No. 08-3557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT McBRIDE,

Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 3:06-cv-01017-JPG-CJP

The Honorable J. Phil Gilbert

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT CSX TRANSPORTATION, INC.

James A. Bax
BRASHER LAW FIRM, L.C.
211 North Broadway, Suite 2300
St. Louis, MO 63102-2793
Telephone: (314) 621-7700
Facsimile: (314) 621-1088

Evan M. Tager
Dan Himmelfarb
Stephen E. Sachs
MAYER BROWN LLP
1909 K Street, N.W.
Washington, DC 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Attorneys for Defendant-Appellant CSX Transportation, Inc.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-3557

Short Caption: McBride v. CSX Transportation, Inc.

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CSX Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

CSX Corporation

Attorney's Signature: _____ Date: January 7, 2009

Attorney's Printed Name: Dan Himmelfarb

Please indicate if you are Counsel of Record for the above listed parties pursuant to Cir. Rule 3(d). Yes X No __.

Address: Mayer Brown LLP, 1909 K Street, N.W. Washington, D.C. 20006

Phone Number: (202) 263-3000 Fax Number: (202) 263-3300

E-Mail Address: dhimmelfarb@mayerbrown.com

CIRCUIT RULE 26.1 AMENDED DISCLOSURE STATEMENT

Appellate Court No: 08-3557

Short Caption: McBride v. CSX Transportation, Inc.

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Attorney's Signature: _____ Date: January 7, 2009

Attorney's Printed Name: Evan M. Tager

Please indicate if you are Counsel of Record for the above listed parties pursuant to Cir. Rule 3(d). Yes __ No __X__.

Address: Mayer Brown LLP, 1909 K Street, N.W. Washington, D.C. 20006

Phone Number: (202) 263-3000 Fax Number: (202) 263-3300

E-Mail Address: etager@mayerbrown.com

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Attorney's Signature: _____ Date: January 7, 2009

Attorney's Printed Name: Stephen E. Sachs

Please indicate if you are Counsel of Record for the above listed parties pursuant to Cir. Rule 3(d). Yes __ No __X__.

Address: Mayer Brown LLP, 1909 K Street, N.W. Washington, D.C. 20006

Phone Number: (202) 263-3000 Fax Number: (202) 263-3300

E-Mail Address: ssachs@mayerbrown.com

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Attorney's Signature: _____ Date: January 7, 2009

Attorney's Printed Name: James A. Bax

Please indicate if you are Counsel of Record for the above listed parties pursuant to Cir. Rule 3(d). Yes __ No __X__.

Address: Brasher Law Firm L.C., 211 North Broadway, Suite 2300, St. Louis, MO 63102-2793

Phone Number: (314) 621-7700 Fax Number: (314) 621-1088

E-Mail Address: jbax@brasherlaw.com

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JURISDICTIONAL STATEMENT

On December 13, 2006, plaintiff-appellee Robert McBride filed an action against defendant-appellant CSX Transportation, Inc. ("CSXT") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, in the United States District Court for the Southern District of Illinois. SA7. McBride invoked the district court's jurisdiction under 28 U.S.C. § 1331.

On August 21, 2008, after a jury verdict in McBride's favor, the district court entered final judgment on the verdict. A32. On August 28, 2008, CSXT filed a motion seeking, in the alternative, reversal, a new trial, or remittitur. SA305. On September 8, 2008, the district court denied CSXT's motion. A34-A36.

On October 7, 2008, CSXT filed a timely notice of appeal. SA324. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), CSXT respectfully requests oral argument. This appeal raises an important and recurring issue of federal law that this Court has not recently addressed and that has divided other courts. Oral argument will assist the Court in resolving this issue.

INTRODUCTION

FELA authorizes a railroad employee to recover for a workplace injury "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, with the damages reduced in proportion to any contributory negligence by the employee, 45 U.S.C. § 53. In Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007), the Supreme Court addressed the question whether a defendant's negligence and a plaintiff's contributory negligence are governed by the same causation standard under the Act. The Court applied the established principle that the elements of a FELA claim are determined by reference to the common law unless there is express statutory language to the contrary, id. at 165-66, and it held, consistent with the common law, that the causation standard is the same for both parties, id. at 166-71. The petitioner in Sorrell had also asked the Court to decide what the standard of causation is, and to hold that both the plaintiff and the defendant must establish proximate causation. The Court did not reach that question, however. Id. at 163-65.

Two concurring opinions in Sorrell did address the standard of causation. In one, Justice Souter, joined by Justices Scalia and Alito, noted that there was a conflict among lower courts as to whether FELA requires a

showing of proximate causation. 549 U.S. at 173 & n.* (Souter, J., concurring). Justice Souter went on to explain that proximate causation was the common-law rule before FELA; that FELA did not abrogate it; that the Supreme Court consistently applied the rule for half a century after FELA's enactment; and that, contrary to the view of some lower courts, the Court's decision in Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957), did not adopt a different rule. Sorrell, 549 U.S. at 173-77 (Souter, J., concurring).

The question whether FELA requires proximate causation is the principal issue in this appeal. The Court should hold that it does, not only for the reasons set forth in Justice Souter's comprehensive concurrence in Sorrell, but also because, consistent with the settled interpretive methodology and the decisions of the Supreme Court, this Court itself has repeatedly held, both before and after Rogers, that FELA requires proximate causation. Based on the same misinterpretation of Rogers that the three-Justice concurrence corrected in Sorrell, the court below refused to instruct the jury that it must find proximate cause to return a verdict for McBride. That error prejudiced CSXT, because a properly instructed jury could easily have found that any negligence on CSXT's part was at most a

"but for" cause of McBride's injury, not a proximate cause. This Court should therefore reverse the district court's judgment and remand for a new trial.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court committed reversible error by refusing to instruct the jury that a FELA plaintiff must prove that the defendant's negligence was a proximate cause of the plaintiff's injury.

STATEMENT OF THE CASE

On December 13, 2006, McBride sued CSXT under FELA, alleging that he had injured his hand while working as a locomotive engineer for CSXT and that the injury was caused by CSXT's negligence. SA7-SA9.

On August 18 and 19, 2008, the case was tried to a jury. SA4. At the charging conference, over CSXT's objections, the district court accepted McBride's proposed causation instruction, which did not require proof of proximate cause, A3-A4; *see* SA298, and it rejected CSXT's proposed instruction, which did require such proof, A11; *see* SA301. The court delivered McBride's instruction to the jury, A19-A20, which returned a verdict for McBride, A26-A27. On August 21, 2008, the district court

entered judgment for McBride in the amount of $184,250.00 plus costs. A32.

On August 28, 2008, CSXT filed a motion seeking, in the alternative, reversal, a new trial, or remittitur. SA305. On September 8, 2008, the district court denied the motion. A34-A36.

This appeal followed. SA324.

STATEMENT OF FACTS

A. Statutory Background

Enacted in 1908, FELA establishes 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 * * * for such injury * * * 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. The basic elements of a FELA cause of action are thus "(1) negligence, i.e., [breach of the duty] of care, and (2) causation, i.e., the relation of the negligence to the injury." Sorrell, 549 U.S. at 169 (quoting Page v. St. Louis Sw. Ry. Co., 349 F.2d 820, 823 (5th Cir. 1965)).[1]

FELA adopts a regime of comparative negligence. Under Section 1 of the Act, a railroad is liable even if the employee's injury resulted only "in part" from the railroad's negligence. 45 U.S.C. § 51. And under Section 3, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

B. Factual Background

1. CSXT operates an interstate system of railroads. SA10. In addition to transporting long-distance freight, it makes "local" runs that pick up individual rail cars for long-distance transportation or deliver cars

[1] A FELA plaintiff need not prove negligence, and need only prove causation, when the defendant is shown to have violated a particular railroad-safety statute (e.g., the Safety Appliance Act, 49 U.S.C. §§ 20301-20306). See, e.g., Norfolk & W. Ry. Co. v. Hiles, 516 U.S. 400, 409 (1996).

to their final destinations. SA41. At each stop on a local run, cars are added or removed from the train in a process known as "switching." Id. Switching requires more frequent starts and stops than a long-distance journey. SA42.

