
No. 08-3685

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Robert Borger, Sr. and Derrick J. Atkinson,

Plaintiffs-Appellants,

v.

CSX Transportation, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Southern District of Ohio, Western Division at Cincinnati
No. 1:06-cv-00019-SSB-TSB
The Honorable Sandra S. Beckwith

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee CSX Transportation, Inc. states that it is 100% owned by CSX Corporation.

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STATEMENT REGARDING ORAL ARGUMENT

CSXT believes that the issues in this case are so straightforward, and that the district court's resolution of them is so obviously correct, that oral argument is unnecessary. *See* Fed. R. App. P. 34(a)(2)(C); 6th Cir. R. 34(j)(2)(C). If the Court nevertheless schedules oral argument, CSXT wishes to participate.

STATEMENT OF THE ISSUES

Plaintiffs sued defendant CSX Transportation, Inc. ("CSXT") under the Federal Employers Liability Act ("FELA" or "Act"), 45 U.S.C. §§ 51-60, alleging that they were injured by fumes from a tank car carrying hydrochloric acid when the train transporting the car passed them. The district court granted summary judgment to CSXT. Assuming for purposes of its decision that there had in fact been a release of fumes, the court held that plaintiffs could not prove that any such discharge was foreseeable to CSXT. The questions presented are:

1. Whether the district court correctly held that plaintiffs are not relieved of their obligation to prove foreseeability under a theory of negligence *per se*, because either (a) a violation of the Hazardous Materials Regulations ("HMR" or "Regulations"), 49 C.F.R. Parts 171-180, is not negligence *per se* under FELA or (b) CSXT did not violate the HMR.
2. Whether the district court correctly held that plaintiffs cannot prove foreseeability.

STATEMENT OF THE CASE

On January 17, 2006, plaintiff Robert Borger, Sr. filed an action against defendant CSXT, seeking recovery under FELA. The complaint alleged that, while employed by CSXT and as a result of unsafe work conditions, Borger was exposed to “noxious substances, fumes or gases” that caused “pulmonary impairment.” (Dkt. Entry 1, Compl. 2; 1 ROA 14).¹ On May 2, 2007, plaintiff Derrick J. Atkinson filed a virtually identical complaint. (1:07-cv-00353-SSB Dkt. Entry 1, Compl.; 2 ROA 6-9). The cases were ultimately consolidated. (Dkt. Entry 35, Ord.; 1 ROA 256).

CSXT filed motions for summary judgment, arguing that there was no evidence of foreseeability, an essential element of a FELA claim. (Dkt. Entry 27, S.J. Mot.; 1 ROA 138-86; Dkt. Entry 49, S.J. Mot.; 1 ROA 259-71). The district court granted the motions. (Dkt. Entry 77, Slip op.; 1 ROA 967-82). The court rejected plaintiffs’ argument that they were relieved of their obligation to prove foreseeability on the theory that CSXT violated certain federal regulations concerning hazardous materials and was therefore negligent *per se*. The court also rejected plaintiffs’ argument that there was sufficient evidence of foreseeability to permit a jury finding in their favor.

This appeal followed.

¹ Unless otherwise indicated, “Dkt. Entry” refers to the docket in 1:06-cv-00019-SSB-TSB.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. The Federal Employers' Liability Act

FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). State-law remedies are preempted. *Id.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence.

Section 1 of FELA provides that

[e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * , or, in case of the death of such employee, to his or her personal representative, * * * 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.

45 U.S.C. § 51. To prevail on a FELA claim, “a plaintiff must prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.”

Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990) (internal quotation marks omitted).

If a railroad violates the Safety Appliance Act (“SAA”), 49 U.S.C. §§ 20301-20306, or the Boiler Inspection Act (“BIA”), 49 U.S.C. §§ 20701-20903,

a FELA plaintiff is relieved of the obligation to prove negligence—*i.e.*, duty, breach, and foreseeability. *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). In that circumstance, the plaintiff need prove only that the statute was violated and that its violation caused the plaintiff’s injury. *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400, 408 (1996). As in tort law generally, this theory of liability is sometimes known as negligence *per se*. *Mickler v. Nimishillen & Tuscarawas Ry. Co.*, 13 F.3d 184, 188 (6th Cir. 1993).

2. The Hazardous Materials Regulations

The Hazardous Materials Transportation Act (“HMTA”), 49 U.S.C. §§ 5101-5128, directs the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.” 49 U.S.C. § 5103(b)(1). The Secretary has delegated authority to issue such regulations to the Pipeline and Hazardous Materials Safety Administrator. 49 C.F.R. § 1.53(b). Pursuant to that delegation, the Administrator has issued the HMR, which govern transportation of hazardous materials by road, rail, water, and air. The Regulations impose distinct obligations on the party that “offers” hazardous material for transportation—the shipper—and the party that “accepts” it—the carrier.

Part 171 of the HMR sets forth the general requirements for transporting hazardous material, including that “[n]o person may transport a hazardous material

in commerce unless the hazardous material is transported in accordance with applicable requirements of [the Regulations].” 49 C.F.R. § 171.2(f). The same provision makes clear that “[e]ach carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material * * *, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror * * * is incorrect.” *Id.*

Part 172 of the HMR describes the information that an offeror of hazardous material is required to provide. It states, among other things, that “each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with [the Regulations].” 49 C.F.R. § 172.204(a).

Part 173 of the HMR prescribes the requirements for preparing hazardous material for shipment. Section 173.31 governs the use of tank cars and requires, in subsection (d), that the offeror conduct a thorough examination of the tank car before shipping. Subsection (d)(1) provides that “[n]o person may offer for transportation a tank car containing a hazardous material * * * unless that person determines that the tank car is in proper condition and safe for transportation.” Subsection (d)(1) goes on to say that, “[a]s a minimum, each person offering a tank car for transportation must perform an external visual inspection” that includes the

tank shell and heads; piping valves, fittings, and gaskets; nuts and bolts; closures and the fastenings securing them; protective housings; the pressure-relief device, rupture disc, and tell-tale indicators; the various systems; and the required markings.

Part 174 of the HMR sets forth the requirements for transportation of hazardous material by rail. Section 174.9 describes the inspection required of the carrier. Unlike Section 173.31(d)(1), which requires the shipper to conduct an exhaustive, top-to-bottom inspection of its tank car, Section 174.9(a) requires only that the carrier “inspect each rail car containing the hazardous material, at ground level, for required markings, labels, placards, securement of closures and leakage.”² Part 174 also includes a regulation, Section 174.3, that is essentially identical to Section 171.2(f), quoted above, except that it is rail-specific. Section 174.3 provides that “[n]o person may accept for transportation or transport by rail any shipment of hazardous material that is not in conformance with the requirements of [the Regulations].”

² Subsections (b), (c), and (d) of Section 174.9, relating to ground-level inspection for tampering and suspicious items, were added after the events at issue in this case. *See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, 73 Fed. Reg. 20,752, 20,773 (Apr. 16, 2008).

B. Factual Background

The following facts, as the district court correctly observed, are “straightforward and largely undisputed” (Dkt. Entry 77, Slip op. 1; 1 ROA 967):

On June 21, 2004, at approximately 12:30 a.m., CSXT placed Train Q506 on a departure track at Queensgate Yard in Cincinnati, Ohio. Between 3:25 a.m. and 4:45 a.m. the same day, two experienced CSXT car inspectors, Fred Furnish and John Hamm, examined the 58 cars of the train. The inspectors visually observed both sides of each car, including all valves, ports, discharge pipes, hatches, latches, and other equipment on the tank cars and covered hopper cars. The inspectors also used their sense of smell to detect any unusual or extreme odors emanating from, or present in the vicinity of, any of the cars. In the course of their inspection, Messrs. Furnish and Hamm did not detect any unusual or unsafe condition on, in, or around any car, and they did not detect any unusual or extreme odor. (Dkt. Entry 27-4, Fisher Aff. 1-2; 1 ROA 156-57; Dkt. Entry 69-2, Hamm Dep. 41-42, 72-75; 1 ROA 850-51, 881-84).

Later the same day, Train Q506 departed from Queensgate Yard, heading north. The train was operated by C. Sunnycalb, the engineer; P. M. Swann, the conductor; and J. A. Currier, an engineer-trainee. While Train Q506 was traveling north, CSXT Train Q221 was traveling south. Train Q221 was operated by plaintiff Robert Borger, Sr., the engineer, and plaintiff Derrick J. Atkinson, the

conductor. At approximately 10:00 p.m. on June 21, Train Q221 pulled into a siding in Vandalia, Ohio, to allow Train Q506 to pass. (Dkt. Entry 17-2, Borger Dep. 9-10, 27-33; 1 ROA 26-27, 31-32; Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 1, Swann Aff. 1, Currier Aff. 1; 1 ROA 151, 153, 160; Dkt. Entry 53, Atkinson Dep. 10-12, 28-30; 1 ROA 281-83, 299-301).

