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PAUL C HOBBS
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AREA CODE 606
329-8771

August 13, 1984

Clerk
United States District Court
Eastern District of Kentucky
P. O. Box 1139
Pikeville, Kentucky 41501

Re: Arnold Belcher vs. C & O
U.S. District Court, Pikeville
Civil Action No. 83-362

Dear Sir:

Enclosed are an original and three copies of Agreed Order Dismissing the above captioned action. Please present them to Judge Unthank for his approval and after they have been filed, please forward one file-stamped copy to me and one to each of the plaintiff's counsel. Thank you.

Very truly yours,

Paul C. Hobbs

PCH:kw

Enclosures

Judge's Copy

FILED FEB 27 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

ARNOLD BELCHER,	
Plaintiff,	
-vs-	Civil Action No. 82-362
CHESAPEAKE & OHIO RAILWAY COMPANY,	Judge G. Wix Unthank
Defendant.	

REQUEST FOR INSTRUCTIONS

Plaintiff hereby makes written request to the Court to give the following written instructions on law to the jury. The request is hereby made separately for each written instruction attached hereto.

J. B. BLUMENSTIEL
261 West Johnstown Road
Columbus, Ohio 43230
Telephone: 614-475-9511
Grieser, Schafer, Blumenstiel &
Slane Co., L.P.A., Of Counsel

FRANCIS DALE BURKE
P.O. Drawer 511
Pikeville, Kentucky 41501
Telephone: 606-432-0181
Burke, Scott & Burke, Of Counsel

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

Request for Instructions was served upon defendant by mailing a copy of same by United States Mail, postage prepaid, this 23rd day of February, 1984, to Mr. Paul C. Hobbs, Hobbs & Cleveland, 908 Plaza Building, P.O. Box 248, Ashland, Kentucky 41105, and to Mr. Donald Combs, P.O. Drawer 31, Pikeville, Kentucky 41501, counsel for defendant.

Attorney for Plaintiff

INSTRUCTION NO. _____

It has been admitted that the plaintiff, Arnold Belcher, was an employee of the defendant, Chesapeake & Ohio Railway Company, and was in the scope of his employment in interstate commerce at the time when and in the place where he was injured on March 10, 1982.

This case is, therefore, governed exclusively by the federal law as I shall instruct you, and you must apply this federal law to the evidence in this case, to the complete exclusion of any other law, such as state or local law.

INSTRUCTION NO. _____

I charge you that under the federal law which controls this case, a railroad employer is liable in money damages to its employee if the railroad employer is negligent and such negligence played any part, even the slightest, in producing injuries to the employee in the course of his employment.

If, therefore, you find by a preponderance of the evidence, that the defendant railroad, Chesapeake & Ohio Railway Company, was negligent and that its negligence played any part, even the slightest, in producing the injuries to plaintiff, Arnold Belcher, its employee, on March 10, 1982, then your verdict must be in favor of the plaintiff and against the defendant.

Title 45, U.S.C., Section 51
Rogers v. Missouri-Pacific Railroad Co., 352 U.S. 500
DeLima v. Trinidad Corp., 302 F.2d 585

INSTRUCTION NO. _____

I charge you that under the federal law which controls this case, the railroad employer, the defendant, Chesapeake & Ohio Railway Company, had a continuing duty at all times and at all places of employment to use reasonable care to provide its employee, Arnold Belcher, a safe place to work, a safe and suitable method of performing the work, and safe and suitable equipment with which to work. That duty becomes more imperative as the risk increases.

In determining whether the defendant railroad complied with that duty, you may take into consideration all the facts and circumstances in evidence in this case as a whole and you may view the conduct and knowledge of the defendant railroad through its officers, agents or other employees as a whole.

Patton v. Texas & Pacific Ry. Co., 179 U.S. 568
Blair v. Baltimore & Ohio R. Co., 323 U.S. 600
Bailey v. Central Vermont R. Co., 319 U.S. 350
Wilkerson v. McCarthy, 336 U.S. 53
Union Pacific R. Co. v. Hadley, 246 U.S. 330
Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360
Ferguson v. Moore-McCormack Lines, 352 U.S. 360
Deen v. Gulf, Colorado and Santa Fe R. Co., 353 U.S. 925
Thompson v. Texas Pacific R. Co., 77 Sup. Ct. 698, reversing
232 F.2d 313
Meeks v. Georgia Southern R. Co., 377 U.S. 405
Davis v. Baltimore & Ohio R. Co., 85 Sup. Ct. 636

INSTRUCTION NO. _____

I charge you that under the federal law which controls this case, in determining whether or not the defendant railroad employer was negligent, you may treat the acts, omissions, conduct and knowledge of any agent or employee of the defendant, other than plaintiff, who was acting in the course of his employment for the defendant, as the acts, omissions, conduct and knowledge of the defendant itself.

INSTRUCTION NO. _____

Negligence is a failure to use ordinary care. Ordinary care is that amount of care which a reasonably prudent person or corporation through its officers or agents would have used under the same or similar circumstances, taking into consideration all of the relevant facts, circumstances and conditions in evidence.

INSTRUCTION NO. _____

Certain rules issued by the defendant, Chesapeake & Ohio Railway Company, have been admitted into evidence. Such rules may be considered by you on the issues of negligence and causation, but they are not conclusive or binding on you, and the application of said rules to the facts in this case is solely for you, the jury, to determine, and the weight, if any, to be given to those rules in determining the issues of negligence and causation in this case is likewise for you, the jury, to determine.

Spann v. Richmond, Fredericksburg & Potomac R. Co., 273 F.2d 827
Illinois Central R. Co. v. Andre, 267 F.2d 372, cert. den., 361 U.S. 820
Teets v. Chicago, Southshore & South Bend R. Co., 238 F.2d 223
Healy v. Penn R. Co., 184 F.2d 209, cert. den., 340 U.S. 935
Wiggins v. Powell, 110 F.2d 751, cert. den., 314 U.S. 649
Frowbet v. New York Central & St. Louis R. Co., 88 F.Supp. 821
Reed v. Terminal R. Assn. of St. Louis, 62 S.W.2d 747
Renaldi v. N.Y., N.H. & H.R. Co., 230 F.2d 841 (2nd Cir. 1956)

INSTRUCTION NO. _____

Certain rules of the defendant railroad are in evidence in this case. Such rules may be considered by you, along with all the other facts and circumstances in evidence in this case. Those rules, however, are not binding or conclusive on you on the issues of the alleged negligence of defendant or the alleged contributory negligence of the plaintiff or on the issue of whether such negligence, if any, caused in whole or in part or did not cause the injuries to plaintiff. Those issues are for you, the jury, to determine upon consideration of all the facts and circumstances in evidence under the applicable instructions of law.

