No. 09-788

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

REPLY BRIEF

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OTHER AUTHORITY

REPLY BRIEF

In the petition, Norfolk Southern demonstrated deep and acknowledged divisions of authority over the principal elements of a FELA claim—(1) whether FELA replaced ordinary common-law causation with "slightest" causation; and (2) whether FELA abrogated traditional common-law negligence in favor of "slightest" negligence. Jordan does not meaningfully contest the existence of either conflict. Instead, the Brief in Opposition focuses principally on various claimed procedural obstacles. None, however, is substantial. The issues were litigated below, and at Jordan's behest and over Norfolk Southern's objection, the court gave a jury instruction that erroneously employed the same "even the slightest" language that has bedeviled the lower courts, Pet. App. 69a-70a, and sharply divided this Court, see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 172-77 (2007) (Souter, J., concurring); *id.* at 178 (Ginsburg, J., concurring in the judgment). Compounding the prejudice, this instruction applied only to Norfolk Southern, in stark contrast to a common-law causation instruction that governed Jordan's negligence claim against Burlington Northern.

The petition should be granted to provide clarity in this area of continuing confusion on an issue that arises in virtually every FELA case.

I. THE DECISION BELOW WIDENS A CONFLICT OVER FELA'S CAUSATION STANDARD, AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. There exists a decades-old division of authority over whether FELA requires a showing of common-law proximate cause, or instead has substituted "relaxed" or "slightest" causation (as Jordan advocated

below). At least seven state supreme courts hold that a FELA plaintiff must show that his injuries were proximately caused by the railroad's negligence. Pet. 11-12 & n.5. In direct conflict, various federal courts of appeals have mistakenly interpreted *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), as relaxing FELA's causation standard. Pet. 12-14. Jordan grudgingly concedes "that there is some disagreement on the exact meaning of *Rogers*." Opp. 17; *id.* 18-19. His arguments therefore seek only to distract from, not deny, the conflict. In any event, they fail.

First, Jordan observes that some cases that embrace proximate causation also cite *Rogers*. *Id.* 20 & n.11. But this would be significant only if *Rogers* were irreconcilable with proximate cause, which it is not. Pet. 20-21; *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). More to the point, that is the question presented for this Court's resolution on the merits. What matters here is that various courts understand *Rogers* and proximate cause to be entirely compatible,[1] and this understanding conflicts clearly with courts that read *Rogers* as abrogating proximate cause.

Second, Jordan argues that "there is no conflict among the lower courts in practice." Opp. 20. His argument appears to be that even courts expressly *saying* that proximate cause is required apply some lesser standard in practice. So, for instance, Jordan

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[1] For instance, in *Gardner* v. *CSX Transportation, Inc.*, the West Virginia Supreme Court both cited *Rogers* and correctly held that "to prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury." 498 S.E.2d 473, 483 (W. Va. 1997).

argues that in *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009), the Utah Supreme Court "applied what can only be described as a relaxed standard," Opp. 20-21. But it is unclear what makes *Raab*'s factual analysis "relaxed." And, more fundamentally, *Raab* squarely rejected the plaintiff's request for a "relaxed" standard, held that "there is no ... statutory support for reading *Rogers* as eliminating the requirement of proximate causation"; and explained that "such a reading would be contrary to the Court's announced interpretive approach to FELA." 221 P.3d at 225 & n.14, 229; *accord Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674-75 (Mont. 1991). Jordan may not perceive any conflict here, but *Raab* expressly did. 221 P.3d at 230.

Third, Jordan disparages the issue as "academic," "unimportant," and "arcane." Opp. 21. On the contrary, this issue arises repeatedly, as demonstrated by the numerous authorities addressing the issue. Pet. 10-15 & nn.5-7. Hundreds of FELA cases are filed each year in federal court,[2] in addition to numerous FELA cases filed in state court, and the Jones Act cases employing the same standards.[3] Causation is an element in each. It is commonplace that juries are presumed to follow their instructions, *CSX Transp., Inc.* v. *Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam)—which surely is why Jordan fought the issue so hard below, Supp. App. 6a. Indeed, Jordan

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[2] *See* Admin. Office of U.S. Courts, *Annual Report of the Director: Judicial Business of the United States Courts,* tbl.C-2A at 146 (2008), *available at* http://www.uscourts.gov/judbus2008/appendices/C02ASep08.pdf (more than 3300 federal FELA cases filed from 2004-2008).

