APPENDIX TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5794

JOSEPH BRENT MATTINGLY,

Plaintiff - Appellant,

v.

R.J. CORMAN RAILROAD GROUP, LLC;
R.J. CORMAN RAILROAD SERVICES, LLC;
R.J. CORMAN RAILROAD COMPANY/
MEMPHIS LINE aka R.J. Corman Railroad
Company/Memphis Line, Inc.,

Defendants - Appellees.

Before: GIBBONS, READLER, and DAVIS, Circuit Judges.

JUDGMENT

(Filed Jan. 3, 2024)

On Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0002p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH BRENT MATTINGLY, *Plaintiff-Appellant,* *v.* R.J. CORMAN RAILROAD GROUP, LLC; R.J. CORMAN RAILROAD SERVICES, LLC; R.J. CORMAN RAILROAD COMPANY/ MEMPHIS LINE aka R.J. Corman Railroad Company/Memphis Line, Inc., *Defendants-Appellees*.	>	No. 22-5794

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 5:19-cv-00170—Joseph M. Hood, District Judge.

Argued: July 27, 2023

Decided and Filed: January 3, 2024

Before: GIBBONS, READLER, and DAVIS,
Circuit Judges.

COUNSEL

ARGUED: Joseph H. Mattingly III, JOSEPH H. MATTINGLY III, PLLC, Lebanon, Kentucky, for Appellant. James T. Blaine Lewis, MCBRAYER PLLC, Louisville, Kentucky, for Appellees.

ON BRIEF: Joseph H. Mattingly III, JOSEPH H. MATTINGLY III, PLLC, Lebanon, Kentucky, William C. Robinson, Elizabeth Graves Coulter, MATTINGLY, SIMMS, ROBINSON & MCCAIN, PLLC, Springfield, Kentucky, for Appellant. James T. Blaine Lewis, Shane O'Bryan, MCBRAYER PLLC, Louisville, Kentucky, for Appellees.

OPINION

STEPHANIE D. DAVIS, Circuit Judge. While employed by R.J. Corman Railroad Services, LLC ("Corman Services"), Plaintiff-Appellant Joseph Brent Mattingly sustained injuries during the repair of a bridge owned and operated by a common carrier, Defendant-Appellee Memphis Line Railroad ("Memphis Line"). Mattingly filed suit to recover damages under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. The district court determined that Mattingly was not employed by a common carrier—a prerequisite to trigger FELA liability—and granted Defendants' Motion for Summary Judgment. Mattingly challenges that ruling as well as the district court's entry of summary judgment before ruling on an

important discovery dispute. Specifically, Mattingly faults the district court for not allowing individualized discovery as to Memphis Line after its late addition as a party. Because we conclude that Mattingly was not employed by a common carrier and is thus not entitled to FELA coverage, we AFFIRM.

I.

A.

Defendants in this case are individual members of a corporate family. Defendant R.J. Corman Railroad Group, LLC ("Corman Group") is the holding company for, and sole Member and Manager of, various subsidiary companies including Corman Services—a construction company that performs repair and construction work on railroad tracks and bridges throughout the country—and R.J. Corman Railroad Company, LLC ("Railroad Company"). Railroad Company, although not a party to this case, owns various short-line railroads, including Memphis Line.

In January 2017, Mattingly fell while performing bridge repair work on the Memphis Line and sustained several serious injuries, which ultimately led to the amputation of his left leg. At the time of the accident, Mattingly was nominally employed by Corman Services.

Memphis Line Project. Memphis Line retained Corman Services to repair the Red River Bridge and the Cumberland River Bridge (collectively, the

"Memphis Line Project") in Clarksville, Tennessee. Mattingly supervised his own bridge repair crew solely comprised of Corman Services employees on the Memphis Line Project. Mattingly assigned crew members to equipment, assured that they had all necessary tools, and picked the spot they would work on each day. He reported to the superintendent, Paul Childres, another Corman Services employee who also supervised a separate crew of Corman Services bridge workers. Mattingly and Childres both reported to a Corman Services operations manager. Initially, the entire Corman Services team reported to the Cumberland River Bridge, but Memphis Line later determined it would be more efficient to divide the workflow between the two bridges. Mattingly and his crew therefore switched to the Red River Bridge, and Childres and his crew remained at the Cumberland River Bridge approximately two miles away.

In addition to Corman Services employees, Railroad Company employees were involved in the Project. Jason Topolski, a Railroad Company bridge inspector who was on Memphis Line's payroll, was present at the job site. As bridge inspector, Topolski was responsible for ensuring the safety of Railroad Company bridges, which included ensuring the satisfactory maintenance and repair of those bridges. Cain Jones, another Railroad Company worker, was also present on the job site and served as its joint "Employee in Charge" alongside Topolski. Federal regulations mandate the appointment of an Employee in Charge on railway projects. *See* 49 C.F.R. §§ 214.317; 214.319; 214.353. The role

involves ensuring railroad workers' safety on the tracks, including by communicating with dispatch to monitor train traffic passing through the job site and stopping work, if necessary, to allow the trains to pass.

Either Topolski or Jones was physically present onsite throughout the Memphis Line Project. At the outset of the Project, Memphis Line provided Corman Services with a list of bridge posts in need of repair, and Mattingly marked these posts. Mattingly and his crew worked to replace posts, caps, and cross braces on the bridge. At times, Memphis Line would adjust the priority or timing of repairs based on anticipated train traffic. Mattingly testified that Topolski would show employees how to complete discrete tasks, such as how to drill a hole. That said, Topolski mostly instructed the railroad's newer employees and generally stayed out of Mattingly's way since Mattingly was more familiar with bridge work than others.

Though Mattingly placed Topolski at the worksite "the whole time [Mattingly] was there," (R. 62-4, PageID 963), Topolski estimated that he was present at the Memphis Line Project site two to three days a week and not for the entire day. He admitted that he sometimes advised Corman Services' employees on certain matters and communicated with them about what the railroad needed done. Nevertheless, Topolski maintained that he did not supervise the Corman Services workers or otherwise tell the railroad crews what to do each day. He explained that if he did perform work on the Project, it would have been tasks outside of Corman Services' scope of work.

One of Mattingly's crew members, Dillon Neace, testified that Topolski may have been on the Cumberland River Bridge when the Memphis Line Project first started, but otherwise was not present at the job site. Neace apparently did not view Topolski's directions as requirements to follow. Rather, he stated that he would "probably listen" to Topolski if he told him to do something on the project because of Topolski's greater knowledge about bridge work and not due to his status. (R. 62-15, PageID 2048–49). Neace also explained that if Jones asked him to do something pertaining to the Memphis Lines Project, he would first check with Mattingly and Childres. Michael Wilson, another member of Mattingly's crew at Red River, testified that he rarely saw Topolski or Jones.

At the start of every day, two safety meetings would take place on the Memphis Line Project—one typically led by Memphis Line regarding track protection, and one led separately by and for Corman Services employees. As a supervisor, Mattingly was required to provide daily production reports to Memphis Line to apprise them of the project's progress. This practice was common, regardless of whether Corman Services was working for a Corman Railroad Company railroad or for a non-Cormon-owned line. At the time of Mattingly's accident, only Corman Services employees were present at the Red River Bridge; Jones was on the Cumberland River Bridge and Topolski was on a separate project out-of-state. Mattingly testified that he was his own supervisor at that point in time.

Corporate Organization. Corman Group provides administrative services to its subsidiary companies, including payroll, accounting, legal, human resources, information technology, public affairs, private aircraft services, risk management, purchasing, and commercial development. It maintains several joint policies that apply to all its subsidiaries, including single workers' compensation; general liability insurance; automobile liability and life insurance policies; along with joint health insurance benefits and a single retirement plan. It charges each individual company a monthly fee for its services. Leaders of Corman Group's subsidiaries are considered senior staff and report directly to Corman Group's President, Ed Quinn. Corman Group also created and memorialized Senior Staff Policies. However, Corman Group maintains that they were "legacy documents," and that Quinn was unaware of their existence and did not adhere to the policies. (R. 79-2, PageID 3414, ¶¶ 15–16). Corman Group also has developed safety protocols applicable to all its subsidiaries and conducts annual mandatory safety trainings for all subsidiary employees. Further, Quinn approves the annual budget of each subsidiary as well as purchases over a certain amount.

Each of Corman Group's subsidiaries, including Corman Services, employs a president, a vice president, managers, and supervisors separate from Corman Group. Corman Services makes its own hiring, firing, promotion, and disciplinary decisions. It also independently manages its employees' schedules. Corman Services' largest customers include Class I

railroads, as well as short line and regional railroads unaffiliated with the Railroad Company railroads. Railroad Company routinely solicits bids from other repair and construction companies, but frequently chooses Corman Services for work when availability permits. When Corman Services works on one of Railroad Company's railroads, including Memphis Line, it charges only the actual cost for labor and equipment, not the market rate. Undisputed testimony indicates that whether and for how long Corman Services remains on a Railroad Company job is directly related to whether Corman Services has any non-Corman work. The record also shows that Corman Services often left Railroad Company jobs before completion. In Topolski's experience, Corman Services prematurely pulled out of every Railroad Company job that had ever been assigned to it, without consequence.

B.

Mattingly filed a complaint in the United States District Court for the Eastern District of Kentucky, initially naming Corman Group and Corman Services as defendants. Mattingly sought compensation under FELA for his injuries and losses. The district court ordered phased discovery, allowing first for discovery on the threshold issue of FELA applicability. Once discovery and dispositive motions regarding the Act's applicability were complete, the court would set the second phase of discovery as needed. During phase I discovery, the magistrate judge denied Mattingly's request to obtain a copy of Corman Group's consolidated

external audit report. Mattingly filed a motion for modification of the magistrate judge's order, which the magistrate judge denied. Mattingly filed objections to the magistrate's order that remained unresolved when summary judgment was issued.

As the case progressed, the court granted Mattingly's motion for leave to file a second amended complaint in which he sought to add Memphis Line as a defendant over Defendants' objections. Several months later, Memphis Line was added as a defendant in the Second Amended Complaint.

Discovery closed on the FELA applicability issue. Mattingly moved for partial summary judgment as to that issue, and Corman Group and Corman Services moved for summary judgment as to Mattingly's FELA claims. For his part, Mattingly asserted that under the "unitary theory," Corman Group operated its subsidiaries as an organized, unitary railroad system, rendering Corman Group and all of its subsidiaries—including Corman Services—common carriers for the purposes of FELA. Alternatively, he argued that he should be considered the employee of a common carrier for purposes of FELA based on common-law principles, as a subservant of a company (Corman Services) that was in turn acting as a servant of a common carrier (Corman Group and Memphis Line).

In August 2022, the district court determined that FELA does not apply to Mattingly's claim and granted Defendants' motion for summary judgment, including all claims against the later-added defendant, Memphis

Line. It did so without ruling on Mattingly's pending discovery objections, and without reopening discovery to allow for a targeted inquiry as to Memphis Line. In granting summary judgment, the court reasoned that Mattingly's unitary theory for recovery was not supported by law, and that he had failed to present adequate evidence from which a rational jury could find that Memphis Line controlled, or had the right to control, Corman Services or Mattingly's daily work at the time of his injury under common-law principles. This appeal followed.

II.

We review the district court's grant of summary judgment *de novo*. *See Kentucky v. Yellen*, 54 F.4th 325, 335 (6th Cir. 2022). In doing so, the court must view the facts in the light most favorable to Mattingly as the non-moving party and give him the benefit of all reasonable inferences arising from the record. *See LaPlante v. City of Battle Creek*, 30 F.4th 572, 578 (6th Cir. 2022). Summary judgment is appropriate where the movant shows that there exists no genuine dispute of material fact, and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. We review the district court's rulings regarding discovery under a highly deferential abuse-of-discretion standard. *See Blount v. Stanley Eng'g Fastening*, 55 F.4th 504, 515 (6th Cir. 2022).

III.

A.

FELA Applicability. Mattingly maintains that the district court erred in concluding that Corman Services is not a common carrier, and as such, FELA coverage does not extend to Mattingly. FELA provides the exclusive remedy for employees of common carriers by railroad to recover damages for injuries sustained during the course of employment. The statute provides that a common carrier by railroad engaging in commerce:

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . 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 . . . or other equipment.

45 U.S.C. § 51. Relevant here, FELA applies only to (1) employees (2) of a common carrier by railroad.

On appeal, Mattingly advances the same two theories for FELA coverage that he did in the district court: unitary theory and subservant liability. But neither theory supports Mattingly's claim for recovery. We address each in turn.

1. Unitary Theory

Mattingly first asserts that Corman Group's ownership, management, and control over Corman Services and its common carrier subsidiaries makes Corman Services a member of a "unitary" railroad system and, consequently, a common carrier for purposes of FELA. This argument, however, essentially asks the court to disregard Defendants' corporate structure to hold Corman Group and its non-common carrier subsidiaries (including Corman Services) liable under FELA. This we cannot do.

The Supreme Court has interpreted FELA's use of "common carrier by railroad" to mean "one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier." *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187 (1920). More recently, we have elaborated that a "common carrier" under FELA is:

> one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public serv[a]nt.

Kieronski v. Wyandotte Terminal R.R. Co., 806 F.2d. 107, 109 (6th Cir. 1986) (citation omitted). FELA also includes in its definition of a common carrier, "persons or corporations charged with the duty of the

management and operation of the business of a common carrier." 45 U.S.C. § 57.

Mattingly's unitary theory relies on two early-twentieth-century Supreme Court cases: *Southern Pacific Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498 (1911) and *United States v. Union Stockyards & Transit Co. of Chi.*, 226 U.S. 286 (1912). In both cases, the Court weighed whether entities held in common ownership alongside common carriers might be deemed common carriers for purposes of the Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379, and whether they were within the jurisdiction of the Interstate Commerce Commission ("ICC"). These cases carry some limitations in the context of Mattingly's FELA claims, but they are useful in providing general principles for our analysis. *See Kieronski*, 806 F.2d at 109 (examining *Southern Pac. Terminal Co.* and *Union Stockyards* applicability to FELA claims).

Southern Pacific appears to provide the Court's earliest guidance on the unitary theory. In that case, the Supreme Court found that Southern Pacific Terminal ("SP Terminal")—a business entity owned by Southern Pacific Company, which in turn owned a group of individually incorporated railroads—was a common carrier. *Id.* at 517. SP Terminal was in the business of operating wharves and docks to accommodate the import and export of freight. *Id.* at 502. The wharves and docks themselves were connected to the railroad tracks of SP Terminal's sister companies. *Id.* at 503. The Court concluded that SP Terminal was a common carrier, in part, because of its ownership and

operation, along with its sister companies, by a single corporation. In that regard, the Court noted the fact that Southern Pacific Company "control[led] . . . the properties . . . through stock ownership." *Id.* at 521 ("There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company."). Equally important, SP Terminal "form[ed] a link in the chain of transportation" for the respective companies. *Id.* at 522. That is to say, SP Terminal's wharves and docks were "*necessary* to complete the avenue through which move shipments over [the] lines owned by a single corporation," making SP Terminal a common carrier for purposes of ICC jurisdiction. *Id.* (emphasis added).

