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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-2164

BRADLEY LEDURE,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:17-cv-00737-JPG-GCS — **J. Phil Gilbert**, *Judge*.

Argued February 12, 2020 — Decided June 17, 2020

Before: BAUER, KANNE, and BARRETT, *Circuit Judges*.

BAUER, *Circuit Judge*. Bradley LeDure, a conductor for Union Pacific Railroad Company, slipped and fell while preparing a locomotive for departure. LeDure brought suit for negligence against Union Pacific under the Locomotive Inspection Act and the Federal Employers' Liability Act. The district court granted summary judgment for Union Pacific. It found the Locomotive Inspection Act inapplicable and then determined that LeDure's injuries were otherwise unforeseeable because he slipped on a small "slick spot" unknown to Union Pacific. For the following reasons, we affirm.

I. BACKGROUND

On August 12, 2016, at about 2:10 a.m., LeDure reported to work at a rail yard in Salem, Illinois. His job was to assemble a train for a trip to Dexter, Missouri. The first step was to determine how many locomotives were necessary and tag each one to indicate whether or not they would operate.

Three locomotives were coupled together on a sidetrack. The locomotives arrived at 2:00 a.m. from Chicago, Illinois. LeDure decided that only one locomotive would be powered on. LeDure tagged the first locomotive for operation and the second for non-operation. He moved to the final locomotive, UP5683, to shut it down and tag it accordingly.

While on the exterior walkway of UP5683, LeDure slipped and fell down its steps. LeDure got up and proceeded to power down and tag the locomotive. He returned to where he fell and, using a flashlight, bent down to identify a "slick" substance. LeDure reported the incident to his supervisor. He gave a written statement before going home. Union Pacific conducted an inspection and reported cleaning a "small amount of oil" on the walkway.

LeDure sued Union Pacific for negligence. He alleged violations of the Locomotive Inspection Act and the Federal Employers' Liability Act, arguing that Union Pacific failed to maintain the walkway free of hazards. Both parties moved for summary judgment. The district court agreed with Union Pacific and dismissed LeDure's claims with prejudice. The court found the Locomotive Inspection Act inapplicable since UP5683 was not "in use" during the incident. It also held LeDure's injuries were not reasonably foreseeable because they resulted from a small "slick spot" unknown to Union Pacific.

LeDure moved to alter or amend the judgment, and the court denied the motion. LeDure timely appealed.

II. DISCUSSION

We review *de novo* the grant of summary judgment. *Kopplin v. Wis. Cent. Ltd.*, 914 F.3d 1099, 1102 (7th Cir. 2019). Summary judgment is required if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A court will grant summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Bio v. Fed. Express Corp.*, 424 F.3d 593, 596 (7th Cir. 2005).

The Locomotive Inspection Act and the Federal Employers' Liability Act together provide redress for injured railroad workers. Specifically, the Locomotive Inspection Act supplements a Federal Employers' Liability Act negligence claim. The Locomotive Inspection Act delegates authority to the Secretary of Transportation to create regulations delineating the safe "use" of locomotives. 49 U.S.C. § 20701. If the plaintiff shows a regulatory violation, this establishes negligence per se. The plaintiff must still show, per the Federal Employers' Liability Act, the injury resulted "in whole or in part" from this negligence. *Crane v. Cedar Rapids Iowa City Ry.*, 395 U.S. 166 (1969) (citing 45 U.S.C. § 51).

The first question for the Locomotive Inspection Act is whether the locomotive was "in use" at the time of the accident. *Brady v. Terminal Rail Ass'n of St. Louis*, 303 U.S. 10, 13 (1938); *Lyle v. Atchison T. & S.F. Ry. Co.*, 177 F.2d 221, 222 (7th Cir. 1949). The district court noted the circuit courts' various tests. For instance, while the Fourth Circuit created a totality of the circumstances

analysis, the Fifth Circuit has said a locomotive is "in use" if it is assembled and the crew has completed pre-departure procedures. *Deans v. CSX Transportation, Inc.*, 152 F.3d 326, 329 (4th Cir. 1998); *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187, 189 (5th Cir. 1991).

In determining that UP5683 was not in use, the district court properly applied *Lyle* and its holding that "to service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it." *Lyle*, 177 F.2d at 223. LeDure essentially seeks to limit this holding to say a locomotive is not "in use" only when it is being repaired, but this is an unduly narrow reading of *Lyle* and its progeny. *See Tisneros v. Chicago & N.W. Ry. Co*, 197 F.2d 466 (7th Cir. 1952). The district court reasoned that UP5683 was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce. For those reasons, we agree it was not "in use" and that the Locomotive Inspection Act and its regulations are inapplicable.

LeDure argues that Union Pacific is nevertheless liable because it did not clean up the slick spot or alternatively because UP5683's walkway traction was not adequately maintained. For claims about unsafe work conditions, an essential element of a Federal Employers' Liability Act claim is foreseeability, or whether there were "circumstances which a reasonable person would foresee as creating a potential for harm." *Holbrook v. Norfolk Southern Ry. Co.*, 414 F.3d 739, 742 (7th Cir. 2005) (quoting *McGinn v. Burlington N. R.R.*, 102 F.3d 295, 300 (7th Cir. 1996)). The plaintiff "must show that the employer had actual or constructive notice of those harmful circumstances." *Id.* (citing *Williams v. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1063 (7th Cir.1998)).

