[worker names omitted/railroad name omitted/names deleted]

Plaintiff,

v. CIVIL ACTION NO.

RAILROAD , INC.,

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

Plaintiffs, by counsel, file this Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability relating to Defendant's violations of federal Railroad regulations, and states as follows:

Summary

On September 22, 2005, there was a violent head-on collision between two RAILROAD freight trains traveling directly toward each other on the same RAILROAD tracks near Franklin, Virginia, in the middle of the night. Each train was traveling over thirty miles an hour and the violent collision left six crew members (three on each train) with significant personal injuries and post-traumatic stress disorders. The State Police public information officer labeled the wreck as the worst ever in Virginia. This Motion for Partial Summary Judgment relates to Defendant's clear liability for Railroad regulatory "radio communication" violations, 49 CFR sec 220.1 et seq., directly causing the collision and resulting injuries.

One of the goals of partial summary judgment is to prevent extensive trials on liability issues over which material facts are not in dispute. Here, no material

facts are in dispute over regulatory violations by RAILROAD 's dispatcher and regarding injury causation as a direct result of same.

Background

Standards Relating to Summary Judgment

On a motion for summary judgment, the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S.242, 250 (1986). Once the burden of production has shifted, the party opposing the motion may not "simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, he must go beyond the pleadings and present some type of evidentiary material in support of his position. Celotex, at 324. Accordingly, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." Id. It is submitted that RAILROAD T cannot establish a genuine issue of material fact regarding FRA regulatiory violations and their causal relationship to Plaintiffs' injuries. Partial summary judgment in favor of the Plaintiffs on these issues should be granted (in the 3 related Plaintiff cases).

Violation of a Railroad Safety Statute or Regulation Resulting in Injury to a Railroad Employee Places Strict Liability on Railroad s Under the FELA

It is well settled that the FELA requires a finding of negligence *per se* when a Railroad violates a safety statute specifically aimed at the Railroad industry. See e.g., Fuszek v. Royal King Fisheries, Inc., 98 F.3d 514, at 516, 517 (9th Cir. 1996); Morant v. Long Island Railroad , 66 F.3d 518, at 522, 523 (2nd Cir. 1995); Harding v. Consolidated Rail Corporation, 423 Pa. Super. 208, at 217, 620 A.2d 1185, at 1189 (Pa. Super. 1993); Failing v. Burlington Northern Railroad Company, 815 P.2d 974, at 976 (Colo. App. 1991). The Locomotive Inspection Act, one of many rail safety statutes, has been held to be a safety statute aimed at the protection of Railroad employees by requiring the use of safe equipment. See Lilly v. Grand Trunk, 317 U.S., 481, 485 (1943).

Courts have also long held that the violation of a Railroad safety regulation by a common carrier Railroad is negligence *per se*, (strict liability) if the violation contributed to the Plaintiffs' injury. See e.g., Bevacqua v. Union Pacific Railroad Company, 1998 MT 120; 289 Mont. 36; 960 P.2d 273, at 285 (Mont. 1998); Morant v. Long Island Railroad , 66 F.3d 518, at 522, 523 (2nd Cir. 1995); Walden v. Illinois Central Gulf Railroad , 975 F.2d 361, 364 (7th Cir. 1992); Eckert v. Aliquippa & Southern Railroad Company, 828 F.2d 183, at 187 (3rd Cir. 1987); Kernan v. American Dredging Co., 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 282 (1958).

Under § 20103 of the Federal Railroad Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20101 et seq., the Secretary of ("The Secretary") has the authority to

issue appropriate regulations "for every area of Railroad safety . . . ." The Railroad radio communication safety regulations violated here within 49 CFR §§220.1 - 220.61, were enacted under the auspices of the FRSA, and specifically govern Railroad radio communications. There is no dispute these are rail safety regulations to protect both the crew and the public.

Admissions of Dispatcher J. C. Doe in Deposition

The key portions of Dispatcher Doe's deposition are as follows:

Q: While you are handling the Portsmouth subdivision, [area of wreck] can any train or train crew move on that subdivision without your authority?
A: No, Sir.

