular drawbar "twice and it seemed to move no worse than any of the other ones." (*Id.*) In fact, he described it as "no more difficult than an average" drawbar, i.e. it worked exactly as expected. (*Id.*) Following the "popping" sensation in his low back, Appellant "took a few minutes to figure out what was going on" and then resumed his work. (*Id.*) He was ultimately able to get the cars to couple together, after he moved them onto a straight stretch of track. (A.A.21.) He moved on to adjust the remaining drawbars that needed alignment, and then "gave control over to [Mr. Barbier] and let him pull it out." (*Id.*)

Following the incident, Appellant did nothing to alert his employer to the fact that a piece of potentially defective equipment might be making its way onto one of its trains,

such as bad-order the car or report the condition to one of his supervisors as required by the safety rules. (A.A.20.) Nor did he ever take any steps to make note of the cars with which he was working when he sustained his alleged injury. (A.A.21.) He never went back and tried to locate them afterward. (*Id.*)

Instead, Appellant simply completed his shift and returned to his home in Forest Lake. (A.A.22.) Later that evening, he was seen in the emergency room for evaluation of his back pain. (A.A.23.) He called his union representative and “a couple” of his supervisors at the railroad the following day, but it was not until July 28, 2010, that he made his way back to Northtown to provide a description of his accident to his employer. (A.A.24.) At that time, he provided a hand-written statement regarding the incident in which he simply indicated that he had heard “a popping noise” originating from his back while adjusting “multiple bypassed drawbars” on July 24, 2010. (R.A.7.) The following day, Appellant completed and signed a BNSF “Employee Personal Injury/Occupational Illness Report,” in which he disclosed that he experienced “back pain” after “pushing a drawbar on a bulkhead flat car that had bypassed” in the Northtown yard. (A.A.44.) No other information about the equipment with which he had been working was provided. (*Id.*) In his report, Appellant indicated that the accident had not been caused by the conduct of another person, that there was nothing he could have done to avoid his injury, and that there was no “defect/malfunction/problem with the equipment” that might have contributed to his injury. (*Id.*)

II. Appellant Tries To Inject A New Theory in His Deposition

In his deposition, Appellant told his factual account of how the injury happened. He admitted that “there was nothing wrong with the drawbar” he was aligning when he sustained his alleged injury. (A.A.22.) In his own words, the only problem with the drawbar was that he “had to keep realigning it.” (*Id.*) Otherwise, “[t]he drawbar was perfectly fine.” (*Id.*) He testified unequivocally that “[t]here was no defect on the car that [he] physically hurt [him]self on.” (A.A.27.)

After a lengthy break in the deposition, Appellant then posited a different theory for his injury. He claimed, for the first time since the alleged incident, that the reason he had to adjust the drawbar on which he injured himself multiple times was because the pin⁹ in the coupler mechanism of the *adjacent* car had not fallen as it should have to lock the knuckles together. (A.A.26.) He claimed that his negative response to the question concerning any potential defective equipment in the accident report he filled out was only “partially correct.” (*Id.*) Thus, because the purported condition that caused his injury was not on the car or drawbar that he was actually touching at the time of the incident but rather on the car next to it, he answered “no” to the question as to whether any defective or malfunctioning equipment had caused his injury. (*Id.*) Appellant could not, however, specify the precise nature of the defect. Appellant admitted that he did not inspect it at any point, and that even if he had, he “wouldn’t know if something was wrong with it.”

⁹ By “pin,” Appellant was referring to the coupler lock, which “drops into position by gravity when the knuckle closes and prevents reopening of the knuckle until the uncoupling mechanism is activated.” *Railway Age’s Comprehensive Railroad Dictionary*, 2nd Ed. (2002).

(A.A.28.) He had not been present when the cars were initially sorted into the tracks, and so he can do no better than to speculate as to why they failed to couple when they were originally classified. (A.A.27.) Since the cars ultimately coupled after being moved from the curved track onto a straight section of track, Appellant had no reason to inspect or report them because their appurtenances had functioned as intended. (A.A.28–29.) He could not identify any particular defect with the pin. Even when specifically questioned whether he was making a claim that the pin on the adjacent car was the defect upon which he blamed his injury, Appellant could only state, somewhat cryptically, that “[i]f the pin had fallen the first time, they were lined up. I would not have had to maneuver the car multiple more moves and adjust the drawbar.” (A.A.29.)

At his deposition, Appellant was also questioned regarding the allegations of negligence that he had made in his Complaint. He testified that he based his claim on his belief that he had not been properly trained to do his duties as a switchman and had not been provided the proper tools with which to fulfill his job responsibilities. (A.A.28.) By “proper tools,” he meant the mechanical devices, such as the knuckle-mate, which are designed to assist in the movement of drawbars that cannot be aligned by hand. (*Id.*) Although he had not performed any inspection of the drawbar upon which he sustained his alleged injury and had previously testified unequivocally that there was nothing wrong it, he did claim generally at his deposition that the “drawbars [on Respondent’s rail cars] could have been lubed more” than they were. (A.A.29.) Appellant admitted, however, that the drawbar he was moving at the time of his alleged injury was “perfectly fine,” that he experienced no difficulty whatsoever in moving it, and that he never

inspected it at any time on July 24, 2010, to determine whether it truly was in need of maintenance or repair. (A.A.20, 22.)

III. Both Parties Move for Summary Judgment

At the completion of discovery, BNSF moved for summary judgment. BNSF explained that Appellant's FSAA claim failed as a matter of law. His theory of liability based on the misaligned drawbars was precluded by the Supreme Court's decision in *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996), and his belated theory based on the defective pin was precluded by his own testimony of how the incident happened. BNSF also argued that Appellant's evidence is legally insufficient to hold the railroad liable in negligence.

On the defective pin theory, Appellant's deposition testimony underscores how illogical the theory is. He testified that he attempted to couple the cars by adjusting the drawbar "multiple times" before he finally moved the cars to a straight stretch of track and successfully coupled them. (A.A.25, 27a.) Appellant also explained that the reason he needed to keep realigning the drawbar was because the knuckle pin failed to drop on each attempt. (A.A.26.) However, if the cars were truly aligned and coupled (but the pin had not fallen) when Appellant first came to 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 because of the claimed pin failure. (A.A.64–66.) Likewise, if the only problem was that the knuckle pin failed to drop, the drawbars would have remained in alignment on each successive attempt as well and Appellant would have had no need to adjust them "multiple times." (*Id.*) The simple fact

that the drawbars needed repeated adjustment after each coupling attempt establishes that it was their misalignment – and not a defective knuckle pin – that was preventing the cars from coupling. (*Id.*) This is only further proven by the fact that once Appellant moved the cars to a straight stretch of track, they coupled together on the first attempt. (*Id.*; A.A.21, 27a.)

