STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1566

Randy Nygaard,
Appellant,

vs.

BNSF Railway Company,
Respondent.

Filed June 10, 2013
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Hennepin County District Court
File No. 27CV1118213

Paula M. Jossart, Christopher J. Moreland, Bremseth Law Firm, P.C., Minnetonka, Minnesota (for appellant)

Lee A. Miller, Kimberly L. Johnson, Noelle L. Schubert, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges the summary-judgment dismissal of his claims against his former employer, respondent railroad, arising out of an injury to his knee, which appellant alleges was caused by defective equipment and unsafe working conditions.

Appellant asserts that the district court erred by holding that the Federal Safety Appliances Act (SAA) does not apply to his claim and by holding that he cannot recover in negligence under the Federal Employers' Liability Act (FELA) because he failed to present sufficient evidence of breach or foreseeability. Because we conclude that the SAA does not apply, we affirm summary judgment in favor of respondent on appellant's SAA claim. Because appellant presented sufficient evidence of breach and foreseeability to withstand summary judgment dismissing his FELA claim, we reverse the dismissal of this claim and remand for further proceedings.

FACTS

Appellant Randy Nygaard began working for respondent BNSF Railway Company (BNSF) in 1978. In July 2010, he was a switchman/brakeman in Grand Forks, North Dakota. His job duties included coupling and uncoupling rail cars, assembling and disassembling trains, and connecting, repairing, and replacing air-brake hoses.

On the day that he was injured, Nygaard and his co-worker, Chad Gilbertson, were assigned to take cars to and from, the North Dakota Mill (the Mill), one of BNSF's customers located outside of the Grand Forks rail yard. Trains use the main track to get to and from the Mill. Nygaard and Gilbertson had to assemble 15 to 25 cars and an engine. Nygaard was equipped with a remote-control-operated unit (RCO) to control the engine. Using the RCO, he could, from any location along the assemblage of cars, prevent the engine from moving.

After the cars and engine were assembled, Nygaard and Gilberston were required to test the air brake system before the train could move. To test the air brake system, they

attached the air-brake hoses between the cars and Nygaard "cut the air" into the hoses from the engine, but the air did not reach Gilbertson, who was at the end of the cars. Nygaard began inspecting the air-brake hoses, beginning at the front of the train. About five cars back from the engine, he found a damaged air hose. Nygaard retrieved a new hose and a wrench from the engine and used the RCO to put the train into emergency mode to prevent the engine from moving while he replaced the damaged hose.

There was nothing unusual about the fact that an air hose was damaged at the Mill. Nygaard testified in his deposition that the Mill employees often damaged air hoses while using front-end loaders to move cars around the facility and that BSNF was aware of such damage. BNSF Terminal Manager Hjerstedt testified in his deposition that he knew about rail cars being damaged at the Mill "be it from the car mover or someone running into them."

To replace the hose, Nygaard had to kneel in ballast. Nygaard testified in his deposition that the ballast at the Mill is "mainline ballast," also called "road ballast," which is larger, more uneven, and more difficult to work in than "yard ballast," also called "fines," which is the ballast used in the Grand Forks yard. Nygaard asserts that use of road ballast in a yard is inappropriate and that he and other BNSF employees had complained about the hazardous working conditions at the Mill due to the use of road ballast. Nygaard did not wear kneepads while he knelt in the road ballast.

When he stood up after the repair, Nygaard's right knee was "very sore." The pain persisted. Nygaard saw Dr. Jeffrey Eickman two days later. Dr. Eickman noted that Nygaard did not remember any particular event that would have caused his knee pain.

The next day, Nygaard filed an injury report with BNSF. On his injury report he wrote the following description of how he was injured: "Kneeling Bending Possibly while changing hose Monday Afternoon was kneeling in Ballast."

Nygaard received follow-up treatment from Dr. Phillip Johnson in January 2011. On Dr. Johnson's advice, Nygaard quit his job. He had surgery on his right knee in April 2011. Dr. Johnson has opined that the July 2010 incident of kneeling in road ballast caused Nygaard's right knee injuries in whole or in part, resulting in the need for surgery.

