Tentative Rulings for February 1, 2023
Department 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

_____

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(24)

Tentative Ruling

Re: ***Ramirez v. Ford Motor Company, a Delaware Corporation***
Superior Court Case No. 20CECG01742

Hearing Date: ~~February 1, 2023~~ (Dept. 503) – *None*. *See below*.

Motion: Christopher M. Lovasz' Motion to be Relieved as Counsel

Tentative Ruling:

To order off calendar.

Explanation:

Defendant filed a "Notice to State Court and Adverse Party of Removal of Action to Federal Court" on July 27, 2020. Once a defendant exercises its right to remove the action to federal court, this automatically ousts the state court of jurisdiction, such that any order this court made on this motion would be void:

> Once a notice of removal is filed, "the State court shall proceed no further unless and until the case is remanded." 28 U. S. C. § 1446(d). The state court "los[es] all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment [are] not ... simply erroneous, but absolutely void." *Kern v. Huidekoper*, 103 U.S. 485, 493, 26 L.Ed. 354 (1881). "Every order thereafter made in that court [is] *coram non judice*," meaning "not before a judge." *Steamship Co.* v. *Tugman*, 106 U.S. 118, 122, 1 S.Ct. 58, 27 L.Ed. 87 (1882); Black's Law Dictionary 426 (11th ed. 2019). See also 14C C. Wright, A. Miller, E. Cooper, J. Steinman, & M. Kane, Federal Practice and Procedure § 3736, pp. 727–729 (2018).

(*Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano* (2020) __ US __, __, 140 S.Ct. 696, 700, brackets in the original, footnote omitted.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 1/30/23.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Harris v. BNSF Railway Company***
Superior Court Case No. 20CECG01310

Hearing Date: February 1, 2023 (Dept. 503)

Motion: by Defendant for Summary Judgment, or in the alternative, for Summary Adjudication

Tentative Ruling:

To deny defendant's motion for summary judgment, and the alternative motion for summary adjudication. (Code Civ. Proc. § 437c.)

Explanation:

Count Five—Violation of the Federal Locomotive Inspection Act:

Defendant first moves for summary adjudication of plaintiff's claim for violation of the Federal Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, *et seq.* under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*.

Under 45 U.S.C. section 51,

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, … shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, … for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(45 U.S.C. § 51.)

The LIA states that, "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances – [¶] (1) are in proper condition and safe to operate without unnecessary danger of personal injury…" (49 U.S.C.A. § 20701, subd. (1).)

"The LIA and FELA should be read together as companion statutes. The LIA supplements the FELA by imposing on interstate railroads a duty to provide safe equipment. Because the LIA does not create an independent cause of action for personal injuries, injured parties rely on the FELA to recover damages caused by a LIA violation." (*Munns v. CSX Transp., Inc.* (N.D. Ohio 2008) 579 F.Supp.2d 924, 929, internal citations omitted.) "In cases arising under FELA, 'the right of the jury to pass on factual issues must be liberally construed.'" [Citation.] '[T]he case must not be dismissed at the

summary judgment phase unless there is absolutely no reasonable basis for a jury to find for the plaintiff." (*Haas v. Delware and Hudson Ry. Co.* (2d Cir. 2008) 282 Fed.Appx. 84, 87.)

"The LIA imposes strict liability on railroad carriers for violating the Act's safety standards. [¶] Three requirements must exist for the LIA to apply: 1) plaintiff must show the locomotive was 'in use' at the time of the injury; 2) the locomotive must be 'on [defendant's] railroad' at the time of the injury; and 3) plaintiff must prove that the condition of the locomotive created an unnecessary danger of personal injury. [¶] A railroad can violate the LIA by either: 1) failing to comply with regulations issued by the Federal Railroad Administration [FRA], or 2) breaching the broad duty to keep its locomotives' parts and appurtenances in proper condition and safe to operate without unnecessary danger of personal injury." (*Munns v. CSX Transp., Inc., supra,* 579 F.Supp.2d at p. 932, internal citations omitted.)