In *Union Stockyards*, the Court similarly found that the defendant, "Stock Yard Company," was a common carrier subject to the Interstate Commerce Act. 226 U.S. at 303. The Stock Yard Company was held by a parent company, and that parent company also held Junction Company—an owner and operator of railroads. *Id.* The Stock Yard Company operated facilities to load and care for livestock in their journey over Junction Company's rail lines. It also received two-thirds of Junction Company's profits. *Id.* at 300. Again, while the fact that Stock Yard Company and Junction Company shared a common owner was a relevant consideration in the Court's holding, the salient consideration was that Stock Yard Company's facilities and services provided a necessary physical link in the chain of interstate commerce. *Id.* at 304–05. Moreover,

the character of the services rendered by Stock Yard Company were that of a common carrier because it "perform[ed] services as a railroad." *Id.* ("Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce . . . or receive it while it is still in progress in interstate commerce.").

Here, Corman Services' bridge repair and construction services do not provide such an inextricable function for Memphis Line's common carrier services like the entities in *Southern Pacific Terminal* and *Union Stock Yard* did. Granted, the maintenance and repair of railroad tracks and bridges is surely integral to the operation of railroads. But maintenance is not a rail service contracted for by the public when it engages Memphis Line as a common carrier. In the leading cases, the plaintiffs functioned to actively keep things—freight and livestock respectively—moving in interstate commerce. In this case, Corman Services maintained the physical structure of the railroad, but it was not an active participant in the chain of commerce itself. *See Union Stockyards*, 226 U.S. at 304 (emphasizing that the primary consideration is whether the "service to be performed was a part of the carriage of freight by railroad in interstate commerce") (citing *Southern Pacific*, 219 U.S. 498); *see also Kieronski*, 806 F.2d at 109 (understanding *Southern Pac.*

Terminal and *Union Stockyards* to extend common carrier liability to "linking" entities that have "common ownership" with a railroad).

Edwards v. Pacific Fruit Express Company offers additional guidance. 390 U.S. 538 (1968). In *Edwards*, the Supreme Court addressed Congress's reluctance to expand the meaning of common carriers in its 1939 amendments to FELA. The Court observed that "[b]y refusing to broaden the meaning of railroads, Congress declined to extend the coverage of the Act to activities and facilities intimately associated with the business of common carrier by railroad." *Id.* at 541. While the *Edwards* Court weighed whether renting refrigerator cars to railroads and providing protective services in the transport of perishable commodities constituted the business of a common carrier, the Court's logic that, "while used in conjunction with railroads and closely related to railroading, are yet not railroading itself," applies with equal heft to Corman Services' construction and repair activities. *Id.* at 540.

Moreover, an age-old principle of corporate common-law "deeply 'ingrained in our economic and legal systems'" is useful to our analysis as well: "a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929)); *see also Schultz v. Gen. Elec. Healthcare Fin. Servs.*, 360 S.W.3d 171, 174 (Ky. 2012) ("General principles of corporate law, specifically with respect to piercing the corporate veil, have

become axiomatic. For example, it is widely accepted that a corporation should be viewed as a separate legal entity."). Mattingly does not present circumstances warranting the disregard of Defendants' separate corporate structure.

For instance, in *Bestfoods*, the Supreme Court considered whether a parent corporation could be charged with derivative liability for its subsidiary's actions under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). In answering in the negative, the Court looked to the statute itself. It emphasized that CERCLA was notably silent on "the liability implications of corporate ownership." *Id.* at 63. And the statute's silence "demand[ed] application of the rule that, to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law." *Id.* (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)). The Court's guidance in *Bestfoods* leads us down two paths—statutory and common law—both yielding the same result.

First, unlike CERCLA, FELA arguably does contemplate a circumstance in which courts may disregard separate corporate entities. *See* 45 U.S.C § 55. Section 55 voids "[a]ny contract, rule, regulation, or device whatsoever," with "the purpose or intent . . . to enable any common carrier to exempt itself from any liability created" by FELA. At least one of our sister circuits has interpreted the provisions of Section 55 to "encode[] the [corporate] 'domination' doctrine to the extent the FELA permits the use of this doctrine to pierce the corporate veil." *See Selser v. Pac. Motor*

Trucking Co., 770 F.2d 551, 554 (5th Cir. 1985). The Fifth Circuit in *Selser* addressed whether a common carrier parent company could be liable under FELA for its non-common carrier subsidiary. The court reasoned that "common law 'domination' is . . . relevant only to the extent to which it may evidence intent or purpose to exempt the parent [] from FELA liability." *Id.*; *see also Smith v. Rail Link, Inc.*, 697 F.3d 1304, 1309 (10th Cir. 2012) (noting in dicta that plaintiff "might succeed" in implicating the corporate parent of common carrier subsidiaries as a common carrier subsidiary itself "if she could show that this corporate structure was established as a means of evading FELA liability").

Citing *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 746 (Utah 1946), Mattingly maintains that Corman Group's organization has the *practical effect* of exempting some of its employees from FELA liability, providing sufficient grounds to fall within the ambit of § 55. But *Petersen*, a state court decision from Utah, appears to stand alone in its interpretation of the Act. We do not take such a liberal view of FELA's statutory language. This court's sister circuits—and the plain language of the statute—indicate that the purpose and intent, not the "practical effect," of the device in question is relevant to the analysis. *See Selser*, 770 F.2d at 554 ("By its terms, section 55 voids all devices, and only those devices, whose actual *purpose or intent* is to enable a carrier to exempt itself from liability.") (emphasis in original); *Smith*, 697 F.3d at 1409 ("[Plaintiff] might succeed if she could show that this

corporate structure was established as a means of evading FELA liability."). Mattingly points to no evidence that Corman Group designed its corporate structure with the purpose or intent to exempt itself from FELA liability. To the contrary, undisputed record testimony reflects numerous legitimate purposes for the corporate segregation of the companies, including their diverse functions, clientele, suppliers, and management requirements.

Mattingly fares no better if we instead apply corporate common-law principles as in *Bestfoods.* 524 U.S. at 63; *see also Willard v. Fairfield S. Co.*, 472 F.3d 817, 823 (11th Cir. 2006) (considering Alabama corporate law to determine whether a railroad "so control[led] the operation of [the plaintiff's nominal employer] as to make it a mere adjunct, instrumentality, or alter ego of" the railroad for purposes of FELA); *Greene v. Long Island R.R. Co.*, 280 F.3d 224, 235 (2d Cir. 2002) (similar). State law dictates whether circumstances exist warranting piercing the corporate veil. *See Longhi v. Animal & Plant Health Inspection Serv.*, 165 F.3d 1057, 1061 (6th Cir. 1999). "Under Kentucky law, separate corporate interests, including subsidiaries and affiliates . . . are separate legal entities and must be recognized and treated as such unless there is some reason to pierce the corporate veil." *Hazard Coal Corp. v. Ky. W. Va. Gas Co.*, 311 F.3d 733, 739 (6th Cir. 2002). And such reasons are found "only in the rarest of circumstances." *Schultz*, 360 S.W.3d at 174. Specifically, two elements must be met: "(1) domination of the corporation resulting in a loss of corporate separateness *and*

(2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice." *Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 469 (Ky. Ct. App. 2012) (emphasis in original) (quoting *Inter-Tel Techs., Inc. v. Linn Station Props., LLC*, 360 S.W.3d 152, 165 (Ky. 2012)). Considerations going to the first factor include "grossly inadequate capitalization, egregious failure to observe legal formalities and disregard of distinctions between parent and subsidiary, and a high degree of control by the parent over the subsidiary's operations and decisions, particularly those of a day-to-day nature." *Inter-Tel Techs., Inc.*, 360 S.W.3d at 164. While Mattingly cites evidence that Corman Group exercised some degree of control over its subsidiaries, the evidence advanced does not warrant the exceptional measure of disregarding corporate formalities among the entities. The subsidiary Defendants managed their own daily operations and maintained corporate officers and personnel distinct from Corman Group; Mattingly presents no evidence that the subsidiary Defendants were not financially independent of Corman Group; and Services maintained substantial business relationships beyond the Corman Group subsidiary railroads. Thus, a common law approach is no more effective here than a statutory one.

As such, Mattingly does not present a genuine dispute of material fact as to whether Corman Services may be considered a common carrier based on its relationship to Corman Group under FELA.

2. Subservant Theory

Mattingly next asserts that even if Corman Services cannot be considered a common carrier by virtue of Corman Group's operation, common-law employment principles still render him an employee of Memphis Line.

Under FELA, the words "employee" and "employed" are intended in their natural sense, established by proof of a master-servant relationship under traditional principles of common law. *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323 (1974). A master-servant relationship under common law exists where "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Id.* at 324 (quoting Restatement (Second) of Agency § 220(1) (1958)).

The parties agree that the leading case on the matter is *Kelley*. There, the Supreme Court enumerated three approaches for a plaintiff seeking coverage under FELA to establish common law employment with a common carrier. *Id.* at 324. Mattingly chose to proceed under the "subservant" approach, which allows him to rely on evidence that he was acting as "a subservant of a company that was in turn a servant of the railroad." *Id.* To prevail under this approach, Mattingly must show that (1) Corman Services was a servant of Memphis Line, and (2) he was subject to the

control of both Memphis Line and Corman Services.[1] Because we do not find that Memphis Line controlled or had the right to control Corman Services' daily operations such as to establish a master-servant relationship, Mattingly's subservant theory of employment must fail.

The facts of *Kelley*—where the Supreme Court determined that the district court's findings did not establish a master-servant relationship between the plaintiff's nominal employer and a defendant railroad company—are helpful to our review. The plaintiff was employed by a trucking company ("PMT") and sustained injuries while unloading vehicles from the defendant-railroad company's railcar to PMT's trailer. *Id.* at 321. PMT was a wholly owned subsidiary of the railroad company, and the plaintiff-employee claimed to be employed by the railroad company for purposes of FELA. *Id.* The district court found that the relationship between the plaintiff-employee and the railroad

[1] In his briefs before this court, Mattingly states that both Corman Group and Memphis Line were "masters" of Corman Services for purposes of the subservant theory. (Dkt. 22, Page 50). However, the substance of his argument focuses solely on Memphis Line's control over Services (*see id.* at 52–53; Dkt. 33, Page 21). We therefore address only the master-servant relationship between Memphis Line and Corman Services. *See Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019) ("[A] defendant forfeits an argument by . . . identifying it without pressing it.") (quoting *United States v. White*, 920 F.3d 1109, 1122–23 n.4 (6th Cir. 2019)). Although Mattingly's arguments are forfeited, Defendants directly and adequately addressed the issue in their response brief. (Dkt. 27, Page 53–54). With no counter to the defendant's well taken arguments, Mattingly cannot prevail on this issue.

company established FELA liability. *Id.* The district court reasoned that because PMT was serving as an agent of the railroad, the railroad was ultimately "responsible" for the unloading operation; PMT employees were the railroad's agents for purposes of the unloading operation; and the work performed by the plaintiff fulfilled a nondelegable duty of the railroad. *Id.* at 322.

The Court of Appeals for the Ninth Circuit reversed, finding the district court's test for FELA liability too broad; the Supreme Court agreed. *Id.* The Court reasoned that FELA liability requires more than an agency relationship, but that of a "master-servant" where the railroad must have "controlled or had the right to control the physical conduct of PMT employees in the course of their unloading operations." *Id.* at 325. It did not matter that railroad employees were responsible for checking safety conditions on the site—this only "reflect[ed] the fact that the activities of the two companies were closely related and necessarily had to be coordinated." *Id.* at 326–27. And despite railroad supervisory personnel being on site and occasionally advising or consulting with PMT employees and supervisors, the railroad did not play "a significant supervisory role in the unloading operations." *Id.* at 327. Further, "[t]he two companies were sufficiently distinct in organization and responsibility that there was no apparent overlap in the supervisory ranks." *Id.*

Under facts similar to Mattingly's, we applied *Kelley*'s subservant theory to FELA claims in *Campbell v. BNSF Railway Company*, 600 F.3d 667 (6th Cir. 2010). We found no master-servant relationship between the

plaintiff's employer, Pacific Rail Services, LLC ("PRS"), and BNSF Railway Company, with whom PRS contracted. *Id.* at 668. The plaintiff in *Campbell* was injured while driving a railroad transport vehicle at a railyard owned by BNSF. *Id.* BNSF employed one worker at the terminal: a hub manager who was charged with ensuring that PRS workers timely completed their assignments and followed BNSF's safety protocols. *Id.* at 669. The hub manager also discussed with PRS employees which tracks needed to be cleared and spotted, but PRS managers and supervisors were otherwise responsible for directing the specifics of PRS employees' activities, assigning containers to rail cars, and coordinating and tracking the work. *Id.* Further, BNSF had no authority to hire, train, evaluate, discipline, or terminate PRS employees. *Id.* at 673. PRS maintained substantial business relationships outside of its dealings with BNSF and had complete authority over its employees' schedules; PRS could also assign any number of workers to the BNSF terminal. *Id.* Taken together, the court found that "PRS controlled, and had the exclusive right to control, its employees as BNSF's independent contractor," and as such, the subservant theory failed. *Id.* at 674.

Similarly, Mattingly does not establish that Corman Services was a conventional common-law servant of Memphis Line. Corman Services employed its own supervisory personnel who were present at the job site each day. *See Kelley*, 419 U.S. at 327. Corman Services paid its workers from its own bank account. *See id.* at 328 (considering that a nominal employer "fixed and

paid [workers'] wages"). Corman Services determined which and how many of its workers would show up at each job, including the Memphis Line Project. *See Campbell*, 600 F.3d at 673. Memphis Line had no authority to hire, fire, discipline, train, or evaluate Corman Services employees. *See id.* at 669. For example, Childres conducted Mattingly's employee evaluations, and Mattingly in turn conducted employee evaluations for his supervisees at Corman Services. Moreover, Corman Services had "substantial business relationships" outside of its dealings with Memphis Line. *Id.* at 673. In fact, these external business relationships apparently took precedence over its relationships with the Railroad Company railroads, as Corman Services often dropped Corman jobs if other work became available. Moreover, while the railroad defined the scope of the work on the Memphis Line Project—identifying which bridge posts required repair—Corman Services controlled its own day-to-day schedule. *See id.* at 669.

The relative roles of the companies are also relevant here. *See e.g.*, *Kelley*, 419 U.S. at 326–27; *Standard Oil Co. v Anderson*, 212 U.S. 215, 226 (1909). Memphis Line retained responsibility for ensuring the safety of Corman Railroad bridges and the work site, while Corman Services was utilized to repair unsafe portions of the bridge. The *Standard Oil Company* decision is instructive here. In *Standard Oil Company*, the Court explained that a winchman obeying the signals of a gangman while timing the raising and lowering of cases of oil "showed co-operation rather than subordination" and "not the [taking] of orders, but of

information." 212 U.S. at 216. Mattingly's version of the facts, viewed in the context of the functions of Memphis Line and Corman Services on the Memphis Line Project are also more indicative of cooperation than subordination, and "reflect the fact that the activities of the two companies were closely related and necessarily had to be coordinated." *Kelley*, 419 U.S. at 327; *see Standard Oil Co.*, 212 U.S. at 256 ("[W]hen one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos."). And similar to *Kelley*, due to the nature of the work performed, the companies "naturally had substantial contact with one another." *Kelley*, 419 U.S. at 327. As such, the evidence demonstrates that Corman Services was not subjugated to the control or right to control of Memphis Line.