In September 2011, Nygaard sued BNSF for damages arising out of his knee injury, asserting claims for negligence under the FELA and strict liability under the SAA. Nygaard alleged that BNSF was negligent because it failed to provide a reasonably safe workplace, failed to provide him with safe and proper equipment, failed to inspect, maintain, and repair the properties and equipment employees used, and "failed to properly instruct and/or correct unsafe procedures used by its customers." Nygaard alleged that BNSF violated the SAA by using or allowing use of defective and unsafe air hoses which resulted in his injury.

Nygaard and BNSF filed cross-motions for summary judgment. The district court denied Nygaard's motion and granted summary judgment for BNSF, concluding that the SAA does not apply to this incident and that Nygaard failed to make a sufficient showing of breach of duty or foreseeability to preclude summary judgment dismissal of his FELA negligence claim. This appeal followed.

D E C I S I O N

I. Summary judgment standard of review

A district court's summary-judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The role of this court when reviewing a grant of summary judgment "is to determine whether there are any genuine issues of material fact and whether the [district] court erred in its application of the law." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). We may not weigh the evidence or make factual determinations, but must consider the evidence in the light most favorable to the party against whom summary judgment was granted. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

II. Application of the SAA air-brake provision

The SAA, first enacted in 1893, imposes a number of specific requirements for equipment on a railroad "vehicle." 49 U.S.C. § 20302(a)(1)-(3) (2006). A vehicle is defined as "a car, locomotive, tender, or similar vehicle." 49 U.S.C. § 20301(a) (2006). But the provision in the SAA relating to air brakes applies only to use of a "train." 49 U.S.C. § 20302(a)(5) (2006). Under this provision, a railroad carrier may use or allow to be used on its lines a train only if:

> (A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and
>
> (B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using

> the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

Id.

A railroad is strictly liable for an employee's injury or death caused by a violation of the SAA. *Norfolk & W. Ry. v. Hiles*, 516 U.S. 400, 408-09, 116 S. Ct. 890, 895 (1996) (stating that a railroad carrier has an absolute duty to comply with the SAA and that its liability for a violation is not dependent on negligence); *see also O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390, 70 S. Ct. 200, 204 (1949) (stating that liability for failure of equipment to perform as required by the SAA is not dependent on negligence or proof of care or diligence).

If there is any evidence from which a jury may reasonably infer that the SAA was violated and that such violation caused a railroad employee's injury, the case should be submitted to a jury for a verdict. *See, e.g.*, *Carter v. Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35, 70 S. Ct. 226, 229-30 (1949) (reversing a directed verdict for a railroad carrier on an SAA claim when the evidence was sufficient to allow the case to go to a jury); *Myers v. Reading Co.*, 331 U.S. 477, 484-86, 67 S. Ct. 1334, 1338-40 (1947) (reversing a judgment notwithstanding the verdict issued in favor of a railroad carrier on an SAA claim when the evidence was sufficient to support the jury's verdict for a railroad employee). The SAA, "fairly interpreted must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances." *Coray v. S. Pac. Co.*, 335 U.S. 520, 522-23, 69 S. Ct. 275, 276 (1949). "Congress has . . . for its own reasons imposed extraordinary safety

obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's [injury], the railroad must pay damages." *Id.* at 524, 69 S. Ct. at 277.

The United States Supreme Court has explained the circumstances in which the air-brake provision applies:

> It will be perceived that the air-brake provision deals with running a train, while the other requirements [in the SAA] relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars.

United States. v. Erie R.R., 237 U.S. 402, 407-08, 35 S. Ct. 621, 624 (1915).

BNSF argued, and the district court agreed, that at the time he was injured, Nygaard was not working on a "train" and was engaged in switching operations such that the SAA does not apply to his injury. The district court relied on cases from the Eighth Circuit Court of Appeals to conclude that "*movement* of the engine and its cars *as a unit* distinguishes switching operations from train functions."