The district court correctly held that LeDure failed to provide evidence sufficient to prove his injuries were reasonably foreseeable. Whereas the *Holbrook* plaintiff identified the potential source of oil he slipped on, LeDure does not claim Union Pacific had notice of the slick spot or any hazardous condition that could have leaked the oil. Instead, he argues that Union Pacific should have inspected UP5683 and cleaned the spot beforehand. But, as in *Holbrook*, there is no evidence that an earlier inspection would have cured the hazard. This is problematic when LeDure testified the spot was small, isolated, and without explanation. Under these facts, a jury could not find Union Pacific knew or should have known about the oil or its hazard to LeDure.

Finally, LeDure argues the district court failed to address his argument that UP5683's walkway was not adequately maintained. This is inaccurate. LeDure introduced pictures of UP5683's walkway two years after the incident and pictures of another locomotive walkway that did not use metal studs for traction. As the district court noted, LeDure presented evidence to support a design-defect theory but nothing to show negligence. Just as importantly, the cause of his injury was undisputedly the slick spot and there is no evidence—aside from LeDure's lay testimony—to suggest the alternate design pattern could have prevented his injury.

III. CONCLUSION

We conclude that the Locomotive Inspection Act and its regulations are inapplicable since UP5683 was not "in use" at the time of LeDure's injury. We further hold that LeDure's injuries were not reasonably foreseeable under the Federal Employers' Liability Act and thus Union Pacific breached no duty of care. For those reasons, we AFFIRM the grant of summary judgment for Union Pacific.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 3:17-cv-00737-JPG-GCS

BRADLEY LEDURE,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

MEMORANDUM AND ORDER

J. PHIL GILBERT, DISTRICT JUDGE

Plaintiff Bradley LeDure was injured on the job. He then brought suit against his employer—Union Pacific Railroad Company—arguing that he is entitled to damages under the Federal Employers' Liability Act. The parties have now filed cross-motions for summary judgment, and in their aftermath, the Court **GRANTS** summary judgment in favor of Union Pacific.

I. BACKGROUND

At 2:10 AM on a summer morning, Bradley LeDure—an engineer for Union Pacific Railroad Company—showed up for work at the train depot in Salem, Illinois. (LeDure Dep., ECF No. 49-1, 77:3–78:17.) LeDure's assignment that morning was a train that arrived the previous day and was now sitting on the "back track" of the depot: a dimly lit separate track that diverges from the main track at north end of the depot, runs around the back side of the yard, and reattaches back at the south

end of the depot. (*Id.* at 79:13–21; 88:10–16; Steve Hotze Dep., ECF No. 55-2, 21:9–23:6.) This particular train had three locomotives—the cars that generate power to pull the entire train along—leading it. (LeDure Dep., ECF No. 49-1, 81:14–17.)

LeDure needed to do a few things with the train that morning. First, he needed to determine how many of the three locomotives should be powered on in order to provide enough juice for the train's next trip. (*Id.* at 77:15-22.) Second, he needed to physically enter the cab on each locomotive, turn the locomotive on or off according to how much power was needed, and place a tag indicating as such for the engineer at the next station. (*Id.* at 76:8–12; 77:8–14; 77:23–78:12.) And third, LeDure and some of his coworkers had to make a few moves in the yard to add and/or remove certain cars from the train to get it ready for its next trip. (*Id.* at 83:8–15.) So here, LeDure determined that only the first locomotive needed power, and he climbed aboard with his flashlight to begin the tagging process.

The problem in this case is that LeDure slipped while on the walkway of the third locomotive—owned by Union Pacific—allegedly leading to serious injuries of his "shoulders, spine, back, neck, left and right hand/fingers, and head[.]" (*Id.* at 98:18–99:17; Am. Compl. ¶ 11, ECF No. 22.) LeDure says that he did not see anything before his fall—and even that he stood right back up afterwards, entered the cab, and tagged it. (*Id.* at 105:8–13; 108:21–109.17.) LeDure then walked back to where he fell and "kind of lean[ed] over and get the light down closer to it [and] notice[d] that there was a little something there"—"a greasy or oil-type substance." (*Id.* at 85:5–6, 110:16–24.) LeDure specifically testified:

A. I don't know exactly what the substance was, but it was greasy like.

Q. Grease and oil are two different things. So I just want to make sure, are you saying it was like grease? Or was it more like oil?

A. I don't know what the substance was exactly. I have no idea to tell you if it was a certain substance or another substance.

Q. Did you reach down and touch it at all?

A. Yes.

Q. What did it feel like?

A. It was slick.

Q. So it felt like it was slick?

A. Uh-huh.

Q. So more like an oil?

A. I don't know. I don't know exactly what the substance was. I would be speculating to answer that question.

(*Id.* at 85:5–24.)