Appellant relies upon the deposition testimony of Terminal Superintendent Philip Mullen and Trainmaster Timothy Dingmann, two BNSF employees. As the uncontroverted evidence from both establishes, had the problem Appellant encountered had simply involved an inoperative knuckle pin that failed to drop, the drawbars would not only have remained in alignment as the cars came together but would also stayed in alignment as they pulled apart on each successive attempt. (A.A.40, 64–66.) This is because drawbars remain in whatever position they were in at the moment of uncoupling unless they are acted upon by some outside force, such as a collision with a drawbar on an adjacent car. (A.A.40.) The record here thus proves that Appellant does not know the true cause of the cars’ failure to couple and that his speculation as to why they failed to do so is illogical in light of the actual evidence in the case.

Appellant also moved for summary judgment. In support of his motion for summary judgment, Appellant provided the report of Michael J. O’Brien, his retained liability expert. Mr. O’Brien had reviewed the transcript of Appellant’s deposition testimony as well as those of several of Respondent’s management-level employees, but he did not at any time examine the track where Appellant sustained his alleged injury, nor did he (or could he) ever inspect the allegedly defective coupling equipment which

Appellant claims was the cause of that injury. (A.A.46–48.) In reaching his conclusion that Appellant’s alleged injury resulted from a violation of the FSAA, he failed to either incorporate or explain his failure to include into his methodology Appellant’s testimony concerning the multiple times he had to realign the drawbar before he managed to effect a coupling. Furthermore, as Appellant noted in his brief, Mr. O’Brien relied to a significant extent on the testimony of Respondent’s employees Carlos Canchola, Jeff Jordan, and Timothy Dingmann, who in turn had merely been responding to hypothetical questions posed by Appellant’s counsel which also entirely failed to include Appellant’s own testimony that the drawbars were misaligned. (A.A.46–47, 48–50.)

ARGUMENT

I. Standard of Review

A. Standard of review on summary judgment generally

On appeal from a grant of summary judgment, a reviewing court makes two determinations: “(1) whether there are any genuine issues of material fact” making summary judgment inappropriate and “(2) whether the lower court erred in its application of the law.” *Lubbers v. Anderson*, 539 N.W. 2d 398, 401 (Minn. 1995) (citing *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988)); *see also State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1988); *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000). Review of both questions is *de novo*. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874 (Minn. 2000)); *Sayer v. Minn. DOT*, 790 N.W.2d 151, 155 (Minn. 2010) (“When there are no disputed issues of

material fact, we review *de novo* whether the district court erred in its application of the law.”) (citing *Kelly v. State Farm Mut. Auto. Ins. Co.*, 666 N.W.2d 328, 330 (Minn. 2003)). As such, “[i]n reviewing an entry of summary judgment,” the Court of Appeals “applies the same standard the trial court use[d] in deciding whether to grant summary judgment” in the first place. *Lindner v. Lund*, 352 N.W.2d 68, 70 (Minn. Ct. App. 1984).

Just as a trial court is bound to do when confronted with a motion for summary judgment, a “reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *Abdullah, Inc. v. Martin*, 65 N.W.2d 641, 646 (Minn. 1954). Any doubt as to whether a genuine issue of material fact exists is resolved in favor of the non-moving party. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974). However, that party cannot reclaim its right to trial “merely by referring to unverified and conclusory allegations in [its] pleading or by postulating evidence which might be developed at trial.” *Rosvall v. Provost*, 155 N.W.2d 900, 904 (Minn. 1968). Rather, he must “come forward with specific facts that raise a genuine issue for trial” in response to the motion for summary judgment at the district court level. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001) (citing *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988)). The Minnesota Supreme Court has made it clear that no genuine issue of material fact exists where the party against whom summary judgment was granted can do no more than “present[] evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of [its] case to

permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

B. Standard of review in FELA cases

The FELA imposes liability on railroad employers for injuries sustained by their employees “resulting in whole or in part from the negligence of any of the officers, agents, or employers of such [railroad].” 45 U.S.C. § 51. The FELA is thus quite distinguishable from state workers’ compensation schemes which operate regardless of the attachment of fault to any party. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Rather than obligating the railroads to become absolute insurers of their employees’ safety, the FELA operates as a fault-based system under which “[t]he basis of liability is ... negligence, not the fact that injuries occur.” *Ellis v. Union Pac. Ry. Co.*, 329 U.S. 649, 653 (1947); *Wilkerson v. McCarthy*, 336 U.S. 53, 61, *reh’g denied*, 336 U.S. 940 (1949).

Under traditional negligence analysis, “[t]he mere occasion of injury or mere proof of the happening of an accident is not enough to establish negligence.” *Johnson v. Waletzke*, 448 N.W.2d 541, 542 (Minn. Ct. App. 1989) (*citations omitted*). Rather, to succeed on a claim for negligence, a civil plaintiff must show “(1) that the defendant owed the plaintiff the duty to exercise due care under the circumstances; (2) that he failed to exercise such care; (3) that his failure was the proximate cause of the injury alleged; and (4) that the plaintiff was thereby damaged.” 13B *Dunnell Minn. Digest 2d Negligence* §2.00 (3rd ed. 1981). A plaintiff’s *prima facie* case under the FELA must therefore include evidence sufficient to establish those same elements, plus the additional

“essential ingredient” of foreseeability of the harm. *Davis v. Burlington N., Inc.*, 541 F.2d 182, 185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976). Just as in claims of negligence under the common law, FELA plaintiffs may not rely on the mere happening of an accident to establish negligence on the part of the railroad. *Patton v. Texas & Pac. R. Co.*, 179 U.S. 658, 653 (1900); *N.Y. Cent. R.R. Co. v. Ambrose, Administratrix*, 280 U.S. 486 (1930).

Although in the typical case “negligence involves standards of reasonableness and causation uniquely suited for jury consideration ... [a] trial court may enter a summary judgment on the issue of negligence when the material facts are undisputed and as a matter of law compel only one conclusion.” *Abo El Ela v. State of Minnesota*, 468 N.W.2d 580, 582-83 (Minn. Ct. App. 1991) (*citing Sauter v. Sauter*, 70 N.W.2d at 354 (Minn. 1955)); *see also McDonald v. Cuyuna Range Power Co.*, 175 N.W. 109 (Minn. 1919); *Landru v. Stensrud*, 17 N.W.2d 322 (Minn. 1945); *Otto v. Sellnow*, 46 N.W.2d 641 (Minn. 1951). FELA jurisprudence is replete with cases affirming the removal of FELA cases from the jury’s consideration where the plaintiff has failed to establish each and every element of negligence. *See, e.g., Eckenrode v. Penn. R. Co.*, 335 U.S. 329, 330 (1948) (affirming a trial court’s judgment in favor of the railroad after reaching the conclusion that there was “no evidence, nor any inference which reasonably may be drawn from the evidence” to support a finding that the railroad’s negligence contributed in any way to the decedent’s death); *Hauser v. Chi., M., S.P. & P. R. Co.*, 346 N.W.2d 650 (Minn. 1984) (affirming a trial court’s grant of a directed verdict in favor of the railroad where the evidence established that the plaintiff had sustained an injury as a