Here, defendant argues that plaintiff cannot prove that the locomotive was "in use" at the time of the injury in order for strict liability under the LIA to attach. "Whether a locomotive is 'in use' under the Act is 'a question of law for the trial court to decide and not a question of fact for the jury.'" (*McGrath v. Consolidated Rail Corp.* (1st Cir. 1998) 136 F.3d 838, 842.) Moreover, federal courts have interchangeably applied case law interpreting the LIA to the Federal Safety Appliance Act ("FSAA") and vice versa. (*Phillips v. CSX Transp., Inc.* (4th Cir. 1999) 190 F.3d 285, 288 fn. 2 referencing the LIA's predecessor, the Boiler Inspection Act; see also *Holfester v. Long Island R. Co.* (2nd Cir. 1966) 360 F.2d 369, 373.)

There is no definitive test adhered to the "in use" element. The results vary among the federal circuit courts. Defendant notes that the Ninth Circuit has not issued an opinion on this subject, and asserts that the test applied by the Seventh Circuit in *Ledure v. Union Pac. R.R. Co* (7th Cir. 2020) 962 F.3d 907 is controlling because the holding was affirmed by the United States Supreme Court by an equally divided court in *Ledure v. Union Pacific Railroad Company* (2022) 142 S.Ct. 1582. "Although the affirmance by an equally divided court is conclusive on the rights of the parties to that appeal, no principle of law is settled by the affirmance, and an unexplained affirmance by an equally divided Supreme Court is a judgment not entitled to precedential weight, no matter what reasoning may have supported the judgment." (2A Van Arsdale, *et al.*, Federal Procedure, Lawyers Edition (2022 Update) § 3:866; *Laird v. Tatum* (1972) 409 U.S. 824, 837-838.)

On the other hand, plaintiff relies on the Supreme Court's decision in *Brady v. Terminal Railroad Ass'n* (1938) 303 U.S. 10, and interprets it as determining a locomotive to be "in use" when it has not been withdrawn from use, or *only* when it has reached a place of repair. (*Id*. at p. 13.) However, this appears to be an overly narrow construction of the holding in *Brady*. "In *Brady*, a rail employee was injured while inspecting a car that was placed on a receiving track temporarily for an inspection. [Citations.] The Court held that such a car is 'in use' so long as it would continue to its next destination if it passed inspection. [Citations.] The Court noted that the case was not a situation in which a defective car had reached a place of repair. [Citations.] *Brady* is distinguishable, however, because the locomotive in that case never ceased to be 'in use' during its temporary stop on the receiving track because it was 'still in use, though motionless.' "

(*Wright v. Arkansas & Missouri R.R. Co.* (8th Cir. 2009) 574 F.3d 612, 621.) Similarly, the court in *Trinidad v. Southern Pacific Transp. Co.* (5th Cir. 1991) 949 F.2d 187 distinguished *Brady* by "pointing out that the issue in that case had been whether use had ended during a temporary stop and that the Supreme Court had concluded that because the train was *in the midst of its journey* when the injury occurred; it had not been withdrawn from use." (Annot. (2013) 78 A.L.R. Fed. 2d 333 (2022 supp.) § 11, emphasis added; *Trinidad v. Southern Pacific Transp. Co.* (5th Cir. 1991) 949 F.2d 187, 189.)

Here, there are no facts or allegations indicating that the locomotive units were in use during or prior to the time plaintiff had inspected them and bad ordered the middle unit, only that plaintiff was to pick up the three-unit train consist from the Calwa Yard. Since it has not been shown that the locomotive was in the midst of its journey when plaintiff was injured, there is an insufficient showing that *Brady* applies to the case at bar.

Nonetheless, defendant discusses four tests for the "in use" requirement developed by the Seventh, Fifth, Eighth, and Fourth Circuits, and indicates that under each test, the undisputed facts show that the locomotive here, was not "in use" at the time of the subject injury.