In resisting this result, Mattingly directs our attention to his testimony that Topolski was often present at the Project, and Topolski's testimony that he might offer advice to Corman Services bridge crew members regarding some tasks. But even resolving the conflicting facts in Mattingly's favor, Topolski's unilateral actions on the Project fall short of establishing Memphis Line's control over Corman Services. *See Kelley*, 419 U.S. at 330 ("The informal contacts between the two groups must assume a supervisory character before the [contractor's] employees can be deemed pro hac vice employees of the railroad."). Other testimony, including Mattingly's own, showed that Topolski's involvement on the Project did not take on a supervisory

character. *See id.* at 327 (railroad personnel "advis[ing] or consult[ing] with [contractor] employees and supervisors" does not equate to a "significant supervisory role."). For example, Mattingly explained that while Topolski might instruct newer employees as to certain tasks, he and Topolski stayed out of each other's way because he was more familiar with bridge work. And one of Mattingly's subordinates on the Project, Mr. Neace, explained that he would "probably listen" to Topolski due to his knowledge and experience, but not due to his status. (R. 62-15, PageID 2048–49).

To the extent that Mattingly claims that Topolski "dictated the times when Corman Services employees could work," he also conceded that this was "in relation to when Corman trains needed to pass." (Dkt. 22, Page 34). Such coordination not only indicates "necessary cooperation" as opposed to a master-servant relationship, but it is also consistent with a railroad's federally mandated role in ensuring the safety of on-track workers under 49 C.F.R. §§ 214.317, 214.319, 214.353. *See*, *e.g.*, *Campbell*, 600 F.3d at 674 (explaining that a railroad's obligation to adhere to safety requirements does not demonstrate employment relationship); *Royal v. Mo. & N. Ark. R.R. Co., Inc.*, 857 F.3d 759, 763 (8th Cir. 2017) (same). Similar reasoning applies to the requirement that Corman Services supervisors, including Mattingly, circulate daily production reports by e-mail to Railroad Company supervisors. This practice permitted the railroad to keep track of the work being completed and comply with federal safety requirements. Both Mattingly and Childres testified that this

was a standard practice that they would complete for any railroad with whom Corman Services contracted.

Ultimately, Mattingly does not present a genuine dispute of material fact regarding whether Corman Services, as an entity, was merely a common-law servant to Memphis Line or whether Corman Group's operations established a unitary organization for FELA applicability. Accordingly, we hold that the district court did not err in granting summary judgment to Defendants on Mattingly's FELA claim because Mattingly was not employed by a common carrier under the Act.

B.

Discovery Issues. Lastly, Mattingly maintains that the district court failed to (1) order discovery as to Memphis Line once it was added as a party, and (2) resolve a pending discovery dispute. Generally, summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery. *See Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)).

Mattingly's first claim lacks merit. In June 2021, the parties filed dispositive motions. Memphis Line subsequently entered its appearance in December 2021. In August 2022, the district court granted Defendants' motion for summary judgment on the FELA claim and included Memphis Line in the order and corresponding judgment. There is no indication that

Mattingly sought to initiate a discovery conference or sought additional discovery as to Memphis Line in the months following its addition as a party. *See* Fed. R. Civ. P. 26(f)(2) ("The attorneys of record . . . that have appeared in the case are jointly responsible for arranging the [discovery] conference."). Having failed to preserve the Memphis Line discovery dispute below, Mattingly cannot challenge it here. *See Stemler v. City of Florence*, 126 F.3d 856, 866 n.9 (6th Cir. 1997). In any event, Mattingly cannot support his claim on appeal that he was not afforded a "sufficient opportunity" for discovery as to Memphis Line. *See Vance, v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996.)

Mattingly's remaining claim of error is similarly without merit. During discovery, the magistrate judge denied Mattingly's request to obtain a copy of Corman Group's consolidated external audit report, which he claims would reveal important aspects about the control that Corman Group exercised over its subsidiaries. Mattingly filed a motion to modify the decision and the magistrate judge denied that motion. Mattingly filed objections to the magistrate judge's order, but the district court never ruled on the objections. The parties subsequently filed dispositive motions.

In the context of a motion for summary judgment, "[t]he non-movant bears the obligation to inform the district court of his need for discovery" by complying with Federal Rule of Civil Procedure 56(d). *Id.* at 1148–49. An affidavit pursuant to Rule 56(d) "must 'indicate to the district court [the non-movant's] need for discovery, what material facts it hopes to uncover, and why it

has not previously discovered the information.'" *Doe v. City of Memphis*, 928 F.3d 481, 490 (6th Cir. 2019) (quoting *Ball*, 385 F.3d at 720). If a non-movant fails to comply with Rule 56(d), the issue of whether summary judgment was prematurely entered because additional discovery was required is not preserved for appeal. *See Vance*, 90 F.3d at 1149; *see also Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1196 (6th Cir. 1995).

Mattingly did not file a formal Rule 56(d) affidavit regarding the audit materials. Nor did he file any language with the district court setting forth "specified reasons, [that he could not] present facts essential to justify [his] opposition" pursuant to Rule 56(d). Thus, Mattingly did not preserve the issue of whether the district court abused its discretion in not ruling on his pending objections regarding discovery. *See Plott*, 71 F.3d at 1196–97 (holding that failing to provide a contemporary affidavit seeking additional discovery to oppose summary judgment precludes a finding of an abuse of discretion).

IV.

For these reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

JOSEPH BRENT MATTINGLY *Plaintiff,* v. R.J. CORMAN RAILROAD GROUP, LLC and R.J. CORMAN RAILROAD SERVICES, LLC *Defendants.*	Civil Action No. 5:19-CV-00170-JMH **JUDGMENT** (Filed Aug. 12, 2022)

* * *

Consistent with the Memorandum Opinion and Order entered contemporaneously herewith, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED** and **ADJUDGED** as follows:

(1) The Complaint, all amendments therto, against Defendants is **DISMISSED**.

(2) This action is **CLOSED** and **STRICKEN** from the Court's active docket.

(3) This is a **FINAL** and **APPEALABLE** judgment and there is no just cause for delay.

This the 12th day of August, 2022.

Signed By:

[SEAL] /s/ **Joseph M. Hood JMH**
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

JOSEPH BRENT MATTINGLY *Plaintiff,* v. R.J. CORMAN RAILROAD GROUP, LLC and R.J. CORMAN RAILROAD SERVICES, LLC *Defendants.*	Civil Action No. 5:19-CV-00170-JMH MEMORANDUM OPINION AND ORDER (Filed Aug. 12, 2022)

* * *

This matter is before the Court on two motions for summary judgment, filed by Plaintiff [DE 62] and Defendants [DE 63], on the limited issue of the application of the Federal Employers' Liability Act, 45 U.S.C. § 51 ("FELA"). For the reasons stated herein, the Court finds that FELA is not applicable.

I. BACKGROUND

On January 26, 2017, Plaintiff Joseph Brent Mattingly was injured while at work. At the time of his injury, Mattingly was employed by R.J. Corman Railroad Services, LLC ("Services"), which was conducting repairs on a bridge owned and operated by R.J.

Corman Railroad Company/Memphis Line ("Memphis Line").

In February of 2019, Mattingly brought suit against Services[1] and R.J. Corman Railroad Group, LLC ("Group"). In September of 2020, Mattingly filed a motion for leave to file a Second Amended Complaint, which would join Memphis Line as an additional defendant. [DE 32]. The Court granted the motion over Defendants' objections. [DE 73].

Defendants are related through their corporate structure. Group, a holding company, is the sole member of R.J. Corman Railroad Company, LLC ("Railroad Company"), Services, and several other entities. Defendants claim that Group, Services, and Railroad Company are not common carriers by railroad. Railroad Company is the sole shareholder of Memphis Line, which Defendants concede is a common carrier by railroad.

A. GROUP'S ROLE WITH ITS SUBSIDIARIES

Due to the corporate structure, Group takes responsibility for several administrative tasks, choosing a joint approach. For example, because Group files a single tax return accounting for its subsidiaries' income and expenses, none of the separate subsidiaries file a federal tax return. Group procures a single

[1] Originally, Mattingly's Complaint listed "R.J. Corman Railroad Construction, LLC" but in his First Amended Complaint [DE 13], Mattingly corrected the name to "R.J. Corman Railroad Services, LLC."

workers' compensation policy, general insurance policy, automobile liability policy, life insurance policy, and health insurance benefits for all its subsidiaries and offers a single retirement plan. In 2018, all the Group subsidiaries filed a joint security agreement listing all assets in order to perfect a security interest. In accordance with 49 U.S.C. § 11323, which requires approval by federal Surface Transportation Board (STB) before an entity can purchase or acquire control of a railroad, Group jointly filed a Notice of Exemption. In applying for public grant funding to rehabilitate railroad tracks, Group used its own letterhead and discussed the history of Services. To settle a Fair Labor Standards Act lawsuit, Group signed an agreement that released all Group subsidiaries.

Group implements Senior Staff Policies that, among other things, require Group officers to approve inter-company employee transfers, designate the Group president to be in charge if an organizational crisis occurs, and adopts a 5-year plan for rehabilitation of the short-line railroads. Group also implements an Employee Discipline Policy. Defendants admit these policies were produced and available but state the policies were not followed. The subsidiaries are required to adhere to the safety protocols developed by Group, and Group conducts an annual mandatory safety training for employees of the subsidiaries.

In the event rail lines are damaged by inclement weather, employees of all Corman entities are subject to assignment on the storm team. Group can issue a "stand down" order, which requires all entities to shut

down. At times, employees of one Group subsidiary would fill in for a different subsidiary.

Group provides significant administrative services for its subsidiaries including payroll, accounting and finance, legal, human resources, information technology, public affairs, aircraft pilot services, risk management, purchasing and procurement of commercial development services. The subsidiaries pay Group an administrative fee for many of the services.

At times, subsidiaries must seek Group's approval. For example, the president of Group must approve the annual budget of every subsidiary, and purchases over a specified amount must be approved by the president or vice-president. In 2013, Group officers approved Mattingly's transfer from Group to Services and subsequent promotion.

Marketing material places emphasis on the "Soulrce" logo and "One Source" idea. Its website promotes the following:

> R.J. Corman is the One Source service provider for all facets of railroading. Although we are made up of several entities, our individual companies come together to form a custom package to respond to our customer's unique needs. All companies and service groups are unified under one R.J. Corman banner and adhere to the same set of core values in order to provide consistent, high quality solutions for our customers.

RJ Corman Railroad Home Page, www.rjcorman.com.

The subsidiaries are subject to different labor regulations. Railroad employees fall under the Railway Labor Act, are covered by FELA, and contribute to railroad retirement. While non-railroad employees adhere to the National Labor Relations Act, are covered under state workers' compensation laws, and contribute to social security for retirement.

B. MEMPHIS LINE'S RELATIONSHIP WITH SERVICES

Even though Railroad Company did not use Services exclusively for repairs and usually solicited bids for bridge work, most work was performed by Services. Railroad Company was charged at the actual cost of labor and equipment, not the market rate. Services also did repair work for other railroads not associated with Corman.

At the time of his injury, Mattingly was doing repair work on a bridge owned and operated by Memphis Line in Clarksville, Tennessee. Services had been retained to repair two bridges, the Cumberland Bridge and the Red River Bridge (collectively the "Memphis Line Project"). Mattingly and Paul Childres were supervisors of the Memphis Line Project and employed by Services. Mattingly and Childres reported to Dickie Dillon, the operation manager employed by Services. The work crew supervised by Childres and Mattingly consisted of Services employees including Dillon Neace and Mike Wilson. Memphis Line and Railroad Company employees were also involved in the

Memphis Line Project. Ed Quillian was Railroad Company's Chief Engineer on Memphis Line's payroll, Jason Topolski was a Railroad Company bridge supervisor on Memphis Line's payroll, and Cain Jones was the Employee in Charge ("EIC") for the Memphis Line.

At the onset when a larger than expected Services work crew showed up, Railroad Company determined it would be more productive if one crew went to the Red River Bridge and the second crew went to Cumberland Bridge. [Topolski Deposition, at 23]. Mattingly supervised a crew on the Red River Bridge, and Childres supervised a crew on the Cumberland Bridge.

Railroad officers reviewed the scope of work with Services. Memphis Line personnel had inspected and identified areas of the bridge that needed repair. At the beginning of the project, Services was given a list indicating which bridge posts needed to be replaced. Upon receiving the list, Mattingly marked the posts with spray paint. [Mattingly Deposition, at 146-47]. Topolski was responsible for answering questions regarding the scope of work [Topolski Deposition, at 80], confirmed that Services was removing the correct posts, and explained how it should look at the end. [Topolski Deposition, at 78].

According to Mattingly, Topolski indicated which posts he wanted done first and what posts should be completed that day [Mattingly Deposition, at 150-55]. Mattingly also testifies that he gave his own crew their assignments every morning, assigning the crew to equipment, ensuring the necessary tools were

obtained, locating the material, and choosing which spot he wanted to work on that day. [Mattingly Deposition, at 69]. Quillian confirmed that on some work, that it would be expected that Mattingly, or the like, was expected to follow the specific direction of Topolski as to which post Topolski wanted worked on that day. [Quillian Deposition, at 95]. Topolski denies directing Services employees on which post number needed to be replaced on a given day or in a specified order, but admits that posts were prioritized when Services indicated that they were pulling out earlier and thus unable to finish the job, prompting Topolski to change the scope of work to prioritize the critical posts [Topolski Deposition, at 121-122] and that the only time Topolski intervened with Services' plan for the day was to inform the crew that a train may be coming through at a certain time, in which case Services would need to adjust their timeline to accommodate. [Topolski Deposition, at 132].

Complying with federal regulations, Memphis Line provided an EIC to the Memphis Line Project. The EIC communicated with dispatch to monitor railroad traffic in order to clear the track if a train needed to enter the work area. On projects outside of Corman lines, EICs would give the parameters of track time then oftentimes would not be seen again. But the Corman EICs were present during the workday, worked with the crews, and instructed workers where to go and what to do. [Mattingly Deposition at 136] & [Childres Deposition, at 82]. When Topolski supervised the Memphis Line Project, he "wanted it done his way,"

was "pretty vocal," "whatever he said, that's what you did," "it had to be his way always," supervised the way posts were cut, and trained new employees on how to drill holes and cut posts. [Mattingly Deposition, at 137 & 151-159]. Topolski admits that there were times when he leaned on his own experience to show new crew members what he learned over the years. [Topolski Deposition, at 79].

