

OAKLAND OFFICE

350 FRANK H. OGAWA PLAZA  
4TH FLOOR, OAKLAND, CA 94612  
TELEPHONE: 510-451-6732  
FACSIMILE: 510-465-7023

ANTHONY S. PETRU  
QUYNH L. NGUYEN  
PAULA A. RASMUSSEN  
CAROLE M. BOSCH  
CHARLES S. BRACEWELL  
GAVIN S. BARNEY

**HILDEBRAND MCLEOD & NELSON LLP**  
**ATTORNEYS AT LAW**

WWW.HMNLAW.COM

CLIFTON HILDEBRAND  
(1899-1977)  
FREDERICK L. NELSON  
(Of Counsel)

CHARLES C. McLEOD  
(1910-1991)  
DAVID B. DRAHEIM  
(Of Counsel)

LOS ANGELES OFFICE

700 N. BRAND BLVD., SUITE 860  
GLENDALE, CA 91203  
TELEPHONE: 323-662-6400  
FACSIMILE: 323-669-8549

VICTORIA. RUSSO

Dear Brothers and Sisters,

We would like to share some information with you regarding air conditioning units in locomotive cabs, seals on cab windows and doors, and diesel exhaust/fumes inside the cabs. The Federal Railroad Administration (“FRA”) has regulated safety standards on these matters and, working together, the regulations should provide occupants/train crews comfortable temperatures and healthy air quality inside the cab. Unfortunately, railroad employers sometimes fail to comply with safety standards and attempt to dilute the effectiveness of the regulations.

Attached are pertinent safety regulations which impose on railroads safety requirements inside the locomotive cab regarding the abovementioned matters. We also included an FRA commentary pertinent to the issue of exhaust in the cab. We hope the information will assist you in asserting your rights for a safer work environment inside a locomotive cab after you review the materials.

49 C.F.R. § 229.119, “Cabs, floors, and passageways.”

(g) Each locomotive or remanufactured locomotive placed in service for the first time on or after June 8, 2012, shall be equipped with an air conditioning unit in the locomotive cab compartment.

(h) Each air conditioning unit in the locomotive cab on a locomotive identified in paragraph (g) of this section shall be inspected and maintained to ensure that it operates properly and meets or exceeds the manufacturer’s minimum operating specifications during the periodic inspection required for the locomotive pursuant to § 229.23 of this part.

[These subsections pertain to requirements for air conditioning units in locomotives that were placed in service on or after June 8, 2012. For all locomotives before that date, if the railroad installed an air conditioning unit in the cab before it was required by the FRA, the railroad is responsible for ensuring that the unit operates properly. The railroad can be held liable if an injury results from a poorly maintained air conditioning unit. See law explained below.]

49 C.F.R. § 229.121, “Locomotive cab noise.”

“Conditions that may lead a locomotive cab occupant to file an excessive noise report include, but are not limited to: defective cab window seals; defective cab door seals...”

[If a proper window or door seal can keep out noise, it should also be able to keep out exhaust and fumes. Under the FELA, when a railroad’s violation of a safety regulation causes injury, the railroad will be held liable regardless of whether the injury was of the type that the regulation sought to prevent.]

49 C.F.R. § 229.43 “Exhaust and battery gases.”

“Products of combustion shall be released entirely outside the cab and other compartments.”

Federal Register / Vol. 77, No. 68 / Monday, April 9, 2012 / Rules and Regulations

See “Diesel Exhaust in Locomotive Cabs” at p. 21323.

FRA: “Diesel exhaust from the locomotive engine that is released into an occupied locomotive cab causes a safety risk.”

[We believe 49 CFR 229.43 is clear and unequivocal about keeping exhaust outside the cab. The FRA, however, commented that not all exhaust can be prevented from entering the cab, such as when a locomotive is standing with its windows open and its engine not running next to a highway or in a marine port. Note that this scenario is very different from an exposure to high levels of diesel exhaust that enter the cab and result in injury. Such traumatic exposures expose railroads to liability.]

A railroad employer may violate the Locomotive Inspection Act (“LIA”) in two ways: (1) by breaching the broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary danger of personal injury at all times; or, (2) by failing to comply with the FRA’s locomotive safety regulations under 49 C.F.R. Part 229. An LIA violation cannot be excused, nor its noncompliance be justified, since FELA liability is absolute upon proof of an unsafe part and proximate cause. Additionally, once a railroad chooses to install a piece of equipment that is not required by the FRA, like an icebox, then the railroad must properly maintain that piece of equipment. If it fails to do so, and injury results, the railroad can be held liable for violating the LIA. Attached is our partial summary judgment motion in *Eutsler v. Union Pacific Railroad Company*, which sets forth the abovementioned points.

We hope this helps. In closing, Brothers and Sisters, please remember to use Hildebrand, McLeod & Nelson, LLP as a resource to further educate yourself and your members. If you would like this package attached to an email in PDF format let us know and we will send it to you to better enable you to share it with your members. You are encouraged to share these documents with your members as an educated union is the best way to protect and expand your rights.

Feel free to contact us:



Anthony S. Petru

[petru@hmnlaw.com](mailto:petru@hmnlaw.com)

800-447-7500 office

510-701-1110 cell

49 C.F.R. § 229.119

§ 229.119 Cabs, floors, and passageways.

(a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.

(b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, [Safety Glazing Standards, 49 CFR part 223, 44 FR 77348](#), Dec. 31, 1979.)

(c) Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

(d) Any occupied locomotive cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 60 degrees Fahrenheit 6 inches above the center of each seat in the cab compartment.

(e) Similar locomotives with open-end platforms coupled in multiple control and used in road service shall have a means of safe passage between them; no passageway is required through the nose of car body locomotives. There shall be a continuous barrier across the full width of the end of a locomotive or a continuous barrier between locomotives.

(f) Containers shall be provided for carrying fusees and torpedoes. A single container may be used if it has a partition to separate fusees from torpedoes. Torpedoes shall be kept in a closed metal container.

(g) Each locomotive or remanufactured locomotive placed in service for the first time on or after June 8, 2012, shall be equipped with an air conditioning unit in the locomotive cab compartment.

(h) **Each air conditioning unit in the locomotive cab** on a locomotive identified in paragraph (g) of this section shall be inspected and maintained to ensure that it operates properly and meets or exceeds the manufacturer's minimum operating specifications during the periodic inspection required for the locomotive pursuant to [§ 229.23](#) of this part.

(i) Each locomotive or remanufactured locomotive ordered on or after June 8, 2012, or placed in service for the first time on or after December 10, 2012, shall be equipped with a securement device on each exterior locomotive cab door that is capable of securing the door from inside of the cab.

49 C.F.R. § 229.119

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**§ 229.121 Locomotive cab noise.**

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**(a) Performance Standards for Locomotives.**

- (1) When tested for static noise in accordance with paragraph (a)(3) of this section, all locomotives of each design or model that are manufactured after October 29, 2007, shall average less than or equal to 85 dB(A), with an upper 99% confidence limit of 87 dB(A). The railroad may rely on certification from the equipment manufacturer for a production run that this standard is met. The manufacturer may determine the average by testing a representative sample of locomotives or an initial series of locomotives, provided that there are suitable manufacturing quality controls and verification procedures in place to ensure product consistency.
- (2) In the maintenance of locomotives that are manufactured in accordance with paragraph (a)(1) of this section, a railroad shall not make any alterations that cause the average sound level for that locomotive design or model to exceed:
  - (i) 82 dB(A) if the average sound level for a locomotive design or model is less than 82 dB(A); or
  - (ii) 85 dB(A) if the average sound level for a locomotive design or model is 82 dB(A) to 85 dB(A), inclusive,
- (3) The railroad or manufacturer shall follow the static test protocols set forth in appendix H of this part to determine compliance with paragraph (a)(1) of this section; and, to the extent reasonably necessary to evaluate the effect of alterations during maintenance, to determine compliance with paragraph (a)(2) of this section.

**(b) Maintenance of Locomotives.**

- (1) If a railroad receives an excessive noise report, and if the condition giving rise to the noise is not required to be immediately corrected under part 229, the railroad shall maintain a record of the report, and repair or replace the item identified as substantially contributing to the noise:
  - (i) on or before the next periodic inspection required by § 229.23; or
  - (ii) if the railroad determines that the repair or replacement of the item requires significant shop or material resources that are not readily available, at the time of the next major equipment repair commonly used for the particular type of maintenance needed.
- (2) **Conditions that may lead a locomotive cab occupant to file an excessive noise report include, but are not limited to: defective cab window seals; defective cab door seals; broken or inoperative windows;** deteriorated insulation or insulation that has been removed for other reasons; broken or inoperative doors; and air brakes that vent inside of the cab.