As Train Q506 passed Train Q221, plaintiffs smelled what they have described as a strong chemical odor. According to plaintiffs, they immediately experienced irritation in their eyes and throat, and later experienced coughing, headaches, and nausea. Borger contacted the crew of Train Q506 and informed them of the odor, which he believed was coming from their train. Plaintiffs did not see or hear any discharge of vapor as Train Q506 passed, however, and they cannot say when the odor began or how long it lasted. (Dkt. Entry 17-2, Borger Dep. 33-53; 1 ROA 32-37; Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 1, Swann Aff. 1, Currier Aff. 1; 1 ROA 151, 153, 160; Dkt. Entry 53, Atkinson Dep. 30-46, 70-72; 1 ROA 301-317, 341-43).

After receiving the communication from Borger, the crew of Train Q506 stopped their train approximately four miles north of the Vandalia siding. Messrs. Swann and Currier then inspected both sides of the entire length of the train. They noticed an occasional faint chemical odor coming from the fifteenth car of the train, No. UTLX 130138, which was carrying hydrochloric acid, but they did not

observe any leak. On the contrary, they found the car completely secure, including its valves and hatches. No member of the crew of Train Q506 had smelled any odor coming from the train before it stopped north of Vandalia. (Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 1-2, Swann Aff. 1-2, Currier Aff. 1-2; 1 ROA 151-54, 160-61).

After this inspection by its crew, Train Q506 continued on to the yard facility in Lima, Ohio, where it was inspected again. Donnelly McCoy, a CSXT trainmaster, conducted a roll-by inspection as the train arrived and observed nothing unusual. Accompanied by a CSXT car inspector, Shane Smith, Mr. McCoy then inspected each of the cars containing hazardous materials, including No. UTLX 130108. He also inspected the covers and appliances on top of that car, and the outlets and appliances underneath. Mr. McCoy perceived no odor and found no evidence of any leak from any of the cars. (Dkt. Entry 19, McCoy Dep. 9-12, 19-20; 1 ROA 125, 127; Dkt. Entries 27-2, 27-3, Sunnycalb Aff. 2, Swann Aff. 2; 1 ROA 152, 154).

Train Q506 then continued on to Stanley Yard in the Toledo, Ohio area, where it was inspected yet again. This inspection was performed by Timothy J. Mannas, Manager of Hazardous Materials, Field Services, at CSXT, and John Seifert of Eagle Construction and Environmental, a CSXT contractor. Using sophisticated equipment capable of detecting any prior leak of hydrochloric acid,

Messrs. Mannas and Seifert found no defect in any of the cars and no evidence of any present or past discharge. (Dkt. Entry 18-2, Mannas Dep. 9-29; 1 ROA 104-09).

The medical symptoms that Atkinson claims to have experienced—irritation in the eyes and throat, headaches, and nausea—subsided within days of the incident. The symptoms that Borger claims to have experienced—mainly difficulty in breathing—improved after he received treatment. (Dkt. Entry 17-4, Borger Dep. 109-11; 1 ROA 51-52; Dkt. Entry 53-2, Atkinson Dep. 87-88; 1 ROA 358-59).

C. Proceedings in the District Court

1. The *Borger* case

On January 17, 2006, Borger filed a FELA action against CSXT, alleging that he had suffered “toxic exposure to harmful and noxious substances, fumes or gases” on or about June 21, 2004, the date of the incident at issue. (Dkt. Entry 1, Compl. 2; 1 ROA 14). After the parties conducted discovery, CSXT moved for summary judgment.

Although “no leakage or emission or car defect was ever found,” CSXT invited the district court “to assume *arguendo*,” in deciding the motion, that “there was some kind of odor coming from train Q506 when it passed the plaintiff’s train at Vandalia.” (Dkt. Entry 27, S.J. Mot. 8; 1 ROA 145). CSXT argued that

summary judgment should be granted “[e]ven if that were the case,” because Borger offered no evidence that his injury was foreseeable to CSXT. *Id.*³ In support of its argument, CSXT relied on undisputed evidence that, among other things, (1) CSXT train inspectors examined all the cars of Train Q506 before it left Queensgate Yard on the day of the incident and detected no odor or anything else out of the ordinary; (2) no member of the crew of Train Q506 had any knowledge of any problem with any of the train’s cars, including any leak or odor, before Borger informed the crew that he had smelled an odor coming from the train when it passed him; and (3) CSXT detected no leak during any of the three post-incident inspections that it performed. (Dkt. Entry 27, S.J. Mot. 6-8; 1 ROA 143-45).

In response to CSXT’s motion, Borger asserted that he had no obligation to prove foreseeability, because CSXT violated the HMR and was therefore negligent *per se*. Although he had made no such allegation in his complaint, Borger argued that CSXT violated 49 C.F.R. §§ 173.31 and 174.9, by performing an inadequate inspection before Train Q506 left Queensgate Yard, and violated 49 C.F.R. § 174.3, by accepting a shipment of hazardous material not in conformance with the HMR. (Dkt. Entry 68, Opp. to S.J. Mot. 10-15; 1 ROA 725-30). The sole “evidence” of the claimed violation of Section 174.3 was an assertion by Borger’s

³ Contrary to plaintiffs’ repeated assertion in this Court (Br. 6, 7, 11, 18), CSXT has never conceded that Car No. UTLX 130108 was in fact leaking hydrochloric acid.

expert, Joel T. Robertson, that a shipment of hazardous material that is properly prepared does not leak during transportation. (Dkt. Entry 68-3, Robertson Rep. 3-4, 17; 1 ROA 760-61, 774). Borger also argued that there was sufficient evidence of foreseeability even if CSXT was not negligent *per se*, although the only “evidence” he identified to support that theory was the assertion that CSXT had failed to perform the inspection required by the HMR. (Dkt. Entry 68, Opp. to S.J. Mot. 16-18; 1 ROA 731-33).

In reply, CSXT argued that a violation of the HMR is not negligence *per se* under FELA; that there was no such violation in any event; and that there is no other evidence of foreseeability. (Dkt. Entry 73, Reply Mem. in Support of S.J. Mot. 10-17; 1 ROA 920-27).

2. The *Atkinson* case

On May 2, 2007, a little more than a week after CSXT filed its motion for summary judgment in *Borger*, Atkinson filed his own complaint against CSXT, alleging that he had “suffered toxic exposure to chemicals” on or about June 21, 2004. (1:07-cv-00353-SSB Dkt. Entry 1, Compl. 2; 2 ROA 7). The complaint was virtually identical to Borger’s. CSXT thereafter moved for summary judgment in *Atkinson*, essentially incorporating by reference its motion in *Borger*. (Dkt. Entry 49, S.J. Mot.; 1 ROA 259-71). Atkinson, who was—and still is—represented by the same law firm as Borger, did not file a separate response to the motion.

3. The district court's decision

After consolidating the two cases (Dkt. Entry 35, Ord.; 1 ROA 256), the district court granted CSXT's motions for summary judgment.

The court first held that plaintiffs had "failed to demonstrate that CSX[T] violated any federal regulation concerning the shipment of hazardous materials" and that plaintiffs had therefore "failed to demonstrate that CSX[T] was negligent per se." (Dkt. Entry 77, Slip op. 9; 1 ROA 975). The court explained that 49 C.F.R. § 173.31 "places the duty of performing * * * inspections on the offeror of the tank car," not on the carrier, and that "the record demonstrates that CSX[T] complied with its duty" under the regulation that governs inspections by carriers, 49 C.F.R. § 174.9. (Dkt. Entry 77, Slip op. 10-11; 1 ROA 976-77). As for the asserted violation of 49 C.F.R. § 174.3, which prohibits a carrier from accepting a shipment of hazardous materials "not in conformance" with the HMR, the court rejected, on two separate grounds, plaintiffs' theory that Car No. UTLX 130108 would not have leaked if it had been properly inspected. The first ground was that plaintiffs' theory "would lead to the imposition of strict liability on CSX[T]," a result that "is not permissible under FELA." (Dkt. Entry 77, Slip op. 12; 1 ROA 978). The second ground was that a carrier is entitled to rely on the shipper's certification of compliance with the HMR unless the carrier has "actual or constructive notice" of non-compliance, and CSXT had "no actual or constructive

notice that UTLX 130108 was not fit for transporting hydrochloric acid.” (Dkt. Entry 77, Slip op. 13-14; 1 ROA 979-80).

After concluding that plaintiffs were not relieved of their obligation to prove foreseeability on a theory of negligence *per se*, the district court explained that “the record demonstrates that the release of hydrochloric acid vapor from UTLX 130108, assuming such did occur, was not foreseeable to CSX[T].” (Dkt. Entry 77, Slip op. 14; 1 ROA 980) The court therefore held that CSXT “is not liable for Plaintiffs’ injuries under FELA.” *Id.*

SUMMARY OF ARGUMENT

Assuming that there was a release of fumes from Car No. UTLX 130138, as plaintiffs allege, plaintiffs cannot prove that any such discharge was foreseeable to CSXT. The district court correctly so held, and summary judgment for CSXT was therefore proper.