While Quillian was not really involved in the Memphis Line Project nor present at the site [Mattingly Deposition, at 125] & [Childres Deposition, at 80], there is conflicting testimony regarding how often Topolski was at the bridge site. Mattingly claims he saw Topolski on a daily basis during the course of the project. [Mattingly Deposition, at 137]. Because he was still working on other projects in different states, Topolski states he was only present two to three days per week. [Topolski Deposition, at 118 & 121]. Neace testified that Topolski might have been present at the bridge briefly when the crew first arrived, but other than that was not present. [Neace Deposition, at 45]. However, Neace indicated that Jones would be on the Cumberland Bridge, running safety meanings and giving the parameters of track and time. [Neace Deposition, at 45]. Wilson similarly indicated that Topolski might have been at the Memphis Line Project the first week, but after that Jones was the EIC. [Wilson Deposition, at 27-28]. Topolski would show up sometimes and leave, and Jones tended to stay at the Cumberland Bridge. [Wilson Deposition, at 49].

There is conflicting testimony regarding Memphis Line employee's physical involvement on the Project. Topolski denies pitching in to help Services employees with their work, noting that they did not need his work due to their ample workforce, but there were times when he might use a chainsaw to perform tasks outside of the scope of work, like using tools to cut brush. [Topolski Deposition, at 104]. Childres testified that Topolski and Jones performed labor on the project including cutting posts and using the chainsaw, which was not common for EICs when Services worked on non-Corman lines. [Childres Deposition, at 81]. Wilson testified that sometimes Jones would jump in and work, but Topolski "not so much." [Wilson Deposition, at 50]. Wilson specified that he was not sure what Jones was doing on the other bridge, but that he believed he was cutting posts, [Wilson Deposition, at 50] and he confirmed that at some point Topolski brought a man lift over to the Cumberland Bridge and trained others on how to operate it. [Wilson Deposition, at 29]. Topolski confirmed that he used a manlift on the Memphis Line Project to perform his inspections easier. [Topolski Deposition, at 102].

While Services employees would listen to Memphis Line supervisors, Services employees knew to first follow Childres or Mattingly. Quillian stated that if he had a specific instruction for Mattingly or Childres that he would not expect them to immediately comply with his direction but would expect a discussion. [Quillian Deposition, at 100]. Childres indicated that hypothetically if Quillian were to ask him to do

something related to his supervisor position, Childres would do it, but when asked about specific examples of Quillian supervising bridge projects, Childres indicated that if he had a question, he might call Quillian. [Childres Deposition, at 25]. If Topolski and Dillon issued conflicting orders, Childres guessed he would ultimately follow Dillon, but that it would depend on the situation. [Childres Deposition, at 82]. While Neace indicated that Quillian supervised a different project in the Carolinas requiring him to adhere to his instruction, Neace does not testify similarly for the Memphis Line Project, [Neace Deposition, at 43], and Neace would not follow Cain's instructions about work, unrelated to safety or track and time authority, without first asking Childres or Mattingly. [Neace Deposition, at 45].

Mattingly first explains that he had two bosses who would tell him where to go and give him assignments, Dillon and Childres. [Mattingly Deposition, at 44]. While Mattingly was his own supervisor, he also considered Childres and Topolski to be his supervisors as well. [Mattingly Deposition, at 122-123]. When Railroad and Services people were working together on the track, Services would adhere to Railroad's orders, and this included Childres and Mattingly taking orders from Topolski. [Mattingly Deposition, at 138].

Services supervisors were required to send daily production reports to Railroad Company, Memphis Line, Services, and Group officials detailing what was completed and how many hours the tasks took. [Topolski Deposition, at 130] [Quillian Deposition, at

96]. Railroad supervisors asked Mattingly to include the exact location of work completed and include the post number. Corman007110 and Corman007240.

Railroad Company supplied the material for the Memphis Line Project and arranged for its delivery to the sites. Topolski specified what material should be used on specific posts to stretch material out and how material, like bolts, would be provided to Services. Corman006674-006676.

Services kept track of their hours worked and travel expenses. Checks for Services employees on the project came from Services' bank account. [Johnson Deposition, at 47-50].

At the beginning of every workday on the Memphis Line Project a safety meeting was conducted. Sometimes Childres or Mattingly conducted the meetings. [Childres Deposition, at 74] & [Mattingly Deposition, at 66 & 125]. Other times Quillian, Topolski, or Jones conducted the safety meetings. [Mattingly Deposition, at 66 & 125], [Childres Deposition, at 74], & [Topolski Deposition, at 118].

On the day of the accident, Childres brought Mattingly's crew replacement chains for their chainsaws. In order to retrieve the chains and converse with Childres, Mattingly climbed into a man-basket that was attached to crane. The winch mechanism failed, causing Mattingly to fall from a significant height. Mattingly suffered a severe injury, which ultimately resulted in the amputation of his lower leg. No Group, Railroad Company, or Memphis Line employee was

present at the Red River Bridge when the accident occurred. [Mattingly Deposition, at 145].

II. Standard of Review

"The court shall 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). A "genuine dispute" exists when "a reasonable jury could return a verdict for the non-moving party." *Olinger v. Corporation of the President of the Church*, 521 F. Supp. 2d 577, 582 (E.D. Ky. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); *Smith v. Perkins Bd. of Educ.*, 708 F. 3d 821, 825 (6th Cir. 2013). In the Court's analysis, "the evidence should be viewed in the light most favorable to the non-moving party." *Ahlers v. Schebil*, 188 F. 3d 365, 369 (6th Cir. 1999) (citing *Anderson*, 477 U.S. at 255). However, "[s]tatements in an affidavit which are based on information and belief or which are unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 132 (1992).

The initial burden falls on the moving party, who must identify portions of the record establishing the absence of a genuine issue of material fact. *Chao v. Hall Holding Co.*, 285 F. 3d 415, 424 (6th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If established, the non-moving party "must go beyond

the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Id.* The non-moving party will not overcome a motion for summary judgment by simply showing "some metaphysical doubt as to the material facts." *Id.* (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). In other words, "the respondent must adduce more than a scintilla of evidence to overcome the motion." *Street v. J.C. Bradford & Co.*, 886 F. 2d 1472, 1479 (6th Cir. 1989). As a "mere scintilla of evidence" is insufficient, the non-movant must show the existence of "evidence on which the jury could reasonably find for the non-moving party." *Sutherland v. Mich. Dept. of Treasury*, 344 F. 3d 603, 613 (6th Cir. 2003) (citing *Anderson*, 477 U.S. at 251). Instead, the non-moving party is required to "present significant probative evidence in support of its opposition." *Chao*, 285 F. 3d at 424.

III. Discussion

FELA is a "broad remedial statute" that is to be "liberally construed" to provide "a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62 (1987). FELA provides that:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in damages to any person suffering injury while

> he is employed by such carrier in such commerce . . .

There are four points that must be established for a plaintiff to recover damages under FELA:

> First, they must establish that the defendant is a common carrier by railroad engaged in interstate commerce; second, they must prove that they were employed by the defendant and assigned to perform duties which furthered such commerce; third, they must demonstrate that their injuries were sustained while they were employed by the common carrier; and finally, they must prove that their injuries resulted from the defendant's negligence.

Felton v. Southeastern Pennsylvania Transp. Authority, 952 F.2d 59, 60 (3rd Cir.1991). The first two requirements, common carrier status and employment, are at issue in this case.

Mattingly argues that FELA liability applies based on two separate theories. First, Mattingly claims that FELA liability extends to an entity whose "parent holding company owns common carrier subsidies and owns, manages, and controls all of its subsidiaries as a unitary, organized railroad system" (the "unitary theory") making the entity a common carrier by railroad. Second, Mattingly claims that even if Services is not a common carrier by railroad, Mattingly was also employed by Memphis Line, which is a common carrier by railroad, because FELA liability applies when the "injured worker is acting under direction, supervision,

management and control of a parent holding company and one of its common carrier subsidiaries." The Court addresses each argument in turn.

A. UNITARY THEORY

FELA defines the term "common carrier" to "include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." 45 U.S.C. § 57. In 1968, the Supreme Court defined common carrier by railroad as "one who operates a railroad as a means of carrying for the public, – that is to say, a railroad company acting as a common carrier." *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538, 540 (1968). An entity is also a common carrier if it "holds [itself] out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering [its] services to the public generally." *Kelly v. Gen. Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa. 1953). Plaintiff bears the burden of proving that the defendant is a common carrier by railroad and "must present affirmative evidence indicating such." *Mickler v. Nimishillen and Tuscarawas Railway Co.*, 13 F.3d 184, 189 n. 3 (6th Cir. 1993).

Plaintiff's brief points to *Southern Pacific Terminal Co. v. Interstate Commerce Comm.*, 219 U.S. 498 (1911), as the founding case for the unitary theory. The issue before the court was whether Southern Pacific Terminal Co. ("SP Terminal"), a wharfage company, was within the jurisdiction of the Interstate Commerce

Commission ("ICC"). *Southern Pacific*, 219 U.S. at 514. The question turned upon whether SP Terminal was a common carrier.

In holding that SP Terminal was a common carrier for purposes of ICC jurisdiction, the court partially focused on the "control of the properties by the Southern Pacific Company through stock ownership." *Id.* at 522. The Southern Pacific Company owned 99% of SP Terminal and 99% of multiple individually incorporated railroads. The court looked beyond the corporate form, noting that "[t] here is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company." *Id.* at 521.

However, it was not merely mutual ownership that transformed SP Terminal into a common carrier, but that the owner, the Southern Pacific Company, "united them into a system of which all are necessary parts." *Id.* SP Terminal was the only track facility whereby cars were able to move in between the ships and the tracks of the Southern Pacific Railways. Because of this exclusivity, SP Terminal "forms a link in this chain of transportation" and is "necessary in the transportation or delivery" of freight transported by the Southern Pacific Company system. This was not a case where the holding company "was content to hold." Instead, the Southern Pacific Company was "actively managing and uniting the railroads and the Terminal Company into an organized system." *Id.* at 523. Thus, *Southern Pacific* finds that when a holding company controls and operates a subsidiary that is not a common carrier so

that it becomes a necessary link in the chain of transportation with the holding company's other common carrier subsidiaries, that non-common carrier entity is to be treated as a common carrier.

Southern Pacific cannot support Mattingly's argument because Group has not actively united Memphis Line and Services so that Services is a necessary link in the chain of transportation. Unlike SP Terminal, which was the only avenue by which cars could get from ships to Southern Pacific Railways, Services does not serve as a physical link in the chain of transportation nor has Group united the two companies so that Services plays an exclusive role in the chain. Services performed bridgework for other railroad clients, and Railroad Company solicited bids from other repair teams.

Plaintiff next points to *United States v. Union Stock Yard & Transit Co.*, 226 U.S. 286 (1912), as further support for his unitary theory. The issue before the court was whether the Union Stock Yard & Transit Company of Chicago ("Stock Yard Company") was a common carrier subject to the Interstate Commerce Act. Originally, Stock Yard Company was "organized for the purpose of maintaining a stock yard . . . and it was authorized to and did own and operate a railroad system." *Id.* at 302. However, the Junction Company began operating the railroad portion of the operation, though the Stock Yard Company still received two-thirds of the profits in connection with the railroad transportation. The stock of both companies was held by the same investment company. The court held the

companies were subject to the Act as common carriers "because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company" explaining that "[t]ogether, these companies . . . engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars and transport it . . . or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee." *Id.* at 306.

Union Stock Yard cannot support Mattingly's unitary theory. While the court considered their common ownership in rendering a decision, the court pointed to other important factors that are not present in this case. First, the duties performed by Memphis Line were never originally performed by Services, nor did Services receive two-thirds of Memphis Line's profit from their railroad operations. Lastly, unlike the situation in *Union Stock Yard* and *Southern Pacific*, neither Services nor Group is a linking carrier.

Mattingly also relies on *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967), where the court held that Lone Star, a steel company that operated a rail trackage system within its plant, was a common carrier and listed multiple considerations for determining whether an entity is a common carrier under FELA:

> First – actual performance of rail service, second – the service being performed is part of the total rail service contracted for by a member of the public, third – the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth – remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad.

Id. at 647. The court noted that Lone Star's track system connected to a track operated by Texas & Northern Railway Company ("T&N"), a common carrier by railroad, and T&N's track extended into the Lone Star plant. More, Lone Star was virtually the sole stockholder of T&N. Lone Star performed rail services that were part of the total rail transportation, was "an integral part of the T&N system of interstate transportation" by "regularly shuttling the goods of other business concerns located within its plant and thereby is performing a part of the total rail services which another railroad, T&N, has obligated itself to perform," and "receives in the form of dividends a part of the rate charged the industries by T&N." *Id.* The court clarified that this was not "a case of mere stock ownership" but "[i]nstead the record reflects that the operations of the two are highly integrated and mutually dependent"

because Lone Star was a "necessary part" of the T&N's common carrier operations. *Id.* at 648.

Lone Star cannot support Mattingly's unitary theory. Neither Group nor Services operates an in-plant rail system and Memphis Line is not physically connected to the other two entities. While Group owns Memphis Line like Lone Star owned T&N, the *Lone Star* court does not rely on ownership alone in extending common carrier status, but instead points to the physical integration that makes them mutually dependent. While Mattingly argues that Group provides significant administrative services for its subsidiary entities and the short lines use Services for bridge repair, Mattingly does not show the existence of physical integration making Group or Services a necessary part of Memphis Line's common carrier operations.

Next, Mattingly cites *Kieronski v. Wyandotte T. R., Co.*, 806 F.2d 107 (6th Cir. 1986), where the court clarified that the *Lone Star* list should not be applied as a test, but rather as "a list of *considerations* for a court to keep in mind." Instead, the court found that "carriers can be divided into several categories," which is "more helpful." *Kieronski*, 806 F.2d at 109. The categories included in-plant facilities that are not common carriers, private carriers that are also not common carriers, linking carriers that are common carriers where "a rail entity links two or more common carriers" becoming "a vital part of the common carrier system," and the *Lone Star* category where Lone Star looks like a typical in-plaint operation, which is not a common carrier, but owns a common carrier and performs

functions of that common carrier, thus becoming a common carrier itself. *Id.*

The *Kieronski* court then arranged the facts before it into the appropriate category. The plaintiff sued his employer, Wyandotte Terminal Railroad Company ("Wyandotte"), for compensation under FELA. Wyandotte was a wholly-owned subsidiary of BASF Wyandotte Corporation ("BASF"). Wyandotte's operations "were almost entirely concerned with in-plant switching for BASF" whereby on one parcel of land, Wyandotte's tracks connected to and Wyandotte received cars from one railroad and at the other parcel, Wyandotte's tracks connected to and Wyandotte received cars from another rail corporation. *Id.* at 108. The court held that Wyandotte was not a common carrier because it was simply an in-plant system.