- *Seventh Circuit Test*

In *Ledure v. Union Pac. R.R. Co* (7th Cir. 2020) 962 F.3d 907 affirmed by an equally divided court in *Ledure v. Union Pacific Railroad Company* (2022) 142 S.Ct. 1582 (collectively, "*Ledure*"), the court applied the test in *Lyle v. Atchison T. & S.F. Ry. Co.* (7th Cir. 1949) 177 F.2d 221, which held that "'to service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it.'" (*Ledure v. Union Pac. R.R. Co* (7th Cir. 2020) 962 F.3d 907, 910 citing *Lyle v. Atchison T. & S.F. Ry. Co.* (7th Cir. 1949) 177 F.2d 221, 223.) The Court in *Lyle* reasoned that the locomotive was not in use because (1) the engine had reached the end of its run; (2) the engineer and fireman had left and the hostler had taken charge; and (3) it had been moved to the service track and inspection pit to be serviced by plaintiff and prepare the engine for further future use. (*Lyle, supra,* 177 F.2d at 222-223.) Similarly, the court in *Ledure* determined that the locomotive was not in use where it "was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." (*Ledure v. Union Pac. R.R. Co, supra,* 962 F.3d at 910.)

- *Fifth Circuit Test*

In *Trinidad v. Southern Pac. Transp. Co.* (5th Cir. 1991) 949 F.2d 187, the court applied a "bright line test" and held that a train is not in use until the switching process is complete, the train is assembled, and all pre-departure inspections are complete. (*Id.* at p. 188-189.)

- *Eighth Circuit Test*

The Eighth Circuit Court of Appeals has adopted a "totality of the circumstances" test. In *Wright v. Arkansas & Missouri RR. Co.* (8th Cir. 2009) 574 F.3d 612, the appellate

court determined that where the train was "blue flagged" for repairs[1], the inspector had placed locks on the switch, and the locomotive was still undergoing inspection or service, it was not "in use" for the purposes of the LIA. (*Id.* at p. 621-622.)

- *Fourth Circuit Test*

In *Deans v. CSX Transp., Inc.* (4th Cir. 1998) 152 F.3d 326, the appellate court applied a "multiple factors test" consisting of: (1) the location of the train at the time of incident, and (2) the activity of the injured party to determine whether the train was considered to be in use. (*Id*. at p. 329.) There, the court reasoned that where a train was standing on a track in the rail yard in preparation for imminent departure, as opposed to being in storage or waiting to be moved into a repair location, and the plaintiff conductor was attempting to release the hand brakes to put help put the train into motion, the train was "in use". (*Id*. at p. 330.)

In the absence of a controlling United States Supreme Court decision on a federal question, a state court is free to adopt one of the divergent lines of authority. "[T]he decisions of the lower federal courts, although entitled to great weight, are not binding on state courts. '[T]he decisions of the lower federal courts on federal questions are merely persuasive. ... Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law.' [Citation.]" (9 Witkin, Cal. Procedure (6th ed. 2022) Appeal § 527.) Where the federal circuits are in conflict, the authority of the Ninth Circuit is entitled to no greater weight than decisions from other circuits. (*Ibid.*; *Debtor Reorganizers, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 696.) "[W]here there is more than one appellate court decision, and such appellate decisions are in conflict ... the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions. [Citations.]" (*Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034.)