LeDure then said that he did not know where the substance could have come from. (*Id.* at 6–10.) And a corporate designee for Union Pacific later confirmed that there were no components in the architecture of the locomotive near that area that could have leaked and caused the "slick spot." (Thomas Kennedy Dep., ECF No. 49-5, 42:1–12.) Regardless, LeDure continued with his morning duties, rearranged some cars on the train with a coworker, parked the train—and then reported his injuries to Union Pacific and went home. (LeDure Dep., ECF No. 192:12–194:7, 194:8–196:5, 84:16–85:1.)

Later, LeDure sued Union Pacific in this Court for violations of two interrelated statutes:

(1) the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60; and (2) the Locomotive Inspection Act, 49 U.S.C. §§ 20701–03. LeDure's specific theories are numerous—he says that Union Pacific failed to maintain the train in a condition that was safe to operate; failed to adequately inspect the train; failed to provide him with a safe place, conditions, and equipment to work; failed to properly treat the floors of the train and provide secure footing; and more. Both parties have now filed cross motions for summary judgment.

II. LEGAL STANDARDS

The Court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396.

The initial summary judgment burden of production is on the moving party to show the Court that there is no reason to have a trial. *Celotex*, 477 U.S. at 323; *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). When responding to a motion for summary judgment, the nonmoving party may not simply rest upon the allegations contained in the pleadings, but must present specific facts to show that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 322– 26; *Anderson*, 477 U.S. at 256–57; *Modrowski*, 712 F.3d at 1168. A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the

material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact only exists if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

III. ANALYSIS

The two statutes at issue here—The Federal Employers' Liability Act (FELA) and the Locomotive Inspection Act—work in tandem. FELA is a "broad federal tort remedy for railroad workers injured on the job." *Crompton v. BNSF Ry. Co.*, 745 F.3d 292, 296 (7th Cir. 2014) (quoting *Williams v. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1061 (7th Cir. 1998)). The standards are simple: a plaintiff must prove the elements of negligence—duty, breach, cause, and harm—in order to prevail. *Id.* (citing *Fulk v. Illinois Cent. R.R. Co.*, 22 F.3d 120, 124 (7th Cir. 1994)). But FELA comes with a gift to plaintiffs: their burden of proof on the element of causation is even lower than standard negligence. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011). This standard of proof is so low, in fact, that the Seventh Circuit has repeatedly referred to it as "scarcely more substantial than pigeon bone broth." *Green v. CSX Transp., Inc.*, 414 F.3d 758, 766 (7th Cir. 2005) (quoting *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 132 (7th Cir. 1990)).

The Locomotive Inspection Act, on the other hand, is a supplemental amendment to FELA that imposes specific duties on railroad carriers—and it does so by delegating authority to the Secretary of Transportation to promulgate regulations dealing with the safe "use" and operation of locomotives. 49 U.S.C. § 20701. *Ward v. Soo Line R.R. Co.*, 901 F.3d 868, 873 (7th Cir. 2018), *reh'g denied* (Sept. 21, 2018). Specifically, if a plaintiff shows that a railroad carrier violated one of the corresponding

regulations, then such a violation is negligence *per se* under the Federal Employers' Liability Act. *Coffey v. Ne. Illinois Reg'l Commuter R. Corp. (METRA)*, 479 F.3d 472, 474 (7th Cir. 2007). This means (1) a plaintiff does not need to prove that the violation proximately caused his injury; and (2) that the defendant may not argue that the plaintiff engaged in any contributory negligence. *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384, 390 (1949); 45 U.S.C. §§ 53–54.

So FELA and the Locomotive Inspection Act work in harmony—a plaintiff can bring a broad negligence claim against a carrier under FELA, but at the same time bring a negligence per se claim against the carrier under the Locomotive Inspection Act if the carrier violated one of its corresponding regulations. And that is what LeDure does here. Count I alleges that Union Pacific violated the Federal Employers' Liability Act under theories of both simple negligence as well as negligence *per se* pursuant to certain regulations under the Locomotive Inspection Act, while Count II directly alleges violations of the same Locomotive Inspection Act regulations mentioned in Count I. (*See generally* ECF No. 22.)

A. The Locomotive Inspection Act

The first issue here is whether LeDure's Locomotive Inspection Act theory—which is predicated on violations of numerous U.S. Department of Transportation regulations—may proceed at all. The statute says:

> A railroad carrier **may use or allow to be used** a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
>
> > (1) are in proper condition and safe to operate without unnecessary danger of personal injury;

> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20701 (emphasis added).

Accordingly, the locomotive in question must be "in use" at the time of the accident for the Locomotive Inspection Act to apply. *Lyle v. Atchison T. & S.F. Ry. Co.*, 177 F.2d 221, 222 (7th Cir. 1949), *cert. denied* 339 U.S. 913 (1950). "In other words, when a locomotive or car is in 'use on the line,' the mandatory duty of the carrier attaches; and, when the car or engine is not so 'in use,' then the duty under the express provision of the statute does not exist." *Id.*; *see also Wright v. Arkansas & Missouri R.R. Co.*, 574 F.3d 612, 620 (8th Cir. 2009); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991); *Deans v. CSX Transp.*, Inc., 152 F.3d 326, 329 (4th Cir. 1998); *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 13–14, 58 S.Ct. 426, 82 L.Ed. 614 (1938). This question is a matter of law for the Court to decide. *Steer v. Burlington Northern, Inc.*, 720 F.2d 975, 976 (8th Cir. 1983).