[3] *See Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]" (internal quotation marks omitted)).

ultimately concedes that "[t]he reporters are filled with FELA cases in which causation is truly at issue." Opp. 16. It therefore is no surprise that the outcome of FELA cases indeed turns on the causation standard. In *Syverson* v. *Consolidated Rail Corp.*, for instance, the Second Circuit reversed summary judgment for the railroad. Although it would have affirmed dismissal "had this been a negligence action at common law," reversal was required under FELA's "substantially diluted" and "relaxed" causation standard: FELA permits liability "for risks that would be too remote to support liability under common law." 19 F.3d 824, 825-28 (2d Cir. 1994); *accord* AAR Br. 7-10 (discussing cases in which the causation standard was critical). An outcome-determinative legal standard that has hopefully divided the lower courts is precisely the type of issue this Court should grant certiorari to decide.

B. Review additionally is warranted because the slightest causation standard conflicts with this Court's precedents. The Court repeatedly has held that FELA requires a showing of proximate cause. Pet. 19-22 & n.11. Notably, Jordan does not dispute this showing. Instead, he responds that there also "are numerous cases (many decided before *Rogers*) in which this Court unmistakably applied a relaxed [causation] standard." Opp. 22-23 & n.13. If this were true, then there would exist a conflict in this Court's precedents that only this Court could resolve. And that would be more reason, not less, to grant the petition.

In fact, however, not one of the cases cited by Jordan purports to "appl[y] a relaxed causation standard." At least three of them specifically articulate proximate cause as the governing standard. See *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S.

430, 435 (1949); *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944); cf. Pet. 20-21 & n.10. Others say nothing about proximate cause at all.[4] Jordan's point again seems to be that, whatever standard the Court articulated, the one it actually applied was "relaxed." Even were this true—and how Jordan determines what constitutes "relaxed" causation, he does not explain—it does not remotely suffice to overcome the numerous cases in which this Court specifically has stated that FELA requires proximate cause. See Pet. 19-20 & n.11.

Given the clarity of these precedents, Jordan ultimately is forced to attack the "rule that FELA adopted then-existing common law except where otherwise stated." Opp. 23. But that is precisely the rule this Court has articulated on six or more occasions. *E.g.*, *Sorrell*, 549 U.S. at 165-66 ("Absent express statutory language to the contrary, the elements of a FELA claim are determined by reference to the common law."); *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949).[5] Critical here, FELA did not abrogate the common-law standard of proximate causation, which therefore governs.

C. Having presented no serious argument to counteract the showing of a split of authority and a con-

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[4] *Webb* v. *Illinois Central Railroad*, far from rejecting proximate cause, explained that "we do not think that the case presents an issue of causation," and simply quoted *Rogers*. 352 U.S. 512, 515-16 (1957). And *Lavender* v. *Kurn* articulated no special rule for FELA cases, but spoke generally about inferences that factfinders may draw. 327 U.S. 645, 651 (1946).

[5] *Accord Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 429 (1997); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994); *Monessen S.W. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988).

flict with this Court's precedents, Jordan is left to offer arguments why ultimately he would prevail on the merits. Opp. 7-17. These arguments are premature at this stage, and mistaken in any event.

1. Jordan first contends that, whatever the propriety of a "slightest" cause standard, "the jury instructions in fact required … common law proximate cause." *Id.* 7 (capitalization omitted). There can be no question, however, that the court instructed the jury to apply slightest causation:

> [FELA] imposes liability on the railroad employer … when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, *even the slightest*, on the part of the employer.

Pet. App. 70a (emphasis added). Nor can Jordan be heard to argue that this instruction embodies anything other than relaxed causation. Jordan himself advocated this language precisely because it embodies such a standard:

> That is the standard of causation under the FELA which is exactly the point I was driving home a minute ago. It says: Legal cause of damage—we can go pull *Rogers*, you just read from that and that's what it said. That's what *Rogers* and the United States Supreme Court and every court that's interpreted it says.
>
> Legal cause of damage or complaint. Any part, *no matter how small,—and that's really the standard*—in bringing about or actually causing the injury or damage.

Supp. App. 6a (emphasis added).