A. Contrary to plaintiffs’ contention, CSXT was not negligent *per se*, and plaintiffs accordingly are not relieved of their obligation to prove foreseeability. That is true for two independent reasons.

As an initial matter, the violation of a regulation issued pursuant to the HMTA is not negligence *per se* under FELA. The Supreme Court has never extended the doctrine beyond safety statutes specific to the railroad industry—the SAA and BIA—and lower courts should be reluctant to extend it themselves.

There are compelling reasons for exercising restraint in this area. One is that statutes like the HMTA do not occupy the same position vis-à-vis FELA as the SAA and BIA, which are effectively “amendments” to the Act. *Urie v. Thompson*, 337 U.S. 163, 189 (1949). Another is that treating a violation of the HMTA or the HMR as negligence *per se* would amount to inferring a private right of action under the HMTA, which provides for civil and criminal penalties but no private suits, 49 U.S.C. §§ 5123-5124, and would thereby upset Congress’ carefully crafted remedial scheme. It is therefore unsurprising that no court has found a violation of the HMR to be negligence *per se* under FELA.

Even if such a violation could be negligence *per se*, CSXT was not negligent *per se* here, because it did not violate the HMR. Plaintiffs assert that CSXT failed to perform the inspections required by 49 C.F.R. § 173.31, but that regulation imposes obligations on the *shipper* of a tank car, not on the carrier. Plaintiffs also assert that CSXT failed to perform the inspection required by 49 C.F.R. § 174.9, a regulation that does impose obligations on the carrier, but the record unequivocally establishes that CSXT complied with those obligations.

There was also no violation of the regulation on which plaintiffs most heavily rely, 49 C.F.R. § 174.3, which prohibits the acceptance of a shipment of hazardous material that is “not in conformance” with the HMR. The Regulations require the shipper to certify that “the material is offered for transportation in

accordance with [the HMR],” 49 C.F.R. § 172.204, and they permit the carrier to “rely on information” provided by the shipper, unless the carrier knows or has reason to know that the information is incorrect, 49 C.F.R. § 171.2(f). There is no evidence that any information provided by the shipper of Car No. UTLX 130138 was incorrect, much less that CSXT knew or should have known that it was incorrect. There is also no evidence that the shipment was “not in conformance” with the HMR. Plaintiffs claim that the discharge of vapor (assuming there was one) would not have occurred if the shipper had complied with the HMR, but that claim is based entirely on speculation, not on proof. Finally, even if CSXT were not entitled to rely on the shipper’s certification, and even if there were evidence that the shipment was not in conformance with the Regulations, CSXT could be deemed to have violated Section 174.3 only on a theory of strict liability, which cannot support recovery under a negligence statute like FELA.

B. Because CSXT was not negligent *per se*, plaintiffs must prove foreseeability. And there is no evidence of foreseeability in the record.

As an initial matter, plaintiffs’ contention that the standard of foreseeability is “relaxed” was not pressed or passed upon below, and has therefore been forfeited. The contention is also mistaken. FELA incorporates common-law principles unless it expressly provides otherwise, *e.g.*, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 166 (2007), and nothing in FELA abrogates the ordinary

common-law rule of foreseeability. Consistent with that interpretive principle, this Court has squarely rejected the view that FELA's negligence standard is "relaxed." *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007); *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598 (6th Cir. 2001).

In any event, plaintiffs cannot prove foreseeability under any standard. Assuming that there was an odor coming from Train Q506 when it passed plaintiffs, as they allege, there is no evidence that CSXT was or should have been aware of the odor and no evidence that CSXT was or should have been aware of any problem with any car on the train that might cause such an odor. No one perceived the odor before the incident at issue; and everyone who inspected the train both before and after the incident found no indication of any leak.

Plaintiffs contend that a jury could find foreseeability based on evidence that the crew of Train Q506 detected an odor during an earlier part of the trip, before the incident at issue. That contention has been forfeited, however, because it was not pressed or passed upon below. The contention also lacks merit, because the odor detected by the crew was not the chemical odor plaintiffs claim to have smelled and it did not come from the train.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Mounts v. Grand Trunk W. R.R.*, 198 F.3d 578, 580 (6th Cir. 2000). Summary judgment is required "if the

pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met its burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 432 (6th Cir. 2003). If the non-moving party is the plaintiff, as in this case, he “must present a jury question as to each element of [his] case.” *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007). If the plaintiff “fails to make a showing sufficient to establish the existence of an element,” the Federal Rules of Civil Procedure “mandate[] the entry of summary judgment.” *Celotex*, 477 U.S. at 322.

ARGUMENT

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO CSXT ON THE GROUND THAT PLAINTIFFS CANNOT SATISFY THE ESSENTIAL ELEMENT OF FORESEEABILITY

Plaintiffs allege that they were injured by fumes from a tank car carrying hydrochloric acid when the train transporting the car passed them. To prevail on their FELA claim, plaintiffs must prove “the traditional common law elements of

negligence: duty, breach, foreseeability, and causation.” *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (internal quotation marks omitted). In granting CSXT’s motions for summary judgment, the district court assumed *arguendo* that there had been a release of fumes—despite the undisputed fact that multiple inspections did not detect any leak—and held that plaintiffs could not prove that any such discharge was foreseeable to CSXT.

Plaintiffs challenge the district court’s decision on two alternative grounds. First, they contend that they have no obligation to prove foreseeability, because CSXT violated the HMR and was therefore negligent *per se*. Br. 17-22. Second, they contend that the evidence in any event would support a jury finding of foreseeability. Br. 22-28. As explained below, each of these contentions is mistaken, and the district court correctly rejected them.

A. Plaintiffs Cannot Establish Negligence *Per Se* And Thus Are Not Relieved Of Their Obligation To Prove Foreseeability

Plaintiffs’ argument that CSXT was negligent *per se* suffers from two independently fatal flaws: a violation of the HMR is not negligence *per se* under FELA; and even if it is, CSXT did not violate any of the Regulations.

1. A violation of the HMR is not negligence *per se* under FELA

Under the doctrine of negligence *per se*, a defendant’s violation of a particular statute relieves the plaintiff of the obligation to prove negligence—*i.e.*, duty, breach, and foreseeability—and the plaintiff need prove only that the

statutory violation caused the injury. The Supreme Court has applied the doctrine in FELA cases when the railroad was shown to have violated the SAA or BIA, each a safety statute specific to the railroad industry. *See Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). The Supreme Court has never held that a violation of the HMTA, which is *not* specific to the railroad industry, is negligence *per se* under FELA—much less that a violation of a regulation issued pursuant to the HMTA is negligence *per se*. Nor has this Court. Nor, as far as we are aware, has any other court.

As the Third Circuit made clear in *Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156 (3d Cir. 1992), there are good reasons for that. *Ries* held that the violation of a regulation issued pursuant to another statute—the Occupational Safety and Health Act (“OSHA”), 29 U.S.C. §§ 651-678—is not negligence *per se* under FELA, and its reasoning applies equally to the HMTA.

First, “the Supreme Court has never extended the statutory duty of care of a railroad employer beyond a few safety statutes specific to the railroad industry.” *Ries*, 960 F.2d at 1163. Lower courts should be “reluctant to imply such an extension in the absence of express guidance from the Court,” particularly in light of the Court’s own “reluctance to extend the FELA in other areas.” *Id.*

Second, the HMTA does not “occupy the same position *vis-à-vis* the FELA” as do “[r]ailroad safety statutes such as the Safety Appliance and Boiler Inspection

Acts.” *Id.* at 1164. The Supreme Court has determined that a violation of those statutes is negligence *per se* because, unlike a statute like OSHA or the HMTA, the SAA and BIA “cannot be regarded as statutes wholly separate from and independent of [FELA]” but instead are “substantively if not in form amendments to [it].” *Urie*, 337 U.S. at 189.

Third, Congress has established a system of civil and criminal penalties for violations of the HMTA, 49 U.S.C. §§ 5123-5124, but has not created a private right of action, *e.g.*, *Borough of Ridgefield v. N.Y. Susquehanna & W. R.R.*, 810 F.2d 57 (3d Cir. 1987). Allowing a violation of the HMTA or HMR to serve as the basis for negligence *per se* under FELA would effectively create an implied private right of action, and thereby “upset the Congressional scheme.” *Ries*, 960 F.2d at 1164.

The decisions on which plaintiffs rely (Br. 18 n.5, 19-20) do not support their contention that a violation of the HMR is negligence *per se*. *Mickler v. Nimishillen & Tuscarawas Railway Co.*, 13 F.3d 184 (6th Cir. 1993), stated only that “[a] violation of BIA or SAA is negligence *per se* under FELA.” *Id.* at 188. The regulations relied upon by the plaintiffs in *Colonna v. Wheeling & Lake Erie Railway Co.*, 1997 WL 705092 (6th Cir. Nov. 5, 1997), *Morant v. Long Island Railroad*, 66 F.3d 518 (2d Cir. 1995), *Walden v. Illinois Central Gulf Railroad*, 975 F.2d 361 (7th Cir. 1992), and *Correll v. Consolidated Rail Corp.*, 266 F. Supp.