**(3)** A railroad has an obligation to respond to an excessive noise report that a locomotive cab occupant files. The railroad meets its obligation to respond to an excessive noise report, as set forth in paragraph (b)(1) of this section, if the railroad makes a good faith effort to identify the cause of the reported noise, and where the railroad is successful in determining the cause, if the railroad repairs or replaces the items cause the noise.

**(4) Recordkeeping.**

- (i)** A railroad shall maintain a written or electronic record of any excessive noise report, inspection, test, maintenance, replacement, or repair completed pursuant to § 229.121(b) and the date on which that inspection, test, maintenance, replacement, or repair occurred. If a railroad elects to maintain an electronic record, the railroad must satisfy the conditions listed in § 227.121(a)(2)(i) through (v).
- (ii)** The railroad shall retain these records for 92 days if they are made pursuant to § 229.21, or for one year if they are made pursuant to § 229.23.
- (iii)** The railroad shall establish an internal, auditable, monitorable system that contains these records.

49 C.F.R. § 229.43

§ 229.43 Exhaust and battery gases.

(a) Products of combustion shall be released **entirely outside** the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments **under usual operating conditions**.

(b) Battery containers shall be vented and batteries kept from gassing excessively.

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stakeholders. By overcoming institutional and financial barriers to technology harmonization, stakeholders could realize lower life-cycle costs for the acquisition and maintenance of systems. FRA will pursue appropriate, cost effective, performance based standards containing precise criteria to be used consistently as rules, guidelines, or definitions of characteristics, to ensure that materials, products, processes and services are fit for purpose, and present an acceptable level of risk that are applicable across all elements of the railroad industry. FRA believes that establishing a safety analysis requirement in this final rule that is based on best engineering practices and standards in section 237.307 is consistent with goal of standardization and harmonization.

#### *M. Locomotive Cab Securement*

On June 20, 2010, a CSX Conductor was shot and killed in the cab of the controlling locomotive of his standing train in New Orleans, during an attempted robbery. The Locomotive Engineer assigned to that train was also wounded by gunfire during the incident. This incident was particularly tragic, because it resulted in a fatality. By letter dated September 22, 2010, in response to this incident, the BLET requested that FRA require door locks on locomotive cab doors. Under current industry practice, many locomotive cab doors are not locked. According to BLET's letter, requiring the use of door locks would impede unauthorized access to the locomotive cab and reduce the risk of violence to the train crew when confronted by a potential intruder.

In the NPRM, FRA requested comments on the various securement options that are currently available on locomotive cab doors, and whether equipping the locomotive cab with a securement device would improve safety. Based on its review of comments received, FRA believes that locomotive cab securement can potentially prevent unauthorized access to the locomotive cab, and thereby increase train crew safety.

The BLET and UTU submitted comments stating that locks should be designed to open from within the locomotive cab without the use of a key. Locomotive cab securement demands a careful and balanced approach, because when emergencies requiring emergency egress or rescue access occur, securement systems must not hinder rapid and easy egress by train crews or access by emergency responders without undue delay. A latching device (e.g., a dead-bolt arrangement) is

sufficient to satisfy this requirement. This final rule requires that each locomotive or remanufactured locomotives ordered on or after the effective date of the final rule, or placed in service for the first time on or after six months from the effective date of the rule, be equipped with a securement device. However, FRA believes that the decision whether to use the securement device is best left to the discretion of each railroad.

AAR submitted comments stating that the railroad industry is currently developing a securement standard that will address safety concerns. Based on information gathered while attending industry meetings, FRA understands that the railroad industry is working on producing a standard that will require a securement device on the outside of an unattended locomotive cab. FRA believes that the industry is moving in the right direction on this issue and will continue to monitor the development of a new standard. If FRA determines that the actions currently being undertaken by the industry are not sufficient to ensure the proper securement of locomotive cabs from the outside, FRA will consider taking regulatory action to address this issue in a future rulemaking.

A Battalion Fire Chief from Fairfax County, Virginia, submitted comments stating that a rapid-entry box system (similar to a realtor's lock-box system) would ensure access by emergency responders into a locked locomotive cab. FRA believes that a rapid-entry box system could improve emergency responder access into the locomotive cab. However, at this time, FRA believes it would be impractical to require such a system, due to the potential cost of equipping all locomotives with the locks, the significant logistic challenges involved with distributing keys to emergency responders throughout the country, and the inability of FRA to ensure that those keys are secure.

#### *N. Diesel Exhaust in Locomotive Cabs*

In response to the NPRM, AAR submitted comments requesting that FRA clarify the meaning of existing § 229.43. Section 229.43 requires that locomotives be built with exhaust systems that are properly designed to convey engine exhaust from the engine and release it outside of the locomotive, and to ensure that the exhaust system is maintained to prevent leaks of exhaust into an occupied locomotive cab. FRA has been consistent in its enforcement of this requirement. FRA has not discovered locomotive exhaust systems that have noncompliant designs. However, FRA has found mechanical

defects (e.g., a cracked exhaust manifold) in locomotive exhaust systems that permit exhaust to be released into an occupied locomotive cab, and has routinely issued violations for the railroads' failure to comply with § 229.43.

Diesel exhaust from the locomotive engine that is released into an occupied locomotive cab causes a safety risk. The exhaust can adversely affect the train crew and their ability to operate the locomotive safely. Inside the locomotive cab, the exhaust causes an inhalation hazard and will reduce the train crew's vision and comfort. However, FRA did not intend for § 229.43 to prevent any and all diesel exhaust from being present in an occupied locomotive cab. It would be impracticable to try to eliminate all diesel exhaust in the locomotive cab. A locomotive that is standing with its windows open and its engine not running next to an active highway will most likely be found to have some measurable quantity of diesel exhaust in the cab, due to the traffic from the highway. The same would be found if the locomotive were located in a similar circumstance in an active marine port. Similarly, FRA does not believe that it is possible to prevent the re-entry of diesel exhaust into the locomotive cab through windows or ventilation system intakes, and has never enforced the existing regulation in such a manner.

#### *O. Federalism Implications*

One commenter suggested that FRA should add language to its discussion of the federalism implications of this final rule to clarify the pre-emptive effect of the rule. The discussion of federalism contained in the NPRM explains the federalism implications of the Locomotive Inspection Act and the existing Locomotive Safety Standards. See 76 FR 2224. FRA believes that the discussion of federalism implications is clear, and that changes to the final rule regarding the pre-emptive effect of the rule are not necessary.

#### *P. E.O. 13563 Retrospective Review*

In accordance with the requirements of E.O. 13563, this final rule modifies the existing locomotive safety standards based on what has been learned from FRA's retrospective review of the regulation. E.O. 13563 requires agencies to review existing regulations to identify rules that are overly burdensome, and when possible, modify them to reduce the burden. As a result of its retrospective review, FRA is reducing the burden on the industry by modifying the regulations related to periodic locomotive inspection and



1 \$2160  
2 J.D. SULLIVAN, ESQ.  
3 GENE M. KAUFMAN, ESQ.  
4 SULLIVAN LAW  
5 1625 Hwy 88, Suite 401  
6 Minden, NV 89423  
7 Telephone: (775) 782-2700  
8 Facsimile: (775) 782-3439  
9 Email: [jd@mindenlaw.com](mailto:jd@mindenlaw.com); [gene@mindenlaw.com](mailto:gene@mindenlaw.com)

6 Anthony S Petru, Esq., CA State Bar No. 91399  
7 (*Pro Hac Vice*)  
8 Paula A. Rasmussen, Esq. CA State Bar No. 258352  
9 (*Pro Hac Vice*)  
10 HILDEBRAND McLEOD & NELSON LLP  
11 350 Frank H. Ogawa Plaza, 4<sup>th</sup> Floor  
12 Oakland, CA 94612  
13 Telephone: (510) 451-6732  
14 Facsimile: (510) 465-7023  
15 Email: [petru@hmnlaw.com](mailto:petru@hmnlaw.com)

12 Attorneys for Plaintiff  
13 JOHN R. EUTSLER

14 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
15 IN AND FOR THE COUNTY OF WASHOE

16 JOHN R. EUTSLER

Case No. CV14-01913  
Dept. No. 6

17 Plaintiff,

18 vs.

