SC92996

IN THE SUPREME COURT OF MISSOURI

RAFAEL LOZANO, PLAINTIFF-APPELLANT

vs.

BNSF RAILWAY COMPANY, DEFENDANT-RESPONDENT

On Appeal From The Circuit Court of Jackson County, Missouri 16th Judicial Circuit Honorable Jack R. Grate Case No. 1016-CV05790

PLAINTIFF-APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment entered on August 11, 2011, by the Honorable Jack Grate, Circuit Judge of Jackson County, in favor of Defendant-Respondent Burlington Northern Santa Fe Railway Company ("BNSF") and against Plaintiff-Appellant Rafael ("Ray") Lozano ("Plaintiff" or "Lozano") on a jury verdict in this action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq. (LF 99, 100; A1-A2).[1] Plaintiff filed a timely motion for new trial on September 2, 2011 (LF 102). The trial court denied the motion for new trial on October 26, 2011 (LF 190) and Plaintiff filed a timely notice of appeal to the Missouri Court of Appeals, Western District on November 2, 2011 (LF 194). On October 9, 2012, a panel of the Court of Appeals entered an Order affirming the judgment pursuant to Rule 84.16 (b). The Court of Appeals panel also filed a Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b).

This Court granted Plaintiff's Application for Transfer under Rule 83.04 on February 26, 2013. This Court therefore has jurisdiction. Article V, § 10, Missouri Constitution, and Rule 83.04, Missouri Rules of Civil Procedure.

[1] References to the Legal File in this brief will be shown as (LF ___). References to the trial transcript will be shown as (T ___). References to the Appendix to this Substitute Brief will be shown as (A__).

STATEMENT OF FACTS

Introduction

This is an appeal from a judgment in favor of BNSF and against Plaintiff in an action for personal injuries under the FELA. Plaintiff alleged that he was injured while lifting two end-of-train devices in a locomotive cab during the course of his employment with BNSF at its Argentine, Kansas Diesel Service facility. The Points Relied On in this appeal relate solely to the exclusion by the trial court of evidence proffered by Plaintiff during trial and relating to liability. Some background as to the nature of BNSF's facilities at Argentine and its operations and Plaintiff's employment history and his duties is needed for an understanding of the issues presented.

Accordingly, this Statement of Facts will begin with a short description of BNSF's yard and locomotive service facilities at Argentine, followed by Plaintiff's work history and duties, including the "lead qualification" of locomotives and the basic allegations of the Petition. End of train devices (ETDs) and the handling of ETDs were central to Plaintiff's theory of liability at trial. Therefore, the Statement of Facts includes a short introduction to ETDs. This is followed by a summary of the evidence presented by Plaintiff and admitted at trial.

Because the Points Relied On relate to evidence excluded at trial, the motions in limine filed by BNSF, the trial court's rulings and the offers of proof made by Plaintiff are then set forth. Finally, the Plaintiff's verdict directing instruction as given by the trial court, the definition of negligence as given to the jury in the instructions, the jury verdict, and the judgment in favor of BNSF as entered by the trial court are set forth.

The Diesel Service Facility ("DSF") at BNSF's Argentine, Kansas facility

Plaintiff's Petition alleged an injury sustained while he was employed at BNSF's Argentine, Kansas facility (LF 2). In addition to rail yard facilities, BNSF maintains a Locomotive Maintenance Inspection Terminal ("LMIT") at Argentine. Within the LMIT BNSF operates a Diesel Service Facility ("DSF") (T 313, 391-392; Exhibit 263E). When BNSF locomotives are taken off the main line or taken off the train, they will start out in the DSF to be serviced (T 391). Any problems that can be repaired in the DSF will be done there. If they are good after that the locomotives will go to the outbound (T. 391) The LMIT is actually connected to the Argentine rail yard; BNSF has limits posted in the Argentine facility to indicate where the mechanical facility begins and where the yards begin in between the two (T 392; Exhibit 263B). The BNSF locomotives come into the DSF directly from BNSF's rail yard (T 394).

Plaintiff's employment and duties with BNSF, including "lead qualification" of BNSF locomotives in the DSF

Plaintiff has been working for BNSF for 33 years (T 246). He began as a laborer for a year-and-a-half before becoming an electrical apprentice for four years. (T 247). He then became an electrician, and has worked for BNSF as an electrician for 29 years. (T 248). He had been working as an electrician in the DSF at Argentine Yard for eighteen years (T 250, 313). He customarily worked the second shift, from 4:00 p.m. to midnight (T 248).

Plaintiff's duties as an electrician at the DSF included repairing electrical systems of the locomotives, regular maintenance of locomotives, inspecting their electrical

systems, changing light bulbs, hooking up the locomotives, and checking the heaters, air conditioners, water coolers and refrigerators of the locomotives (T 249). Plaintiff's duties in the DSF included inspection of locomotives in order to be "lead qualified." (T 249). The lead locomotive is the one that goes at the front of the train and controls any other locomotives that are behind it. The lead locomotive must be clean and safe and in perfect operating order (T 250). There is a checklist with a host of items required in order for the locomotive to be "lead qualified" (T 154-155). Lead qualifying a locomotive required that there was nothing loose in the cab and nothing that could become a projectile in the event of an incident (T 250, 253-254)

About 98% of Plaintiff's work as an electrician in the DSF was involved in working inside locomotive cabs (T 250).

Plaintiff's Petition

Plaintiff filed this action under the FELA in the Circuit Court of Jackson County on February 18, 2010. LF at 1-5. Plaintiff alleged that while employed by BNSF and working at BNSF's Argentine facility in Kansas City Kansas, Plaintiff sustained an injury to his groin when he was "required to lift, manhandle, and carry very heavy end-of-train devices." LF 8. Plaintiff alleged his injuries resulted from the negligence of BNSF, "its agents, servants and employees".

Plaintiff's evidence at trial, as reviewed below, was that he suffered a left inguinal hernia as a result of lifting two end-of-train devices ("ETDs") that were placed behind the water-cooler (i.e. refrigerator) in a locomotive cab (T 109, 259, 272).

Plaintiff alleged BNSF was negligent in several particulars, including but not limited to the failure of BNSF to provide "reasonably adequate help" and in the failure of BNSF to provide "reasonably safe methods of or conditions for work" Petition, ¶¶ 9b and 9c, LF 3.

End of train devices – ETDs

The ETD replaced the caboose of a locomotive and served the same function when attached to the back of the last railroad car of a train (T 250). An ETD is a rectangular metal box several feet in height with hoses and a battery attached, and weighs approximately 40 pounds (T 251, 253, 254). The ETD monitors the brake pipe and gives the engineer information about the brake pipe (T 396). ETDs would come into the DSF after they were removed from the train in the yard (T 396-397). If ETD was removed from the train by a carman he would have a cart and would put the ETD on his cart. If the ETD was instead removed from the train in the yard by an operating department employee - the operator of the locomotive or the conductor - they would put the ETD on the locomotive (T 396-397). That was a common occurrence (T 397).

There is a rack in the BNSF facility at Argentine that is located just at the entrance to the DSF that is used by BNSF to store ETDs that are not in use until they are picked up (T 395-396, 233; Exhibit 263A).

The evidence presented by Plaintiff and admitted at trial concerning his injury of May 2007 - lifting and removing ETDs from a locomotive cab

Plaintiff's evidence at trial was that he sustained injuries while lifting two ETDs in order to remove them from a locomotive cab[2] in late May 2007 (T 251). Plaintiff encountered ETDs placed in locomotive cabs in the course of performing his duties in the DSF approximately two times a week during the entirety of his employment as an electrician for BNSF (T 252). Plaintiff would usually find ETDs in the nose of the cab (T 252). Plaintiff had to manually remove any ETDs he found from the locomotive cab to "lead qualify" the locomotive because the ETD did not belong in the locomotive cab (T 252). To lead qualify the locomotives, Plaintiff had to remove any ETDs from the cab because of the safety hazard posed by the ETDs such as becoming a projectile in the event of an incident (T 253). There was not supposed to be anything loose in the locomotives (T 254).

Plaintiff testified that the ETDs should never have been put into locomotive cabs in the first place, and should not have been on the locomotives when the locomotives got to Plaintiff in the DSF to perform the lead qualifying inspection (T 254). Plaintiff was told that by his BNSF supervisor, the second shift general foreman and lead supervisor, Ken Pichelman (T. 254-257). Mr. Pichelman also told Plaintiff that the ETDs did not belong in locomotive cabs and that Plaintiff was to remove ETDs he found from the cabs (T 256).

[2] Plaintiff testified the locomotive was an EMD SD 40-2 model of the kind previously used on the Santa Fe railway part of the BNSF system, as opposed to those previously used on the Burlington Northern part of the BNSF system (T 262).

Plaintiff reported to his superiors that he was finding ETDs in the locomotive cabs and made multiple reports of the finding of the ETDs to every DSF supervisor he had (T 257-258). He made these complaints many times before May 2007, five or six times to Mr. Pichelman (T 258). He voiced his concerns about the ETDs in the locomotive cabs to his supervisors a lot of times at lineup, the safety meeting with all the employees conducted at the beginning of each shift (T 258). However, Plaintiff continued to find ETDs within the locomotive cabs after he had reported and complained about them (T 258).

In addition to his own testimony, Plaintiff called as witnesses two other experienced BNSF employees who had worked with locomotives at BNSF's Argentine facilities for many years.[3] Joe Bob O'Neal had been employed by BNSF for 38 years, working as an electrician for 28 of those years and on locomotives for 30 years (T 183-184, 186). He did most of his electrical work on locomotives, and had worked for 12 years at the Argentine facility (T 185). O'Neal inspected the locomotives and their cabs after they had been repaired or serviced, to make sure everything was good to go and was lead qualified (T 185-186, 198). The inspection of the cabs included performing lead locomotive qualification checks and he was involved in that work for 11 years in Kansas

[3] These two experienced BNSF employees, Joe Bob O'Neal and Terry Summers, as well as Plaintiff, would have also testified to other matters that were excluded by the trial court's evidentiary rulings that are in issue in this appeal and that will be more fully reviewed in the discussion below.

City and 10 years in Springfield (T 187). He spent about four or five hours a shift in locomotive cabs during his 30 years of working with locomotives (T 188). He was involved with the maintenance of EMD SD40-2 locomotives for about 20 years (T 189). He also testified he found ETDs in locomotive cabs many times, most often in the nose of the cab, and that the employees were required to remove any ETDs they found in a locomotive cab and get the ETDs back to the shop (T 190). He too testified that the ETDs were awkward and hard to carry (T 192). He would sometimes find two or three ETDs piled on top on one another in a cab, and therefore harder to get to and to get out of the locomotive cab (T 192).

Terry Summers was a BNSF machinist who had worked for BNSF for almost 17 years as of the time of trial (T 153). Pretty much all of his work with BNSF has been with locomotives (T 155). His job includes hooking up the locomotives to outbound consists of cars before they go out as part of a train; he is the last person on the locomotive from the mechanical department (T 153-155). He also described the requirements to lead qualify a locomotive, and the list of items that must be checked off to make sure the locomotive is lead qualified (T 154-155). He is very familiar with the SD40-2 model locomotives, as he works on one almost every shift (T 155-158).

Summers also testified that he sees EDTs in the nose of the cab or in the walkway of locomotives once a month (T 159). When they find an ETD on a locomotive they have to take it off (T 160). He has lifted and carried ETDs (T 160-164). It is awkward to do. With its design and weight, with a hose hanging down off of it, an ETD is awkward to carry (T 164).

Plaintiff's Injury

While Plaintiff was working on a locomotive in late May 2007 he discovered two ETDs that had been placed with their hoses down behind the refrigerator (also referred to as the "water cooler") in the locomotive cab (T 259, 267). The ETDs were about 3 ½ feet long and about 40 pounds (T. 267). They also had battery packs attached to them (T 260).

In addition to being required by his job duties to remove ETDs from locomotive cabs outlined above, Plaintiff believed he had to remove the ETDs that were behind the refrigerator because that was an unsafe location (T 260-261). The rocking motion of a locomotive with the ETDs in that location would have broken the refrigerator loose and caused it to fall across the floor, blocking the toilet and possibly causing someone to be trapped in the toilet; it could have caused the refrigerator itself to become a projectile (T 261). If the ETDs pinched the electrical wire to the refrigerator, it could have started a fire in the cab (T 261). The locomotive could not have been lead qualified if Plaintiff did not remove the ETDs from behind the refrigerator and out of the locomotive cab (T 261).

The location of the ETDs behind the refrigerator required Plaintiff to lean over the refrigerator and wiggle the ETDs in an attempt to remove them one at a time (T 259, 268). He was twisting and bracing himself with the refrigerator when he was trying to get them out (T 268). The refrigerator was approximately three feet in height, and was attached to the floor (T 264). While attempting to remove the ETDs from behind the refrigerator, Plaintiff felt a pinch in his left groin (T 267). Space constraints and the awkward layout of the locomotive cab prevented Plaintiff from lifting with his legs when

attempting to lift the ETDs out from behind the refrigerator (T 268). These factors and the location of the ETDs behind the refrigerator prevented Plaintiff from lifting close to his body (T 268), and he was not able to lift the ETDs by their attached handles because the handles were buried behind the refrigerator and were not accessible (T 259, 269). BSNF safety rule S-1.4.7 requires using safe lifting practices when lifting, carrying or performing other tasks that might cause back pain, injury or property damage (T 281). Plaintiff testified he was unable to comply with these rules when removing the ETDs from behind the refrigerator in May 2007 because of the way they were positioned (T 281). Plaintiff did not ask for assistance to remove the ETDs because there was no room for two individuals to be able to reach and lift the ETDs (T 269).