2d 711 (N.D. Ohio 2003), were all issued pursuant to safety provisions specific to railroads in the part of the United States Code that includes the SAA and BIA, 49 U.S.C. §§ 20101-21311. And *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), was a Jones Act case, not a FELA case. The Supreme Court thus “necessarily looked beyond the [SAA] and [BIA],” which are “meaningless in the maritime context.” *Ries*, 960 F.2d at 1163. Just as the SAA and BIA are safety statutes specific to the railroad industry, moreover, the regulation at issue in *Kernan* was issued pursuant to a safety statute specific to navigation. See *Kernan*, 355 U.S. at 427 & n.1.

2. CSXT did not violate the HMR

Even if a defendant’s violation of the HMR can be negligence *per se* under FELA, a plaintiff obviously cannot benefit from the doctrine unless he or she can prove a violation. In this case, plaintiffs contend (Br. 17-22) that CSXT violated three of the Regulations: 49 C.F.R. §§ 173.31, 174.9, and 174.3. In fact, there is no evidence that CSXT violated any of them.

a. CSXT did not violate 49 C.F.R. § 173.31

Plaintiffs assert that CSXT did not perform the inspections required by Section 173.31. As the district court correctly held, however, that regulation “places the duty of performing these specific inspections on the offeror of the tank

car for shipping,” not on the carrier. (Dkt. Entry 77, Slip op. 10-11; 1 ROA 976-77). CSXT therefore could not have violated Section 173.31.

Subsection (d) of 49 C.F.R. § 173.31 is titled “Examination before shipping” (emphasis added). It sets forth “the inspection requirements that must be fulfilled *before* a tank car of hazardous materials is *offered* for transportation.” Crashworthiness Protection Requirements for Tank Cars; Detection and Repair of Cracks, Pits, Corrosion, Lining Flaws, Thermal Protection Flaws and Other Defects of Tank Car Tanks, 60 Fed. Reg. 49,048, 49,068 (Sept. 21, 1995) (emphasis added). The text of the regulation states that “[n]o person may *offer* for transportation a tank car containing a hazardous material * * * unless *that person* determines that the tank car is in proper condition and safe for transportation.” 49 C.F.R. § 173.31(d)(1) (emphasis added). The regulation goes on to say that “each person *offering* a tank car for transportation must perform an external visual inspection” that includes at least ten different categories of parts, systems, and markings. *Id.* (emphasis added). Under the HMR, the term “offers” has its ordinary meaning: to “[t]ender[] or make[] the hazardous material available to a carrier for transportation in commerce.” 49 C.F.R. § 171.8.⁴ CSXT was the

⁴ This definition was added to the HMR a little more than a year after the incident at issue, but it is “[c]onsistent with previously issued administrative determinations.” Applicability of the Hazardous Materials Regulations to a “Person Who Offers” a Hazardous Material for Transportation in Commerce, 70 Fed. Reg. 43,638, 43,638 (July 28, 2005).

carrier, not the offeror, of the material at issue here. Section 173.31 therefore imposed no obligations on CSXT, which could not have violated it by failing to do what the regulation required of someone else. Plaintiffs offer no alternative reading of the Regulations.

b. *CSXT did not violate 49 C.F.R. § 174.9*

Unlike Section 173.31, Section 174.9 does impose inspection duties on the carrier of the material. As the district court correctly held, however, “the record demonstrates that CSX[T] complied with its duty pursuant to § 174.9.” (Dkt. Entry 77, Slip op. 10-11; 1 ROA 976-77).

Section 174.9 does not require of the carrier the type of exhaustive, top-to-bottom inspection that Section 173.31 requires of the offeror. Instead, the responsible agencies determined that “ground level inspections [by the railroad] provide an adequate level of safety.” *Transportation of Hazardous Materials by Rail; Miscellaneous Amendments*, 61 Fed. Reg. 28,666, 28,669 (June 5, 1996). The regulation governing the railroad’s duty to inspect therefore requires only that the carrier “inspect each rail car containing the hazardous material, at ground level, for required markings, labels, placards, securement of closures and leakage.” 49 C.F.R. § 174.9(a). The evidence demonstrates that CSXT performed that required inspection here. (Dkt. Entry 27-4, Fisher Aff. 1-2; 1 ROA 156-57; Dkt. Entry 69-2, Hamm Dep. 41-42, 72-75; 1 ROA 850-51, 881-84).

Plaintiffs argue that the evidence shows that CSXT “merely performed a brake inspection and a brake test” and that it “never [conducted] any actual inspection of any of the tank cars.” Br. 19. That is simply incorrect. The evidence shows that the inspection conducted by CSXT’s two train inspectors

included both visual observations of both sides of each car of train Q506, including all valves, ports, discharge pipes, hatches, latches and other equipment on tank cars and covered hopper cars, as well as the use of [the inspectors’] sense of smell to pick up any unusual or extreme odors emanating from, or present in the vicinity of, any car.

(Dkt. Entry 27-4, Fisher Aff. 2; 1 ROA 157; *see* Dkt. Entry 69-2, Hamm Dep. 41-42, 72-75; 1 ROA 850-51, 881-84). Plaintiffs offered no evidence to the contrary.

c. CSXT did not violate 49 C.F.R. § 174.3

Section 174.3, on which plaintiffs most heavily rely, imposes the general requirement that “[n]o person may accept for transportation or transport by rail any shipment of hazardous material that is not in conformance with the requirements of [the Regulations].” Plaintiffs’ assertion that CSXT violated that requirement fails on multiple grounds, and the district court correctly rejected it. (Dkt. Entry 77, Slip op. 11-14; 1 ROA 977-80).

First, plaintiffs’ theory is that CSXT violated Section 174.3 by “accept[ing] * * * an improperly prepared shipment of hazardous material in a tank car.” Br. 19. A premise of that theory is that the shipper—the entity offering the material for transportation—was responsible for the shipment’s asserted failure to be “in

conformance” with the Regulations. But the shipper is required to certify that “the material is offered for transportation in accordance with [the Regulations].” 49 C.F.R. § 172.204. And the Regulations understandably permit the carrier to “rely on information provided by the offeror,” unless the carrier knows or has reason to know that the information provided by the offeror is incorrect. 49 C.F.R. § 171.2(f).⁵ Plaintiffs have identified no evidence—and there is none—that any information provided to CSXT was incorrect, much less that CSXT either knew or should have known that it was incorrect. Under these circumstances, plaintiffs cannot prove that CSXT accepted a shipment that was “not in conformance” with the HMR, and the district court correctly so held. (Dkt. Entry 77, Slip op. 12-14; 1 ROA 978-80).

Second, even if CSXT were not entitled to rely on the shipper’s certification of compliance, there would still be no violation of Section 174.3, because there is no evidence that the shipment was “not in conformance” with the Regulations. Plaintiffs do not identify any regulation with which the shipper was supposedly not in conformance. Indeed, they do not identify anything—whether required by the

⁵ This language was added to the HMR a little more than a year after the incident at issue, but it was merely a “clarifying” amendment (70 Fed. Reg. at 43,638), not a change in the law. As the district court observed (Dkt. Entry 77, Slip op. 13; 1 ROA 979), the Department of Transportation had previously interpreted the HMR to permit a carrier to rely on the shipper’s certification unless the carrier had actual or constructive knowledge that the certification was incorrect. *See Hazardous Materials: Formal Interpretation of Regulations*, 63 Fed. Reg. 30,411 (June 4, 1998).

regulations or not—that the shipper supposedly should have done to prevent the discharge of vapor (assuming there was one). Instead, plaintiffs rely solely on the fact of the discharge itself (again, assuming there was one) to establish that the shipment was not in conformance with the HMR. *See* Br. 18-19 (“properly prepared tank cars do not leak”). But the Regulations themselves refute the notion that proof of a discharge is *per se* proof of non-compliance with the HMR. *See* 49 C.F.R. § 173.31(d)(2) (recognizing that a discharge may be attributable either to the fact that “a proper inspection was not performed by the offeror” or to “a specific cause not within the control of the offeror”); *see also* 60 Fed. Reg. at 49,065 (listing examples of causes of a discharge not within the control of the offeror). In the end, plaintiffs can only speculate that the shipment was “not in conformance” with the HMR. And “[s]peculation cannot supply the place of proof” in a FELA case (*Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 578 (1951)), even when it is an “expert” that does the speculating (*see* Dkt. Entry 68-3, Robertson Rep. 3-4, 17; 1 ROA 760-61, 774).