Trains use multiple brake systems in slowing to a stop. The "automatic brake" acts to slow the cars of the train, while a separate "independent brake" slows the locomotives. SA80-SA81. The automatic brake normally activates the independent brake as well, and careless use of the former can cause the locomotives to brake too quickly, leading the rear cars to run into those in front. SA81-SA82. To slow a long train, engineers apply the automatic brake while releasing the independent brake, a maneuver known as "actuating" or "bailing off" the independent brake. SA61-SA62, SA81-SA82, SA115. Standard practice is to actuate the independent brake for four seconds per locomotive. SA83.

On certain models of heavier, "wide-body" locomotives, informally known as "comfort cabs," the independent brake is actuated by pressing a button on the side of the brake handle, which is located in front of the engineer's seat. SA85, SA208. The pressure required to depress this button does not depend on the number of locomotives on the train. On some

smaller "conventional" locomotives, engineers actuate the independent brake by pushing the handle down with one hand. SA169-SA170.

2. McBride was at all relevant times a locomotive engineer for CSXT. SA11. On April 12, 2004, he was assigned to a local run on a train with five locomotives, including a wide-body locomotive in the lead. SA47. Towards the end of the run, McBride reached to release the independent brake and hit his hand on the brake handle. SA119. The injury produced swelling and pain. SA119-SA120. McBride missed work and sought medical treatment for continuing pain in his hand. SA127-SA129. He later filed suit against CSXT under FELA, alleging that, as a result of CSXT's negligence, he had "injured his right hand on the independent braking system." SA8-SA9.

C. Proceedings In The District Court

1. The trial

a. McBride's case

McBride's basic theory at trial was that the train CSXT assigned to him was unsafe for switching and that his repeated pressing and holding of the actuator button had fatigued his hand and caused his injury.

(i) One of McBride's trial witnesses was Paul F. Byrnes, his railroad expert, who expressed the opinion that the train assigned to McBride was inappropriate for switching. SA85. Byrnes said that wide-body locomotives have diminished visibility and more difficulty on curved tracks. SA78, SA85-SA87. He also testified that the use of five locomotives required careful braking and extra time actuating the independent brake; otherwise, the locomotive brakes could be damaged, the cars could "sling-shot out," and there would be "a very good chance of breaking knuckles [between the cars] and even possibly putting something on the ground." SA82, SA92, SA97-SA98. Byrnes declined, however, to give an opinion on what had caused McBride to strike the independent brake handle with his hand. SA97.

McBride also called Paul Perry, his medical expert. SA101. Perry had diagnosed McBride with two conditions: "trigger finger," a locking of two different fingers; and "saddle syndrome," an inflammation of the tendons. SA262, SA264-SA265. Perry attributed McBride's saddle syndrome to blunt trauma from hitting his hand on the independent brake. SA266-SA267. Perry described trigger finger as a repetitive-motion disorder, which he found "consistent with [a] scenario" of "repetitive gripping" described by

McBride's counsel. SA267. On cross-examination, however, Perry admitted that trigger finger was a long-term condition that would not have been caused in a single day. SA272-SA273. Like Byrnes, Perry declined to offer an opinion on how McBride had come to hit his hand on the brake. SA269-SA270.

McBride also testified himself. He said that he had initially been concerned by the number and type of locomotives, because he had not been trained to switch with a wide-body engine and feared that the extra weight of the locomotives could cause the rear cars "to come in and hit the engines and maybe jackknife them off the track." SA111, SA115. As for his injury, McBride testified that the repeated exertion of pressing the button to actuate the brake had fatigued his hand and that he later "ran [his] hand into the independent brake" when he reached to release it. SA118-SA119.

(ii) At the close of McBride's case, CSXT moved for judgment as a matter of law, on the ground that there was no evidence of "any causal connection" between "the actions of using [this] set of locomotives [for] switching," on the one hand, and "Mr. McBride's injury," on the other. SA152. CSXT argued that, although Byrnes had described the locomotive arrangement as "unsafe to use" for switching, neither he nor any other

witness had established "any causal link between [McBride's] injury * * * and the use of those locomotives." Id. In response, McBride argued that the evidence necessary to establish liability under FELA "is much less than [in] an ordinary negligence case." SA153. The district court denied the motion, finding sufficient evidence for the case to go to the jury. SA154.

b. CSXT's case

CSXT attributed McBride's injury to his own negligence. It introduced evidence that, in an ordinary local run, the engineer's exertion in actuating the independent brake is minimal. McBride's supervisor, Wayne Willoughby, testified that the required safety procedures for each switch could take five or ten minutes, during which time the engineer would not have to press the actuator button. SA160-SA165. Similarly, CSXT's railroad expert, Brian Heikkila, estimated that the actuator button would be used less than 10 percent of the time that was spent in active switching operations. And he could identify "no reason or occasion to move one's hand with such force that if there's a miscalculation on grasping that handle, * * * it would cause injury in coming in contact with that independent brake." SA213-SA215.

At the close of the evidence, CSXT renewed its motion for judgment as a matter of law. The court denied the renewed motion, stating that it was doing so for the same reason it had denied the initial motion. SA223.

c. Jury instructions

(i) Before trial, the district court directed the parties to propose instructions to the jury. SA17. On the second day of trial, outside the jury's presence, the court held a charging conference at which it examined the proffered instructions and issued rulings on the record. Two rulings are most relevant here.

The first ruling related to McBride's Instruction No. 4, on causation, which made no reference to proximate cause. The instruction stated:

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

SA298. CSXT objected to the proffered charge, on the ground that it was "a misstatement of the causation standard set forth by the Supreme Court's latest opinion in Norfolk and Southern versus Sorrell, and the cases cited therein." A3-A4. In response, McBride pointed out that it was "a pattern

instruction unmodified from the Seventh Circuit." A4. The commentary to that recently adopted pattern instruction cites Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957), for the propositions that "[a] relaxed standard of causation applies under FELA" and that "[t]he common law standard of proximate cause does not apply." 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. Without further comment, the district court stated that it was "going to give [the instruction] over objection." A4.

The second ruling related to CSXT's Instruction No. 15, which would have required McBride to prove proximate causation. The instruction stated:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

SA301. CSXT argued that the proffered charge reflected "the proper standard for causation as set forth by the Supreme Court opinions that are cited as well as the Supreme Court's opinion in Norfolk Southern versus Sorrell." A12. The decisions that CSXT cited in support of the proposed

instruction, SA301, hold that FELA requires proof of proximate causation.[2] McBride objected, "based on the same reasons" he had previously stated. A12-A13. Without further comment, the court denied the requested instruction for the "[s]ame reasons." A13.[3]

(ii) Later the same day, the district court charged the jury.

Tracking the general language in FELA's text, 45 U.S.C. § 51, the court instructed the jury that the Act imposes liability

> where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad.

A18-A19; see SA302. Dividing that language into two separate elements, the court then told the jury that McBride was required to prove that

> 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries.