Nygaard argues that the district court erred by treating movement as determinative of whether he was working on a train or performing switching operations at the time of

his injury. Nygaard asserts that completing a pre-departure air brake test, which can only be performed on a train, establishes as a matter of law that he was working on a train at the time of injury. *See* 49 C.F.R. § 232.215(a) (2012) (laying out the procedures for performing required air-brake test on a transfer train[1]). Nygaard argues that BNSF conceded in the district court that the assemblage of cars and engine that he was working on constituted a train by repeatedly referring to the assemblage as a "transfer train," and only referring to the assemblage as "rail cars" in its argument that the assemblage did not constitute a train for purposes of the SAA air-brake provision. We do not find this argument persuasive regarding the issue of whether the SAA air-brake provision applies to Nygaard's injury. Cases involving the SAA frequently use "train" to describe something that is ultimately determined not to be a train to which the air-brake provision of the SAA applies. *See, e.g., Trinidad v. S. Pac. Transp. Co.*, 949 F.2d, 187, 188-89 (5th Cir. 1991) ("Generally, courts have not applied the [SAA] to trains involved in switching operations . . . even though such trains are in motion."). The cases demonstrate that mere use of the word "train" to describe an assemblage of cars and an engine does not make the air-brake provision of the SAA applicable as a matter of law.

Whether movement of an assemblage of cars and an engine constitutes train movement or a switching operation is, for purposes of application of the air-brake

[1] "*Transfer train* means a train that travels between a point of origin and a point of final destination not exceeding 20 miles. Such trains may pick up or deliver freight equipment while en route to destination." 49 C.F.R. § 232.5 (2012). A transfer train is a train within the meaning of the SAA. *See United States v. Chi., Burlington, & Quincy R.R.*, 237 U.S. 410, 412, 35 S. Ct. 634, 635 (1915) (holding that transfer trains are subject to the air-brake provision of the SAA).

provision of the SAA, a question of law. *United States v. Thompson*, 252 F.2d 6, 9 (8th Cir. 1958). This court reviews questions of law de novo. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

The Code of Federal Regulations (C.F.R.) defines a train as "one or more locomotives coupled with one or more freight cars, except during switching service." 49 C.F.R. § 232.5. The C.F.R. defines switching service as:

> the classification of freight cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

Id.

Many of the early cases dealing with application of the air-brake provision of the SAA deal with challenges to penalties imposed on railroad carriers for alleged violation of the air-brake provision while cars are being moved from place to place within a rail yard or from yard to yard. There is no bright-line test for determining whether an assemblage of coupled cars attached to an engine is functioning as a train or is involved in switching operations; the decision turns on the particular facts of each case. *Ill. Cent. R.R. v. United States*, 14 F.2d 747, 748 (8th Cir. 1926). Cases have considered movement, length, distance moved, use, tracks, and whether the hazards that the SAA intends to protect against may be encountered. *See Louisville & Jeffersonville Bridge Co. v. United States*, 249 U.S. 534, 538, 39 S. Ct. 355, 357 (1919) ("The movement of this train of cars, 1,100 feet in length, was for a distance of over three-quarters of a mile, and

involved crossing, at grade, . . city streets . . . and a main[-]track movement of at least 2,600 feet, with two stops and startings on the main track. This is not only a train movement, but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employ[ees], of passengers, and of the public which it is the purpose of the act to secure . . . ."); *United States v. N. Pac. Ry.*, 254 U.S. 251, 253-55, 41 S. Ct. 101, 102 (1920) (rejecting argument that the SAA did not apply where no part of journey was on main line of railroad); *United States v. Seaboard Air Line R.R.*, 361 U.S. 78, 81-83, 80 S. Ct. 12, 15-16 (1959) ("Movements which, though miniature when compared with main-line hauls, have the characteristics of the customary 'train' movement and its attendant risks are to be included.").

In this case, the district court found determinative the lack of any movement of the assemblage of cars and engine before Nygaard was injured, relying on Eighth Circuit opinions that involve moving assemblages of cars and engines and that focus on whether the movement constituted train functions or switching operations. *See Thompson*, 252 F.2d at 7-9 (discussing whether the relevant movements were train movements or switching operations); *Chi., St. Paul, Minneapolis & Omaha Ry. v. United States*, 36 F.2d 670, 671 (8th Cir. 1929) (analyzing whether the movement of the cars in question constituted switching operations or train movements); *Ill. Cent. R.R.*, 14 F.2d at 749 (analyzing a rail yard that "was divided into two sets of switching tracks, a considerable distance apart" and concluding that, to be considered train operations, movements were not required to take place on main line tracks rather than in the designated rail yard);