While facts of *Kieronski* are not analogous to the facts now before the court, the case is important due to its treatment and analysis of previous cases cited by Mattingly. Importantly, the *Kieronski* court places *Southern Pacific* and *Union Stock Yard* in the linking carrier case, noting that one linked docks to a common carrier railroad and one linked common carrier railroads. The court describes how a linking carrier links two or more common carriers, becoming a vital part of the common carrier system and goes on to explain that "[t]his is true where there is common ownership between the linking carrier and a linked common carrier." *Id.* at 109. Contrary to Mattingly's contentions, there is no category whereby a non-carrier maintenance and repair entity becomes a common carrier

because its parent company owns subsidiaries that own railroad companies. Mattingly has not argued nor presented facts showing that Services serves as a vital part of the common carrier system as a linking carrier. The facts before the Court do not fall into any of the *Kieronski* categories, and Mattingly has failed to provide case support for its unitary theory.

Even if there was support for finding that ownership and the providing of administrative services was enough to deem the parent company, Group, a common carrier by railroad, Mattingly has not shown how the common carrier status would then be extended to Services. At the time of the accident, Mattingly was nominally employed by Services, and Plaintiff does not argue that he was employed by Group. Therefore, even if Group was deemed a common carrier by virtue of its ownership of common carriers coupled with its administrative oversite, Mattingly would still not be able to claim FELA liability because he admits that he was not employed by Group, a requirement for FELA liability.

Mattingly has not argued nor presented evidence that the corporate structure of the Corman enterprises was established with the purpose of evading FELA liability. Defendants have postured legitimate business purposes for the structuring as William Booher, Group's corporate representative, stated that the companies are "vastly different business. The railroads have a different set of customers, clients, suppliers, operations, you know, it's a process-based business. Whereas, you know, construction or derailment have a

whole separate set of operations, customers, suppliers, and it's more project-based business." Booher goes on to explain how the entities have separate businesses and risk profile, need employees with different skill sets, and require different management groups. Plus, employees of Group's subsidiaries that admit to common carrier status, like Memphis Line, do receive the benefits of FELA.

Mattingly has failed to provide support for his argument that Group is a common carrier. Nor, by extension, has Mattingly shown that Services could be a common carrier. This is not a situation dealing with in plant rail systems or linking carriers. While Group performs administrative functions for its subsidiaries, Mattingly has not shown that Group unites the subsidiaries into a system where all parts are necessary due to exclusivity or mutual dependance or that the subsidiaries are essential links in a chain.

B. SUBSERVANT THEORY

Mattingly's second theory of liability argues that FELA coverage is extended to employees of entities that are not common carriers when the injured worker was acting under the direction, supervision, management, and control of a holding company and one of its common carrier subsidiaries. Plaintiff argues that even though Mattingly was nominally employed by Services, by virtue of Memphis Line's control over Services and Mattingly, Memphis Line essentially became

Mattingly's employer for purposes of FELA applicability.

Plaintiff points to *Kelley v. Southern Pac. Co., 419 U.S. 318 (1974)* birthing this concept. At the time of the accident, plaintiff, Eugene Kelley, was employed by the Pacific Motor Trucking Co. (PMT), a wholly owned subsidiary of the Southern Pacific Company. Part of PMT's duties was to transport new automobiles from Southern Pacific's railyards to dealers in the area. Kelley's job was to "unhook the automobiles from their places on the railroad cars and to drive them into the yard for further transfer to PMT auto trailers." *Kelley*, 419 U.S. at 321. While Southern Pacific employees were present in the yard and "would occasionally consult with PMT employees about the unloading process, PMT supervisors controlled and directed the day-to-day operations." *Id.* The district court held that Kelley was employed by Southern Pacific withing the meaning of FELA. However, the Court of Appeals reversed finding that the " 'while employed' clause of the FELA requires a finding not just of agency but of a master-servant relationship between the rail carrier and the FELA plaintiff." *Id.* at 322. The Supreme Court confirmed that "[f]rom the beginning the standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad" and remanded the case to the district court "to reexamine the record in light of the proper legal standard." *Id.* at 323.

The *Kelley* court detailed the "proper legal standard" to be used for determining employment under FELA by referencing common-law principles and the

Restatement (Second) of Agency, which defines servant as one who "with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Id.* at 324. The court condensed the common-law principles to "three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another."

> First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad.

Id. (citations omitted). The court found that, based on the district court's findings, the third option was most applicable but the subservant theory would still fail because the findings did not establish the master-servant relationship between Southern Pacific and PMT sufficient to render Kelley a subservant of the railroad. The theory turned on the "control or right to control" test. The court explained:

> [T]he trial court did not find that Southern Pacific employees played a **significant supervisory role** in the unloading operation or, more particularly, that petitioner was **being supervised** by Southern Pacific employees **at the time of his injury**. **Nor** did the court find that Southern Pacific employees had any **general right to control** the activities of petitioner and the other PMT workers.

Id. at 327. Instead, the district court's finding showed that the two companies were "closely related and necessarily had to be coordinated," "naturally had substantial contact," and "the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation." *Id.* at 330.

Mattingly appears to assert the subservant theory of employment arguing:

> [T]here is a question of material fact as to whether, under the *Kelley* "methods" for extending FELA liability for injuries to a worker nominally employed by a non-common carrier, Corman Services was actually the "servant" of Corman Group and Memphis Line and Mattingly, as a subservant, is deemed, for FELA purposes, an employee of Corman Services, Corman Group and Memphis Line.

[DE 62, Mattingly's Memorandum in support of Application of FELA, at 40]. In order for FELA to attach under this theory, the nominal employer's master must be a common carrier by railroad subject to FELA. As Group is not,[2] Mattingly must establish a

[2] Even if Group was a common carrier by railroad, Mattingly has not established that Group attempted to control or had the right to control the manner or details of Services' repair work or that Mattingly was being directly controlled by Group employees at the time of his injury. Mattingly has not argued that Group supervisors were present on the Memphis Line Project, nor that a Group employee ever gave him an order related to the project,

master-servant relationship between Services and Memphis Line. Establishing the requisite control under the master-servant analysis "does not require that the railroad have full supervisory control . . . only that the railroad, through its employees, plays 'a significant supervisory role' as to the work of the injured employee." *Lindsey v. Louisville & Nashville R. Co.*, 775 F.2d 1322, 1324 (5th Cir. 1985); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1350 (3d Cir. 1991).

1. CASES

Mattingly attempts to distinguish two Sixth Circuit cases that applied *Kelley* and found that there could be no coverage under FELA. *Campbell v. BNSF Ry.*, 600 F.3d 667 (6th Cir. 2010); *Zeller v. Canadian Nat'l Ry. Co.*, 666 F. App'x 517 (6th Cir. 2016). Defendants rely on the two Sixth Circuit cases and cite two other factually similar cases that support the absence of FELA liability. *Royal v. Mo. & N. Ark. R.R. Co.*, No. 4:15-cv-04008, 2016 WL 4426411, 2016 U.S. Dist. LEXIS 109071 (W.D. Ark. Aug. 17, 2016); *Thomas v. Union Pac. R.R. Co.*, No. 4:16-cv-04052, 2018 WL 3747467, 2018 U.S. Dist. LEXIS 132160 (W.D. Ark. Aug. 7, 2018).

In *Campbell*, plaintiff Michael Campbell, while employed by Pacific Rail Services, LLC ("PRS"), was driving a railroad transport vehicle at a rail yard owned by defendant BNSF Railway Company f/k/a The

---

nor that Group was involved in the day-to-day activities on the Memphis Line Project.

Burlington Northern & Santa Fe Railway Company ("BNSF") at the time of his injury. *Campbell*, 600 F.3d at 668. Despite Campbell's argument that he was an employee of BNSF for FELA purposes, the Sixth Circuit affirmed the district court's holding that that there was no master-servant relationship between BNSF and PRS or between BNSF and Campbell. By contractual relationship, PRS operated BNSF's terminal in Memphis, Tennessee. *Id.* at 669. Although BNSF supplied some material and employed a hub manager at the terminal who was charged with ensuring PRS workers timely completed the work and adhered to BNSF's safety protocols, PRS provided equipment, conducted safety training, made hiring decisions, handled disciplinary matters, and PRS supervisors were responsible for directing the specifics and managing works schedules. *Id.*

Applying the principles set out in *Kelley*, the court held that the "undisputed evidence demonstrates that BNSF had no right to control, nor did it attempt to exercise control over, the manner and details of PRS's work" and did not even have the personnel in place to do so because BNSF only employed one worker at the terminal and "his role was limited to observation, rather than control." *Id.* at 673. PRS employed its own managers and supervisors who held safety meetings before each shift and directed the work. "BNSF also played little, if any, role in Campbell's accident" as "PRS employed Campbell and the worker who rear-ended him, and it owned both of the hostlers involved in the accident." *Id.* The court found that Campbell

did not establish that BNSF retained the requisite control by obligating PRS to conform to BNSF's safety requirements because "PRS was responsible for implementing these policies on a daily basis" and it was reasonable for the BNSF, as the property owner, "to be concerned about workers performing potentially hazardous work on its land." *Id.* at 674.

In the second Sixth Circuit case that Mattingly attempts to distinguish from his own situation, Plaintiff Sarah Zeller was a customs analyst for CN Customs Brokerage Services (USA), Inc. ("CNCB"). *Zeller*, 666 Fed. Appx at 519. Canadian National Railway Company ("CNR") owned subsidiaries which in turn owned CNCB.[3] The district court rejected Zeller's FELA claim against CNR. The Sixth Circuit affirmed noting that Zeller has not "provided any evidence of a master-servant relationship sufficient to raise a question of fact concerning her relationship to CNR for the purposes of FELA" and emphasizing that "Zeller has identified no one other than CNCB personnel who supervised or controlled her activities as a customs analyst." *Id.* at 527. Despite the fact that a CNR-CNCB employee oversees the daily operations of CNCB and signed Zeller's offer letter, "there is no reason to assume that [the CNR-CNCB employee] acts in her

[3] *Zeller*, 666 F. App'x at 519. "CNCB was a wholly-owned subsidiary of IC Financial Services Corporation, which was, in turn, a wholly-owned subsidiary of Illinois Central Corporation, which was, in turn, owned by Grand Trunk Corporation. Grand Trunk Corporation was a wholly-owned subsidiary of Defendant Canadian National Railway Company ("CNR"). CNCB performs its services for CNR as well as for hundreds of other customers."

capacity with CNR" when she manages and directly supervises, CNR did not pay Zeller, nor could CNR discipline or discharge Zeller. *Id.* at 528.

Defendants point to a factually similar case where plaintiff Shawn Royal was employed by North American Railway Services ("NARS"), which while not a common carrier, performed work on railroads. *Royal v. Mo. & N. Ark. R.R. Co.*, No. 4:15-cv-04008, 2016 U.S. Dist. LEXIS 109071, at *2 (W.D. Ark. Aug. 17, 2016). NARS entered into a contract with RailAmerica ("RA") to do work on one of RA's railroads, Missouri and Northern Arkansas ("MNA"), a common carrier by railroad. *Id.* at *2. When Royal was injured while operating a ballast regular, Royal brought suit seeking relief under FELA. *Id.* at *3. MNA argued it was entitled to summary judgment because Royal was not an employee of the railroad. *Id.* at *13. Applying the analysis from *Kelley*, the court granted the motion for summary judgment finding that "[t]he evidence of whether MNA controlled NARS is not in dispute, and a reasonable jury would not find that MNA either controlled or had the right to control the work of Royal on the day of the accident such that Royal would be considered an employee of MNA." *Id.* at *18.

The court found there was no evidence that MNA controlled or had the right to control Royal's actions despite the fact that MNA had "general oversight over the job NARS was performing", "NARS was required to perform its work 'to the satisfaction and acceptance' of MNA" including maintaining "specific engineering specification and workmanship practices," NARS was

required to provide status reports, MNA had a project engineer that could conduct periodic inspections to verify quality of workmanship and adherence to schedules, MNA employed an EIC who "would give the parameters of track and time, and tell them when it was clear to work . . . had the authority to stop the job . . . would inspect the track at the end of the day and inform [Royal's supervisor employed by NARS] if there was something that needed to be done differently . . . had the right to order NARS employees off the property if they were not performing their job safely or correctly," and the NARS supervisor "would communicate with the EIC concerning where they were working, what time they needed to come back, and, if there was a specific concern, he would call the EIC and seek guidance on how to handle it." *Id.* at *15-*17.

The court iterated that NARS, not MNA, hired and paid Royal, was responsible for implementing a safety program, had authority to discipline, trained employees, "makes all decisions regarding which equipment and personnel are necessary to complete the job," owned the equipment used by Royal, the majority of work done by NARS is performed for railroads other than MNA, no one expressed to royal he was an employee of MNA, Royal admits that MNA did not control and direct how he did his work, and Royal considered his chain of command to be only NARS employee. *Id.* at *15-*16. Even though the EIC had the ability to tell NARS supervisors if something needed to be done differently after inspection, the court found that Royal's chain of command consisted only of NARS employees.

The court held that the evidence shows only that MNA had "general inspections rights" over NARS and any direction was limited to general oversight. *Id.* at *18. "[T]he ability of MNA to inspect work and enforce safety regulations on their tracks does not amount to control as required to be considered an employee. The right to stop and inspect work for compliance is distinguishable from the right to control the manner of compliance." *Id.* at *17-*18 (citation omitted).

Defendants next cite to another factually similar case where Plaintiff Austin Thomas was employed as a bridge repairman by Rail 1, LLC, ("Rail 1") when he fell off a railroad bridge owned and operated by Union Pacific Railroad Company ("Union Pacific"). *Thomas v. Union Pac. R.R. Co.*, No. 4:16-cv-04052, 2018 U.S. Dist. LEXIS 132160, at *1 (W.D. Ark. Aug. 7, 2018). Rail 1 had been hired as a subcontractor by Jay Construction to do the repair for Union Pacific. After being told that the previously installed guard timbers were crooked and needed to be fixed, Thomas fell off the bridge while complying with the order. A Union Pacific employee, Charles Mann, and a Rail 1 foreman, Kelvin Crecelius, were at the job site, but the parties disagree as to who ordered the guard timbers to be fixed. *Id.* at *2. Thomas sued Union Pacific under FELA, but the railroad filed a motion for summary judgment arguing that it was not Thomas' employer pointing to a contract that explicitly denounced agents of Jay construction as "employees", stated that Jay Construction would be responsible for removing inadequate workers, compensation, and providing equipment and labor. Thomas

testified that he was a Rail 1 employee, worked out of a Rail 1 truck, used Rail 1 tools, and that Crecelius directed him to pry up and redo the crooked timbers. *Id.* at *9-*10. Mann testified that he had no right to hire or fire Rail 1 employees and never directly assigned tasks to Rail 1 employees, but just provided the scope of work.

Thomas argued that summary judgment was inappropriate because his co-worker, Frederick, testified that Rail 1 employees were under the direct control of both Mann and Crecelius, that Mann gave the crew "direct orders" and they did "exactly what [Mann] said at all times, no matter what," Mann gave daily briefings which included "what we were doing that day," and Mann gave the orders to fix the incorrectly installed timbers. *Id.* at *11.