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[2] See Coray v. S. Pac. Co., 335 U.S. 520, 523 (1949); Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 32 (1944); Brady v. S. Ry. Co., 320 U.S. 476, 483-84 (1943); Chapman v. Union Pac. R.R., 467 N.W.2d 388, 395 (Neb. 1991); Marazzato v. Burlington N. Ry. Co., 817 P.2d 672, 674-75 (Mont. 1991).

[3] The court also rejected CSXT's Instruction No. 14, on contributory negligence, which likewise would have required a finding of proximate cause, A12; see SA300, and CSXT's Instruction No. 11, which provided a definition of proximate cause adapted from the Illinois pattern instructions, A11; see SA299.

A19; see SA303. The court then delivered McBride's proffered instruction, approved at the charging conference, on the element of causation. The court informed the jury that

> [d]efendant "caused or contributed to" plaintiff's injury if defendant's negligence played a part—no matter how small—in bringing about the injury.

A19-A20; see SA304.

The court did not give CSXT's proffered instruction on proximate cause or otherwise mention that concept during the charge.

d. Summations

In his summation to the jury, McBride argued that CSXT had been negligent in three respects: "[the lead] locomotive was not meant for switching"; "it was unsafe to switch with five locomotives in a train"; and McBride had not been "trained on how to switch these types of engines." SA234. He also emphasized the "but for" relationship between this asserted negligence and his injury, arguing that, "[i]f he was given the right locomotive and the right train setup," McBride would "never have had to make these repetitive movements and grips with his right arm" and would "never have hit his hand." SA234-SA235. Tying this "but for" theory to the court's causation instruction, he argued: "What we * * * have to show is

defendant's negligence caused or contributed to Bob's injury. It never would have happened but for the defendant giving him that train." SA236.

In its summation, CSXT disputed this account of causation. It argued that McBride had not used the actuator all day long and that there was no evidence that, "if he did use it all day long, [this use] caused his injury." SA248.

e. Verdict

The jury returned a verdict in favor of McBride, finding that CSXT had been negligent and that its negligence had caused or contributed to McBride's injury. The jury also found McBride to have been contributorily negligent. It awarded damages of $275,000, of which 67 percent was attributed to CSXT's negligence and 33 percent to McBride's. A26, A30-A31.

The district court entered judgment for McBride from the bench, in the amount of $184,250. A28. It subsequently entered a written judgment. A32.

2. Post-trial motions

After trial, CSXT filed a motion seeking, in the alternative, reversal, a new trial, or remittitur. SA305. The motion argued that CSXT was entitled

to a new trial because FELA requires proximate causation; the district court erroneously delivered jury instructions that omitted that requirement; and the court erroneously rejected instructions that included it. SA305-SA306, SA309-SA316. The motion also argued that CSXT was entitled to judgment as a matter of law because McBride had failed to prove proximate causation, in that his witnesses had described a five-locomotive train with a wide-body engine as unsafe for switching, but the risks they identified—diminished visibility, difficulty negotiating curves, and the like—were unrelated to the injury McBride sustained. SA306, SA318-SA319.

The district court denied CSXT's motion in a summary order. A34. Without further explanation, it rejected CSXT's challenge to the jury instructions "[f]or the reasons given by the Court in the jury instruction conference," and it ruled that McBride had "put forth sufficient evidence from which a jury could conclude that [CSXT] was negligent and that such negligence caused [McBride's] injuries." A34-A35.[4]

[4] The district court's order also rejected CSXT's contention that the damages were excessive, and it awarded the costs that McBride had requested. A35.

SUMMARY OF ARGUMENT

The district court committed reversible error by refusing to instruct the jury that a FELA plaintiff must prove proximate causation.

A. FELA requires proximate cause. The elements of a FELA claim are determined "by reference to the common law," unless the Act includes "express language to the contrary." Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165-66 (2007). Both before FELA's enactment and since, it has been "clear common law that a plaintiff [must] prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." Id. at 173 (Souter, J., joined by Scalia and Alito, JJ., concurring). And FELA "sa[ys] nothing * * * about the familiar proximate cause standard." Id. at 174 (Souter, J., concurring). Consistent with the established interpretive methodology, both the Supreme Court and this Court have repeatedly "recognized and applied proximate cause as the proper standard in FELA suits." Id.

The drafters of the pattern jury instruction that the district court delivered—and by implication the court itself—believed that Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957), held to the contrary. See 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. That belief was mistaken.

Rogers involved multiple causation, not proximate causation; it "did not address, much less, alter," existing law on "the necessary directness of cognizable causation." Sorrell, 549 U.S. at 173 (Souter, J., concurring). Rogers interpreted FELA's statement that a plaintiff may recover for injuries resulting "in whole or in part" from the railroad's negligence, 45 U.S.C. § 51, to mean that a railroad is liable if its negligence "played any part, even the slightest," in producing the injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence." 352 U.S. at 506. Far from having rejected proximate causation, Rogers assumed that it is required: the jury in the case was instructed that it must find proximate cause for the railroad to be liable, id. at 505 n.9; and the Court cited prior decisions explicitly recognizing that a railroad's negligence must have been "a contributory proximate cause" of the employee's injury, id. at 506 n.11 (citing Coray v. S. Pac. Co., 335 U.S. 520, 523 (1949)); id. at 507 n.13 (citing Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 435 (1949)). The holding of Rogers, in short, is not that a FELA defendant's negligence need not be a proximate cause of the plaintiff's injury, but that it need not be the sole proximate cause.

B. The district court's causation charge was erroneous. Unlike the instruction proffered by CSXT, which would have charged the jury both on multiple causation and on proximate causation, SA301, the instruction delivered by the district court charged only on multiple causation. The court informed the jury that it should find for McBride if CSXT's negligence "caused or contributed to" his injury—i.e., if CSXT's negligence "played a part—no matter how small—in bringing about the injury." A19-A20. That instruction fails the most basic test of a permissible jury charge, in that it does not "correctly state[] the law." Calhoun v. Ramsey, 408 F.3d 375, 379 (7th Cir. 2005). The instruction says nothing about the requisite directness of the causal relationship between negligence and injury, and it permits a verdict for the plaintiff even if the defendant's negligence was only a "but for" cause of the injury. Indeed, that was the very point of the instruction, whose drafters were of the mistaken view that "proximate cause does not apply." 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a.

C. The instructional error was not harmless. A party is prejudiced by an erroneous instruction, and a new trial is therefore required, unless the evidence was so one-sided that a properly instructed jury necessarily would have reached the same result. United States v. Thomas, 86 F.3d 647,

651 (7th Cir. 1996). That is manifestly not the case here. There are enough separate links in the chain of causation from CSXT's alleged negligence (providing the wrong type and number of locomotives) to McBride's alleged injury (swelling and pain from hitting his hand) for a properly instructed jury to find the causal relationship too "indirect[] or remote[]," Sorrell, 549 U.S. at 173 (Souter, J., concurring), to amount to proximate cause, particularly given the jury's finding that McBride's own carelessness contributed to the accident. Similarly, while McBride's principal theory of negligence at trial was that CSXT's use of five locomotives with a wide-body locomotive in the lead created a risk of derailment or collision, McBride was not injured by either of those, and thus a properly instructed jury could have found that there was no proximate cause because CSXT's "duty was to take precautions against a different kind of loss from the one that materialized." Movitz v. First Nat'l Bank of Chi., 148 F.3d 760, 763 (7th Cir. 1998). McBride explicitly asked the jury to return a verdict in his favor because his injury "would never have happened but for the defendant giving him that train." SA236 (emphasis added). Even assuming that the jury agreed with McBride on that point, there is good reason to believe—and at the very least it is possible—that the jury would have returned a

verdict for CSXT if it had been instructed that the causation must be proximate.

