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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOHN F. REDOS, JR.,  
Plaintiff,  
v.

No. 2:08-cv-01036-MCE-KJM  
Related to:  
No. 2:08-cv-01155-MCE-KJM

MEMORANDUM AND ORDER

UNION PACIFIC RAILROAD  
COMPANY,  
Defendants.

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Plaintiff filed this action on May 12, 2008. His case was later ordered related to Nickels v. Union Pacific Railroad Company, 2:08-cv-01155-MCE-KJM, and was then consolidated for discovery purposes with Nickles and Gomez v. Union Pacific Railroad Company, 2:09-cv-002255-MCE-KJM. Presently before the Court is Plaintiff's Motion for Summary Judgment, which is materially identical to that filed in Nickles, 2:08-cv-01155. For the following reasons, the instant Motion is denied.<sup>1</sup>

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<sup>1</sup> Because oral argument will not be of material assistance, the Court ordered this matter submitted on the briefing. E.D. Cal. Local Rule 78-230(h).

1 **BACKGROUND<sup>2</sup>**

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3 Plaintiff initiated this action seeking to recover for  
4 injuries suffered as a result of the derailment of rail grinding  
5 track maintenance equipment. The equipment was owned and  
6 operated by Harsco Track Technologies ("Harsco"), a contractor  
7 providing services for Union Pacific. Plaintiff Redos supervised  
8 the rail grinding equipment and Plaintiff Nickles was its  
9 operator.

10 According to Plaintiff's Statement of Undisputed Facts,  
11 Union Pacific contracted with Harsco for rail grinding services.  
12 Pursuant to that contract, Union Pacific was to provide qualified  
13 personnel to accompany the equipment and to obtain track  
14 occupancy time. Additionally, it was Defendant's responsibility  
15 to arrange for transportation of Harsco's equipment to and  
16 between the locations where grinding was to occur.

17 Additionally, the Harsco/Union Pacific contract specifically  
18 stated that Harsco and its agents and employees were not to be  
19 considered employees of Union Pacific. Rather, Harsco was  
20 clearly delineated as an independent contractor. Union Pacific  
21 retained no control over "employment, discharge, compensation and  
22 service" of Harsco employees.

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26 <sup>2</sup> The Court is cognizant that Defendant makes numerous  
27 objections to the form of Plaintiff's Separate Statement of  
28 Undisputed Facts, as well as to the citations to the record and  
admissibility of the proffered evidence. However, because the  
Court finds summary judgment improper on the merits, those  
objections are overruled without prejudice as moot.



1 Rule 56 also allows a court to grant summary adjudication on  
2 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party  
3 seeking to recover upon a claim ... may ... move ... for a  
4 summary judgment in the party's favor upon all or any part  
5 thereof."); see also *Allstate Ins. Co. v. Madan*, 889 F. Supp.  
6 374, 378-79 (C.D. Cal. 1995); *France Stone Co., Inc. v. Charter*  
7 *Township of Monroe*, 790 F. Supp. 707, 710 (E.D. Mich. 1992).  
8 The standard that applies to a motion for summary adjudication is  
9 the same as that which applies to a motion for summary judgment.  
10 See Fed. R. Civ. P. 56(a), 56(c); *Mora v. ChemTronics*, 16 F.  
11 Supp. 2d. 1192, 1200 (S.D. Cal. 1998).

12 A party seeking summary judgment always bears the  
13 initial responsibility of informing the district court  
14 of the basis for its motion, and identifying those  
15 portions of 'the pleadings, depositions, answers to  
interrogatories, and admissions on file together with  
the affidavits, if any,' which it believes demonstrate  
the absence of a genuine issue of material fact.

16 *Celotex Corp. v. Catrett*, 477 U.S. at 323 (quoting Rule 56(c)).

17 If the moving party meets its initial responsibility, the  
18 burden then shifts to the opposing party to establish that a  
19 genuine issue as to any material fact actually does exist.

20 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,  
21 585-87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S.  
22 253, 288-89 (1968).

