



## I.

In its first motion, CSX seeks to preclude plaintiff from offering any evidence concerning the fact that he was employed by the National Railroad Passenger Corporation (Amtrak) at the time of his injury. Plaintiff had been working for Amtrak as a machinist when he was hired by CSX in March 1995 and, unbeknownst to CSX, he continued to work eight-hour shifts for both CSX and Amtrak until the December 2, 1995 accident. Plaintiff's shifts were usually back-to-back, meaning that on a usual work day he worked 16 hours straight and then had eight hours off. CSX contends that by working this second job plaintiff was in violation of the Hours of Service Act, 49 U.S.C. § 21101 et. seq., and that he should not be allowed to profit from his violations of the law by recovering lost income on the basis of his jobs with both Amtrak and CSX.

The Hours of Service Act ("HSA") was enacted to promote railroad safety by limiting the time that employees involved in the movement of trains could remain on duty and by establishing minimum off-duty or rest periods. See generally Brotherhood of Locomotive Engineers v. Atchison, Topeka Santa Fe R.R. Co., 516 U.S. 152, 153-54 (1996). With exceptions not relevant here, the Act provides:

[A] railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty--

- (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
- (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

49 U.S.C. § 21103(a). A "train employee" is defined as "an individual engaged in or connected

with the movement of a train, including a hostler.”<sup>2</sup> 49 U.S.C. § 21101(5). It is undisputed that in his employment with CSX plaintiff was a “train employee” for purposes of the Hours of Service Act.

Even assuming that plaintiff’s schedule was inconsistent with the dictates of the HSA,<sup>3</sup> I cannot agree with CSX that plaintiff was in violation of the Act. The HSA makes it unlawful for a “railroad carrier and its officers and agents” to “require or allow” a train employee to exceed the prescribed on-duty hourly limits. It does not purport to prohibit a train employee from exceeding the limits by working for two employers on his own initiative. Not surprisingly in the face of the statute’s plain import, CSX fails to provide a single authority holding a train employee, as opposed to a railroad employer, in violation of the Act. The only authority on the matter suggests, to the contrary, that a train employee cannot violate the Act. See United States v. North Pacific Railroad, 224 F. Supp. 303, 305 (D. Minn. 1963) (the HSA is “merely designed to limit the right of the railroad to require that its employees work overtime. There is no attempt to control the activities of the employees with regard to ‘moonlighting.’”).

I conclude from the plain language of the Act that plaintiff, as a “train employee,” could not violate the HSA and that the Act therefore fails to provide a basis upon which to preclude

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<sup>2</sup> A hostler is “one who takes charge of a railroad locomotive after a run[;] one who moves and services locomotives in enginehouse or roundhouse territory.” “Hostling” is “the act or process of handling a locomotive between runs that includes taking it to the enginehouse and delivering it to the road crew.” Webster’s Third New International Dictionary, unabridged (1968).

<sup>3</sup> Plaintiff argues that he was not a “train employee” insofar as his employment with Amtrak was concerned and that his schedule was not inconsistent with the HSA. See 49 U.S.C. § 21103(b) (setting forth rules as to what is “off duty” time, what is “on duty,” and what is neither (so-called “limbo” time)); see generally Brotherhood of Locomotive Engineers, 512 U.S. at 156-161 (applying rules of § 21103(b) to time train crew members spent waiting for transportation back to terminal after being on-duty). I need not decide the point because, as set forth below, I conclude that plaintiff could not be held to have violated the Act even if his schedule ran afoul of its prescriptions.

evidence of plaintiff's earnings from Amtrak.<sup>4</sup> Accordingly, defendant's motion in limine will be denied.