Jordan notes that elsewhere, the court instructed the jury that "'[i]n order to find that it was a proximate cause, you must find that the injury was the

natural and probable consequence of the railroad's negligence.'" Opp. 8. Thus, he says, "the trial court's causation instruction was, in substance, a proximate cause instruction." *Id.* But the remainder of the instructions served only to emphasize the relaxed nature of the causation standard applied against Norfolk Southern. The jury charge distinguished repeatedly between the standards applicable to Norfolk Southern under FELA, and those applicable to Jordan's separate common-law negligence claim against Burlington Northern. *Compare, e.g.*, Jordan App. 17a ("[t]he instructions I am about to give you apply exclusively between the plaintiff employee and [Norfolk Southern]" and are "based upon [FELA]"), *with id.* 26a (FELA "has no application to" Burlington Northern; "plaintiff's theory against [Burlington Northern] is under common law negligence"), *and id.* 27a (common-law negligence requires "proximate or legal cause"). Burlington Northern, of course, was found not liable. And if it were true, as Jordan posits, that the jury considered both the "even the slightest" standard and also the earlier instruction on legal cause when evaluating Norfolk Southern's liability, which is improbable, the internal contradiction in the instructions is more reason to vacate and remand.

2. Jordan further argues that "causation was never seriously contested at trial." Opp. 15. But that is an issue to be determined by a properly instructed jury. And it is incorrect in any event. A principal focus of Norfolk Southern's closing argument was that its conduct was not the cause of Jordan's injuries. See generally Trial Tr. at 2022-31, *Jordan* v. *BNSF*, No. CT004175-03D2 (Tenn. Cir. Ct. Feb. 8, 2006). The argument could not have been more directly stated: "[W]hen you think about it, when you analyze the evidence, the evidence shows that close [railroad

track] clearances did not—[were] not a legal cause of this accident." *Id.* 2022.

Furthermore, Norfolk Southern argued that Burlington Northern's failure to use its headlight and bell caused Jordan's injuries. Pet. App. 6a-7a. The evaluation of this argument necessarily was affected when the court instructed the jury to apply different causation standards to Norfolk Southern and Burlington Northern. *Supra* 6-7; cf. also Jordan App. 16a (in assessing fault, the jury should consider "[w]hose conduct more directly caused the injury to the plaintiff"). Far from causation not being contested, these two causation arguments were a centerpiece of Norfolk Southern's defense at trial.

3. Finally, Jordan argues that the use of the phrase "even the slightest" related to "a negligence instruction, not a causation instruction." Opp. 14. For the reasons discussed next, the use of a relaxed negligence standard presents an even starker conflict than relaxed causation, and finds even less support in this Court's precedents. If Jordan is right, this is further reason that the petition should be granted.

II. THE DECISION BELOW DEEPENS AN ENTRENCHED DIVISION OF AUTHORITY OVER FELA'S NEGLIGENCE STANDARD.

A. The petition also demonstrates even deeper division over whether FELA embraces a "slightest negligence" standard (in addition to slightest *causation*). Pet. 15-18. After Jordan's Brief in Opposition, it could not be clearer that this issue merits the Court's attention. He does not even attempt to dispute the existence of the entrenched circuit split. He also presents no serious argument that this Court has embraced "slightest negligence," which it has not. See *id.* 22-23. On the contrary, "'[s]o far as negli-

gence is concerned, that standard is the same—ordinary prudence—for both Employee and Railroad alike.'" *Sorrell*, 549 U.S. at 169 (quoting *Page* v. *St. Louis Sw. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965)). Notably, even some courts that have adopted the erroneous slight causation standard have rejected slight negligence as inconsistent with FELA and *Rogers*. *E.g.*, *Montgomery* v. *CSX Transp., Inc.*, 656 S.E.2d 20, 26-28 (S.C. 2008); see also *Coffey* v. *Ne. Ill. Reg'l Commuter R.R. (Metra)*, 479 F.3d 472, 476 (7th Cir. 2007). This issue plainly warrants the Court's attention, and the fact that Jordan does not argue otherwise speaks volumes.