Great N. Ry. v. United States, 288 F.2d 190, 191 (8th Cir. 1923) (holding that movement between two terminal yards, via main line track, constituted train functions and not switching operations); *see also United States v. N. Pac. Ry.*, 121 F. Supp. 397, 400-02 (D. Minn. 1954) (considering "whether in its proper setting the essential nature of the work done by the movement was that of train transportation or merely of switching or classification of cars" and concluding that the relevant movement constituted train operations).

All of the cases relied on by the district court involve the nature of movements rather than the absence of movement. There do not appear to be any Eighth Circuit cases analyzing whether an assemblage of cars and an engine that has not yet moved but is in final preparation for movement onto the main line is engaged in switching operations or constitutes a train subject to the SAA air-brake provision.

Nygaard argues that *Trinidad* supports his position that "[t]he switching process was complete, and the train was fully constituted. [Therefore] it was subject to the provisions of the [SAA] despite being motionless." *See* 949 F.2d at 189 ("Trains that have completed the switching process, and departed for their destinations, . . . are subject to the [SAA's] requirements, whether or not they are actually in motion when the defect occurs.") But, as BNSF points out, the facts in *Trinidad* are substantially similar to the facts here, and the court in *Trinidad* concluded that the air-brake provision of the SAA did not apply to the injury involved. There, the train being inspected at the time of the appellant's injury "had not moved from [the spot on which it was assembled] because it had not been released following inspection because the inspection was not yet complete."

Id. *Trinidad* does not support Nygaard's argument that the air-brake provision applies to his injury because, as in *Trinidad*, his injury occurred before the assemblage he was working on had been cleared to move and at a time when, due to the RCO being placed in emergency mode, there was no possibility of movement. Without possibility of movement, there was no possibility of encountering the hazards that the air-brake provision was designed to prevent.

The purpose of the air-brake provision is to eliminate hazards incident to using hand brakes while the train is in motion and to provide for more efficient control of moving trains. *See Seaboard Air Line R.R.*, 361 U.S. at 82-83, 80 S. Ct. at 15-16 ("History showed that hundreds of workers had been injured or killed by the stopping of unbraked cars, by the operation of hand brakes, and by the use of hand couplers. This history, well known to Congress, was the primary purpose behind the legislation." (Footnote omitted.)).

We conclude that, under the circumstances of this case, the district court correctly determined that the air-brake provision of the SAA does not apply to Nygaard's injury. None of the factors that might support a determination that Nygaard was working on a train at the time of the injury change the fact that this assemblage of cars and engine had not been cleared for train movement and was not capable of any movement at the time of the injury.

The district court alternatively held that, even if Nygaard's injury occurred while he was working on a "train" for purposes of 49 U.S.C § 20302(a)(5), the SAA still would not apply to his injury because the train was not "in use" at the time of the injury. *See*

Deans v. CSX Transp., Inc., 152 F.3d 326, 328 (4th Cir 1998) (stating that absolute liability for violation of the SAA only attaches "if the train is 'in use' at the time of the accident").[2] Whether a train is deemed to be "in use" at the time of an accident for purpose of the SAA is a question of law. *Id.* at 329.

In *Deans*, the Fourth Circuit rejected as "too facile" the district court's attempt to draw a "bright line distinction between trains which have had their pre-departure inspections and tests completed and been okayed for service (and are therefore 'in use'), and those for which pre-departure tests have not yet been completed (and therefore not 'in use'). *Id.* Deans was injured when he was releasing a hand brake before he attempted to conduct the air-brake test required before the train was released for departure. *Id.* The record established that Deans could have chosen to perform the air-brake test prior to attempting to release the hand brake, and if he had performed the air-brake test first, the train would have been okayed for service and, under the bright-line rule, deemed to be "in use" when he released the hand brake and was injured. *Id.* at 329. Concluding that "[i]t is inappropriate to base liability under the [SAA] on the mere happenstance of whether an employee chooses to release the hand brakes or conduct an air brake test first," the Fourth Circuit stated that "a more consistent and fairer result is reached by looking at a number of different factors, rather than simply at the completion or noncompletion of pre-departure tests" and held that "to determine whether a train is 'in