* * * *

Q: And if you give them authority to move, then they have to move unless they call you back and tell you they're not going to?
A: That is correct.

* * * *

Q: And what was the mistake that you picked up on when you first heard the tape? [tape of crew communications that night]
A: That they answered to the wrong train ID and I did not catch them repeating the wrong engine number to me.
Q: Have you determined if you made any errors that night?
A: Yes, Sir, I have.
Q: And if you could, tell us what those were.
A: Well, one, ...[there] was not positive identification of the train.

* * * *

Q: ....Is that something that you are required to get as a dispatcher before you issue instructions to a train?
A: Yes, Sir.

Q: And if you don't get proper positive identification from a train, can you issue instructions to him?
A: No, Sir.
Q: Does it all come back to you as far as making sure that you know where the trains are and who they are and that type of thing -- even if they don't do their job as far as proper identification or that type of thing?
A: Yes.

* * * *

Q: What did the letter [from RAILROAD management] say with respect to these operating rules as far as whether or not you complied with them?
A: They had a list of operating rules that I had violated.

[Mr. Doe was terminated from dispatching employment]

Doe Deposition of September 22, 2006 at pp. 40-50.

RAILROAD also produced for deposition Gary X as a RAILROAD supervisor who had trained dispatchers like Doe. X reviewed all the dispatching tapes, transcripts, and applicable regulations and RAILROAD operating rules. See Deposition excerpts of G. X , attached, and entire Deposition of September 19, 2006, also attached. X confirmed that all RAILROAD radio communication rules must comport with the FRA radio communication regulations. X Deposition at pp. 10-12. See also 49 C.F.R. §220.21.

X unequivocally confirms that RAILROAD dispatcher Doe violated RAILROAD operating rules 411, 420, 412, 471, 532 and 535, (Id. at 42), which each equate with a corresponding FRA radio communication regulatory violation. Further, X verifies that Engineer X violated one RAILROAD rule, but that dispatcher Doe, after receiving this inadequate transmission, proceeded to violate multiple critical operating rules. Id. at 41-53.

The dispatch communications between both train K95921-Engine 9011 and train K96021-Engine 471 were recorded by Defendant on the night in question and the dispatch tapes have been transcribed. See Attachments, Exhibits 1 and 8. (X Deposition). Many other documents relied upon by Mr. B were produced by Defendant RAILROAD in discovery in the prior litigation referenced herein.

The pivotal events in question and which impose summary judgment liability upon Defendant arose when train K95921 was situated in a siding off the main track at Branchville, Virginia. According to Mr. B 's report, based on an analysis of all the materials, and based on deposition testimony, at approximately 2:16 a.m. on September 22, 2005, Dispatcher Doe initiated a radio transmission with the intention of granting the southbound train K96021-Engine 471 authority to move south and occupy the Boykins and Branchville blocks (geographical sections of Railroad track). Instead, because Dispatcher Doe did not follow proper radio regulations, a radio response came not from the intended southbound train crew, but from the locomotive engineer of the northbound train, Craig X , engineer of K95921-Engine 9011. X and his train crew were situated in the Branchville siding waiting for directives to proceed north.

Dispatcher Doe then provided that train crew a "mandatory directive" over the radio, but when repeating the mandatory directive back to the dispatcher, the northbound K95921 engineer, X , did use his correct engine number, Engine 9011. Further, the locomotive engineer X also announced back to dispatcher Doe the Railroad "blocks" in a reverse order, repeating "Branchville and

Boykins", which was actually the direction in which his train would then travel (northbound) through the blocks. However, this crew's response back to the dispatcher did not mirror Dispatcher Doe's intended message.