Third, even if CSXT were not entitled to rely on the shipper’s certification of compliance, and even if there were evidence that the shipment was “not in conformance” with the Regulations, there might be a violation of Section 174.3, but it would not be a basis for negligence *per se* under FELA. The rationale for the doctrine of negligence *per se* is that “[t]he standard of conduct required of a

reasonable person [is] prescribed by [the] legislative enactment.” W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220 (5th ed. 1984). But if it were a violation of Section 174.3 for a carrier to receive a shipment not in conformance with the HMR, without regard to whether the carrier had any reason to know of the non-conformance, Section 174.3 would impose a form of strict liability. A regulation of that type “do[es] not prescribe [a standard of] conduct, only an ideal result to aim for or achieve.” 1 Dan B. Dobbs, THE LAW OF TORTS § 41, at 332 (2001). It therefore could not prescribe any duty of care for railroads under FELA, which is obviously a negligence statute. 45 U.S.C. § 51. As the district court correctly observed, a finding of negligence *per se* in this circumstance would “lead to the imposition of strict liability on CSX[T] for [plaintiffs’] injuries, which is not permissible under FELA.” (Dkt. Entry 77, Slip op. 12; 1 ROA 978).

B. Plaintiffs Cannot Prove Foreseeability

Because CSXT was not negligent *per se*, plaintiffs must prove negligence, which includes the element of foreseeability. Plaintiffs contend that there is a “relaxed” standard of foreseeability under FELA. That contention is both wrong and irrelevant. Under any conceivable standard, plaintiffs cannot prove foreseeability.

1. The standard of foreseeability under FELA is not “relaxed”

Plaintiffs assert that “an employer may be held liable under FELA for risks that would otherwise be too remote to support liability at common law.” Br. 22 (quoting *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994)). That assertion was not pressed or passed upon in the district court (Dkt. Entry 68, Opp. to Mot. for S.J.; 1 ROA 716-807; Dkt. Entry 77, Slip op.; 1 ROA 967-82) and has therefore been forfeited (*Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552-53 (6th Cir. 2008)). In any event, this Court has already rejected it.

While some courts have interpreted *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), to mean that there is a relaxed standard of causation under FELA, that interpretation is mistaken, as Justice Souter recently demonstrated in a concurring opinion for himself and two other Justices. *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 173-174 (2007) (Souter, J., joined by Scalia and Alito, JJ., concurring). But even if there is a relaxed standard of *causation* under FELA, a question not presented here, this Court has explicitly held that “FELA does not lessen a plaintiff’s burden to prove the elements of *negligence*”—*i.e.*, duty, breach, and foreseeability. *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007) (emphasis added). Instead, whether an employer is negligent under FELA—whether there has been a breach of the duty to protect against foreseeable risks—“is determined under the ‘ordinary prudence’ standard

normally applicable in negligence cases.” *Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598 (6th Cir. 2001). Plaintiffs do not even acknowledge these cases, relying instead on decisions of the Second Circuit, which applies a different rule. Br. 22-23.

That FELA does not relax the standard for duty, breach, or foreseeability is not only compelled by this Court’s precedents; it also is self-evidently correct. Under the settled interpretive methodology, the elements of a FELA claim are determined “by reference to the common law,” unless the Act includes “express language to the contrary.” *Sorrell*, 549 U.S. at 166 (opinion of the Court); *accord*, e.g., *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Consol. Ry. Co. v. Gotshall*, 512 U.S. 532, 543-44 (1994). FELA provides simply that a railroad is liable for injuries caused by its “negligence.” 45 U.S.C. § 51. As the en banc Fifth Circuit has observed, there accordingly is “nothing in the text” of the Act to indicate that “the standard of care * * * is anything different than ordinary prudence under the circumstances.” *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc).

2. Under any standard, the evidence does not support a finding of foreseeability

a. There is no evidence that the injuries allegedly sustained by plaintiffs were foreseeable to CSXT, under either the ordinary, common-law standard or the “relaxed” standard advocated by plaintiffs. To prove foreseeability, a FELA

plaintiff must show that the railroad “was or should have been aware of conditions which created a likelihood that [the plaintiff], in performing the duties required of him, would suffer * * * an injury.” *Aparicio v. Norfolk & W. Ry Co.*, 84 F.3d 803, 813 (6th Cir. 1996) (internal quotation marks omitted); *accord, e.g., Miller v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 317 F.2d 693, 695 (6th Cir. 1963) (“Under familiar law, defendant could not be convicted of negligence, absent proof that [the] defect was known, or should or could have been known, by defendant, with opportunity to correct it.”). Assuming that there was an odor coming from Train Q506 when it passed plaintiffs’ train at Vandalia, as plaintiffs allege, there is no evidence that CSXT was or should have been aware of it.

As an initial matter, plaintiffs have identified no evidence, and have not even suggested, that CSXT had any reason to doubt that the tank car at issue—No. UTLX 130138—had been adequately inspected by the shipper, which had principal responsibility for inspection and certification, before the shipper provided the car to CSXT. Nor is there evidence that CSXT’s own inspection, after receiving the car, was in any way inadequate. Before the train transporting the car—Train Q506—departed from Cincinnati on the day in question, two experienced car inspectors examined both sides of all the cars. Neither smelled any unusual odor, or otherwise perceived anything out of the ordinary, in, on, or

around any of the cars. (Dkt. Entry 27-4, Fisher Aff. 1-2; 1 ROA 156-57; Dkt. Entry 69-2, Hamm Dep. 41-42, 72-75; 1 ROA 850-51, 881-84).

Between the time Train Q506 left Cincinnati and the time it passed the train on which plaintiffs were traveling—Train Q221—in Vandalia, no member of the crew of Train Q506 smelled the odor plaintiffs claim to have smelled, or any similar odor. No member of the crew otherwise perceived any leak, emission, or discharge from any of the cars of the train during that period. And no member of the crew was informed during that period that there was any odor or leak from any of the train's cars. As far as the record shows, the first time any employee of CSXT—or, for that matter, anyone at all—became aware of the odor or the supposed leak was when Train Q506 passed Train Q221 and plaintiffs themselves reported that they had smelled a chemical odor coming from Train Q506. Indeed, there is no evidence that the supposed leak even existed before that time. (Dkt. Entry 17-2, Borger Dep. 47-48, 80-90; 1 ROA 36, 44-47; Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 1-2, Swann Aff. 1-2, Currier Aff. 1-2; 1 ROA 151-54, 160-61; Dkt. Entry 53-2, Atkinson Dep. 68-72; 1 ROA 339-43).

There is thus a complete absence of proof that anyone at CSXT either knew or should have known, based on events before the incident, that there would likely be a discharge of vapor (assuming there was one) when Train Q506 passed Train Q221 in Vandalia. That alone entitles CSXT to summary judgment. But even if

events *after* the incident are thought relevant to the issue of foreseeability, none of the evidence concerning post-incident events suggests that CSXT had any reason to foresee the supposed leak either.

After plaintiffs reported the odor, the crew stopped Train Q506 and two members of the crew inspected both sides of the entire length of the train. They found nothing leaking from any of the cars, but did notice a faint chemical odor coming from the fifteenth car, No. UTLX 130138, which was carrying hydrochloric acid. The car, however, was found to be entirely secure, including its valves and hatches. (Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 2, Swann Aff. 1-2, Currier Aff. 2; 1 ROA 152-54, 161).

CSXT then took the additional precaution of conducting a second inspection at the first yard facility the train reached. A CSXT trainmaster conducted a roll-by inspection and observed nothing amiss. Accompanied by a car inspector, he then performed a more focused inspection of each of the cars containing hazardous materials. He found no evidence of any leak, and perceived no odor. (Dkt. Entry 19-2, McCoy Dep. 9-12, 19-20; 1 ROA 125, 127; Dkt. Entries 27-2, 27-3, Sunnycalb Aff. 2, Swann Aff. 2; 1 ROA 152, 154).

CSXT then conducted yet a third inspection upon the train's arrival at Stanley Yard. A manager of hazardous materials and a CSXT contractor performed that inspection, which was exceedingly thorough and lasted more than

two hours. Using sophisticated equipment that would have detected any prior leak of hydrochloric acid, the inspectors found no defect in any of the tank cars and no evidence of any present or past discharge. (Dkt. Entry 18-2, Mannas Dep. 9-29; 1 ROA 104-09).

In short, there is no evidence that CSXT should have known of the odor plaintiffs claim to have smelled, or even that it should have known that there may have been a problem with Car No. UTLX 130108—or any other car on Train Q506—that might cause such an odor. No one perceived the odor before the incident at issue; and everyone who inspected the car and the train both before and after the incident found no indication of any leak. As the district court correctly held, “the record [thus] demonstrates that the release of hydrochloric acid vapor from UTLX 130108, assuming such did occur, was not foreseeable to CSX[T].” (Dkt. Entry 77, Slip op 14; 1 ROA 980).

b. Relying on evidence that the crew of Train Q506 “detected some type of smell **prior** to the incident” at issue (Br. 26 (emphasis in original)), plaintiffs argue that “[t]he failure to stop and inspect or at least radio for instructions” at that time “is enough to permit a trier of fact to conclude that it was foreseeable that something could be leaking or otherwise wrong with the shipment” (Br. 24). This argument, however, was not pressed or passed upon in the district court. (Dkt. Entry 68, Opp. to Mot. for S.J.; 1 ROA 716-807; Dkt. Entry 77, Slip op.; 1 ROA

967-82). It has therefore been forfeited. *Scottsdale Ins. Co.*, 513 F.3d at 552-53. In any event, the argument lacks merit. The odor detected by the crew during an earlier part of the trip, near Trenton, Ohio, was not the chemical odor later detected by the plaintiffs, and it did not come from the train.