Spann v. Richmond, Fredericksburg & Potomac R. Co., 273 F.2d 827, pp. 828, 829 (involving a general order of the railroad company)
Illinois Central R. Co. v. Andre, 267 F.2d 372, cert. den., 361 U.S. 820
Teets v. Chicago, Southshore & South Bend R. Co., 238 F.2d 223
Healy v. Penn R. Co., 184 F.2d 209, cert. den., 340 U.S. 935
Wiggins v. Powell, 119 F.2d 751, cert. den., 314 U.S. 649

INSTRUCTION NO. _____

If you find by a preponderance of the evidence that defendant was negligent and that such negligence caused in whole or in part injuries to plaintiff and if you further find that said injuries either precipitated, worsened or aggravated a pre-existing condition, then plaintiff is entitled to recover damages and to be compensated for the entire extent of such precipitation, worsening or aggravation of the pre-existing condition.

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959)
Holladay v. Chicago, Burlington & Quincy R. Co., 255 F.Supp. 879 (1966)
Matthews v. Atchison, T. & S. F. Co., 129 P.2d 435 (1942)
Randall v. Reading Company, 344 F.Supp. 879 (1972)

INSTRUCTION NO. _____

I charge you that under the federal law which controls this case, the plaintiff, Arnold Belcher, cannot be held to have assumed any of the risks of his employment if you find by a preponderance of the evidence that his employer, the defendant, Chesapeake & Ohio Railway Company, was negligent and that such negligence played any part, even the slightest, in producing injuries to the plaintiff.

In other words, if you find that the plaintiff has proven by a preponderance of the evidence that the defendant railroad was negligent and that such negligence played any part, even the slightest, in producing injuries to plaintiff, then under the law you cannot find that the defendant railroad is relieved of responsibility to the plaintiff because plaintiff engaged in his work knowing that risks were involved in connection with his work.

Title 45, U.S.C., Section 54
Rogers v. Missouri-Pacific R. Co., 352 U.S. 500
Tiller v. Atlantic Coastline R. Co., 318 U.S. 54
Koshorek v. Pennsylvania Railroad Co., 318 F.2d 364
Thomas v. Union Pacific Ry. Co., 215 F.2d 18
Williams v. Atlantic Coastline R. Co., 190 F.2d 744
Johnson v. Erie R. Co., 236 F.2d 352
Luthy v. Terminal Railroad Assn. of St. Louis, 243 S.W.2d 332

INSTRUCTION NO. _____

In addition to denying that any negligence of this defendant caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff, himself, was a cause of any injuries and consequent damages plaintiff may have sustained. Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the defendant in effect alleges that, even though the defendant may have been guilty of some negligent act or omission which was one of the causes, the plaintiff himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place in question, also contributed one of the causes of any injuries and damages plaintiff may have suffered.

The burden is on a defendant, alleging the defense of contributory negligence, to establish, by a preponderance of the evidence in the case, the claim that the plaintiff himself was also at fault, and that such fault contributed one of the causes of any injuries and consequent damages plaintiff may have sustained.

You may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

Title 45, U.S.C., Section 53

Plaintiff objects to any instruction on contributory negligence on the ground that the evidence will not raise that issue. The above submitted instruction is tendered as a correct statement of the law on contributory negligence, plaintiff reserving his objection to any instruction on contributory negligence.

INSTRUCTION NO. _____

Under the federal law which controls the claim of plaintiff against the defendant railroad company, a finding of contributory negligence on the part of the employee does not bar his claim against his railroad employer, but the total amount of damages must be reduced by the percentage of negligence attributed to the employee.

The burden of proof is on the defendant. Therefore, if defendant has failed to prove by a preponderance of the evidence that the plaintiff was contributorily negligent, then the defense must be dismissed and not considered by you.

Even if, however, defendant has proven that plaintiff was contributorily negligent, then such proof does not bar his claim against the defendant, but you must reduce the total amount of damages found by the percentage of negligence attributed to the plaintiff.

Title 45, U.S.C., Section 53

Plaintiff objects to any instruction on contributory negligence on the ground that the evidence will not raise that issue. The above submitted instruction is tendered as a correct statement of the law on contributory negligence, plaintiff reserving his objection to any instruction on contributory negligence.

INSTRUCTION NO. _____

If you find that the defendant railroad, Chesapeake & Ohio Railway Company, is liable in this case, you should assess as damages the amount you find by a preponderance of the evidence as full and just compensation for all of the plaintiff's damages, resulting from his injuries, no more and no less. Compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff; that is, to make him whole or as he was immediately prior to his injury.

No evidence of the value of such intangible things as mental or physical pain and suffering has been nor need be introduced; for, in that respect, it is not value you are trying to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered and will suffer in the future.

You should consider the following elements of damages both past and future to the extent you find them proved by a preponderance of the evidence, and no others: physical and mental pain and suffering; physical disability; impairment and inconvenience; humiliation, shame and embarrassment; mental anguish and anxiety; worry and concern, including feelings of economic insecurity caused by disability; the reasonable cost of medical expenses; income loss in the past; impairment of earning capacity or ability in the future; impairment of normal progress in the plaintiff's earning capacity; and impairment of his normal ability to enjoy the pleasure and pursuits of life.

INSTRUCTION NO. _____

If you find that plaintiff, Arnold Belcher, is entitled to recover against defendant, Chesapeake & Ohio Railway Company, you will assess money damages in the amount which will fairly compensate plaintiff for all damages and losses, past and future, which you find by a preponderance of the evidence he has sustained and will sustain as a result of the injuries incurred on March 10, 1982 and the consequences therefrom.

In arriving at the total amount of money damages, you should first consider all the evidence concerning damages to date, that is, damages from the date of injury to the date of trial. In this connection, you should consider the following to the extent proven by a preponderance of the evidence:

(1) An amount which will fairly compensate plaintiff for the nature, extent, duration and severity of the injuries, both physical and mental, sustained on March 10, 1982 and the consequences from those injuries to date.