## II.

In its second motion in limine, CSX seeks to preclude certain testimony by plaintiff's liability expert, Mr. Max E. Ferguson, P.E., concerning a derailer installed on the locomotive servicing track near the turntable pit. The gist of Mr. Ferguson's expert report is that the derailer was negligently installed for a variety of reasons and therefore failed to derail the locomotives plaintiff was moving before they reached the turntable pit. The disputed portion of Mr. Ferguson's report concerns the placement of the derailer:

In order to prevent any likelihood of a locomotive intruding on the turntable, providing it derails as intended, it [the derailer] should be placed at least 50 feet away. The one involved in this case was placed only about 28 feet from the edge of the pit. The 50 foot distance is generally recognized as reasonable in this type application. Under Federal Railroad Administration Regulation 49 CFR 218, Railroad Operating Practices, the 50 foot distance is used in two locations. The first, which is appropriate in this case, applies in a locomotive servicing area where speed is limited to 5 miles per hour. 218.29(1)(4) states that derails shall be placed at least 50 feet from the equipment to be protected. 218.97(a)(3), which deals with protecting workers in occupied camp cars in a 5 mph speed area, also states that when a derail is used it should be placed at least 50 feet from the end of the camp cars to be protected.<sup>5</sup>

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<sup>4</sup> Nor do I see any general inequity in allowing plaintiff to offer evidence of his two jobs. The HSA plainly places on railroad carriers such as CSX, if on anyone, the duty to patrol train employees' hours. The record suggests that CSX did not inquire of plaintiff whether he held or intended to hold any other employment when he worked for CSX, and that plaintiff did not volunteer any such information. There is no evidence as to whether CSX had any practices or policies concerning employee moonlighting or informed plaintiff of any such policy. On this record, therefore, CSX will not be heard to complain that plaintiff might recover more damages for lost income than he might have been permitted to earn had CSX attempted to ensure that his schedule complied with the dictates of the HSA.

<sup>5</sup> Section 218.29 provides in relevant part:

Characterizing these statements as opining that the derailer's placement "violated" § 218.29 of the FRA's regulations, CSX contends that such testimony is irrelevant and misleading and should be precluded because the regulation was not applicable to the locomotive pit track on

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Instead of providing blue signal protection for workers in accordance with § 218.27, the following methods for blue signal protection may be used:

(a) When workers are on, under, or between rolling equipment in a locomotive servicing track area:

- (1) A blue signal must be displayed at or near each switch providing entrance to or departure from the area;
- (2) Each switch providing entrance to or departure from the area must be lined against movement to the area and locked with an effective locking device; and
- (3) A blue signal must be attached to each controlling locomotive at a location where it is readily visible to the engineman or operator at the controls of that locomotive;
- (4) If the speed within this area is restricted to not more than 5 miles per hour a derail, capable of restricting access to that portion of a track within the area on which the rolling equipment is located, will fulfill the requirements of a manually operated switch in compliance with paragraph (2) of this paragraph (a) when positioned at least 50 feet from the end of the equipment to be protected by the blue signal, when locked in a derailing position with an effective locking device, and when a blue signal is displayed at the derail;

Section 218.27 requires, inter alia, that certain blue signal protection be provided for track switches "[w]hen workers are on, under, or between rolling equipment on track other than main track."

Section 218.79 provides in relevant part:

Instead of providing protection for occupied camp cars in accordance with § 218.75 or § 218.77, the following methods of protection may be used:

(a) When occupied camp cars are on track other than main track:

- (1) A warning signal must be displayed at or near each switch providing access to or from the track;
- (2) Each switch providing entrance to or departure from the area must be lined against movement to the track and locked with an effective locking device; and
- (3) If the speed within this area is restricted to not more than five miles per hour, a derail, capable of restricting access to that portion of track on which the camp cars are located, will fulfill the requirements of a manually operated switch in compliance with paragraph (a)(2) of this section when positioned at least 50 feet from the end of the camp cars to be protected by the warning signal, when locked in a derailing position with an effective locking device, and when a warning signal is displayed at the derail.

which plaintiff's accident occurred. In the alternative, CSX contends that the proposed testimony constitutes a "legal opinion" that the derailer's placement violated § 218.29 and thus impermissibly intrudes upon a determination that is the responsibility of the trial court.