B. Jordan focuses his attention upon claimed defects in the presentation of the issues. These arguments likewise fail.

1. Jordan first argues that the issue was insufficiently preserved. Opp. 26-27. Specifically, he says, Norfolk Southern "never once … suggested that instruction affected the negligence standard." *Id.* 26. On the contrary, Norfolk Southern's trial counsel broadly objected to any use of the term "even the slightest." Supp. App. 5a-6a, 8a. He specifically linked that phrase to "the railroads' duties," *id.* 6a, and to the "railroad's exposure to negligence standards," *id.* 8a. In response, Jordan's counsel himself recognized that the phrase "'even the slightest'" "talks about the *duty* of the railroad under [FELA]." *Id.* 10a (emphasis added). In posttrial motions, Norfolk Southern likewise objected to the instruction as incorrectly stating "[t]he degree of negligence to be applied in this case." *Id.* 14a.

Most importantly, Jordan effectively concedes that the point was preserved. He says that Norfolk Southern made this argument for the first time "in its Court of Appeals rebuttal brief." Opp. 26. But nearly

the same language that Jordan admits raised the issue appears in Norfolk Southern's opening brief on appeal.[6] Nor did the court of appeals find the issue waived, although Jordan claimed waiver there too; on the contrary, and as Jordan recognizes, the court simply misunderstood the issue. *Id*. 26-27. That an appellate court conflated slight cause with slight negligence is further evidence that this Court needs to bring clarity to the issue.

2. Jordan further argues that the focus on slight negligence "did not have any effect," given that negligence was "previously[] defined" elsewhere in the instructions. *Id.* 27. This argument is quickly dismissed. Jordan fought tooth and nail to have the phrase "even the slightest" included in the jury instruction. Supp. App. 2a, 6a. Indeed, he argued that it would be reversible error to omit it: When, during a discussion of instructions concerning "the railroads' duties," Norfolk Southern asked the court to remove the phrase "even the slightest," Jordan's counsel responded that he "would welcome you to take that out because I'll win on appeal." *Id*. 6a. Having gotten the instruction he fought for, Jordan cannot now argue that it was meaningless.

To the extent Jordan's point is that the instructions were self-contradictory, this illustrates confusion warranting this Court's attention. In fact, however,

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[6] *Compare* Supp. App. 18a ("In the instant case, the trial court instructed the jury based upon the so-called 'watered down' version of causation and negligence…. Justice would not be served by allowing a $4,000,000 verdict to stand on an incorrect standard of causation and negligence."), *with* Opp. 26 ("'[t]he trial court incorrectly instructed the jury based upon the so-called "watered down" version of causation and negligence'" (quoting Norfolk Southern's reply brief on appeal)).

the meaning of the instruction could not be clearer. The court instructed the jury that FELA

> imposes liability on the railroad employer … when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, *even the slightest*, on the part of the employer.

Pet. App. 70a (emphasis added). This language was a clear invitation to the jury to impose liability based on some lesser quantum of negligence than otherwise would be required, as the courts embracing slight negligence recognize.[7] That the instruction elsewhere also discusses negligence in general terms, see Jordan App. 25a, does not remotely lessen the error of the "slightest" negligence standard. E.g., *Deserant* v. *Cerillos Coal R.R.*, 178 U.S. 409, 421 (1900) (reversible error where the relevant legal principle was properly stated in the general instruction, but "materially modified in the application" portion of the instructions).

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[7] *See Hileman* v. *Pittsburgh & Lake Erie R.R.*, 685 A.2d 994, 995-96 (Pa. 1996) ("the slightest bit of negligence ... is sufficient" for a finding of "liability under the FELA"); *see also Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1150 (Wash. 1999) (providing that FELA "requires the worker provide only slight evidence his injuries were foreseeably the result of the railroad's breach of its duty").

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 23, 2010

SUPPLEMENTAL APPENDIX A

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

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NO. CT004175-03D2

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THOMAS DAVID JORDAN,
Plaintiff,

vs.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A Corporation and NORFOLK SOUTHERN RAILWAY COMPANY, A Corporation.

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OBJECTIONS TO COURT'S CHARGE

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[1] BE IT REMEMBERED, that the excerpt of the above-captioned Cause came on to be heard on the 7th & 8th days of February, 2006, beginning at approximately 10:00 a.m. before the HONORABLE JAMES RUSSELL, Judge Presiding, when and where the following proceedings were had, to-wit:

* * *

[12] THE COURT: . . . Let's look on down to the bottom of Page 8 where we'll pick up with the beginning of the instructions that apply to the—explain the legal concepts that apply to everyone.

Again, this is taken straight, almost, from the TPI, in certain instances, to fit our case. That covers pages, the bottom of Page 8 through the top of Page 13. Any questions, comments, suggestions or changes, either by way of addition or deletion?