STANDARD OF REVIEW

This Court reviews a district court's interpretation of a statute de novo. Village of DePue, Ill. v. Exxon Mobil Corp., 537 F.3d 775, 784 (7th Cir. 2008). This Court also reviews jury instructions de novo, "to determine whether, taken as a whole, they correctly and completely informed the jury of the applicable law." Huff v. Sheahan, 493 F.3d 893, 899 (7th Cir. 2007); accord Schmitz v. Can. Pac. Ry. Co., 454 F.3d 678, 681-82 (7th Cir. 2006). In that connection, although a district court's denial of a motion for a new trial is reviewed for abuse of discretion, "the decision to deny the new trial [is] * * * an abuse of discretion" if the court "committed legal error in instructing the jury." Huff, 493 F.3d at 899. Such a decision requires reversal "when the instructions 'misstate the law or fail to convey the relevant legal principles in full' and when those shortcomings confuse or mislead the jury and prejudice the objecting litigant." Id. (quoting Byrd v. Ill. Dep't of Pub. Health, 423 F.3d 696, 705 (7th Cir. 2005)).

ARGUMENT

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY THAT A FELA PLAINTIFF MUST PROVE PROXIMATE CAUSATION

The district court believed that FELA does not require the plaintiff to prove proximate causation; it therefore charged the jury that McBride need prove only that CSXT's negligence "caused" his injury in whole or part; and the jury so found, returning a verdict for McBride. The verdict cannot stand. As explained below, FELA does require proof of proximate cause; the district court's charge on causation was therefore erroneous; and the error was not harmless, because a properly instructed jury could easily have found that any negligence on CSXT's part was, at most, a "but for" cause of McBride's injury.

A. FELA Requires A Plaintiff To Prove Proximate Causation

FELA requires proof of proximate causation—a "direct relation between the injury asserted and the injurious conduct alleged," Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992)—for two related reasons. First, as the Supreme Court's recent decision in Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007), confirms, FELA is deemed to incorporate common-law principles unless it expressly provides otherwise. Proximate

cause is a bedrock principle of common-law negligence, and there is nothing in FELA that abrogates it. Second, both the Supreme Court and this Court have repeatedly held that proximate cause is an element of a FELA claim. As the three-Justice concurrence in Sorrell explained, moreover, Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957), did not hold otherwise. Nor has any post-Rogers decision of either the Supreme Court or this Court.

1. Proximate causation is required under the settled methodology for interpreting FELA

a. Under long-settled precedent of the Supreme Court, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." Sorrell, 549 U.S. at 165-66; accord, e.g., Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 145 (2003); Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543-44 (1994). Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," Gottshall, 512 U.S. at 542-43—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act

through contract, 45 U.S.C. §§ 51, 53-55.[5] Otherwise, however, FELA is "founded on common-law concepts." Urie v. Thompson, 337 U.S. 163, 182 (1949).

Thus, finding no clear contrary indication in the statutory text, the Supreme Court has followed the common law in holding that a right of action for personal injury is extinguished by the death of the injured party, Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 67-68 (1913); in holding that FELA authorizes recovery of certain types of damages for occupational disease, Urie, 337 U.S. at 182, negligent infliction of emotional distress, Gottshall, 512 U.S. at 549-50, or a genuine and serious fear of developing cancer, Ayers, 538 U.S. at 149; in holding that FELA does not authorize awards of prejudgment interest, Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 337-38 (1988); in holding that FELA provides for joint and several liability, Ayers, 538 U.S. at 163-65; and in holding that FELA applies the same causation standard to the defendant's negligence and the plaintiff's contributory negligence, Sorrell, 549 U.S. at 165-72. Finding no clear

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[5] See also S. Rep. No. 60-460, at 1 (1908) ("[T]he proposed measure * * * revises the law as now administered in the courts of the United States in four important particulars[.]"); H.R. Rep. No. 60-1386, at 1 (1908) ("The purpose of this bill is to change the common-law liability [in four respects].").

contrary indication in the statutory text, this Court has likewise followed the common law in holding that an employer is vicariously liable under FELA only if the negligent employee was acting in furtherance of the employer's business, Sobieski v. Ispat Island, Inc., 413 F.3d 628, 632 (7th Cir. 2005), and in holding that FELA does not relax the standard of negligence, Coffey v. Ne. Ill. Reg'l Commuter R.R. Corp., 479 F.3d 472, 476 (7th Cir. 2007).

b. As Justice Souter noted in his Sorrell concurrence, "[p]rior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." 549 U.S. at 173; see, e.g., 3 John D. Lawson, Rights, Remedies & Practice § 1028, at 1740 (1890); 1 Thomas G. Shearman & Amasa A. Redfield, A Treatise on the Law of Negligence § 26, at 26 (4th ed. 1888). That, of course, remains the rule today. See, e.g., 1 Dan B. Dobbs, The Law of Torts § 180, at 443 (2001); W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 41, at 263 (5th ed. 1984). The requirement of proximate causation—that the plaintiff's injury followed "naturally, uninterruptedly, and with reasonable probability" from the defendant's negligence, In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995)—reflects the recognition that, "[i]n a philosophical sense, * * * the causes of an event go back to the dawn of

human events, and beyond"; that "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts"; and that a "boundary must [therefore] be set to liability for the consequences of any act," Keeton, supra, § 41, at 264.

There is no language in FELA, much less any express language, that dispenses with the common-law requirement of proximate causation. On the contrary, "FELA sa[ys] nothing * * * about the familiar proximate cause standard." Sorrell, 549 U.S. at 174 (Souter, J., concurring). As far as causation is concerned, FELA provides only that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. That language authorizes recovery when the railroad's negligence is merely one of the causes of the plaintiff's injury, but it says nothing about the requisite directness of any cause. As this Court has paraphrased Justice Souter's concurrence in Sorrell, "Congress's * * * purpose in specifying 'in whole or in part' was to make clear that a railroad would be liable if it was negligent even if the injured worker had been much more negligent," or if there were "joint tortfeasors of unequal responsibility." Coffey, 479 F.3d at 476. More generally, as this Court put it in an earlier case, "[t]he words 'in part'" in FELA indicate that "there may

be a plurality of causes" and thereby "enlarge[] the field or scope of proximate causes." Eglsaer v. Scandrett, 151 F.2d 562, 566 (7th Cir. 1945).

2. Proximate causation is required under the decisions of the Supreme Court and this Court on FELA causation

Consistent with the settled interpretive methodology, both the Supreme Court and this Court repeatedly held, for half a century after FELA was enacted, that an employee must prove that the railroad's negligence was a proximate cause of the employee's injury. Contrary to the premise of the jury instruction given here, moreover, the Supreme Court did not abandon that requirement in Rogers, and this Court has never interpreted that decision to have done so. Nor has either court held in any case decided after Rogers that FELA abrogated the proximate-cause requirement; in fact, this Court has explicitly applied the requirement post-Rogers. The decisions requiring proof of proximate causation therefore control.

a. Pre-Rogers decisions

In the period "between FELA's enactment and the decision in Rogers," the Supreme Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." Sorrell, 549 U.S. at

174 (Souter, J., concurring). The Court not only recognized and applied the standard, but stated it in the clearest possible terms. "In order to recover under [FELA]," the Court said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the * * * accident." Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 32 (1944). The Court made clear that "but for" causation was insufficient, explicitly contrasting negligence that is the "proximate cause" of an injury with negligence that "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." Davis v. Wolfe, 263 U.S. 239, 243 (1923). Altogether, the Court applied the proximate-cause standard in more than fifteen FELA cases through the middle of the twentieth century.[6]