The problem, however, is that there is no clear-cut test to determine when a locomotive is "in use." The seminal Seventh Circuit case on the matter—dating back to 1949—asked whether "the use of the engine in transportation had for the time being been abandoned…[and] its use in commerce had come to an end." *Lyle*, 177 F.2d at 222. The locomotive in *Lyle* was in a roundhouse for inspection and repairs, so the Seventh Circuit instructed: "To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it." *Lyle*, 177 F.2d at 223. But since *Lyle* did not create any sort of concrete test or

set of guidelines, federal district courts—and even state courts, which FELA grants concurrent jurisdiction to in certain circumstances—applying the case are all over the map. Both parties in this case accordingly point to an abundance of district court opinions in their favor, but given their sheer number and contrasting outcomes, none of them are very instructive.

Other United States Courts of Appeals are also all over the place. The Tenth Circuit has said that "in use" means "used in moving interstate or foreign traffic." *Estes v. Southern Pacific*, 598 F.2d 1195, 1198 (10th Cir. 1979). The Fourth Circuit has said that this is a totality of the circumstances test, but the most important factors are (1) where the train was located; (2) if the train was stationary, what time the train was scheduled to depart; and (3) what the injured party was doing at the time of the accident. *Deans v. CSX Transportation, Inc.*, 152 F.3d 326, 329–30 (4th Cir. 1998). The First Circuit gets a bit more specific: if the locomotive is running on the yard track and ready to move into service, and the worker was injured while performing pre-departure inspection duties, then the locomotive is "in use." *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998). And the Fifth Circuit has the strictest test: the locomotive is not "in use" until it is fully assembled and the crew has completed those predeparture inspections. *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187, 189 (5th Cir. 1991).

Here, after reviewing all of the circumstances in this case, Union Pacific's locomotive was not "in use" at the time of LeDure's accident. To harken back to the Seventh Circuit's first instruction: "To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it." *Lyle*, 177 F.2d at 223. And here, although LeDure was not repairing the locomotive in a roundhouse like in *Lyle*, LeDure was nevertheless putting the locomotive

"in readiness for use" when he slipped: the train was (1) stationary; (2) on a backtrack in the depot yard; (3) had not yet been inspected or tagged; and (4) perhaps most importantly, the engineers had not yet assembled the cars on the train for its next use in interstate commerce. In fact, LeDure specifically said at his deposition that "the train was not set up and ready to go." (LeDure Dep., ECF No. 49-1, 83:9–10.) LeDure later explained just how much work needed to be done before the train would be ready for its next use in interstate commerce:

Q. Just tell me what switching you did that morning.

A. I can't recall if we set out or we picked up, but we had to make a couple of moves on a couple of different tracks and then put our train back together.

Q. Were you able to do that safely?

A. I thought I did, yes.

Q. So how many different moves did you have to make to do that switching?

A. I would be estimating because I don't recall exactly.

Q. What is your estimate?

A. More than three.

(*Id.* at 193:18–194:7.) There was still a considerable amount of work to be done before this locomotive was ready for its next trip in interstate commerce, and that is the "antithesis of using it." *Lyle*, 177 F.2d at 223.

And these facts would lead to the same conclusion in other circuits. *Trinidad*, 949 F.2d at 189 (locomotive not "in use" when the train was not yet fully assembled); *McGrath*, 136 F.3d at 842 (locomotive not "in use" if the train is not ready to move into service); *Estes v.*

Southern Pacific, 598 F.2d at 1198 (locomotive not "in use" if it is not moving interstate traffic). Even *Deans v. CSX Transportation, Inc.*, 152 F.3d 326 (4th Cir. 1998)—which LeDure relied on heavily at oral argument—does not compel a different conclusion: there, a train was "in use" even when sitting on a back track, but only because it was ready for "imminent departure." 152 F.3d at 330. Here, LeDure's own testimony demonstrates that the train was not close to ready for "imminent departure" when he slipped—there was still a considerable amount of prep work to be done.

Since the locomotive was not "in use" at the time of the accident, there is a lot of collateral damage to the rest of the motions and the complaint in this case. 49 U.S.C. § 20701—the opening bit of the Locomotive Inspection Act—instructs that a locomotive must be "in use" for it to apply, and then delegates authority to the Secretary of Transportation to promulgate regulations to implement the statute. But since the locomotive here was not "in use," none of those regulations apply to this case. This means that the Court must dismiss the entirety of Count II of the first-amended complaint, as well as ¶¶ 10(e)–(i) of Count I—which are all predicated on Department of Transportation regulations promulgated pursuant to the Locomotive Inspection Act. Moreover, any further arguments in the motions pertaining to the regulations—such as whether 49 C.F.R. § 229.119(c) applies to exterior walkways; or whether LeDure is entitled to partial summary judgment based on Union Pacific's alleged violation of any of the regulations (ECF No. 50)—are moot. This also extends to Union Pacific's motion regarding the tread patterns on the locomotive walkway (ECF No. 46): the company had argued that the regulations preclude LeDure from arguing that Union Pacific should have installed a different tread design on the walkways, because such a theory is actually a

design defect claim. LeDure had responded that he is not brining a design defect claim, but is simply arguing that 49 C.F.R. § 229.119(c) requires railroads to properly treat locomotive floors—and Union Pacific failed to do so. But since the regulations do not apply to this case, all of that it moot as well.

