

Court leaves one defendant in railroad case

Today's 7th U.S. Circuit Court of Appeals case involves an Amtrak train collision with a pickup truck at a private grade crossing at the Illinois Central Railroad's rail yard facility in Centralia and the questions of breach of duty and proximate causation.

Miller v. Illinois Central Railroad Company, 474 F.3d 951 (7th Cir. 2007).

The Illinois Central Railroad hired defendant STS Acquisitions to do construction work on some of its fuel-related facilities at its rail yard in Centralia. STS hired Central States Environmental Services as general contractor and CSES hired S & M Basements as the concrete subcontractor on the project. Thomas Miller, whose pickup truck was struck by the Amtrak train, was a partner in S & M.

The accident occurred at a private grade crossing consisting of three parallel railroad tracks, which the workers, including Miller, used to access the construction site in the rail yard. The tracks ran north and south and the construction area was west of them. A worker leaving the construction area would proceed eastbound across the tracks, crossing the "rip track" first (a spur track on which railroad cars were repaired in place). The next, or middle track, was a switching track used by switch engines. The third track was the main track. An Amtrak train ran on the main track every day at about 5 p.m. at about 78 mph (speed limit is 79 mph).

On the date of accident, Miller was going home around 5 p.m. and had crossed the rip track and switch track in his pickup truck when an Amtrak train on the main line, traveling 78 mph, struck the rear of his truck.

Miller sued Illinois Central Railroad Co., Amtrak, S.T.S. Acquisitions, and Central States Environmental Services for damages, alleging negligence in state court. The case was removed to federal court because Amtrak is an instrument of the federal government because over 50 percent of its stock is owned by the United States.

Chief Judge G. Patrick Murphy of the U.S. District Court for the Southern District of Illinois granted summary judgment for all defendants, finding that Miller's conduct in crossing the tracks without yielding to the train was the sole proximate cause of the accident.

A panel of the the 7th Circuit, in a 2-to-1 decision, affirmed for all defendants except Illinois Central. Judge Richard A. Posner wrote the opinion, reversing only as to Illinois Central, suggesting a jury could find it negligent by inviting use of the private crossing by the workers and not providing some protection, such as a flagman. Judge Kenneth F. Ripple dissented, suggesting he would have affirmed summary judgment for all defendants.

Posner began the court's discussion of why summary judgment was properly



Federal Courts

By Jay S. Judge

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granted for Amtrak, which complied with state law requiring whistle blowing for grade crossings:

"Miller has no recollection of the accident, a common result of a serious accident. Although one witness testified that she did not hear the train sound its whistle (and that she would have heard it if had), as it was required to do when approaching a crossing, several others were positive they heard it and the train's engineer testified that in addition to blowing the standard whistle pattern he began blowing frantically when he saw that the truck was on a collision course with the train. The 'ditch light' on the locomotive was on when the train reached the crossing. It is connected to the whistle; and the connection had been working that morning. An independent expert's report states without contradiction that an examination of the locomotive's 'black box' after the accident revealed that the whistle had indeed been blown in the irregular warning pattern to which the locomotive engineer testified.

"The witness who said the whistle hadn't been blown was testifying almost four years after the accident, and in the face of all the other evidence we do not think a reasonable jury could conclude that the whistle had not been blown, merely because one witness did not recall hearing the whistle years after a very dramatic event. It would be easy for her to forget the one routine feature of the episode — a train's whistle blowing, albeit irregularly. We conclude that summary judgment was rightly granted in favor of Amtrak."

Next, the court considered and found the district court's grant of summary judgment for STS and CSES proper and warranted:

"We do not think a reasonable jury could find that either STS or CSES was careless, because they did not control the crossing or its use. The crossing was one way of getting to the construction site, which was about 100 feet west of the tracks, but there was at least one other way, though the railroad crossing was more convenient. If you have a highway accident while driving to a grocery store, the store is not

liable. It is not that it has no duty of care to its customers; a customer who slipped and fell in the store because of the negligence of an employee would have a claim against the store. But the store would not be responsible for accidents to customers that occurred elsewhere, because those accidents would not be caused by negligence by the store.