According to the evidence in the summary-judgment record, one crew member had “briefly noticed a skunk-like odor which could have been from the exhaust of our locomotives”; another had “briefly smelled an unusual odor, but believed that it had come from the Miller Brewery, not our train”; and the third had “briefly smelled an unusual odor, but did not believe that it was coming from our train.” (Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 1-2, Swann Aff. 1-2, Currier Aff. 1-2; 1 ROA 152-54, 160-61). Each crew member testified, without contradiction, that he was not aware of any odor coming from any car of Train Q506 prior to the time the train stopped just north of Vandalia. (Dkt. Entries 27-2, 27-3, 27-5, Sunnycalb Aff. 1, Swann Aff. 1, Currier Aff. 1; 1 ROA 151, 153, 160). The crew members who conducted the inspection at that time also testified that the faint odor from Car No. UTLX 130108 was not the same one they had earlier perceived near Trenton. (Dkt. Entries 27-3, 27-5, Swann Aff. 2, Currier Aff. 2; 1 ROA 154, 161).

That the crew members had earlier smelled a different odor from a different source does not create a triable issue as to whether it was foreseeable to CSXT that

a chemical odor would come from one of the cars when Train Q506 passed Train Q221 in Vandalia, such that CSXT had a duty to stop the train before that time and inspect the cars again. If plaintiffs' theory were correct, a crew would be obligated to stop and inspect the cars every time a train passed an oil refinery, a chemical facility, or a fertilizer plant. That obviously is not the law, and plaintiffs unsurprisingly cite no authority suggesting that it is.

Plaintiffs do rely (Br. 22-23) on *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), but that decision provides no support for their position. In *Gallick*, the plaintiff was injured by the bite of an insect from a pool of stagnant water on the railroad's property, and the Court upheld the jury's finding of foreseeability because there was evidence that the railroad "knew that the accumulation of the pool of water would attract bugs." *Id.* at 118. In this case, by contrast, there is no evidence that CSXT knew, or even that it should have known, either of the discharge of vapor that allegedly caused plaintiffs' injuries (assuming there was such a discharge) or of any condition that might cause one.

Plaintiffs also argue that CSXT need have foreseen only "an" injury, not the injury in the "precise form" in which it occurred. Br. 24. But plaintiffs cannot satisfy even that standard. Because there is no evidence that CSXT could reasonably have foreseen a discharge of fumes (assuming there was one), CSXT

necessarily could not have foreseen that plaintiffs might be injured, in any manner, by such a discharge.

Finally, plaintiffs argue that foreseeability in a FELA case is “peculiarly a jury issue.” Br. 25. But a plaintiff obviously has no right to a jury trial when there is a complete failure of proof with respect to an essential element of his or her claim. This Court has not hesitated to find insufficient evidence of foreseeability in FELA cases involving comparably remote risks. *See Basinger v. CSX Transp., Inc.*, 1996 WL 400182 at *5 (6th Cir. July 16, 1996) (affirming summary judgment on ground that railroad could not have foreseen injury to plaintiff from allegedly defective equipment); *Gibbons v. CSX Transp.*, 1993 WL 494145 at *2-*3 (6th Cir. Nov. 30, 1993) (affirming summary judgment on ground that railroad could not have foreseen assault on plaintiff); *Mang v. Norfolk & W. Ry. Co.*, 1985 WL 14083 at *3-*5 (6th Cir. Dec. 11, 1985) (affirming directed verdict on ground that railroad could not have foreseen injury to plaintiff when train collided with truck whose driver was negligently crossing tracks); *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 809 (6th Cir. 1985) (affirming directed verdict on ground that railroad could not have foreseen assault on plaintiff); *see also Adams v. CSX Transp.*, 899 F.2d 536, 540 (6th Cir. 1990) (affirming verdict following bench trial on ground that railroad could not have foreseen plaintiff’s nervous breakdown caused by workplace interaction with supervisor).

On this record, in sum, plaintiffs could recover only under a theory of strict liability. And even courts that apply a relaxed standard of negligence recognize that “FELA is not a strict liability statute.” *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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December 22, 2008

CERTIFICATE OF COMPLIANCE

I, Evan M. Tager, hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9,077 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface, namely Times New Roman 14, using Microsoft Word 2002.

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ADDENDUM A: 45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

ADDENDUM B: 49 C.F.R. § 171.2

§ 171.2 General requirements.

(a) Each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter.

(b) Each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter A of this chapter. There may be more than one offeror of a shipment of hazardous materials. Each offeror is responsible for complying with the requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter, with respect to any pre-transportation function that it performs or is required to perform; however, each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform, and each offeror may rely on information provided by another offeror, unless that offeror knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the other offeror is incorrect.

(c) Each person who performs a function covered by or having an effect on a specification or activity prescribed in part 178, 179, or 180 of this subchapter, an approval issued under this subchapter, or an exemption or special permit issued under subchapter A of this chapter, must perform the function in accordance with that specification, approval, an exemption or special permit, as appropriate.

(d) No person may offer or accept a hazardous material for transportation in commerce or transport a hazardous material in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable.

(e) No person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter.

(f) No person may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued

under this subchapter or subchapter A of this chapter. Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

(g) No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter governing its use in the transportation of a hazardous material in commerce unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of this subchapter. No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of an exemption, a special permit, approval, or registration issued under this subchapter or subchapter A of this chapter unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of the exemption, special permit, approval, or registration issued under this subchapter or subchapter A of this chapter. The requirements of this paragraph apply whether or not the packaging or container is used or to be used for the transportation of a hazardous material.

(h) The representations, markings, and certifications subject to the prohibitions of paragraph (g) of this section include:

- (1) Specification identifications that include the letters “ICC”, “DOT”, “CTC”, “MC”, or “UN”;
- (2) Exemption, special permit, approval, and registration numbers that include the letters “DOT”, “EX”, “M”, or “R”; and
- (3) Test dates associated with specification, registration, approval, retest, exemption, or special permit markings indicating compliance with a test or retest requirement of the HMR, or an exemption, special permit, approval, or registration issued under the HMR or under subchapter A of this chapter.

(i) No person may certify that a hazardous material is offered for transportation in commerce in accordance with the requirements of this subchapter unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter or an exemption or special permit, approval, or registration issued

under this subchapter or subchapter A of this chapter. Each person who offers a package containing a hazardous material for transportation in commerce in accordance with the requirements of this subchapter or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter, must assure that the package remains in condition for shipment until it is in the possession of the carrier.

(j) No person may, by marking or otherwise, represent that a container or package for transportation of a hazardous material is safe, certified, or in compliance with the requirements of this chapter unless it meets the requirements of all applicable regulations issued under Federal hazardous material transportation law.

(k) No person may, by marking or otherwise, represent that a hazardous material is present in a package, container, motor vehicle, rail car, aircraft, or vessel if the hazardous material is not present.

(l) No person may alter, remove, deface, destroy, or otherwise unlawfully tamper with any marking, label, placard, or description on a document required by Federal hazardous material transportation law or the regulations issued under Federal hazardous material transportation law. No person may alter, deface, destroy, or otherwise unlawfully tamper with a package, container, motor vehicle, rail car, aircraft, or vessel used for the transportation of hazardous materials.

(m) No person may falsify or alter an exemption or special permit, approval, registration, or other grant of authority issued under this subchapter or subchapter A of this chapter. No person may offer a hazardous material for transportation or transport a hazardous material in commerce under an exemption or special permit, approval, registration or other grant of authority issued under this subchapter or subchapter A of this chapter if such grant of authority has been altered without the consent of the issuing authority. No person may represent, mark, certify, or sell a packaging or container under an exemption or special permit, approval, registration or other grant of authority issued under this subchapter or subchapter A of this chapter if such grant of authority has been altered without the consent of the issuing authority.

ADDENDUM C: 49 C.F.R. § 172.204

§ 172.204 Shipper's certification.

(a) General. Except as provided in paragraphs (b) and (c) of this section, each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing (manually or mechanically) on the shipping paper containing the required shipping description the certification contained in paragraph (a)(1) of this section or the certification (declaration) containing the language contained in paragraph (a)(2) of this section.

(1) “This is to certify that the above-named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation.”

Note: In line one of the certification the words “herein-named” may be substituted for the words “above-named”.

(2) “I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labelled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations.”

(b) Exceptions.

(1) Except for a hazardous waste, no certification is required for a hazardous material offered for transportation by motor vehicle and transported:

(i) In a cargo tank supplied by the carrier, or

(ii) By the shipper as a private carrier except for a hazardous material that is to be reshipped or transferred from one carrier to another.

(2) No certification is required for the return of an empty tank car which previously contained a hazardous material and which has not been cleaned or purged.

(c) Transportation by air—

(1) General. Certification containing the following language may be used in place of the certification required by paragraph (a) of this section:

I hereby certify that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked and labeled, and in proper condition for carriage by air according to applicable national governmental regulations.