Plaintiff had never felt pain like he did when he lifted the ETDs from behind the refrigerator (T 270). The sharp left groin pain lasted approximately one to two minutes (T 270). But as the pain lasted for a relatively short period of time and then subsided somewhat, Plaintiff did not think he had injured himself at that time (T 270). This occurred in the middle of Plaintiff's shift, at approximately eight o'clock (T 271). Plaintiff did not feel any more groin pain that day and was able to finish his shift (T 273). However, Plaintiff continued to feel swelling and left groin pain when he completed strenuous work thereafter (T 276-77). Plaintiff had no injuries to his groin or abdomen prior to the groin pain he felt while lifting the ETDs from behind the refrigerator in May of 2007 (T 279). Plaintiff has had no additional injuries to his groin or abdomen since May 2007 when he was lifting the ETDs from behind the refrigerator (T 279).

Lozano's Medical Treatment for Left Groin Pain.

Plaintiff saw a physician, Dr. Anthony Guitteriez, for his left groin pain on June 1, 2007 (T 285). Plaintiff was subsequently seen by Dr. Brian McCroskey (T 285). Dr. McCroskey authorized a left inguinal hernia repair for Plaintiff (T 111).

BNSF's motions in limine to bar any evidence or argument of alternative work methods and any evidence or argument concerning ETDs in locomotive cabs as tripping hazards, the trial court's order granting BNSF's motions in limine, and Plaintiff's offer of proof

The theory of negligence Plaintiff sought to present at trial was that the ETDs should not have been in the locomotive cab in the first instance because their presence in the cab required Plaintiff to remove the ETDs from the cab as ordered by his supervisors to lead qualify the locomotive, and at least in part because ETDs in a locomotive cab were unsafe because they could become projectiles and presented a tripping hazard to employees who had to work in the cab; that the situation was rendered more hazardous because the ETDs were jammed behind the cooler, presenting the possibility the cooler could also become a projectile in the cab, and making it impossible for him to use safe lifting techniques to lift the ETDs to remove them from the cab; and because the ETDs could have been placed or stored in an alternative location on the locomotive: the compressor compartment rather than the locomotive cab. The evidence of the alternative location in the compressor compartment was not presented to the jury because the trial court sustained a motion in limine to bar evidence or argument as to that alterative location and adhered to that ruling in limine at trial. Evidence that ETDs placed in the

locomotive cab presented a tripping hazard was also excluded by an order sustaining a BNSF motion in limine and at trial.

BNSF filed its Second Motions in Limine and Suggestions in Support. Motion No. 1 of the Second Motions sought to exclude Plaintiff from introducing evidence or argument "that there were safer alternative work methods that would have avoided plaintiff's alleged injury." (LF 55). BNSF argued that "the fact that there may have been a safer method of work does not automatically render the chosen method unsafe or negligent for purposes of FELA" and that "the proper inquiry is whether the method proscribed by the employer was reasonably safe, not whether the employer could have employed a safer alternative method for performing the task." (LF 55).[4]

Plaintiff opposed BNSF's motion in limine, citing *Welsh v. Burlington Northern Railroad Co.*, 719 S.W.2d 793, 796 (Mo.App. E.D. 1986) and the court's statement in that decision that: "The question of alternative methods are facts to be considered by the jury in determining whether the method use by defendant was reasonably safe and whether or not other methods could have been easily adopted." (LF 75).

[4] BNSF cited several cases in support of its Motion. *Chicago R.I. & Pac. R.R. v. Lint*, 217 F.2d 279 (8th Cir. 1954); *Stillman v. Norfolk & W. Ry. Co.*, 811 F.2d 834 (4th Cir. 1987); *Soto v. Southern Pacific Transportation*, 644 F.2d 1147 (5th Cir.), *cert. denied*, 454 U.S. 969 (1981); *Atl. Coast Line R.R. v. Dixon*, 189 F.2d 525 (5th Cir. 1951). These cases will be discussed in the Argument below.

The trial court granted No. 1 of BNSF's Second Motions in Limine (LF 79; T. 73-74).

In No. 2 of its Second Motions in Limine, BNSF also moved to exclude Plaintiff from introducing evidence or argument "that BNSF had a rule or policy against the presence of tripping hazards in the cabs of locomotives [and] . . . that the presence of the ETD's violated this rule." (LF 56). BNSF argued this evidence was not relevant because Plaintiff was not injured by tripping over an ETD in the cab.

Plaintiff opposed this motion in limine, arguing in part that the "rule against tripping hazards is relevant, in that one of Plaintiff's contentions is that the devices he was lifting when injured should not have been in the locomotive cab." The trial court also sustained No. 2 of BNSF's Second Motions in Limine (LF 79).

During trial, Plaintiff attempted to present evidence that the ETDs could have been stored in an alternative location on the locomotive, the compressor compartment, and that a rack could have been placed in the compressor compartment to secure ETDs. Plaintiff sought to present this evidence through his own testimony and the testimony of BNSF employees Terry Summers, and Joe Bob O'Neal. The trial court sustained BNSF's objections based on its order granting No. 1 of BNSF's Second Motions in Limine. BNSF's objections to testimony offered by Plaintiff as to BNSF's rule against tripping hazards in locomotive cabs were also sustained by the trial court based on its order granting No. 2 of BNSF's Second Motions in Limine (T 152, 197-198, 374-375).

Plaintiff made an offer of proof. Out of the hearing of the jury, each of these witnesses testified on direct and cross examination as to testimony Plaintiff would give

(T. 372-375), and that would be given by Terry Summers (T. 173-178) and Joe Bob O'Neal (T. 203-215) on these matters if permitted to do so by the trial court.

During the offer of proof as to Joe Bob O'Neal, Exhibit 9 was identified and offered (T 209-210). Exhibit 9 is a diagram or schematic of the compartments of a SD 40-2 locomotive, which was admitted for purposes of the offer of proof (T 209-210). In the offer of proof, Mr. O'Neal identified Exhibit 9 and indicated the location of the compressor compartment on Exhibit 9 (T 209-210). He testified that the ETDs could have been placed in the compressor compartment, and that a rack could have been built in the compressor compartment to secure the ETDs (T 210-211). He testified that there was a lot of spare space in the compressor compartment and that the compressor compartment was the location used by BNSF to store tools on the locomotive (T 208-209). The railroad has in the past also used the compressor compartment as a location for storing railroad property while it was being shipped between terminals (T 208-209).

In their offers of proof, Plaintiff (referring to Exhibit 9) and Terry Summers also testified ETDs could be placed in the compressor compartment rather than the locomotive cab, and secured in a rack or some device to hold it secure (T 177, 373). Unlike the locomotive cab, no one rides in the compressor compartment; if something came loose in the compressor compartment during a derailment, it would not therefore injure anyone (T 177).

In the offers of proof for O'Neal and Summers, each also testified that the presence of ETDs in a locomotive cab would create a tripping hazard (T 177-178, 207-208). O'Neal testified that when they were lead qualifying a locomotive they had to

make sure there was nothing loose in the cab and nothing that could cause a tripping hazard (T 208). In the offer of proof as to Plaintiff, Plaintiff testified that the ETDs in the cab presented a tripping hazard in particular because of the hose; there is very little lighting in the locomotive cab and someone could trip over it (T 372). Plaintiff testified in the offer of proof this tripping hazard due to an ETD put in a locomotive cab would exist when the locomotive was in the DSF (T 372).

Plaintiff also sought to present evidence that ETDs presented a tripping hazard and that they should not therefore be in the locomotive cabs through the deposition testimony of Paul Schakel. Portions of Mr. Schakel's deposition were read at trial, but the parts relating to a tripping hazard were excluded by the trial court on objection by BNSF.

Mr. Schakel was at the time of trial the facility manager for the BNSF's LMIT facility in Argentine (T 222). He is the only facility manager for the LMIT; there are no shifts (T 223). Mr. Schakel was BNSF's "night" or second shift general foreman for the LMIT at Argentine from early 2007 until 2008, thus including May 2007, when Plaintiff testified he was injured (T. 222-23, 229). Mr. Schakel's position as general foreman was a management position (T. 225). All of the employees in the locomotive department of the mechanical department reported to him, including electricians, machinists, laborers, and sheet metal workers (T 225-226). Plaintiff reported to Mr. Schakel indirectly, through an intervening foreman (T 223-224). Employees who worked in the yard, such as carmen or operating or transportation department employees, including engineers or switchmen, did not report to Mr. Schakel and were not within his direct supervisory authority (T 226-227). Mr. Schakel has worked for BNSF for 40 years (T 224-225).

The part of the deposition read at trial included the following question and answer:

Q. Do you know of any – of any rule against storing end-of-train devices inside of locomotives?

A. Not specifically.

(T 239). However, BNSF objected to the follow up questions that immediately followed this question and answer. The trial court excluded these immediate follow up questions and answers and did not allow them to be read to the jury. All the jury heard was the initial question and answer set forth above. The immediately following questions and answers in Mr. Schakel's deposition that were excluded by the trial court were as follows:

Q: Generally do you know of one [rule against storing end-of-train devices in locomotives]?

A: No, I just – we're not supposed to have anything in the cab that would be a trip hazard to somebody.

Q: So if you saw someone, say someone from the transportation department or a train crew member storing them in there, putting them in there, would you stop him from doing that or would you call a supervisor from that?

A: I would report that to the – the operating department supervision.

Q: Because –

A: If I saw it physically, I would take exception to it there, but I would refer it to the supervision in the operating department, transportation department.

Q: And again, you would report it to the – to the department because it's improper, correct?

A: That's correct.

Schakel Deposition at p. 28, line 6 to p. 29, line 2 (bracketed material supplied). These pages of Mr. Schakel's deposition appear in the Legal File (LF 45-46). Plaintiff made an offer of proof at trial that contained these follow up questions and answers (T 299-300).[5]

Plaintiff also unsuccessfully asked the trial court to accept Mr. O'Neal, Mr. Summers, and Plaintiff as expert witnesses, based on their practical experience with locomotives and work histories on BNSF, including at the DSF, as set forth above, and to allow them to testify on that basis as to the compressor compartment as an alternative location for ETDs and the tripping hazard presented by ETDs in the locomotive cab, as set forth above in the offers of proof.

The trial court rejected each of these offers of proof and excluded all of the testimony set forth above (T 179-181, 215-219, 300-301, 374-375).

Plaintiff's verdict directing instruction and the definition of "negligence" submitted to the jury

[5] The full passage referred to here, including both the initial question and answer as read at trial and the immediately following questions and answers that were excluded, appear together in context in Mr. Schakel's deposition as set forth in the Legal File (Schakel Deposition, p. 28, line 2 to p. 29, line 2; LF 45-46).

Plaintiff's verdict directing instruction, as given to the jury by the trial court, Instruction, No. 6, stated as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant either failed to provide:
>
> reasonably safe conditions for work, or
>
> reasonably safe methods of work, or
>
> reasonably adequate supervision, and
>
> Second, defendant in any one or more of the respects submitted in Paragraph First was negligent, and
>
> Third, such negligence resulted in whole or in part in injury to plaintiff.

(LF 95; A4). This verdict directing instruction was based on MAI 24.01 (A). There was no contributory negligence verdict directing instruction submitted on behalf of BNSF.

The instructions given to the jury by the trial court also defined "negligent" and "negligence" in accordance with MAI 11.07, as follows:

> The term "negligent" or "negligence" as used as these instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction No. 5 (LF 94; A3). Instruction 5 was given by the trial court with the approval and agreement of BNSF (T. 459-460).

The verdict and judgment

By a majority vote of ten to two, the jury found in favor of BNSF (LF 99; A2). The trial court entered judgment in favor of BNSF in accordance with the verdict on August 11, 2011 (LF 100; A1). Plaintiff filed a timely Motion for a New Trial (LF 102), which was denied by the trial court (LF 190). Plaintiff filed a notice of appeal (LF 194). This Court granted transfer after a decision by the Court of Appeals and this appeal is now before the Court for decision as if on direct appeal. Rule 83.09, Missouri Rules of Civil Procedure.

POINTS RELIED ON

I.

The trial court erred in granting BNSF's motion in limine, sustaining BNSF's objections at trial, and denying Plaintiff's offer of proof as to evidence of the compressor compartment as an alternative location for ETDs placed on locomotives, thereby excluding all evidence that the compressor compartment of the locomotive was an alternative location for ETDs placed on locomotives, as opposed to the locomotive cab, because the evidence of this alternative was relevant to Plaintiff's theory of negligence that the ETDs should not have been in the locomotive cab at all and could have been placed in the compressor compartment instead as an alternative method of storage of ETD's and as an alternative method of providing reasonably conditions for work, in that the evidence of this alternative tended to make it more probable that BNSF failed to use ordinary care and was negligent than it would be without the evidence of this alternative and this evidence was

logically and legally relevant. The trial court's exclusion of this evidence was prejudicial to Plaintiff.