The *Thomas* court held that a reasonable jury could not find that "Union Pacific controlled or had the right to control Thomas's work at the time he was injured." *Id.* at *15. Thomas considered himself employed by Rail 1, was compensated by Rail 1, and used Rail 1 tools. Even though Frederick testified that Mann gave Rail 1 crew members "distinct orders," the evidence did not show "that Mann or Union Pacific had the right to control Thomas or any other Rail 1 crew members' work" because, other than the order to fix the guard timbers, Thomas did not point the court to any evidence of specific orders and Frederick stated elsewhere that Mann "didn't make sure your T's crossed and your I's dotted," which shows only that Mann had general oversight authority. *Id.* at *16. "As in Royal,

the fact that Union Pacific had the ability to inspect Rail 1 employees' work and require them to adhere to safety regulations and workmanship practices is immaterial to the question of whether Union Pacific had control or the right to control Thomas's job performance." *Id.* at *16-*17. Assuming that Mann gave the orders to correct the guard timbers, the court still found summary judgment proper because "Mann did not specifically tell them how to go about fixing the guard timbers" and at the time of the injury "Mann was acting within his authority to ensure that Thomas and Frederick corrected non-compliant work rather than exercising direct control over the means and manner of completing the work." *Id.* at *18-*19.

2. APPLICATION

First, Mattingly has not shown that Memphis Line employees had the general right to control nor generally controlled the physical conduct of Mattingly or Services or that Memphis line employees played a significant supervisory role.

Defining the scope of work by issuing a work list specifying which posts need to be removed is not controlling the details of the work, rather it is illustrating the goal to be accomplished, which is a necessary step anytime that contractors are hired for a job. *Atlas v. Union Pac. R.R. Co.*, 2019 IL App (1st) 181474, 435 Ill. Dec. 270, 138 N.E.3d 884(holding plaintiff was not the subservant of the railroad even though plaintiff contended that the railroad instructed plaintiff "on which

locomotives to service and the order in which to service them" and plaintiff "would receive a list of locomotives that needed to be serviced" because plaintiff would "then set about his job alone, without any direct supervision from the railroad" which is the "level of contact" that "indicates nothing more than the necessary coordination of a complex railroad operation").

Mattingly admitted that he chose where he wanted to work every morning. Assuming there were times when Memphis Line employees gave Mattingly specific instructions on which posts needed to be prioritized due to a new limited timeframe, Plaintiff has not argued that Memphis Line employees told him how to carry out that work. This is an example of Memphis Line altering the scope of work by removing low priority posts from the work list. Similarly, informing the Services crew that a train was coming through at a certain time is not Memphis Line employees controlling the details of the physical work, but rather informing the crew of incoming traffic so that the crew could figure out how to manage their time and prioritize tasks for the day. This is the type of communication necessary in large scale productions. After being told the train schedule, it was Services' responsibility to complete the work in a timely manner.

Although Mattingly makes conclusory claims that on Corman railroad related projects the EICs tended to instruct workers where to go and what to do, [Mattingly Deposition, at 69], when detailing the specifics of his day on the Memphis Line Project, Mattingly admits that he gave his crew their assignments every

morning, assigning the crew to equipment, ensuring the necessary tools were obtained, locating the material, and choosing which spot he wanted to work on that day.

That an EIC or Memphis Line supervisor required posts adhere to a certain standard and quality, in others words "wanted it done his way," and required posts be cut properly shows only that Memphis Line had general oversight. In *Royal*, despite the fact that NARS was required to maintain specific engineering specification and workmanship practices, the court explained, "[t]he right to stop and inspect work for compliance is distinguishable from the right to control the manner of compliance." 2016 U.S. Dist. LEXIS 109071, at *18.

While Mattingly and Childres testify that Memphis Line supervisors worked alongside them at times, participating in the physical tasks in conjunction with the Services crew does not equate to Memphis Line supervisors controlling how Services employees performed the physical task.

Though Mattingly points to Topolski's admission that he advised Services bridge crew members how to perform their tasks [DE 62-1 at 38], looking to the context of Topolski's testimony, the Court does not find that Topolski was *controlling* the details of the crew's work, but was instead answering questions regarding the scope of the work, explaining how he used to cut posts, and describing what it should look like in the end. [Topolski Deposition, at 97-84]. This behavior is in

line with ensuring specific engineering specification and workmanship practices were followed similar to *Royal*.

The presence and usage of EICs alone does not mean that Memphis Line was controlling Mattingly or Services' work. The presence of an EIC is common on similar jobs and necessary under federal regulations. In *Campbell*, the court found the railroad was not exercising control over the manner and details of plaintiff's work even though the railroad supplied a hub manager at the terminal charged with guaranteeing timely completion of work and adherence to safety protocols as the plaintiff's employer retained its own managers and supervisors. Ensuring that the Services crew was safe and that train traffic would not put the crew in danger is not proof of controlling Plaintiff's work. Plus, services retained their own supervisors who instructed and directed the crew.

While the frequency with which a Memphis Line supervisor is present may be indicative of their tendency to exhibit control over Services employees, it is not conclusive. Though there is conflicting testimony regarding how often Topolski was present at the Memphis Line project, assuming Topolski was present at the site as often as Mattingly claims, basically everyday, Topolski's uninterrupted presence does not equate to control over the details of the work. For example, that an EIC from Memphis Line is constantly present to communicate with dispatch to ensure that the repair crew can safely occupy the track is not proof of control over details of the physical work.

Although Mattingly considered Memphis Line employees to be his supervisors, Mattingly admits that he was also his own supervisor and he considered his two bosses to be Dillon and Childres. While Mattingly claims he would adhere to orders from Memphis Line employees when on site, Mattingly does not point to specific orders of Memphis Line supervisors instructing him on the details of his own physical work and admits that he picked where he worked everyday. While the chain of command can be indicative of control, that repair crew feel inclined to follow orders of the railroad EIC or other railroad employee, especially when related to track and time authority and safety, is not tantamount to the railroad having the right to control the details of repair crew's work. Plus, the repair crew testified that they would first follow Childres and Mattingly.

Even if Memphis Line supervisors instructed Services to have one crew work on the Cumberland Bridge while the other crew worked on the Red River Bridge, such direction does not implicate the kind of control over detail discussed in caselaw. In ordering two projects be worked on, Memphis Line supervisors were not telling the crew how to do the specifics of those jobs. Instead, the decision to work on both projects at once is an example of Memphis Line supervisors setting the scope of work to ensure the best usage of company resources as there were two crews worth of Services employees, two sets of tools, and two bridges that needed repair.

That Services was required to send daily production reports does not establish a master-servant relationship. Production reports were common on similar jobs to update owners of progress in order to gauge the amount of time remaining for completion of the project so that lines could be reopened. The reports were sent after Services had completed their work for the day and summarized their accomplishments. That Memphis Line was informed of the details of their work, does not mean that the Railroad was controlling the details. Mattingly argues that Services was controlling the manner of the reports as Topolski and Quillian responded with critiques in emails. However, asking Mattingly to include the exact location of work completed and include the post number in further reports does not exhibit control over details of Mattingly's work. To the contrary, it shows that Memphis Line supervisors were unaware of the details of Services' work for the day, and needed to be relayed those specific details in the evening in order to keep their records organized. Just like any other railroad line, Memphis Line needed to know which posts were replaced so the proper inspections could be conducted and so that posts that were not replaced could be added to a future project. Further a railroad needs to know what material was being used to monitor expenses, know when new material may be needed, and learn for future projects how to estimate material needs and costs.

That Memphis Line employees provided the material for the bridge repair and even specified what material should be used on specific posts is not indicative

of control over details. In *Campbell*, the court found that despite the railroad supplying some material, plaintiff did not prove the requisite control. As the railroad was providing the posts and would need to arrange to get more if Services ran out, it was proper for the railroad to specify that the longer posts should not be cut when shorter post were available so that the longer post could be conserved for necessary use. Ensuring that the material provided was able to last for the repair is not controlling the details of the work.

That Memphis Line supervisors participated in or even led the daily morning safety meetings is not determinative. Mattingly does not argue that the purpose of the safety meetings was to obtain or assign specific tasks for the day or explain how to implement those tasks. Due to the nature of the job, safety meetings were a necessary facet of railroad bridge repair work. As explained in *Campbell*, it is reasonable for the bridge property owners to be concerned about workers performing potentially hazardous work on its land. Participation in or even occasionally leading a safety meeting, focusing purely on safety, before beginning work for the day is not an example of the railroad exhibiting control over the repair crew, especially when Services was responsible for implementing the policies on a daily basis.

Services did not perform bridgework exclusively for Railroad Company, but had other clients, and Railroad Company solicited bids from other repair teams. That Services was only charging the market rate or

that Services ended up doing most of Railroad Company's repair work is not determinative.

Mattingly has not argued that Memphis Line employees had the power to or ever did discipline or terminate him or other Services employees. Similarly, there is no indication that Memphis Line was involved in the hiring of Services employees for the bridge work. Mattingly has not indicated that the equipment used to perform the bridge work was provided by Memphis Line. While Mattingly does cite deposition testimony that Topolski trained Services crew members how to use a "man lift" and showed new Services employees how to drill a hole, Mattingly does not point to evidence that Memphis Line played a significant supervisory role in training Services crew members. Mattingly was required to track his own expenses, which he sent to Services. And Mattingly was paid by Services for his work on the Memphis Line Project. Services made decisions regarding which equipment and personnel were needed to complete the job. While Services is distantly related to Memphis Line through their corporate structure, Services maintained its own supervisors, employees, and other customers. The worklist, defining the scope of work, safety meetings, track and time duties, and production reports are the type of contacts necessary in a large and coordinated operation as explained in *Kelley*, and not evidence of direction or control.

Second, Mattingly has not shown that Memphis Line was exercising control, nor had the right to, at the time of Mattingly's injury. In addition to finding no

right to control or attempt to exercise control over plaintiff, the *Campbell* court iterated that the railroad "played little, if any, role in Campbell's accident" as "PRS employed Campbell and the worker who rear-ended him, and it owned both of the hostlers involved in the accident." *Campbell*, 600 F.3d at 673. Similarly, it is undisputed that Memphis Line employees had little, if any, role in Mattingly's accident as only Services employees were present, only Services employees controlled the equipment associated with the accident, and no Services employee, including Mattingly, was following the direction of a Memphis Line employee.

The absence or presence of Memphis Line supervisor at the time the injury occurred is not dispositive as one can control the details of a person's work without being physically present, if for example, the worker was following the detailed instructions listed by the supervisor when the accident occurred. Nonetheless, Mattingly does not argue that on the day of his accident he was following instructions from a Memphis Line supervisor. Mattingly has not asserted that when he attempted to retrieve the chains from Childres, he was under the direction of anyone from Memphis Line or was using equipment provided by an entity other than Services. He was retrieving replacement chains from a Services employee, whom Plaintiff considered to be his supervisor, for use in the completion of his duties. Plaintiff has failed to prove that *at the time* of the accident Memphis Line was controlling the details of his work.

In *Thomas*, even though the railroad worker, Mann, was present at the scene and assumedly gave the order to fix the guard timbers that resulted in the injury, the court still found the requisite level of control was not met because Mann was acting with general oversight authority, which included the right to inspect and demand compliance with regulations and Mann did not tell Thomas *how* to fix the guard timbers. Here, in stark contrast, no one from Memphis Line was even present at the time of the accident nor has Mattingly argued that he was following orders from anyone at Memphis Line at the time of the accident. *Thomas*, 2018 U.S. Dist. LEXIS 132160, at *18.

A reasonable jury could not find that Memphis Line either controlled or had the right to control the work of Mattingly on the day of the accident precluding Mattingly from being a subservant of Memphis Line.

IV. CONCLUSION

For the reasons stated herein, Defendants' motion for summary judgment on the FELA issue is granted. Mattingly's unitary theory of liability is not supported by the law and Mattingly has failed to present adequate evidence from which a rational jury could find that Memphis Line controlled or had the right to control his daily work at the time of his injury. FELA does not apply to Plaintiff's injury claim.

While only Group and Services filed the motion for summary judgment, the Court recognizes that the third defendant, Memphis Line, was not a part of the

action until Mattingly's motion to file a second amended complaint was granted, which occurred after the deadline for filing dispositive motions. Because the Court's findings clearly apply to Memphis Line and preclude the applicability of FELA, the Memphis Line defendants are included in this order and corresponding judgment. Therefore, **IT IS HEREBY ORDERED** as follows:

(1) Defendants' Motion for Summary Judgment [DE 63] regarding the applicability of the FELA to his injury claim is **GRANTED**;

(2) Plaintiff's Motion for Partial Summary Judgment [DE 62] regarding the application of FELA is **DENIED**;

(3) A corresponding judgment will follow.

This the 12th day of August, 2022.

Signed By:

[SEAL] /s/ **Joseph M. Hood JMH**
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

JOSEPH BRENT MATTINGLY Plaintiff, v. R.J. CORMAN RAILROAD GROUP, LLC -and- R.J. CORMAN RAILROAD SERVICES, LLC Defendants.	Civil Action No.: 5:19-CV-00170-JMH **ORDER** (Filed Oct. 6, 2021)

***

This matter is before the Court on Plaintiff's Motion for Leave to File a Second Amended Complaint. [DE 32]. The amended pleading seeks to bring in a new defendant. The motion is opposed by Defendants. [DE 33]. For the reasons set out herein, Plaintiff's motion will be granted.

I. BACKGROUND

Plaintiff, Joseph Brent Mattingly ("Mattingly"), suffered severe injuries while performing duties as a railroad bridge worker on the "Memphis Line." [DE 1, ¶ 10]. The current defendants in the action include R.J Corman Railroad Group, LLC ("Corman Group") and R.J. Corman Railroad Services ("Corman Services").

[DE 13]. Corman Group is the manager of multiple R.J. Corman Railroad entities. [DE 1, ¶ 2]. Plaintiff is a direct employee of Corman Services.

Plaintiff is suing Defendants under the Federal Employers' Liability Act, 45 U.S.C. § 51, et. seq.("FELA"). Mattingly states his previous complaints assert two theories of liability under FELA. First, Plaintiff claims Defendants are liable as "a unified railroad operation." [DE 1, ¶ 13]. Second, Plaintiff claims FELA liability based upon control over Mattingly's work detail at the time of his injury as recognized in *Kelly v. S. Pac. Co.*, 419 U.S. 318, 323 (1974). [DE 32-1 at 4-5 and DE 1, ¶ 8]. However, Plaintiff claims he mistakenly identified Corman Group as the employer of his supervisors on the project, when in actuality, Plaintiff's supervisors were employed by R.J. Corman Railroad Co./ Memphis Line ("Corman Memphis"). Therefore, Plaintiffs now claim for their second theory of liability under FELA, liability based on the specific direction and supervision of Plaintiff at the time of his injury, Corman Memphis should be substituted for Corman Group.

Because Plaintiff's injuries occurred on January 26, 2017, the statute of limitations under FELA ran on January 27, 2020. Mattingly sought leave to file his second amended complaint on November 9, 2020. Since this amendment would be outside of the statute of limitations, Mattingly claims relation back applies under Fed. R. Civ. P. 15(c).