result of his own failure to wear his company-issued safety glasses rather than to the railroad's failure to ensure that he was wearing them); *see also Hurley v. Patapsco & B. R.R. Co.*, 888 F.2d 327 (4th Cir. 1989); *Soto v. S. Pac. Transp. Co.*, 644 F.2d 1147, 1148 (5th Cir. 1981). Thus, in *Buganski v. Soo Line R.R. Co.*, Court File No. A11-41, 2011 Minn. App. Unpub. LEXIS 808 (Minn. Ct. App. Aug. 22, 2011),¹⁰ this Court affirmed a trial court's grant of summary judgment in favor of the railroad where the employee "failed to produce sufficient, non-speculative evidence" that the railroad's practice with respect to the replacement of certain parts on its locomotives "was a breach of its duty to provide a safe workplace." *Id.* at *13; *see also Lager v. Chi. N.W. Transp. Co.*, 122 F.3d 523, 525 (8th Cir. 1997) (affirming the trial court's grant of summary judgment in favor of the railroad where the plaintiff failed to produce any evidence that the harm he allegedly suffered had been reasonably foreseeable to his employer); *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 271 (6th Cir. 2007) (affirming the trial court's grant of summary judgment in favor of the defendant railroad where the plaintiff had presented no evidence from which a jury could find that the railroad had breached its duty of care).

Though the FSAA itself does not provide a remedy to injured employees, it is well-settled that "[t]he FELA renders railroads liable for damages resulting from violations of the FSAA." *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570, 572 (6th Cir.

¹⁰ In accordance with Minn. Stat. § 480A.08, a copy of this unpublished opinion is attached. (R.A.19.)

1994) (citing *San Antonio & A. P. R. Co. v. Wagner*, 241 U.S. 476, 484 (1916)). Liability for a proven violation of the FSAA is strict and absolute:

[a] failure of equipment to perform as required by [the Act] is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability – a liability that cannot be escaped by proof of care or diligence.

O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 390-91 (1949); *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 99 (1950). Nevertheless, summary judgment is appropriate in those cases where a violation is alleged but unsupported by the evidence. See, e.g., *Tezak v. BNSF Ry. Co.*, File No. C09-05212BHS, 2010 U.S. Dist. LEXIS 81703 (W.D. Wash. 2010)¹¹; *Hairston v. Metro-North Comm. R.R.*, 2 A.D.3d 127 (N.Y. 2003); *Nash v. Norfolk & W. Ry. Co.*, 93 F.Supp.2d 703 (W.D. Va. 2000); *Van Gorder v. Grand Trunk W. R.R., Inc.*, File No. 06-14345, 2008 U.S. Dist. LEXIS 94027 (E.D. Mich. 2008)¹²; *Ehmann v. Norfolk S. Corp.*, File No. 3:98-cv-7360, 1999 U.S. Dist. LEXIS 13396 (N.D. Ohio 1999)¹³.

Appellant spends several pages of his brief presumptively educating this Court on the nature of the FELA and its various departures from the common law of negligence. He cites a number of cases for the broad proposition that the relaxed standards with respect to fault and causation in FELA claims – as well as the intensified role that factual inferences are allowed to play with respect to those two issues – necessarily require that courts be more reluctant to grant (and appellate courts be more reluctant to affirm)

¹¹ A copy of this unpublished opinion is attached. (R.A.32.)

¹² A copy of this unpublished opinion is attached. (R.A.35.)

¹³ A copy of this unpublished opinion is attached. (R.A.41.)

summary judgment against FELA and FSAA claimants. Contrary to Appellant's assertion that his status as an FELA claimant should have some bearing on the standard to be applied on summary judgment and appeal, however, case law from this jurisdiction and many others demonstrates that summary judgment is a proper tool for disposing of FELA and FSAA claims for which there is no factual support. *See, e.g., Brooks v. Union Pac. Ry. Co.*, 620 F.3d 896 (8th Cir. 2010); *Francisco v. Burlington N. R.R. Co.*, 204 F.3d 787 (8th Cir. 2000); *Lager v. Chi. N.W. Transp. Co.*, 122 F.3d at 523; *Johnson v. Duluth, Missabe & Iron Range Ry. Co.*, 437 N.W.2d 727 (Minn. Ct. App. 1989); *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697 (3rd Cir. 1970); *Aparacio v. Norfolk & W. Ry. Co.*, 84 F.3d 803 (6th Cir. 1996); *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129 (7th Cir. 1990); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358 (9th Cir. 1995); *Mo. Ks. Tx. Ry. Co. v. Hearson*, 422 F.2d 1037 (10th Cir. 1970).

Respondent does not deny the existence of the “long line of FELA cases [that] reiterate the lesson that the statute vests the jury with broad discretion to engage in common sense inferences regarding issues of causation and fault.” *Harbin*, 921 F.2d at 132 (*citing Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 510 (1957)). But Appellant likely directs this Court's attention to this FELA idiosyncrasy in the hopes that the Court will apply the “slight evidence” standard in its review of this case as well. Application of the “slight evidence” standard would, of course, be error; this tipping of the scales in an FELA Appellant's favor is appropriate only where the summary judgment motion at issue challenges the sufficiency of the evidence with respect to causation. *See, e.g., Rogers*,

352 U.S. at 506; *Harbin*, 921 F.2d at 131, 132; *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 150 (8th Cir. 1982); *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 363 (1952).

There is, by contrast, no authority under which this Court may apply the same relaxed standard where, as here, the issues on appeal involve breach of duty and foreseeability of harm. In fact, 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. *See Pauly v. Burlington N. Santa Fe Ry.*, Court File No. A04-812, 2004 Minn. App. LEXIS 1386 (Dec. 14, 2004)¹⁴ (holding that the cases upon which an appellant employee relied to support his argument for a more lenient standard on summary judgment were inapposite as they “relate[d] to the issue of causation and injury” whereas the issue in his case was whether the statute of limitations barred his claim). With respect to issues beyond causation and fault, this Court in *Pauly* applied the “traditional” standard of review and ultimately affirmed the district court. It should do the same here as well.

II. Appellant Has Produced No Evidence To Prove His Claim Of A Safety Appliance Defect Beyond Bare Allegation And Unfounded Speculation, Thus, He Cannot Prove His Claim Under The Federal Safety Appliance Act

The FSAA obligates railroad carriers to use on their lines only those vehicles that are equipped with “couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles.” 49 U.S.C. § 20302(a)(1)(A). Appellant here alleges that Respondent violated this

¹⁴ A copy of this unpublished decision is attached. (R.A.24.)

provision of the FSAA by allowing on its rail line a rail car equipped with a defective knuckle pin, though he has produced no evidence of one and has failed to establish any foundation for his belief that this is what ultimately prevented the car upon which he injured himself from coupling to the adjacent car. His claim is pure conjecture, unsupported and ultimately invalidated by the facts of this case.