Stone v. New York, C. & St. L.R. Co., 344 U.S. 407, 409 (1953)

Elliott v. St. Louis Southwestern Ry. Co., 487 S.W.2d 7, 15 (Mo. 1972)

Welsh v. Burlington Northern Railroad Co., 719 S.W.2d 793 (Mo.App.E.D. 1986)

Hatfield v. Christopher, 841 S.W.2d 761 (Mo.App.W.D. 1992)

45 U.S.C. § 51

II.

The trial court erred in sustaining BNSF's motion in limine, sustaining BNSF's trial objections, and rejecting Plaintiff's offer of proof, thereby excluding competent, relevant, and material evidence proffered by Plaintiff that ETDs placed in locomotive cabs constitute tripping hazards because Plaintiff's proffered evidence (1) was relevant and admissible on the issue of foreseeability under the FELA and (2) was also relevant and admissible to whether BNSF was negligent based on Plaintiff's contention that placing ETDs in locomotive cabs after they were removed from the end of the train was an unsafe method of storing ETDs and that the presence of ETDs in the locomotive cabs created unsafe conditions for work. Evidence that ETDs in locomotive cabs were a tripping hazard made it more probable that BNSF negligently failed to provide reasonably safe conditions for work and failed to use a reasonably safe method of storing ETDs than without the evidence, and that BNSF's negligence caused or contributed to cause injury to

Plaintiff. The trial court precluded the jury from considering such evidence and thereby prejudiced Plaintiff and affected the merits of the action.

CSX Transportation, Inc. v. McBride, ___ U.S.___, 131 S.Ct. 2630 (2011)

Keith v. Burlington Northern Railroad Company, 889 S.W.2d 911 (Mo.App. S.D. 1994)

Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963)

Union Pacific R. Co. v. Hadley, 246 U.S. 330 (1918)

45 U.S.C. § 51

III.

The trial court erred in excluding all evidence as to the compressor compartment as an alternative location for ETDs and the tripping hazard presented by ETDs in locomotive cabs to the extent that the trial court excluded the evidence on the ground that Plaintiff, Mr. O'Neal and Mr. Summers were not qualified as experts and their testimony did not rise to the level of expert testimony because their knowledge and experience gained through their years of work with locomotives for BNSF qualified them as experts and because their testimony would have assisted the jury in understanding the evidence and determining the facts in issue in that these subjects are ones with which the average juror would not be familiar and are not subjects of everyday experience for persons outside the railroad, and because their fact testimony on these matters would have been admissible in any event.

Wessar v. John Cezik Motors, Inc., 623 S.W.2d 599 (Mo.App. 1981)

Whelan v. Missouri Public Service, Energy One, 163 S.W.3d 459 (Mo.App. W.D. 2005)

Ford v. Louisville & N. R. Co., 355 Mo. 362, 196 S.W.2d 163 (Mo. 1946)

Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. E.D. 1992)

Section 490.065, R.S.Mo.

ARGUMENT

Standard of Review

All of the Points Relied On presented by Plaintiff in this Substitute Brief relate to the exclusion of evidence by the trial court. The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009).

> An abuse of discretion occurs "when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *State v. Gonzales*, 153 S.W.3d 311, 312 (Mo. banc 2005).

State v. Clark, 364 S.W.3d 540, 544 (Mo. banc 2012) (reversing due to erroneous exclusion of evidence).

This Court has also held that:

> A trial court can abuse its discretion through the inaccurate resolution of factual issues or through the application of incorrect legal principles. Where the facts are at issue, appellate courts extend substantial deference to trial court decisions. However, when the issue is primarily legal, no deference is warranted and appellate courts engage in de novo review.

State v. Taylor, 298 S.W.3d 482, 492 (Mo. banc 2009).

This Court has also stated that:

> . . . . error in "[t]he exclusion of evidence is presumed prejudicial unless otherwise shown." *McMillin v. McMillin*, 633 S.W.2d 223, 226 (Mo.App.1982). *See also Reed v. Reed*, 101 Mo.App. 176, 70 S.W. 505, 506 (1902) ("The error is presumed to be prejudicial where it is not shown to be harmless."). Though not always so clearly stated, this is the general rule when reviewing the admission or exclusion of evidence.

Tune v. Synergy Gas Corp., 883 S.W.2d 10, 22 (Mo. banc 1994). *See also State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003) (reversing due to erroneous exclusion of evidence) ("A trial court's exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994)"); *Richcreek v. General Motors Corp.*, 908 S.W.2d 772, 778 (Mo.App.W.D. 1995). Trial court error is prejudicial and reversible if there is a reasonable probability that the trial court's error affected the outcome of the trial. *Clark*, 364 S.W.3d at 544; *Barriner*, 111 S.W.3d at 401; *Richcreek*, 908 S.W.2d at 778.

I.

The trial court erred in granting BNSF's motion in limine, sustaining BNSF's objections at trial, and denying Plaintiff's offer of proof as to evidence of the compressor compartment as an alternative location for ETDs placed on locomotives, thereby excluding all evidence that the compressor compartment of the locomotive was an alternative location for ETDs placed on locomotives, as opposed to the locomotive cab, because the evidence of this alternative was relevant to Plaintiff's

theory of negligence that the ETDs should not have been in the locomotive cab at all and could have been placed in the compressor compartment instead as an alternative method of storage of ETD's and as an alternative method of providing reasonably conditions for work, in that the evidence of this alternative tended to make it more probable that BNSF failed to use ordinary care and was negligent than it would be without the evidence of this alternative and this evidence was logically and legally relevant. The trial court's exclusion of this evidence was prejudicial to Plaintiff.

A. Applicable legal principles

Plaintiff's Point Relied On I involves both Missouri rules of evidence and substantive federal statutory and case law under the FELA.

1. Law applicable to FELA cases tried in a state court

"FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

The admission or exclusion of evidence is a procedural matter which is governed by law of the forum. *E.g., Keith v. Burlington Northern Railroad Co.*, 889 S.W.2d 911, 920 (Mo.App.S.D. 1994); *Cupp v. National Railroad Passenger Corp.*, 138 S.W.3d 766, 775 (Mo.App.E.D. 2004).

2. Missouri relevancy rules

Under Missouri law the "test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other evidence." *Kansas City v. Keene*

Corp., 855 S.W.2d 360, 367 (Mo. banc 1993). Evidence is "relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issue." *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981).

> "[L]ogical relevance has a very low threshold." *State v. Anderson*, 76 S.W.3d 275, 277 (Mo. banc 2002). Each piece of logically relevant evidence need not be a slam-dunk; it must only be evidence which makes a fact of consequence more probable than not.

State v. Miller, 208 S.W.3d 284, 287 (Mo.App.W.D. 2006). "Relevant evidence tends to prove or disprove a fact that is of consequence and makes that fact more probable or less probable than it would be without it." *Reason v. Payne*, 793 S.W.2d 471, 477 (Mo.App. E.D. 1990). *See also State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992) (concurring opinion of Thomas, J.) (evidence is relevant " if such evidence tends to make the existence of any material fact more or less probable than it would be without the evidence. This is a very low-level test that is easily met").

Logically relevant evidence may be excluded if it is not "legally" relevant because its probative value or usefulness is outweighed by danger of "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence (the cost of the evidence)." *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992) (concurring opinion of Thomas, J.)

"Facts and circumstances relevant to the issues in a case are admissible unless their exclusion is required by an established rule of evidence." *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 930 (Mo.App.W.D.1994). *See also Godsy*

v. Thompson, 352 Mo. 681, 691. 179 S.W.2d 44, 49 (1944) (FELA case) ("It is a basic rule of evidence that 'evidence of whatever facts are logically relevant to the issue is legally admissible except as it may be excluded by some specific rule or principle of law.'"); *Miles v. Dennis*, 853 S.W.2d 406, 409 (Mo.App.W.D. 1993) ("In the absence of clear prejudice, all relevant evidence should be admitted").[6]

> Evidence need only be relevant, not conclusive. It is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issue.

State v. Mercer, 618 S.W.2d 1, 9 (Mo. banc 1981)

Missouri courts have repeatedly held that if the question of relevancy is doubtful, the evidence should be admitted for the jury to consider.

> Before evidence can be excluded upon the ground that it is irrelevant, it is essential that it appear so beyond doubt. If the question is doubtful, the

[6] The Federal Rules of Evidence treat relevance issues in a substantially similar way. Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed.R.Evid. 401. Relevant evidence is presumptively admissible under Rule 402 and is subject to exclusion under Rule 403 only if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

> settled rule is that the evidence should go to the jury for their own evaluation of it.

Luechtefeld v. Marglous, 151 S.W.2d 710, 714 (Mo. App. 1941)

> "Evidence is relevant if the fact it tends to prove or disprove is a fact in issue, or to corroborate evidence which is relevant and which bears on the principal issue. Before evidence can be excluded on the ground that it is irrelevant, it is essential that it appears so beyond doubt."

State v. O'Neal, 718 S.W.2d 498, 503 (Mo. banc 1986), *quoting State v. Sanderson*, 528 S.W.2d 527, 531 (Mo.App.1975). *See also State v. Rowe*, 838 S.W.2d 103, 111 (Mo. App. E.D. 1992) ("If there is any doubt as to relevancy, the settled rule is that the evidence should go to the jury to enable them to draw their own inferences from it").

3. The substantive test of negligence under the FELA

The FELA, 45 U.S.C. § 51 (A5), provides that rail carriers shall be liable to "any person suffering injury" while employed by the carrier "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."[7]

[7] 45 U.S.C. § 53 provides that "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." Contributory negligence is not a complete defense. 45 U.S.C. § 54 eliminates assumption of risk as a defense.

What constitutes negligence under the FELA is a federal question, *Urie v. Thompson*, 337 U.S. 163, 174 (1949), and is the "failure to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller v. Atlantic Coast Line R.Co.*, 318 U.S. 54, 67 (1943). *See also Stone v. New York, C. & St. L.R. Co.*, 344 U.S. 407, 409 (1953) (negligence based on "what a reasonable and prudent person would have done under the circumstances").

Whether the railroad was negligent is to be determined by the jury based on consideration of all of the facts and circumstances. *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 353 (1943); *Wilkerson v. McCarthy*, 336 U.S. 53, 63 (1949) ("In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence"); *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 332 (1918) ("The whole may be greater than the sum of its parts" and jury could properly determine "if the defendant's conduct as a whole warranted a finding of neglect").

The railroad's duties under the FELA include furnishing a reasonably safe place to work. This Court has held this "requires the employer to eliminate those dangers that could be removed by the exercise of reasonable care by the employer." *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84, 86 (Mo. banc 1990). In *Elliott v. St. Louis Southwestern Ry. Co.*, 487 S.W.2d 7 (Mo. 1972), this Court affirmed the admission of evidence of an alternative "method of making the crossing reasonably safe," *id.* at 15-16,

in a case alleging "failure to provide reasonably safe conditions for work," *id.* at 13, and held that:

> 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' *See also Cleghorn v. Terminal Railroad Ass'n of St. Louis*, Mo., 289 S.W.2d 13, 18. 'The exercise of due care, . . ., requires precautions which a reasonably prudent employer would have taken in given circumstances, even though other employers may not have taken such commensurate precautions.' *Cleghorn, supra, l.c.* 18.

Elliott v. St. Louis Southwestern Ry. Co., 487 S.W.2d 7, 15 (Mo. 1972)

B. Plaintiff's proffered evidence of the locomotive compressor compartment as an alternative location for ETDs placed on BNSF's locomotives was relevant to the issue of whether BNSF was negligent. The trial court erred in excluding it.

1. The relevance of alternative method evidence under the FELA

In *Schroeck v. Terminal R. R. Ass'n of St. Louis,* 305 S.W.2d 18, 21 (Mo. 1957) (FELA action), this Court held that:

> That there are alternative methods of performing a task is certainly a relevant circumstance to be considered in determining what a reasonable and prudent employer should have done in the circumstances (*Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441)").

In *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407 (1953), the plaintiff was injured removing track ties. The United States Supreme Court stated that alternative ways of removing the ties was one of the factors comprising "the situation to be appraised in determining whether respondent was negligent." *Id.* at 409. It was one of the circumstances "for the trier of facts to appraise." Or put more simply, evidence of alternative methods was relevant and material to the issue of the railroad's negligence with its weight to be determined by the trier of fact.

In the instant case Plaintiff sought to present evidence of an alternative location on the locomotive for ETDs to be placed and secured, the locomotive compressor compartment rather than the cab. This was an alternative method of storing any ETDs that were put in the locomotive after being removed from the end of a train. This went directly to whether BNSF was negligent under the applicable reasonable person standard and failed to provide Plaintiff with reasonably safe conditions for work. This alternative method of using of the compressor compartment for ETDs on the locomotive was thus also an alternative method to provide reasonably safe conditions for work. *Elliott v. St. Louis Southwestern Ry. Co.*, 487 S.W.2d 7, 13, 15-16 (Mo. 1972)

Plaintiff presented evidence that it was improper and unsafe to place ETDs in locomotive cabs. It was undisputed that Plaintiff was required to remove any ETDs he found in locomotive cabs in order to lead qualify the locomotive. He testified that he had complained to his supervisors and at morning safety meetings on multiple occasions about the continued presence of ETDs in the cabs he had to inspect and lead qualify, but that he still continued to find ETDs in locomotive cabs after he made those reports and

complaints. On the day he was injured, not only were the ETDs in the locomotive cab, but the conditions he encountered in performing his duties were rendered even more unsafe because the ETDs had been placed behind the cab refrigerator. He testified that that it also made it impossible for him to remove the ETDs using safe lifting methods.

