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Hennepin County Civil, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Case Type: Personal Injury

Sean Kennedy,

Plaintiff,

v.

Soo Line Railroad Company,
a Minnesota corporation,
d/b/a Canadian Pacific,

Defendant.

Court File No.: 27-CV-12-3265
Judge Ivy S. Bernhardson

ORDER ON POST-TRIAL MOTIONS

The above-captioned matter came on for a hearing on Defendant's Rule 50.02 and Rule 59 motions and Plaintiff's motion to amend the Court's Order of May 10, 2013 by the undersigned Judge of District Court on July 26, 2013, in Courtroom 657, Hennepin County Government Center, 300 South 6th Street, Minneapolis, Minnesota.

Timothy R. Thornton, Esq., and Kimberly L. Johnson, Esq., appeared as counsel for Defendant Soo Line Railroad Company, d/b/a Canadian Pacific.

John D. Magnuson, Esq., Christopher W. Bowman, Esq., and Michael L. Weiner, Esq., appeared as counsel for Plaintiff Sean Kennedy.

Based on the submissions and all of the files, records and proceedings herein, including the arguments of counsel, **IT IS HEREBY ORDERED**

1. Defendant's post-trial motions are **denied** in their entirety.
2. Plaintiff's motion to amend is **denied**.
3. Judgment in favor of Plaintiff Sean Kennedy shall be entered in the amount of Three Million Six Hundred Forty-Six Thousand Two Hundred Seventy Seven Dollars ($3,646,277.00), as determined by the Jury as its special verdict.

4. Pursuant to applicable federal law, **interest on the judgment amount shall accrue from the entry date of this Order** at the interest rate set forth in Minn. Stat. § 549.09.

5. The attached Memorandum of Law is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: October 24, 2013

Ivy. S. Bernhardson
Judge of District Court

MEMORANDUM OF LAW

This matter arises under the Federal Employers Liability Act ("FELA"), which provides tort remedies to railroad employees injured on the job. 45 U.S.C. §§ 51-60 (Supp. 2011). Plaintiff Sean Kennedy ("Kennedy") was working as a conductor for Defendant Soo Line Railroad Company ("Soo Line") on September 5, 2011, when he was injured at the La Crosse, Wisconsin railyard (the "September 5, 2011 incident"). This matter came before the undersigned for a jury trial from April 3 through April 12, 2013. The jury returned a special verdict on April 15, 2013, finding that both Kennedy and Soo Line were causally negligent in connection with the September 5, 2011 incident. The jury allocated 40% of the fault to Soo Line and 60% to Kennedy. The jury also found that Soo Line violated 49 C.F.R. § 220.45 in connection with the incident and that the violation caused or contributed to the incident. The jury found that Kennedy had incurred damages of $3,646,277 as a result of the incident, with $2,300,000 of that amount attributed to future pain and suffering. On May 10, 2013, the Court stayed judgment on the verdict pending determination of the post-trial motions herein, which were set for hearing by agreement of the parties for July 26, 2013. Presently before this Court are Soo Line's motions for (i) judgment as a matter of law; or (ii) a new trial; or (iii) remittitur.

Motion for Judgment as a Matter of Law (Minn. R. Civ. P. 50.02)

A Rule 50.02 motion "must be governed by the same rules which govern the court in passing upon a motion for directed verdict." Minn. R. Civ. P. 50 advisory comm. cmt.; *Dean v. Weisbrod*, 217 N.W.2d 739, 742 (Minn. 1974).

> A motion for a directed verdict, which by its very nature accepts the view of the entire evidence most favorable to the adverse party and admits the credibility of the evidence in his favor and all reasonable inferences to be drawn therefrom, should be granted only in those unequivocal cases where, in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly against the entire evidence, or where it would be contrary to the law applicable to the case.

Id. (internal citations omitted).[1] Because the standard takes into account "the entire evidence," courts are especially cautious when a motion for judgment as a matter of law is made upon the ground of failure of proof at the close of a civil plaintiff's case in chief rather than at the close of all evidence.[2] *Usher v. Allstate Ins. Co.*, 218 N.W.2d 201, 205 (Minn. 1974). Thus, Minnesota Rule of Civil Procedure 50.02 provides as follows: "If, for any reason, the court does not grant a motion for judgment as a matter of law made during trial, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion."