In *Grogg v. Mo. Pac. R. Co.*, 841 F.2d (8th Cir. 1988), the Eighth Circuit Court of Appeals observed that, “[t]o recover for a violation of the FSAA [a plaintiff has] to show: (1) the statute was violated; and (2) the violation was a causative factor contributing in whole or in part to the accident that caused [the] injuries.” *Id.* at 212 (citations and internal quotations omitted). To prove the alleged violation, a plaintiff may either show evidence of “some particular defect” in a safety appliance or its “failure to function, when operated with due care, in the normal, natural, and usual manner.” *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947) (citations omitted). As discussed in detail below, Appellant’s FSAA claim fails under both tests. He cannot identify either a particular defect in a safety appliance nor its failure to function when operated as intended, without engaging in pure, unfounded speculation. As such, the District Court properly dismissed his FSAA claim.

A. The United States Supreme Court has held that a misaligned drawbar cannot constitute a defect under the FSAA

With his FSAA claim, Appellant seeks to hold Respondent liable as a matter of law for the injuries he allegedly sustained while trying to straighten a misaligned drawbar. The United States Supreme Court considered – and ultimately rejected – an

identical claim in *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996). In *Hiles*, just as in the present case, the plaintiff had “injured his back while attempting to re-align an off-center drawbar.” *Id.*, 516 U.S. at 402. He brought suit in Illinois state court, alleging violation of the FSAA. *Id.* Although the railroad argued that the drawbar was not misaligned as the result of any defect in the equipment, the trial court granted the plaintiff’s motion for a directed verdict on liability, which was then affirmed by the state’s appellate court despite that tribunal’s recognition of a “deep split of authority” among jurisdictions with respect to whether a plaintiff could recover under the FSAA for injuries sustained while attempting to realign a drawbar. *Id.* at 408. The United States Supreme Court then granted certiorari “to resolve the conflict among the lower courts.” *Id.*

After a lengthy description of the necessary function served by equipping rail cars with drawbars capable of pivoting in their housing and a recitation of the history behind the development of an automatic coupler that would operate without the necessity of workers having to go in between rail cars, the *Hiles* Court began its legal analysis by recognizing that its previous cases established “that the FSAA creates an absolute duty requiring not only that automatic couplers be present, but also that they actually perform” on any given occasion. *Id.* at 408-409. In particular, the Court singled out its 1950 decision in *Affolder* for the proposition that “the failure of equipment to perform as required is sufficient to create liability” under the FSAA. *Id.* at 409 (*citing Affolder*, 339 U.S. at 99). But even in *Affolder*, the Court had recognized that “failure to couple would

not create liability if the coupler was not properly set” prior to the attempt. *Id.* Applying the logic of *Affolder* to the case before it, the *Hiles* Court reasoned that

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.

Id. at 410. The *Hiles* Court also understood that adopting the plaintiff’s reading of the FSAA in that case would require it to “hold that a misaligned drawbar, by itself, is a violation” of the Act, which it was logically and correctly unwilling to do:

Historically, misaligned drawbars [are] an inevitable byproduct of the ability to traverse curved track and ... are part of the normal course of railroad car operations. We are understandably hesitant to adopt a reading of [§ 20302] that would suggest that almost every railroad car in service for nearly a century has been in violation of the [FSAA].

Id. at 412. The Court thus extended *Affolder*’s “failure-to-perform liability ... to every step necessary to prepare a nondefective coupler for coupling ..., including ensuring proper alignment of the drawbar.” *Id.* at 410. The *Hiles* Court then concluded that “a misaligned drawbar simply is not a violation of [the FSAA].” *Id.* at 413.

B. The District Court properly relied upon *Hiles* in holding that Appellant had failed to produce evidence sufficient to establish a question of fact with respect to his FSAA claim

It was on the conclusive authority of *Hiles* that the District Court dismissed Appellant’s FSAA claim. Judge Robiner’s holding was based on a thorough review of the record, taking into account not only Appellant’s testimony but his description of the incident and his activities leading up to it. She correctly observed that Appellant was in the process of aligning bypassed drawbars when he sustained his alleged injury, the very

activity that formed the center of the dispute in *Hiles*. She recognized that all of his energy and attention were focused on the drawbar as the root of the problem and that he did nothing to inspect or even remedy the knuckle pin that he now claims was defective. Judge Robiner took note of the affidavit of Philip Mullen, Terminal Superintendent, wherein he explained that a faulty knuckle pin will not cause an otherwise properly set drawbar to slue to either side during a routine coupling attempt. Appellant of course takes issue with Mr. Mullen's affidavit, but not even the liberties he takes in his interpretation of Mr. Mullen's testimony can remove his counsel's reference to the need for drawbars to be properly aligned in order to effectuate a coupling complete with a dropped knuckle pin. Judge Robiner saw that although Appellant alleged a defective knuckle pin was to blame for the failed coupling attempts, he had produced only evidence that supported a conclusion that the drawbars were indeed misaligned and failed to contradict Respondent's evidence that they could not have become so simply as a result of a defective knuckle pin. Judge Robiner did mention that the evidence established the fact that Appellant was ultimately able to get the cars to couple without difficulty once he moved them to a straight stretch of track, that fact was not – as Appellant would have this tribunal believe – central in any way to the her conclusion that Appellant had failed to satisfy his burden of production with respect to his allegation of a safety appliance defect. The district court appreciated and relied upon the direct and obvious link between the facts in *Hiles* and the facts as alleged by Appellant and understood that he could not succeed on an FSAA claim based solely on his activity aligning a drawbar.

C. Appellant’s specious reliance on case law holding that a single failed coupling establishes a violation of the FSAA cannot save his claim in light of the evidence proving that the drawbars were misaligned

On appeal, Appellant reiterates his argument that his injuries were the result of a defective knuckle pin on the adjacent car which, for whatever reason, he claims failed to drop when the coupler mechanisms came together on the date of the incident. He goes to great lengths to convince this Court that he is entitled to summary judgment in his favor on the FSAA claim because he has proven through his own testimony “a single failed coupling” sufficient to “constitute[] a per se FSAA violation that subjects the railroad to absolute liability.”¹⁵ In making this argument, he cites a number of cases which pre-date the Supreme Court’s decision in *Hiles*; he utterly fails, however, to provide any legal authority to contradict or even call into question *Hiles*’ holding that the alignment of drawbars is a condition precedent to a finding of an FSAA violation in the absence of a successful coupling. Nor does he, in his speculative allegations, successfully refute the evidence in the record that conclusively disproves his claim of a defective knuckle pin.

