A word isn't worth a thousand pictures: court

Federal Courts

By Jay S. Judge

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Today's case involves an Federal Employers Liability Act, 45 U.S.C. § § 51-60, claim by Frank Coffey, an engineer, against Northeast Illinois Regional Commuter Railroad Corp. (Metra) for injuries he sustained when he climbed into an engine in the dark and struck his head on a sun visor as he reached to turn on the light switch in the cab.

Coffey v. Northeast Illinois Regional Commuter Railroad Corp. (Metra), No. 06-2310 (2007 WL 702807 (C.A.7 (Ill.)).

The 7th U.S. Circuit Court of Appeals, in an opinion written by Judge Richard A. Posner, encouraged attorneys to provide the courts with visual evidence (photos, measurements and such) to enable an accurate understanding of the facts in issue. Remarking that photos of the engine's cab interior showing the location of the sun visor and light switch would have been immensely helpful, Posner wrote:

"The case illustrates the curious and deplorable aversion of many lawyers to visual evidence and exact measurements (feet, inches, pounds, etc.) even when vastly more informative than a verbal description. We have noted this aversion in previous cases, *United States v. Boyd,* 475 F.3d 875, 878 (7th Cir. 2007); *Miller v. Illinois Central R.R.,* 474 F.3d 951, 954 (7th Cir. 2007); *United States v. Barnes,* 188 F.3d 893, 895 (7th Cir. 1999) — once remarking that some lawyers think a word is worth a thousand pictures. Wide-angle photo of the cab (showing its layout) — or better, because an angle wide enough to take in the whole cab would create distortion, a schematic diagram or blueprint with the dimensions indicated — would have revealed at a glance whether the visor in a horizontal position, in juxtaposition with the location of the light switch, created a significant risk of the engineer's bumping his head. And information on the weight of the visor and the material and thickness of the padding would have revealed whether the potential for injury that was created by its being in a horizontal position was sufficiently great to require the railroad to take precautions against its ever being in that position."

In the case of *Miller v. Illinois Central Railroad Co.,* 474 F.3d 951 (7th Cir. 2007), Posner similarly implored lawyers to provide physical dimensions and measurements where material and determinative of issues in dispute:

"The lawyers' imprecision on this score is exasperating, as nothing could be simpler than measuring the length of the crossing, including the part of the crossing to the east of the siding. All we have is testimony that the distance between the tracks was about 10 feet. The standard U.S. railroad gauge is 4 feet 8.5 inches, and if 'about ten feet' refers to the distance between the east rail of one track and the west rail of another, the total distance from the west rail of the siding (the first track) to the east rail of the main line (the third track) was almost 35 feet. (474 F.3d at 954).

In this case, U.S. District Judge Charles R. Norgle granted summary judgment for Metra, finding that Coffey failed to present a prima facie case of negligence under the FELA against Metra. The 7th Circuit affirmed, holding no negligence under the FELA was proven and that even Coffey's reliance upon the Locomotive Inspection Act, 49 U.S.C. § § 20701-20703, the violation of which is prima facie negligence under the FELA, was not sufficient to present a prima facie case.

Beginning the 7th Circuit's discussion, Posner set out Coffey's claim:

"The plaintiff, who worked as an engineer for a commuter railroad, brought suit against his employer, charging negligence under the Federal Employers Liability Act, 45 U.S.C. § § 51-60, plus a violation of the Locomotive Inspection Act, 49 U.S.C. § § 20701-20703 (such a violation is negligence per se under the FELA). Early one morning, when it was still pitch dark, the plaintiff had climbed into the driver's cab of the train and (according to his version of the accident, which the procedural posture of the case — the district court granted summary judgment for the defendant — requires us to credit), while reaching for the light switch, bumped his forehead against the sun visor, which was in a horizontal position rather than, as it should have been, turned up so that it was flush with the wall above the cab's windshield. He alleges improbably that he sustained serious injuries from the bump, even though it didn't prevent him from driving the train to its destination."

Noting the lack of physical evidence — dimensions, measurements and such — Posner wrote:

"The case is remarkable chiefly for the lack of investigation by the plaintiff's lawyer. He never bothered to determine what the visor is made of (his client didn't know, beyond saying that it was 'very hard' and was 'probably metal'), its weight and dimensions, what its padding was made of and how thick the padding was (the plaintiff testified that it was 'real thin'); the distance between the visor's edge and the seated engineer; and whether the light switch was so placed that in groping for it the engineer would be likely to thrust his head forward and hit the visor. The defendant's expert estimated that the plaintiff's head would have been 11.5 inches from the visor when he was where he said he was in the compartment, and the expert speculated that what really had happened was that the plaintiff had tripped over the workbag that he had carried with him into the cab and had fallen against the visor — which was what the plaintiff said had happened when he first reported the accident."