19 UNION PACIFIC RAILROAD CO., a  
20 corporation; and DOES 1-20, inclusive,

21 Defendants.

22  
23 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY**  
24 **JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES WITH**  
25 **ACCOMPANYING SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS AND**  
26 **DECLARATION OF ANTHONY S. PETRU**  
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**NOTICE**

COMES NOW PLAINTIFF JOHN R. EUTSLER (“Eutsler”), by and through his undersigned counsel, and hereby moves this honorable Court for partial summary judgment against Defendant Union Pacific Railroad Company (“UPRR”). This Motion is based upon the following Memorandum of Points and Authorities and all the papers and records on file in this action.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT REGARDING DEFENDANT’S VIOLATION OF THE LOCOMOTIVE INSPECTION ACT, JUSTIFIES A SUMMARY JUDGMENT FOR PLAINTIFF’S 2<sup>ND</sup>, 3<sup>RD</sup> AND 4<sup>TH</sup> CAUSES OF ACTION**

Plaintiff John R. Eutsler, a railroad engineer, age 44, brings this personal injury action against defendant UNION PACIFIC RAILROAD COMPANY (“UPRR”), his employer, to recover damages under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §§ 51 *et seq.*, for permanently disabling back injuries resulting from UPRR’s negligent failure to provide him a safe place to work. Railroad employees like Plaintiff do not qualify for workers’ compensation, but must seek redress for work-place injuries by suing their employer and establishing that its negligence played any part, even the slightest, in causing their injury. *Rogers v. Missouri Pac. R.R. Co.* (1957) 352 U.S. 500, 506; *CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2636 (2011). Eutsler moves for partial summary judgment on his Second, Third and Fourth Causes of Action which he brought under the Locomotive Inspection Act, “LIA,” 49 U.S.C. §§ 20701 *et seq.*, and its related regulations [49 C.F.R. §§ 229.45 & 229.119(c)], because there is no genuine issue as to any material fact that UPRR violated the LIA and said regulations, and that Eutsler is entitled to judgment as a matter of law.

On October 4, 2013, Eutsler suffered a bad fall when he slipped on the steps leading down to the restroom in the nose of a certain locomotive.<sup>1</sup> The soles of Eutsler’s work boots became wet when he had to walk on the saturated floor next to a leaking icebox in the close confines of a certain locomotive cab. The combination of the wet boots on the smooth metal strip at the top of the steps resulted in the slipping accident. UPRR knew about the leaking icebox and the water-covered floor,

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<sup>1</sup> Plaintiff John Eutsler’s Report of Personal Injury, attached as **Exhibit 17**, to the Declaration of Anthony S. Petru. All exhibits referenced herein are attached to Mr. Petru’s Declaration unless stated otherwise.

1 because Eutsler had reported them. Yet, without fixing the leak, UPRR ordered Eutsler to work on the  
2 unsafe locomotive.

3 The FELA provides that any interstate rail carrier “shall be liable in damages to any person  
4 suffering injury while he is employed by such carrier in such commerce . . . for such injury or death  
5 resulting in whole or in part from the negligence of any of the officers, agents, or employes of such  
6 carrier.”<sup>2</sup> 45 U.S.C. § 51. To supplement the FELA and to “facilitat[e] employee recovery,” Congress  
7 enacted the LIA<sup>3</sup> which imposes on interstate railroads “an absolute and continuing duty” to provide  
8 safe locomotive equipment. *Urie v. Thompson*, 337 U.S. 163, 188-190 (1949); *Lilly v. Grand Trunk W.*  
9 *R. Co.*, 317 U.S. 481, 485 (1943); *Richards v. Consolidated Rail Corp.* (6<sup>th</sup> Cir. 2003) 330 F.3d 428.  
10 Under the LIA, UPRR may only use a locomotive if its parts and appurtenances “are in proper  
11 condition and safe to operate without unnecessary danger of personal injury.” 49 U.S.C. § 20701(1).  
12 The railroad’s violation of the LIA results in strict liability. *Haworth v. B.N.S.F Ry. Co.*, 281  
13 F.Supp.2d 1207, 1211 (E.D. WA 2003); *Coffey v. Ne. Ill. Reg’l Commuter R.R. Corp.* (7<sup>th</sup> Cir.2007)  
14 479 F.3d 472, 477. UPRR may also be liable for violating the LIA by failing to comply with the  
15 Federal Railroad Administration’s safety standards under 49 C.F.R. Part 229. *See*, 45 U.S.C. § 54a.  
16 Under 49 C.F.R. § 229.119(c), the FRA expressly forbids the presence of water on the locomotive cab  
17 floor that creates a slipping hazard. Uncontroverted evidence establishes that water accumulated on  
18 locomotive “UP 1603’s” cab floor from a leaking icebox, and that the water constituted a slipping  
19 hazard resulting in the slip and fall accident. *No* issues of material fact exist as to Eutsler’s LIA claims.

## 20 II. FACTUAL BACKGROUND

### 21 A. Water Was On the Cab Floor of Locomotive Unit UP 1603 On October 4, 2014

22 Eutsler was working on a three-man crew whose job that day was to set out and pick up railcars  
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25 <sup>2</sup> When an FELA action is brought in state court, state law governs procedural questions, while federal law  
26 governs substantive issues. *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). State  
27 procedure does not apply, however, if it results in the denial of a federal right granted by Congress. *Arnold*  
28 *v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 361 (1957)

<sup>3</sup> The Locomotive Inspection Act, “LIA,” was formerly known as the Boiler Inspection Act, “BIA,” 45  
U.S.C. § 23, which was recodified as the LIA in 1994. (Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat.  
885.) For ease of reading, all references to the BIA will be identified as references to the LIA.

1 from different industries around Sparks.<sup>4</sup> Before departing the UPRR Sparks rail yard, the crew had to  
2 build their train by coupling two locomotives to six railcars, which were at opposite ends of the yard.<sup>5</sup>  
3 When Eutsler boarded the lead locomotive, UP 1603, he saw water on the cab floor around the icebox<sup>6</sup>  
4 – a metal ice chest that is affixed to the locomotive cab.<sup>7</sup> Conductor Scott McGuire confirmed that the  
5 cab floor “was saturated around the [ice]box itself, and then out to the wall, the back wall of the unit,  
6 there was water.”<sup>8</sup> McGuire described the amount of water on the floor as “standing,” like a bottle of  
7 water had been poured on the floor; it was spread out and the floor was wet to the touch.<sup>9</sup>

8 Eutsler radioed the UPRR Sparks yardmaster, Tony Disibbio, to tell him that there was a  
9 leaking icebox inside unit UP 1603, and that there was water on the floor of the locomotive cab.<sup>10</sup>  
10 Eutsler asked for someone to look at the water on the floor<sup>11</sup> but, instead, Disibbio instructed the crew  
11 to move the units to the west end of the yard, couple them to the railcars and depart.<sup>12</sup> Eutsler really  
12 noticed the water on the floor after the crew had coupled the locomotives to the railcars.<sup>13</sup> After the  
13 crew had prepared the train for departure, and were ready to depart, Eutsler again radioed Disibbio to  
14 have someone check the icebox.<sup>14</sup> Disibbio then sent someone from the UPRR Mechanical Department  
15 or the “roundhouse” to check the icebox.<sup>15</sup>

16 Shawn Orr, a mechanical foreman, came to look at the water on the floor.<sup>16</sup> Orr “climbed on  
17 the locomotive, noticed there was water, water around the icebox. So I gave them WypAlls, what we  
18 have, towels, to put around the icebox if there was any more moisture. Because I cleaned up what was  
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20 <sup>4</sup> **Exhibit 1**, Deposition transcript of John R. Eutsler, “DT Eutsler,” at 75:12-76:22, 94:1-95:11, 96:7-19.  
Eutsler was working with conductor J. Scott McGuire and brakeman Wally Smiraldo. DT Eutsler 76:6-12.

21 <sup>5</sup> **Exhibit 1**, DT Eutsler 95:22-96:19, 96:20-97:6.

22 <sup>6</sup> **Exhibit 1**, DT Eutsler 98:5-10, 110:16-111:4, 116:20-117:18, 119:24-121:12, (the icebox contains ice and  
bottled drinking water for the crew). **Exhibit 2**, Photographs of the icebox, bottled water, and ice.

23 <sup>7</sup> **Exhibit 4**, Deposition transcript of UPRR Mechanical Foreman Shawn Orr, “DT Orr,” at 13:1-16:8,  
23:23-24:5. **Exhibit 3**, Photographs depicting the icebox affixed to locomotive cab, and its drain hose.

24 <sup>8</sup> **Exhibit 5**, UPRR’s Recorded Statement of Conductor Scott McGuire, “McGuire Statement,” at 23:2-10.