The trial court excluded Plaintiff's proffered evidence that ETDs could have been placed in the alternative location of the compressor room, rather than the locomotive cab. Using Exhibit 9, the diagram or schematic of the compartments of the locomotive, Plaintiff and his witnesses would have shown the jury the location of the compressor compartment (T 209- 210, 373). Plaintiff and his witnesses, Joe Bob O'Neal and Terry Summers, would have each testified that ETDs could have been placed in the compressor compartment rather than the locomotive cab and that a rack could have been placed in the compressor compartment to secure the ETDs (T 177, 208-210, 373).[8] Joe Bob O'Neal would have testified that there was a lot of spare space in the compressor compartment and that the compressor compartment was the location that BNSF used to store tools on locomotives (T 208-209). He would have also testified the railroad has in the past also used the compressor compartment as a location for railroad property to be stored on the locomotive while that property was being shipped between terminals (T 208-209). Terry

[8] The use of a rack as method of storing and securing ETDs that were not in use on the back of a train was one that was certainly well known to BNSF. It is undisputed that BNSF provided a rack for storage of ETDs just outside the DSF at Argentine (T 233, 395-396; Exhibit 263A).

Summers would have testified that, unlike the locomotive cab, no one rides in the compressor compartment; if something came loose in the compressor compartment during a derailment, it would not therefore injure anyone (T 177).[9]

This evidence of the alternative of the compressor compartment was relevant because it made it more probable and tended to prove that BNSF failed to exercise reasonable care to provide reasonably safe conditions for work. *Schroeck v. Terminal R. R. Ass'n of St. Louis,* 305 S.W.2d 18, 21 (Mo. 1957) ("That there are alternative methods of performing a task is certainly a relevant circumstance to be considered in determining what a reasonable and prudent employer should have done in the circumstances").

Each district of the Missouri Court of Appeals has also held evidence of alternative methods is relevant and admissible on the issue of whether the railroad exercised reasonable care. In *Welsh v. Burlington Northern Railroad Co.*, 719 S.W.2d 793 (Mo.App.E.D. 1986), the BN, much as BNSF in did in its Second Motions in Limine in this case, argued that evidence of alternative methods was inadmissible because it the admission of such evidence injected "a false standard into the lawsuit – whether there were safer tools or methods of work which might have been used." *Id.* at 796. The Eastern District of the Court of Appeals rejected BN's argument and held that:

[9] The very extensive personal knowledge and experience of Plaintiff, Mr. O'Neal and Mr. Summers with respect to these facts and issues is more fully set forth and discussed in this Brief at p. 3-4, p. 7-8 and p. 70-71.

> The question of alternative methods are facts to be considered by the jury in determining whether or not the method used by defendant was reasonably safe and whether or not other methods could have been easily adopted.

Id. at 796. That evidence "was relevant and probative on the issue of whether defendant was negligent. . . ." Id. at 797. *See also Roth v. Atchison Topeka and Santa Fe Railway Co.*, 912 S.W.2d 583, 589 (Mo.App.W.D. 1996) (same, *citing and quoting Welsh*); *Keith v. Burlington Northern Railroad Company*, 889 S.W.2d 911, 920 (Mo.App. S.D. (1995). In *Keith*, the Southern District of the Court of Appeals rejected BN's argument that evidence of alternatives was inadmissible. BN had argued the evidence of alternatives was not admissible because BN had a duty "only to provide reasonably safe appliances, devices, and methods of operation in exercising reasonable care." *Id.* at 920. This of course is exactly the same argument made by BNSF in support of its Second Motions in Limine in the instant case. The Court of Appeals rejected BN's claim of error, citing both *Welsh* and *Stone v. New York, C., & St. L.R. Co.*, 344 U.S. 407, 73 S.Ct. 358 (1953).[10] See also *Euton v. Norfolk & Western Railway Company*, 936 S.W.2d 146, 153 (Mo.App.E.D. 1997) (evidence of an appliance that was not provided was "relevant on the issue of whether Railway was negligent in failing to provide reasonably safe appliances").

[10] Each of these three decisions involved one of the predecessors of BNSF before the merger of the Burlington Northern and Atchison Topeka and Santa Fe railway systems to create the BNSF.

In *Robinson v. CSX Transportation, Inc.*, 103 So.3d 1006 (Fla.App.2012), a very recent decision, the appellate court held the trial court abused its discretion in excluding evidence that certain safety tools were not provided to plaintiff. The court held the evidence of alternatives was relevant to whether the railroad breached its duty to provide a safe workplace, even though plaintiff did not proffer testimony that the tools were routinely used and available at the yard where plaintiff was injured on the day of the injury.

Federal courts applying FELA principles have taken a similar view of the relevancy of evidence of alternatives in FELA cases. For instance, *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 905-906 (6th Cir. 2006), was a maritime claim based on unseaworthiness and the Jones Act.[11] The court in that case stated that:

> Proof that a safer alternative existed makes it "more probable" that Defendants failed to exercise reasonable care . . . . Evidence of an alternative to allegedly negligent conduct is relevant, and thus admissible, unless excluded by another rule of evidence for policy reasons.

Similarly, the court in *Rodriguez v. Delray Connecting R.R.*, 473 F.2d 819, 821 (6th Cir. 1973), rejected a railroad argument that evidence of alternatives was irrelevant, stating that "alternatives often have a significant bearing on what is 'reasonable.'"

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[11] The Jones Act incorporates by reference the provisions of the FELA. See 46 U.S.C. § 30104. FELA case law is applicable and controlling in cases under the Jones Act. *Duncan v. American Commercial Barge Line*, 166 S.W.3d 78, 83 (Mo.App.E.D. 2004).

Several recent federal district court decisions have explained that whether the conditions or methods provided by the railroad are reasonably safe cannot be determined in a factual vacuum without consideration of possible alternatives. In *Edsall v. CSX Transportation, Inc.*, 2007 WL 4608788 at *4 (N.D.Ind. 2007), the court stated that:

> But the issue of what is reasonably safe cannot be viewed in a factual vacuum. . . . evidence of alternative methods can be helpful in determining whether a reasonable and prudent railroad would have required use of the method that injured the employee . . . . the trier of fact must determine whether the method employed by the railroad was reasonable under the circumstances.

Similarly in *Gorman v. Grand Trunk Western R.R., Inc.*, 2009 WL 2448604 at *6 (E.D. Mich. 2009), the district court explained:

> But whether any given arrangement is reasonably safe cannot be determined, as Grand Trunk seems to suggest, without any consideration of possible alternative arrangements. Instead, whether the conditions of a workplace are reasonably safe depends on a comparison of the marginal benefits and costs of an available safer alternative. . . . . Thus, the proper inquiry here is not whether requiring machinists to change brake shoes from a lying position could be regarded as "reasonably safe" when considered in a vacuum, but rather whether it was reasonable in light of the burden that safer alternatives would have imposed on Grand Trunk, as compared to the increase in safety that the alternatives would offer.

In *Fitzgerald v. Buffalo & Pittsburgh R.R., Inc.*, 2011 WL 3163241 (W.D. Pa. 2011), the court stated that:

> Defendant correctly notes that an employer is not necessarily required to "furnish the employee with the latest, best or most perfect appliances with which to work." *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527 (5th Cir.1951); see Def.'s Br. at 11 (Doc. 40). But this does not mean that the availability of alternative, safer tools is irrelevant to the issue of negligence. The proper inquiry is "what a reasonable and prudent person would have done under the circumstances." *Stone*, 344 U.S. at 409.

2011 WL 3163241, at * 7-8.[12] *See also Eaton v. Long Island Railroad Company*, 398 F.2d 738, 741-742 (2nd Cir. 1968); *Boston & Maine R.R. v. Meech*, 156 F.2d 109, 111 (1st Cir. 1946); *Cook v. CSX Transportation, Inc.*, 2008 WL 2275544, at *2-3 (M.D.Fla. 2008) ("Evidence of safer alternative methods for performing Plaintiff's work could be relevant to the issue of reasonable care"; any confusion of issues or prejudice could be cured with a limiting instruction); *Williams v. Northeast Regional Commuter R.R. Corp.*, 2002 WL 1433724 at *8-9 (N.D.Ill.2002) ("… *Stone* requires that the trier of fact determine whether the method used was reasonable"); *Delvecchio v. Metro-North Railroad Company*, 65 Fed.R.Evid.Serv. 1289, 2004 W.L. 2851951 at *2 (D.Conn. 2004).

[12] *Dixon* is one of the cases cited by BNSF in support of its Second Motions in Limine that is further discussed below.

This body of case law clearly shows that Plaintiff's proffered evidence concerning the compressor compartment as an alternative location for ETDs put on the locomotives was relevant and highly probative in this case.

2. The rationale of the Court of Appeals memorandum was erroneous

Although this Court on transfer reviews the judgment of the trial court as if on direct appeal, and does not reviews the decision of the Court of Appeals, one aspect of the reasoning of the Court of Appeals bears comment here.

The Memorandum entered by the Court of Appeals concluded that in order for evidence of alternative methods of work or alternative methods of furnishing reasonably safe conditions for work to be admissible on the issue of whether the methods or conditions actually furnished by the railroad were reasonably safe, the employee must first show that alternative method "was known to the employer and had been previously employed" or "was known to be available but the employee was forced by supervisors to not use the alternative method or was refused access to the tools necessary, and thus became injured while attempting to complete the task." Memorandum at 11. None of the cases cited in the briefs in the Court of Appeals or discussed by the Memorandum contains any holding that making such a showing is a necessary pre-condition or foundation for admission of evidence of alternative methods of work or of furnishing reasonably safe conditions for work. To the contrary, this Court has held that the "exercise of due care . . . , requires precautions which a reasonably prudent employer would have taken in given circumstances, even though other employers may not have taken such commensurate precautions." *Elliot v. St. Louis Southwestern Ry. Co.*, 487

S.W.2d 7, 15 (Mo. 1972), *quoting Cleghorn v. Terminal Railroad Association of St. Louis*, 289 S.W.2d 13, 18 (Mo. 1956) (no error in admitting evidence of an alternative method - the use of overpasses or underpasses - for making a crossing within its yard reasonably safe). "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not." *Cleghorn*, 289 S.W.2d at 18.

In *Cleghorn*, this Court held the jury could properly consider the railroad's failure "to illuminate or mark" a switchstand in a dark part of the yard "in some manner for the protection of employees engaged in switching movements in its vicinity in the nighttime" in determining whether the railroad failed to provide a reasonably safe place for work. Consideration of this alternative method of providing a reasonably safe place for work was proper even though there was no evidence "tending to show any practical method of illuminating the switch stand and mechanism, nor was there evidence that it was customary for railroads in general to illuminate switchstands." *Cleghorn*, 289 S.W.2d at 18. This Court in *Gleghorn* clearly did not condition consideration of alternatives on a showing that illumination or marking or any other such alternative method of providing a reasonably safe place for work was either known to the railroad or had been previously employed. In the instant case, the trial court erroneously excluded proffered testimony that would have informed the jury of an existing alternative location to the locomotive cab where an ETD could be stored: the compressor compartment.

Jurors, while fully possessed of common sense, are not clairvoyant. The jurors in the instant case, who were not railroad employees, could not be expected to be familiar

with locomotives, the layout of locomotives or of their compartments, or the way in which the compartments were used. While the average juror might know that a locomotive has a cab where the engineer sits to operate the locomotive, an average juror would not likely know that there was even such a thing as a compressor compartment on a locomotive except through the testimony of witnesses knowledgeable about locomotives and their constituent compartments and layout. The jurors could not have known from their own experience that the compressor compartment had available space that could be used for ETDs that had been removed from trains and placed on the locomotive, and could not therefore have considered whether ETDs could be secured in a rack in that space, as they already were in the DSF. The jurors could not have known BNSF used the compressor compartment as a location for the storage of tools. They could not have known that the railroad had previously used space in the locomotive compressor compartment for storage of railroad property while being shipped between terminals. They could not have considered that this space, of which they would have been unaware absent admission of the proffered evidence, was, unlike the cab, a place that did not have anyone riding in it. The jurors could not have known of this existence of this available alternative without testimony from witnesses such as Plaintiff, O'Neal and Summers, who had each worked on and with locomotives for many years, were familiar with the work Plaintiff was doing and with the DSF in Argentine, and were more than fully qualified to furnish the jurors with this information. The proffered testimony from Plaintiff and his witnesses was thus necessary in order to permit the jury to consider this alternative.

3. BNSF's motion in limine to exclude Plaintiff's proffered evidence is not supported by the law cited by BNSF in its motion

The case law cited by BNSF in its Second Motions in Limine does not support BNSF's argument that Plaintiff's proffered evidence of an alternative location was inadmissible. Only one of these cases contains any discussion concerning the admission of evidence of alternative methods, and that discussion was at most dictum.

In *Stillman v. Norfolk & Western Ry. Co.*, 811 F.2d 834 (4th Cir. 1987), the plaintiff's theory of liability was based upon *res ipsa loquitur*. The plaintiff was injured when a forklift being used to lift a gear to install the gear in a railroad car quit operating and would not move up or down. Plaintiff placed himself partly under the forks and tried to remove the gear from the blades by taking hold of the chains holding the gear up on the blades, and the blades fell on him. The jury returned a verdict in favor of the defendant railroad.