(2) An amount which will fairly compensate plaintiff for the pain, suffering, humiliation, mental anxiety and nervous and emotional damage and disorder resulting from those injuries and consequences to date.

(3) An amount which will fairly compensate plaintiff for the effect of those injuries and consequences on plaintiff's normal personality, habits, activities, recreation and pleasures to date.

(4) Loss of earnings and fringe benefits sustained by plaintiff to date as a result of those injuries and consequences.

(5) The value of medical and nursing services, care and treatment and therapy rendered to date as a result of those injuries and consequences.

(6) The cost of hospitalizations as a result of those injuries and consequences.

From all the foregoing you will determine the amount of money damages which will fairly compensate plaintiff for his injuries and consequences to date.

You will then consider future losses and damages. In this connection you should consider the following, to the extent proven by a preponderance of the evidence:

(7) An amount which will fairly compensate plaintiff for the nature, extent, permanency and severity of the physical and mental injuries and consequences sustained on March 10, 1982 from this date for the remainder of his life.

(8) An amount which will fairly compensate plaintiff for the pain, suffering, humiliation, mental anxiety, and nervous and emotional damage and disorder resulting from those injuries and consequences from this date to the remainder of his life.

(9) An amount which will fairly compensate plaintiff for the effect of those injuries and consequences on plaintiff's normal personality, habits, activities, recreations and pleasures from this date to the remainder of his life.

(10) An amount which will fairly compensate plaintiff for the loss or diminution of his earning capacity which will be sustained from this date for the remainder of his earning life as a result of those injuries and consequences.

(11) An amount which will compensate plaintiff for the loss of fringe benefits from this date for the remainder of his life.

(12) An amount to compensate plaintiff for medical expenses that he can reasonably expect to incur in the future.

From the foregoing you will determine the amount of money damages which will fairly compensate plaintiff for his injuries and consequences from this date forward.

In arriving at total damages, you should add the amount you have determined for past damages, that is, from the date of the injuries to the date of this trial, and the amount you have determined for future damages, that is, from the date of this trial forward.

INSTRUCTION NO. _____

I further instruct you that, once you have determined the dollar amount of future wage and fringe benefit loss plaintiff is reasonably anticipated to suffer as a result of his injuries, then you are to determine the present worth of that amount.

In determining the present worth of that amount, you, the jury, should decide what lump sum of money awarded today and invested at a safe rate of interest, would produce, over the period of time you find the plaintiff will be disabled, an amount equal to the total of the future wage and fringe benefit loss.

In determining what safe rate of interest plaintiff should be expected to obtain over the future period of his disability and the amount available for investment, you should consider plaintiff's education, his training, understanding, experience and knowledge, or lack thereof, in investment matters, the amount of money necessary for daily living, and expenses, which could not be tied up in non-liquid or long-term investments, and the past, present and probable future safe rates of interest available to a person of plaintiff's capabilities.

Additionally, you should consider the effects of inflation on the purchasing power of the dollar. By that I mean, if you find both by your common experience in the past, as well as from the evidence presented, that inflation will in all probability continue to reduce the purchasing value of the dollar, then you may consider this factor in determining the final dollar amount you award plaintiff for his future loss of wages and fringe benefits.

In other words, plaintiff is to be awarded an amount now which should make him whole for his future loss of wages and fringe benefits for

the period of his disability, taking into consideration his daily monetary needs and expenses, the amount available for investment, the probable safe rate of interst obtainable by one of plaintiff's capabilities over that period and the probable future effect of inflation on the purchasing power of the dollar.

Such a reduction to present worth does not apply to the money damages you have determined plaintiff is entitled to from the date of his accident to the date of this trial.

Furthermore, you are not to reduce to present value the money damages that you award plaintiff for any future pain and suffering.

Bach, Executrix v. Penn Central Transportation Co., 502 F.2d 117 (6th Cir. 1974)
Waterman Steamship Corp. v. Rodriguez, 290 F.2d 175 (1st Cir. 1961)
Torres v. Hamburg-Amerika Line, 353 F.Supp. 1276 (D. Puerto Rico 1972)
Culley v. Pennsylvania R. Co., 244 F.Supp. 710 (D. Del. 1965)
Hanson v. Reiss Steamship Co., 184 F.Supp. 545
Texas & Pacific Ry. Co. v. Buckles, 232 F.2d 257 (5th Cir. 1956)
Chicago & N. W. Ry. Co. v. Candler, 283 F. 881 (8th Cir. 1922)
Taylor v. Denver & Rio Grande Western R. Co., 438 F.2d 351 (10th Cir. 1971)

INSTRUCTION NO. _____

In determining the amount of lost earnings, past and future, suffered by plaintiff in this case, you should consider the matter of federal income taxes; and if you find by a preponderance of the evidence that federal income taxes would have been and would be payable by plaintiff on the earnings lost, you should deduct the amount of federal income taxes, if any, from the gross loss of earnings and award the net loss.

No other deduction may be made from lost earnings.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980)

INSTRUCTION NO. _____

The lump sum award of total damages which you find that plaintiff suffered in this case is not subject to federal income taxes, and you must not either increase or decrease that award because of the fact that such award is not subject to federal income taxes.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980)

INSTRUCTION NO. _____

If you find that plaintiff is entitled to recover in this case, I instruct you that under the federal tax laws the amount of the verdict actually recovered by plaintiff from the defendant railroad is not taxable as income, and the amount of the verdict actually paid by the defendant railroad to the plaintiff is deductible as a business expense from the railroad's gross income in determining the railroad's federal taxable income. You must not, however, either increase or decrease the amount of damages to which you find plaintiff is entitled because of the foregoing federal income tax consequences of your award and verdict.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980)
Kornhauser v. United States, 276 U.S. 145 (1928)
W. S. Dickason, 20 BTA 496 (1930)
Emanuel O. Diamond, 19 TC 737 (1953)
R. G. Plante v. United States, 63-2 USTC ¶9530 (D.C.)
Mulgrew Blacktop, Inc. v. United States, 70-1 USTC ¶9164 (D.C.)