[2] *Deans* cites the language of 49 U.S.C. §20302(a) relating to hand brakes. 152 F.3d at 328. This provision is substantially similar to the section's air-brake provision.

use' for purposes of the [SAA], the primary factors we consider are where the train was located at the time of the accident and the activity of the injured party." *Id.*

In *Wright v. Ark. & Mo. R.R.*, the Eighth Circuit adopted the *Deans* multi-factor test to determine whether a train is "in use" and held that "determination of whether a train is 'in use' is to be made based upon the totality of the circumstances at the time of the injury." 574 F.3d 612, 621 (8th Cir. 2009) (applying a totality of the circumstances test to determine whether a train was "in use" for the purposes of the Locomotive Inspection Act[3]). In *Wright*, the Eighth Circuit affirmed the district court's conclusion that the train was not "in use" at the time Wright was injured because it was still undergoing inspection and had not yet been released for departure. *Id.* at 621-22.

Using the totality of the circumstances test, we conclude that the district court correctly determined that the train Nygaard and Gilbertson were still testing and which had been rendered unmovable, was not "in use" at the time Nygaard was injured.[4] Nygaard's reliance on *Deans* is misplaced because the sequence of tests performed by Nygaard is not an issue in Nygaard's case. Successful repair of the air-brake was a prerequisite to the possibility of train movement whereas release of the hand brake by

[3] The "in use" language of the Locomotive Inspection Act (formerly the Boiler Inspection Act) is identical to that in the SAA and courts apply the caselaw interchangeably. *See Steer v. Burlington N., Inc.*, 720 F.2d 975, 976 n.3 (8th Cir. 1983).

[4] 49 C.F.R. § 232.9(a) (2012), provides, in relevant part, that a railroad shall not be liable for a civil penalty for use of a train that does not comply with the SAA "if such action is in accordance with § 232.15 [governing movement of defective equipment]. For purposes of this part, a train . . . will be considered in use prior to departure but after it has received, or should have received, the inspection required for movement and is deemed ready for service." Although this provision applies specifically to civil penalties and not civil liability for injuries and the Eighth Circuit has rejected a bright-line test, we find the provision relevant to a determination of when a train is "in use."

Deans was not a repair needed to qualify the train for movement. *Deans*, 152 F.3d at 328.

Nygaard also relies on an unpublished federal district court opinion, *McGowan v. Wisc. Cent. Ltd.*, No. 04-C-017, 2005 WL 2077355 (E.D. Wis. Aug. 26, 2005), which involved circumstances similar to the circumstances of this case. Although *McGowan* supports Nygaard's argument, it is not precedent. And because the opinion relies on an analysis not adopted by the Eighth Circuit, we do not find it persuasive.

Because the district court correctly determined that, even if Nygaard was working on a "train," the train was not in use at the time of his injury, precluding application of the air-brake provision of the SAA in this case, we affirm dismissal of Nygaard's claim for strict liability under the SAA.[5]

III. Nygaard's claim under the FELA

The FELA provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

[5] Nygaard argues in his brief on appeal that liability under the SAA is not limited to the *type of injury* that the provisions of the act were intended to prevent. But BNSF has not made an argument that the type of injury precludes recovery under the SAA, and the district court did not base its decision on the type of injury. Nygaard's SAA claim fails because he failed to present evidence of an SAA violation related to his injury, not because of the type of injury he suffered.

45 U.S.C. § 51 (2006). What constitutes negligence for the purpose of applying the FELA is a federal question that must be determined by common-law principles as established and applied in the federal courts. *See Urie v. Thompson*, 337 U.S. 163, 174, 69 S. Ct. 1018, 1027 (1949); *see also Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 2404 (1994).

The general intent of Congress in passing the FELA was to "provide liberal recovery for injured workers." *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398 (1958); *see also Lisek v. Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994) ("The FELA is meant to provide a broad remedial framework for railroad workers and, in light of that purpose, is to be liberally construed in their favor."). A plaintiff's burden in a FELA action is thus "significantly lighter than it would be in an ordinary negligence case." *Lisek*, 30 F.3d at 832.