For the reasons set forth below, the Court denies Soo Line's motion for judgment as a matter of law.

Radio rule

Soo Line argues that the evidence is insufficient, as a matter of law, to show that Soo Line employee, engineer James Isakson, who worked with Kennedy the night of the September 5, 2011 incident, violated a radio communication regulation, 49 C.F.R. § 220.45, which reads as follows: "Any radio communication which is not fully understood or completed in accordance with the requirements of this part and the operating rules of the railroad, shall not be acted upon and shall be treated as though not sent."

[1] The denial of a motion for directed verdict is not appealable; the order entering judgment on the case as a whole is. Minn. R. Civ. App. P. 103.03.

[2] The Court notes that the timing and substance of Soo Line's motion for judgment as a matter of law at the close of Kennedy's case-in-chief was somewhat disingenuous. In an effort to expedite the trial, which was approaching the end of the Court's civil calendar, counsel for Kennedy agreed off the record, in the presence of Soo Line counsel and the Court, that he would not call key witness James Isakson in his case-in-chief, but would examine him at the time Soo Line called him. The Court therefore anticipated that Isakson's testimony would be relevant to Kennedy's claims.

Statutory Interpretation

Soo Line's argument is premised upon an interpretation of 49 C.F.R.§ 220.45 that does not include the operating rules of Soo Line, and that limits the meaning of the term "understood" to the physical hearing and identification of words.

First, the Court will address Soo Line's argument that the regulation does not encompass the operating rules of the railroad, namely the General Code of Operating Rules (GCOR) 2.6, which reads as follows:

> 2.6 Communication Not Understood or Incomplete
> An employee who does not understand a radio communication or who receives a communication that is incomplete must not act upon the communication and must treat it as if was not sent.
> EXCEPTION: An employee who receives information that may affect the safety of employees or the public or cause damage to property must take the safe course. When necessary, stop movement until the communication is understood.

GCOR 1.1.1., Maintaining a Safe Course, provides that "[i]n case of doubt or uncertainty, [railroad employees should] take the safe course." Soo Line argues that, although 49 C.F.R.§ 220.45 expressly incorporates the operating rules of the railroad in addition to the requirements of chapter 49, part 220 of the Code of Federal Regulations, it only incorporates that part of the operating rule that mirrors the regulation and not the exception. This interpretation is absurd, as it renders the term "and the operating rules of the railroad" entirely superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotations omitted)).

The Court disagrees with Soo Line's assertion that 49 C.F.R. § 220.1, entitled "Scope," sets this upward limit. Section 220.1 reads, in relevant part, "[t]his part prescribes minimum requirements governing the use of wireless communications in connection with railroad

operations. . . . So long as these minimum requirements are met, railroads may adopt additional or more stringent requirements." Because § 220.1 explicitly applies to all of part 220, the Court reads it *in pari materia* with 49 C.F.R.§ 220.45 and concludes that the addition of the term "and the operating rules of the railroad" anticipates that railroad operating rules will adopt additional requirements and explicitly incorporates them into the regulation.

The Court concludes that 49 C.F.R.§ 220.45 incorporates all of GCOR 2.6, including the exclusion, which is itself consistent with another of Soo Line's operating rules mandating that employees always take the safe course in situations of doubt or uncertainty.

Next, the Court addresses Soo Line's narrow reading of the term "understood" in 49 C.F.R.§ 220.45. In the context of the relevant operating rules, it is clear that "understood" is not limited to the elimination of uncertainty in the words spoken, but also the elimination of uncertainty with respect to their import for the safety of employees and property. Soo Line's interpretation is contrary to the clear purpose of the regulation and operating rules, which is to ensure that people communicating at a distance with respect to the movement of massive pieces of machinery coordinate and understand how to safely move that machinery.

Sufficiency of the Evidence

As noted above, on a Rule 50.02 motion, the Court reviews the entirety of the evidence in the light most favorable to the verdict, which means that it does not review engineer Isakson's testimony separately from the rest of the evidence.