INSTRUCTION NO. _____

Section 3 of the Federal Employers' Liability Act (Title 45, U.S.C., Section 53) provides in part that:

> "In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

So, if you should find, from a preponderance of the evidence in the case, that the defendant, Chesapeake & Ohio Railway Company, was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff, Arnold Belcher, and if you should further find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of some contributory negligence which contributed toward bringing about his own injury; then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

Plaintiff objects to any instruction on contributory negligence on the ground that the evidence will not raise that issue. The above submitted instruction is tendered as a correct statement of the law on contributory negligence, plaintiff reserving his objection to any instruction on contributory negligence.

Judge's Copy

FILED FEB 27 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

ARNOLD BELCHER,	
Plaintiff,	
-vs-	Civil Action No. 82-362
CHESAPEAKE & OHIO RAILWAY COMPANY,	Judge G. Wix Unthank
Defendant.	

PLAINTIFF'S TRIAL BRIEF

I. JURISDICTION OF THE COURT

The jurisdiction of the Court is based upon the Federal Employers' Liability Act, Title 45 U.S.C., Sections 51 and following. The jurisdictional basis is admitted by defendant.

II. NATURE OF THE CASE

This action is brought under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, which congressional act is a negligence statute, and said claim is for personal injuries received by the plaintiff while employed by the defendant railroad company.

III. STATEMENT OF THE CASE

Arnold Belcher, a 48 year old Maintenance of Way employee for the Chesapeake & Ohio Railway Company, was employed as a track laborer on March 10, 1982.

The assigned task was to proceed to a derailment area where a train had derailed a day or so before causing the ribbon rail, or welded rail, to be twisted from its normal position onto its side in an unusable fashion.

Because of the derailment and the damage done to the ribbon rail, the crew was going to remove all spikes holding the rail in and another welding crew was going to be assigned the task of cutting one end of the ribbon rail out, cutting through the ribbon rail in preparation for removing those twisted and damaged portions.

Several supervisors above the foreman's position were present and directing the activities.

Approximately 1000 feet or more of the rail were in the twisted and torqued position and crew members had been assigned the task of removing the spikes and plugging the holes. Plugging the holes means putting wooden spikes into the holes where the railroad spikes had been so that the tie is solid again in preparation for the new placement of tie plates and rail.

While plaintiff Arnold Belcher was so performing that task, some 600 to 800 feet away from him a supervisor was directing the welding crew to cut through the ribbon rail. Shortly before the accident, said supervisor directed that the cutting be stopped momentarily. He apparently made some sort of investigation and then directed the welding crew to proceed with the final cut through the ribbon rail.

At no time did any of the supervisors warn and alert those men positioned along the twisted and torqued portion of the ribbon rail to move out of the way before the cut was completed. Immediately before the cut was completed it broke through the remaining portion causing the rail to fly into the air, twisting in multiple directions. Ultimately the portion near Arnold Belcher raised in the air and coming down with great force crushed both of his feet resulting in the amputation of his one foot and the permanent disfigurement and damage to the other foot.

As a result of this injury, Arnold Belcher has been permanently and totally disabled from all forms of labor, as he is incapable of standing on his feet for any protracted period of time.

Plaintiff was earning approximately $26,000.00 a year in 1981, and would have been able to work until age 70 under the federal law.

Plaintiff is married and has two children living at home.

IV. ISSUES AND LAW

A. Federal Law Controls

This action arises under and is governed exclusively by the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following. That Act and the decisions construing that Act constitute the controlling federal law governing the issues raised in the pleadings of this case. Brown v. Western Ry. of Alabama, 338 U.S. 294; Arnold v. Panhandle and Santa Fe Ry. Co. 353 U.S. 360; Maynard v. Durham and Southern Railroad Co., 365 U.S. 160.

B. Federal Employers' Liability Act and Judicial Interpretations

The Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, is an Act which was passed by Congress for the benefit and protection of railroad employees and their families. The basic section of that Act, Title 45, U.S.C., Section 51, provides in part pertinent to this action:

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

works, boats, wharves or other equipment.
(Emphasis added)

The first fundamental principle which controls the disposition of all issues under the Act concerns the quantum of proof necessary for the submission of the issues in the case to the jury. That rule is this: The issues of a case arising under the Federal Employers' Liability Act must be submitted to the jury if there is evidence "of any probative value" showing that some negligence of the railroad caused in any part the injuries for which damages are being sought, even if such a conclusion must necessarily be based upon speculation and conjecture. Lavender v. Kurn, 327 U.S. 645.

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

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

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

> [W]hether the proof justifies with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . .

Rogers v. Missouri-Pacific Railroad Co., 352 U.S. 500.

Thus, the controlling test for a jury case is whether there is evidence of any probative value that some negligence of the railroad "played any part, even the slightest, in producing" the injuries for which damages are sought. Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108. The jury should be charged accordingly on the issue of causation. DeLima v. Trinidad Corporation, 302 F.2d 585 (2nd Cir. 1962) at pp. 587, 588.

Still another important principle has been applied by the United States Supreme Court in cases arising under the foregoing Act. The employer railroad has a continuing duty at all times and at all places of employment to exercise due care to furnish its employee with a reasonably safe place to work and reasonably safe equipment in performing the job or operation. That duty becomes more imperative as the risk increases. Patton v. Texas and Pacific Ry. Co., 179 U.S. 568; Bailey v. Central Vermont Railroad Co., 319 U.S. 350; Blair v. Baltimore & Ohio Railroad Co., 323 U.S. 600 and Wilkerson v. McCarthy, 336 U.S. 53.

Of particular importance in this case is the Federal Rule of Unitary Negligence which must be applied in determining whether the railroad has fulfilled its duties imposed upon it under the law. In determining whether those duties have been fulfilled and whether or not the railroad was negligent, the jury may view the railroad's conduct as a whole and may

consider all of the facts and circumstances as a whole. Union Pacific Railroad Co. v. Hadley, 246 U.S. 300; Bailey v. Central Vermont Railroad Co., 319 U.S. 350; Blair v. Baltimore & Ohio Railroad Co., 323 U.S. 600; Arnold v. Panhandle and Santa Fe Ry. Co., 353 U.S. 360. This principle was perhaps best expressed by the great Justice Holmes in the case of Union Pacific Railroad Company v. Hadley, 246 U.S. 300, at p. 332:

> On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question.