Although a plaintiff's proximate-cause burden may be lighter, the essential elements of a negligence claim brought under the FELA are the same as at common law. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165-66, 127 S. Ct. 799, 805 (2007); *see also Holbrook v. Norfolk S. Ry.*, 414 F.3d 739, 742 (7th Cir. 2005) ("FELA does not, however, render a railroad an insurer of its employees. Thus, a plaintiff must proffer some evidence of the defendant's negligence in order to survive summary judgment."). A plaintiff claiming under the FELA must therefore provide proof of the common-law elements of negligence: duty, breach, foreseeability, and causation. *Green v. CSX Transp., Inc.*, 414 F.3d 758, 766 (7th Cir. 2005); *see also Gottshall*, 512 U.S. at 543, 114 S. Ct. at 2404 (stating that the FELA is based on common-law concepts of negligence);

Van Gorder v. Grand Trunk W. R.R., 509 F.3d 265, 269 (6th Cir. 2007) ("FELA does not lessen a plaintiff's burden to prove the elements of negligence.").

"[B]ecause his burden at trial is so low, a FELA plaintiff can survive a motion for summary judgment when there is even slight evidence of negligence." *Lisek*, 30 F.3d at 832 (quotation omitted); *see also Smith v. Soo Line R.R.*, 617 N.W.2d 437, 439 (Minn. App. 2000) (stating that "FELA requires only a scintilla of evidence to establish negligence" (quotation omitted)), *review denied* (Minn. Nov. 21, 2000). The issue of negligence should be submitted to a jury if there is "a reasonable basis in the record for concluding that there was negligence which caused the injury." *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653, 67 S. Ct. 598, 600 (1947); *see also Eggert v. Norfolk & W. Ry.*, 538 F.2d 509, 511 (2nd Cir. 1976) ("It is well established that the role of the jury is significantly greater in FELA cases than in common law negligence actions."). But a FELA action "is not impervious to summary judgment," and "[i]f the plaintiff presents no evidence whatsoever to support the inference of negligence, the railroad's summary judgment motion is properly granted." *Lisek*, 30 F.3d at 832.

A. Duty

Whether there is a duty is a legal question for court resolution. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986). The district court stated that the existence of BNSF's duty to provide its employees with a reasonably safe workplace is not disputed in this case.

On appeal, BNSF relies on *Barnett v. Terminal R. Ass'n. of St. Louis* for the proposition that it "did not owe [Nygaard] a duty to inspect and repair a defect that it was

his job to inspect and repair." 228 F.2d 756, 761 (8th Cir. 1956) (concluding that the railroad did not owe Barnett a duty to protect him from a defect in an air hose that it was his job to repair). Because BNSF did not file a notice of review challenging the district court's ruling that it owed a duty to Nygaard, this issue is not before us on appeal. *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). And, even if we were to reach the issue, BNSF's argument is without merit because Nygaard's negligence claim is that BNSF breached its duty by failing to have the Mill use proper ballast in a location where BNSF knew that its employees would be kneeling in the ballast to repair air hoses, failing to correct the condition that led the Mill employees to routinely damage air hoses at the Mill, and failing to provide or require kneepads for kneeling in ballast.

A railroad carrier has a duty to exercise "due care," which is "what a reasonable and prudent man would [do] under the circumstances of the situation." *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 67, 63 S. Ct. 444, 451 (1943). A railroad carrier is "liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances, bearing in mind that the standard of care must be commensurate to the dangers of the business." *Wilkerson v. McCarthy*, 336 U.S. 53, 61, 69 S. Ct. 413, 417 (1949) (quotations omitted). A railroad's duty to provide a safe work place is nondelegable and exists even when its employees are required to go onto the premises of a third party over which the railroad has no control. *Shenker v. Balt. & Ohio R.R.*, 374 U.S. 1, 7, 83 S. Ct. 1667, 1671-72 (1963); *Carter v. Union R.R.* 438 F.2d 208, 211 (3rd Cir. 1971) ("This duty includes a responsibility to

inspect the third party's property for hazards and to take precautions to protect the employee from possible defects . . .").