Note to paragraph (c)(1): In the certification, the word “packed” may be used instead of the word “packaged” until October 1, 2010.

(2) Certificate in duplicate. Each person who offers a hazardous material to an aircraft operator for transportation by air shall provide two copies of the certification required in this section. (See § 175.30 of this subchapter.)

(3) Additional certification requirements. Effective October 1, 2006, each person who offers a hazardous material for transportation by air must add to the certification required in this section the following statement:

“I declare that all of the applicable air transport requirements have been met.”

(i) Each person who offers any package or overpack of hazardous materials for transport by air must ensure that:

(A) The articles or substances are not prohibited for transport by air (see the § 172.101 Table);

(B) The articles or substances are properly classed, marked and labeled and otherwise in a condition for transport as required by this subchapter;

(C) The articles or substances are packaged in accordance with all the applicable air transport requirements, including appropriate types of packaging that conform to the packing requirements and the “A” Special Provisions in § 172.102; inner packaging and maximum quantity per package limits; the compatibility requirements (see, for example, § 173.24 of this subchapter); and requirements for closure for both inner and outer packagings, absorbent materials, and pressure

differential in § 173.27 of this subchapter. Other requirements may also apply. For example, single packagings may be prohibited, inner packaging may need to be packed in intermediate packagings, and certain materials may be required to be transported in packagings meeting a more stringent performance level.

(ii) [Reserved]

(4) Radioactive material. Each person who offers any radioactive material for transportation aboard a passenger-carrying aircraft shall sign (mechanically or manually) a printed certificate stating that the shipment contains radioactive material intended for use in, or incident to, research, or medical diagnosis or treatment.

(d) Signature. The certifications required by paragraph (a) or (c) of this section:

(1) Must be legibly signed by a principal, officer, partner, or employee of the shipper or his agent; and

(2) May be legibly signed manually, by typewriter, or by other mechanical means.

ADDENDUM D: 49 C.F.R. § 173.31

§ 173.31 Use of tank cars.

(a) General.

- (1) No person may offer a hazardous material for transportation in a tank car unless the tank car meets the applicable specification and packaging requirements of this subchapter or, when this subchapter authorizes the use of a non-DOT specification tank car, the applicable specification to which the tank was constructed.
- (2) Tank cars and appurtenances may be used for the transportation of any commodity for which they are authorized in this part and specified on the certificate of construction (AAR Form 4-2 or by addendum on Form R-1). See § 179.5 of this subchapter. Transfer of a tank car from one specified service on its certificate of construction to another may be made only by the owner or with the owner's authorization. A tank car proposed for a commodity service other than specified on its certificate of construction must be approved for such service by the AAR's Tank Car Committee.
- (3) No person may fill a tank car overdue for periodic inspection with a hazardous material and then offer it for transportation. Any tank car marked as meeting a DOT specification and any non-specification tank car transporting a hazardous material must have a periodic inspection and test conforming to subpart F of part 180 of this subchapter.
- (4) No railroad tank car, regardless of its construction date, may be used for the transportation in commerce of any hazardous material unless the air brake equipment support attachments of such tank car conform to the standards for attachments set forth in §§ 179.100-16 and 179.200-19 of this subchapter.
- (5) No railroad tank car, regardless of its construction date, may be used for the transportation in commerce of any hazardous material with a self-energized manway located below the liquid level of the lading.
- (6) Unless otherwise specifically provided in this part:
 - (i) When the tank car delimiter is an "A," offerors may also use tank cars with a delimiter "S," "J" or "T".

(ii) When the tank car delimiter is an “S,” offerors may also use tank cars with a delimiter “J” or “T”.

(iii) When a tank car delimiter is a “T” offerors may also use tank cars with a delimiter of “J”.

(iv) When a tank car delimiter is a “J”, offerors may not use a tank car with any other delimiter.

(7) A class DOT-103 or DOT-104 tank car may continue to be used for the transportation of a hazardous material if it meets the requirements of this subchapter and the design requirements in Part 179 of this subchapter in effect on September 30, 2003; however, no new construction is authorized.

(8) A tank car authorized by the Transport Canada TDG Regulations (IBR, see § 171.7 of this subchapter) may be used provided it conforms to the applicable requirements in § 171.12 of this subchapter.

(b) Safety systems—

(1) Coupler vertical restraint. Each tank car conforming to a DOT specification and any other tank car used for transportation of a hazardous material must be equipped with a coupler vertical restraint system that meets the requirements of § 179.14 of this subchapter.

(2) Pressure relief devices.

(i) Pressure relief devices on tank cars must conform to part 179 of this subchapter.

(ii) A single-unit tank car transporting a Division 6.1 PG I or II, or Class 2, 3, or 4 material must have a reclosing pressure relief device. However, a single-unit tank car built before January 1, 1991, and equipped with a non-reclosing pressure relief device may be used to transport a Division 6.1 PG I or II material or a Class 4 liquid provided such materials do not meet the definition of a material poisonous by inhalation.

(3) Tank-head puncture-resistance requirements. The following tank cars must have a tank-head puncture-resistance system that conforms to the requirements in § 179.16 of this subchapter, or to the corresponding requirements in effect at the time of installation:

- (i) Tank cars transporting a Class 2 material.
 - (ii) Tank cars constructed from aluminum or nickel plate that are used to transport hazardous material.
 - (iii) Except as provided in paragraph (b)(3)(iv) of this section, those tank cars specified in paragraphs (b)(3)(i) and (ii) of this section not requiring a tank-head puncture resistance system prior to July 1, 1996, must have a tank-head puncture resistance system installed no later than July 1, 2006.
 - (iv) Class DOT 105A tank cars built prior to September 1, 1981, having a tank capacity less than 70 kl (18,500 gallons), and used to transport a Division 2.1 (flammable gas) material, must have a tank-head puncture-resistant system installed no later than July 1, 2001.
- (4) Thermal protection requirements. The following tank cars must have thermal protection that conforms to the requirements of §179.18 of this subchapter:
- (i) Tank cars transporting a Class 2 material, except for a class 106, 107A, 110, and 113 tank car. A tank car equipped with a thermal protection system conforming to § 179.18 of this subchapter, or that has an insulation system having an overall thermal conductance of no more than 0.613 kilojoules per hour, per square meter, per degree Celsius temperature differential (0.03 B.t.u. per square foot, per hour, per degree Fahrenheit temperature differential), conforms to this requirement.
 - (ii) A tank car transporting a Class 2 material that was not required to have thermal protection prior to July 1, 1996, must be equipped with thermal protection no later than July 1, 2006.
- (5) Bottom-discontinuity protection requirements. No person may offer for transportation a hazardous material in a tank car with bottom-discontinuity protection unless the tank car has bottom-discontinuity protection that conforms to the requirements of E9.00 and E10.00 of the AAR Specifications for Tank Cars (IBR, see § 171.7 of this subchapter). Tank cars not requiring bottom-discontinuity protection under the terms of Appendix Y of the AAR Specifications for Tank Cars as of July 1, 1996, must conform to these requirements no later than July 1, 2006, except that tank cars transporting a material that is hazardous only because it meets the

definition of an elevated temperature material or because it is molten sulfur do not require bottom discontinuity protection.

(6) Scheduling of modifications and progress reporting. The date of conformance for the continued use of tank cars subject to paragraphs (b)(3), (b)(4), (b)(5), (e)(2), and (f) of this section and §§ 173.314(j) and 173.323(c)(1) is subject to the following conditions and limitations.

(i) Each tank car owner shall modify, reassign, retire, or remove at least 50 percent of their in-service tank car fleet within the first half of the compliance period and the remainder of their in-service tank car fleet during the second half of the compliance period.

(ii) By October 1 of each year, each owner of a tank car subject to this paragraph (b)(6) shall submit to the Federal Railroad Administration, Hazardous Materials Division, Office of Safety Assurance and Compliance, 1120 Vermont Avenue, Mail Stop 25, Washington, DC 20590, a progress report that shows the total number of in-service tank cars that need head protection, thermal protection, or bottom-discontinuity protection; the number of new or different tank cars acquired to replace those tank cars required to be upgraded to a higher service pressure; and the total number of tank cars modified, reassigned, acquired, retired, or removed from service the previous year.