23 In attempting to establish the existence of this factual  
24 dispute, the opposing party must tender evidence of specific  
25 facts in the form of affidavits, and/or admissible discovery  
26 material, in support of its contention that the dispute exists.  
27 Fed. R. Civ. P. 56(e).

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1 The opposing party must demonstrate that the fact in contention  
2 is material, i.e., a fact that might affect the outcome of the  
3 suit under the governing law, and that the dispute is genuine,  
4 i.e., the evidence is such that a reasonable jury could return a  
5 verdict for the nonmoving party. *Anderson v. Liberty Lobby,*  
6 *Inc.*, 477 U.S. 242, 248, 251-52 (1986); *Owens v. Local No. 169,*  
7 *Assoc. of Western Pulp and Paper Workers*, 971 F.2d 347, 355 (9th  
8 Cir. 1987). Stated another way, "before the evidence is left to  
9 the jury, there is a preliminary question for the judge, not  
10 whether there is literally no evidence, but whether there is any  
11 upon which a jury could properly proceed to find a verdict for  
12 the party producing it, upon whom the onus of proof is imposed."  
13 *Anderson*, 477 U.S. at 251 (quoting *Schuylkill and Dauphin*  
14 *Improvement Co. v. Munson*, 81 U.S. 442, 448 (1871)). As the  
15 Supreme Court explained, "[w]hen the moving party has carried its  
16 burden under Rule 56(c), its opponent must do more than simply  
17 show that there is some metaphysical doubt as to the material  
18 facts .... Where the record taken as a whole could not lead a  
19 rational trier of fact to find for the nonmoving party, there is  
20 no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

21 In resolving a summary judgment motion, the evidence of the  
22 opposing party is to be believed, and all reasonable inferences  
23 that may be drawn from the facts placed before the court must be  
24 drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255.  
25 Nevertheless, inferences are not drawn out of the air, and it is  
26 the opposing party's obligation to produce a factual predicate  
27 from which the inference may be drawn.

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1 Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45  
2 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

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4 **ANALYSIS**

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6 Plaintiff moves for summary judgment only as to the issue of  
7 whether he, an employee of Harsco, was also a borrowed servant of  
8 Union Pacific under the Federal Employers' Liability Act, 45  
9 U.S.C. § 51, et seq. ("FELA"). FELA "does not use the terms  
10 'employee' and 'employed' in any special sense, so that the  
11 familiar general legal problems as to whose 'employee' or  
12 'servant' a worker is at a given time present themselves as  
13 matters of federal law under the Act. It has been well said of  
14 the question that '(e)ach case must be decided on its peculiar  
15 facts and ordinarily no one feature of the relationship is  
16 determinative." Baker v. Texas & P. Ry. Co., 359 U.S. 227, 228  
17 (1959) (internal citations omitted). "[T]he question, like that  
18 of fault or of causation under the Act, contains factual elements  
19 such as to make it one for the jury under appropriate  
20 instructions as to the various relevant factors under law. Only  
21 if reasonable men could not reach differing conclusions on the  
22 issue may the question be taken from the jury." Id. (internal  
23 citations omitted).

24 In this case, the issue of borrowed servant status cannot  
25 properly be resolved on Plaintiff's Motion. At the very least,  
26 some of Plaintiff's factual contentions are disputed. Moreover,  
27 very different inferences can be drawn from each fact here  
28 presented.

1 Thus, on the facts submitted to the Court by both parties,  
2 reasonable men could disagree as to whether Plaintiff was a  
3 borrowed servant of Defendant. Accordingly, the question of  
4 whether Plaintiff was a borrowed servant is most properly a  
5 question for the trier-of-fact.

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7 **CONCLUSION**  
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9 For the reasons just stated, Plaintiff's Motion for Summary  
10 Judgment (Docket No. 58) is DENIED, and the hearing scheduled at  
11 2:00 p.m. on July 30, 2009, is hereby vacated.

12 IT IS SO ORDERED.

13 Dated: July 24, 2009

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16 MORRISON C. ENGLAND, JR.  
17 UNITED STATES DISTRICT JUDGE  
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