

**Case Name:** Larry A.Petree v The Cincinnati, New Orleans, and Texas Pacific Railway Company, et al.

**Date Decided:** July 23rd, 2009

**Originally Filed in:** ()

**Decided by:** (State)

**Court:** U.S.D.C. Southern District of Ohio

**Judge:** Judge Spiegel

**Citation:** 2009 WL 2243127 (S.D. Ohio)

**Background:**

Plaintiff, Larry A. Petree ("Petree"), employed by the Norfolk Southern Railway Company ("Norfolk"), sued for injuries sustained under the Federal Employers' Liability Act ("FELA") and state law claims. There were several motions before this court. Plaintiff Petree was operating a locomotive while employed by Norfolk. While crossing over multiple lanes of traffic the Mosteller crossing, a busy intersection, plaintiff's locomotive collided with defendant's, Gram and Muser, truck. Norfolk, Petree, and Muser all file for motions of summary judgment. Did the Court grant the motions for summary judgment based upon the disputed evidence provided?

**Issue:**

**Overall Issues Discussed or Touched Upon in this Case:**

-

**Held:**

1. Norfolk's Motion for Summary Judgment Norfolk seeks summary judgment on Petree's claim against Norfolk because (1) Petree failed to prove negligence on Norfolk's part and (2) the conduct of Petree's employer, Graham and Masur ("Masur"), as his employer were the sole cause of the accident. Norfolk claims that Petree provided insufficient evidence to establish negligence because he had control over the train's movement, prior to a collision, and also made critical deposition admissions. Petree, argues there is substantial evidence presented that showed a breach of duty, on Norfolk's part, to provide Petree with a safe place to work. The crossing where the collision occurred was known to be dangerous, and was a hazard repeatedly discussed at safety meetings. Petree, in his assertions, relies on the higher standard of care imposed on railroad employer's under FELA. This Court denies Norfolk's motion for Summary Judgment because there was sufficient evidence presented to establish a question for the jury to determine Norfolk's negligence. Furthermore, there was sufficient evidence presented to permit a reasonable jury to find Norfolk negligent in maintaining an "extra-hazardous" railroad crossing and its failure to exercise ordinary care. 2. Defendant's,

Graham and Masur's Motion in Opposition to Norfolk's Motion for Summary Judgment

Defendant, Masur, allege there is enough evidence to show negligence on the part of Patree, the crew, and Norfolk Southern which raise factual issues precluding summary judgment. Musar claims a reasonable jury could find the engine failed to sound its horn continuously through the crossing based upon eye witness testimony that states only three short whistles, barely audible, were heard. Moreover, Masur alleges negligence on the part of Norfolk because they assumed the duty to maintain flaggers and flares at the crossing and because none were present at the time of the accident, Norfolk breached their duty. This Court finds that summary judgment on this issue was inappropriate. This Court held that there is a material dispute of fact for the jury to determine Norfolk's negligence for failing to provide flaggers or a warning in spite of the alleged danger in the intersection. Therefore, Norfolk's motion for summary judgment on both Petree's claims and Norfolk's cross-claims against Masur is denied. 3. Plaintiff's motion for partial summary judgment Finally, this Court denies plaintiff Petree's motion for partial summary judgment inappropriate. There are numerous factual issues, such as sounding the horn and further possible negligence on the part of the railroad in dispute. Other facts in dispute, the visibility of Musar's driving lane and failure to provide an adequate warning, among others, preclude a finding of summary judgment.

**Comments:**

Under FELA, precedent supports a duty of care imposed on a railroad employer to provide flaggers and adequate warnings on railroad crossings depending on the circumstances. Here, Norfolk failed to provide such warning and Petree introduced evidence sufficient to show a dispute as to whether this duty should be imposed here. Furthermore, Petree's own negligence must be found by a finder of fact. Alleged by the defendant, Norfolk, is that Petree as the locomotive operator failed to blow the train's whistle as required under railroad regulations. Accordingly, this case has too many disputes of material fact to grant either the plaintiff's or defendant's motions for summary judgment Steve Gordon  
<http://www.gordon-elias.com>