A review of the federal case law suggests that the weight of authority holds that if a train is stationary in a roundhouse waiting for or undergoing service and repair, the train is not "in use." (*Lyle v. Atchison T. & S.F. Ry. Co.* (7th Cir. 1949) 177 F.2d 221, 222.) However, if the train or car has been serviced and is being moved or is ready to be moved to the main line it is "in use," even if not all inspections have been completed. (*Angell v. Chesapeake and O. Ry. Co.* (4th Cir. 1980) 618 F.2d 260, 261; *Deans v. CSX Transp., Inc., supra,* 152 F.3d at 328; *Wright v. Arkansas & Missouri RR. Co., supra,* 574 F.3d at 620-21; *McGrath v. Consolidated Rail Corp., supra,* 136 F.3d at 842; *Holfester v. Long Island R. Co.* (2d Cir. 1966) 360 F.2d 369, 372.) With the exception of the Fifth Circuit's decision in *Trinidad*, no single factor, by itself, has been held to be dispositive in any of these cases. As a result, it appears that the majority view is to apply a multifactor analysis in consideration of the factual circumstances of each case. Thus, the court will follow the totality of the circumstances at the time of the injury test adopted by the Eighth Circuit in *Wright*.

[1] "The blue flag is widely recognized throughout the railroad industry as a signal, warning crews not to move locomotives in the surrounding area." (*Wright v. Ark & Mo. RR. Co.* (8th Cir. 2009) 574 F.3d 612, 622.)

Here, the undisputed facts show that during all relevant times, defendant employed plaintiff as a conductor. (UMF No. 17) As part of his employment duties, on June 17, 2019, plaintiff was assigned to transport a three-unit train from the Calwa Yard to Conejo, California in order to pick up 100 empty grain cars, and then travel to Bakersfield, California. (UMF No. 39.) The three-unit train was waiting on the runaround track and should have been ready for departure after plaintiff conducted a visual inspection and released the handbrakes. (UMF No. 40-41.) All track switches were pre-lined for movement onto the mainline. The visual inspection was completed and engineer Fred Garcia had signed the daily inspection card for the middle unit, Locomotive 4695. (UMF No. 42-43.) Upon boarding Locomotive 4695, plaintiff noticed oil on the walkway and reported it to the Trainmaster on duty, Andrew Adams. (UMF No. 44-45.) Trainmaster Adams instructed plaintiff to bad order Locomotive 4695, set it out on the runaround track, and then depart with a two-unit train consist to complete their road job assignment. (UMF No. 47.) Once Locomotive 4695 was set out on the runaround track, plaintiff needed to line Switch 5550 in order to depart from the Visalia lead instead of the runaround track as initially planned and previously lined. (UMF No. 49.) As plaintiff was lining Switch 5550, it abruptly stopped halfway, causing his alleged injuries. (Exhibit 10 to Plaintiff's Table of Evidence, 103:8-24, 111:8-112:3; Exhibit 8 to Plaintiff's Table of Evidence, 41:19-42:2.)

Unlike many of the cases cited by both parties, Locomotive 4695 was neither being serviced in a place of repair, nor operating on the main line. Instead, Locomotive 4695 was set out on the runaround track and it is unclear whether the ultimate destination for Locomotive 4695 would be to be routed onto its next destination or to be serviced in a place of repair. Of notable difference, here, Locomotive 4695 was previously a part of the three-unit train consist that would have otherwise been ready to depart if not for the oil discovered on the walkway of Locomotive 4695. All of the necessary track switches were pre-lined for movement of the three-unit train consist onto the mainline. However, since Locomotive 4695 was set out from the three-unit consist onto the runaround track, plaintiff had to depart with the remaining two-unit train consist from the Visalia lead instead of on the runaround track, which was previously planned and lined for. As a result, plaintiff was required to line Switch 5550 in order to depart and plaintiff was allegedly injured while attempting to line Switch 5550.

Neither party cites to any case involving circumstances where the plaintiff's injury occurred while a defective or inoperable locomotive unit was being set out in order to depart with the remaining locomotives, or during activities to allow for the departure of the remaining locomotive units. However, it is clear that plaintiff was required to throw the subject switch in furtherance of operating a locomotive train. In other words, plaintiff's actions resulting in the alleged injury were undertaken while attempting to operate a locomotive train, and thus, the court determines the subject locomotive to be "in use" at the time of plaintiff's injury.