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[6] In addition to the cases cited in the text, see Norfolk & W. Ry. Co. v. Earnest, 229 U.S. 114, 118-19 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise * * * reasonable care and caution, and his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); Lang v. N.Y. Cent. R.R. Co., 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect"); Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Goneau, 269 U.S. 406, 410-11 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident * * *, the case was rightly submitted to the

During the same period, in case after case, this Court likewise recognized and applied proximate causation as the proper standard under FELA. Like the Supreme Court, moreover, this Court did so in no uncertain terms, stating, for example, that "[t]o recover under the Act

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jury * * *."); St. Louis-S.F. Ry. Co. v. Mills, 271 U.S. 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death."); N.Y. Cent. R.R. Co. v. Ambrose, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due to the negligence of the company"); Nw. Pac. R.R. Co. v. Bobo, 290 U.S. 499, 503 (1934) ("If petitioner was negligent * * *, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); Swinson v. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 294 U.S. 529, 531 (1935) ("The Safety Appliance Act * * * give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act."); Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 67 (1943) (FELA "leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"); Brady v. S. Ry. Co., 320 U.S. 476, 483 (1943) ("evidence of the unsuitability of the rail for ordinary use * * * would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); Coray v. S. Pac. Co., 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); Urie, 337 U.S. at 177 (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"); O'Donnell v. Elgin, Joliet & E. Ry. Co., 338 U.S. 384, 390 (1949) ("a failure of equipment to perform as required by the Safety Appliance Act is * * * an actionable wrong, * * * for the proximate results of which there is liability [under FELA]"); and Carter v. Atlanta & St. Andrew's Bay Ry. Co., 338 U.S. 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff").

plaintiff must prove that defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries." Larsen v. Chi. & N.W. Ry. Co., 171 F.2d 841, 844 (7th Cir. 1948). There are numerous other decisions to the same effect.[7]

b. Rogers

In eliminating proximate causation, the drafters of the pattern jury instruction delivered by the court below relied on the Supreme Court's decision in Rogers. See 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a (citing

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[7] See, e.g., Vigor v. Chesapeake & Ohio Ry. Co., 101 F.2d 865, 868 (7th Cir. 1939) ("the injuries to decedent for which [the plaintiff] seeks recovery must have been proximately caused by the failure of the car and tender to couple automatically"); Wendell v. Chi. Rock Island & Pac. Ry. Co., 184 F.2d 868, 871 (7th Cir. 1950) ("[T]here must be proof of the defendant's negligence which is the proximate cause of the employee's injury or death."); Wetherbee v. Elgin, Joliet & E. Ry. Co., 191 F.2d 302, 306 (7th Cir. 1951) ("The question[s] [are], Was the carrier negligent, and if so was such negligence a proximate cause of plaintiff's injuries?"); Sivert v. Pa. R.R. Co., 197 F.2d 371, 375 (7th Cir. 1952) ("In order to recover under [FELA], it was incumbent upon plaintiff to prove that defendant was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident."); Kaminski v. Chi. River & Ind. R.R. Co., 200 F.2d 1, 3 (7th Cir. 1952) (quoting Wetherbee, 191 F.2d at 306); Wadiak v. Ill. Cent. R.R. Co., 208 F.2d 925, 930 (7th Cir. 1953) ("there is not an iota of proof that [defendant's negligence] was the proximate cause of plaintiff's injuries"); O'Day v. Chi. River & Ind. R.R. Co., 216 F.2d 79, 83 (7th Cir. 1954) ("this question of proximate causation was a question of fact for the jury"); Teets v. Chi., S. Shore & S. Bend R.R., 238 F.2d 223, 226 (7th Cir. 1956) ("It is for the jury to determine whether a violation of [the] rule is a proximate cause which contributed in whole or in part to the accident.").

Rogers for the proposition that "proximate cause does not apply under FELA"). Indeed, virtually every court that has rejected proximate cause in FELA cases has done so in reliance on Rogers. See, e.g., Sorrell, 549 U.S. at 173 n.* (Souter, J., concurring). As the three-Justice concurrence in Sorrell explained, however, "Rogers did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm." Id. at 173 (Souter, J., concurring). There is thus no basis to conclude—as the district court effectively did—that Rogers overruled the more than fifteen decisions holding that FELA requires proximate cause, much less that it did so sub silentio.

(i) At common law, a plaintiff's contributory negligence "operated as an absolute bar to relief." Sorrell, 549 U.S. at 166. FELA abolished that defense, replacing it with the doctrine of comparative negligence. Gottshall, 512 U.S. at 542. Under Section 1 of the Act, a defendant is liable for an injury to the plaintiff "resulting in whole or in part" from the defendant's negligence, 45 U.S.C. § 51 (emphasis added), and under Section 3 the plaintiff's damages are reduced "in proportion to the amount of negligence attributable to [the plaintiff]," 45 U.S.C. § 53.

Rogers concerned those principles, and multiple causation more generally. The Supreme Court "granted certiorari in Rogers to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes." Sorrell, 549 U.S. at 174-75 (Souter, J., concurring). Quoting Sections 1 and 3 of FELA, Rogers, 352 U.S. at 506 n.12, 507 & n.14, the Court explained that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence," id. at 506; see also id. at 507-08 (issue is whether defendant's negligence "played any part, however small," in plaintiff's injury, and jury question is presented if conclusion may reasonably be drawn that defendant's negligence "played any part at all" in plaintiff's injury). The Court ultimately held that the evidence in the case before it was sufficient to support a finding that the defendant's negligence "played a part" in the plaintiff's injury. Id. at 503.

As Justice Souter observed in Sorrell, Rogers thus addressed only "the occasional multiplicity of causations," 549 U.S. at 175—the question of "how to proceed when there are multiple cognizable causes of an injury," id. at 173. It did not address "the necessary directness of cognizable

causation." Id. The two concepts are distinct. "[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2004). "[P]roximate cause and sole cause are plainly different." Taylor v. Ill. Cent. R.R. Co., 8 F.3d 584, 587 (7th Cir. 1993) (internal quotation marks omitted). That the railroad's negligence need not be the sole cause of an employee's injury under FELA, therefore, does not mean that it need not be a proximate cause.

The statutory "in whole or in part" language construed in Rogers had always been part of FELA, and both the Supreme Court and this Court had consistently interpreted the Act to require proximate causation. Indeed, a number of those decisions explicitly stated that FELA requires proof that the defendant's negligence was the "proximate cause in whole or in part" of the plaintiff's injury, thereby confirming that directness of causation ("proximate cause") and multiplicity of causation ("in whole or in part") are distinct.[8] Rogers merely clarified that "in part" means "any part, even the slightest." 352 U.S. at 506. Consistent with the view of the three-Justice concurrence in Sorrell, this Court has correctly understood the "any part,

[8] See Tennant, 321 U.S. at 32; Larsen, 171 F.2d at 844; Sivert, 197 F.2d at 375; Teets, 238 F.2d at 226.

even the slightest" language in Rogers to mean that "[t]he fact that there may have been a number of causes of the injury is * * * irrelevant as long as one cause may be attributable to the railroad's negligence." Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246-47 (7th Cir. 1974); accord Harris v. Chesapeake & Ohio Ry. Co., 358 F.2d 11, 12 (7th Cir. 1966) (interpreting same language to mean that, "[a]lthough any number of causes may contribute to an injury, so long as one may be attributable to the railroad's negligence, a proper foundation for liability exists"). Similarly, in the same decision in which another court held that a FELA plaintiff "has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]," Marazzato v. Burlington N. R.R. Co., 817 P.2d 672, 675 (Mont. 1991) (alteration in original) (quoting Barilla v. Atchison, Topeka & Santa Fe Ry., 635 F. Supp. 1057, 1059 (D. Ariz. 1986)), it correctly observed that Rogers "address[ed] the [distinct] issues of multiple causes and contributory negligence." Id. at 674.