According to Mr. B , first, it is important that Doe's "mandatory directive" was being repeated back to him from Engine 9011 and not Engine 471, the southbound train for which the dispatcher was intending to direct the "mandatory directive". Dispatcher Doe failed to notice that the name of the locomotive engineer (X) did not match the names of the train crew on the southbound train (his intended recipient). Mr. B notes that Dispatcher Doe did not explain his intention to have the particular train travel southbound through the DTC blocks, instead giving an improper shorthand radio transmission "Boykins and Branchville, Boykins and Branchville 0217 over," which was repeated back by Engine 9011, which was not the engine to which he was intending to communicate the transmission at the time. See B report.

Approximately forty minutes later at 2:58 a.m., a southbound RAILROAD train ahead of K96021 released certain blocks as it traveled southbound. Accordingly, train Dispatcher Doe then attempted to issue the Seaboard blocks to the second following southbound train, K96021-Engine 471, that he believed was following directly behind the first southbound train. See radio transcripts, X Deposition Exhibits, attached, and B report. When dispatcher Doe issued this communication to this second southbound train, K96021-Engine 471, the crew informed Dispatcher Doe that they had not received a prior communication to

follow behind the first southbound train through the Boykins and Branchville blocks.

At this time, well before the collision ever occurred, Dispatcher Doe should have questioned himself and realized that he had given his previous mandatory directive to occupy the Boykins and Branchville blocks, to another (wrong) train crew. However, instead, Dispatcher Doe *insisted to the train crew K960121 that he had previously given them permission to travel southbound through the Boykins and Branchville blocks.* He simply re-read, over the radio, his previous mandatory directive. This crew, K96021-Engine 471, properly repeated the mandatory directive over the radio back to Dispatcher Doe and then began to proceed southbound through the Boykins and Branchville blocks, unaware that the northbound K95921-Engine 9011 train was already in those same geographical blocks approaching from the opposite direction.

At approximately 3:17 a.m., the two trains collided head-on. Each train was traveling between thirty and forty miles an hour seconds before the impact. At these speeds, even though both trains were placed in emergency braking modes when each crew saw approaching locomotive headlights, both crews realized that neither train would brake in time to avoid a collision. See crew affidavits attached (D , F , E). Train K95921-Engine 9011, which was more heavily loaded with over 7,000 tons, smashed into train K96021-Engine 471, which entire train “consist” weighed 898 tons, a far lighter overall weight. In the collision, Engine 471 was smashed and partly flattened, and the lead engines of train K95921-Engine 9011, careened up and over Engine 471 and derailed off to

the right, near the adjacent woods. The crew members of K95921-Engine 9011 were hanging on for their lives outside the cab, at the rear of Engine 9011, and were catapulted into the woods, where they “landed” and suffered serious injuries. Only crew member S was able to cling to part of Engine 9011 and suffered a serious leg injury among others. The crew members of K96021 remained partly trapped in the engine cab of engine 471 with the roof crushed and smashed down, before escaping the engine. Some of the diesel fuel caught fire. All the six crew members (three on each train) survived and received emergency rescue squad care before being transported to hospitals.

Specific Railroad Regulation Violations Committed by Defendant

By virtue of Defendant’s Dispatcher Doe’s deposition admissions, the deposition of RAILROAD supervisory official Gary X , as well as the deposition and analyses of Paul B , it is clear that Defendant RAILROAD violated numerous Railroad regulations relating to the wireless radio communications that directly lead to the train crash and crew personal injuries.

First, at approximately 2:17 a.m. on September 22, 2005, when Defendant’s Dispatcher Doe initiated a communication to and intended to grant blocks of track to the southbound train he violated a federal regulation by not identifying himself instead simply saying “Hello, 960". This was a violation of 49 C.F.R. §220.27 as well as corresponding RAILROAD Operating Rule 411 which required “positive identification” and required “employees must identify the name or initials of the Railroad ”, the base station “by name and location of office” from which they are transmitting.

49 CFR 220.27 Identification. (RAILROAD Operating Rule 411)

(a) . . .the identification of each wayside, base or yard station shall include at least the following minimum elements, stated in the order listed:

1. Name of Railroad . An abbreviated name or initial letters of the Railroad may be used where the name or initials are in general usage and are understood in the Railroad industry; and
2. Name and location of office or other unique designation.