B. The Federal Employers' Liability Act

Even though the locomotive was not in use, LeDure still may have recourse under the Federal Employers' Liability Act—and all he has to do is show that Union Pacific is liable in standard negligence in order to prevail. *Crompton*, 745 F.3d at 296. Union Pacific argues that they are entitled to summary judgment on this theory as well because LeDure's injury was not reasonably foreseeable—basically, that LeDure has not demonstrated "circumstances which a reasonable person would foresee as creating a potential for harm." *Holbrook v. Norfolk Southern Railway Co.*, 414 F.3d 739, 742 (7th Cir. 2005). LeDure can do this in two ways: he can show that (1) Union Pacific had actual notice of the condition—meaning that they knew about the risk and failed to act—or (2) Union Pacific had constructive notice of the condition—meaning that they could have taken reasonable steps ahead of time to learn about the condition, but failed to do so. *Id.*; *Zuppardi v. Wal-Mart Stores, Inc.*, 770 F.3d 644, 651 (7th Cir. 2014).

LeDure can do neither, in a very similar vein to *Holbrook*. There, an employee for Norfolk Southern was injured when he slipped while climbing a ladder. And once he hit the ground, he noticed "a sticky, oily substance on the rung, which he wiped off with a paper towel." 414 F.3d at 741. Holbrook then sued Norfolk Southern under FELA, and although he did "not know whether the substance was on the ladder before he came to it or [if he] tracked [the oil] onto it from somewhere

else," Holbrook claimed that the substance must have come from the train yard where there sometimes were pools of oil on the ground. *Id.* So Holbrook first argued that Norfolk Southern had actual notice of the condition because of those occasional pools of oil in the yard that everyone knew about, but the Seventh Circuit rejected that—stating "Holbrook simply offers no evidence that he was in the vicinity of an accumulated oil pool on the day of the accident, or that any such accumulation even then existed [on that particular day]," so "it would not be reasonable to infer that putative pools of accumulated oil in the Elkhart Yard played a part in Holbrook's injury." *Id.* at 744.

And here, there is also no evidence that Union Pacific had actual notice of the "greasy or oil-type substance" that LeDure slipped on. In fact, LeDure himself could not identify the source of the substance or even what it was: he said "I don't know what the substance was exactly. I have no idea to tell you if it was a certain substance or another substance." (LeDure Dep., ECF No. 49-1, 85:11–13.) And there is no evidence that Union Pacific saw this substance before LeDure did— even LeDure did not see it until he brought himself to "kind of lean over and get the light down closer to it to notice that there was a little something there." (*Id.* at 110:16–24.)

So LeDure instead relies on a theory of constructive notice—namely that Union Pacific should have inspected the locomotive before they sent LeDure out to work on it. But the employee in *Holbrook* brought a similar argument, yet the Seventh Circuit very quickly rejected that one as well. In *Holbrook*, Norfolk Southern failed to catch the alleged slick spot during their last inspection, but the Seventh Circuit reasoned:

> [A]ccording to the plaintiff, if the grease was on the ladder before he came to it, the inspectors

> should have discovered it. However, there is absolutely no evidence that the grease was on the ladder before Holbrook stepped on it. And even assuming that the grease was on the ladder before Holbrook stepped on it, there are a myriad of possible ways the substance could have gotten onto the ladder between the railcar's inspection and its contact with Holbrook (*e.g.*, splatter from a passing train on adjacent tracks, residue from mounting by another employee). Holbrook himself conceded that, if the dab of grease was on the ladder before he stepped on it, it could have attached sometime after the car's inspection. Because plaintiff's constructive notice argument "rests on mere speculation and conjecture," it too must fail. *See Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) (affirming grant of summary judgment against FELA plaintiff where plaintiff "introduced no evidence to show that an earlier inspection would have revealed or cured the [defective condition], or that the railroad had notice of the defect prior to the accident").

414 F.3d at 744–45.

The facts here are nearly identical: LeDure has introduced no evidence that the small slick spot was on the walkway before he stepped on it—which is especially concerning considering he testified that he wears the very same work boots around his farm. (LeDure Dep., ECF No. 49-1, 173:22–174:3.) And even assuming that the spot was there before he stepped on it, "there are a myriad of possible ways the substances could have gotten onto" the walkway, just as outlined in *Holbrook*. 414 F.3d. at 475. And what is more, LeDure also testified that he "did not see anything that looked like it was coming out of the engine compartments"—making his theory even more hazy. (LeDure Dep., ECF No. 49-1, 87:16–20.) The same

was confirmed by Union Pacific's corporate designee, who testified that there were no components in the architecture of the locomotive near that area that could have leaked and caused the slick spot. (Thomas Kennedy Dep., ECF No. 49-5, 42:1–12.)