As plaintiff points out, however, "nowhere in his report does Mr. Ferguson state that CSX was in violation of any FRA regulations." (Pl. B. at 4.) Contrary to CSX's characterization of the report, it appears clear to me that Mr. Ferguson refers to both § 218.29 and § 218.79 simply to support his view that a derailer should be placed at least 50 feet from the thing to be avoided -- that is, the turntable pit -- where trains are limited to speeds of five miles per hour. Thus, before citing the specific regulations, Mr. Ferguson asserts that the "50 foot distance is generally recognized as reasonable in this type application." And he does not say that § 218.29 applied to the context of this case but that it was "appropriate," which plainly just means "instructive" or "analogous."

Taking this view of Mr. Ferguson's report, and assuming that the relevance of the derailer's placement to plaintiff's claim is established at trial, the regulations are clearly relevant and probative as to the reasonableness of the derailer's placement. Insofar as CSX intends to suggest the contrary (and I am not sure it does), it offers no argument or authority in support of its position. Accordingly, to the extent plaintiff seeks to introduce testimony regarding §§ 218.29 and 218.79 as evidence of whether the derailer was a prudent and reasonable distance from the turntable pit, I can see no reason at this stage to preclude the evidence.

This conclusion does not, however, entirely dispose of the matter because plaintiff, despite insisting that Mr. Ferguson's report never states that the derailer's placement violated FRA regulations, nonetheless appears to hint that he might wish to offer testimony to the effect

that § 218.29 was violated.<sup>6</sup> Accordingly, it appears prudent for me to make clear that any such testimony by Mr. Ferguson will be precluded. This is so for several reasons. First, as already noted, Mr. Ferguson's report does not suggest that § 218.29 was actually applicable to the derailer at issue or provide the bases for any such conclusion. Accordingly, any testimony as to such matters would be precluded since defendant has not been provided with proper notice and opportunity to prepare a rebuttal of the testimony. See Fed. R. Civ. Proc. 26(a)(2) (an expert report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor"). Second, plaintiff has expressly disclaimed that the report asserts that FRA regulations were violated by the derailer's placement. And third, Mr. Ferguson's opinion that § 218.29 was violated would not assist the trier of fact and therefore is not admissible as expert opinion. Expert opinion testimony is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Here, if evidence is presented of facts upon which it could be found that § 218.29 was applicable to the CSX locomotive servicing track and that the derailer was not placed as prescribed by the regulation, the jury will not require any "technical, or other specialized knowledge" to assist it in determining whether the regulation was violated. This "ultimate issue" is a simple one as to which expert testimony could only confuse matters or be prejudicial. Accordingly, I find that such testimony would not be admissible under Rule 702 and will be

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<sup>6</sup> Plaintiff does contend at one point in his brief that the derailer was in violation of § 218.29(a)(4), see Pl. B. at 3, and he also seems to argue that an expert should be allowed to testify on the matter. See id. at 4. Thus, although defendant appears to misapprehend Mr. Ferguson's report, its concerns do not appear entirely misplaced.

precluded.<sup>7</sup>

ORDER

AND NOW, this        day of January, 1999, upon consideration of defendant's motions in limine to preclude certain evidence and plaintiff's response thereto, it is hereby ORDERED:

(1) defendant's motion to preclude plaintiff from offering evidence of his employment with or earnings from Amtrak at the time of his injury is DENIED;

(2) defendant's motion to preclude plaintiff from offering certain expert testimony of Max E. Ferguson is DENIED IN PART and GRANTED IN PART. The motion is DENIED as to testimony that the derailler was an unreasonably insufficient distance from the turntable pit as shown in part by Federal Railroad Administration regulations, 49 C.F.R. §§ 218.29 and 218.79, and GRANTED as to testimony that the derailler's placement violated the regulations.

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THOMAS N. O'NEILL, JR., J.

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<sup>7</sup> Plaintiff argues that expert opinion on the ultimate issue of whether § 218.29 was violated is admissible under Rule 704, which provides that "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces and ultimate issue to be decided by the trier of fact." Since I have found that the proposed testimony is not admissible under Rule 702, however, it is not "otherwise admissible" opinion testimony and Rule 704 is inapplicable.