As a threshold matter, and as the Court notes below in its discussion of Colin Fulk's testimony, the Court's Order on Motions in Limine did not preclude Fulk from testifying based on his knowledge and experience of federal regulations; it very specifically precluded him from encroaching on the jury's role and testifying that engineer Isakson "actually violated any federal regulations." Implicit in the Court's Order was its conclusion that expert testimony regarding the

ultimate question was not necessary—and in fact was undesirable—to allow the jury to apply the facts to the law and reach a determination with respect to whether Soo Line had violated 49 C.F.R.§ 220.45.

As a second (related) threshold matter, the Court concludes that Kennedy's testimony with respect to ultimate questions did not constitute judicial admissions precluding the consideration of evidence to the contrary.

> If a party's testimony consists only of a narrative of events in which he participated or which he observed, there is an obvious possibility that he may be mistaken like any other witness. In such a situation, if other witnesses give a different version of the occurrence, his testimony must be weighed with theirs and he will not be concluded by his own statements. But, when a party testifies to facts in regard to which he has special knowledge such as his own motives, purposes, or knowledge, or his reasons for acting as he did, the possibility that he may be honestly mistaken disappears.

Peterson v. Am. Fam. Mut. Ins. Co., 460 N.W.2d 541, 545 (Minn. 1968).

Soo Line argues that Kennedy's testimony that he and Isakson followed proper radio procedure and that Isakson's actions did not contribute to the incident precludes all other evidence bearing on the issue of Soo Line's liability for violation of 49 C.F.R.§ 220.45. The Court concludes that Soo Line is mistaken for at least two reasons. First, the Court notes that Kennedy's testimony with respect to these issues is based on his narrative of events in which he participated and observed Isakson's behavior, not a recounting of his own internal mental processes. Second, the Court notes that Kennedy's knowledge and training with respect to radio regulations may have qualified him as an expert in the area, but that such knowledge was not in his exclusive control such that his opinion should not be weighed with those of other experts or otherwise usurp the role of the jury to apply the facts to the law.

Finally, the Court concludes that the record contains sufficient evidence to support Kennedy's theory of the case and the jury's special verdict answers with respect to Soo Line's liability for violation of 49 C.F.R.§ 220.45.

The testimony of Kennedy and Isakson was sufficient to allow a jury to find the following facts: that Kennedy spoke to Isakson over the radio (Tr. 215:14); that Kennedy made a statement to the effect that he did not see the clearance point for eight, but that Pesta had told him that the clearance points for seven and eight lined up (Tr. 215:14-22; Tr. 883:24-25, 884:1-2); that Isakson did not know what Kennedy was talking about because he knew that the clearance points for seven and eight did not line up (Tr. 884:8-14, 885:1-6); that Isakson did not ever seek clarification of Kennedy's statement (Tr. 215:23-25, 216:1-7); that Kennedy subsequently directed Isakson to shove back one more car length (Tr. 884:15-16); and that Isakson moved the engine back another length (Tr. 216:10-15; Tr. 884:21-25), leaving the cars in the foul, which caused the September 5, 2011 incident.

On the basis of these facts, a jury could reasonably conclude that Isakson had received information that may affect the safety of an employee or property within the meaning of the exception to GCOR Rule 2.6, and/or that he had doubt with respect to whether Kennedy knew where the relevant clearance point was, and thus that Isakson was required to take the safe course and inquire. The jury received testimony from railroad supervisor and corporate representative Norb Denzer that when an engineer had a question about a conductor's instruction, the safe course was not to move the engine until the engineer had sought and received clarification. (Tr. 481:1-16). Soo Line argues that Kennedy's direction to shove back one more car length eliminated any doubt Isakson had that Kennedy did not know where the relevant clearance point was. Whether Isakson should have assumed that Kennedy had found the clearance marker or

whether he should have taken the safe course and requested clarification was also a determination for the jury to make.[3]

The Court dismisses Soo Line's arguments that Isakson's actions could not have caused the September 5, 2011 incident. Isakson's failure to clarify whether Kennedy knew where the clearance point was meant that Kennedy remained ignorant of the clearance point location and thus, that the cars were left in the foul. That Kennedy may have also had an obligation to relieve himself of the ignorance and failed to do so meant that negligence on both their parts caused the incident.