And although this case is factually distinguishable from *Holbrook* on the grounds that the inspection here had not occurred yet, it does not make any difference—LeDure's constructive notice argument still would rest on "on mere speculation and conjecture" that an inspection would have turned something up—which is doubtful considering how difficult it was for LeDure to find this slick spot in the first place. *Id*. Just as the Fourth Circuit said in *Deans*—a case that LeDure relied heavily on at oral arguments—summary judgment is proper when a plaintiff "introduced no evidence to show that an earlier inspection would have revealed or cured the [defective condition]." *Deans*, 152 F.3d at 330. And that is exactly what happened here—LeDure has introduced no evidence to show that an earlier inspection would have revealed this small, mysterious "slick spot." So LeDure's standard negligence theory under FELA fails as well.

CONCLUSION

For the foregoing reasons, the Court:

- **GRANTS** Union Pacific's motion for summary judgment (ECF No. 48);
- **FINDS AS MOOT** Union Pacific's motion for summary judgment on any claims regarding the tread pattern on the locomotive walkway (ECF No. 46);
- **FINDS AS MOOT** LeDure's motion for partial summary judgment (ECF No. 50);
- **FINDS AS MOOT** any other pending motions;

- **DISMISSES** this case **WITH PREJUDICE**; and
- **DIRECTS** the Clerk of Court to enter judgment accordingly.

IT IS SO ORDERED.

DATED: JANUARY 31, 2019

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 3:17-cv-00737-JPG-GCS

BRADLEY LEDURE,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

MEMORANDUM AND ORDER

J. PHIL GILBERT, DISTRICT JUDGE

Federal Rule of Civil Procedure 59(e) "is not a procedural folly to be filed by a losing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants." *Erlandson v. ConocoPhillips Co.*, No. 09-99-DRH, 2010 WL 4292827, at *1 (S.D. Ill. Oct. 21, 2010) (citing *Yorke v. Citibank*, *N.A.* (In re BNT Terminals, Inc.), 125 B.R. 963, 977 (N.D.Ill. 1990)). Nor is it a vehicle for a losing party to misrepresent a district court's opinion, and then seek a review based on those misrepresentations. But plaintiff Bradley LeDure uses Rule 59(e) here for those purposes anyways. This Court previously granted summary judgment in favor of defendant Union Pacific Railroad Company, and LeDure has since filed a motion to alter or amendment the judgment under the rule. (ECF No. 88.)

Instead, Rule 59(e) allows the Court to amend a judgment if the movant "can demonstrate a manifest error of law or present newly discovered evidence." *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008). A "manifest error" is a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (internal quotations and citations omitted). This form of relief is only available if the movant clearly establishes the manifest error. *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (citing *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1122 n. 3 (7th Cir. 2001)).

LeDure meets none of those standards, and instead misunderstands or misrepresents both this Court's prior order and the binding caselaw that it relied on. It is unnecessary to address every single one of LeDure's arguments—many of them are rehashes of LeDure's summary judgment arguments, and the Court reaffirms its prior order for all of the reasons therein—but in order to ensure that the Court's order is not warped in any potential appellate briefs, it is necessary to highlight a few of LeDure's arguments: one regarding unpublished district court decisions; one regarding citations; one regarding the nature of the Locomotive Inspection Act, and one regarding the facts of this case.

First, LeDure complains that the Court did not consider a number of unpublished district court cases within the Seventh Circuit, such as *Underhill v. CSX Transportation, Inc.*, No. 1:05-CV-196-TS, 2006 WL 1128619 (N.D. Ind. April 24, 2006) and *Zanden v. Norfolk & Western Rwy. Co.*, No. 93 C 4572, 1996 WL 699604 (N.D. Ill. Nov. 26, 1996). This is a non-starter. As the Court explained in its prior order, the specific question in this case—whether the locomotive was "in use" at the time of the accident—has led many United States Courts of Appeals to inconsistent outcomes with

very little guidance. (ECF No. 85, p. 6–7.) And because of that, district courts around the country—many of them in nonprecedential unpublished decisions—are also all over the place in terms of their analysis. For that reason, the Court explained that it would focus its attention on the published appellate cases instead of these nonprecedential district court opinions, explaining: "[b]oth parties in this case accordingly point to an abundance of district court opinions in their favor, but given their sheer number and contrasting outcomes, none of them are very instructive." (ECF No. 85, p. 7.) The Court did not make any manifest errors by rejecting these nonprecedential district court opinions.