The same principle has been consistently applied by the United States Supreme Court. For example, we refer the Court to the case of Blair v. Baltimore & Ohio Railroad Co., 323 U.S. 600, supra. at p. 604:

> The duty of the employer "becomes 'more imperative' as the risk increases." Bailey v. Central V. R. Co., 319 U.S. 350, 352, 353. See also Tiller v. Atlantic C. L. R. Co., 318 U.S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. Union Pac. R. Co. v. Hadley, 246 U.S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

1. Analogous Cases

In a similar case, the court in Kansas City Southern Railway Co. v. Sparks, 222 S.W. 724, stated that where a track laborer was injured by an old rail which had been loosened and fell upon his foot, evidence of

negligence of the master's foreman was sufficient to warrant the jury finding on behalf of plaintiff.

Also in the case of LaBonte v. N.Y., N.H. & H.R. Co., 167 N.E.2d 629, the court held that there was a jury issue of negligence where plaintiff was injured when he was hit in the leg by a crosstie when a fellow employee failed to wait for proper count to lift or to warn plaintiff.

In our particular case, the method and the total failure to warn plaintiff are both strong counts of negligence bordering on gross negligence.

Also in the case of Stone v. New York Central and St. Louis R. Co., 344 U.S. 407, the court held that a jury issue was created where there were alternative safer means available to do the task in which plaintiff was injured.

See also, Yawn v. Southern Ry. Co., 591 F.2d 312, which case asserts negligent supervision as a basis for liability in a Federal Employers' Liability Act case.

In the case of Alabama Great Southern Railroad Co. v. Chicago & Northwestern Ry. Co., 493 F.2d 978, the court held that where a railroad "failed to discover a dangerous condition which was open and obvious and likely to cause injury to one of its employees," such act is active negligence.

The evidence will be in this case that the company's own rules clearly set out that all personnel should have been warned ahead of time or restraining devices should have been placed on the rail or perhaps the spikes should never have been removed when the cut was made until tension was taken off the rail, and under any of those circumstances there is clearly evidence of negligence entitling plaintiff to recover against the defendant.

C. Contributory Negligence and Assumption of Risk

Defendant has alleged as an affirmative defense contributory negligence on the part of the plaintiff. We deny that the evidence will present any issue of contributory negligence. Under the controlling federal law, however, even a jury finding of contributory negligence on the part of the plaintiff will not bar his claim against the defendant railroad, but will only diminish the damages in proportion to the percentage of negligence, if any, which the jury attributes to the plaintiff. Title 45, U.S.C., Section 53.

It is mandatory that the defendant railroad not be permitted to interject into this action the forbidden defense of assumption of risk under the guise of contributory negligence. In cases arising under the Federal Employers' Liability Act, the 1939 Amendment removed as a matter of law the defense of assumption of risk and every vestige of it. Title 45, U.S.C., Section 54. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54. Contributory negligence presents the issue of whether the plaintiff performed his duties with reasonable care under all the facts and circumstances present, while assumption of risk involves the knowledge of plaintiff that he performed his job under circumstances which he well may have known to involve risks. Knowledge of such a risk on the part of the plaintiff is not contributory negligence, but involved the assumption of risk, which doctrine has absolutely been abolished as a defense under the Act.

It follows that this Court must carefully distinguish between alleged contributory negligence and assumption of risk and clearly eliminate the latter as a defense in this case. Koshorek v. Pennsylvania R. Co., 318 F.2d 364. Otherwise, the Act and the Tiller doctrine have been violated. This principle was applied by the United States Court of Appeals for the

Sixth Circuit in the case of Thomas v. Union Pacific Ry. Co., 215 F.2d 18, p. 20:

> Even though the employee may know that the employer has been negligent in the furnishing of a safe place to work, the employee does not, under the Federal Employers' Liability Act, assume the risks of such danger. Williams v. Atlantic Coast Line Railroad Co., 5th Cir. 190 F.2d, 744, 748. (Emphasis added)

The Sixth Circuit in the Thomas case cited with approval the decision of the Fifth Circuit in Williams v. Atlantic Coast Line Railroad Co., 190 F.2d 744. In the Williams case, the court condemned a charge requiring that warning of a dangerous situation must be given by an employee to the railroad to put the latter on notice, and then stated at page 748:

> The employee has a right to rely upon the performance of his duty by the employer and to govern his actions accordingly. 35 Am. Jur. p. 604, Master and Servant, Section 175, p. 612, Master and Servant, Section 184. Indeed, even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not, under this Act, assume the risk of such danger, Title 45 U.S.C.A., Section 54, Tiller, Exec. v. Atlantic Coast Line Railroad Co., 318 U.S. 54. (Emphasis added)

We emphatically deny, as we have stated, that the record herein will support a charge of contributory negligence. In any event, such a charge must not state the issue of so-called contributory negligence in terms of what really amounts to assumption of risk. This was the very error condemned by the Circuit Court of Appeals in the case of Johnson v. Erie Railroad Co., 236 F.2d 352, p. 355.

> In addition, we think the court stated the issue of contributory negligence to the jury in such terms that it might be thought that assumption of risk was a good defense, contrary to 45 U.S.C.A., Section 54, Tiller v. Atlantic Coast Line Railroad Co., 318 U.S. 54.

D. Issues of Damage and Evidence

The usual rules of damages in personal injuries will apply, namely, a plaintiff is to be compensated fully and adequately for his injuries and all consequences and losses resulting therefrom. In connection with the issue of damages, as well as perhaps other issues in this case, certain questions may arise with respect to evidence. We do not attempt to and cannot anticipate all such issues. We do point out the following, however, which may arise.

1. Evidence and Quantum of Proof in Medical Issues

Medical issues, such as the nature and extent of injuries and any aggravation of any pre-existing condition, the consequences therefrom and the causes are under the controlling federal law for the ultimate decision by the jury. There is no requirement under that law for any particular forms of medical words by the testifying physicians, such as, "reasonably probable," or "with reasonable medical certainty," etc. The leading case on this point is Sentilles v. Inter-Caribbean Shipping Corp., 261 U.S. 107, which dealt with a seaman under the Jones Act which is in pari materia with the Federal Employers' Liability Act. The seaman was thrown to the deck of a ship during heavy seas and carried a considerable distance by the wash of the wave. Shortly thereafter he developed a severe case of tuberculosis.

The court in its opinion clearly stated that:

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The

> matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the questions of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration. (Emphasis added)

In connection with expert testimony in general, including that by medical experts, both the scope of and the basis for admissible expert testimony have been broadened in Federal Courts by the Federal Rules of Evidence, Rules 702-705, inclusive.