FELA Claim

Soo Line argues that Kennedy's FELA case fails as a matter of law for insufficiency of the evidence. Soo Line's argument assumes that Kennedy's theories of negligence stand alone, independent of one another. That is simply not the case. In FELA cases, "[t]he negligence of the employer may be determined by viewing its conduct as a whole," especially "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." *Blair v. Baltimore & O.R. Co.*, 323 U.S. 600, 604 (1945) (citing *Union Pac. R. Co. v. Hadley*, 246 U.S. 330, 332-33 (1918)).

FELA provides such employees with broader protection than that afforded other persons filing negligence-based actions. Several common-law tort defenses (fellow servant rule, contributory negligence, assumption of risk, and exemption) do not relieve a plaintiff of a claim in a FELA case, and strict liability applies if the railroad violates applicable federal safety regulations. §§ 51, 53-55. Congress enacted these amendments to the FELA in 1939 to

[3] The Court rejects Soo Line's formalistic insistence that to violate 49 C.F.R.§ 220.45, an act must immediately follow a radio communication with no intervening communications, even when the original point of confusion may still exist. There is no basis for this requirement in the text of the rule, and it contravenes the regulation's purpose to prevent train movements based on misguided information.

encourage jury determination of the cases. *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 507-09 (1956); s*ee, e.g.*, *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943) ("To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."); *Ackley v. Chi. & N.W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987) ("The Supreme Court has emphasized the jury's role in determining whether an employer has breached its duties under the FELA."). As a result, "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death" that is the subject of the suit. *Rogers*, 352 U.S. at 507.

Under the FELA, a railroad owes its employee a continuous duty to provide a reasonably safe place to work. *Bailey*, 319 U.S. at 352-53. This duty includes, *inter alia*, responsibility for negligence related to the railroad's equipment and the actions of its other employees. S*ee* 45 U.S.C. § 51. The measure of the railroad's duty is based on the reasonable foreseeability of harm, or the degree of care that persons of ordinary prudence and sagacity would use under the same or similar circumstances. *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 (2011). The duty is thus commensurate with the risk to the employee. *Bailey*, 319 U.S. at 353; *Ackley*, 820 F.2d at 267.

Under the FELA, an injured worker must prove causation by showing that "the railroad's negligence played a part—no matter how small—in bringing about the injury." *McBride* at 2644. The railroad is liable for damages so caused even if "the extent of the injury or the manner in which it occurred was not probable or foreseeable." *Id.* at 2643 (internal citations and alterations omitted).

The Court has addressed Soo Line's argument with respect to judicial admissions in its discussion of the radio regulation.

Soo Line further argues that engineer Isakson had a legal right to assume that Kennedy would not act negligently in performance of his duties. Soo Line did not object to the jury instructions in this case, which provide that

> [a] person has a right to assume that others will exercise reasonable care for their own safety and will obey the law, safety rules and operating practices. However, a person is only entitled to assume that others will use reasonable care or will obey the law, safety rules or operating practices until it reasonably appears that they will not.

This jury instruction is compatible with FELA precedent, with tort law, and with the operating rules of the railroad. *Ackley*, 820 F.2d at 268 (citing 3 F. Harper et al., *The Law of Torts* § 16.12 at 495-96 (2d ed. 1986) and Restatement (Second) of Torts § 302A & cmt. c (1965)); *Wilkerson v. McCarthy,* 336 U.S. 53, 61 (1949); GCOR 1.1.1, 2.6. The "safe course" directives in the relevant operating rules acknowledge that employees are required to take steps to avoid harm to a fellow employee when they have reason to believe that the employee may be unsafe. The cases upon which Soo Line relies, *S. Ry. Co. v. Youngblood*, 286 U.S. 313 (1932) and *Unadilla Valley Ry. Co. v. Caldine,* 278 U.S. 139 (1928),[4] have been called into question by the Seventh Circuit as being abrogated, or at least substantially limited, by the 1939 amendments to the FELA in which Congress expressed its intention to leave causation determinations to the jury. *Walden v. Ill. Cent. Gulf R.R.*, 975 F.2d 361, 365 (7th Cir. 1992).