Second, LeDure made the following argument:

> The Court also manifestly erred in concluding that the locomotive would not be in use if precedent from other circuits was applied (Doc. 85 at 9). Most egregiously, in citing *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998), the Order mischaracterized the holding as finding a locomotive not in use "if the train is not ready to move into service." To the contrary, *McGrath* found the locomotive was in use because it "was not being stored on the yard track or awaiting removal to the engine house for repairs. Rather [it] was running on the yard track and ready to move into service." *Id.*

(ECF No. 88, p. 8.) That is incorrect. Even a cursory review of the Court's prior order shows that it accurately explained *McGrath* as holding "if the locomotive is running on the yard track and ready to move into service, and the worker was injured while performing pre-departure inspection duties, then the locomotive is 'in use.'" (ECF No. 85., p. 7.) And then two pages later—the page that LeDure complains about—the Court used

parentheticals to explain how each of these circuit court cases, such as *McGrath*, would come out if faced with the facts of this case. (*Id.* at p. 9.) LeDure's argument that this was a "most egregious" error by the Court is either a misrepresentation or a misunderstanding.

Third, one of the issues in this case was the application of regulations promulgated under the Locomotive Inspection Act, 49 U.S.C. § 20701. The opening of that statute instructs that a locomotive must be in use for it to apply, and then it delegates authority to the Secretary of Transportation to promulgate regulations to implement the statute. The Court accordingly had concerns as to whether LeDure's cited regulations—promulgated by the Secretary of Transportation pursuant to the Locomotive Inspection Act—would even apply to this case if the Court found that the locomotive was not in use at the time of the accident. The Court asked both parties about this at oral argument, and ultimately agreed with the following response by the defendant:

> **[DEFENDANT]**: And I would just say we disagree [with the plaintiff] that these regulations would apply if you find the locomotive was not in use.
>
> **THE COURT**: So, you are saying if I find the locomotive not in use, then the LIA claims go away; is that what you are saying?
>
> **[DEFENDANT]**: Yes, because those regulations are pursuant to the FRA's authority to promulgate regulations pursuant to the LIA. And, in fact, two of these regulations, the first two, I think, just simply regurgitate the Locomotive Inspection Act, the same language.

(ECF No. 87, 62:9–19.) For that reason, and because the Court found that the locomotive was not "in use" here, the Court found it unnecessary to address any

of the arguments pertaining to the specifics of those regulations—including 49 C.F.R. § 229.119(c), which LeDure centers most of his complaints on, and 49 C.F.R. § 229.21, which LeDure accuses the Court of dismissing "without discussion or analysis." (ECF No. 88, p. 13.)

Finally, the last issue is one of fact. The Court previously dismissed LeDure's negligence claim because there was zero evidence in this case that anyone had any notice of the "small slick spot" on the walkway—a substance that LeDure could not even identify—before he slipped on it. That lack of evidence was particularly concerning here because (1) LeDure admitted that he did not see anything coming out of the engine compartments; (2) a Union Pacific representative testified that there were no components in the architecture of the locomotive near that area that could have leaked and caused the "slick spot"; and (3) LeDure wore these same boots around his farm, adding yet another wrinkle to the myriad of ways that this slick spot could have allegedy gotten onto the walkway. (*See* ECF No. 85, pp. 10–13.) The Court then explained that the plaintiff's case here was even weaker than the situation in *Holbrook v. Norfolk Southern Railway Co.*, 414 F.3d 739, 742 (7th Cir. 2005), in which the Seventh Circuit dismissed Holbrook's claim because he had not shown "circumstances which a reasonable person would foresee as creating a potential for harm"—specifically because "there is absolutely no evidence that the grease was on the ladder before Holbrook stepped on it. And even assuming that the grease was on the ladder before Holbrook stepped on it, there are a myriad of possible ways the substance could have gotten onto the ladder…." *Id.* at 744–45. *Holbrook* governs and forecloses LeDure's argument.

LeDure objects, but only one of those objections deserves particular attention: "the Court disregarded the fact that oil had previously been discovered on the same

area of this locomotive before the incident, supporting a reasonable inference that this locomotive either had a source leaking oil or that Defendant had insufficient clean up practices." (ECF No. 88, p. 16.) But LeDure's statement is not an honest depiction of that evidence: he fails to mention that this prior discovery occurred *three years* before the incident in this case. (ECF No. 55-5.) He did the same in his response to the motion for summary judgment. (ECF No. 55, p. 4.) It is highly questionable whether this evidence from three years prior—with no further explanation from LeDure—is even relevant to the accident in this case. Instead, LeDure merely speculates that they are related, and speculates that a prior inspection would have revealed the substance and stopped the fall. But as *Holbrook* explained, and as the Supreme Court has mandated, "[s]peculation cannot supply the place of proof." *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 577 (1951).

CONCLUSION

For the foregoing reasons, the Court **DENIES** plaintiff Bradley LeDure's motion to alter or amend the judgment. (ECF No. 88.)

IT IS SO ORDERED.

DATED: May 20, 2019

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 16, 2020

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY CONEY BARRETT, *Circuit Judge*

No. 19-2164

BRADLEY LEDURE,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.

No. 3:17-cv-00737-JPG-GCS

J. Phil Gilbert, Judge.

ORDER

On consideration of plaintiff-appellant's petition for rehearing and petition for rehearing *en banc* filed on July 1, 2020, in connection with the above-referenced case, no judge in active service has requested a vote on the petition for rehearing *en banc*,* and all of the judges on

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* Circuit Judge Amy J. St. Eve did not participate in the consideration of this petition for rehearing.

the original panel have voted to DENY the petition for rehearing. It is, therefore, ORDERED that the petition for rehearing and the petition for rehearing *en banc* are DENIED.