24 <sup>9</sup> **Exhibit 5**, McGuire Statement 26:8-18.

25 <sup>10</sup> **Exhibit 1**, DT Eutsler 116:20-117:18.

25 <sup>11</sup> **Exhibit 1**, DT Eutsler 107:8-12, 115:21-116:12.

26 <sup>12</sup> **Exhibit 5**, McGuire Statement 23:12-23.

26 <sup>13</sup> **Exhibit 1**, DT Eutsler 110:16-111:9.

27 <sup>14</sup> **Exhibit 1**, DT Eutsler 124:1-4, 117:19-118:16, 125:20-22, 125:20-126:3. **Exhibit 6**, Photographs taken  
by Eutsler of icebox leak before the train left the Sparks yard; **Exhibit 1**, DT Eutsler 194:19-195:1, from  
deposition Exhibits 6 and 9.

28 <sup>15</sup> **Exhibit 1**, DT Eutsler 116:20-117:18. **Exhibit 5**, McGuire Statement 23:25-24:8, 24:14-21.

<sup>16</sup> **Exhibit 1**, DT Eutsler 107:22-108:13.

1 around the icebox, gave them more WypAlls.”<sup>17</sup> He saw water was around the icebox,<sup>18</sup> with a leaking  
2 pattern from the icebox spreading out onto the cab floor or mat.<sup>19</sup> Orr knew that the icebox should have  
3 drained any melting ice to the outside of the cab and not caused any accumulation of water inside the  
4 cab.<sup>20</sup> After Orr soaked up the liquid with the napkins and distributed others to the crew, he left.<sup>21</sup> Orr  
5 did not fix the leak.<sup>22</sup> McGuire saw that the paper towels were “real thick, heavy duty ones.”<sup>23</sup> After  
6 Orr left, the crew laid the extra towels/napkins around the icebox “just to soak up any water that would  
7 leak from the ice machine.”<sup>24</sup> When Eutsler expressed his concern about the job that Orr did, Disibbio  
8 told him to take the train and just go, and that UPRR would fix the leak when the train returned.<sup>25</sup>

9 While investigating the accident on October 4, 2013, UPRR Manager of Yard Operations in  
10 Sparks, Carl Nagy, saw water with paper towels on the floor of the locomotive around the base of the  
11 icebox.<sup>26</sup> The paper towels were “on the water, flat, laying on the water,” and they were soaked or  
12 wet.<sup>27</sup> Nagy testified, “I did see water on the floor” as depicted in photograph “UP Eutsler 000382,”  
13 taken by yard manager Joel B. Ritter.<sup>28</sup> Ritter, UPRR’s corporate representative and senior-most  
14 manager in Sparks at the time of the accident, saw “some seepage or leakage of water coming from the  
15 refrigerator” on unit UP 1603.<sup>29</sup> Ritter took post-accident photographs of the cab floor, with the wet

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18 <sup>17</sup> Exhibit 4, DT Orr 19:3-11, 30:16-31:15, 36:19-37:19.

19 <sup>18</sup> Exhibit 4, DT Orr 21:14-18.

20 <sup>19</sup> Exhibit 4, DT Orr 21:4-9.

21 <sup>20</sup> Exhibit 4, DT Orr 23:23-24:5.

22 <sup>21</sup> Exhibit 1, DT Eutsler 107:22-108:13. Exhibit 4, DT Orr 20:7-21:3, 21:19-22:3, 22:13-24.

23 <sup>22</sup> Exhibit 5, McGuire Statement 25:8-26:4. Exhibit 4, DT Orr 22:25-23:4, 23:18-22, 24:10-25:9, 26:21-  
27:3.

24 <sup>23</sup> Exhibit 5, McGuire Statement 25:8-26:4.

25 <sup>24</sup> Exhibit 5, McGuire Statement 27:12-16, 27:18-28:7. Exhibit 6, Photographs taken by Eutsler of the  
26 napkins the crew laid on the ground around the icebox before the train left the Sparks yard, including the  
27 icebox leak before the crew laid the napkins; Exhibit 1, DT Eutsler 126:4-8, 194:19-195:1, from deposition  
28 Exhibits 6 and 9.

<sup>25</sup> Exhibit 1, DT Eutsler 114:19-115:20, 199:23-200:20. Exhibit 5, McGuire Statement 28:13-21.

<sup>26</sup> Exhibit 7, Deposition transcript of UPRR Manager of Yard Operations in Sparks in 2013, Carl Nagy,  
“DT Nagy,” at 8:17-25, 17:18-18:8, 18:16-22, 56:2-4, 62:22-63:16.

Carl Nagy is currently UPRR’s Manager of Administration for the Western Region. DT Nagy 9:3-4.

<sup>27</sup> Exhibit 7, DT Nagy 62:22-63:16.

<sup>28</sup> Exhibit 7, DT Nagy 55:3-24. Exhibit 8, Photograph UP Eutsler 000382 is “accurate” and consistent  
with what Nagy saw during the accident investigation. DT Nagy 69:5-9.

<sup>29</sup> Exhibit 9, Deposition transcript of UPRR’s corporate representative and senior-most manager in Sparks  
at the time of the accident, Joel B. Ritter, “DT Ritter,” at 5:8-13, 15:11-25, 16:1-20.

1 napkins around the icebox.<sup>30</sup> Ritter conceded that water should not be leaking from the icebox inside  
2 the locomotive cab.<sup>31</sup> Nagy testified that he would want the Mechanical Department to maintain the  
3 locomotive such that the icebox does not leak.<sup>32</sup>

#### 4 **B. The Wet Cab Floor Constituted A Slipping Hazard**

5 UPRR Mechanical Foreman Orr testified that, before the accident, he had been instructed that  
6 water leaking on the floor can potentially cause a slip and fall injury.<sup>33</sup> UPRR manager Nagy testified  
7 that water inside of a locomotive could be a slipping hazard.<sup>34</sup> As a manager responsible for employees  
8 working on equipment, Nagy would not want water to be on the floor in a locomotive.<sup>35</sup> Manager  
9 Ritter agreed that it was important for him in October of 2013 to understand why there was a slipping  
10 hazard on the floor inside of locomotive UP 1603.<sup>36</sup> Ritter knows that any foreign substance on the  
11 floor of the locomotive cab, like water, is capable of causing a slip or fall.<sup>37</sup> The manufacturer's  
12 installation instructions for the icebox warn that melted ice leaking from an improperly installed icebox  
13 can cause water to accumulate on the cab floor and "create a slipping hazard"<sup>38</sup> The undisputed  
14 evidence establishes that the water on the floor presented a slipping hazard.

#### 15 **C. Water On the Locomotive Cab Floor Caused Mr. Eutsler To Slip and Fall**

16 As the train left Sparks, the floor around the icebox was covered with napkins.<sup>39</sup> By the time  
17 the train arrived at the Schnitzer Steel plant less than an hour later, more water from the icebox had  
18  
19

20 <sup>30</sup> **Exhibit 10**, Photographs by UPRR manager Joel B. Ritter of the wet napkins next to the base of the  
icebox, after the accident.

21 <sup>31</sup> **Exhibit 9**, DT Ritter 5:10-13, 18:7-9.

22 <sup>32</sup> **Exhibit 7**, DT Nagy 57:6-10.

23 <sup>33</sup> **Exhibit 4**, DT Orr 29:23-30:6.

24 <sup>34</sup> **Exhibit 7**, DT Nagy 56:17-23.

25 <sup>35</sup> **Exhibit 7**, DT Nagy 56:24-57:4.

26 <sup>36</sup> **Exhibit 9**, DT Ritter 13:7-14:

27 Q Was it important for you in October of 2013 to understand why there was a slipping hazard on the  
floor inside of locomotive 1603? A Yes, sir.

28 <sup>37</sup> **Exhibit 9**, DT Ritter 15:9-16:5.

<sup>38</sup> **Exhibit 11**, Icebox installation instructions produced by UPRR in a verified response to Plaintiff's  
Request for Production of Documents, No. 14, in Set one; emphasis added.

To prevent water from melted ice accumulating on cab floor, it is essential that the drain hose provided  
with the new ice box . . . is connected to the water drain at the bottom of the ice box and routed to the  
outside below the locomotive platform. If this is not done, **water can accumulate in the locomotive cab  
and create a slipping hazard.**

<sup>39</sup> **Exhibit 1**, DT Eutsler 126:9-18. **Exhibit 8**, Photograph UP Eutsler 000382.