On appeal, Plaintiff argued he was entitled to a directed verdict of liability against the railroad based on *res ipsa loquitur*. The court of appeals rejected that argument because one of the essential elements of *res ipsa loquitur* was not satisfied. The railroad did not have exclusive control of the instrumentality in question, the forklift, because the plaintiff had at least partial control of the forklift and its blades when the blades fell on him. The court held that for this reason the *res ipsa loquitur* doctrine could not be applied to create in inference of negligence. The court held that even if *res ipsa* applied so as to permit an inference of negligence the evidence would not have been strong enough to support directing a verdict in favor of Plaintiff in light of the affirmative evidence

presented by the railroad that it had exercised due care in order to rebut any inference of negligence. When all of its elements are satisfied, *res ipsa loquitur* permits, but does not compel, the jury to infer negligence. The railroad presented affirmative evidence that the operators of the forklifts checked the blades and mechanisms before each tour of duty and that the forklifts were taken out of service if any defect was found and not returned to service until repaired, and that the forklifts were periodically lubed oiled, and checked out. On that record, the court of appeals held that the plaintiff was not entitled to a directed verdict in his favor against the railroad.

The plaintiff in *Stillman* also argued on appeal that the district court had improperly excluded evidence that the gears could have been installed using overhead cranes rather than forklifts. However, the district did not in fact prevent the plaintiff from presenting this evidence to the jury. Plaintiff presented essentially all of this evidence to the jury before the railroad objected, and the district court, although it sustained the objection, never instructed the jury to disregard that evidence. The court of appeals for that reason held that "any error the district court may have committed in sustaining the Railroad's objection to Stillman's proffered testimony was harmless." *Id.* at 838. Under all of the circumstances in that case, the statements in *Stillman* that the district court properly sustained the objection on the ground that the issue was whether the railroad exercised due care, not whether there was a safer way to install gears, *Id.* at 838, were at most dictum. It should also be noted that *Stillman* did not mention or discuss the United States Supreme Court decision in *Stone v. New York, C. & St. L.R. Co.*, 344 U.S. 407

(1953), or any other case law addressing the admissibility of evidence of alternatives under the FELA.

For all of these reasons, *Stillman* does not support BNSF's position, and should not be accepted or relied upon by this Court as supporting BNSF's position.

The remainder of the cases cited by BNSF on this point in its Second Motions in Limine did not hold evidence of alternatives inadmissible; they addressed only issues of error in jury instructions or insufficiency of the evidence.

For instance, in *Chicago, Rock Island & Pacific R. Co. v. Lint*, 217 F.2d 279 (8th Cir. 1954), the plaintiff's judgment was reversed and the case remanded solely because of error in the jury instructions, which failed to instruct that the measure of the railroad's liability was to "use the care a reasonable and prudent person would use under the same or similar circumstances in providing safe equipment and a safe place to work." *Id.* at 286. Plaintiff was injured when a cattle gate fell when the movement of the cattle lifted the gate off its hinge. Evidence was introduced that a different type of hinge would have been safer, although the hinges of the type that failed had been used by the railroad for many years. The railroad did not contend on appeal that this evidence of alternative hinges was not admissible, and the court did not discuss any issue as to the admissibility of that evidence.

Lint stated that the "fact that there may have been a safer method than that employed, or that danger might have been avoided by action in a different manner, does not *necessarily* make an act negligent." Id. at 282-283 (emphasis supplied). *Lint* did not state that the existence of an alternative was not relevant or admissible on the issue of

negligence. The problem in *Lint* was with the instruction given by the district court, which the court found could have given the jury the impression it could find for plaintiff solely because the hinges were either defective or improperly secured, or because the premises were not safe, rather than requiring a finding by the jury that the railroad had not used "due care" "in providing the equipment furnished under the circumstances," in order to return a verdict for the plaintiff. *Id.* at 286. The trial court specifically held that the railroad was *not* entitled to a directed verdict or to judgment notwithstanding the verdict and remanded the case for a new trial. At no point did the *Lint* court indicate that the evidence of alternative hinges that might have been used was not admissible or that it should be excluded at the re-trial.

Similarly, *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525 (5th Cir. 1951), did not present or discuss any issue as to the admissibility of evidence of alternatives. The plaintiff's judgment in *Dixon* was reversed only because the jury instructions allowed the jury to return a verdict for plaintiff if it found that the railroad knew its workplace was unsafe rather than instead requiring the jury to find the railroad had failed to exercise reasonable care to furnish a safe place to work or reasonably safe tools in order to return a verdict for the plaintiff.

Soto v. Southern Pacific Transportation Company, 644 F.2d 1147 (5th Cir. 1981), did not present or discuss any issue as to the admissibility of alternatives. Plaintiff was using a wheel barrow to dump trash and sand from a pit used to service engines. The evidence was undisputed that there was "nothing wrong with the wheelbarrow, the shovel or the area where the barrow was being used" by plaintiff. *Id.* at 1148. By his own

testimony, the plaintiff chose the size of the load, no one was rushing him and he could have made his loads lighter. In short, despite the fact that there were other "arguably more advanced methods" for cleaning the pits, the court held that the district court properly granted a judgment notwithstanding the verdict in favor of the railroad because was insufficient evidence that the railroad was negligent for the case to be submitted to the jury. It is clear that the evidence of alternative methods was admitted and there was no claim the evidence was inadmissible. *Soto* addressed the sufficiency of the evidence, not the admissibility of the evidence.

In the Court of Appeals, BNSF cited two other cases on this point. Neither one supports BNSF's argument. They both addressed the sufficiency of the evidence. In *McGivern v. Northern Pacific Ry. Co.*, 132 F.2d 213 (8th Cir. 1942), evidence was admitted at trial that there were better tools and methods than those used at the time of the injury. *McGivern* does not any way suggest that evidence was not properly admitted, only that such evidence did not "in itself" demonstrate the railroad failed to use due care. *Id.* at 218. The court held no more than that on the particular facts in that case, the plaintiff had not made a submissible case that the railroad had failed to exercise reasonable care. In *McKennon v. CSX Transportation*, Inc., 897 F.Supp. 1024 (M.D. Tenn.), *aff'd*, 56 F.3d 64 (6th Cir. 1995), the district court granted summary judgment in favor of the railroad when the plaintiff admitted that his tool was not defective, and that it was a "safe and appropriate tool" for the job he was doing. Given those admissions, the district court simply concluded that the failure of the railroad to allow plaintiff to use a

machine or automated method of work did not in itself and standing alone make a showing of negligence sufficient to survive summary judgment.

4. Admissibility does not depend on sufficiency or submissibilty

BNSF's Second Motions in Limine and the arguments made by BNSF and accepted by the trial court to exclude Plaintiff's evidence that the ETDs could have been placed in the compressor compartment thus erroneously confuse the sufficiency of the evidence and the weight to be accorded to the evidence by the trier of fact with the admissibility of evidence of alternatives. As the discussion of cases cited by BNSF above shows, evidence of alternatives need not be sufficient, standing alone, to support a finding of negligence in order to be relevant and admissible. The issue is not whether evidence of safer alternatives "alone proves that Defendants were negligent, but whether such evidence makes it more probable that Defendants were negligent." *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898 (6th Cir. 2006).

This Court has also held that admissibility of evidence does not depend on whether it would also be sufficient standing alone to submit an issue to the jury. *E.g.*, *Superior Ice & Coal Co. v. Belger Cartage Service, Inc.*, 337 S.W.2d 897, 905 (Mo. 1960) ("the admissibility of circumstantial evidence does not depend upon its sufficiency as standing alone to take the case to the jury. Admissibility and sufficiency are separate and distinct."). The Missouri Court of Appeals has recognized this principle in the specific context of the admission of evidence of alternative methods in a FELA action. In *Bridges v. St. Louis-San Francisco Ry. Co.*, 198 Mo.App. 576, 199 S.W. 572, 573 (Mo.App. 1917):

> The difficulty with defendant's argument is in not distinquishing between the standard of due care, which is part of the substantive law and which marks the line between reasonable care and negligence and the rules governing the admissibility of evidence, bearing on such standard.

Id. at 579. [13]

The Western District Court of Appeals has held that:

> *A piece of evidence is not required to constitute sufficient proof of the ultimate issue in order to be admissible.* Evidence is relevant, and therefore admissible, if it tends to prove or disprove a fact in issue or if it tends to corroborate other relevant evidence which bears on the ultimate issue.

Hatfield v. Christopher, 841 S.W.2d 761, 764-765 (Mo.App.W.D. 1992) (emphasis supplied). Objections based on sufficiency of the evidence in question go to the weight, and not the admissibility, of the evidence. *Id.* at 764

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[13] It is for this reason that *Ewing v. St. Louis S.W. Ry. Co.*, 772 S.W.2d 774 (Mo.App. 1989), *cert. den.* 493 U.S. 1022 (1990), cited by the Court of Appeals in the instant case as being "more on point" in this case, is actually inapplicable. Memorandum at p. 13. *Ewing* "does not discuss the admissibility of evidence concerning alternative methods of work." *Keith v. Burlington Northern Railroad Co.*, 889 S.W.2d 911, 921 (Mo.App. S.D. 1995). To the contrary, *Ewing* held, after consideration of all the ways in which plaintiff argued the railroad could have made his job safer, that plaintiff failed to make a submissible case. *Ewing* did not rule *any* of plaintiff's evidence inadmissible.

5. The trial court abused its discretion in excluding Plaintiff's evidence

A trial court can abuse its discretion in the exclusion of evidence "through the application of incorrect legal principles." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). As shown above, BNSF's Second Motions in Limine to exclude Plaintiff's proffered evidence of the compressor compartment as an alternative location for ETDs on locomotives was based on the application of an incorrect legal principle. The substantive legal basis for BNSF's objections did not in fact support exclusion of this evidence. The trial court accepted this erroneous rationale as the basis for excluding Plaintiff's proffered evidence. For this reason alone, the trial court abused its discretion in excluding Plaintiff's proffered evidence. The trial court's ruling was clearly contrary to logic of the circumstances.

The trial court's exclusion of this evidence cannot be justified based by a claim that the proffered evidence was not "legally" admissible because its probative value was outweighed by unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.

There could be no undue delay in admitting this evidence. As illustrated by Plaintiff's offers of proof, it would have been presented without consuming any great amount of time. The evidence would not have been cumulative because the trial court excluded *all* evidence of the compressor compartment as an alternative location. Nor on this record could it be said the admission of Plaintiff's proffered evidence would have been a waste of time given its probative value in Plaintiff's case.

Nor would any alleged unfair prejudice, confusion of the issues, or misleading of the jury outweigh the probative value of Plaintiff's proffered evidence. Any claimed confusion of issues or misleading of the jury, if any, would have been fully and completely addressed by the instructions given by the trial court in this case. Those instructions embody the same standard of liability set forth by the case law relied on by BNSF in its Second Motions in Limine, as discussed above. Plaintiff's verdict directing instruction, as given by the trial court, Instruction, No. 6, stated as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant either failed to provide:
>
> reasonably safe conditions for work, or
>
> reasonably safe methods of work, or
>
> reasonably adequate supervision, and
>
> Second, defendant in any one or more of the respects submitted in Paragraph First was negligent, and
>
> Third, such negligence resulted in whole or in part in injury to plaintiff.

(LF 95; A4). This verdict directing instruction was based on MAI 24.01 (A). There was no contributory negligence verdict directing instruction submitted on behalf of BNSF.

The instructions given to the jury by the trial court also defined "negligent" and "negligence" in accordance with MAI 11.07, as follows:

> The term "negligent" or "negligence" as used as these instructions means the failure to use ordinary care. The phrase "ordinary care" means that

degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction No. 5 (LF 94; A3). Instruction 5 was given by the trial court with the approval and agreement of BNSF (T. 459-460). Negligence under the FELA is the "failure to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller v. Atlantic Coast Line R.Co.*, 318 U.S. 54, 67 (1943). The instructions given by the trial court gave the jury exactly that standard. BNSF would also have been free, as MAI contemplates, to discuss the verdict directing instruction and its application to Plaintiff's evidence of the compressor compartment as an alternative location in its jury argument. So long as a party does not misstate the law, that party is free to include arguments about the law and its application to the facts and instructions given by the Court. See Missouri Approved Instructions – Civil (MAI) (7th Ed.), How to Use this Book, pp. LIV to LV, and Why and How to Instruct a Jury, pp. LXXV-LXXVII.[14]

[14] "Thus, the lawyer's argumentative statements that under the law my client had a right to believe or a right to proceed or any of the multitude or rights and duties are entirely proper so long as he does not misstate the law. It is now in the jury arguments that the jury gets its only lucid insight into why it is given any particular instruction." MAI (7th Ed.) at p. LV. "A frequent unjustified criticism heard of MAI is that the jury is not advised abstractly of the right of a litigant by the instructions. The answer is that the jury

This Court has already considered and rejected the substance of any argument that admission of the proffered evidence would have confused the jury or unfairly prejudiced BNSF. In *Elliott v. St. Louis Southwestern Ry. Co.*, 487 S.W.2d 7 (Mo. 1972), the railroad's objection to admission of evidence of alternative methods of providing reasonably safe conditions for work was that such evidence would have "created a 'false standard' with which the jury could have found defendant failed to comply." *Id.* at 15. That was of course exactly the substance of BNSF's argument in support of its Second Motions in Limine in this case. This Court rejected that argument, noting that the case must "stand or fall on its own facts," and that:

> "The exercise of due care . . . requires precautions which a reasonably prudent employer would have taken in given circumstances, even though other employers may not have taken such commensurate precautions.'