For example, Appellant claims that the evidence in the record conclusively establishes that the cars with which he was working failed to couple automatically on impact as required by the FSAA. According to his testimony, the cars came together with sufficient force with at least one knuckle open, but failed to couple because the knuckle pin did not drop. That failure to couple, according to Appellant, establishes Respondent’s violation of the Act. But the record contains additional evidence which not

¹⁵ App. Br. at p. 27.

only calls into question his assertion that the equipment was properly set prior to each attempt to couple but actually conclusively establishes that it was not.

While it is generally true that the failure of equipment to perform as expected on a given occasion may subject the railroad to strict liability under the FSAA, the United States Supreme Court has long recognized that a failure of two cars to couple does *not* give rise to liability under the Act “if the coupler was not properly set” prior to the attempt. *Affolder*, 339 U.S. at 99. Looking beyond Appellant’s surface allegation of a defective knuckle pin, one finds an abundance of evidence that the true problem was that the drawbars were simply misaligned. He testified at his deposition that he had to realign the drawbars on which he allegedly injured himself “multiple times” – after each failed attempt to couple the cars. Indeed, Appellant testified that on one attempt to couple the drawbars impacted so heavily that they were “flung” away from him. (A.A.19.) Of greatest importance, of course, is the fact that the failed coupling that immediately preceded Appellant’s alleged injury was unquestionably the result of misaligned drawbars. (*Id.*) If, as Appellant claims, the knuckles had come together but the pin simply failed to drop, the drawbars would have remained aligned both as the rail cars came together and as they were pulled apart, and no adjustment would have been necessary. But they did not do so, necessarily proving that they had not been properly aligned to begin with.

Appellant complains that the District Court placed too much faith in the affidavit of Philip Mullen, the Northtown terminal superintendent and former switchman who explained that a defective knuckle pin would not have the effect of skewing the drawbars

during a coupling attempt. Appellant refers to this as Mullen’s “unfounded hypothesis,” when in reality it is an uncontroverted statement of fact in the record from which the District Court or any other tribunal reviewing the record can conclude that the drawbars were misaligned.¹⁶ Appellant claims that Mr. Mullen’s affidavit contradicts his own deposition testimony, yet the very testimony he cites came in response to his counsel’s questioning about the need to “adjust the knuckles so that they line up more straight,” indicating that the reason for the initial failed coupling was indeed a misalignment of the drawbars. (A.A.63.)

Appellant further challenges Mr. Mullen’s statement of fact based on his failure to “quantify the forces inherent in a failed coupling,” apparently forgetting that the record conclusively establishes – through his own testimony, no less – that each and every coupling attempt was done at a sufficient and appropriate speed to effect the coupling. (A.A.42–43.)

Finally, Appellant incorrectly claims that Mr. Mullen’s affidavit is contradicted not only by his own testimony but also that of Gary Hawley and Derek Huffaker. In reality, however, Appellant’s testimony and affidavit only establish that he made each attempt at sufficient speed and with at least one knuckle open; though he testified that he went in between the cars on each attempt to move the drawbar, he has never even suggested that he actually had aligned them perfectly so that a coupling could occur. In fact, he testified elsewhere in his deposition that he had to make several attempts to couple the other cars on the track because he had not been able to get the drawbars “lined

¹⁶ App. Br. at p. 34.

up perfect.” (A.A.18.) Rather than addressing the steps an employee must take after a failed coupling as a result of a defective knuckle pin, the affidavit of Gary Hawley does nothing more than state that employees are required to go between cars to realign drawbars when they fail to couple as a result of having had only one knuckle open, which significantly increases the degree to which the drawbars must be aligned in order for a coupling to be successful. (A.A.30–32.) Appellant’s reliance on the testimony of Derek Huffaker is likewise misplaced in that each of his answers quoted on pages 35–36 of Appellant’s brief were given in response to counsel’s hypothetical questions which included a mention of misaligned drawbars. Far from contradicting Mr. Mullen’s affidavit, therefore, the testimony of these individuals actually supports the District Court’s conclusion that the cars failed to couple not because of a defective knuckle pin but because of a misalignment in the drawbars.

Appellant also appears baffled by the District Court’s dismissal of Michael O’Brien’s report. The District Court rejected Mr. O’Brien’s opinions because they were based not on any approved methodology and inspection but rather on Appellant’s equivocal deposition testimony concerning the incident in question and the testimony of Respondent’s management employees who were responding to hypothetical questions posed by Appellant’s counsel which did not necessarily fit the facts of this case as Appellant himself had established them. Far from “corroborating” Mr. O’Brien’s conclusion that Appellant has established a violation of the FSAA, the testimony of Respondent’s management officials simply repeats the same conclusion based on the

improper hypothetical situations posed to them. Moreover, their testimony confirms that misalignment of the coupler mechanisms is often the cause of a failed coupling.

Furthermore, the very nature of the opinion on which Appellant relies to support his claim of a safety appliance defect precluded the District Court from considering it in rendering its decision. Generally, the admissibility of expert testimony is governed by Rule 702 of the Minnesota Rules of Evidence:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Minn. R. Evid. 702. Expert testimony is generally admissible if it assists the jury, has a reasonable basis, is relevant, and its probative value outweighs its potential for unfair prejudice. *State v. Jensen*, 482 N.W.2d 238 (Minn. Ct. App. 1992). However, “[i]n determining whether or not an opinion would be helpful or of assistance under [the Minnesota Rules of Evidence] a distinction should be made between opinions as to factual matters, and opinions involving a legal analysis of mixed questions of law and act. Opinions of the latter nature are not deemed to be of any use to the trier of fact.” Minn. R. Evid. 704, Committee Comment – 1977; *see also, In re Estate of Olson*, 223 N.W.2d 677, 681 (Minn. 1929) (“in a will contest, the opinion should not be asked as to the testator’s capacity to make a valid will”).

The Eighth Circuit has noted the well-established rules that “expert testimony on legal matters is not admissible” and that “matters of law are for the trial judge, and it is the judge’s job to instruct the jury on them.” *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003); *U.S. v. Klaphake*, 64 F.3d 435, 438 (8th Cir. 1995) (“Questions of law are the subject of the court’s instructions and not the subject of expert testimony.”); *Okland Oil Co. v. Conoco, Inc.*, 144 F.3d 1308, 1328 (10th Cir. 1998) (“Generally, an expert may not state his or her opinion as to legal standards[,] nor may he or she state legal conclusions drawn by applying the law to the facts.”); *see also Lakeside Feeders Inc. v. Producers Livestock Mktg. Ass’n*, 666 F.3d 1099, 1111 (8th Cir. 2012); *Williams v. Walmart Stores, Inc.*, 922 F.2d 1357, 1360 (8th Cir. 1990). Likewise, the Minnesota Supreme Court has consistently “not allowed ultimate conclusion testimony which embraces legal conclusions or terms of art.” *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). This rule is necessary because opinions involving a legal analysis or mixed questions of law and fact are of no use to the trier of fact. *State v. Chambers*, 507 N.W.2d 237, 238 (Minn. 1993); *see also, State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003). *Fick v. Wolfinger*, 198 N.W.2d 146 (Minn. 1972). Similarly, an opinion as to whether a particular condition or action is dangerous is inadmissible in that it attempts to set the standard of care, which is the sole function of the jury. *See Jackson v. Wyatt Bros. Cement Co.*, 203 N.W.2d 360 (1972).