(b) . . .the identification of each mobile station shall consist of the following elements, stated in the order listed:

1. Name of Railroad . An abbreviated name or initial letters of the Railroad may be used where the name or initials are in general usage and are understood in the Railroad industry; and
2. Train name (number) if one has been assigned, or other appropriate unit designation; and
3. When necessary, the work "locomotive", "motorcar", or other unique identifier which indicates to the listener the precise mobile transmitting station."

Additionally, RAILROAD Operating Rule 411 required positive identification to whom he was calling by using the "individual's title and name", "train number and engine number and initials". As discussed below, Defendant's rules are promulgated under the auspices of the same set of federal regulations governing wireless communications and violation of the RAILROAD Operating Rules, once promulgated, also equate with the corresponding regulatory violation. 49 CFR §220.21.

Dispatcher Doe's second violation was a far more serious violation of Federal Railroad Regulations and RAILROAD Operating Rules. Dispatcher Doe

gave a mandatory directive to the train crew which he believed was the southbound train, but, in fact, was the northbound train. 49 C.F.R. §220.31 and RAILROAD Operating Rule 412 required that Dispatcher Doe receive a proper acknowledgment and *verify he was communicating with the proper recipient* before he transmitted a "mandatory directive". The pertinent Railroad regulation and operating rule of RAILROAD are set forth below:

> **49 CFR 220.31** Initiating a Radio Transmission (RAILROAD Operating Rule 412)
> BEFORE TRANSMITTING BY RADIO, AN EMPLOYEE SHALL:
>
> (a) Listen to ensure that the channel on which the employee intends to transmit is not already in use;
> (b) Identify the employee's station in accordance with the requirements of §220.27; and
> (c) Verify that the employee has made radio contact with the person or station with whom the employee intends to communicate by listening for an acknowledgment. If the station acknowledging the transmitting employee's broadcast fails to identify itself properly, the transmitting employee shall require a proper identification from the station before proceeding with the transmission.

(Emphasis added).

As outlined in Mr. B 's report and as is evident from the transcript of the communications between the crew and the dispatcher, Engineer X on K95921-Engine 9011 used shorthand, although he did include his Engine 9011 description back to the dispatcher. In any case, the dispatcher, in communicating the "mandatory directive", violated the above-referenced regulation and RAILROAD Operating Rule.

The third pertinent regulatory violation and operating procedure of RAILROAD are set forth below:

49 CFR 220.61 Radio Transmission of a Mandatory Directive (RAILROAD Operating Rule 420)

> (a) Each mandatory directive may be transmitted by radio only when authorized by the Railroad 's operating rules. The directive shall be transmitted in accordance with the Railroad 's operating rules and the requirements of this part.
>
> (b) The procedure for transmission of a mandatory directive is as follows:
>
> > (1) The train dispatcher shall call the addressees of the mandatory directive and state the intention to transmit the mandatory directive.
> >
> > (2) Before the mandatory directive is transmitted, the employee to receive and copy shall state the employee's name, identification, location and readiness to receive and copy. . . .
> >
> > (4) After the mandatory directive has been received and copied it shall be immediately repeated in its entirety. After verifying the accuracy of the repeated mandatory directive, the train dispatcher or operator shall then state the time and name of the employee designated by the Railroad who is authorized to issue mandatory directives. . . . (Emphasis added)

With regard to this regulatory violation, radio transcripts and voice tapes clearly indicate that Dispatcher Doe did not properly call the addressees who were the intended recipients of the mandatory directive. He did not state the name of the person who was the intended recipient who expected to copy the mandatory directive. As B points out in his report, most importantly, Dispatcher Doe transmitted the mandatory directive before the employee--Engineer X of northbound train K95921-Engine 9011--who was receiving the mandatory directive, ever stated his name, identification and location as required by federal regulation. **The entire head-on collision would have been avoided, and no**

resulting injuries or damages would have been incurred if Dispatcher Doe had properly identified the intended recipients of this key communication and had he also properly stated the name of the intended recipient of the mandatory directive. If he had, the locomotive engineer would have learned that the mandatory directive was not intended for his train. As B points out, based on his extensive experience in dispatching and having previously been a supervisor of dispatchers with Defendant RAILROAD :

> It is important to note that the train dispatcher's computer screen identifies the name of each train on his territory, along with the engine number and the names of the crew members. Hence, it would have been a simple matter for the train dispatcher to look at the screen and state the name of the crew member to whom he intended to issue the mandatory directive.