MR. GIBSON: Norfolk Southern has no objection to that portion of the Charge through the top of Page 13.

MR. KEITH: Judge, I really have no objections. But I'm just a little bit concerned, I guess. As you know, the standard of causation is different under a FELA claim versus Burlington Northern.

Your Honor instructed them on proximate cause as it relates to Norfolk Southern, but that [13] doesn't apply. Your Honor just read the Rogers decision, actually. We've just covered that ground. Just not—I think that I see what's going on. I think in terms of the preponderance of the evidence and all that, that's fine. There's a difference between a legal cause and proximate cause.

MR. GIBSON: I will say this. We prefer language centered around proximate cause to legal cause, going back to the old days. And if Mr. Keith wants to use the old TPI proximate cause language, we would prefer that.

MR. KEITH: No. We ain't going to use that.

THE COURT: Let me make this comment and see what you think. One of the reasons I wanted to take another look at Rogers was because we have a situation—we're probably going to get into this more specifically when we get around to the verdict forms.

Frankly, if you looked at the verdict form that Mr. Spencer prepared, you'd see he's approaching this conceptually different. I've wrestled with that aspect of it because you have a [14] comparative fault case. As far as I know, there's been no decision rendered by any appellate court in Tennessee, or any other jurisdiction, that deals with the concept of comparative fault in an FELA world.

And I was trying to capture notions of comparative fault. The thing I was looking back at Rogers for was to see how the Supreme Court discussed negligence issues. Sure enough, they even—it makes reference to the term "fault," and that concept is captured in Rogers. I thought, well, that's good, it helps.

There seems to be no reason why not to blend comparative fault into the whole picture, and so that's what I've tried to do. Frankly, using fault terminology and concepts, if you think about it, the FELA is the mother of all comparative fault. I mean, that's where it all began. How much further do we need to go?

MR. KEITH: I think I agree with all that, I agree with the way Your Honor has approached it from that perspective. I think my concern is going to be addressed more specifically when we talk about the FELA and the railroad. I [15] think we can talk about it, if we need to, then.

MR. GIBSON: Your Honor, if I may. When we get into the next phase,—I guess that's where we're going—I'll just state that Norfolk Southern prefers the alternate instruction beginning the middle of Page 14 to the instruction that immediately preceded it.

THE COURT: Actually, the term "alternate instruction" was to have been deleted in this draft.

MR. GIBSON: It all goes in?

THE COURT: It all goes in.

MR. GIBSON: I have no objection to that.

THE COURT: That heading was to have been taken out. If I'm in the right place—I'm in the right place. And, yes, that heading was to have been deleted.

* * *

[28] THE COURT: I think in being good stewards of our time, the best way to approach this [29] is to go through, almost paragraph by paragraph, and see if there is any objection or suggestion from anyone.

At the top of Page 15 there is the language that you see in just about every FELA case, "A railroad is not an insurer of the safety of its employees . . ." Anything wrong with that?

MR. GIBSON: No, sir.

THE COURT: Mr. Keith?

MR. KEITH: I'm sorry, Judge, I'm trying to flip where you are.

THE COURT: Page 15.

MR. KEITH: No objection.

THE COURT: The next paragraph: No liability may be imposed upon the railroad unless the evidence disclosed proves that it failed to exercise reasonable and ordinary care; that any such failure, in whole or in part, legally caused the injuries of the Plaintiff.

MR. GIBSON: No objection by Norfolk Southern.

MR. KEITH: I see where Mr. Barber objected to these instructions. Judge, what I think—you've already established the burden one [30] time with the general instructions, now you're basically establishing them again. I think technically it's right.

Right there, which comes back to my explanation, you use the language "in whole or in part." But nowhere has it been defined where you got that language and why we have that language, and that that is the standard of legal causation under the

FELA which I think is very important. It's just thrown out to them. And that would be my objection on that basis.

THE COURT: Actually, I quoted from the statute "in whole or in part" on Page 14. If that's an objection, the objection will be overruled and the Charge will be as given here. Let's go to Unavoidable Risks or Dangers.

MR. GIBSON: No objection by Norfolk Southern.

MR. KEITH: I've never seen it before, I had not ever—I don't guess I have any objections to it. I don't like it. But I think that, I do think that it's overly heavily-skewed to the railroad.

THE COURT: Let's move on to Defect or [31] Insufficiency in Tracks or Equipment.