Id. at 15. *See also Keith v. Burlington Northern Railroad Company*, 889 S.W.2d 911, 920 (Mo.App. S.D. (1995) (rejecting argument that evidence of alternatives was inadmissible because BN had a duty "only to provide reasonably safe appliances, devices, and methods of operation in exercising reasonable care").

The rulings of the trial court were erroneous.

6. The error in excluding Plaintiff's proffered evidence was prejudicial

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is not supposed to be so advised in the instructions. Those are argued by counsel." MAI (7th Ed.) at p. LXXV.

Plaintiff had the burden of persuasion "to cause" the jury "to believe" that it was "more likely" than not that BNSF was negligent under the FELA: that BNSF failed to use ordinary care, as defined in the instructions given by the trial court (Instruction No. 4, LF 93). Given Plaintiff's contention that the ETDs should not have been in the locomotive cab at all,[15] the obvious and immediate question that would logically occur to the finder of fact would then be: if the ETDs should not be placed in the cab, where then should or could they be placed instead? What choice did BNSF have in this matter? If not provided with an answer to that question, the jury determination of whether BNSF was negligent would clearly be affected because the jury might believe that BNSF had no available alternative location. The answer to the question is, of course, that BNSF did have at least one alternative: the compressor compartment. But the rulings of the trial court prevented Plaintiff from giving the jury that answer or any answer at all to that question. Plaintiff was not allowed to present evidence to the jury that a compressor compartment even existed on a locomotive. As a result, the jury at best had only half of the story. This was not a peripheral matter. It went to the heart of Plaintiff's case and might very well have affected the result had it been presented to the jury. *Richcreek v. General Motors Corp.*, 908 S.W.2d 772, 778 (Mo.App.W.D. 1995). This error in the exclusion of Plaintiff's

[15] Plaintiff was erroneously limited in presenting even that position by the trial court's exclusion of all evidence that ETDs in the cab presented a tripping hazard to employees who had to work in the cabs while the locomotives were in the DSF, which will be discussed in the next Point Relied On.

evidence is presumed to be prejudicial unless otherwise shown. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994); *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003); *Richcreek v. General Motors Corp.*, 908 S.W.2d 772, 778 (Mo.App.W.D. 1995). It was prejudicial here because of the probability that it affected the outcome of the trial. *State v. Clark*, 364 S.W.3d 540, 544 (Mo. banc 2012); *Barriner*, 111 S.W.3d at 401; *Richcreek*, 908 S.W.2d at 778. It is respectfully submitted that this Court should accordingly reverse the judgment and remand for a new trial.

II.

The trial court erred in sustaining BNSF's motion in limine, sustaining BNSF's trial objections, and rejecting Plaintiff's offer of proof, thereby excluding competent, relevant, and material evidence proffered by Plaintiff that ETDs placed in locomotive cabs constitute tripping hazards because Plaintiff's proffered evidence (1) was relevant and admissible on the issue of foreseeability under the FELA and (2) was also relevant and admissible to whether BNSF was negligent based on Plaintiff's contention that placing ETDs in locomotive cabs after they were removed from the end of the train was an unsafe method of storing ETDs and that the presence of ETDs in the locomotive cabs created unsafe conditions for work. Evidence that ETDs in locomotive cabs were a tripping hazard made it more probable that BNSF negligently failed to provide reasonably safe conditions for work and failed to use a reasonably safe method of storing ETDs than without the evidence, and that BNSF's negligence caused or contributed to cause injury to

Plaintiff. The trial court precluded the jury from considering such evidence and thereby prejudiced Plaintiff and affected the merits of the action.

The Court erred in excluding competent, relevant, and material evidence establishing that ETDs placed in locomotive cabs constitute tripping hazards. In its second Motion In Limine BNSF moved for exclusion of any argument or evidence that ETDs devices in locomotive cabs constitute tripping hazards and that as such were contrary to BNSF's rule or policy against the presence of tripping hazards in locomotive cabs (LF 56). BNSF's Motion was sustained over Plaintiff's objection (T 48). BNSF argued that all evidence and argument as to the tripping hazard presented by ETDs in the locomotive cab should be excluded on the sole ground that Plaintiff did not trip over an ETD in the locomotive when he was injured (LF 56). BNSF's argument, which was accepted by the trial court in excluding Plaintiff's proffered evidence, is based on an erroneously narrow view of the relevance of this evidence under the FELA.

One of the elements necessary to establish a case under FELA is that some injury was reasonably foreseeable. "It is knowledge or anticipation of the possibility of harm to plaintiff, not of the exact nature of the injury, that is determinative." *Stewart v. Alton and Southern Railway Company,* 849 S.W.2d 119, 125 (Mo.App. E.D. 1993). "[T]he foreseeability requirement is satisfied if *some* injury, rather than plaintiff's *precise* injury, were reasonably foreseeable." *Keith v. Burlington Northern Railroad Company,* 889 S.W.2d 911, 916 (Mo.App. S.D. 1994) (emphasis added).

In the instant case, it is clear there was evidence that BNSF was aware that ETDs were being left in locomotive cabs brought into the DSF after the ETDs were removed

from the ends of trains because Plaintiff complained to his supervisors and at safety meeting about the fact that he continued to encounter ETDs in locomotive cabs in the DSF, and that he continued to encounter ETDs in locomotive cabs in the DSF after making those complaints. Mr. Turner, BNSF's daytime general mechanical foreman, acknowledged that it was common for operating department employees who removed the ETDs from the trains in the Argentine yard to then put them on the locomotives (T 397).

In order to meet his burden of establishing foreseeability, it was relevant for Plaintiff to present evidence that *some* injury, not necessarily his precise injury, was foreseeable from BNSF's alleged negligent act of failing to provide a safe method of storing ETDs and failing to provide safe conditions for work by the continued presence of ETDs left in the locomotive cabs. Plaintiff was not required to establish that it was specifically foreseeable that Plaintiff would injure himself lifting an ETD from behind a cab refrigerator in the manner that occurred here, but rather only that *some* injury from the ETDs being in the locomotive cab was foreseeable. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963).

Therefore, evidence of foreseeable injury from tripping on the ETDs was relevant, in that it established some foreseeable injury related to the presence of the ETDs in the locomotive cab. Such evidence made a fact of consequence more probable than it would have been without the evidence: that injuries to employees such as Plaintiff, who were required to work in the locomotive cabs, were foreseeable in this sense, and therefore tended to show a failure to use ordinary care in providing safe conditions for work and that placing ETDs in the locomotive cab was not a reasonably safe method of locating

and handling ETDs removed from the end of trains. The evidence the trial court excluded was relevant and material. Plaintiff proffered his evidence that ETDs in the locomotive cabs presented a tripping hazard in the offers of proof of the testimony of Joe Bob O'Neal, Terry Summers, and Plaintiff, all of whom were certainly competent to render such testimony given their numerous years of experience for BNSF working in, on, and about locomotives and with ETDs (T 153, 173, 183, 372). It is noteworthy that Plaintiff's offer of proof included his testimony that the presence of ETDs in locomotive cabs created a tripping hazard for employees when the locomotives were in the DSF in particular due to the hoses on the ETDs and the poor lighting conditions in the cabs (T 372).

In addition to the foregoing witnesses, Plaintiff also proffered the deposition testimony of Paul Schakel, a BNSF general mechanical foreman at Argentine, who, when asked if there was a rule against storing ETDs in locomotive cabs, stated he was not aware of a specific rule on that point. The jury got to hear that question and answer (T 239). But when Mr. Schakel was further asked on deposition whether there was a general rule against storing ETDs in locomotives he further testified that, "we're not supposed to have anything in the cab that would be a trip hazard to somebody." (LF 45). The jury was not allowed to hear that latter testimony because of the trial court's ruling. That testimony was included in Plaintiff's offer of proof as to Mr. Schakel's deposition that was rejected by the trial court (T 299). This not only erroneously excluded evidence that placing ETDs in locomotive cabs was in fact contrary to a general BNSF rule and policy against having anything in the cab that would be a tripping hazard, but would have also left the jury with

the erroneous impression that there was no applicable BNSF rule or policy at all. This was clearly prejudicial to Plaintiff.

Mr. Schakel also testified on deposition that if he physically saw someone from the transportation department or a member of train crew putting an ETD on a locomotive, he would take exception to that and would report it to the supervision in the operating department (Schakel Depo., p. 28, line 21 to p. 29, line 2; LF 45-46). This testimony was also excluded and was part of the offer of proof as to Mr. Schakel's deposition.

Mr. Schakel was a high level BNSF management employee and supervisor with overall responsibility for employees in the LMIT and the DSF involving locomotives.[16] The excluded deposition testimony showed that there was a general rule or policy against having anything in the cab that would cause a tripping hazard, that ETDs in the locomotive cab were contrary to that rule or policy, and that BNSF and its management were actually aware of those matters. It also showed that a BNSF management employee believed that some action on his part, such reporting the matter to the operating department supervision, was called for if he saw an ETD being placed on a locomotive. This testimony from a high level BNSF management employee thus directly went to whether BNSF used ordinary care in this matter.

[16] As such, his statements were also admissible as an admission of BNSF as to these matters. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 123-124 (Mo. banc 1995).

In denying Plaintiff's motion for new trial on this point, the trial court concluded that this "point is moot" because "the jury was not instructed to determine whether Plaintiff's injury was foreseeable." (LF 192).[17] But that conclusion ignores the fact that paragraph First of Plaintiff's verdict directing instruction submitted in part BNSF's failure to provide "reasonably safe conditions for work" or "reasonably safe methods or of work" and that paragraph Second required a finding that BNSF was negligent in any one or more of the respects submitted in paragraph First. A finding of negligence further required the jury to find BNSF had failed to use ordinary care, defined as the care "an ordinarily careful person would use under the same or similar circumstances." The verdict directing instruction given by the trial court also required a finding that "such

[17] By this, trial court was evidently referring to the fact that the language from MAI 24.01 (B) (2006) was not included in Plaintiff's verdict directing instruction, as given by the trial court. That language, that requires a finding that "conditions for work were not reasonably safe and defendant knew or by using ordinary care could have known of such conditions and that they were not reasonably safe," is to be included in the plaintiff's verdict directing instruction when there is an issue for the jury as to whether the railroad had notice through actual or constructive knowledge of the alleged unsafe condition. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84, 87 (Mo. banc 1990). According to the Notes on Use to MAI 24.01 (B), it "is to be used in cases in which constructive knowledge of the railroad is disputed."

negligence resulted in whole or in part in injury to plaintiff." These issues remained in the case.

The evidence that ETDs in locomotive cabs constitute tripping hazards was directly relevant to the issue of "safe conditions" for work and to the issue of whether putting ETDs in locomotive cabs was a reasonably safe method of storing ETDs that were put on the locomotives. Evidence that ETDs in locomotive cabs presented a tripping hazard made it "more probable" that both the conditions for work and the method for storage of ETDs used were not reasonably safe, and that BNSF was in those respects failed to use ordinary care and was therefore negligent.[18] Plaintiff's proffered testimony

[18] Plaintiff's Original Petition specifically pleaded negligence based on failure to provide "reasonably safe methods of or conditions for work." (LF 3). To the extent that the trial court appears to have had the view this evidence was not relevant because a "tripping" hazard was not pleaded (T 179-180, 217-218, 301), that view is contradicted by allegations of the Petition of negligence based on failure to provide reasonably safe conditions for work and the corresponding submission of that issue in the verdict directing instruction. The proffered evidence was plainly relevant to those allegations and that submission. BNSF did not file any motion to make more definite and certain, and was clearly not surprised by the evidence of a tripping hazard offered by Plaintiff since BNSF filed its Second Motions in Limine to exclude that evidence prior to trial. Under these circumstances, it was error to exclude the proffered evidence on that basis. *See, e.g., State ex rel. State Highway Commission v. City of St. Louis*, 575 S.W.2d 712, 723-724

that the tripping hazard existed when the locomotives were in the DSF served only to make the evidence even more probative because it showed a risk to employees such as Plaintiff, who had to work in locomotive cabs in the DSF.

Plaintiff's proffered evidence, excluded by the trial court, remained relevant to these aspects of the verdict directing instruction regardless of whether the trial court specifically instructed the jury to make a finding on foreseeability. A showing that putting ETDs in the locomotive cabs was not reasonably safe in this case logically involved being able to explain to the jury *why* and *how* it was unsafe with respect to employees working in the DSF, and the evidence of a tripping hazard was relevant for exactly that reason. Plaintiff had the burden of proof, including the burden of persuasion, on these issues. The exclusion of the proffered evidence prejudiced Plaintiff in trying to carry his burden of persuasion because it impaired Plaintiff's ability to furnish answers to these questions for the jury. Without the proffered evidence, these questions, especially as they related to risk to employees like Plaintiff working with locomotives in the DSF, remained unanswered.

It is true, as BNSF argued in the trial court, that Plaintiff was not injured by tripping on an ETD because Plaintiff's testimony was the two ETDs had been wedged behind the refrigerator that was bolted to the floor of the cab. That means of putting the

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(Mo.App.1978) (rejecting claim that evidence was beyond the scope of the pleadings; "when a pleading is first attacked by objection to the introduction of evidence, it will be given a most liberal construction").