B Report at §4.2.3.

As Mr. B notes, in synthesizing how critical the Railroad regulatory violations were, had the dispatcher not transmitted the mandatory directive until the receiving employee provided his name, identification and location, then the train dispatcher would have known that he was issuing the mandatory directive <u>to the wrong person, on the wrong train, at the wrong location</u>. As Mr. B notes,

> The intended recipient was Conductor W. H. D on K96021, Engine 471, at Hand [Virginia]. However, the mandatory directive was actually transmitted to locomotive Engineer X , on K95921, Engine 9011, at Branchville. Had train dispatcher J.C.C. (Doe) complied with Federal Railroad Safety Regulations and RAILROAD Operating Rules, he would not have issued the mandatory directive until the receiving employee stated his name, identification and location. At that point, it is reasonable to conclude that the train dispatcher would have surely recognized the error and would not have sent the mandatory directive which resulted in K95921, Engine 9011, traveling northbound through the Boykins and Branchville blocks; consequently, the head-on collision would have been prevented.

B Report at §4.2.3.

The fourth pertinent regulation and operating rule violation is as follows:

> **49 CFR 220.61** Radio Transmission of a Mandatory Directive (RAILROAD Operating Rule 420)
>
> (a) Each mandatory directive may be transmitted by radio only when authorized by the Railroad 's operating rules. The directive shall be transmitted in accordance with the Railroad 's operating rules and the requirements of this part.
>
> (b) The procedure for transmission of a mandatory directive is as follows:
>
> (1) The train dispatcher shall call the addressees of the mandatory directive and state the intention to transmit the mandatory directive.
>
> (2) Before the mandatory directive is transmitted, the employee to receive and copy shall state the employee's name, identification, location and readiness to receive and copy. . . .
>
> (4) After the mandatory directive has been received and copied it shall be immediately repeated in its entirety. After verifying the accuracy of the repeated mandatory directive, the train dispatcher or operator shall then state the time and name of the employee designated by the Railroad who is authorized to issue mandatory directives. . . . (Emphasis added)

Dispatcher Doe did not note the discrepancies between the mandatory directive that he issued and the read-back transmission by the locomotive engineer of northbound train K95921, Engine 9011, X . When the train engineer repeated back the Railroad blocks, Branchville and Boykins, in the *wrong order* from which the dispatcher provided them to the engineer, Dispatcher Doe failed to notice that the mandatory directive was being repeated from Engine 9011 and

not Engine 471, and he also failed to notice that the name of the locomotive engineer did not match any of the names of the train crew on southbound K96021.

As noted by the report of Paul B , there are additional multiple violations by Dispatcher Doe. Those particularized additional regulatory violations are outlined in his report, and are merely cumulative to the four separate violations outlined above in this motion for summary judgment.

Rule or Regulatory Violations by Train Crew, as Opposed to Dispatcher Doe

As can be seen in the outline above, there was also a mistake and operating rule violation committed by Engineer X in his communications with Dispatcher Doe outlined above. Engineer X admits this in his prior deposition, and has contended that the poor and garbled radio transmissions affected his hearing the precise words of the dispatcher. Irrespective of whether X violated a rule or regulation, Dispatcher Doe admitted his regulatory and rule violations in his deposition. B notes that because train crews cannot move on this type of "dark territory" without receiving mandatory directives from dispatchers like Mr. Doe, that Doe's violations were central to the cause of the head-on collision, and RAILROAD supervisor X also agreed that Doe violated several operating rules in acting on X 's transmission. It is clear that any crew member violations are merely cumulative, as engineer X 's violation would only add to the regulatory violations attributable to RAILROAD as and any and all regulatory violations of RAILROAD 's agents may be relied upon in supporting the regulatory violations outlined in this motion. There is no credible evidence that the related case

Plaintiffs (D , E or F) have any contributory fault, much less were the sole cause of the collision.