Defendants oppose the motion, focusing on two arguments. First, Defendants claim Mattingly did not make a mistake in his employer's identification as required for relation back. Second, Defendants assert that the previous complaints only assert FELA liability under one theory, therefore, the amended complaint does not simply substitute one party for the other, but impermissibly adds a new party under a new theory of liability.

II. LEGAL STANDARD

If a party can no longer amend its pleadings as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave," which "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). When the amended pleading is filed after the statute of limitations has expired, under certain circumstances governed by Fed. R. Civ. P. 15(c), the amended pleading will be allowed to "relate[] back to the date of a timely filed original pleading and is thus itself timely." *Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 541 (2010).*

When the amended pleading attempts to bring in another party, additional requirements must be met for relation back to occur. An amendment to the complaint will relate back when:

> **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if,

> within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> > **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and
> >
> > **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C). Broken down, the rule provides multiple conditions that must be satisfied before the amended pleading can be considered timely. *Black-Hosang v. Ohio Dept of Public Safety*, 96 F. App'x 372, 374-75 (6th Cir. 2004); *Moore v. City of Harriman*, 272 F.3d 769, 774 (6th Cir. 2001). The party seeking to have the amended complaint relate back bears the burden of showing the requirements of Rule 15(c) have been met. *Hiler v. Extendicare Health Network*, No. 5:11-CV-192-REW, 2013 U.S. Dist. LEXIS 26548, at *9 (E.D. Ky. Feb. 26, 2013).

III. ANALYSIS

a. SAME OCCURRENCE OR TRANSACTION

First, Rule 15(c)(1)(C), referencing Rule 15(c)(1)(B), requires "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out–or attempted to be set out–in the original pleading." The defendants opposing the amendment do not dispute that the bringing in of the new defendants

arose out of the same transaction. In the original complaint Plaintiff sought recovery for the work-related incident that occurred on January 26, 2017, resulting in injury. [DE 1, ¶ 12]. Now, Plaintiff again seeks recovery from the same incident for the same injury, just against a new party. The first requirement is satisfied.

b. NOTICE

Second, the party being brought into the litigation must have received notice of the action "within the period provided by Rule 4(m) for serving the summons and complaint." Fed. R. Civ. P. 15(c)(1)(C). Like the first requirement, the defendants opposing the amendment do not dispute that they received notice of the action in the appropriate timeframe. The Corman Group is the sole member of R.J. Corman Railroad Co., LLC., which in turn is the sole shareholder of Corman Memphis. [DE 32-2]. Emersed within the same corporate structure, it is likely that Corman Memphis had actual notice of the action when the defendants were served within the proper timeframe. Binding case law goes on to impute constructive notice as well when the defendant to be brought in stems from the same corporate web.

> As for the notice prong, Sixth Circuit cases indicate that unnamed defendants do not have to receive actual notice of the action. *Berndt v. Tennessee*, 796 F.2d 879, 884 (6th Cir. 1986) (citations omitted). Constructive notice is enough. *Id.* Here, the companies are related in such a way that notice to TLD America

> constitutes notice to TLD USA and TLD Lantis. To start, the companies are part of the same larger corporate structure.

Williams v. TLD Am. Corp., No. 3:08CV-510-H, 2010 U.S. Dist. LEXIS 9130, at *7 (W.D. Ky. Feb. 2, 2010). Therefore, the second requirement is satisfied.

c. KNOWLEDGE

Third, Plaintiff must prove that Corman Memphis "knew or should have known that the action would have been brought against it." Fed. R. Civ. P. 15(c)(1)(C). Once again, Defendants do not argue that they did not know the action should have been against them. Part of Plaintiff's liability theory is that the details of his work were being controlled by supervisors of another entity within the corporate structure different from the entity that actually employed Plaintiff.

> 8. At all times relevant herein, the Plaintiff, although putatively directly employed as a railroad worker, while performing functions as a railroad bridge worker, by [R. J. Corman Railroad Services, LLC][1], **acted under the direction, supervision, management and control of** the Defendant, R. J. Corman Railroad Group, LLC, its agents, officers, employees, managers or ostensible agents, as part of a unified railroad organization . . .

[DE 1, ¶ 8]. As it was actually the employees of Corman Memphis who were directing, supervising, managing,

[1] *See* First Amended Complaint [DE 13].

and controlling the details of Plaintiff's work on the Memphis Line, not employees directly employed by the Corman Group as Plaintiff stated, Corman Memphis should have known the allegations in paragraph 8 were intended to be brought against it. Therefore, the third requirement is met.

d. MISTAKE

Fourth, the misidentification must have been due to a mistake. For relation back to occur, Plaintiff must show the party now intended to be brought in, was not added previously due to "a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C). In Mattingly's Motion to Amend, he explains how he previously identified Ed Quillian as his supervisor over the Memphis Line, but mistakenly believed Quillian was employed by Corman Group. [DE 32]. Quillian is actually employed by Corman Memphis. Defendants opposing the addition of the Corman Memphis argue there was no mistake.

The Supreme Court expanded the definition of mistake to include any an "error, misconception, or misunderstanding." *Krupski v. Costa Crociere S. p.* A., 560 U.S. 538, 548 (2010). In *Krupski*, the amended complaint was allowed to relate back when plaintiffs named Costa Cruise instead of their related corporate entity, Costa Crociere, as the defendant. The court clarified that when the plaintiff makes "a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the

two parties," no mistake occurred. *Id.* at 549. A district court "may infer the absence of mistake only if the complaint and a plaintiff's conduct together demonstrate that a plaintiff sought some strategic advantage in naming the wrong defendant in the original complaint." *Waite, Schneider, Bayless & Chesley Co., LPA v. Davis*, No. 1:11CV851, 2013 U.S. Dist. LEXIS 114091, 2013 WL 4080712, at *4 (S.D. Ohio Aug. 13, 2013) (citing *Krupksi*, 560 U.S. at 552). Here, Mattingly did not fully understand that Corman Memphis was the direct employer of his supervisors on the Memphis Line. Like the plaintiffs in *Krupski* made a mistake regarding the identity of the proper corporate entity, Mattingly named the wrong Corman entity. Further, by naming the incorrect party, Mattingly could not have sought a strategic advantage. In suing Corman Group, Mattingly disadvantaged himself by potentially foreclosing his ability to sue under the second theory of liability.

First, Defendants claim there can be no mistake because Plaintiff was on notice that the employees supervising the Memphis Line project were employed by Corman Memphis. Defendants reference as proof of notice, Plaintiff's January 8, 2020, deposition where Plaintiff identified Quillian as a being "in charge" and that he "worked for the Railroad" and "was 100 percent Railroad." [DE 331, at 86-87]. However, Corman Memphis is never mentioned in the cited excerpt. Given that the majority of the entities contain "railroad" in their title, the deposition does not prove notice.

Second, Defendants argue that Plaintiff had all the information necessary to name Corman Memphis

and the reference to Quillian is a red herring. When asked in his deposition whether Quillian was "involved at all and physically present on the Memphis Line project," Plaintiff answered "no." [DE 33-1, at 25]. Instead, Plaintiff identified Jason Topolski as his supervisor on the Memphis Line job, saying he was "100 percent Railroad." In his reply, Plaintiff contends that both Toplski and Quillian were supervisors over the Memphis Line. [DE 24, at 13]. Whether Quillian, Topolski, or both were Mattingly's supervisors is immaterial because Mattingly misunderstood who employed both men. As aforementioned, it is unclear which entity "Railroad" is referencing. When asked directly if Jason Topolski worked for the Memphis line, Plaintiff again gives a vague answer and seems to be referring to the overall corporation.

> Q Exactly. Right. Do you remember who the EICs were on the Memphis Line job when you were injured?
>
> A Yes, sir. I remember one of them was Jason Topolski. He was a – a bridge inspector for the railroad. He was in charge of that job.
>
> Q All right. Which railroad? He was from Memphis Line?
>
> A He is actually from Lexington, but he was in charge of that job. You know, we took orders from him.
>
> Q Okay. But he worked for the Memphis Line at that point in time?

> A He worked for the railroad, R.J. Corman Railroad. Yeah. He was in – I've never seen a – an employee of the Memphis Line. That's only person I've ever seen from the railroad was Jason.

[DE 33-1, at 3-4]. While Plaintiff may have known of the existence of Corman Memphis, it is by no means evident from this testimony that Plaintiff knew his supervisors were employed by Corman Memphis.

Regardless, "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." *Krupski*, 560 U.S. at 541. Plaintiff's knowledge is only relevant for determining whether Plaintiff actually made a mistake. *Id.* at 548. Even if a plaintiff knows that an entity exists, but fails to name that entity as a party believing another entity to be responsible, the plaintiff should not then be barred from later bringing in the proper entity.

> [I]t would be error to conflate knowledge of a party's existence with the absence of mistake . . . That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant – call him party A – exists, while erroneously believing him to have the status of party B.

Id. at 548-49. Further, "[t]he reasonableness of the mistake is not itself at issue." *Id.* at 549.

Mattingly made a mistake in identifying which corporate entity played the direct supervisory role, similar to the plaintiffs in *Krupski.* While Plaintiff knew of the existence of Corman Memphis just as Krupski was aware of the existence of the proper defendant, Plaintiff was mistaken about their role. *Id.* at 552. Plaintiff's complaint claims he "acted under the direction, supervision, management and control of" the Corman Group. However, Plaintiff was actually acting under the supervision of workers employed by Corman Memphis. Plaintiff, therefore, erroneously misidentified the entity employing his supervisors. The mistake requirement is met.

e. SUBSTITUTION

Prior to the Supreme Court's *Krupski* decision in 2012, which defined "mistake" more broadly for purposes of Rule 15(c)(1)(C)(ii), the Sixth Circuit had a narrower approach declining to define mistake to include the addition of a party. *Hiler v. Extendicare Health Network*, No. 5:11-CV-192-REW, 2013 U.S. Dist. LEXIS 26548 (E.D. Ky. Feb. 26, 2013) *14. "[T]he precedent of this circuit clearly holds that 'an amendment which adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations.'" *In re Kent Holland Die Casting & Plating, Inc.*, 928 F.2d 1448, 1449 (6th Cir. 1991) (quoting *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 (6th Cir. 1973)). Application of *Krupksi* amongst courts in the Sixth Circuit has been varied.

> Since *Krupski*, the Sixth Circuit has declined to examine its line of cases holding that Rule 15(c) does not allow a relation back when the plaintiff attempts to add a new defendant . . . And district courts have reached different conclusions regarding *Krupski's* effect on Sixth Circuit precedent concerning the addition of new defendants.

Jadco Enters. v. Fannon, Civil Action No. 6: 12-225-DCR, 2013 U.S. Dist. LEXIS 162717, at *12-13 (E.D. Ky. Nov. 15, 2013) (internal citations omitted).

The district courts do agree, however, that "Rule 15(c) does not permit relation back when a plaintiff learns more about a case and seeks to broaden the liability sphere to encompass new parties in addition to one already before the court." *Hiler*, 2013 U.S. Dist. LEXIS 26548, at *18 (citing *Ham v. Marshall County*, 2012 U.S. Dist. LEXIS 167925, 2012 WL 5930148, at *6 (W.D. Ky. Nov. 27, 2012). Attorneys have struggled to define what it means to "broaden the liability sphere." Here, Defendants by incorrectly applying post *Krupski* cases in this district, claim that Rule 15(c)(1)(C) bars relation back any time a party is added while the original party is retained. However, this Court, guided by precedent, disagrees.

As a preliminary matter, the Court must first address whether there are two theories of liability under FELA in the original complaint. For if just one theory initially existed, the unified railroad operations theory, and that theory is still being pursed against the original party, the Corman Group, then it would be

impossible for a substitution to have occurred. Instead, Plaintiff would now be attempting to keep all original claims against the original defendants while adding a new defendant and an additional theory of liability. Such a situation would likely be an impermissible broadening of liability.

The Court finds that there are two theories of liability in the original complaint. First, neither party disputes that the unified railroad operations theory was put forth in the previous pleading, and Plaintiff identifies this theory sufficiently and directly in his previous complaint. [DE 1 at 13]. The issue is the second theory, which alleges liability due the control over Mattingly's work detail at the time of his injury as recognized in *Kelly v. S. Pac. Co.*, 419 U.S. 318, 323 (1974). While not as clear as the first theory of liability, Plaintiff references this theory in paragraph 8 of the complaint where they assert that "although putatively directly employed as a railroad worker, by [R. J. Corman Railroad Services, LLC]," Plaintiff "acted under the direction, supervision, management and control of the Defendant, R. J. Corman Railroad Group, LLC." The Supreme Court allows liability to attach when the employee is "serving as a borrowed servant," "acting for two masters", or "a subservant of a company that was in turn a servant of the railroad." *Kelly*, 419 U.S. at 324. *Kelly* allows for liability in situations where an employee is working for company A, while "serving" or "acting" for Company B, which is exactly what Mattingly claims occurred. Mattingly asserted in his previous complaint that even though he was working

directly for Corman Services, he was being supervised by another entity. Therefore, this Court finds two theories of liability under FELA were originally pursued.

Now turning to whether, Corman Memphis is being substituted for Corman Group as opposed to added, the Court turns to precedent referenced by the parties in their briefs. Defendants assert that any time a party is added while the original party is retained relation back cannot occur. However, each case cited by Defendants is distinguishable.

For example, in *Jadco* the Court did not allow relation back to occur. *Jadco Enters. v. Fannon*, Civil Action No. 6: 12-225-DCR, 2013 U.S. Dist. LEXIS 162717 (E.D. Ky. Nov. 15, 2013). Plaintiffs added two new defendants and two new claims against them, while maintaining the original defendants and not subtracting any liability from the original defendants. *Id.* at *6. Similarly, in *Hiler*, while the court ultimately held no relation back was allowed because liability was broadened, the plaintiff was maintaining the exact same claims against the original defendants. *Hiler*, 2013 U.S. Dist. LEXIS 26548, at *18. However, in the present case, while Plaintiff keeps Corman Group as a defendant, Plaintiff substitutes Corman Memphis for Corman Group in paragraph 8 of the original complaint under the second theory of liability. No new cause of action is asserted. Additionally, the scope of liability against the original party, Corman Group, is lessened unlike the *Jadco* and *Hiler* defendants.

Relation back under Rule 15(c)(1)(C) is not automatically barred when a new defendant is added while some claims still remain against the original defendant. A new defendant can be "substituted" for one claim, while other claims remain against the original defendant. In other words, a new defendant is not automatically "added" as opposed to "substituted" when the new party is only substituted for one of many claims. Other districts within the Sixth Circuit acknowledge the distinction that allows relation back while still maintaining claims against the original defendant. *State Farm Mut. Auto. Ins. Co. v. Bmw of N. Am., LLC*, No. 08-12402, 2009 U.S. Dist. LEXIS 69074, at *3 (E.D. Mich. Aug. 7, 2009); *Wanke v. Invasix Inc.*, No. 3:19-cv-0692, 2020 U.S. Dist. LEXIS 87899, at *37-38 (M.D. Tenn. May 19, 2020) (while ultimately denying the bringing in of the new defendant because no allegations against the original defendant were changed, the Court speculated that "[a]t the very least, the mistake requirement and the general rule that simply adding defendants does not fall within Rule 15(c)(1)(C) suggest that the new party should be substituted for the existing party in some way to reflect an earlier misattribution, even if other allegations and claims may keep the original defendant in the case in a more limited capacity").