1 leaked onto the floor, soaking the napkins.<sup>40</sup> At the time of the accident, Eutsler had stopped the train,  
2 and the other crew members were going about doing the work of setting out and picking up railcars at  
3 Schnitzer.<sup>41</sup> Before going to the restroom, Eutsler needed to visually check the train behind him for  
4 trespassers, the crossing signals, the location of his crew members, and to make sure that the train had  
5 cleared Fourth Street.<sup>42</sup> Eutsler stepped from the engineer's controls and "went topside of the cab"  
6 towards the seat on the conductor's side of the cab to look through a window to the back of the train.<sup>43</sup>  
7 This was his vantage point in the cab where he could check the train's clearance; he had done it that  
8 way since someone had been decapitated on the Reno branch line.<sup>44</sup> Walking to the topside of the cab,  
9 Eutsler could not avoid stepping on the wet floor.<sup>45</sup> The space inside the locomotive cab was compact,  
10 with only "a small walkway" between the icebox and the conductor's seat.<sup>46</sup> The stairwell to the  
11 restroom was in between the icebox and the engineer's control stand.<sup>47</sup>

12 The soles of Eutsler's boots got wet when he stepped on the wet floor.<sup>48</sup> As Eutsler proceeded  
13 down the steps to the restroom in the nose of the locomotive,<sup>49</sup> his wet boot slipped on the metal strip  
14 affixed on the floor at the top of the steps.<sup>50</sup> When his feet slipped out from under him, Eutsler went  
15 down the two steep steps and ended up on the floor of the nose.<sup>51</sup> As he fell, his shoulder and underarm

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18 <sup>40</sup> Exhibit 1, DT Eutsler 134:25-135:11, 200:24-201:10. Exhibit 4, DT Orr 39:15-40:7. Exhibit 5,  
McGuire Statement 37:3-8. Exhibit 8, Photograph UP Eutsler 000382, Exhibit 10, Photographs by UPRR  
19 manager Joel B. Ritter of the wet napkins next to the base of the icebox, after the accident.

20 <sup>41</sup> Exhibit 1, DT Eutsler 152:22-153:10.

21 <sup>42</sup> Exhibit 1, DT Eutsler 134:9-24, 147:19-149:2.

22 <sup>43</sup> Exhibit 1, DT Eutsler 128:1-129:10, 129:17-130:9, 134:9-24, 144:12-24, 147:19-149:2, 182:16-19,  
185:6-14, 184:5-185:4. Exhibit 12, Photograph UP Eutsler 000486, inside the cab of locomotive UP 1603.

23 <sup>44</sup> Exhibit 1, DT Eutsler 134:9-24, 147:17-149:2.

24 <sup>45</sup> Exhibit 1, DT Eutsler 147:17-149:2. Exhibit 12, Photograph UP Eutsler 000486 depicting inside the  
cab of locomotive UP 1603.

25 <sup>46</sup> Exhibit 1, DT Eutsler 145:10-24, 147:17-149:2. Exhibit 5, McGuire Statement 27:18-28:4. Exhibit 12,  
Photograph UP Eutsler 000486.

26 <sup>47</sup> Exhibit 5, McGuire Statement 27:18-28:4. Exhibit 12, Photograph UP Eutsler 000486.

27 <sup>48</sup> Exhibit 1, DT Eutsler 132:25-133:6, 133:8-134:8. Exhibit 10, Photographs by UPRR manager Joel B.  
Ritter of the wet napkins next to the base of the icebox, after the accident with boot prints.

28 <sup>49</sup> Exhibit 1, DT Eutsler 129:17-130:9; 131:14-132:14. Exhibit 13, photographs indicating the metal strip  
where the slip occurred, and the thin metal bar where Eutsler's shoulder and underarm hit and caught.

<sup>50</sup> Exhibit 1, DT Eutsler 132:25-133:6, 133:20-134:8, 137:3-24. Exhibit 14, photographs of steps to the  
restroom; see photograph UP Eutsler 000383. Exhibit 15, photographs of the metal strip at the top of the  
stairs where Eutsler's wet boot slipped.

<sup>51</sup> Exhibit 1, DT Eutsler 136:8-137:2. Exhibit 9, DT Ritter 50:7-14. Exhibit 16, photographs of steps to  
the restroom and their measurements indicating that the height of the steps is almost 14 inches.

1 hit and caught on a thin metal bar next to the stairs.<sup>52</sup> Ritter, the UPRR manager who drove Eutsler to a  
2 hospital, could tell that he was in pain.<sup>53</sup> He saw that Eutsler was grimacing and moaning, and that  
3 Eutsler “got into the backseat [of the car] somewhat careful.”<sup>54</sup> In talking with Eutsler, Ritter  
4 understood that Eutsler “went down the nose to use the facility, slipped and fell. In falling, he caught  
5 himself or something on his left arm, shoulder, so forth. And that is my understanding was he had like  
6 a left arm, shoulder-type injury.”<sup>55</sup> When asked if he would be critical or negative towards Eutsler in  
7 trial with regard to his observations of Eutsler and Eutsler’s description of the accident, between the  
8 time he saw Eutsler at the Schnitzer Steel facility and the hospital, Ritter said, “No. Absolutely not.”<sup>56</sup>

### 9 III. SUMMARY JUDGMENT STANDARD

10 The Court may grant summary judgment on the issue of liability alone although there may be a  
11 genuine issue as to the amount of damages. N.R.C.P. 56(c). Summary judgment must be granted if  
12 there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a  
13 matter of law. Nev.R.Civ.P. 56(c); *Las Vegas Tribe of Paiute Indians v. Phebus*, “*Phebus*,” 5 F. Supp.  
14 3d 1221, 1226-1227 (D. Nev. 2014). Material facts are those which may affect the outcome of the case.  
15 *Id.* The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations  
16 unsupported by facts. *Id.* The court may grant summary judgment when “the record taken as a whole  
17 could not lead a rational trier of fact to find for the non-moving party.” *Spade v. CSX Transp., Inc.*,  
18 2004 WL 2980740, \*1 (W.D.Mich. 2004). Speculative statements are insufficient to raise genuine  
19 issues of material fact. *Withrow v. CSX Transp., Inc.*, 2008 WL 5101150, at \*4 (S.D. Ohio 2008).  
20 Here, UPRR cannot raise a genuine issue of material fact on the strict liability claims, because the law  
21 and undisputed evidence establishes that it violated the LIA and 49 C.F.R. §§ 229.45 and 229.119(c).

### 22 IV. THE FELA IS A REMEDIAL STATUTE THAT FAVORS THE INJURED EMPLOYEE

23 To obtain a remedy for work-related personal injuries, railroad employees like Eutsler must sue  
24

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25 <sup>52</sup> **Exhibit 1**, DT Eutsler 140:11-141:9, 141:15-19. **Exhibit 13**, where Eutsler fell: the metal strip where the  
26 slip occurred, and the thin metal bar where Eutsler’s shoulder and underarm hit and caught; see photograph  
UP Eutsler 000384.

27 <sup>53</sup> **Exhibit 9**, DT Ritter 39:9-18.

28 <sup>54</sup> **Exhibit 9**, DT Ritter 38:7-39:18.

<sup>55</sup> **Exhibit 9**, DT Ritter 39:19-41:1.

<sup>56</sup> **Exhibit 9**, DT Ritter 39:19-41:1.



1 their employer and establish that the railroad's negligence *played some role, no matter how slight*, in  
2 causing the injuries.<sup>58</sup> *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500 (1957). The railroad owes its  
3 employees a paramount duty to provide a reasonably safe place to work. *Atchison, T. & S.F. Railway*  
4 *Co. v. Buell*, 480 U.S. 557, 558 (1987). A railroad breaches this duty when it fails to use ordinary care  
5 under the circumstances, or fails to do what a reasonably prudent person would have done under the  
6 circumstances to make the working environment reasonably safe. *Tiller v. Atlantic C.L.R. Co.*, 318  
7 U.S. 54, 67 (1943). Because the FELA is a remedial statute, courts must liberally construe the statute in  
8 workers' favor. *Rodriguez v. Delray Connecting R.R.*, 473 F.2d 819, 820 (6<sup>th</sup> Cir. 1973).<sup>59</sup> An FELA  
9 action is generally based upon traditional elements of negligence (duty; breach; foreseeability;  
10 causation; damages), but is "significantly different from the ordinary common-law negligence  
11 action."<sup>60</sup> *Gallose v. Long Island R.R.*, 878 F.2d 80, 86 (2<sup>nd</sup> Cir. 1989); *Weaver v. Mo. Pac. R.R. Co.*,  
12 152 F.3d 427, 429 (5<sup>th</sup> Cir. 1998). A railroad employer may be held liable under the FELA for risks  
13 that would otherwise be too remote to support liability at common law. *Ulfik v. Metro-North Commuter*  
14 *R.R.*, 19 F.3d 54, 58 (2<sup>nd</sup> Cir. 1996).