(ii) Far from having rejected proximate causation, the Court in Rogers assumed that proximate cause is an element of a FELA claim. For example, the jury instructions in the case required a determination that the defendant's negligence was the "proximate cause" of the plaintiff's injuries.

Rogers, 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with which the Court "took no issue." Sorrell, 549 U.S. at 176 (Souter, J., concurring). Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge." Rogers, 352 U.S. at 505.

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which Rogers relied." Sorrell, 549 U.S. at 175 (Souter, J., concurring). Those cases require proof that the railroad's negligence was a proximate cause—though not necessarily the sole proximate cause—of a FELA plaintiff's injury. Thus, for the proposition that the test under the Act is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury, 352 U.S. at 506, the Court cited Coray v. Southern Pacific Co., 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. See Rogers, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury, id. at 507, the Court cited Carter v. Atlanta & St.

Andrews Bay Railway Co., 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. See Rogers, 352 U.S. at 507 n.13.

The Court's decision in Rogers is thus "no authority for anything less than proximate causation in an action under FELA." Sorrell, 549 U.S. at 177 (Souter, J., concurring). Consistent with common-law principles as qualified by the statutory language, the holding of the case is not that a FELA defendant's negligence need not be a proximate cause of the injury, but that it need not be the sole proximate cause. The jury instruction proffered by CSXT, but rejected by the district court, faithfully reflects that holding: "In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted 'in whole or in part' from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury." SA301.

c. Post-Rogers decisions

It has been suggested that, regardless of whether the Supreme Court eliminated the proximate-cause requirement in Rogers, it did so in two subsequent cases. See Sorrell, 549 U.S. at 177-78, 180 n.1 (Ginsburg, J.,

concurring in the judgment) (citing Crane v. Cedar Rapids & Iowa City Ry. Co., 395 U.S. 314 (1969), and Gottshall, 512 U.S. 532). In fact, neither of those decisions held that FELA abrogates the proximate-cause requirement. Nor has any post-Rogers decision of this Court.

(i) In Crane, the Supreme Court cited Rogers for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166 (quoting 45 U.S.C. § 51). That statement was dictum, because the suit against the railroad in Crane was filed by a nonemployee, and thus the issue of causation was governed by state law rather than FELA. Id. at 167. In any event, the statement is properly understood to mean only that FELA does not embody the concept of sole proximate causation, as the Court's quotation of the Act's "in whole or in part" language confirms. If the dictum was intended to mean something more, however, it was simply incorrect, because it conflated the question of how direct a cause of an injury must be with the question of whether a plaintiff may recover when the injury has multiple causes. Certainly the dictum cannot be thought to have overruled the long line of decisions explicitly holding that proximate causation is required by FELA,

particularly in light of the Supreme Court's recent reaffirmation of the principle that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law," Sorrell, 549 U.S. at 165-66.

In Gottshall, the Supreme Court cited Rogers for the proposition that "a relaxed standard of causation applies under FELA." Gottshall, 512 U.S. at 543. That statement, too, was dictum, because Gottshall involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to take a position on FELA causation generally. In any event, the illustrative quotation from Rogers that immediately followed the statement—the "any part, even the slightest" language, id. (quoting 352 U.S. at 506)—is entirely consistent with the view that Rogers addressed only the issue of multiple causes. Gottshall's dictum concerning the "relaxed standard of causation"—which does not mention proximate cause—thus appears to be a reference to Rogers' holding that FELA allows a plaintiff to recover even when the railroad bears only a small proportion of the responsibility for the injury.

(ii) As for this Court, far from having rejected proximate cause after Rogers, it continued to interpret FELA to incorporate the requirement.

Thus, in Rogers v. Elgin, Joliet & Eastern Railway Co., 248 F.2d 710 (7th Cir. 1957), the Court affirmed a jury verdict for the plaintiff because there was sufficient evidence "of a violation of the Safety Appliance Act and that it was the sole or contributory proximate cause of plaintiff's injuries." Id. at 712. In so holding, the Court cited, id., the Supreme Court's decisions in Coray, 335 U.S. at 523, and Carter, 338 U.S. at 435, each of which held that FELA requires proximate causation. Similarly, in reversing a jury verdict for the plaintiff in Shupe v. New York Central System, 339 F.2d 998 (7th Cir. 1965), this Court applied the principle that a FELA plaintiff "cannot recover damages which are not proximately caused by defendant's * * * negligence." Id. at 1000. Numerous other federal and state courts have likewise held, post-Rogers, that a FELA plaintiff must prove proximate cause.[9]

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[9] See, e.g., Moore v. Chesapeake & Ohio Ry. Co., 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980); Lynch v. Decker, No. CIV. L-91-1864, 1994 WL 902363 at *3 (D. Md. Aug. 19, 1994); Wier v. Soo Line R.R. Co., No. 96 C 2094, 1997 WL 733909 at *2 (N.D. Ill. Nov. 18, 1997); Dickerson v. Staten Trucking, Inc., 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006); Reed v. Pa. Rd. Co., 171 N.E.2d 718, 721 n.3 (Ohio 1961); Brabeck v. Chi. & N.W. Ry. Co., 117 N.W.2d 921, 923 (Minn. 1962); Chapman, 467 N.W.2d at 395; Marazzato, 817 P.2d at 675; Snipes v. Chi., Cent. & Pac. R.R. Co., 484 N.W.2d 162, 164 (Iowa 1992); Gardner v. CSX Transp., Inc., 498 S.E.2d 473, 483 (W. Va. 1997); Brooks v. Brennan, 625 N.E.2d 1188, 1193 (Ill. App. 5th Dist. 1994); Lehman v. Nat'l R.R. Passenger Corp., 661

It is true that, in Lisek v. Norfolk & Western Railway Co., 30 F.3d 823 (7th Cir. 1994), this Court quoted the language from Crane discussed above—that an employee "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or [in] part' from the railroad's [negligence]." Id. at 826 n.4 (quoting 395 U.S. at 166). As in Crane itself, however, that language was dictum, because causation was not at issue; Lisek addressed the question whether particular conduct violated the Safety Appliance Act, and held that it does not. Id. at 825-31. As in Crane itself, moreover, the statement is properly understood to mean only that FELA does not embody the concept of sole proximate causation.

It is also true that, in Holbrook v. Norfolk Southern Railway Co., 414 F.3d 739 (7th Cir. 2005), this Court stated that "a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case." Id. at 741-42. Insofar as that statement had anything to do with causation, however, it was also dictum, because there was no issue of causation in that case either; the Court affirmed summary judgment for the railroad on the ground that the plaintiff could not prove that the railroad

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A.2d 17, 19 (Pa. Super. 1995); Kelson v. Cent. of Ga. R.R. Co., 505 S.E.2d 803, 808 (Ga. App. 1998). But see Sorrell, 549 U.S. at 173 n.* (Souter, J., concurring) (citing contrary authority).

was negligent. In any event, as in Gottshall, the statement appears to have been a reference to Rogers' holding that a railroad's negligence need only be a cause of the plaintiff's injury, particularly in light of the immediately following sentence, which quoted Rogers' "any part, even the slightest" language. Id. at 742 (quoting 352 U.S. at 506). We therefore disagree with the suggestion that Holbrook is one of the cases that has "taken the view that Rogers smuggled proximate cause out of the concept of defendant liability under FELA." 549 U.S. at 173 n.* (Souter, J., concurring). Holbrook does not mention proximate cause, much less say that Rogers abandoned it.