MR. GIBSON: There's only one objection I have. Your Honor, on Page 16 I have filed a brief in support of our request for instruction number one, which addresses the language from Rogers, quote, "even the slightest," closed quote, and why it's not applicable.

And may I just stand on that brief and enter an objection only to that clause, quote, "even the slightest" appearing in this draft on line five, Page 16?

THE COURT: Are you suggesting that the "even the slightest" words be taken out of that paragraph when it's used everywhere else?

MR. GIBSON: That's the substance of the brief, Your Honor. The brief covers earlier decisions by the U.S. Supreme Court and some subsequent commentaries in cases. It reaches the conclusion that the U.S. Supreme Court denied for that to be a part of an instruction on causation to the jury.

THE COURT: Well, do you suggest taking it out of this paragraph and leaving it everywhere else or are you suggesting taking it out [32] altogether?

MR. GIBSON: Altogether. Bear in mind, I'm not talking about "in whole or in part," I'm talking about "even the slightest". "In whole or in part," of course, is in the statute. I don't object to that.

I think this is the only place where you have "even the slightest". If you've got it anywhere else, I object to it anywhere else but hadn't spotted it. You've got "in whole or in part" throughout the instructions regarding the railroads' duties, and I cannot object to that because it's in the statute.

MR. KEITH: Judge, I hope that—I dang sure hope we get a verdict in this case for us. But in the event that we don't, then I would welcome you to take that out because I know I'll win on appeal.

That is the standard of causation under the FELA which is exactly the point I was just driving home a minute ago. It says: Legal cause of damage—we can go pull Rogers, you just read from that and that's what it said. That's what Rogers and the United States Supreme Court and [33] every court that's interpreted it says.

Legal cause of damage or complaint. Any part, no matter how small,—and that's really the standard—in bringing about or actually causing the injury or damage.

THE COURT: Well, frankly, I may have missed the point of your brief, Mr. Gibson. If you'll bear with me a second, I think I need to get it off my desk.

(Judge retrieves documentation)

MR. WILLIAMS, SR: Your Honor, is there any reason for the corporate representatives to stay here or can they leave?

THE COURT: Thank you. I'm as comfortable as you are, there's no reason for any of the parties to stay unless you want to and want to be a part of, or consulted in, any of this. I take that as a request that all the folks seated behind counsel table be allowed to leave if they like.

(Parties exit courtroom)

THE COURT: I wasn't real sure when I read this—I want to take up the requested instructions one by one from everyone, and I'm not [34] sure if now is the time to get into Norfolk Southern's Request No. 1 which was supported by significant memorandum points and authorities.

I didn't get the notion, Mr. Gibson, that this brief was intended to go into the esoteric rationale behind the language "even the slightest". And I made a point as I was ruling on the Motion for Directed Verdict, and in reviewing the Rogers case I think I commented that there are legal pundits who have written, I think somewhat extensively, on the point of the language "even the slightest".

There's that school of thought that would argue that the language "even the slightest" was not intended as a measure of damages to be explained to the jury and used in jury instructions. Rather, it was intended as a standard of review for appellate courts, when they look at the trial record, to determine if there is any evidence—material evidence to support a verdict.

And what would be argued there, is the appellate courts are to be governed by this "even the slightest"

language, not juries. Frankly, is [35] that where you're pitching this or are we going in a different direction?

MR. GIBSON: The brief is a little bit different. It's not so much appellate standard as it is talking in terms of multiple parties in these cases. To me, the crux of the brief is the language "proximate cause". The damage is done to the language of proximate cause when "even the slightest" is added to the causation instruction.

That the intent of the act, and the decision by the Supreme Court, is to use that "in whole or in part" to define the railroad's exposure to negligence standards. That's the way I see it.

THE COURT: Is the suggestion now up for discussion to delete the use of the words "even the slightest" here and everywhere else?

MR. GIBSON: If it appears anywhere else. I've missed it if it does.

THE COURT: It appears in the very next sentence.

MR. GIBSON: Then twice.

THE COURT: It's there in other places, too.

MR. GIBSON: And anyplace that it [36] appears. I'm sorry, I just, I hadn't had time to review this as carefully as I would like. I've missed all of those except the one I called the Court's attention to. The intent of the objection was to take that language out, wherever it might appear.