Thus, it is clear that Mr. O’Brien’s opinion – that the facts as Appellant described them establish a violation of the FSAA – is nothing more than a legal opinion which could not have been admitted at trial. Given that Rule 56.05 of the Minnesota Rules of

Civil Procedure requires all affidavits submitted in support of or opposition to a motion for summary judgment to set forth only “such facts as would be admissible in evidence,”¹⁷ Appellant cannot now rely on Mr. O’Brien’s legal conclusion to support his argument on appeal. The District Court was correct to resist allowing this inadmissible evidence to color her analysis of the case in ruling on the parties’ summary judgment motions. This tribunal should likewise set aside Mr. O’Brien’s legal opinion in favor of a searching and careful evaluation of the true evidence in this case.

D. Appellant did not sustain his burden of production or proof with respect to his FSAA claim.

It was incumbent upon Appellant, in support of his FSAA claim, to produce sufficient evidence to establish either “some particular defect” in a piece of equipment that led to his injury or that it “fail[ed] to function, when operated with due care, in the normal, natural, and usual manner.” *Myers*, 331 U.S. at 483. Based on the foregoing, it is clear that Appellant has done neither. His own description of his alleged injury and the events leading up to it demonstrates that he does not know the cause of any failure to couple between the two subject cars – if such a failure did indeed occur – when they were initially sent down the hump onto the classification track; that he attempted to couple them multiple times and that on at least three of those attempts he had to realign the drawbars; that although he claims the failure to couple was the result of a defective knuckle pin he neither inspected that equipment or made any attempt to adjust it; that he did, conversely, make repeated attempts to align the drawbars; that on one occasion the

¹⁷ Minn. R. Civ. P. 56.05.

drawbars were so far out of alignment that their impact “flung” them in opposite directions; that on the very next attempt they were so far out of alignment that they were both pushed away from Appellant toward the opposite rail; and that it was while he was again adjusting the drawbar following that failed attempt that he sustained his alleged injury. The undisputed evidence in the record further demonstrates that the successive and repeated sluing of the drawbars can only mean one thing – that they were misaligned on each attempt. Though Appellant claims his own testimony and that of several of Respondent’s employees supports his conclusion that switchmen occasionally must realign drawbars when there is a failure of the knuckle pin to drop, careful scrutiny of the deposition transcripts reveals that in each case a mention of the need to adjust the drawbars to bring them more in line with one another was included in the hypothetical. In support of his own conclusion that the FSAA was violated, by contrast, Appellant has provided only his bare allegation – one so speculative that he failed to include it even in his Complaint¹⁸ – that the knuckle pin failed to drop. The District Court recognized that to allow Appellant to proceed to trial on unfounded speculation that was so clearly disproven by the facts in the record would be error. That conclusion should be affirmed.

¹⁸ Appellant’s Complaint contains no mention of any failure of the knuckle pin to operate as expected among its allegations.

III. There Is No Evidence In The Record Upon Which A Jury Could Reasonably Conclude That Respondent Breached Its Duty To Provide Appellant With A Reasonably Safe Place To Work, Therefore, His FELA Claim Could Not Survive Summary Judgment

A. As a railroad employer, Respondent is obligated to provide a reasonably safe place for its employees to perform their work

The duty owed by a railroad to its employees is well-established. Under the FELA, “[a]n employer’s duty of care ... turns in a general sense on the reasonable foreseeability of the harm.” *Ackley v. Chi. & N.W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987) (citing *Gallick v. Baltimore & O. R.R.*, 372 U.S. 108 (1963)). “The employer’s conduct is measured by the degree of care that persons of ordinary, reasonable prudence would use under similar circumstances and by what these same persons would anticipate as resulting from a particular condition.” *Id.* Put another way, under the FELA a railroad employer is neither an absolute insurer of its employees’ safety nor obligated to eliminate all workplace dangers they might encounter; rather, the railroad simply “has a duty to provide its employees with a reasonably safe workplace” and to exercise “reasonable care to that end.” *Van Gorder*, 509 F.3d at 269 (quoting *B. & O. S.W. R. Co. v. Carroll*, 280 U.S. 491, 496 (1930)); see also *Peyton v. St. Louis S.W. Ry. Co.*, 962 F.2d 832, 833 (8th Cir. 1992).

B. The record is devoid of foundationally-supported admissible evidence to establish that Respondent breached its duty to Appellant

The District Court concluded that Appellant’s negligence claim under the FELA failed because he had not sustained his burdens of production or proof with respect to the elements of breach of the duty of care and foreseeability of the harm he allegedly

suffered while on the job. In arguing that this was error – in essence that Respondent should have known Appellant could have injured himself while manually adjusting a drawbar – Appellant misses the District Court’s point entirely. The Court recognized that the issue was not that Respondent could not have foreseen that Appellant would be injured moving a drawbar but rather that he alleged an injury as a result of moving a drawbar that was “perfectly fine” and subsequently blamed his injury on the maintenance of the equipment, the existence of curved tracks, assistive devices, and staffing decisions about which he can only speculate and for which he provided absolutely no foundation.

With respect to his claim concerning the condition of the drawbar, Appellant relies quite heavily on the affidavits of Messrs. Kuduk and Hawley, two former railroad employees who performed no inspection of the equipment, were not on the property at the time, and in Mr. Hawley’s case, were not even employed by the railroad on the date of the incident.¹⁹ Their “generalized complaints”²⁰ about the condition of the drawbars and other equipment in the Northtown yard were properly dismissed by the District Court because they not only had no bearing on the condition of the specific equipment Appellant was adjusting at the time of his alleged injury but also because it directly contradicted Appellant’s own description of that equipment. While the affidavits of Messrs. Kuduk and Hawley may address the very general allegations of negligence that

¹⁹ Although Appellant’s counsel objected as speculative to direct questions posed to Appellant at his deposition about the maintenance and alleged defects in the equipment he was actually utilizing on the date of the incident (A.A.29), he now relies on the speculation of two former employees who were not present to view the equipment. (A.A.30-36.)

²⁰ A.Ad.11.