As the Court has noted, Kennedy's arguments and evidence with respect to training and lighting issues are interwoven with its other arguments about the September 5, 2011 incident. There can be little question that cars were left in the foul on that night because Kennedy did not know where the appropriate clearance point was located. The jury received evidence that would support its finding that Kennedy did not bear all of the fault for his ignorance. The jury received

[4] The other case on which Soo Line relies, *Combs v. Norfolk & W. Ry. Co.*, 507 S.E.2d 355 (Va. 1998), does not discuss whether an employer has an obligation to anticipate an employee's negligence. It merely recognizes that an employee's negligence may cause his injuries.

evidence that Kennedy was an identifiable rookie, a fact that may bear on the reasonableness of footboard yardmaster Pesta and engineer Isakson's communications with him. Contrary to Soo Line's assertions, that Kennedy did not use his lantern in an attempt to locate the marker for track 8 does not foreclose the lighting issue; instead, it calls into question the reasonableness of Kennedy's failure to do so given all of the circumstances, including the ambient lighting. A lantern is a directed light that requires a more conscious choice/act on the part of its user; this human factor of choice is part of the lighting issue. Thus, the evidence does not compel a finding that Kennedy was the sole cause of his injuries, and the Court declines to enter judgment as a matter of law on his FELA claim.

Motion for New Trial (Minn. R. Civ. P. 59)

The Court has addressed Soo Line's substantive arguments with respect to the rule-violation issue in its discussion of the Rule 50.02 motion. The Court will address Soo Line's arguments with respect to wage-loss damages in its discussion of Jeffrey Opp's testimony.

Motions for a new trial "should be granted cautiously and sparingly and only in the furtherance of substantial justice." *Leuba v. Bailey*, 88 N.W.2d 73, 83 (Minn. 1957).

For the reasons set forth below, the Court denies Soo Line's motion for new trial.

Jury Instructions

Minnesota Rule of Civil Procedure 51.03 provides that objections to jury instructions must be timely, specific, and on the record; if a party fails to so object, a court may consider plain errors affecting substantial rights. Minn. R. Civ. P. 51.04(b).

> Only where the omissions destroy the substantial correctness of the charge as a whole, cause a miscarriage of justice, or result in substantial prejudice on an issue vital in the litigation will errors in the instructions be treated as fundamental and require a new trial without timely objection or exception.

Clifford v. Peterson, 149 N.W.2d 75, 77 (Minn. 1967) (internal quotations omitted).

Soo Line argues for the first time in this motion that the jury instructions with respect to the rule violation were not complete. Namely, they did not include Seventh Circuit Civil Pattern Jury Instruction 9.07, which identifies the rule violation as an issue separate from the FELA claim and instructs that the jury must find that the defendant violated the regulation and that the violation caused or contributed to the plaintiff's injuries by a preponderance of the evidence.

Soo Line's claim that the jury lacked any instruction with respect to the burden of proof it was to apply stretches credulity at best. The jury instructions included Minnesota Civil Jury Instruction 14.15 Burden of Proof, which provides that "[t]he greater weight of the evidence must support a 'yes' answer" on the verdict form. The special verdict form asked the jury to determine whether the defendant violated the regulation and whether the violation caused or contributed to the plaintiff's injuries. Soo Line has not shown that the omission of Instruction 9.07 destroyed the substantial correctness of the charge as a whole or prejudiced it.

Soo Line also argues that the instructions should have included provisions that informed the jury about the legal effects of its answers with respect to the rule violation. Namely, Soo Line argues that the jury should have been given instructions that state the defendant's rule violation constitutes negligence *per se* and the jury should not consider the plaintiff's negligence when answering questions about the rule violation.[5] 7th Cir. Civ. Pattern Jury Inst. 9.01 cmts. e, f & 9.07.

However, the instructions that Soo Line now brings to the Court's attention do not clearly state that the jury's finding a rule violation would obviate the allocation of fault with respect to damages.[6] Instead, the Seventh Circuit Pattern Civil Jury Instructions respect state law on informing a jury about the legal effects of its answers. Comment h to Instruction 9.04, which

[5] There is no inconsistency in the jury's finding that Soo Line violated the rule, that Soo Line was negligent, and that Kennedy was negligent.

[6] The Court notes that the jury was not instructed on the effect of the allocation of fault with respect to damages.

instructs on the damages to be awarded on a FELA claim, provides that because the general rule in Wisconsin is that a jury is not to be informed of the effect of its verdict, those judges may choose not to give the portion of the instruction concerning apportionment.