Defendant further argues that plaintiff's injury is too attenuated from the alleged violation of the LIA to support a finding of liability against defendant. However, defendant fails to cite to any case illustrating a finding that the LIA was inapplicable to the plaintiff's claims in such a circumstance. When an action for violation of the LIA is prosecuted as an action under the FELA, the FELA causation standard applies. "[T]he Supreme Court announced a relaxed test for establishing causation in FELA cases in its

landmark decision…" in *Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500. (*Richards v. Consolidated Rail Corp.* (6th Cir. 2003) 330 F.3d 428, 433.)

> Courts in FSAA cases (and FELA and BIA cases as well) should focus on whether a reasonable jury could conclude that the defective appliance played any part, even the slightest, in bringing about the plaintiff's injury. This means that if a reasonable jury could find that the plaintiff's injury "was within the risk created by" the defective appliance, the plaintiff's right to a jury trial should be preserved. For example, if as a result of a defective appliance a plaintiff is required to take certain actions and he or she is injured while taking those actions, the issue of causation generally should be submitted to a jury.

(*Id*. at p. 437.)

However, if the alleged violation of the LIA "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury," courts have held that the required causal link between the LIA and the employee's injury was not established. (*Davis v. Wolfe* (1923) 263 U.S. 239, 241; *Green v. River Terminal Ry. Co.* (6th Cir. 1985) 763 F.2d 805, 810.) The court in *Richards* discusses possible examples where a court could reasonably find no causation as a matter of law: where "a train goes into an emergency stop due to defective air brakes; and an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured." (*Richards v. Consolidated Rail Corp., supra,* 330 F.3d at 437, fn. 5.)

Here, as previously discussed, plaintiff was required to throw the subject switch in furtherance of operating a locomotive train. Specifically, plaintiff would not have been required to throw the subject switch but for the need to depart the Calwa Yard from a different lead due to the setting aside of the bad-ordered unit. Plaintiff's alleged injuries were not the result of an intervening or superseding cause unrelated to defendant railroad. Nor was the circumstance created by the LIA violation merely incidental to plaintiff's injuries, as plaintiff has proven that he could not proceed with his job assignment without lining Switch 5550. A reasonable jury could readily infer from the circumstances here that the oil on Locomotive 4695 and the allegedly defective switch could have resulted in plaintiff's injuries. Therefore, the court will not grant the motion based on any alleged lack of evidence that the defect(s) caused the accident.

Defendant's further argument that courts have generally refused to apply the LIA to locomotives involved in switching operations, is unpersuasive. Defendant relies on *Trinidad v. Southern Pac. Transp. Co.* (5th Cir. 1991) 949 F.2d 187, *United States v. Northern Pac. Ry. Co.* (1920) 254 U.S. 251, and *DiFrischia v. New York Cent. R. Co.* (3rd Cir. 1962) 307 F.2d 473 to contend that in general, "courts have not applied the Act to trains involved in switching operations – those procedures by which the cars and engines are uncoupled, moved, and reassembled – even though such trains are in motion." (*Trinidad v. Southern Pac. Transp. Co., supra,* 949 F.2d at 188-189, internal citations omitted.) However, many federal cases applying the LIA or its predecessor the BIA, have held that a locomotive was "in use," or have declined to hold that locomotive was not "in use,"

where the plaintiff's injury occurred during locomotive switching or train assembly activities. (See *Raudenbush v. Baltimore & O.R. Co.* (3d Cir. 1947) 160 F.2d 363; *Angell v. Chesapeake and O. Ry. Co.* (4th Cir. 1980) 618 F.2d 260; *McGrath v. Consolidated Rail. Corp.* (1st Cir. 1998) 136 F.3d 838.)

Therefore, the court will not grant the motion for summary adjudication of the fifth count for violation of the LIA.