Strict Liability Must Be Applied Here

The sole issue for decision on partial summary judgment is whether even one of the pertinent FRA regulations, 49 C.F.R. §220.01 et seq., was violated by virtue of the dispatch communications of RAILROAD T dispatcher Doe, on September 22, 2005. In some FELA cases involving such regulatory violation issues, whether the alleged violation was also a cause of injuries may be reasonably contested. Here, it is plain that the dispatching communications were factually and legally directly connected to the resulting head-on collision and injuries. The uncontradicted evidence, including the deposition testimony, all compel the conclusion that plaintiffs are entitled to partial summary judgment on the FRA regulatory violations and their link to crew member injury causation as a matter of law, leaving only the determination of damages to the jury–which will result in a streamlined trial and will properly remove many days of trial covering liability issues not in material dispute.

The FELA Prohibits Contributory Fault Evidence Where a Railroad 's Regulatory Violation Leads to Worker Injury

The violation of a Railroad safety statute or Railroad regulation creates absolute liability on a Railroad , and bars a finding of contributory negligence by the Plaintiffs. Urie v. Thompson, 337 U.S. 163, 188 (1949). Also, courts across the country have not hesitated in ruling that the Railroad 's violation of a safety statute constitutes negligence per se. See, Affolder v. N.Y.C. & St LR,. Co. 339 US. 96 (1949); Gadsen v. Port Authority Trans-Hudson, 140 F3d 207 (2d Cir.

1998); Ries v. Nat'l RR Pass. Corp., 960 F.2d 1156, 1159 (3rd Cir. 1992); Bailey v. Norfolk & Western Ry. Co., 942 S.W.2d 404 (Mo. Ct. App.E.D. 1997).

Because it is so plain that the FRA regulations apply and were violated by RAILROAD under the circumstances of this case, it is anticipated (and has already been raised in depositions) that RAILROAD will still contend that one of the Plaintiffs' "contributory fault" or violation of a separate RAILROAD company-imposed written rule may have contributed to his injury. However, this Court should bar consideration of such employer defenses pursuant to the express provisions of the FELA, 45 U.S.C. §53 (no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee).

Also, any implied argument by RAILROAD that Plaintiffs somehow accepted any risk of injury constitutes inadmissible evidence under the FELA as well. 45 U.S.C.§54 (No employee shall be held to have assumed the risk of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee). Legion cases under the FELA have instructed that acceding to a supervisor's direct work request is not an employer defense as assumption of risk was abolished under the FELA. See e.g., Jenkins v. Union Pacific R. Co., 22 F 3d 305 (9th Cir. 1994).

If Plaintiffs violated a RAILROAD company rule or even another safety regulation, it is plain that such contributory fault (in theory only) would be

subsidiary and secondary to the central regulatory violation of the dispatch regulations by RAILROAD 's dispatcher. Both temporally and logically, the actions of any RAILROAD train crew member are inadmissible evidence in defense against the liability of RAILROAD for the regulatory violations outlined.

Plaintiffs Move *in limine* to Prohibit RAILROAD From Introducing Evidence of Plaintiff's Contributory Fault or Violation of any Company Rules in Relation to Safety Regulation Violations