Like Wisconsin courts, Minnesota courts have a policy against instructing the jury as to the legal effects of its fact determinations. Minnesota Rule of Civil Procedure 49.01 provides that in actions other than those brought under Minnesota Statutes chapter 604, "neither court nor counsel shall inform the jury of the effect of its answers on the outcome of the case" when using a special verdict form. The purpose of this rule is to permit the jury to fulfill its function as factfinder free from bias, prejudice, and sympathy and without regard to the effect of its answers upon the ultimate outcome of the case. *McCourtie v. U.S. Steel Corp.*, 93 N.W.2d 552, 562 (Minn. 1958).

Thus, Soo Line's argument with respect to "the jury's intent" is unpersuasive and is in contravention of Minnesota policy. The jury was instructed not to "consider the possible effect of its answers to other questions in determining the amount of damages," and this instruction was read to the jury following its question to the Court. The most rational thing for the Court to conclude is that in determining its damages verdict, the jury did not consider the possible effect of its answers to other questions. Soo Line has not demonstrated a fundamental error requiring a new trial. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910-11 (Minn. 1990) (failure to instruct jury on effect of comparative fault answers not fundamental error).

Evidentiary Rulings

Before an evidentiary error may be grounds for a new trial, it must appear that the inclusion or exclusion of the evidence in question might reasonably have changed the result of the trial. *Cloverdale Foods of Minn., Inc., v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. Ct. App. 1998). "The sufficiency of evidence to establish a foundation is discretionary with the trial court,

and his decision will not be reversed if there is any evidence fairly tending to support it." *Schmidt v. Riemenschneider*, 265 N.W.816, 817 (Minn. 1936). For the reasons set forth below, the Court does not conclude that it erred in its evidentiary rulings or that they deprived Soo Line of a fair trial.

Colin Fulk's Testimony

Soo Line argues that the testimony of Kennedy's railroad expert Colin Fulk about the relationship between the 49 C.F.R. § 220.45 and Soo Line's operating rules was legally incorrect and misleading.[7] Because the Court disagrees for reasons set forth in its discussion of Soo Line's Rule 50.02 motion, it finds this argument to lack merit.

Lighting Evidence

Soo Line argues that Kennedy made an "improper argument" about Soo Line's ability to provide "more" lighting instead of "available" lighting. Given that Soo Line does not refer to any particular piece of evidence, cite the record, or provide the relevant portion of the transcript with respect to this "argument," the Court can only assume that Soo Line means to challenge the admission of evidence comparing the lighting of the west end of the La Crosse railyard with the lighting at the east end of that railyard.

The Court notes that its Order on Motions in Limine did not restrict Kennedy to providing only evidence of available lighting. In fact, the Order specifically declined to exclude evidence on that basis subject to a weighing of its particular relevance with its possible prejudice at the time of its offer. Order Mot. Limine 4-5. The Order acknowledged that evidence of more lighting could be relevant to the jury's determination of what a person of ordinary prudence would have used under the circumstances. *Id.* at 5 (citing *Chi., R.I. & P.R. Co. v. Lint*, 217 F.2d

[7] The Court notes that its Order on Motions in Limine did not, as a general matter, preclude Fulk from testifying from his knowledge and experience about federal regulations; it very specifically precluded him from encroaching on the jury's role and testifying that engineer Isakson "actually violated any federal regulations." The Court also notes that Soo Line's citations to the transcript in this section are entirely incorrect. Order Mot. Limine 10.

279, 282-83 (8th Cir. 1954). Reviewing the transcript with respect to Fulk's testimony (the Court lacks the transcript of any relevant portion of Billington's testimony), the Court notes that Soo Line did not make a relevancy objection at any point during the admission of evidence, including photographs, concerning the east end of the La Crosse railyard. The Court does not now conclude that evidence concerning Soo Line's own lighting practices and implicit safety decisions is more prejudicial than it is probative.

Again, because Soo Line does not refer to any particular piece of evidence or cite the record, the Court assumes that when Soo Line argues that "[e]vidence about other railroads' lighting standards or recommendations lacked foundation," it refers to the AREMA recommendations and/or the FRA report; the Court is not aware of any other evidence of recommendations. The Court notes that the recommendations provide some relevant evidence about industry goals or practice, and thus some relevant evidence about negligence, even if they are not binding authority or do not directly apply to the La Crosse railyard. *See Moses v. Union Pac. R.R.*, 64 F.3d 413, 419 (8th Cir. 1995). The Court notes that Fulk laid foundation with respect to his use of the FRA report (Tr. 146:9-25, 147:1-13), and that both Fulk and Billington stated in their reports that they had reviewed it.