Counts One, Two, Three, and Four—Negligence and Violations of Federal Safety Regulations:

Next, defendant moves for summary adjudication of plaintiff's FELA claims as to the first, second, third, and fourth counts for negligence and violations of Federal Safety Regulations, 49 Code of Federal Regulations, sections 213.135, 213.233, and 213.235.

"Under FELA, an employer has a duty to provide its employees with a reasonably safe workplace, including safe equipment. If an employee is injured because of an unsafe condition, the employer is liable 'if its negligence played any part, even the slightest, in producing the employee's injury.' The burden remains on the employee, however, to show the employer was negligent. Whether an employer has breached its duty of care is measured by 'the degree of care that persons of ordinary, reasonable prudence would use under similar circumstances and by what these same persons would anticipate as resulting from a particular condition.' In other words, the employer's duty under FELA to maintain a safe workplace turns in a general sense on the reasonable foreseeability of harm. Thus, an employer is not liable if it had no reasonable way of knowing about the hazard that caused the employee's injury." (*Peyton v. St. Louis Southwestern Ry. Co*. (8th Cir. 1992) 962 F.2d 832, 833, internal citations omitted.)

"In order to recover pursuant to the FELA, a plaintiff must show [¶] [1] that he was injured while in the scope of his employment, [2] which employment is in furtherance of the railroad's interstate transportation business, [3] that his employer was negligent, and [4] that his employer's negligence played some part in causing the injury for which compensation is sought under FELA." (*Green v. River Terminal Ry. Co*. (6th Cir. 1985) 763 F.2d 805, 808, internal citations omitted.)

"'[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence.' … In the context of conduct which violates an established standard, there must be evidence 'of prior disregard of the rule which would "warrant [ ] a finding of the defendant's knowledge of the practice and of its negligence in the performance of its duty to enforce the rule".' However, 'the particular and exact manner of the accident need not be foreseen.' 'The test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that an injury might occur....'"'" (*Ibid*, internal citations omitted.)

Here, defendant relies on *Haas v. Delware and Hudson Ry. Co.* (2d Cir. 2008) 282 Fed.Appx. 84 to further argue that the switch was not defective, simply because plaintiff thought it was hard to throw. Moreover, even if the switch was defective, defendant

contends that plaintiff cannot provide evidence to show that defendant had actual or constructive knowledge of the potential hazard triggering its duty to repair or warn, and thus, plaintiff cannot provide evidence to establish that defendant breached such a duty.

In *Haas*, the court granted defendant railway company's motion for summary judgment after it found no evidence that defendant "failed to exercise reasonable care to protect its employees from even a remote risk of injury from an under-oiled switch." (*Id*. at p. 87.) There, plaintiff brought suit under the FELA, alleging that he injured his shoulder operating a rail switch. The evidence indicated that the switches were oiled weekly and inspected monthly. Just four days before plaintiff's incident, the switch at issue was inspected and found to be defect free. Just prior to throwing the switch, plaintiff checked it for obstructions and found none. When plaintiff threw the switch, he noticed it was difficult to throw, and later that day, he threw the switch again using his other arm, and now aware that it would be difficult to throw, threw it without incident. After plaintiff informed the terminal coordinator of his injury, the terminal coordinator inspected the switch, found nothing unusual, and threw it without difficulty. (*Ibid.*) As a result, the circuit court affirmed the district court's decision in granting defendant's motion for summary judgment.

Unlike in *Haas*, plaintiff has presented evidence to provide a reasonable basis for a jury to find that defendant breached its duty to exercise reasonable care to protect plaintiff from a risk of injury from the subject switch. It is undisputed that "[a] couple days prior to June 17, 2019, division safety coordinator Chris Jackson received a report from the train crew that worked the midnight job that Switch 5550 was hard to throw and in need of repair." (UMF No. 27.) Plaintiff submits the deposition testimony and declaration of Christopher Keith Jackson attesting to the fact that Switch 5550 was reported to him as being hard to throw within a couple days prior to plaintiff's incident. (Exhibit 1 to the Table of Evidence, ¶ 3; Exhibit 5 to the Table of Evidence, 6:8-18, 6:23-7:3, 8:22-10:1.)