Plaintiffs are moving for partial summary judgment as to Defendant RAILROAD T's violation of the safety regulations, specifically, the FRA radio communication regulations. Plaintiffs move the Court to affirmatively rule that contributory fault evidence is not admissible in defense to the regulation violation claims presented by Plaintiffs "related crew" members (with actions pending in this court). At trial, the only issue for the jury will be causally-related damages to the Plaintiff. Evidence of contributory fault, or violation of a federal regulation or company rule would be inadmissible pursuant to the FELA statutes noted, 45 U.S.C. sections 53, 54, and 54 (a), as detailed above, and also as detailed under Urie, 337 U.S. at 163; Pratico, 783 F 2d at 268; and Eckert, 828 F 2d at 187 cited above. Strict liability under the F.E.L.A. applies if the Plaintiffs' injuries here are caused in whole or in part by the Railroad 's violation of an FRA statute or regulation. ***The "in whole or in part" language is critical in this analysis***. Sometimes, skilled Railroad defense counsel assert that such contributory fault defenses are admissible because a Railroad worker's fault may constitute the "sole proximate cause" of the injuries, the one "exception" where a worker alleges a regulatory violation caused injuries. Here, such a defense is plainly

meritless and rises to the level of a frivolous defense interjected for an improper purpose-to delay and frustrate.

Should the Court rule in favor of Plaintiffs on this summary judgment motion, Plaintiffs will thereafter likely proceed at trial solely on the basis of regulation violations. Clearly, contributory fault evidence is prohibited by the FELA express provisions, even if Plaintiffs' summary judgment action is still outstanding at trial. Though Plaintiffs submit that this matter should be ruled on pre-trial by motion, the case of Baker v. RAILROAD , Inc., 581 N.E.2d 770 (Ill. App. 1991) is highly instructive and on these facts.

In Baker, the plaintiff was a RAILROAD freight conductor on a 1 to 1½ mile long freight train calling on industrial track areas. The RAILROAD engineer was situated over a mile away and was controlling the train's air brake system to move the train. Id. at 774. Plaintiff, the brakeman/conductor, claimed he was hurt when he was crossing over between two train cars to turn an angle cock. Id. at 776. While engaged in this task, a portion of plaintiff's leg was caught between a coupler knuckle when there was sudden movement of the train cars and he later suffered amputation of toes and a portion of his left foot due to the injury. Id. His claim was that the *sudden train movement* constituted a statutory Locomotive Inspection Act violation, and that contributory fault evidence was inadmissible.

The Baker case was submitted to the jury solely on the Locomotive Inspection Act violation count and the appeal involved Defendant RAILROAD 's claims that the plaintiff's contributory negligence was the sole cause of his

injuries. The Appeals Court affirmed the handling of rulings by the trial court and also confirmed that evidence of contributory negligence was properly barred on motion *in limine* during trial. Id. at 782.

There, the same defendant (RAILROAD) sought to offer various "worker fault" defenses at trial against plaintiff's federal statutory violation claims, and the Court on appeal analyzed the situation that had transpired at trial:

> More importantly, where, as here, plaintiff proceeded to trial solely on the Safety Appliance Act and Boiler Inspection [federal statutory] Act claims where liability is absolute upon proof of a defect and proximate cause, the admission of evidence concerning the violation of a safety rule could have seriously confused and misled the jury despite a successful proof of his case under the Boiler Inspection Act. (See Howard v. Baltimore & Ohio Chicago Terminal R.R. Co., (1945), 327 Ill. App. 83, 99-100, 63 N.E.2d 774, 781). **As such, this evidence concerned a concurrent rather than independent act of negligence on plaintiff's part, which is irrelevant and inadmissible in a case founded on a violation of the Boiler Inspection Act. Indeed, the court below expressed its concern at the pretrial motion *in limine* hearing that a sole-proximate-cause issue raised by the defense could be a back-door way of getting around the prohibition against evidence of contributory or comparative negligence.**

Id. at 779. (Emphasis supplied).

The Plaintiffs suggest Defendant RAILROAD may offer the same red herrings in this cause and in its opposition brief, and that the Court should strike such defenses against the regulatory violations for all the reasons explained above.