The Court notes that both Fulk and Billington stated in their reports that they had reviewed and relied upon the AREMA recommendations. Soo Line argues that because Fulk is not a member of AREMA or an engineer, he lacked foundation to rely on and testify to the AREMA recommendation for lighting a flat switching yard. The Court concludes that the scope of an expert's ability to recognize the authority of a treatise and to rely upon it is not so limited. Fulk, an expert in the management and administration of railroad yards, testified that AREMA is a professional organization of railroad engineers and maintenance way workers who study and make recommendations with respect to engineering practices for railroad yards. (Tr. 157:13-19).

Fulk also testified that supervisors of class one railroads, including Soo Line, are members of AREMA. (Tr. 159:21-25 – 160:1-5). The Court is satisfied that the AREMA recommendation was supported by sufficient foundation. *See Bach v. Gehl*, No. A05-1843, 2006 WL 2865166, at *9-10 (Minn. Ct. App. Oct. 10, 2006).

The Court issued a curative instruction with respect to any reference to the AREMA recommendation as "standards." (Tr. 562:14-20) The Court has no reason to believe that the jury disregarded its curative instruction.

Soo Line argues that because Kennedy's accident-reconstruction expert Daniel Billington made his measurements and observations of the incident-site lighting without a lantern, his testimony was misleading because it did not accurately reflect the lighting conditions with respect to the September 5, 2011 incident.

The Court concludes that Billington's lanternless measurements and observations are relevant to describe the site of the incident. Contrary to Soo Line's assertions and as noted in the Court's Rule 50.02 discussion, that Kennedy did not use his lantern in an attempt to locate the marker for track 8 does not foreclose the lighting issue; instead, it calls into question the reasonableness of Kennedy's failure to do so given all of the circumstances, including the ambient lighting. A lantern is a directed light that requires a more conscious choice/act on the part of its user; this human factor of choice is part of the lighting issue. The Court notes that Soo Line cross-examined Billington about the fact that he did not use a lantern and that Soo Line's own expert testified with respect to the adequacy of the lighting with a lantern. The Court concludes that Billington's testimony was more probative than it was prejudicial.

Because Soo Line[8] has neglected to provide the Court with the portion of the transcript it references with respect to Billington's testimony and the opinions he gave at trial, the Court incorporates and readopts the ruling it made with respect to Soo Line's motion to strike Billington's testimony and concludes that Billington is qualified, through his law enforcement and accident reconstruction training, which included instruction on lighting and human factors, to give opinions on lighting as it relates to the likelihood of accidents, or safety.

Jeffrey Opp's Testimony

Soo Line argues that the testimony of Jeffrey Opp, which evaluated Kennedy's lost-wages damages based on his position as a railroad conductor, was based on a fiction because Kennedy had been terminated from his conductor position with Soo Line.

The case that Soo Line cites in support of its argument, *Stewart v. Burlington N. R.R. Co.*, 173 F.R.D. 254 (D. Minn. 1995), is not persuasive in this instance. The procedural posture of that case is significantly different, as are the relevant factual circumstances. The issue before the *Stewart* court was whether it could stay the defendant railroad's disciplinary proceedings against the plaintiff employee; it concluded that it lacked jurisdiction to do so. Further, the *Stewart* court acknowledged the concern that a railroad might seek to discharge its employee in order to limit its future earnings damages in a FELA case and opined that, conversely, employees should not be allowed to use FELA claims to avoid discipline. The *Stewart* court also observed that a railroad employee's discharge is not final until the NRAB rules on the appeal, and it expressly reserved ruling on whether the jury would hear evidence of a discharge should it occur.