Finding serious doubt with respect to Coffey's theory that the vibration of the train caused the bolts to loosen and allowed the sun visor to hang down so that when he reached to turn on the light switch, he struck his head on the visor, the 7th Circuit stated:

"His lawyer conjectured that the bolts that fasten the visor to the wall had been loosened as a result of the train's vibration and the loosening had caused the visor to descend halfway so that it was pointing at the driver's head. The conjecture is implausible, though not quite so outlandish that it can be rejected as a matter of law. But pretty outlandish — a lack of friction due to the bolts' being loose should result, once the train's vibration started the visor on its downward journey, in its descending all the way; for it to stay in the horizontal position there would have to be enough friction to support the visor's weight, since if there wasn't the visor wouldn't stop in the middle.

"The lawyer made no request to inspect the visor. He did ask a Metra foreman whether there had been 'any kind of repair or modification' of the cab after the plaintiff reported the injury. The foreman replied that there hadn't been any repair that he was aware of, the inspection of the visor after the accident having revealed no defects in it. The plaintiff testified that the visor moved 'fairly easily.' But this does not imply that it was so loose that it would tumble down all by itself — and stop before it was all the way down.

"Nor did the lawyer make any effort to find the engineer who had last driven the train from that cab. (The train has cabs at either end from which it can be operated.) Suppose that driver had left the visor in the horizontal position, not realizing or perhaps not caring that it would pose a hazard to the next driver if, as happened, the next driver entered the cab while it was still dark outside. (That is a likelier explanation of its position than the loose-bolts theory.) Then, since the FELA abolishes the 'fellow servant' rule of the common law of industrial accidents, the earlier driver's negligence would be imputed to the railroad."

Finding no evidence to support the loose bolts let the sun visor drop down theory, the court found no basis for an FELA cause of action:

"As framed by the plaintiff's lawyer,

however, the issue of negligence in this case is only whether the railroad was negligent in failing to protect its engineers from the risk of colliding with a visor that dropped down into the horizontal position as a result of not being fastened tightly enough. Although the FELA is often said to require only slight evidence of negligence, e.g., *Mendoza v. Southern Pacific Transportation Co.*, 733 F.2d 631, 632-33 (9th Cir. 1984), that is not what the statute says; and as the Supreme Court reminded us just weeks ago: 'Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law.' *Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. 799, 805, 166 L.Ed.2d 638 (2007).

"It's true that the FELA makes the railroad liable for 'injury or death *resulting in whole or in part* from the negligence' of the railroad or its employees, 45 U.S.C. § 51 (emphasis added), and this has been interpreted to mean that the railroad is liable if 'the proofs justify with reason the conclusion that employer negligence played any part, even the *slightest*, in producing the injury or death for which damages are sought.'

"The missing links in the plaintiff's negligence case are evidence of the proximity of the visor in its horizontal position to the driver's head when he is groping for the light switch, and the weight and padding of the visor. If the visor is light and well padded, like the sun visor of an automobile, the railroad would have no reason to anticipate that bumping one's head on it would cause an injury and that therefore precautions should be taken to make sure the visor is never in the horizontal position. Perfunctory investigation by the plaintiff's lawyer would have filled in these missing links, but none was ever conducted. The record contains no plan of the cab, and though there are photos they don't reveal the layout. Nor are the essential dimensions of the cab and the visor in the record. The plaintiff, in short, has failed to make a prima facie case of negligence."

The 7th Circuit next considered whether possible Locomotive Inspection Act violations had been shown so as to create a prima facie FELA negligence case and found no proof thereof:

"As far as concerns this case, the Locomotive Inspection Act merely requires that the cab be safe; and that is no different from what the FELA would require by itself. But the plaintiff cites several regulations under the Locomotive Inspection Act, and a violation of such a regulation would be negligence per se, just like a violation of the Act itself. One of the regulations merely repeats what the statute says — that the cab must be safe, 49 C.F.R. § 229.45. Another, more promisingly, requires that sharp edges inside the cab be eliminated or padded, 49 C.F.R. § 238.233(e), but this regulation didn't go into effect until long after the cab car was placed in service, and so it is inapplicable, 'Section 238.233 Interior Fittings and Surfaces,' 64 Fed.Reg. 25540, 25614 (May 12, 1999) — and anyway the visor was padded.

"A third regulation requires the cab to 'have a conveniently located light that can be readily turned on and off by the persons operating the locomotive and that provides sufficient illumination for them to read train orders and timetables.' 49 C.F.R. § 229.127(a). It is unclear whether this is a reference to the kind of light that the plaintiff was groping for. The regulation refers to other lights as well, but they are 'cab lights, which will provide sufficient illumination for the control instruments, meters, and gauges to enable the engine crew to make accurate readings from their normal positions in the cab. These lights shall be located, constructed, and maintained so that light shines only on those parts requiring illumination and does not interfere with the crew's vision of the track and signals.' So the regulation may not refer to 'his' light at all. Still, under the Locomotive Inspection Act itself, without regard to the regulation, if the light switch was in an 'inconvenient' place and hence 'can[not] be readily turned on and off' and as a result would contribute to the injury if its placement created a risk to the engineer of bumping his head on the visor while reaching for the switch, the plaintiff might have a case. But he hasn't shown this. So he loses."

Concluding its decision with the recommendation that lawyers provide photos and measurements where essential to understanding the issues, the 7th Circuit affirmed the district court's grant of summary judgment for Metra.