"We would have a different case if CSES or STS had controlled the crossing, *Kotecki v. Walsh Construction Co.*, 333 Ill.App.3d 583, 776 N.E.2d 774, 777 (2002), but there is no evidence of that unless it is Miller's statement in his deposition that the crossing 'was where you entered' and left the construction site, and that is far short of signifying control. Nor is it even remotely likely that the Illinois Central would have ceded control of a crossing to a company that was not in the railroad industry — that would be a dangerous thing to do.

"We would also have a different case had CSES or STS directed S & M Basements to use the crossing to get to the work site. 'One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.' Restatement (Second) of Torts '414 (1965). (The Illinois courts treat this provision of the Restatement as a correct statement of Illinois common law. *Kotecki v. Walsh Construction Co.*, supra.) But there is no evidence that either company had retained such a 'right of supervision that the contractor [S & M][was] not entirely free to do the work in his own way.' CSES could assume that S & M would exercise due care in transporting S & M's workers to and from the work site."

Having affirmed summary judgment for Amtrak, STS, and CSES, Posner next considered whether a reasonably jury could find Illinois Central negligent for not providing more protection for the workers at its private crossing, which it invited the workers to use:

"A reasonable jury could, however, find that the Illinois Central was negligent. Although Miller was injured at a 'private' crossing, the workers who were working on the fuel oil system for the railroad on the railroad's property were using the crossing at the railroad's invitation, as it was the most convenient way of getting to the site. *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 706 N.E.2d 441, 448 (1998); Restatement (Second) of Torts § 332, comment e. Knowing that the crossing was being used by a number of persons who were not railroad workers alert to the dangers of a rail yard, the railroad welcomed their use of it. The crossing road crossed several tracks — one a main line on which trains ran at high

speed — and yet lacked any safety precautions. The two parallel live tracks made a safe passage tricky as we explained, and by parking a line of boxcars next to the westernmost crossing the railroad had made it even trickier."

Posner suggested that a jury should consider whether the Illinois Central could have taken precautions to avoid the accident at a cost less than the cost of an accident discounted by the probability an accident would occur:

"So it was a dangerous crossing — or so a jury could reasonably find — and a jury might also find that the railroad could at a cost lower than the expected accident cost have stationed a flagman at the crossing when a passenger train was expected (the engineer was required to call a few minutes ahead to notify the rail yard that he was coming through), for that was only once or twice a day. True, Amtrak trains are often delayed, so the flagman might have had to wait around much of the day waiting for the call, though a delay in the afternoon train would be no problem if it lasted beyond the time when all the workers would have gone home. It is also true that there were freight trains running on the main line throughout the day, but freight trains are less dangerous because they're slower. Anyway, these are matters to be sorted out at a trial, along with consideration of alternatives — maybe the railroad could at modest cost have moved the boxcars to some other point on the siding, unblocking the view to someone crossing from the west to east. If the cost to the railroad of a precaution that would have averted the accident would have been less than the cost of an accident, if it occurred, discounted (multiplied) by the probability (enhanced by the number of workers using the crossing) that it would occur, the railroad was negligent. See *Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323, 327 (7th Cir. 1993); *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1263-64 (7th Cir. 1986) (Illinois law); *Pageloff v. Gaumer*, 365 Ill.App.3d 481, 849 N.E.2d 1086, 1088-89 (2006). That is for a jury to determine."

Finally, Posner did conclude a jury would find Miller negligent and assess his percentage of negligence:

"A jury that found that the Illinois Central was negligent would doubtless find that Miller was negligent too. But a victim's negligence is no longer a complete defense to a negligence suit, provided that the victim is not more careless than the injurer. 735 ILCS 5/2-1116(c); *Mrowca v. Chicago Transit Authority*, 317 Ill.App.3d 784, 251 Ill.Dec. 291, 740 N.E.2d 372, 374 (2000)."

The 7th Circuit affirmed summary judgment for Amtrak, STS, and CSES and reversed summary judgment for Illinois Central.