#### 15 V. THE LIA SUPPLEMENTS THE REMEDIES PROVIDED TO INJURED WORKERS 16 UNDER THE FELA

17 The LIA provides in pertinent part:

18 A railroad carrier may use or allow to be used a locomotive or tender on its railroad line  
19 only when the locomotive or tender and its parts and appurtenances--

20 **(1) are in proper condition and safe to operate without unnecessary danger of  
21 personal injury . . .**

21 <sup>58</sup> The United States Supreme Court holds that the FELA supplants an employer's common law duty with a  
22 "far more drastic duty of paying damages for injury or death at work due in whole or in part to the  
23 employer's negligence." *Rogers, supra*, 352 U.S. at 507-508. Under the FELA, the burden of proving  
24 causation is significantly relaxed compared to the burden in an ordinary negligence action. *Consolidated*  
25 *Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). The question is "whether negligence of the employer  
26 played any part, however small, in the injury or death which is the subject of the suit." *Rogers, supra*, 352  
27 U.S. at 508. "[W]here the employer's conduct falls short of the high standard required of him by the  
28 [FELA] and his fault, in whole or in part, causes injury, liability ensues." *Kernan v. Am. Dredging Co.*, 355  
U.S. 426, 438-439 (1958) (emphasis added); see, *McBride, supra*, 131 S.Ct. at 2636, (noting that the  
"FELA's language on causation ["played any part, even the slightest"] 'is as broad as could be framed.'").

<sup>59</sup> The FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and  
lives which it consumed in its operations" and represents a legislative departure from the principles of the  
common law, motivated by "the special needs of railroad workers who are daily exposed to the risks  
inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Mo. Pac.*  
*R.R.*, 356 U.S. 326, 329 (1958).

<sup>60</sup> See footnote 57 hereinabove.

1 49 U.S.C.A. § 20701; emphasis added. An employer may violate the LIA in two ways: (1) by  
2 breaching the *broad duty* to keep all parts and appurtenances of its locomotives in proper condition and  
3 safe to operate without unnecessary danger of personal injury, (49 U.S.C. § 20701); or, (2) by failing to  
4 comply with the FRA's locomotive safety regulations under 49 C.F.R. Part 229. *McGinn v. Burlington*  
5 *Northern R. Co.*, 102 F.3d 295, 298-299 (7<sup>th</sup> Cir. 1996). An LIA violation cannot be excused, nor its  
6 noncompliance be justified, since FELA liability "is absolute upon proof of an unsafe part and  
7 proximate cause" and "the FELA causation standard applies." *Crane v. Cedar Rapids & Iowa City Ry.*  
8 *Co.*, 395 U.S. 164, 166 (1969). *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 810 (6<sup>th</sup> Cir. 1985).

9 No evidence of actual or constructive notice to the defendant of a locomotive defect or unsafe  
10 condition is necessary; the railroad is simply liable if its breach of duty caused or contributed to the  
11 injury, (*Baltimore & O. R. Co. v. Groeger* (1925) 266 U.S. 521, 527; *Lilly, supra*, 317 U.S. at 485),  
12 "without regard to whether the injury flowing from the breach was the injury the statute sought to  
13 prevent," (*Kernan v. Am. Dredging Co.* (1958) 355 U.S. 426, 433). A violation of the LIA bars the  
14 defenses of contributory negligence and the assumption of risk. *Lilly, supra*, 317 U.S. at 491; 45  
15 U.S.C. §§ 53 and 54; *Grand Trunk W. Ry. Co. v. Lindsay* (1914) 233 U.S. 42, 49-50, (the defense of  
16 contributory negligence is abolished, "not only as a bar to recovery, but for all purposes.") The  
17 Supreme Court and Congress have emphasized that the statute is to be liberally construed in light of its  
18 prime purpose to protect employees and others by requiring the use of safe equipment. *Lilly, supra*,  
19 317 U.S. at 486; *Withrow, supra*, 2008 WL 5101150, at \*3.

20 **A. The Water On the Cab Floor, Which Created A Slipping Hazard, Violated § 229.119(c)**

21 UPRR violated 49 C.F.R. § 229.119(c) because it failed to keep UP 1603's cab floor free from  
22 water which created a slipping hazard. Under 45 U.S.C. 54a of the FELA, a safety regulation  
23 prescribed by the Secretary of Transportation<sup>61</sup> is deemed to be a safety statute under 45 U.S.C. § 53  
24 which provides, "That no such employee who may be injured or killed shall be held to have been guilty  
25 of contributory negligence in any case where the violation by such common carrier of any statute  
26 enacted for the safety of employees contributed to the injury or death of such employee." The Supreme

27 \_\_\_\_\_  
28 <sup>61</sup> The Secretary of Transportation ("Secretary") has delegated the duties of regulating railroad safety to the  
FRA. 49 U.S.C. § 20103(a); 49 C.F.R. 1.89(a).

1 Court held that a violation of a federal safety regulation constitutes a violation of the statute, and  
2 results in negligence as a matter of law. *Urie, supra*, 337 U.S. at 190-191; *Kehdi v. BNSF Ry. Co.*,  
3 2007 WL 2994600, \*3 (D.Or. 2007). 49 C.F.R. § 229.119(c), provides:

4 **Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or**  
5 **any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly**  
6 **treated to provide secure footing.**

6 (Emphasis added.) “When interpreting the regulation according to its plain and ordinary meaning, it  
7 clearly prohibits the presence of specific substances of oil, water, and waste.” *Kehdi, supra*, 2007 WL  
8 2994600 at \*3. Court decisions, which have found that oil on a locomotive’s floor violated 49 C.F.R. §  
9 299.119(c) in the context of a plaintiff’s summary judgment motion are, by analogy, instructive here.

10 The *Kehdi* court concluded that, “The evidence in this case establishes that a residue [oil] was  
11 present on the floor of the compressor compartment, where the plaintiff slipped and fell. The presence  
12 of this residue violates [49] C.F.R. § 229.119(c) by creating a slipping hazard. This, in turn, violates  
13 the Locomotive Inspection Act on its face.” *Kehdi, supra*, 2007 WL 2994600 at \*4. The *Kehdi* court  
14 relied on the following evidence to grant the plaintiff partial summary judgment on claims that the  
15 railroad’s violation of the LIA established its liability as a matter of law under the FELA:

16 Here, plaintiff has provided evidence that oil or other slippery residue was present on the  
17 floor of the compressor room. After plaintiff fell, he asked a coworker to take photographs of  
18 the accident site. The photographs clearly show a substance on the compartment floor; a slip  
19 mark is clearly visible in the substance. After the accident, defendant completed a Report of  
20 Inspection in which three independent inspectors appointed by defendant examined the  
21 compartment and likewise found a “residue” on the floor. The report reflects that in order to  
22 cure this condition, the inspectors “cleaned up residue in compressor room floor area.”

20 Defendant asserts that a factual dispute exists concerning the identification and amount of  
21 any residue on the compartment floor; specifically, defendant contends that plaintiff has not  
22 provided evidence to establish where the residue was located and whether the residue was  
23 present in an amount sufficient to create a slipping hazard. To counter this assertion, plaintiff  
24 points to the photos, which clearly show a slip mark running through a substance on the floor,  
25 and the Report of Inspection, in which defendant's own inspectors reported the presence of  
26 residue on the floor in sufficient amounts that clean up was necessary.<sup>62</sup>

24  
25 <sup>62</sup> *Kehdi, supra*, 2007 WL 2994600 at \*1, \*4. Similar to the evidence in *Kehdi*, Eutsler presents: (1)  
26 undisputed testimony by Plaintiff, and UPRR employee witnesses and managers that there was water on the  
27 cab floor at and around the base of the icebox of unit UP 1603; (2) undisputed testimony by UPRR  
28 Mechanical Foreman Orr that there was enough water on the floor necessitating clean-up with WypAll  
napkins; (3) uncontroverted testimony by Plaintiff and McGuire that more napkins were needed to soak up  
the water after Orr departed; (4) photographs taken by Eutsler and UPRR management that undisputedly  
show water on the cab floor which continued to leak and accumulate even after Orr wiped up the water with  
napkins; (5) photographs which undisputedly depict soaked paper towels covered with shoe prints; (6)