THE COURT: Well, without going back over the Rogers case and all that we've said earlier,—even in connection with the Motion for Directed Verdict—if the suggestion, as I understand it, is to delete any use of the phrase "even the slightest," the Court is of

the considerate opinion that that phrase is so deeply entrenched in the law of FELA cases, that it has become a part of the jury instructions with regard to, at least, every FELA case this Judge has been involved in, either as a trial lawyer or now as a sitting judge, and that it should not be removed and should be included in the Charge to the jury.

MR. GIBSON: Your Honor, Norfolk Southern has no objection to the Safer Manner of Doing Work, also on Page 16.

MR. KEITH: Your Honor, could I make this suggestion? I don't know if it makes any [37] difference or not. Just the way—here's how my simple mind reads these instructions.

I think they're well written instructions, I think Your Honor's done a good job. On the flow of it, first, at one point it starts talking about what our obligation is, then the railroad doesn't have to do this, this and that.

I would recommend that we take the bottom of Page 15 where it says, "The law under which Plaintiff brings this action . . .", and I would recommend that we take that paragraph and pull it up to the top of the page, up to right before where it says, "A railroad is not an insurer of the safety of its employees," on that same page. Also, where it talks about "safer manner of doing work," pull that up here too.

Then what'll happen is after that point we should start talking about what the FELA is not and why it's not an insurer of its employees' safety. I don't know if that makes a difference. I think that may be the biggest problem I have reading this, and I think that may be why Mr. Barber thought it was unfair too.

I think what I see going on is really [38] kind of jumping around. Let's talk about how good it is and talk about this, this, this. I think if it first talks about the obligations of how we prove our case, and then it talks about what the railroad doesn't have to do; if we set it up in that kind of order, I think we flow better and I think it would be more balanced.

MR. GIBSON: I didn't follow any of that. I'm sorry, Your Honor. I can't comment 'till I see it on paper, and I didn't follow any of that.

MR. KEITH: I guess—here's what I'm talking about. Page 14. It starts out on Page 14—maybe I can make my point more clear—and it says, it first sets out what is the FELA and essentially what the FELA is. X, Y, and Z. And then right under where you have the Alternate Instruction, which will be deleted, it says it is established in this case that certain things under this statute have already been proven and are agreed to.

Then you go and state, "This is a negligence action. This means that before Plaintiff can recover, he must prove that his [39] injury resulted, in whole or in part, from the negligence or fault of this Defendant."

We've got the issue with the Workers' Comp thing. After that, what I would suggest is we go right into, "The law under which Plaintiff brings this action provides that Defendant shall be . . .", and it talks about what their obligations are under this law.

And it gets into, you go on into "even the slightest". It talks about the duty of the railroad under this law and the duty of the Defendant to use ordinary care and provide suitable tools. Then you get into the notice thing.

I think at the end, what we would do is put in this stuff about the railroad is not an insurer of the safety of its employees' negligence and no liability may be imposed upon the railroad unless the evidence—and that's how you wrap it up, and then you get into our negligence. And it makes sense, what I'm saying to the Court. I think that is a more balanced way of approaching it.

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SUPPLEMENTAL APPENDIX B

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS SHELBY COUNTY

NO. CT004175-03D2

THOMAS DAVID JORDAN,
Plaintiff,

vs.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A corporation and NORFOLK SOUTHERN RAILWAY COMPANY, a corporation,
Defendant.

DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S RULE 50.02 AND 59.02 MOTIONS

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[1] Defendant, Norfolk Southern Railway Company ("Norfolk Southern"), pursuant to Rule 50.02, Tennessee Rules of Civil Procedure, moves the Court to set aside the verdict returned in this case and the judgment entered on the verdict and to enter judgment in accordance with Norfolk Southern's motion for a directed verdict. Grounds for this motion are:

At the close of all of the proof, Norfolk Southern moved the Court to direct a verdict in its favor on the grounds that the sole basis for recovery alleged against Norfolk Southern was failure to furnish a safe place to work because of close track clearances and that the proof established that Norfolk Southern

was in compliance with T.C.A. § 65-6-205(d), the controlling standard on track clearances. The Court denied [2] the motion, Denial of the motion was erroneous and should be corrected on this post-trial motion.