ETDs in the cab did alleviate the immediate tripping hazard. It meant the ETDs were not lying loose on the floor. But this at best improvised method of securing the ETDs in the cab so as not to present an immediate tripping hazard presented new dangers of its own. It presented the risk the refrigerator could have become a projectile or the risk of fire from damage to the wires. More importantly here, it increased the danger to Plaintiff, who was required to remove the ETDs from the cab in order to perform his assigned duties. He testified the placement of the ETDs behind the refrigerator in the manner Plaintiff encountered made it impossible for him to use safe lifting practices to remove the ETDs from behind the refrigerator and did not leave sufficient room for anyone else to assist him. The manner in which the ETDs were placed behind the refrigerator made the handles inaccessible. *None* of these conditions would have existed in the locomotive cab, and Plaintiff would not have been injured as he was here, had locomotive cabs not been used as a place to put ETDs removed from trains in the yard in the first place.

The substance of BNSFs relevancy argument was that the tripping hazard is not relevant because Plaintiff was not injured by tripping on an ETD. Plaintiff, however, presented evidence that BNSF knew that ETDs were being placed and left in locomotive cabs coming into the DSF. Plaintiff's proffered but excluded evidence was that this presented a tripping hazard, one that existed when the locomotives were in the DSF, and that this was contrary to BNSF's general rules and policies. Plaintiff sought to argue at trial that ETDs removed from the ends of trains should not be placed in the locomotive cabs at all based at least in part on that tripping hazard, but should have instead been placed in an alternative location such as the compressor compartment or not placed on the

locomotive at all. The excluded evidence was relevant to the issues of whether BNSF failed to use ordinary care and whether Plaintiff's injury "resulted in whole or in part" from the negligence of BNSF or its employees, the standard expressly provided for in the text of the FELA. 45 U.S.C. § 51.

In accordance with this federal substantive statutory law under the FELA, Paragraph Third of Plaintiff's verdict directing instruction as given by the trial court submitted: "such negligence resulted in whole *or in part* in injury to plaintiff." (LF 95) (emphasis supplied). The instruction omits the words "direct" or directly" that appear in MAI instructions in non-FELA cases. The Committee Comments to MAI 24.01 (A) and B (Committee Comments (2008)) (7th Ed.), p. 435, 438 explain that:

> In an F.E.L.A. case, common law negligence rule are controlling except as these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence in only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

(emphasis in MAI Committee Comment). The Committee Comments (Comment B), (MAI 7th Ed.) p. 435, 438, go on to state in part that:

> In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly in the verdict direct instruction because of the proximate (direct) cause requirements. This prevents the jury from

> awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with the F.E.L.A.

The United States Supreme Court has quite recently reaffirmed that as a matter of federal substantive statutory law, the railroad caused or contributed to cause an injury "if the railroad's negligence played a part – no matter how small – in bringing about the injury." *CSX Transportation, Inc. v. McBride*, ___ U.S.___, 131 S.Ct. 2630, 2644 (2011). The Court explained its holding in part as follows:

> If negligence is proved, however, and is shown to have "played any part, even the slightest, in producing the injury," *Rogers*, 352 U.S., at 506, 77 S.Ct. 443 (emphasis added), then the carrier is answerable in damages even if "the extent of the [injury] or the manner in which it occurred" was not "[p]robable" or "foreseeable." *Gallick*, 372 U.S., at 120–121, and n. 8, 83 S.Ct. 659 (internal quotation marks omitted); see 4 F. Harper, F. James, & O. Gray, Law of Torts § 20.5(6), p. 203 (3d ed.2007); 5 Sand 89–21.

McBride, 131 S.Ct. at 2643. Under *McBride*, the fact that Plaintiff in this case did not trip on an ETD does not render irrelevant the proffered evidence of a tripping hazard when ETDs are put in locomotive cabs.[19]

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[19] *See also Eaton v. Long Island Railroad Co.*, 398 F.2d 738, 742 (2nd Cir. 1968) (plaintiff did not testify that he slipped on grease or oil when he was injured in an attempt to climb out of a work pit; presence of grease and oil in the pit was nevertheless relevant to claim based on failure to provide a safe means of egress from pit).

More importantly, under the FELA as interpreted and applied by the United State Supreme Court, the issue of whether the railroad was negligent is to be determined based on consideration of *all* of the facts and circumstances. *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 353 (1943); *Wilkerson v. McCarthy*, 336 U.S. 53, 63 (1949) ("In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence"); *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 332 (1918) ("The whole may be greater than the sum of its parts" and the jury could properly determine "if the defendant's conduct as a whole warranted a finding of neglect").

It was important to Plaintiff in carrying his burden of persuasion to show why ETDs removed from the end of trains should not have been placed in the cabs of locomotives coming into the DSF. The proffered evidence that they presented a tripping hazard to employees like Plaintiff, who were thereafter required to enter and work in the cab, went directly to that issue and to whether BNSF failed to use ordinary care. The excluded evidence, taken in combination with the excluded evidence of the compressor compartment as an alternative location, went to the heart of Plaintiff's liability case.

The exclusion of Plaintiff's proffered evidence that ETDs placed in locomotive cabs present a tripping hazard was inconsistent with federal substantive law under the FELA. It was contrary to the logic of the circumstances. The trial court abused its discretion in excluding this evidence. The error is presumed to be prejudicial and materially affected the merits and outcome of this action. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994); *State v. Clark*, 364 S.W.3d 540, 544 (Mo. banc 2012);

State v. Barriner, 111 S.W.3d 396, 401 (Mo. banc 2003); *Richcreek v. General Motors Corp.*, 908 S.W.2d 772, 778 (Mo.App.W.D. 1995).Accordingly, the judgment in favor of BNSF should be reversed and the case remanded for a new trial.

III.

The trial court erred in excluding all evidence as to the compressor compartment as an alternative location for ETDs and the tripping hazard presented by ETDs in locomotive cabs to the extent that the trial court excluded the evidence, on the ground that Plaintiff, Mr. O'Neal and Mr. Summers were not qualified as experts and their testimony did not rise to the level of expert testimony because their knowledge and experience gained through their years of work with locomotives for BNSF qualified them as experts and because their testimony would have assisted the jury in understanding the evidence and determining the facts in issue in that these subjects are ones with which the average juror would not be familiar and are not subjects of everyday experience for persons outside the railroad, and because their fact testimony on these matters would have been admissible in any event.

The trial court excluded on relevance grounds all evidence and argument as to the compressor compartment as an alternative location on the locomotive for placing ETDs and as to the tripping hazard presented by ETDs in locomotive cabs. This was the trial court's primary stated reason for the exclusion of this evidence. As shown in the arguments in Point I and Point II, above, this was prejudicial error.

Plaintiff at trial argued in part that Plaintiff, Mr. O'Neal and Mr. Summers could testify as expert witnesses on a number of subjects, based on their many years of

experience working for BNSF, including their work at the DSF, and their extensive experience in working with locomotives, working in locomotive cabs, and lead qualifying locomotives. The trial court stated that these witnesses were not "experts" and could not furnish opinion testimony as to matters that were not, in the trial court's view, outside common knowledge. *See e.g.*, T 180-181 ("There's no reason to believe he has any expertise beyond any of the rest of us"); T 216 (". . . his testimony does not rise to expert style testimony, and in the alternative he's not been qualified as an expert").

To the extent that the trial court excluded Plaintiff's proffered evidence as to the compressor compartment as an alternative location to place ETDs and as to the tripping hazard presented by ETDs in locomotive cabs on these grounds, the trial court erred.[20] As will be shown below, Plaintiff, Mr. O'Neal, and Mr. Summers were qualified to offer

[20] Mr. O'Neal and Mr. Summers would have also testified as to other matters, such as safe lifting techniques, the risk that an ETD in a locomotive cab could become a projectile, and the risk that an ETD wedged in behind the refrigerator could cause the refrigerator itself to become a projectile. However, Plaintiff's own testimony, covering the substance of the testimony Mr. O'Neal and Mr. Summers would have given on these subjects, was admitted at trial, and for that reason, the exclusion of the testimony of Mr. O'Neal and Mr. Summers on these matters is not a part of this Point Relied On. The trial court also granted a motion in limine to exclude testimony from Mr. O'Neal as to causation with respect to the injury sustained by Plaintiff. Plaintiff did not thereafter attempt to offer such testimony at trial and that also is not a part of this Point Relied On.

testimony as experts, based on their knowledge and experience gained during their employment by BNSF. They each could have properly testified as to these two matters.

A. Plaintiff, O'Neal and Summers were qualified to testify as experts based on their knowledge and experience

The standard for the admissibility of expert testimony in civil cases is provided by Section 490.065, R.S.Mo. (A6). *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153-154 (Mo. banc 2004); *Kivland v. Columbia Orthopaedic Group*, L.L.P., 331 S.W.3d 299, 310 (Mo. banc 2011).

Section 490.065.1 provides that:

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

"Section 490.065 is written conveniently in English. It has 204 words. Those straightforward statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings." *McDonagh*, 123 S.W.3d at 160 (Wolff, J., concurring).

Section 490.065.1 specifically provides that a witness may be qualified to testify as an expert by "experience" or "knowledge" as well as by skill, training or education. The "use of the disjunctive" in Section 490.065 "recognizes that an expert witness may be qualified on foundations other than the expert's education or license." *Landers v.*

Chrysler Corp., 963 S.W.2d 275, 281 (Mo.App.E.D. 1997), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). "Substantial practical experience in the area in which the expert is testifying is a permissible source of expertise." *Donjon v. Black & Decker (U.S.), Inc.*, 825 S.W.2d 31, 32 (Mo.App. E.D. 1992), citing *McCutcheon v. Cape Mobile Home Mart, Inc.*, 796 S.W.2d 901, 906 (Mo.App. 1990). "If the witness has some qualifications, the testimony may be permitted. . . . (citation omitted). The extent of the expert's experience or training goes to the weight of his testimony and does not render the testimony incompetent." *Donjon*, 825 S.W.2d at 32-33 (citations omitted). "The issue in determining whether a particular witness is an expert is not whether there are others better qualified. The question is whether the witness possesses peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice or experience." *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 208 (Mo. banc 1991).

This Court has also held that while the trial court determines whether the statutory factors of Section 490.065, such as whether the witness is qualified as an expert, are met, "the court is not required to consider the degree to which they are met. So long as the expert is qualified, any weakness in the expert's knowledge is for the jury to consider in determining what weight to give the expert." *Kivland*, 331 S.W.3d at 311. Similarly, any "weakness in the factual underpinnings of the expert's opinion . . . goes to the weight that testimony should be given and not its admissibility." *Kivland*, 331 S.W.3d at 311 (*citing Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 246 (Mo. banc 2001)).

It is well established that the practical knowledge and experience of a railroad employee gained over years of service can be sufficient to qualify that employee to give expert testimony in a FELA case. This Court has repeatedly approved the admission of expert testimony from railway employees in FELA cases based upon their years of experience in railroad work and knowledge concerning railroad operations and equipment acquired during that employment. For example, in *Young v. Wheelock*, 333 Mo. 992, 64 S.W.2d 950, 957 (Mo. 1933), this Court approved the admission, over the defendant railroad's objection, of testimony from a locomotive engineer as to whether operation of a train at a particular location and speed would tend to cause a derailment, stating that "[s]uch matters are not within the experience of average jurors." In *Hiatt v. Wabash Ry. Co.*, 334 Mo. 895, 906, 69 S.W.2d 627, 632 (Mo. 1934), this Court approved the admission of opinion testimony of a railroad employee with four years of experience to testify about the difference in how trains "with air" on them and trains "without air" stopped, even though the witnesses experience was limited to riding on the trains, not operating them. In *Ford v. Louisville & N.R. Co.*, 196 S.W.2d 163 (Mo. 1946), the trial court allowed the witness, a brakeman with 23 years of experience, to testify as to safe and unsafe speeds for operation of the train. This Court affirmed, rejecting the railroad's objection that the witness was stating a conclusion and thereby invading the province of the jury, stating instead that the matters were proper subjects for expert testimony. In *Cruce v. Gulf, Mobile & Ohio R. Co.*, 238 S.W.2d 674 (Mo. 1951), the plaintiff, who was the GM&O's coal chute foreman, sustained injuries when a steel cable attached to the coal chute pan broke, the pan fell, and plaintiff was injured. The plaintiff, with more than

30 years of railroad experience, was permitted to testify over the Respondent GM&O's objection that it was a mere "conclusion," that it was not his, the coal chute foreman's, ***duty*** to inspect the cable for defects. This Court rejected the defendant's contention and held this was a proper subject for plaintiff's expert testimony stating:

> As pointed out in the former opinion, he detailed his qualifications, knowledge and experience and testified that it was not his duty to inspect, or repair or even to supervise the repair of the cables. But upon the basic question of the admissibility of his evidence, it is plain from the conflicting evidence and inferences on the subject that *the duties of the coal chute foreman, and of others, with respect to the cable is not the subject of general knowledge but is dependent upon a knowledge of facts peculiar to railroad, and railroad rules and practices and is properly the subject of expert evidence*.