Appellant identified in his deposition testimony with respect to training, maintenance, and the use of curved tracks, neither affidavit contradicts or even addresses Appellant's own testimony that the drawbar he was moving at the time of his alleged injury was "perfectly fine," that he experienced no difficulty whatsoever in moving it, and that he never inspected it at any time on July 24, 2010, to determine whether it truly was in need of maintenance or repair. (A.A.20, 22.) Nor do they explain why, in light of Appellant's testimony about the drawbar's "perfectly fine" condition, his knowledge (or purported lack thereof) of the existence of certain assistive devices has any relevance to the facts of this case. (*Id.*; A.A.30–36.) Moreover, while the affidavits of both gentlemen discuss the purported dangers of coupling cars with long drawbars on curved tracks and of having only one employee pulling pins at the crest of the hump, neither man provides any context or supporting data for their conclusions or offers an explanation of the basis of their qualifications to render an opinion as to whether these practices constitute a breach of the railroad's standard of care. (A.A.30–36.)

Though Appellant states several times in his brief that the drawbar had been improperly or poorly lubricated and that the housing mechanism which connected it to the rail car was full of dirt,²¹ this is an egregious misstatement of the evidence. While his counsel insist that the drawbar was difficult to move "because it was not properly lubricated and because there was dirt in the housing mechanism,"²² in reality Appellant testified unequivocally that the drawbar was "perfectly fine" and that it was no different

²¹ App. Br. at pp. 10, 39.

²² App. Br. at p. 39.

from any other drawbar he had adjusted over the course of his railroad career, and he is incompetent to testify as to the condition of the equipment because he never bothered to inspect it nor does he have any knowledge of its maintenance or repair history. That it was “poorly lubricated” or “dirty” is thus not circumstantial evidence, but simply pure speculation upon which no jury can be allowed to render a verdict.

Appellant also argues that he might have avoided this alleged injury had he known that certain assistive devices, such as the knuckle mate, were available in the Northtown yard, but he cannot prove that such knowledge would have prevented his alleged injury in this case. Admittedly, there is conflicting evidence in the record: Respondent’s safety rules contain a lengthy description of the various mechanical devices that may be used to align a drawbar that does not move with the application of minimal force, but despite Appellant’s assertion that he was familiar with all the rules contained in his rulebook, he nevertheless claimed to have no recollection of that particular rule. Given the remainder of Appellant’s testimony, however, this issue is immaterial and ultimately inconsequential. Indeed, regardless of Appellant’s knowledge – or purported lack thereof – concerning these devices and their availability, the simple truth is that he had no need of them on the date of his alleged accident. The devices described in Respondent’s rules and stored for use throughout its Northtown facility are specifically designed to assist in the alignment of equipment that human exertion alone cannot move. But Appellant testified not only that the drawbar was “perfectly fine” and no different than any of the other countless drawbars he had manually aligned, but 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. As such, even if he knew of the existence and location of a knuckle-mate or other assistive device, it could not have saved him from his alleged injury because he had no reason to resort to its use in the absence of a drawbar that he himself was unable to move. Moreover, Appellant knew that if he encountered a drawbar that he could not align by himself, he was supposed to call for assistance or “bad-order” the car, which he never did.

Appellant further asserts that Respondent could have been negligent in “failing to provide straight track on which to work so that the drawbars would not have to be manually aligned.” (A.A.1–4.) Notably missing from the record, however, is any evidence that providing curved track for the performance of switching operations somehow constitutes a deviation from the standard of care to which Respondent must be held. Such evidence – clearly outside the realm of knowledge and experience of the average layperson – can only come in through the testimony of an expert in such matters. But no such expert was ever disclosed. Instead, Appellant relied entirely on the affidavits of Messrs. Kuduk and Hawley, and the testimony of Respondent’s management employees, who indicated that coupling cars on curved tracks was “more likely” to lead to failed couplings, or that it was “more difficult” to line the equipment properly on a curved track in order to effectuate a coupling. They never explained, however, 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. They never 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 properly align a drawbar on a straight track

versus doing the same work on a curved track. And while Appellant hints at some corporate policy or practice of sorting cars with long drawbars onto straighter tracks, it is important to note that not one of the witnesses upon whose testimony Appellant basis his insistence that such a “custom” exists ever testified that such a rule could ever enjoy strict compliance, given that the ultimate purpose of the hump operation is to sort the cars according to their destination rather than by their type.

Finally, Appellant makes several unsubstantiated complaints about the staffing decisions in the Northtown yard. Relying on the affidavit of Mr. Kuduk, he suggests that because switch crews “used to consist of four workers”²³ rather than two, a jury could find that Respondent provided insufficient manpower to perform the required work in violation of the FELA. *See Stone v. N.Y., C. & St. O. R. Co.*, 344 U.S. 407 (1953) (holding that the railroad had breached its duty to provide sufficient personnel where the injured employee’s supervisor had additional workers available to help with the work but nevertheless instructed the employee to “pull harder” on the railroad ties he was attempting to move at the time of his injury.) Neither Appellant nor Mr. Kuduk himself, however, has provided any context for this statement. Mr. Kuduk is a *retired* railroad worker who worked in the yard for many, many years. When he hired on, there were neither the automated hump tower operations nor automatically-lined switches that exist at Northtown today. Nor was there RCO capability to assist the men in their work. Mr. Kuduk’s affidavit cannot be used to support any finding that the reduction in crew size

²³ App. 36.

actually increased the burden on switchmen like Appellant, particularly in light of this progressive technology.

With this argument, Appellant takes the position that the more workers on duty would have somehow prevented the injury he now claims. This argument is nothing more than a misapplication of the duty of an employer under the FELA to provide its employees with sufficient assistance to perform a task. Respondent in no way disputes that one part of its duty to provide a safe work environment is providing workers with sufficient manpower to accomplish an assigned task; however, courts that have addressed the issue consistently hold that when the task assigned is a one-person job, the failure to assign additional workers to the task is neither negligence nor even evidence of negligence. In those rare instances where “lack of manpower” claims are submitted to a jury, FELA plaintiffs can only recover when the evidence establishes that they were required to perform a particular task that required more than one individual (i.e., to perform a two-person task by themselves). While tasks such as lifting or dragging heavy equipment typically require more than one person to be performed safely, the alignment of drawbars is one exclusively performed by one individual employee.