B. Breach and foreseeability

"A railroad breaches its duty to provide a safe workplace when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform or protect its employees." *Smith*, 617 N.W.2d at 439; *see also Martinez v. Union Pac. R.R.*, 82 F.3d 223, 228 (8th Cir. 1996) (The FELA requires an employer to exercise "the same degree of care as an ordinary, reasonable person would exercise in similar circumstances"). And the requirement of foreseeability in a FELA action is met if the railroad carrier "was or should have been aware of conditions which created a likelihood that [the employee], in performing the duties required of him, would suffer just such an injury as he did." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 503, 77 S. Ct. 443, 447 (1957); *see also Urie*, 337 U.S. at 178, 69 S. Ct. at 1028 (stating that negligence under the FELA will attach if the railroad carrier "knew, or by the exercise of due care should have known, that prevalent standards of conduct were inadequate to protect [the injured employee] and similarly situated employees" (quotation omitted)). The issue of foreseeability is a question of fact for a jury. *Rogers*, 352 U.S. at 503-04, 778 S. Ct. at 447. "A FELA plaintiff need only present a scintilla of evidence tending to show negligence to survive summary judgment." *Smith*, 617 N.W.2d at 440.

The district court concluded that Nygaard failed to present evidence of breach of duty or foreseeability. The district court points to Nygaard's "choice" not to wear kneepads, noting that Nygaard did not assert, in his deposition, that kneepads were

unavailable to him and "failed to cite any bad conduct by another employee, any means of preventability, or any equipment problems as contributing to his injury at the time of his initial injury report." But the record does not support the district court's description of Nygaard's assertions.

Nygaard testified in his deposition that the ballast used in the yard at the Mill was mainline ballast (road ballast), which he described as being "harder to work with" and not usually used in a yard setting, and that employees had complained about it because "tracks or trenches . . . don't smooth out like fines do after things." He also testified that he did not know that kneepads were available. At oral argument on appeal, BNSF argued that Nygaard's testimony is insufficient to establish that use of road ballast in a yard is an unsafe condition. Because BNSF did not challenge the sufficiency of the evidence on this issue in its summary-judgment motion, Nygaard had no opportunity to present additional evidence concerning the impropriety of the use of road ballast. Given the minimal evidence necessary to defeat summary judgment, we conclude that Nygaard's testimony on the use of road ballast in a yard is sufficient to defeat summary judgment in this case.[6]

Nygaard also stated in his deposition that BNSF was aware that the Mill employees using loaders frequently damaged the rail cars and air hoses. And BNSF's Terminal Manager testified that he was aware of such damage. Because Nygaard

[6] We note that case law confirms that railroads are aware of the problems with using large ballast in work areas. *See, e.g., Grimes v. Norfolk S. Ry.*, 116 F.Supp.2d 995, 1004-05 (N.D. Ind. 2000) (denying summary judgment where, among other things, the size of ballast was at issue in a FELA claim for failure to provide a safe workplace).

identified the unsafe conditions and measures that would have prevented his injury, we conclude that Nygaard presented sufficient evidence to survive summary judgment on the elements of foreseeability and breach.

C. Causation

"[A] relaxed standard of causation applies under FELA." *Gottshall*, 512 U.S. at 543, 114 S. Ct. at 2404. A railroad carrier is liable for an employee's injury if the injury resulted "in whole or in part" from the carrier's negligence. 45 U.S.C. § 51. 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," then the employer railroad carrier is liable. *Gottshall*, 512 U.S. at 543, 114 S. Ct. at 2404 (quotation omitted). Nygaard presented sufficient evidence of causation through the opinion of Dr. Phillip Johnson that Nygaard's knee injury was caused in whole or in part by kneeling on road ballast at the Mill.

Because Nygaard presented sufficient evidence on all elements of his negligence claim, the district court erred by granting summary judgment to BNSF dismissing Nygaard's FELA claim.[7]

Affirmed in part, reversed in part, and remanded.

[7] Because we are reversing the district court's dismissal of Nygaard's FELA claim, we do not reach Nygaard's argument that the district court's dismissal of the FELA claim exceeded the scope of BNSF's summary-judgment motion.