This Motion for Partial Summary Judgment is Ripe

Plaintiffs anticipate that Defendant RAILROAD may argue to this Court that the Plaintiffs' Motions for Partial Summary Judgment are not ripe at this time. This argument is without merit as explained below:

Defendant has had more than adequate time to investigate all circumstances surrounding this head-on collision. First, it held a comprehensive company internal investigation wherein it required its employees to provide statements. This particular inquiry is *inadmissible* in this civil FELA case, but is relevant simply to show the extent of Defendant's ability to investigate all circumstances surrounding the accident. This occurred during 2005, and was conducted on two separate dates.

Subsequently, Defendant battled against one of the injured RAILROAD crew members in his FELA litigation case, S v. RAILROAD , Portsmouth Circuit Court, for over a year and the case was one week before trial when finally settled. Defendant RAILROAD provided all of its expert opinions and its expert and company personnel were produced for extensive depositions. As far as crew members including the Plaintiffs before this Court, Defendant took the extensive deposition of Mr. S , who was the conductor of train K95921 (his other crew members were Engineer X and Conductor Trainee E). In connection with the S case, Defendant also conducted the deposition, for all issues surrounding "liability", of the crew members in Mr. S ' train, Engineer X and Conductor Trainee E (whose action is pending before this Court). *Defendant RAILROAD extensively developed all information relating to each and every crew members' acts or omissions in the S litigation previously conducted*.

As for the other train, K96021 (which includes Plaintiffs D and F), according to Paul B 's prior deposition in S v. RAILROAD as well as per his comprehensive report, there was no act or omission of this train crew that was

relevant or any action or omission that was a rule or regulatory violation. Even if this court was to accept that this crew violated any RAILROAD rule or a regulation (a falsity), it would not be germane to this motion because once a Railroad 's regulatory violation contributes, in whole or in part, to a resulting injury, the contributory fault or additional acts or omissions of other RAILROAD crew members will not relieve the Railroad from its strict liability for the regulatory violation. In other words, Mr. B 's report finds no violations of any nature or description on crew members in train K96021. Secondarily, even if Defendant was to argue that there is some conceivable "relevant" act or omission of this crew, it would only combine with the clear regulatory violations of Defendant's dispatcher Doe and would be a "red herring" to any substantive issue about Defendant's relevant regulatory violations. RAILROAD extensively deposed expert B in the S litigation, and it is abundantly clear that RAILROAD will not produce any affidavit or evidence to contest the regulatory violations of dispatcher Doe, which he himself verified in deposition, and which RAILROAD supervisor X confirmed in deposition. No further discovery or expert time frame will alter these simple truths.

For these reasons, there is no reason to delay hearing on this motion. The deposition of the related crew members may be relevant to many issues relating to *damages* but will not affect the liability of Defendant RAILROAD for the subject regulatory violations.

Conclusion

Plaintiffs in the three "related" FELA cases move the Court as follows:

1. For summary judgment ruling that RAILROAD has violated at least four Railroad regulations as outlined herein;

2. That no contributory crew fault evidence will be permitted at trial in defense of regulatory violations, as to the D , E or F trials (whether relating to RAILROAD company rule violations or general evidence);

3. That trial will be limited to damages evidence which each related Plaintiff must prove is causally connected with the train collision.

4. Related case Plaintiffs E and D adopt and join in this motion for summary judgment.

[clients]

By: [Signed by R. N. Shapiro]
Of Counsel

Richard N. Shapiro, Esquire
Va Bar #24324
., SHAPIRO, COOPER,
LEWIS & APPLETON, P.C.
1294 Diamond Springs Road
Virginia Beach, VA 23455
(757) 460-7776
(757) 460-3428 (fax)
E-mail: rshapiro@hsinjurylaw.com

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ATTACHMENT INDEX

1a X Deposition, Exhibit 1 (transcript/notes)

1b X Deposition, Exhibit 8 (transcript/notes)

1c Collision Scene Photographs

2 J. Doe Deposition (S v. RAILROAD)

3 P. B Affidavits

4 P. B Report

5 P. B Deposition (S v. RAILROAD)

6 G. X Deposition - Excerpts (S v. RAILROAD)

7 G. X Deposition (S v. RAILROAD)

8 W. D Affidavit

9 D. E Affidavit

10 A. F Affidavit