2. Loss of Earnings or Earning Capacity and Fringe Benefits

Loss of earnings or earning capacity may be shown by such evidence as the record of plaintiff's earnings, the record of working days or time lost, applicable wage rates over the pertinent period of time, including those fixed for the future by agreement, plaintiff's employment opportunities, present and future, as shown by his skill, capacities and his place on the pertinent roster of employees, and comparison with the earnings of comparable employees, particularly those in similar place or circumstances under the pertinent roster governing the right to job assignments. The latter evidence is admissible provided that the circumstances of the compared employees are substantially similar to those of the plaintiff had he not been injured, disabled or impaired. Plourd v. Southern Pacific Transportation Co., 534 P.2d 965.

Plaintiff is also entitled to recover for loss of fringe benefits, as shown by the evidence, which has been and will be incurred as a result of inability to perform his railroad work, since those benefits attach to and are a part of the total benefits received by one regularly employed and working.

3. Future Loss of Earning Capacity

With respect to the loss or impairment of future earning capacity, the present value of that loss must be determined. In making that determination, an allowance is to be made for the earning power of money, Kelly v. Chesapeake & Ohio Ry. Co., 241 U.S. 485, 490, 491; but recent decisions require that allowance and consideration should also be made for inflation or wage rate increases. Jones & Laughlin Steel Corporation, etc. v. Pfeifer, ____ U.S. ____ (June 15, 1983); Norfolk & Western Ry Co. v. Leipelt, Adm'x, etc., 444 U.S. 490 (1980); Grunenthal v. Long Island Railroad, 393 U.S. 156, 160 (1968), reversing 388 F.2d 480 (2nd. Cir.), reversing 292 F.Supp. 813 (S.D. N.Y. 1967); Drayton, a minor, etc. v. Jiffee Chemical Corp., 591 F.2d 352, 363, 364 (6th Cir. 1978); Morvant v. Construction Aggregates Corp., 570 F.2d 626, 631-633 (6th Cir. 1978); Bach, Exec. v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974); Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453 (3rd Cir. 1982); Doca, et al. v. Marina Mercante Nicaraguense, S.A., et al., 634 F.2d 30 (2nd Cir. 1980); Espana v. United States, 616 F.2d 41 (2nd Cir. 1980); Feldman v. Allegheny Airlines, Inc., 382 F.Supp. 1271 (D.C. Conn. 1974), affirmed 524 F.2d 384, 387-88, (2nd Cir. 1975); Virginian Railway Co. v. Rose, 267 F.2d 312, 316 (4th Cir. 1959); Scruggs v. C&O Railway Co., 320 F.Supp. 1248, 1250-1251 (W.D. Va. 1970); Steeves v. United States, 294 F.Supp. 446, 457 (D. S.C. 1968); Vaughan v. Southern Bakeries Co., 247 F.Supp. 782 (D. S.C. 1965); Culver v. Slater Boat Co., 688 F.2d 280, 308-310 (5th Cir. 1982); Quilter v. Elgin, Joliet & Eastern Railway Co., 409 F.2d 338, 340 (7th Cir. 1969); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (7th Cir. 1982); Galard v. Johnson, 504 F.2d 1198, 1202 (7th Cir. 1974); Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967); United States v. English, 521 F.2d 63, 75

(9th Cir. 1975); Steckler v. United States, 549 F.2d 1375-78 (10th Cir. 1977); Riha v. Jasper Blackburn Corp., 516 F.2d 840, 843-845 (8th Cir. 1975); Taenzler v. Burlington Northern, 608 F.2d 796, 799 (8th Cir. 1979).

It is apparent that the United States Supreme Court has recently approved consideration of future inflation as well as such factors as future employment and future interest rates, among others, in the determination of loss of future earnings. Norfolk & Western Ry. Co. v. Liepelt, Adm'x, etc., 444 U.S. 490 (1980). In that case the Court held that it was error to exclude evidence of federal income taxes payable in the future on decedent's future earnings in determining future pecuniary loss in an action for wrongful death under the Federal Employers' Liability Act. We address that issue, infra. The point to be made here is that in rejecting the argument that future federal income taxes are too speculative or complex, the Court cited and, in effect, approved the consideration of other future speculative elements. Thus, the Court stated:

> Although federal courts have consistently received evidence of the amount of the decedent's personal expenditures, see, e.g., Kansas City Southern R. Co. v. Leslie, 238 U.S. 599, 604, and have required that the estimate of future earnings be reduced by "taking account of the earning power of the money that is presently to be awarded," Chesapeake and Ohio v. Kelly, 241 U.S. 485, 489, they have generally not considered the payment of income taxes as tantamount to a personal expenditure and have regarded the future prediction of tax consequences as too speculative and complex for a jury's deliberations." See, e.g., Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-237 (CA5 1975), cert. den., 423 U.S. 839.
>
> Admittedly there are many variables that may affect the amount of a wage earner's future income tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future

> health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury. (Emphasis added) (footnote omitted)

In the foregoing decisions from the various circuits, those courts had adopted or approved various methods of determining present worth of loss of future income. The United States Supreme Court has recently set forth federal guidelines and parameters in making such a determination in the case of Jones & Laughlin Steel Corp. v. Pfeifer, ____ U.S. ____, (June 15, 1983). That case involved a negligence action under a section of the federal act, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 905.

The Supreme Court initially delineated the two essential stages in determining present value of future loss of income in an inflation-free economy. The first stage is the estimate of the lost stream of income:

> To summarize, the first stage in calculating an appropriate award for lost earnings involves an estimate of what the lost stream of income would have been. The stream may be approximated as a series of after-tax payments, one in each year of the worker's expected remaining career. In estimating what those payments would have been in an inflation-free economy, the trier of fact may begin with the worker's annual wage at the time of injury. If sufficient proof is offered, the trier of fact may increase that figure to reflect the appropriate influence of individualized factors (such as foreseeable promotions) and societal factors (such as foreseeable productivity growth within the worker's industry). (emphasis added)

The second stage is the application of the appropriate discount rate:

> The discount rate should be based on the rate of interest that would be earned on "the best and safest investments." Id., at 491. Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a risk-free stream of future income to replace his lost wages; therefore, the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default. Moreover, since under Liepelt, supra, the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax rate of return to the injured worker.
>
> Thus, although the notion of a damage award representing the present value of a lost stream of earnings in an inflation-free economy rests on some fairly sophisticated economic concepts, the two elements that determine its calculation can be stated fairly easily. The are (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate discount rate, reflecting the safest available investment. The trier of fact should apply the discount rate to each of the estimated installments in the lost stream of income, and then add up the discounted installments to determine the total award. (emphasis added)