Alternatively, pursuant to Rule 59.02, Tennessee Rules of Civil Procedure, Norfolk Southern moves the Court for a new trial on the following grounds:

1. The verdict and the judgment entered on the verdict are excessive.
2. The verdict is so excessive as to indicate passion, prejudice or caprice on the part of the jury.
3. The verdict is against the weight and preponderance of the evidence.
4. The Court erred in giving its instructions to the jury in the following respects:

The Court, over the objection of Norfolk Southern, instructed jury as follows:

> The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, work, . . . or other equipment." This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, *even the slightest*, on the part of the employer. If there is an injury as

> the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, *even the slightest*, on the part of the railroad. (Emphasis supplied).

[3] This instruction was erroneous. The degree of negligence to be applied in this case is correctly stated in Norfolk Southern's request for Instruction No. 1, denied by the Court, which reads as follows:

> If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the plaintiff's injury in whole or in part. You need not find that the railroad's negligence was the sole cause, but you must find that it was a proximate cause of the plaintiff's injury. In order to find that it was a proximate cause, you must find that the injury was the nature and probable consequence of the railroad's negligence, and that the railroad's negligence was a substantial factor in bringing about the injury.
>
> You may not find that the railroad's negligence was a proximate cause if it merely created an incidental condition or situation in which an accident, otherwise caused, resulted in the plaintiff's injury.

In support of its contention that the Court committed error, Norfolk Southern incorporates into this motion by reference the contents of its brief in support of jury instruction request No. 1, filed in this cause on February 3, 2006.

* * *

SUPPLEMENTAL APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION

Shelby County Circuit Court
No. CT-004175-03

THOMAS DAVID JORDAN,
Plaintiff/Appellee,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, a corporation,
Defendant/Appellee/Counter-Appellant,

No. W2007-00436-COA-R3-CV

NORFOLK SOUTHERN RAILWAY COMPANY, a corporation,
Defendant/Appellant/Counter-Appellee,

BRIEF OF APPELLANT,
NORFOLK SOUTHERN RAILWAY COMPANY

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* * *

[31] While the main opinion clearly states that (1) common law principles apply to the FELA unless expressly rejected and (2) the proximate causation standard applied at common law to the issues of negligence and the issue of contributory negligence. The main opinion fails to spell out the obvious conclusion that *proximate cause* is the appropriate

standard in FELA cases, not a watered down version of both causation and negligence as suggested by some courts.

In a concurring opinion, Justices Souter, Scalia, and Alito joined in the opinion drafted by Chief Justice Roberts, but went one step further and announced the appropriate [32] causation standard in FELA cases to correct the misconceptions subsequent to the *Rogers* decision. Specifically, the concurring opinion states the following:

> **Despite some courts' views to the contrary, *Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.**

Id. at 809 (emphasis added).

The concurring opinion reiterated the statements in the main opinion as follows: "Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." *Id.* at 810. The concurring opinion also stated the following:

> FELA changed some rules but, as we have said more than once, when Congress abrogated common law rules in FELA, it did so expressly. . . . FELA said nothing, however, about the familiar proximate cause standard for claims either of a defendant-employer's negligence or a plaintiff-employee's contributory negligence, and throughout the half-century between FELA's enactment and the decision in *Rogers*, we consistently

> recognized and applied proximate cause as the proper standard in FELA suits.
>
> * * *
>
> *Rogers* left this law where it was. We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes.
>
> * * *
>
> True, I would have to stipulate that clarity was not well served by the statement in *Rogers* that a case must go to a jury where "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." *Ibid*. But that statement did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations. It spoke to apportioning liability among parties, each of whom was understood to have had some hand in [33] causing damage directly enough to be what the law traditionally called a proximate cause.
>
> The absence of any intent to water down the common law requirement of proximate cause is evidence from the prior cases on which *Rogers* relied.

Id. at 811.

The concurring opinion points out that just eight years prior to the *Rogers* decision, in *Coray v. Southern Pacific Co*., 335 U.S. 520, "Justice Black unambiguously recognized proximate cause as the standard applicable in FELA suits." *Id*.

In the instant case, the trial court instructed the jury based upon the so-called "watered down" version of causation and negligence. This Court should enter an order granting Defendant Norfolk Southern a new trial such that Plaintiff in the instant case bears the burden of establishing the fundamental elements of negligence—duty, breach, causation, and damages—as stated by the United States Supreme Court in *Coray* and *Sorrell*. Justice would not be served by allowing a $4,000,000 verdict to stand on an incorrect standard of causation and negligence.

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