1 Similarly, in *Withrow, supra*, the court granted the plaintiff's motion for partial summary  
2 judgment on a claim that the defendant had violated the LIA and, therefore, had violated the FELA as a  
3 matter of law. The court found there was no genuine issue of material fact regarding the defendant's  
4 violation of 49 C.F.R. § 229.119(c) regarding oil on a locomotive walkway. Evidence similar to  
5 Eutsler's case supported the plaintiff's motion: the railroad did not dispute the presence of oil on the  
6 walkway; the plaintiff provided uncontroverted testimony that he slipped on the oil; photographs  
7 showed the oil on the walkway with foot prints emanating from it; the footprints indicated that the oil  
8 was thick enough to transfer to the bottom of one's shoes and back again onto the walkway for  
9 numerous steps, (in Eutsler's case, there was enough water to transfer onto the sole of Eutsler's boots  
10 and back onto the floor for the short distance he had to walk towards the steps to the restroom);  
11 photographs showed the oil covered the entire area of the walkway making it difficult to walk around  
12 the spill, (in Eutsler's case, the leaked water was widespread enough in the compact area of the cab to  
13 make it difficult for Eutsler to avoid walking on the soaking wet napkins). *Withrow, supra*, 2008 WL  
14 5101150, at \*4. The *Withrow* court concluded that "the evidence is so one sided that Plaintiff must  
15 prevail as a matter of law." *Id.* at \*5. The evidence in Eutsler's case compels the same conclusion:  
16 that no genuine issue of material fact exists regarding UPRR's violation of 49 C.F.R. § 229.119(c).

17 Additionally, UPRR'S failure to treat the metal strip at the top of the steps to the locomotive  
18 nose, resulted in unsecure footing in violation of § 229.119(c). This regulation requires that "Floors  
19 shall be properly treated to provide secure footing." Uncontroverted evidence establishes that when  
20 Eutsler went down the steps to the nose of the locomotive, his wet boot slipped on the metal strip at the  
21 top of the steps.<sup>63</sup> It appears that the metal strip had not been treated to ensure secure footing.

22 **B. The Presence of Water On the Cab Floor Created An Unnecessary Danger of Personal  
23 Injury In Violation of the LIA and 49 C.F.R. § 229.45**

24 More broad than the specific FRA regulations, the LIA requires that a "locomotive or tender  
25 and its parts and appurtenances . . . are in proper condition and safe to operate without unnecessary

26 undisputed photographs of the smooth metal strip at the top of the steps; and, (7) UPRR management's  
27 undisputed testimony that water on the cab floor is a slipping hazard.

28 <sup>63</sup> **Exhibit 1**, DT Eutsler 129:17-130:9; 131:14-132:14, 132:25-133:6, 133:20-134:8, **137:3-24**. **Exhibit 15**, Close-up photographs of the metal strip at the top of the stairs. **Exhibit 13**, Photograph UP Eutsler 000383. **Exhibits 14 and 16**, photographs showing steps to the restroom.

1 danger of personal injury.” 49 U.S.C. § 20701(1). The Supreme Court holds that “The Act *without*  
2 *limitation* speaks of equipment ‘in proper condition and safe to operate . . . without unnecessary peril  
3 to life or limb’. Conditions other than mechanical imperfections can plainly render equipment unsafe to  
4 operate without unnecessary peril to life or limb.” *Lilly, supra*, 317 U.S. at 488; emphasis added. 49  
5 C.F.R. § 229.45 mimics the LIA’s broad language in mandating that “All systems and components on a  
6 locomotive shall be free of conditions that endanger the safety of the crew.” To recover under the LIA  
7 and § 229.45, the record must show that, (1) the Defendant railroad violated the LIA and (2) the  
8 violation of the LIA caused an injury. *Jarrett v. CSX Transp., Inc.*, 2008 WL 4239148, at \*6 (N.D.  
9 Ohio 2008), (granting summary judgment for a slip where the occurrence and descriptions of the  
10 plaintiff’s slip on an air hose on the floor in the bathroom of a locomotive, tended to show that the air  
11 hose created a tripping hazard).

12 It is well-settled that slipping hazards caused by foreign substances or objects on locomotive  
13 surfaces give rise to liability under the LIA.<sup>64</sup> In *Lilly, supra*, the plaintiff suffered injuries in a fall  
14 from the top of a locomotive tender which had become icy. Sustaining a jury verdict for the plaintiff  
15 the Supreme Court held: “The use of a tender, upon whose top an employee must go in the course of  
16 his duties, which is covered with ice seems to us to involve ‘unnecessary peril to life or limb – enough  
17 so as to permit a jury to find that the [LIA] has been violated.” *Lilly, supra*, 317 U.S. at 486.<sup>65</sup> Here,

18  
19 <sup>64</sup> *Calabritto v. New York, N. H. & H. R. Co.*, 287 F.2d 394, 396-397 (2<sup>nd</sup> Cir. 1961), (dangerous conditions  
20 caused by foreign substances on a locomotive platform gave rise to liability under the BIA [LIA]); *Haworth*  
21 *v. Burlington N. & Santa Fe Ry. Co.*, 281 F. Supp. 2d 1207, 1212 (F.D. Wash. 2003), (“The Supreme Court  
has held that the carrier’s duty under the former BIA to keep its locomotives in proper and safe condition  
extended to protection against foreign matters on the surface of the locomotive.”); *Gowins v. Penn. R. Co.*,  
299 F.2d 431, 432-434, (oil on locomotive walkways could support a BIA claim).

22 <sup>65</sup> Following *Lilly*, the court in *Calabritto v. New York, N. H. & H. R. Co.*, 287 F.2d 394, 395 (2<sup>nd</sup> Cir.  
1961), also found that the use of an engine whose surface has been made slippery by sand and oil may be  
23 found to involve ‘unnecessary peril to life or limb’ in violation of the LIA. In *Topping v. CSX Transp., Inc.*,  
1 F.3d 260 (4<sup>th</sup> Cir. 1993), the court rejected the railroad’s argument that it should not be liable because  
24 Topping slipped on a loose metal object that was not a part or appurtenance of the locomotive. *Topping v.*  
*CSX Transp., Inc.*, 1 F.3d 260, 260 (4<sup>th</sup> Cir. 1993). Citing the plain language of the statute and the *Lilly*  
25 decision, the *Topping* court held, “We see no basis for interpreting the Act so strictly, since it requires the  
train to be “‘in proper condition’ and ‘safe to operate.’” *Id.* at 260-261. In *Whelan v. Penn. Central Co.*,  
26 503 F.2d 886, 889 (2<sup>nd</sup> Cir. 1974), evidence of an icy condition on the bottom step at the rear of the engine  
where the brakeman was required to step to signal the engineer to stop the train, was sufficient to support a  
27 jury finding that the railroad violated the BIA. In *Haworth, supra*, 281 F.Supp.2d at, 1209, the plaintiff  
tripped and fell on an air hose that was left on the floor of the cab, just inside the door. The court held that  
28 it was not necessary for Haworth to prove that the air hose itself was an essential part of the train, because  
the cab floor itself must be kept in safe condition under the LIA. *Id.* at 1213. “The presence of a foreign  
object or tripping hazard on the floor cab or passageway is a violation of the LIA and its corresponding

1 undisputed evidence of the accumulation of water on the cab floor caused by a leaking icebox which  
2 resulted in a slip and fall accident, violated the broad safety requirements of the LIA and Section  
3 229.45 to keep all parts of a locomotive free from conditions that endanger the safety of the crew.

4 **C. UPRR's Failure To Maintain the Icebox In Good Repair Was A Violation of the LIA**

5 Under the LIA, as part of UPRR's broad duty to keep all parts and appurtenances of its  
6 locomotives in proper condition and safe to operate without unnecessary danger of personal injury,  
7 UPRR has a duty to maintain its locomotives' equipment in good repair and safe working order at all  
8 times. *Herold v. Burlington N. Inc.*, 761 F.2d 1241, 1246 (8<sup>th</sup> Cir.1985); *Munns v. CSX Transp., Inc.*,  
9 579 F. Supp. 2d 924, 933-34 (N.D. Ohio 2008). In *Herold*, the court held that "Something can be an  
10 appurtenance for the purpose of the Act even though it is not required by federal regulation." *Herold*,  
11 *supra*, 761 F.2d at 1246.<sup>66</sup> Thus, if a railroad voluntarily installs a part or appurtenance on its  
12 locomotive, "then [the railroad's] failure to maintain it in good operating condition is a violation of the  
13 Boiler Inspection Act [LIA]." *Id.*, (re amber beacon). Here, the icebox was in disrepair and unsafe to  
14 use because it leaked water on the cab floor which caused or contributed to the slip and fall accident.