Respondent’s purported failure to supply additional workers so that Appellant could theoretically perform less work is simply not actionable negligence under the FELA. When the task itself is one that is accomplished by one person, it is not negligence to assign a single person to that job. For example, in *Coomer v. CSX Transp.*,

No. 95-6106, 1996 U.S. App. LEXIS 25338 (6th Cir. Sept. 13, 1996)²⁴, the Sixth Circuit upheld the district court's grant of summary judgment in favor of the railroad when the only claim made was that the plaintiff's maintenance-of-way gang was understaffed. The district court held – and the Sixth Circuit agreed – that when the tasks performed by the employees were single-person tasks, having more workers would have simply meant that the gang would have finished the day's work more quickly, not that the plaintiff would have avoided injury. Simply having more individuals present would not have prevented that plaintiff's back injury when he lifted a forty-pound splice bar. *Id.*

Similarly, in *McKennon v. CSX Transp., Inc.*, 897 F.Supp. 1024 (M.D. Tenn. 1994), *aff'd*, 56 F.3d (6th Cir. 1995), the plaintiff argued that his shoulder injury had been caused by the railroad's failure to assign more workers to the job on the day of his injury. But the plaintiff's spiking job in *McKennon* was a two-person job for which he had sufficient help to accomplish the task. All that the plaintiff in *McKennon* could offer was his own testimony that "it would have been nice to have more men." *Id.* at 1027. In rejecting the argument that additional workers were needed and that the railroad was negligence for not providing them, the court found that "[T]he fact that plaintiff's job would have been easier if there had been more workers does not constitute negligence on the part of the Defendant, nor does it create an unreasonably unsafe work environment."

²⁴ A copy of this unpublished opinion is attached. (R.A.24.)

Id.; see also *Lewis v. CSX Transp., Inc.*, 778 F.Supp.2d 821, 839-40 (S.D. Ohio 2011); *Edsall v. CSX Transp., Inc.*, No. 1:060-cv-389, 2007 U.S. Dist. LEXIS 94900 (N.D. Ind. Dec. 28, 2007).²⁵

Appellant also makes a claim that Respondent's use of "only one pin puller at Northtown" is a "dangerous practice" which increases the risk of failed couplings on the classification tracks.²⁶ Again, as noted above with respect to the use of curved tracks, Appellant has failed to offer any evidence of the extent to which the "risk" of failed couplings is actually increased by this practice. Moreover, with this argument Appellant is asking the Court to allow a jury to determine the railroad's liability based on a routine practice that is standard across hump operations. In essence, allowing a finding of negligence here would be to "suggest that almost every [hump operation] in service for nearly a century has been in violation" of the FELA, which this Court should be hesitant to allow. *Hiles*, 516 U.S. at 412. Appellant's argument is particularly draconian in light of the fact that the equipment is specifically designed to operate with only one knuckle open. *Id.* at 402, 405; see also *Kavorkian v. CSX Transp., Inc.*, 33 F.3d at 576 (holding that for coupling equipment to be "properly set ... so as to impose strict liability, it must be aligned properly and at least one of the knuckles must be open"); *Kavorkian v. CSX Transp., Inc.*, 117 F.3d 953 (6th Cir. 1997) (noting the *Hiles* Court's explicit approval of its earlier holding in 33 F.3d 570). Appellant's claim of negligence based on the

²⁵ A copy of this unpublished opinion is attached. (R.A.46.)

²⁶ App. Br. at pp. 42-43.

provision of “only one pin puller” was therefore properly dismissed by the District Court, and should be by this Court as well.

C. Appellant’s own description of the July 24, 2010, incident forecloses any possibility of success in proving his negligence claim on any of the bases alleged and argued in his brief

The District Court properly dismissed Appellant’s FELA claim as a result of his failure to produce evidence of breach and foreseeability sufficient to create a genuine issue of material fact on those essential elements. At oral argument on April 6, 2012, however, the District Court identified an additional reason for the failure of Appellant’s FELA claim: its complete foreclosure by the facts he alleges with respect to his FSAA claim. At oral argument, Judge Robiner questioned Appellant’s counsel on the “mutually exclusive” theories of liability he had set forth, recognizing that if the equipment was aligned and properly set for coupling, as Appellant had claimed in his FSAA argument, then it *could not* be *misaligned and improperly set*, as he claimed in his FELA negligence argument. (*See* Tr. Oral Arg. at 30.)

Appellant asserts, repeatedly and forcefully, that every necessary precursor to successful coupling of the equipment was in place during the coupling attempt just prior to his alleged injury. He claims the drawbars were perfectly aligned (or, at least, sufficiently aligned), that he made sure at least one knuckle was open, and that he backed the engine with sufficient speed to effectuate a coupling. The only problem, he insists, is that the knuckle pin did not fall as it should have. If, as Appellant claims, these facts are all undisputed, then their truth obliterates his negligence claim in its entirety, depending

as it does on the misalignment of the drawbars and the unavailability of additional switchmen on the crews in the Northtown yard.

In the end, Appellant failed create a genuine fact question on the elements of breach and foreseeability. For while Appellant was certainly free to allege those elements in his Complaint, he could not merely rest on those allegations in response to Respondent's motion for summary judgment. Rather, he had an affirmative duty to produce evidence to show that a question of fact truly did exist. What he did produce, however, was merely more speculation – his own and that of Messrs. Kuduk and Hawley. The District Court recognized that these unverified and conclusory allegations of negligence could not save Appellant's FELA claim, and its dismissal of that claim should be affirmed.

CONCLUSION

Based on the lack of evidence upon which any jury could conclude that Respondent was negligent, the District Court properly dismissed Appellant's FELA claim. Appellant's failure to likewise produce evidence to create a genuine issue of material fact with respect to his allegation of a violation of the FSAA compelled the dismissal of that claim as well. In so doing, Judge Robiner neither ignored Appellant's proffered evidence, such as it was, nor paid simple "lip service"²⁷ to the general remedial nature of the FELA and the general reluctance of courts to dismiss FELA claims on summary judgment. Her detailed memorandum of law evidences a searching and careful scrutiny of the record and an honest evaluation of Appellant's claims. Ultimately,

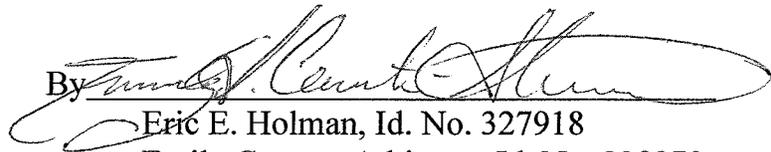
²⁷ App. Br. at p. 31.

however, Judge Robiner was bound to dismiss Appellant's claims because she recognized that in his interminable recitation of the unverified and conclusory allegations he had brought forth in his deposition testimony he fell far short of carrying his burden of coming forward with specific facts to raise a genuine issue of material fact to avoid summary judgment. For that reason, her dismissal of both Appellant's FELA and FSAA claims was appropriate and should be affirmed.

Respectfully Submitted,

Dated: 12.3.12

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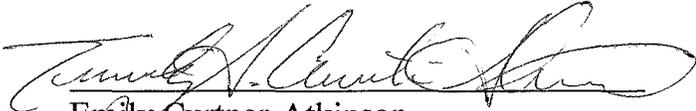
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations in Minn. R. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2007, which reports that the brief contains 13,900 words.



Emily Curtner-Atkinson