STATUTES AND REGULATIONS INVOLVED

Title 45 United States Code, Section 51
Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and

shall be considered as entitled to the benefits of this chapter.

Title 45 United States Code, Section 53
Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Title 45 United States Code, Section 54a
Certain Federal and State regulations deemed statutory authority

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49 or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 53 and 54 of this title.

Title 49 United States Code, Section 20301 Definition and Nonapplication

(a) Definition.— In this chapter, "vehicle" means a car, locomotive, tender, or similar vehicle.

(b) Nonapplication.—This chapter does not apply to the following:

(1) a train of 4-wheel coal cars.

(2) a train of 8-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches.

(3) a locomotive used in hauling a train referred to in clause (2) of this subsection when the locomotive and cars of the train are used only to transport logs.

(4) a car, locomotive, or train used on a street railway.

Title 49 United States Code, Section 20302 General Requirements

(a) General.—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) 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.

(b) Refusal To Receive Vehicles Not Properly Equipped.—

A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from

a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.

(c) Combined Vehicles Loading and Hauling Long Commodities.—

Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(d) Authority To Change Requirements.—The Secretary may—

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads.—

In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

Title 49 United States Code, Section 20701
Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

Title 49 Code of Federal Regulations, Section 229.1
Scope

This part prescribes minimum Federal safety standards for all locomotives except those propelled by steam power.

Title 49 Code of Federal Regulations, Section 229.21
Daily inspection

(a) Except for MU locomotives, each locomotive in use shall be inspected at least once during each calendar day. A written report of the inspection shall be made. This report shall contain the name of the carrier; the initials and number of the locomotive; the place, date and time of the inspection; a description of the non-complying conditions disclosed by the inspection; and the signature of the employee making the inspection. Except as provided in §§229.9, 229.137, and

229.139, any conditions that constitute non-compliance with any requirement of this part shall be repaired before the locomotive is used. Except with respect to conditions that do not comply with §229.137 or §229.139, a notation shall be made on the report indicating the nature of the repairs that have been made. Repairs made for conditions that do not comply with §229.137 or §229.139 may be noted on the report, or in electronic form. The person making the repairs shall sign the report. The report shall be filed and retained for at least 92 days in the office of the carrier at the terminal at which the locomotive is cared for. A record shall be maintained on each locomotive showing the place, date and time of the previous inspection.

(b) Each MU locomotive in use shall be inspected at least once during each calendar day and a written report of the inspection shall be made. This report may be part of a single master report covering an entire group of MU's. If any non-complying conditions are found, a separate, individual report shall be made containing the name of the carrier; the initials and number of the locomotive; the place, date, and time of the inspection; the non-complying conditions found; and the signature of the inspector. Except as provided in §§229.9, 229.137, and 229.139, any conditions that constitute non-compliance with any requirement of this part shall be repaired before the locomotive is used. Except with respect to conditions that do not comply with §229.137 or §229.139, a notation shall be made on the report indicating the nature of the repairs that have been made. Repairs made for conditions that do not comply with § 229.137 or § 229.139 may be noted

on the report, or in electronic form. A notation shall be made on the report indicating the nature of the repairs that have been made. The person making the repairs shall sign the report. The report shall be filed in the office of the carrier at the place where the inspection is made or at one central location and retained for at least 92 days.

(c) Each carrier shall designate qualified persons to make the inspections required by this section.

Title 49 Code of Federal Regulations, Section 229.119
Cabs, floors, and passageways

(a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.

(b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, Safety Glazing Standards, 49 CFR part 223, 44 FR 77348, Dec. 31, 1979.)

(c) Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

(d) Any occupied locomotive cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 60 degrees Fahrenheit 6 inches above the center of each seat in the cab compartment.

(e) Similar locomotives with open-end platforms coupled in multiple control and used in road service shall have a means of safe passage

between them; no passageway is required through the nose of car body locomotives. There shall be a continuous barrier across the full width of the end of a locomotive or a continuous barrier between locomotives.

(f) Containers shall be provided for carrying fusees and torpedoes. A single container may be used if it has a partition to separate fusees from torpedoes. Torpedoes shall be kept in a closed metal container.

(g) Each locomotive or remanufactured locomotive placed in service for the first time on or after June 8, 2012, shall be equipped with an air conditioning unit in the locomotive cab compartment.

(h) Each air conditioning unit in the locomotive cab on a locomotive identified in paragraph (g) of this section shall be inspected and maintained to ensure that it operates properly and meets or exceeds the manufacturer's minimum operating specifications during the periodic inspection required for the locomotive pursuant to § 229.23 of this part.

(i) Each locomotive or remanufactured locomotive ordered on or after June 8, 2012, or placed in service for the first time on or after December 10, 2012, shall be equipped with a securement device on each exterior locomotive cab door that is capable of securing the door from inside of the cab.