Cruce v. Gulf, Mobile & Ohio R. Co., 238 S.W.2d 674, 677 (Mo. 1951) (emphasis supplied). *See also Martin v. St. Louis-San Francisco Ry. Co.*, 329 Mo. 729, 46 S.W.2d 149 (Mo. 1931) (locomotive engineer with long experience operating trains with air brakes competent to testify to inference that double heading brake valve cock had been cut in and the independent brake was not set)

In the instant case, Plaintiff's witness Joe Bob O'Neal had been employed by BNSF for 38 years, working as an electrician for 28 of those years and on locomotives for 30 years (T 183-184, 186). He did most of his electrical work on locomotives, and had worked for 12 years at the Argentine facility (T 185). O'Neal inspected the

locomotives and their cabs after they had been repaired or serviced, to make sure everything was good to go and was lead qualified (T 185-186, 198). The inspection of the cabs included performing lead locomotive qualification checks and he was involved in that work for 11 years in Kansas City and 10 years in Springfield (T 187). He spent about four or five hours a shift in locomotive cabs during his 30 years of working with locomotives (T 188). He was involved with the maintenance of EMD SD40-2 locomotives for about 20 years (T 189).

Terry Summers was a BNSF machinist who had worked for BNSF for almost 17 years as of the time of trial (T 153). Pretty much all of his work with BNSF has been with locomotives (T 155). His job includes hooking up the locomotives to outbound consists of cars before they go out as part of a train; he is the last person on the locomotive from the mechanical department (T 153-155). He also described the requirements to lead qualify a locomotive, and the list of items that must be checked off to make sure the locomotive is lead qualified (T 154-155). He is very familiar with the SD40-2 model locomotives, as he works on one almost every shift (T 155-158).

Plaintiff himself has been working for BNSF for 33 years (T 246). He has worked for BNSF as an electrician for 29 years. (T 248). He had been working as an electrician in the DSF at Argentine Yard for eighteen years (T 250, 313). Plaintiff's duties as an electrician at the DSF included repairing electrical systems of the locomotives, regular maintenance of locomotives, inspecting their electrical systems, changing light bulbs, hooking up the locomotives, and checking the heaters, air conditioners, water coolers and refrigerators of the locomotives (T 249). Plaintiff's duties in the DSF included inspection

of locomotives in order to be "lead qualified." (T 249). About 98% of Plaintiff's work as an electrician in the DSF was involved in working inside locomotive cabs (T 250).

Plaintiff, and Mr. O'Neal and Mr. Summers, possessed extensive practical experience and knowledge concerning BNSF's operation in Argentine, and particularly the DSF, the work done in the DSF, the locomotives used by BNSF and their layouts and their cabs, the ETDs and the continued presence of ETDs in locomotive cabs brought into the DSF, and the process of lead qualifying locomotives. They each had knowledge based upon their experience superior to that of an average or typical juror concerning these matters.

B. The testimony of Plaintiff, O'Neal and Summers would have assisted the jury "to understand the evidence or to determine a fact in issue."

Section 490.065 further provides for the admission of expert testimony from a witness with such knowledge and experience if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue."

In the instant case, as shown in the argument in Points I and II, the testimony proffered by Plaintiff concerning the compressor compartment as an alternative location for ETDs that were left on a locomotive after being removed from the end of a train, and the testimony proffered by Plaintiff concerning the tripping hazard presented by ETDs placed in locomotive cabs, was relevant to the issues in this action. As such, it would clearly assist the trier of fact in understanding the evidence in this case and in determining facts in issue. It was more than just of assistance, it was in fact essential for the jury to understand the evidence and determine the facts in issue. As noted above, an

average juror could not be expected to be familiar with the locomotives used by BNSF, the layout of the locomotives or of their compartments, or the way the compartments were used. While an average juror would likely know that a locomotive had a cab where the engineer would operate the locomotive, an average juror would not have known without being told in the testimony and evidence that there was any such thing on a locomotive as a compressor compartment. An average juror could not have known the location of the compressor compartment and its layout without being told about it and shown a schematic in the testimony and evidence. An average juror would have had no way to know that there was available open space in the compressor compartment without being told about the compressor compartment in the testimony, much less that the compressor compartment had been used for the storage of tools on locomotives or that it had in the past been used as a location for the storage of other railroad property during shipment by the railroad between terminals. The average juror could not have known that there was space in the compressor compartment in which a rack could have been placed to secure an ETD. The jury would have simply been completely unable to consider the compressor compartment as an alternative location without this testimony. This testimony conveyed information to the jury that an average juror would not possess without the testimony, and the testimony would have therefore plainly been of assistance to the jury in understanding the evidence and determining the issues in this action.

Expert testimony may be admitted if the "subject is one with which lay witnesses are not likely to be conversant, and one where the expert's opinion would be of value to the jury." *Wessar v. John Cezik Motors, Inc.*, 623 S.W.2d 599, 602 (Mo.App. 1981). *See*

Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202, 208 (Mo. banc 1991) ("The expert's competence on the subject must be superior to that of the ordinary juror, and the opinion must aid the jurors in deciding an issue in the case"). Opinion testimony is properly rejected "if the subject is one of everyday experience." *Wessar*, 623 S.W.2d at 602.

Wessar involved opinion testimony as to whether plaintiff had received proper instruction in the operation of a motor cycle. The court noted that while the operation of automobiles was normally considered a subject of every day experience, the "technique of motorcycle operation, while perhaps not as far removed from the understanding of the average juror as is the operation of an airplane, is still unfamiliar to the average juror and is a proper subject for expert testimony." *Id.* at 602. As shown above, the matters at issue here involving locomotives, locomotive cabs and ETDs would be similarly unfamiliar to the average juror and are not matters of everyday experience to those not engaged in railroad employment.

In addition to the foregoing, these were matters personally known to these witnesses based upon their long employment with the railroad, and specifically their work over the years with locomotives and in locomotive cabs in BNSF's Argentine DSF. They were certainly qualified as experts in these areas. But they could properly testify to these factual matters, regardless of whether the trial court considered them as experts who

could properly offer expert opinion testimony.[21] In this respect, the situation presented here is comparable to that of testimony by treating physicians, who testify as fact witnesses as well as expert witnesses. In *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 673 (Mo. banc 1993), this Court noted that unlike an expert retained solely for litigation purposes a treating physician has knowledge of facts relevant in the case. This Court held that a treating physician is thus "first and foremost a fact witness as opposed to an expert witness." *Id.* The physician may testify to facts concerning his examination and treatment of a patient. A treating physician "is likely to be the principal fact witness on the issue of damages" in a personal injury suit. *Id.* He is not functioning as an expert witness, however, simply because he uses his training and skill in diagnosing and treating an injury and in describing the plaintiff's condition and treatment to the jury. A treating physician "only functions as an expert witness to the extent that one or both of the parties ask the witness to use the basic facts to draw conclusions and express opinions on relevant medical issues." *Id.*

In *Whelan v. Missouri Public Service, Energy One,* 163 S.W.3d 459 (Mo.App. W.D. 2005), plaintiff's treating physician, when asked at deposition his opinion on causation, indicated he did not have an opinion on the issue. The trial court excluded the treating physician's deposition in its entirety at trial, on relevance and foundation

[21] A witness can testify as what he hears, feels, tastes, smells and sees. *Stone v. Missouri Department of Health and Senior Services*, 350 S.W.3d 14, 21 (Mo. banc 2011). If the fact at issue is "open to the senses," the opinion of a lay witness is admissible. *Id.* at 22.

grounds, including the physician's testimony concerning his examination, care and treatment of the plaintiff. Because that testimony was relevant to the issue of damages, and could be given by the physician as a fact witness, the Court of Appeals held the exclusion of the deposition was prejudicial error and reversed a judgment in favor of the defendant. In the instant case, the exclusion of all evidence concerning the compressor compartment as an alternative location and the tripping hazard presented by ETDs placed in locomotive cabs, including the foregoing factual testimony, was also error.

With respect to the proffered testimony that ETDs placed in locomotive cabs present a tripping hazard, the Court's attention is also invited to *Patton v. May Department Stores, Co.*, 762 S.W.2d 38 (Mo. banc 1988). In *Patton*, this Court stated that:

> Generally, witnesses must state facts from which the jurors are to form their opinion, but when a witness has personally observed events, he may testify to his 'matter of fact' comprehension of what he has seen in a descriptive manner which is actually a conclusion, opinion or inference, if the inference is common and accords with ordinary experiences of everyday life.

Id. at 42 (citations omitted). In *Patton*, plaintiff was injured when she tripped and fell over a box in an aisle in a retail store. This Court held under the foregoing language that a witness who observed boxes in the aisle could properly testify that "this was like an accident waiting to happen." *Id.* at 43.

Given this Court's decision in *Patton*, Plaintiff, O'Neal and Summers, who had each personally encountered ETDs placed in locomotive cabs, could certainly properly

testify that ETDs placed in locomotive cabs presented a tripping hazard based their comprehension of what they have seen in the course of their employment.

In addition to the above matters, Plaintiff and O'Neal would have also testified, if permitted to by the trial court, that the compressor compartment was a "proper" or "appropriate" location to place ETDs (O'Neal, T 208; Plaintiff, T 373). Summers would have testified that that compressor compartment would be a safer location to place an ETD than the nose of the locomotive, which would not be a proper location (Summers, T 176- 177). Given the knowledge and experience of these witnesses as to BNSF's operations, locomotives and equipment at the Argentine DSF, based on their long personal experience, this testimony would have also assisted the jury "to understand the evidence or to determine a fact in issue." Section 490.065.1.

Experienced railroad employees like O'Neal, Summers and Plaintiff have been allowed to give testimony using similar terminology in FELA cases. In *Ford v. Louisville & N. R. Co.*, 355 Mo. 362, 196 S.W.2d 163 (Mo. 1946), the witness at issue was a brakeman who had made the run during which the death occurred for 23 years. This Court affirmed the admission of his testimony as to what was a "safe and an unsafe speed" for the train at the point and under the conditions where the death occurred. *Id.* at 375-376, 196 S.W.2d at 169. He was allowed to testify over the railroad's objection that the train "should" have been stopped or "should" have been going no more than 2 miles per hour at the time the decedent attempted to alight from the train, and that the actual speed at the time of the occurrence, 10 to 12 miles an hour, was "not safe" under the conditions. *Id.* at 371-272, 196 S.W.2d at 166-167. In *Young v. Wheelock*, 333 Mo. 992,

64 S.W.2d 950 (Mo. 1933), the decedent was killed during a derailment. The witness at issue was a locomotive engineer. This Court affirmed the admission of his testimony as to what a "safe rate of speed" would be on a track in good condition for an engine and train at the location, and as to the factors that were present, including a higher speed and evidence the condition of the track was not good, that "would have a tendency to cause derailment." Id. at 998, 1007, 64 S.W.2d at 952, 957. In affirming this Court held such matters were not within the experience of average jurors and the jury was aided by the reception of the evidence. *Id.* at 1007, 64 S.W.2d at 957.

Outside the context of railroads and the FELA, in *Wessar v. John Chezik Motors, Inc.*, 623 S.W.2d 599 (Mo.App.W.D. 1981), plaintiff was injured when she lost control of a motorcycle, while she was being instructed on the operation of the motorcycle by defendant's salesman, who was seated behind her. The witness in question was a motorcycle instructor. The court held that the technique of motorcycle operation was "unfamiliar to the average juror" and was a proper subject for expert testimony. *Id.* at 602. *Wessar* affirmed the admission of testimony from this witness that plaintiff had not received "proper instruction" and had not been given adequate instruction, as well as causation testimony. *Id.* at 601.

For all of these reasons, to the extent that the trial court based its exclusion of all evidence of the compressor compartment as an alternative and all evidence that ETDs in locomotive cabs were tripping hazards on such expert witness and testimony grounds, the trial court erred and abused its discretion to Plaintiff's prejudice.

CONCLUSION

Plaintiff's theory was that ETDs should not have been placed in locomotive cabs in the first instance, and should not have been in the cabs of the locomotives that came into the DSF. The trial court excluded all evidence of the locomotive compressor compartment as an alternative location for ETDs put on locomotives. As a result of the trial court's rulings, the jury did not hear any evidence that a locomotive compressor compartment even existed. The trial court also excluded all evidence that ETDs placed in locomotive cabs presented a tripping hazard. As shown above, the trial court's rulings were erroneous. They were based on a misapplication of legal principles under the FELA, and for that reason alone were an abuse of discretion. They were unreasonable and against the logic of the circumstances before the trial court when considered under a deferential test for abuse.

These errors went to the heart of Plaintiff's liability case. Plaintiff was deprived of evidence that would tend to show why ETDs should not have been placed in locomotive cabs in the first instance and that BNSF failed to exercise ordinary care in that respect while at the same time Plaintiff was also deprived of all evidence that there was any other place the ETDs could have been placed, which also went directly to whether BNSF failed to exercise ordinary care. The trial court thereby erroneously and effectively cut the heart out of Plaintiff's liability case. These errors in excluding evidence were presumptively prejudicial and there is a substantial probability that they affected the outcome of the trial.

For these reasons, it is most respectfully submitted that this Honorable Court should reverse the judgment in favor of BNSF and remand for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Substitute Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b). This Substitute Brief was prepared using Microsoft Word 2007, in Times New Roman, 13 point font. Excluding the cover page, this Certificate of Compliance and the Certificate of Service, it contains 25,941 words, which does not exceed the 31,000 words allowed by Rule 84.06 (b).

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CERTIFICATE OF SERVICE

Pursuant to Rule 103.08, I hereby certify that on April 18, 2013, I electronically filed the foregoing Substitute Brief and the Appendix to this Substitute Brief with the Clerk of the Court using the Missouri e-Filing system which will give notice of such filing to all parties.

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