B. The District Court's Causation Instruction Was Erroneous

Because FELA requires a plaintiff to prove proximate causation, the district court was obligated to instruct on that element. By failing to do so, it erred.

1. A district court enjoys "substantial discretion with respect to the precise wording of jury instructions," but only "so long as the final result, read as a whole, completely and correctly states the law." Calhoun v. Ramsey, 408 F.3d 375, 379 (7th Cir. 2005). The instructions need not be "perfect," but they "must be correct legal statements and must convey the relevant legal principles in full." Lasley v. Moss, 500 F.3d 586, 589 (7th Cir.

2007); accord United States v. Magers, 535 F.3d 608, 610 (7th Cir. 2008). Accordingly, in a case, like this one, in which the substantive law requires proof of proximate causation, the court's instructions must "adequately apprise[] the jury of the law as applied to the problem of proximate cause." Walsh v. Emergency One, Inc., 26 F.3d 1417, 1425 (7th Cir. 1994); accord New Burnham Prairie Homes, Inc. v. Vill. of Burnham, 910 F.2d 1474, 1483 (7th Cir. 1990) (requiring "a correct statement of law" on proximate cause). A district court errs "if it misinforms the jury about the applicable law" requiring proof of "an injury proximately caused by [the defendant's] breach [of duty]." Cooper v. Carl A. Nelson & Co., 211 F.3d 1008, 1015 (7th Cir. 2000).

Consistent with a district court's basic obligation to charge the jury on each element of the cause of action, this Court's general pattern instructions recognize that a jury must be instructed on proximate cause when the substantive law requires the plaintiff to establish that element. 7th Cir. Pattern Civil Jury Instrs. § 1.30. It is settled practice, for example, to give a proximate-cause instruction to civil juries in antitrust, securities, and RICO cases, in which proximate cause is indisputably an element of

the plaintiff's case.[10] It is true that this Court's pattern FELA charge on causation—which the district court gave here—omits any reference to proximate cause. 7th Cir. Pattern Civil Jury Instrs. § 9.02. But that is because the drafters of the instruction mistakenly believed that "proximate cause does not apply under FELA," id. § 9.02 cmt. a, not because they believed that juries need not be informed of that element. And of course the drafters' view of what FELA requires as a matter of substantive law is not entitled to any deference from this Court. See id. intro. at 1-3 (noting that the Circuit Council "has not approved the[] content" of the pattern instructions, that "[n]o trial judge is required to use them," and that the instructions will be modified "as made necessary by evolving case law").

The only conceivable justification for refusing to instruct on proximate causation when the substantive law requires proof of that element would be that the issue is for the court rather than the jury, a view at which Justice Ginsburg hinted in her Sorrell concurrence. See 549 U.S. at 180 (Ginsburg, J., concurring in the judgment). That view is mistaken. The

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[10] See, e.g., 4 Leonard B. Sand et al., Modern Federal Jury Instructions—Civil ¶ 79.02 (2008) (Instr. 79-24) (antitrust) ("direct result" or "predictable consequence"); id. ¶ 82.02 (Instr. 82-9) (securities) ("proximate cause"); id. ¶ 84.04 (Instr. 84-9) (RICO) ("direct relationship").

decisions of the Supreme Court and this Court holding that FELA requires proximate cause leave no doubt that the issue—like every other element of the plaintiff's case—is for the jury to decide.[11] Likewise, the general common-law rule is that proximate cause is for the jury (subject to ordinary sufficiency-of-the-evidence review), see Keeton, supra, § 45, as this Court itself has recognized, see, e.g., Suzik v. Sea-Land Corp., 89 F.3d 345, 349 (7th Cir. 1996) (finding it "well-established * * * that the determination of proximate cause is the province of the jury"). FELA incorporates common-law rules unless it explicitly provides otherwise, Sorrell, 549 U.S. at 165-66, and FELA does not explicitly (or even implicitly) provide that proximate cause is an issue for the court.

2. By delivering McBride's charge on causation and refusing to deliver CSXT's, the district court misinstructed the jury. Unlike the instruction proffered by CSXT, which would have charged the jury on both

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[11] See, e.g., Earnest, 229 U.S. at 118-19 (jury was "rightly" instructed on proximate cause); Tennant, 321 U.S. at 30 (parties had a "right to a jury determination" of proximate cause); Carter, 338 U.S. at 435 (plaintiff may recover "if the jury determines" that defendant's negligence was the proximate cause of plaintiff's injury); Larsen, 171 F.2d at 844 (district court "properly charged the jury" on proximate cause); O'Day, 216 F.2d at 83 (proximate cause was "a question of fact for the jury"); Teets, 238 F.2d at 226 ("[i]t is for the jury to determine" whether a violation of the rule proximately caused the injury).

multiple causation and proximate causation, SA301, the instruction delivered by the district court charged the jury only on multiple causation. The court instructed the jury that it should find for McBride if CSXT's negligence "caused or contributed to" his injury—i.e., if CSXT's negligence "played a part—no matter how small—in bringing about the injury." A19-A20. That instruction obviously failed to provide any guidance on the requisite directness of the causal relationship between the defendant's negligence and the plaintiff's injury. "[N]either choice given to the jury * * *, that the alleged negligence 'caused' the [injury] or that the alleged negligence 'contributed to' the [injury], sufficed as [an instruction] that the alleged negligence [must have been] a proximate cause of the [injury]." Sisters of St. Joseph of Tex., Inc. v. Cheek, 61 S.W.3d 32, 37 (Tex. App. 2001) (emphasis added). Nor did the portion of the instruction stating that the defendant's negligence must have "played a part" in bringing about the plaintiff's injury.

On the contrary, by informing the jury that the defendant's negligence need only have "caused" the plaintiff's injury, the instruction permitted a verdict for the plaintiff no matter how remote the causal relationship was found to be, and even if the plaintiff's injury could be said

to have resulted from the defendant's negligence only in a "but for" sense. Indeed, that was the very point of the instruction, whose drafters were of the erroneous view that "proximate cause does not apply." 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. It goes without saying that an instruction "suggest[ing] to the jury that 'but for' causation is the last word * * * is wrong because it permits the jury to impose liability on [the] defendant for harm for which, under the proper standard, [the] defendant would not be liable." Wallach v. Allstate Ins. Co., 135 P.3d 404, 408 (Or. App. 2006), aff'd, 180 P.3d 19 (Or. 2008). Nor was there any feature of the instructions as a whole that might have apprised the jury that McBride was required to prove proximate cause. See A15-A24; cf. Matthews v. Ernst Russ Steamship Co., 603 F.2d 676, 681 (7th Cir. 1979) (affirming verdict for plaintiff despite district court's failure to give defendant's proffered instruction on proximate cause because "[t]he trial judge used the expression 'proximate cause' throughout his charge and the jury had responded to a special interrogatory that defendants' negligence proximately caused plaintiff's injury").

C. The District Court's Error Was Not Harmless

Because the district court's causation instruction was erroneous, CSXT is entitled to a new trial unless the error was harmless. The error was not harmless, because a reasonable jury that was properly instructed could easily have found an absence of proximate cause.