The Supreme Court, however, acknowledged that "ours is not an inflation-free economy" and that inflation "ideally should affect both stages of the calculation described in the previous section." Id. at 14. The court then stated:

> The first stage of the calculation required an estimate of the shape of the lost stream of future income. For many workers, including respondent, a contractual "cost-of-living adjustment" automatically increased wages each year by the percentage change during the previous year in the consumer price index calculated by the Bureau of Labor Statistics. Such a contract provides a basis for taking into account an additional societal factor--price inflation--in

estimating the worker's lost future earnings. (emphasis added)

The court then turned to the second stage, that is, how inflation or a consideration of inflation may be considered to determine a fair discount rate. After surveying the various methods adopted in the circuits and states, the Supreme Court declined to select and establish one approach to the exclusion of the others. Id. at 22, 23. The Court then defined "general boundaries within which a particular award will be considered legally acceptable." Id. at 23.

The first method mentioned is that where there is a "specific forecast of future rate of price inflation, . . . the proper discount rate would be after-tax market interest rates." The Supreme Court, however, stated that "both plaintiffs and trial courts should be discouraged from pursuing that approach." Id. at 24.

The second method set forth by the Court involves application of the "real interest rate." The Court explained and approved this approach in the following terms:

> On the other hand, if forecasts of future price inflation are not used, it is necessary to choose an appropriate below-market discount rate. As long as inflation continues, one must ask how much should be "offset" against the market rate. Once again, that amount should be chosen on the basis of the same factors that are used to estimate the lost stream of future earnings. If full account is taken of the individual and society factors (excepting price inflation) that can be expected to have resulted in wage increases, then all that should be set off against the market interest rate is an estimate of future price inflation. This would result in one of the "real interest rate" approaches described above. Although we find the economic evidence distinctly inconclusive regarding an essential premise of those approaches, we do not believe a trial court adopting such an approach in a suit under §5(b) should be reversed if it adopts a rate between one

and three percent and explains its choice.
(Emphasis added)

Id. at 24, 25.

It seems apparent that the same approach is permissible under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 et seq., since that Act also involves federal statutes with federal concept of negligence and a general award of damages, without any specific statutory guidelines as to how damages are to be calculated.

The third basic method set forth by the Court involves the "total offset" principle, that is, the concept that market interest rate is offset by inflation, and that neither should be considered in determining present value of future loss of income. This has been imposed as a rule of law in the Third Circuit and by the state courts in Pennsylvania and Alaska. the Supreme Court held, however, that the use of this method is not mandatory in federal courts and may not be imposed on unwilling litigants. The Court did say, however, that "nothing prevents parties interested in keeping litigation costs under control from stipulating to its use before trial." Id at 26, 27.

In summary, the United States Supreme Court, in considering the effect of inflation on determining present value of future loss of income in federal courts, has discouraged the application of specific forecasts of future inflation and has rejected the application of the "total offset" method as a rule of law to be imposed whether or not the parties agree. The Court has, however, approved the consideration of inflation and other factors to be applied to determine the "real interest rate" that should be applied as a discount rate and has suggested approval of a rate between one and three percent if adopted by the trial court. The Court has also obviously left the

door open for any variety of testimony or evidence to arrive at such a discount rate.

4. Income Taxation and Instructions Thereon

Two issues or questions have been presented in the past with respect to federal income taxes in actions arising under the Federal Employers' Liability Act. The first is: Should the jury be permitted to consider evidence of federal income taxes, if any, payable on past and future loss of earnings?

As we have indicated in the previous subsection herein, the United States Supreme Court has recently addressed this issue in Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980) an action under the Federal Employers' Liability Act for wrongful death. In that case the Court held and answered "yes" to the foregoing first question, thus overruling the decisions of the vast majority of the Circuits on the issue.

The second issue or question is: If so requested, should the jury be instructed that the lump sum award for personal injuries or wrongful death is not subject to federal income tax?

Under Liepelt the answer to the above second issue or question is "yes."

The reasoning in Liepelt is based on avoiding a jury's potential misconduct in adding to an award the amount of federal income tax which the jury incorrectly assumes will be imposed. That same reasoning should be applied to avoid the potential misconduct of decreasing the award because it is not subject to federal income tax. In order, therefore, to be clear and fair on this issue (especially if the jury is instructed to consider the matter of federal income taxes with respect to earnings), such an instruction if given must explicitly state that the award is not to be increased or

decreased due to the fact that the award is not subject to federal income tax.

For the same reason, logic and fairness will require that the federal income tax consequences to the railroad must also be explained to the jury, namely, that any actual payment of the verdict or judgment by the railroad to the plaintiff is tax deductible. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980); Kornhauser v. United States, 276 U.S 145 (1928); W. S. Dickason, 20 BTA 496 (1930); Emanuel O. Diamond, 19 TC 737 (1953); R. G. Plante v. United States, 63-2 USTC ¶9530 (D.C.); Mulgrew Blacktop, Inc. v. United States, 70-1 USTC ¶9164 (D.C.). Such language must be added to avoid potential misconduct of the jury which would decrease the award if the jury incorrectly assumes that payment by the railroad of a judgment or award is not a deduction for the railroad under the federal income tax law.

5. Pain and Suffering; Nature and Extent of Injuries

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

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

It should be pointed out that the requirement of finding the present value of future loss of earnings and fringe benefits does not apply to future pain and suffering, and the jury should be so instructed. Waterman Steamship Corp. v. Rodriguez, 290 F.2d 175 (1st Cir. 1961); Torres v. Hamburg-Amerika Line, 353 F.Supp. 1276 (D. Puerto Rico 1972); Culley v.

Pennsylvania R. Co., 244 F.Supp. 710 (D. Del. 1965); Hanson v. Reiss Steamship Co., 184 F.Supp. 545; Texas & Pacific Ry. Co. v. Buckles, 232 F.2d 257 (5th Cir. 1956); Chicago & N. W. Ry. Co. v. Candler, 283 F.881 (8th Cir. 1922); and Taylor v. Denver & Rio Grande Western R. Co., 438 F.2d 351 (10th Cir. 1971).