(c) Tank car test pressure. A tank car used for the transportation of a hazardous material must have a tank test pressure equal to or greater than the greatest of the following:

(1) Except for shipments of carbon dioxide, anhydrous hydrogen chloride, vinyl fluoride, ethylene, or hydrogen, 133 percent of the sum of lading vapor pressure at the reference temperature of 46 degrees C (115 degrees F) for non-insulated tank cars or 41 degrees C (105 degrees F) for insulated tank cars plus static head, plus gas padding pressure in the vacant space of a tank car;

(2) 133 percent of the maximum loading or unloading pressure, whichever is greater;

(3) 20.7 Bar (300 psig) for materials that are poisonous by inhalation (see § 173.31(e)(2)(ii) for compliance dates);

- (4) The minimum pressure prescribed by the specification in part 179 of this subchapter; or
 - (5) The minimum test pressure prescribed for the specific hazardous material in the applicable packaging section in subpart F or G of this part.
- (d) Examination before shipping.
- (1) No person may offer for transportation a tank car containing a hazardous material or a residue of a hazardous material unless that person determines that the tank car is in proper condition and safe for transportation. As a minimum, each person offering a tank car for transportation must perform an external visual inspection that includes:
 - (i) Except where insulation or a thermal protection system precludes an inspection, the tank shell and heads for abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other condition that makes the tank car unsafe for transportation;
 - (ii) The piping, valves, fittings, and gaskets for corrosion, damage, or any other condition that makes the tank car unsafe for transportation;
 - (iii) For missing or loose bolts, nuts, or elements that make the tank car unsafe for transportation;
 - (iv) All closures on tank cars and determine that the closures and all fastenings securing them are properly tightened in place by the use of a bar, wrench, or other suitable tool;
 - (v) Protective housings for proper securement;
 - (vi) The pressure relief device, including a careful inspection of the rupture disc in non-reclosing pressure relief devices, for corrosion or damage that may alter the intended operation of the device;
 - (vii) Each tell-tale indicator after filling and prior to transportation to ensure the integrity of the rupture disc;
 - (viii) The external thermal protection system, tank-head puncture resistance system, coupler vertical restraint system, and bottom discontinuity protection for conditions that make the tank car unsafe for transportation;

- (ix) The required markings on the tank car for legibility; and
 - (x) The periodic inspection date markings to ensure that the inspection and test intervals are within the prescribed intervals.
- (2) Closures on tank cars are required, in accordance with this subchapter, to be designed and closed so that under conditions normally incident to transportation, including the effects of temperature and vibration, there will be no identifiable release of a hazardous material to the environment. In any action brought to enforce this section, the lack of securement of any closure to a tool-tight condition, detected at any point, will establish a rebuttable presumption that a proper inspection was not performed by the offeror of the car. That presumption may be rebutted by any evidence indicating that the lack of securement resulted from a specific cause not within the control of the offeror.
- (e) Special requirements for materials poisonous by inhalation—
- (1) Interior heater coils. Tank cars used for materials poisonous by inhalation may not have interior heater coils.
 - (2) Tank car specifications. A tank car used for a material poisonous by inhalation must have a tank test pressure of 20.7 Bar (300 psig) or greater, head protection, and a metal jacket (e.g., DOT 105S300W), except that—
 - (i) A higher test pressure is required if otherwise specified in this subchapter; and
 - (ii) Other than as provided in paragraph (b)(6) of this section, a tank car which does not conform to the requirements of this paragraph (e)(2), and was authorized for the material poisonous by inhalation under the regulations in effect on June 30, 1996, may continue in use until July 1, 2006.
- (f) Special requirements for hazardous substances.
- (1) A tank car used for a hazardous substance listed in paragraph (f)(2) of this section must have a tank test pressure of at least 13.8 Bar (200 psig), head protection and a metal jacket, except that—
 - (i) No metal jacket is required if—

- (A) The tank test pressure is 23.4 Bar (340 psig) or higher; or
 - (B) The tank shell and heads are manufactured from AAR steel specification TC-128, normalized;
 - (ii) A higher test pressure is required if otherwise specified in this subchapter; and
 - (iii) Other than as provided in paragraph (b)(6) of this section, a tank car which does not conform to the requirements of this paragraph (f)(1), and was authorized for a hazardous substance under the regulations in effect on June 30, 1996, may continue in use until July 1, 2006.
- (2) List of hazardous substances. Hazardous substances for which the provisions of this paragraph (f) apply are as follows:

Aldrin

Allyl chloride

alpha-BHC

beta-BHC

delta-BHC

gamma-BHC

Bis(2-chloroethyl) ether

Bromoform

Carbon tetrachloride

Chlordane

p-Chloroaniline

Chlorobenzene

Chlorobenzilate

p-Chloro-m-cresol

2-Chloroethyl vinyl ether

Chloroform

2-Chloronaphthalene

o-Chlorophenol

3-Chloropropionitrile

DDE

DDT

1,2-Dibromo-3-chloropropane

m-Dichlorobenzene

o-Dichlorobenzene

p-Dichlorobenzene

3,3'-Dichlorobenzidine

1,4-Dichloro-2-butene

1,1-Dichloroethane

1,2-Dichloroethane

1,1-Dichloroethylene

Dichloroisopropyl ether

Dichloromethane @

2,4-Dichlorophenol

2,6-Dichlorophenol

1,2-Dichloropropane

1,3-Dichloropropene

Dieldrin

alpha-Endosulfan
beta-Endosulfan
Endrin
Endrin aldehyde
Heptachlor
Heptachlor epoxide
Hexachlorobenzene
Hexachlorobutadiene
Hexachloroethane
Hexachlorophene
Hexachloropropene
Isodrin
Kepone
Methoxychlor
4,4'-Methylenebis(2-chloroaniline)
Methylene bromide
Pentachlorobenzene
Pentachloroethane
Pentachloronitrobenzene (PCNB)
Pentachlorophenol
Polychlorinated biphenyls (PCBs)
Pronamide
Silvex (2,4,5-TP)

2,4,5-T

TDE

1,2,4,5-Tetrachlorobenzene

2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD)

Tetrachloroethane

Tetrachloroethylene

2,3,4,6-Tetrachlorophenol

Toxaphene

1,2,4-Trichlorobenzene

1,1,1-Trichloroethane

1,1,2-Trichloroethane

Trichloroethylene

2,4,5-Trichlorophenol

2,4,6-Trichlorophenol

Tris(2,3-dibromopropyl) phosphate

(g) Tank car loading and unloading. When placed for loading or unloading and before unsecuring any closure, a tank car must be protected against movement or coupling as follows:

(1) Each hazmat employee who is responsible for loading or unloading a tank car must secure access to the track to prevent entry by other rail equipment, including motorized service vehicles. Derails, lined and locked switches, portable bumper blocks, or other equipment that provides an equivalent level of security may be used to satisfy this requirement.

(2) Caution signs must be displayed on the track or on the tank cars to warn persons approaching the cars from the open end of the track and must be left up until after all closures are secured and the cars are in proper condition for transportation. The caution signs must be of metal or other

durable material, rectangular, at 30.48 cm (12 inches) high by 38.10 cm (15 inches) wide, and bear the word “STOP.” The word “STOP” must appear in letters at least 10.16 cm (4 inches) high. The letters must be white on a blue background. Additional words, such as “Tank Car Connected” or “Crew at Work,” may also appear in white letters under the word “STOP.”

(3) At least one wheel on the tank car must be blocked against movement in both directions, and the hand brakes must be set. If multiple tank cars are coupled together, sufficient hand brakes must be set and wheels blocked to prevent movement in both directions.

ADDENDUM E: 49 C.F.R. § 174.3

§ 174.3 Unacceptable hazardous materials shipments.

No person may accept for transportation or transport by rail any shipment of hazardous material that is not in conformance with the requirements of this subchapter.

ADDENDUM F: 45 C.F.R. § 174.9

§ 174.9 Safety and security inspection and acceptance.

(a) At each location where a hazardous material is accepted for transportation or placed in a train, the carrier must inspect each rail car containing the hazardous material, at ground level, for required markings, labels, placards, securement of closures, and leakage. These inspections may be performed in conjunction with inspections required under parts 215 and 232 of this title.

(b) For each rail car containing an amount of hazardous material requiring placarding in accordance with § 172.504 of this subchapter, the carrier must visually inspect the rail car at ground level for signs of tampering, including closures and seals, for suspicious items or items that do not belong, and for other signs that the security of the car may have been compromised, including the presence of an improvised explosive device. As used in this section, an improvised explosive device is a device fabricated in an improvised manner incorporating explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals in its design, and generally includes a power supply, a switch or timer, and a detonator or initiator. The carrier should be particularly attentive to signs that security may have been compromised on rail cars transporting materials covered by § 172.820 of this subchapter, rail carload quantities of ammonium nitrate or ammonium nitrate mixtures in solid form, or hazardous materials of interest based on current threat information.

(c) If a rail car does not conform to the safety and security requirements of this subchapter, the carrier may not forward or transport the rail car until the deficiencies are corrected or the car is approved for movement in accordance with § 174.50.

(d) Where an indication of tampering or suspicious item is found, a carrier must take appropriate action to ensure the security of the rail car and its contents have not been compromised before accepting the rail car for further movement. If the carrier determines that the security of the rail car has been compromised, the carrier must take action, in conformance with its existing security plan (see subpart I of part 172 of this subchapter) to address the security issues before forwarding the rail car for further movement.

CERTIFICATE OF SERVICE

I, Evan M. Tager, hereby certify that, on December 22, 2008, I caused two copies of the **BRIEF OF DEFENDANT-APPELLEE CSX TRANSPORTATION, INC.** in the above-captioned matter to be served by overnight mail and through the CM/ECF system on:

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