15 "If a railroad chooses to install a piece of equipment that is not required—because the  
16 equipment is not mandated by a federal regulation and does not constitute an integral or essential part  
17 of a locomotive—then the railroad must properly maintain that piece of equipment. If it fails to do so,  
18 and injury results, the railroad can be held liable for violating the LIA." *Giebel v. Union Pac. R. Co.*,  
19 2010 WL 1904921, at \*2-4 (D.Minn. 2010). Undisputed evidence establishes that the icebox was a  
20 fixture on UP 1603 (i.e., a part or appurtenance of the locomotive), and that it should not have leaked  
21 inside the cab.<sup>67</sup> Yet, Orr failed to repair the leaking icebox when he came to the locomotive.<sup>68</sup>

22 regulations. . . . Accordingly, Haworth has established that he is entitled to judgment as a matter of law as to  
23 liability on the LIA claim." *Haworth, supra*, 281 F.Supp.2d at 1213-1214.

24 <sup>66</sup> "The railroad's theory is that Congress has pre-empted the field of railroad safety and federal law  
25 imposes no duty to install warning devices beyond a headlight and whistle. It is true that the state, through  
26 statute or common law, may not require the railroad to install and maintain amber beacons. However, once  
27 any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it be maintained in  
28 good repair at all times. [ ] *The argument that there can be no violation of the Act absent a violation of some  
regulation or order of the Interstate Commerce Commission or Federal Railroad Administration is without  
merit.*" *Herold, supra*, 761 F.2d at 1246; emphasis added.

<sup>67</sup> **Exhibit 3**, Photographs depicting the icebox affixed to locomotive cab. **Exhibit 9**, DT Ritter 5:10-13,  
18:7-9. **Exhibit 11**, Icebox installation instructions warning of leaks.

<sup>68</sup> **Exhibit 5**, McGuire Statement 25:8-26:4. **Exhibit 4**, DT Orr 22:25-23:4, 23:18-22, 24:10-25:9, 26:21-  
27:3.

1           **D. The Water On the Cab Floor Caused or Contributed to the Slip and Fall Accident**

2           The standard of causation under the FELA is whether the evidence justifies the conclusion that  
3 the violation of the LIA “played any part, even the slightest, in producing the injury [] for which  
4 damages are sought.” *Kehdi, supra*, 2007 WL 2994600 at \*4, citing *Rogers, supra*, 352 U.S. at 506.<sup>69</sup>  
5 Eutsler testified that the water on the cab floor got this boots wet, so that when he proceeded down the  
6 steps to the restroom in the nose of the locomotive, his wet boot slipped on the smooth metal strip  
7 affixed at the top of the steps.<sup>70</sup> His testimony is undisputed. Although Eutsler was the sole witness to  
8 the accident, LIA liability would not turn on his testimony alone. He corroborates his testimony with  
9 other evidence: UPRR’s photographs of the close confines of the locomotive cab, the saturated cab  
10 floor, the soaked napkins on the floor between the icebox and the conductor’s seat where Eutsler had to  
11 walk, and the untreated smooth metal strip at the top of the steps; Ritter’s testimony that he saw Eutsler  
12 was in pain after the accident, and that Ritter was not critical of Eutsler or what he was told about the  
13 accident soon after it happened.<sup>71</sup>

14           As the sole witness to his injury, Eutsler’s testimony can support an LIA summary judgment.  
15 For example, the fact that the plaintiff was the sole witness to the accident in *Kehdi, supra*, 2007 WL  
16 2994600 at \*1, \*5-\*6, was not an impediment to granting partial summary judgment. The court  
17 rejected the railroad’s argument that there was inadequate evidence to establish the cause of the  
18 accident, in part, because *Kehdi* was the sole witness to his injury. *Id.* The court pointed out:

19           [I]n addition to plaintiff’s testimony, plaintiff has provided photographs, taken by the train’s  
20 conductor, showing an oily residue on the floor of the compartment, with evident slip  
21 markings within the residue. The court finds sufficient evidence to justify the conclusion that  
the violation of the LIA played at least a “slight” part in producing the injury for which  
damages are sought.

22 *Id.* at \*5. When the railroad challenged the plaintiff’s credibility, the court countered, “Merely arguing  
23 that a jury might disbelieve a witness is not sufficient to meet the nonmoving party’s burden of  
24

25 <sup>69</sup> Eutsler’s discussion is distinct from the issue of the extent and nature of his injuries and related damages.

26 <sup>70</sup> **Exhibit 1**, DT Eutsler 129:17-130:9; 131:14-132:14, 133:8-134:8. **Exhibits 8 and 10**, Photographs of the  
27 wet floor with soaked napkins around the icebox. **Exhibits 14, 15, and 16**, photographs showing steps to  
the restroom.

28 <sup>71</sup> **Exhibit 1**, DT Eutsler 133:8-134:8. **Exhibit 9**, DT Ritter 39:19-41:1. **Exhibits 8 and 10**, Photographs of  
the wet floor with soaked napkins around the icebox. **Exhibit 12**, Photograph depicting inside the cab of  
locomotive UP 1603.

1 opposing a properly supported summary judgment with affirmative evidence.” *Id.*, citing *Anderson v.*  
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court also found that the plaintiff’s testimony was  
3 supplemented by photographs, and an inspection report. *Kehdi, supra*, 2007 WL 2994600 at \*6.  
4 Likewise, Eutsler has provided additional evidence to support his claim.

5 In *Withrow*, the plaintiff was the sole witness to the accident. The defendant argued that  
6 summary judgment was improper when a railroad’s liability hinges solely on an interested party’s  
7 credibility. *Withrow, supra*, 2008 WL 5101150, at \*5. The court disagreed because it found that, “here  
8 the evidence is so one sided that Plaintiff must prevail as a matter of law.” *Id.*; see *Withrow* discussed  
9 above. In *Spade, supra*, 2004 WL 2980740, \*4, the court held that the existence of an issue of fact  
10 regarding the extent of the railroad’s liability for damages, does not preclude a finding of liability for  
11 an LIA violation – thus, concluding that the plaintiff was entitled to partial summary judgment on the  
12 issue of liability. The Court rejected the railroad’s contention that summary judgment might never be  
13 appropriate for a party who bears the burden of proof in the absence of some kind of admission by the  
14 opposing party or documentary evidence proving the moving party’s case because the jury is always  
15 free to disregard the plaintiff’s testimony. *Id.* at fn. 2. The court noted that the railroad failed to cite  
16 authority for this proposition. *Id.* Further, the court found that it was contrary to the non-moving  
17 party’s burden under the Fed.R.Civ.Proc. 56(c) to come forward with affirmative evidence establishing  
18 a genuine issue as to any material fact. *Id.*

#### 18 IV. CONCLUSION

19 Because undisputed evidence establishes that UPRR violated the LIA and 49 C.F.R. §§ 229.45  
20 and 229.119(c), and said violations caused or contributed to the slip and fall accident on October 4,  
21 2013, UPRR is liable as a matter of law for Eutsler’s Second, Third and Fourth Causes of Action  
22 pursuant to the FELA. Given the law and the conclusive evidence, summary judgment must be granted.

23 DATED: March 7<sup>th</sup>, 2016

HILDEBRAND, McLEOD & NELSON, LLP

24  
25 By: 

26 Anthony S. Petru, Esq.  
27 Paula A. Rasmussen, Esq.  
28 350 Frank H. Ogawa Plaza, 4<sup>th</sup> Floor  
Oakland, CA 94612  
Attorneys for Plaintiff,  
JOHN R. EUTSLER



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**AFFIRMATION**

**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document, Plaintiff's Motion for Partial Summary Judgment and Memorandum of Points and Authorities does not contain the social security number of any person.

DATED: March 7<sup>th</sup>, 2016

HILDEBRAND, McLEOD & NELSON, LLP

By: 

Anthony S. Petru, Esq.  
Paula A. Rasmussen, Esq.  
350 Frank H. Ogawa Plaza, 4<sup>th</sup> Floor  
Oakland, CA 94612  
Attorneys for Plaintiff,  
JOHN R. EUTSLER

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that service of the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES** was made this date by depositing a copy for mailing, first-class postage fully prepaid, addressed to the following attorney:

John D. Moore, Esq.  
Moore Law Group, PC  
3715 Lakeside Drive, Suite A  
Reno, NV 89509

FLESHER, SCHAFF & SCHROEDER  
2202 Plaza Drive  
Rocklin, CA 95765

DATED this 7<sup>th</sup> day of March, 2016.

  
An Employee of Hildebrand, McLeod & Nelson, LLP