Defendant argues that "[t]he mere fact that the switch was hard to throw a couple days before the incident is immaterial and does not create a genuine dispute of material fact." (Reply, 8:10-12.) However, "[e]ach switch stand and connecting rod shall be securely fastened and operate without excessive lost motion." (49 C.F.R. § 213.135, subd. (e).) The holding in *Haas* does not support a finding that a switch that is hard to throw is not defective as a matter of law, but merely, that the plaintiff in that case failed to present evidence to show that the switch was hard to throw. Here, plaintiff has submitted sufficient evidence of a defect in Switch 5550 to raise a triable issue of material fact, as the record shows that it was reported to be hard to throw prior to plaintiff's injury. Thus, defendant is not entitled to summary adjudication based on the alleged lack of evidence of a defect.[2]

[2] Both parties have filed extensive objections to each other's evidence. As to plaintiff's evidentiary objections, the court declines to rule on them, as the evidence was not material to the disposition of the motion. (Code Civ. Proc., § 437, subd. (q).) With regard to defendant's objections to the Jackson, Garcia, and Harris declarations, the objections are overruled in their entirety since they are defective. Defendant generally objects to the entirety of the Jackson, Garcia, and Harris declarations. Evidentiary objections should generally state: 1) the language verbatim to which objection is made; 2) the page and line number and document where such language appears; and 3) the legal ground for objection with the same specificity as would be required at trial.

Next, defendant argues that there is no evidence that it was on actual or constructive notice of the alleged defect in Switch 5550, and therefore it cannot be held liable for the plaintiff's injuries. (*Holbrook v. Norfolk* (7th Cir. 2005) 414 F.3d 739, 744-745.) Defendant argues that there was no way it could have anticipated or foreseen that the switch might be dangerous or defective because no prior inspection of the switch ever revealed any problems. Defendant further argues that even plaintiff failed to see anything wrong with the switch in his visual inspection prior to throwing the switch. However, plaintiff has presented evidence that defendant could have reasonably anticipated that the switch might be difficult to throw, because a couple of days prior to plaintiff's incident, it was reported to Mr. Jackson that Switch 5550 was hard to throw and in need of repair. (UMF No. 27.) Thus, there is evidence that defendant was on actual notice of the allegedly defective nature and danger allegedly posed by Switch 5550, and a reasonable jury could conclude that the defendant could have foreseen the accident here. As a result, the court intends to deny summary adjudication of the first, second, third, and fourth counts for negligence and violations of Federal Safety Regulations, 49 Code of Federal Regulations, sections 213.135, 213.233, and 213.235.

Therefore, the court will not grant defendant's motion for summary judgment or in the alternative, for summary adjudication.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 1/30/23.
(Judge's initials) (Date)

(*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 240, fn. 2.) It is not the court's responsibility to sift through entire declarations to determine what sentence (or sentences) might be objectionable.

(36)

Tentative Ruling

Re: ***Seaver v. Khan***
Superior Court Case No. 18CECG03442

Hearing Date: February 01, 2023 (Dept. 503)

Motion: Defendant's Motion for Reconsideration

Tentative Ruling:

To deny. (Code Civ. Proc., § 1005, subd. (b).)

Explanation:

Defendant seeks reconsideration of an order entered on April 19, 2022, denying his motion to set aside default and default judgment.

Unless otherwise provided for, all moving and supporting papers shall be served and filed at least 16 court days before the hearing. (Code Civ. Proc., § 1005, subd. (b).) Also, California Rules of Court, rule 3.1300, subdivision (c) requires that a proof of service of the moving papers be filed with the court no later than *five court days* before the date set for the hearing. Since no proof of service is filed with the court in support of defendant's motion, defendant's motion cannot be granted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh (Judge's initials) on 1/30/23 (Date).