At the time this Court made its evidentiary ruling in the instant matter, Kennedy had been discharged through internal disciplinary proceedings concerning the September 5, 2011 incident

[8] The Court notes that Kennedy provided the Court with portions of Billington's testimony, but not the portions Soo Line references.

but was in the process of appealing. His termination, therefore, had not been reviewed by a disinterested party and was not final. As the Court noted in its Order on Motions in Limine, as a result of the physical injuries Kennedy sustained in the September 5, 2011 incident, he is unable to return to or seek a conductor position with any railroad. Order Mot. Limine 11. The jury found that Soo Line's negligence played a part in bringing about that incident and thus Kennedy's injuries; accordingly, measuring damages based on the loss of employment as a conductor is based on the facts of the case, not a legal fiction. Furthermore, the Court notes that the parties in this matter agreed that the jury would not hear evidence of Kennedy's discharge. Order Mot. Limine 2-3.

Damages Award

To be so excessive that a new trial is required, damages must so greatly exceed what is adequate as to be accountable on no other basis than passion and prejudice. *McPherson v. Buege*, 360 N.W.2d 344, 347 (Minn. Ct. App. 1984). In determining whether a verdict is excessive, the court must consider all of the evidence, including the demeanor and circumstances of the parties. *Id.* Soo Line's arguments are directed at the jury's award for future pain and suffering. As the jury instructions noted, there is no fixed standard for the jury to follow in assessing damages for pain and suffering.

Soo Line's attempt to minimize the impact of Kennedy's injuries does not comport with the Court's obligation to view the evidence in the light most favorable to the award. *Id.* ("The trial court must determine whether the verdict is within the bounds of the highest sustainable award under the evidence.") To put it bluntly, the jury received evidence that Kennedy's pelvis and penis had been crushed and that he would experience the effects of the damage for the rest of his life, which the life expectancy tables had estimated to be another 34 years. The jury could have observed that Kennedy's urinary issues interfered considerably with his ability even to be

continuously present in the courtroom during trial. The jury received evidence that Kennedy's erectile dysfunction had curtailed his ability to have a satisfying intimate relationship with his wife. The jury received evidence that, to a reasonable degree of medical certainty, Kennedy would have to undergo further surgery on his urogenital system. The jury received evidence that, as a result of the September 5, 2011 incident, Kennedy suffers from psychological issues and regular pain. The Court does not find that the jury's valuation in this case shocks the conscience.

Motion for Remittitur

> The requirement of a remittitur is within the trial court's discretion when a motion for a new trial is made pursuant to Rule 59.01[]. The trial judge then takes all of the evidence and circumstances into consideration and can require a remittitur as a condition of denial of the motion if he feels the damages were excessive and influenced by passion and prejudice.

Jangula v. Klocek, 170 N.W.2d 587, 594 (Minn. 1969).

For the reasons explained above with respect to Soo Line's motion for new trial, the Court denies Soo Line's motion for remittitur.

Motion for Amendment of Judgment

Kennedy's motion to amend seeks language in the order for judgment when entered to ensure that he obtains interest on the award at the applicable Minnesota statutory rate (10%) calculated from the date of the jury verdict.

Soo Line argues that under *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330 (1988) and other cases cited, federal law controls and interest does not begin to run until judgment has been entered. The *Monessen* Court expressly held that federal law does not authorize prejudgment interest in FELA suits, whether or not they are brought in state court. 486 U.S. at 335.

The issue before this Court, not squarely addressed by *Monessen*, is whether state law or federal law controls the accrual of interest during what could be characterized as an "interim period"—the time between a jury verdict and the final entry of judgment.

Monessen also stands for the proposition that prejudgment interest is a matter of substantive law, and state courts must apply federal substantive law when adjudicating FELA claims. *Id.* ("It has long been settled that 'the proper measure of damages [under the FELA] is inseparably connected with the right of action,' and therefore is an issue of substance that 'must be settled according to general principles of law as administered in the Federal courts.'" (citing *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491 (1916))).

The *Monessen* Court acknowledged section 1961 as a source of federal substantive law with respect to interest in FELA cases. *Id.* at 336. Interpreting the general federal interest statute, 28 U.S.C. § 1961, the Supreme Court has held that plaintiffs in federal courts applying federal substantive law do not collect interest during the interim period. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 834-35 (1990). Thus, under section 1961, interim-period interest is uncollectable prejudgment interest.

Accordingly, the Court denies Kennedy's motion to amend.

Minnesota law applies, and sets the post-judgment interest rate in this case, which will be calculated at 10%.

ISB