1. An instructional error is prejudicial, and therefore not harmless, when it is "possible" that the error was decisive, and when a properly instructed jury "might have come out the other way." Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756, 770 (7th Cir. 2003). This Court "cannot speculate as to which [theory] the jury chose," DePaepe v. Gen. Motors Corp., 33 F.3d 737, 744 (7th Cir. 1994), or "assume that the jury decided one way or another," Dawson v. N.Y. Life Ins. Co., 135 F.3d 1158, 1165 (7th Cir. 1998), for "[p]rejudice to the complaining party includes the possibility that the jury based its decision on incorrect law," id. Accordingly, an instructional error requires retrial "even if the jury could have based the verdict on a different, properly instructed theory." Byrd v. Ill. Dep't of Pub. Health, 423 F.3d 696, 709 (7th Cir. 2005) (emphasis added); accord Huff v. Sheahan, 493 F.3d 893, 904-05 (7th Cir. 2007); Janotta v. Subway Sandwich Shops, Inc., 125 F.3d 503, 515-16, 517 & n.10 (7th Cir. 1997). Such an error will be deemed

harmless only if the evidence is so one-sided that any "properly instructed jury would have reached the same verdict." United States v. Thomas, 86 F.3d 647, 651 (7th Cir. 1996) (emphasis added); accord Gooden v. Neal, 17 F.3d 925, 929 (7th Cir. 1994).

The district court's error in this case allowed the jury to return a verdict for McBride without finding proximate cause. The relevant inquiry is thus whether "the evidence so favored [McBride] that a jury could not find" for CSXT on that issue even if it were properly instructed. Gooden, 17 F.3d at 929. If "[t]he evidence [is] not so overbalanced that the error can be called harmless," the case must be retried. Id. Even if CSXT might "have an uphill fight" on the question of proximate cause, it is still "entitled to have the jury's decision on th[at] factual question." Id.

2. A properly instructed jury could easily have found that McBride was not "directly injured," Holmes, 503 U.S. at 269, by any negligence on CSXT's part. McBride's principal theory of negligence was that he was not given "the right locomotive" or "the right train setup," SA234-SA235—i.e., that he should not have been required to conduct switching operations with five locomotives and a wide-body locomotive in the lead. As for his injury, while McBride offered evidence of both "saddle

syndrome" and "trigger finger," his own medical expert admitted that trigger finger could not be caused in a single day (and hence was not caused at all, much less proximately, by the configuration of the locomotives on April 12, 2004). SA273. McBride's theory of the causal relationship between CSXT's alleged negligence and his saddle syndrome was that (1) CSXT gave him the wrong type and number of locomotives; (2) as a result of being given the wrong equipment, he had to repeatedly actuate the independent brake by depressing the button and holding it down for approximately 20 seconds; (3) as a result of repeatedly using the brake in that manner, his hand became fatigued; (4) at least as a partial result of his fatigue, he hit his hand on the brake; and (5) as a result of hitting his hand, he experienced swelling and pain. Given the number of links in this chain of causation, and given also that the jury found that McBride's own carelessness contributed to the accident, a properly instructed jury could have found that any negligence on CSXT's part was too "indirect[] or remote[]," Sorrell, 549 U.S. at 173 (Souter, J., concurring), to be a proximate cause of McBride's injury.

Similarly, a properly instructed jury could easily have found that, insofar as CSXT breached any duty, it was a duty "to take precautions

against a different kind of loss from the one that materialized." Movitz v. First Nat'l Bank of Chi., 148 F.3d 760, 763 (7th Cir. 1998). The thrust of McBride's case was that his assigned train was unsafe because of its propensity to cause rail accidents during switching, not because of its propensity to cause imprecise hand movements by fatiguing the thumbs of engineers actuating the independent brake. McBride's expert testified that wide-body locomotives have diminished visibility and difficulty navigating curved tracks, and that the use of five locomotives while switching increased the risk of derailment or collision. SA78, SA82, SA85-SA87, SA92, SA97-SA98. McBride himself worried that the rear cars might "come in and hit the engines and maybe jackknife them off the track." SA115. Neither expressed concern that the locomotive arrangement would fatigue an engineer's hand. Nor would CSXT have expected such a result. It presented evidence that McBride had no need to spend more than a minimal portion of his day actuating the independent brake and that he had no reason to move his hand with enough force to cause an injury. SA160-SA165, SA213-SA215. "[P]roximate cause rules * * * make the defendant's liability coextensive with [its] negligence," meaning that a defendant "is not liable for * * * harms unless the risk of such harms was

one of the reasons for judging [it] to be negligent in the first place." 1 Dobbs, supra, § 187, at 463 & n.1. In light of the trial evidence, a properly instructed jury could have found that any negligence on CSXT's part consisted of the breach of its duty to protect against the risk of derailment or collision, and that such negligence thus was not a proximate cause of McBride's hitting his hand on the independent brake.

The train assigned to McBride may well have been a necessary condition for his injury. (Had there been fewer locomotives, he may have needed less time to bail off the brake; and had a conventional locomotive been in the lead, he may have actuated the brake with his whole hand rather than his thumb.) But the existence of a necessary condition does not establish proximate cause. And the jury was never asked to make such a finding. McBride capitalized on the court's instructional error in his summation, arguing: "What we * * * have to show is defendant's negligence caused or contributed to [the] injury. It never would have happened but for the defendant giving him that train." SA236 (emphasis added). McBride thus asked the jury, in effect, to return a verdict in his favor on the legally impermissible ground that CSXT's asserted negligence created "an incidental condition or situation" that resulted in his injury.

Davis, 263 U.S. at 243. Without speculating as to a legally permissible ground for the jury's verdict, this Court "cannot say that the [instructional] error was harmless," Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 901 (7th Cir. 1994), and CSXT is therefore entitled to a new trial.

CONCLUSION

The judgment of the district should be reversed and the case remanded for a new trial before a properly instructed jury.

Respectfully submitted,

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James A. Bax
BRASHER LAW FIRM, L.C.
211 North Broadway, Suite 2300
St. Louis, MO 63102
(314) 621-7700

Evan M. Tager
Dan Himmelfarb
Stephen E. Sachs
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendant-Appellant CSX Transportation, Inc.

Dated: January 7, 2009

STATUTORY ADDENDUM

The Federal Employer's Liability Act, 45 U.S.C. §§ 51-60, provides as follows:

§ 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.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, 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.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54a. Certain Federal and State regulations deemed statutory authority

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49 or by a State agency that is participating in investigative and surveillance activities

under section 20105 of title 49, is deemed to be a statute under sections 53 and 54 of this title.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive 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, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

CERTIFICATE OF COMPLIANCE—
TYPE-VOLUME LIMITATION

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) for a brief produced with a proportionally spaced font, as it contains 11,611 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

_____

Dan Himmelfarb
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendant-Appellant
CSX Transportation, Inc.

January 7, 2009

CERTIFICATE OF COMPLIANCE—
APPENDIX MATERIALS

I certify under Circuit Rule 30(d) that the Required Short Appendix and the Separate Appendix include all materials required by Circuit Rules 30(a) and 30(b).

_____

Dan Himmelfarb
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendant-Appellant
CSX Transportation, Inc.

January 7, 2009

CERTIFICATE OF COMPLIANCE—
DIGITAL BRIEF

I certify that I am filing with this brief, on a virus-free CD-ROM, a digital version of this brief and of all appendix items that are available in a non-scanned .pdf format, in compliance with Circuit Rule 31(e)(1).

_____

Dan Himmelfarb
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendant-Appellant
CSX Transportation, Inc.

January 7, 2009

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused two copies of this Brief and Required Short Appendix, two copies of the Separate Appendix, and a virus-free CD-ROM containing a digital version of the brief and non-scanned appendix materials, to be served on the following party via overnight delivery, postage pre-paid, on this 7th day of January, 2009:

Robert P. Marcus
KUJASKI & ASSOCS., P.C.
1331 Park Plaza Drive, Suite 2
O'Fallon, IL 62269-1764
(618) 622-3600

Counsel for Plaintiff-Appellee
Robert McBride

_____

Dan Himmelfarb
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendant-Appellant
CSX Transportation, Inc.

January 7, 2009