6. Collateral Source Rule

Under the controlling decisions of the United States Supreme Court, the receipt of or the availability of collateral benefits and any reference thereto are not admissible for any purpose in an action under the Federal Employers' Liability Act. Eichel v. New York Central R. Co., 375 U.S. 253; Tipton v. Socony Mobile Oil Co., 375 U.S. 34; Caughman v. Washington Terminal Co., 345 F.2d 434.

In actions under the Federal Employers' Liability Act, the issue has arisen as to whether the collateral source rule applies to medical expenses which have been paid by insurance, the premium for which has been paid by the defendant railroad. There is a split of authority on this issue. In this case, however, plaintiff will agree to an instruction that medical expenses either paid by the defendant railroad or paid by insurance, the premium for which has been paid by the defendant railroad, are not to be included as damages. Those expenses not covered by the policy or not paid by the railroad, however, will be claimed. Plaintiff will present evidence, moreover, that the coverage extends only for a limited time after the year when the employee last performs actual work and is paid by the railroad employer. All further medical expenses to be incurred after that date, therefore, are properly included and should be considered in the award of damages.

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The foregoing Plaintiff's Trial Brief was served upon defendant by mailing a copy of same by United States Mail, postage prepaid, this 23rd day of February, 1984, to Mr. Paul C. Hobbs, Hobbs & Cleveland, 908 Plaza Building, P.O. Box 248, Ashland, Kentucky 41105, and to Mr. Donald Combs, P.O. Drawer 31, Pikeville, Kentucky 41501, counsel for defendant.

Attorney for Plaintiff

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WILLIAM A. RICHARDS (1922-1975)
ROBERT C. TYLER (1909-1970)

February 22, 1984

The Honorable G. Wix Unthank
United States District Court
Eastern District of Kentucky
Main Street
Pikeville, Kentucky 41501

Re: Arnold Belcher vs.
Chesapeake & Ohio Railway Company
Civil Action Number 82-362

Elzie Samuel Blackburn vs.
Chesapeake & Ohio Railway Company
Civil Action Number 83-443

Dear Judge Unthank:

This is to confirm our conversation with the Court and prior conversations with the defense attorney dealing with the duel setting of the Arnold Belcher vs. Chesapeake & Ohio Railway Company and Elzie Samuel Blackburn vs. Chesapeake & Ohio Railway Company cases.

The older case of Arnold Belcher vs. Chesapeake & Ohio Railway Company had previously been set in January of 1984 for trial and because of the current criminal case, was postponed and reset for March 19, 1984, ahead of the Elzie Samuel Blackburn vs. Chesapeake & Ohio Railway Company case.

This is then to confirm the final resolve through our conference with the Court and through the defense attorneys, that because of that previous setting and the older nature of the case, that the Arnold Belcher case will go first ahead of the Elzie Samuel Blackburn case and that the Blackburn case will be reset at a later time by the Court.

This is further with the understanding that the

criminal case may well continue through that time and neither case may be reached.

Very truly yours,

J. B. BLUMENSTIEL

JBB:jb
cc: James E. Cleveland, III

United States District Court
FOR THE
Eastern District of Kentucky

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

December 5, 1983

Mr. J. B. Blumenstiel
GRIESER, SCHAFER, BLUMENSTIEL & SLANE CO., L.P.A.
261 West Johnstown Road
Columbus, Ohio 43230

Re: Arnold Belcher v. Chesapeake & Ohio Railway Company
Civil Action no. 82-362 - Pikeville Division

Dear Mr. Blumenstiel:

In reply to your November 18, 1983, letter on the subject case, this will confirm my statement to you that Judge Unthank gave his approval for Francis Dale Burke to attend the pretrial conference set for the 3rd day of January, 1984, since you have a conflict in schedule.

Very truly yours,

Mary E. Mayfield

Mary E. Mayfield
Administrative Secretary

GWU:mem

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WILLIAM A. RICHARDS (1922-1975)
ROBERT C. TYLER (1909-1970)

November 18, 1983

Ms. Mary Mayfield
Office of The Honorable G. Wix Unthank
United States District Court
Eastern District of Kentucky
Main Street
Pikeville, Kentucky 41501

Dear Ms. Mayfield:

Re: Arnold Belcher v. Chesapeake & Ohio Ry. Co.
Civil Action No. 82-362, Judge G. Wix Unthank

This is to confirm our conversation with you dealing with the final pretrial of the above-captioned case which is currently set for January 3, 1984.

I have an earlier commitment that will have me in trial in Baltimore, Maryland, in Federal Court at that time, thus, we wanted to confirm that it will be all right with the Court for another attorney from this office to be present for the final pretrial of the Arnold Belcher case.

The attorney who will be present for that pretrial will be vested with full authority to negotiate and compromise all issues in the case, and we appreciate the Court's consideration on this matter.

Francis Dale Burke, of course, is our local counsel and will be present at the pretrial as well.

Very truly,

J. B. Blumenstiel

J. B. BLUMENSTIEL

JBB:dmd
cc: Mr. Francis Dale Burke

TO: Judge
FROM: Donald
DATE: 3-23-83
RE: 82-362
Arnold Belcher v. C & O Railway Company

PC, Thurs., 2-24-83, at 1:30 p.m.

Synopsis: This is another one of those FELA actions, brought by an employee who was injured while on the job.

Plff was an assistant track foreman and was performing track repairs on 3-10-82 from a train derailment when a section of rail snapped and struck him in the legs. Plff has had part of his left foot amputated. He seeks damages of $5 Million + costs.

Pending Motions: None.

Substantive Isues:

1. Was the defendant negligent in providing plff with a reasonably safe place to work?

2. Was plff negligent or contributorily negligent?

Comments:

1. Def. points out in its PC memo that this action is not a workmen's comp. claim, but rather one for negligence.

2. Plff has not filed any PC memo.

3. Plff propounded a set of interrogatories to def. on 22 Nov. '82, to which def. did not respond until 3 Feb. 83. Being untimely, the Clerk tendered plff's answers; therefore, they are not of record at this point in time.

On 11-17-83 Mr. Howard Hackman called (Attorney for Defe.) informing that lead Counsel would be unable to attend the PTC scheduled for Jan. 3, 1984. He asked permission for Co-Counsel Frances Burke to attend; the Court Granted this permission - Mary Ann Jones