A district court in Ohio refused to interpret *Krupski* so narrowly. *Erie Indem. Co. v. Keurig, Inc.*, No. 1:10-CV-02899, 2011 U.S. Dist. LEXIS 76998, at *10 (N.D. Ohio July 15, 2011). Plaintiffs sued Keurig, Inc. ("Keurig") as the party who designed and

manufactured the coffee maker in question. *Id.* However, plaintiffs later learned they had misidentified Keurig as the manufacturer and sought to amend their complaint to also assert claims against the actual manufacturer, Simatelex Manufactory Co., Ltd. ("Simatelex"). "The Plaintiff logically did not simply substitute Simatelex because it made independent, and distinct, claims against Keurig." The court first acknowledged other courts in the Sixth Circuit have interpreted *Krupksi* too narrowly:

> The Court now finds that these decisions read *Krupski* in an unduly narrow fashion. Although Krupski does not expressly resolve whether Rule 15(c)(1)(C) allows for the addition of new parties, the Court believes that a better reading of that decision views it as abrogating the prior Sixth Circuit rule that categorically barred addition of new parties under Rule 15(c). *Asher*, 596 F.3d at 318-19; *Moore*, 267 F. App'x at 455. As the Supreme Court makes clear, a "mistake" under Rule 15(c)(1)(C) includes a "mistake concerning the proper party's identity," which could logically include both mistakes that merely substitutes a party and those that add new parties.

Id. at *8-9 (N.D. Ohio July 15, 2011). The court then held that plaintiffs could amend their complaint by adding Simatelex, while still maintaining claims against Keurig because this was mistake "regarding the proper identity of the party who may have been responsible for the alleged manufacturing and design defects." *Id.* at *8.

This Court similarly believes *Krupski* was never intended to be used as a complete bar to relation back when a plaintiff brings in a new defendant while still maintaining claims against the original defendants. Just as plaintiffs in *Erie* misidentified the manufacturer, Mattingly misidentified the direct employer of his supervisors. Mattingly maintains claims against the Corman Group just like the plaintiffs in Erie maintained claims against Keurig. Therefore, this Court is in agreeance that maintaining claims against the original defendant when amending the complaint to bring in a new defendant, will not automatically prevent relation back from applying.

Even if the Court were to take a more limited approach than the Ohio district court, Mattingly has shown that liability was not broadened by bringing in the new defendants. Corman Memphis has been substituted for Corman Group under the second theory of liability. Plaintiff no longer wishes for Corman Group to be mentioned in paragraph 8. This substitution is occurring because of a mistake in identifying the employer of Plaintiff's supervisor. Relation back should not be denied simply because Plaintiff intends to maintain his other claim against the original defendant. While a new party is being brought in, the sphere of liability is not being broadened because no new claim is being asserted and the original defendant, Corman Group, is being included in a more limited capacity. Therefore, by bringing in Corman Memphis as a defendant, Plaintiffs are substituting and not adding a new defendant, which allows relation back to occur.

IV. CONCLUSION

All of the requirements of Rule 15(c) (1) (C) having been met, Plaintiff's motion for leave to file his Second Amended Complaint [DE 32] is hereby GRANTED.

Accordingly, **IT IS ORDERED** as follows:

(1) Plaintiff's Motion for leave to file his Second Amended Complaint [DE 32] is hereby **GRANTED**.

(2) The Plaintiff's tendered Second Amended Complaint shall be considered filed with the entry of this Order and shall relate back to the date of the filing of the initial Complaint.

(3) The summons shall issue on the Second Amended Complaint and the other Defendants shall have twenty (20) days from the entry hereof to file responsive pleadings.

This the 6th day of October, 2021.

Signed By:
[SEAL] ***Joseph M. Hood*** **/s/ JMH**
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION LEXINGTON

JOSEPH BRENT MATTINGLY	)	
Plaintiff,	)	**NO. 5:19-CV-170-JMH-MAS**
v.	)	
R.J. CORMAN RAILROAD GROUP, LLC, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 17, 2021)

The Court previously conducted a teleconference concerning the parties' current discovery dispute. [DE 37]. It issued an informal, provisional ruling on the matter. [DE 38]. Plaintiff subsequently sought additional and modified relief. [DE 39]. The issues in dispute are fully briefed and ripe for resolution. [DE 43 (Response), 44 (Reply), 45 (Limited Surreply)].[1] For the reasons that follow, the Court denies the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a January 2017 accident that occurred while Plaintiff Joseph Brent Mattingly

[1] After separate briefing on the surreply question, the Court permitted consideration of the brief filing but declined to strike the challenged portion of the DE 44 Reply. [DE 51].

("Mattingly") was performing maintenance work on the Memphis Line railroad. [DE 1, ¶ 10].[2] Mattingly avers that the Memphis Line was owned and managed by one or more Defendant entities (collectively referred to as "R.J. Corman"). [*Id.*]. While working on the railroad bridge (positioned more than twelve feet above the ground or water), Mattingly, at his employer's directive, placed himself in a "man basket" to be lowered from the bridge for the purpose of retrieving necessary equipment. [*Id.*, ¶¶ 10, 12]. When the mechanism lowering the basket failed, the basket containing Mattingly free fell into the ravine below. [*Id.*, ¶ 12]. Mattingly sustained several serious injuries during the incident. [*Id.*, ¶ 14]. Mattingly alleges that R.J. Corman negligently flouted applicable railroad safety rules and failed to implement reasonably safe procedures surrounding use of the man basket. [*Id.*, ¶ 13]. He asserts that R.J. Corman is liable for compensatory damages under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq*. ("FELA"). [*Id.*, ¶ 16].

The current discovery dispute hinges broadly on Mattingly's requests for three categories of material: (1) formal responses to Mattingly's Fourth Requests for Production of Documents; (2) production of various documents housed on R.J. Corman's internal "Depot" database;[3] and (3) an external audit of all R.J. Corman

---

[2] The operative First Amended Complaint [DE 13] did not substantively alter any factual allegations. A second amendment motion pends. [DE 32].

[3] Per the parties, R.J. Corman had already permitted Mattingly's counsel to explore the Depot database, with defense

entities from 2016 and 2017. The Court previously conducted an informal telephonic conference with all counsel to discuss the dispute [DE 37] and issued a provisional ruling [DE 38].[4] Specifically, the Court found that R.J. Corman was required to produce any Depot documents that were otherwise responsive to Mattingly's discovery requests, but that R.J. Corman did not have to create or produce an index, which R.J. Corman argued did not exist. The Court further declined to compel production of the external audit, finding that it was not proportionate to case needs because it contained sensitive financial details about nonparties, and the limited relevant information it likely contained was already available to Mattingly through less burdensome means.

Consistent with the discovery dispute procedure applicable in this case, Mattingly subsequently filed a formal motion to compel production of the materials in all three categories. [DE 39]. However, by the time briefing on the motion concluded, the parties agreed that R.J. Corman had, at this stage, adequately responded to the Fourth Requests for Production of

---

counsel controlling access and displaying various Depot documents via a projector. Mattingly sought copies of several documents identified during that process and additionally, pursuant to the written discovery request, sought an index of all Depot documents.

[4] Though the informal discovery call and provisional ruling related to inquires made in Mattingly's Fourth Requests for Production of Documents, the issue of compelling formal responses to the requests in their entirety was not then squarely before the Court.

Documents and the Depot-related document requests. [DE 43, 44]. Thus, the Court addresses and resolves the sole remaining issue—whether R.J. Corman should be compelled to produce the 2016-17 external audits.

II. ANALYSIS

Under Rule 26, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). In evaluating proportionality, the Court must "consider[ ] the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Evidence need not be ultimately admissible to be discoverable. *Id.*

The Rules are structured "to allow broad discovery[,]" but such breadth "is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant." *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 906 (6th Cir. 1991). "Although a plaintiff should not be denied access to information necessary to establish her claim, neither may a plaintiff be permitted to go fishing" for potentially relevant information in an unduly burdensome manner. *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) (internal quotation marks omitted). Courts may decline to

compel "discovery which meets the general standard of relevance . . . if the discovery is unreasonably cumulative or duplicative, can be obtained from some other source which is more convenient, less burdensome, or less expensive, or if the party seeking the information has had ample opportunity to obtain it in the action[.]" *Brown v. Mohr*, No. 2:13-CV-0006, 2017 WL 2832631, at *1 (S.D. Ohio June 30, 2017), *aff'd*, No. 2:13-CV-06, 2017 WL 10056799 (S.D. Ohio Nov. 6, 2017); *accord Ward v. Am. Pizza Co.*, 279 F.R.D. 451, 458 (S.D. Ohio 2012).

Mattingly has established that the external audit documents likely contain information relevant to his FELA liability arguments. The central question is whether Mattingly could properly be characterized as an employee of the R.J. Corman railroad entities at the time of the accident—either because the railroad divisions of the company had sufficient supervision and control over the manner and details of Mattingly's work, or because the subsidiary R.J. Corman entity then employing Mattingly was functionally an alter-ego of the railroad entities, and the companies were essentially a single, unified operation. *Campbell v. BNSF Ry. Co.*, 600 F.3d 667, 673 (6th Cir. 2010). The distinction between the two theory variants has little practical impact on the instant discovery dispute. In either scenario, Mattingly fairly must have adequate opportunity to explore such topics as R.J. Corman's corporate structure, its internal financial organization, and the policies and procedures dictating the railroad entities' relationship with the subsidiary entities and

their employees. Whether the audit is relevant because it contains information about the railroad entities' functional consolidation with the subsidiaries (including Mattingly's employer) or because it offers insight into the railroad entities' direct relation to the subsidiary employees makes little difference, at this stage.

Regardless of which theory provides the lens, the audits surely cross the Rule 26 relevance bar. *See*, *e.g.*, *Herriges v. Cty. of Macomb*, No. CV 19-12193, 2020 WL 4726940, at *2 (E.D. Mich. Aug. 14, 2020) (emphasizing that "[t]he requesting party has an extremely low bar for showing relevance" under Rule 26(b)) (quotation marks omitted). Indeed, Defendants recognize that the audits may contain some information about the consolidation of R.J. Corman's financials (under the R.J. Corman Railroad Group, LLC ("Group") umbrella) and its tax structuring. The record further indicates that the audits may confirm that certain subsidiary activities, *e.g.*, hiring of particular employees, purchases over a specified dollar amount, etc., must be approved by higher-up corporate officers within the Group. These themes are undoubtedly germane to Mattingly's case, and he must be allowed some room to explore proof supporting them.

But relevance is only the threshold. The Court must also consider proportionality, weighing Mattingly's need for and interest in the sought information against the potential burden on R.J. Corman if required to produce it. Driving factors in this case include the (limited) value of the audits to Mattingly's case, Mattingly's ability to learn the relevant

information through other, less intrusive means, and the prejudice and burden that R.J. Corman would suffer if forced to disclose the audits.

Critically, though the broad factual propositions Mattingly seeks to establish via the audits are relevant to his theory, the granular details that an audit would reveal—such as which employees of the Group must approve which activities, what dollar amounts trigger such higher-up approval in various contexts and who must be involved, etc.—are beyond what is needed to effectively make the arguments Mattingly pursues. The record indicates that Mattingly already has learned and/or has had ample opportunity to learn the relevant information that the audits would provide through written discovery and through depositions of various R.J. Corman officers. For example, R.J. Corman's Rule 30(b)(6) representative Patrick Johnson testified in considerable detail about his knowledge of the R.J. Corman entities' tax structure, explaining that the tax reporting flows upward and ultimately is reported in the aggregate at a level even higher than the Group. [DE 43-1, at Page ID # 288-90]. Johnson further testified that the entire set of R.J. Corman entities is collectively audited annually, and that the income from all subsidiaries is pooled and maintained by the controlling umbrella entity rather than remaining with each individual R.J. Corman company. [*Id.*, at Page ID # 290-91]. Johnson also confirmed that all subsidiary entities' proposed budgets flow through him as finance representative for review, and then all must receive

final approval from the R.J. Corman Estate or Trust. [DE 44-1, at Page ID # 305-06].[5]

This testimony binds Defendants and provides substantial insight into R.J. Corman's financial consolidation and unified tax structuring for purposes relevant to Mattingly's FELA theory. And Mattingly had ample opportunity to explore these facts as much as he wished during Johnson's deposition. *See Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc.*, No. 2:15-CV-3023, 2018 WL 3358641, at *12 (S.D. Ohio July 10, 2018) (quoting *Sabre v. First Dominion Capital, LLC*, 01-cv-2145, 2001 U.S. Dist. LEXIS 20637, 2001 WL 1590544 (S.D.N.Y. Dec. 12, 2001) ("A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity.")).

There is no concrete indication that the audits would provide relevant information beyond what Mattingly already has learned—or has had the

[5] Mattingly also had opportunity to ask Johnson about any subsidiaries' hiring decisions that may have been routed through Johnson as R.J. Corman's former Vice President of Finance and Accounting. In his September 29, 2020 deposition, R.J. Corman General Counsel William Booher testified that he believed hiring decisions that would impact payroll would have had to run through finance, and that Johnson would have more information about those details. [DE 44-3, at Page ID # 319]. Mattingly could have explored this topic to the extent he wished during Johnson's October 2, 2020 deposition, providing further detail about Defendants' consolidated financials and their practical effect on the subsidiaries' operations.

opportunity to learn—through the various depositions. Though Mattingly seeks information related to documents purporting to reflect certain staff policies [DE 44-2], multiple R.J. Corman representatives testified that they did not believe those policies were in place at the time of the events in this case. [DE 44-3, 44-4]. And there is no reason to believe that the audit would contain any further details relevant to that particular question. Indeed, Johnson testified that the audit did *not* encompass any general review of policies or procedures, beyond information concerning internal fraud and other finance-specific controls (such as levels of approval for various types of expenditures, etc.). [DE 44-1, at Page ID # 301-03].

Johnson's testimony and Defendants' position regarding audit scope is consistent with Statement on Auditing Standards ("SAS") No. 78. SAS No. 78 does, in fact, define "internal control" to encompass details about a company's structure beyond mere finances. In addition "reliability of financial reporting," SAS No. 78 directs auditors to consider the "effectiveness and efficiency of operations," as well as a company's "compliance with applicable laws and regulations." American Institute of Certified Public Accountants, Auditing Standards Board, *Consideration of Internal Control in a Financial Statement Audit: An Amendment to SAS No. 55* (Dec. 1995), https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1080&context=aicpa_sas ("SAS No. 78"), at p. 3, ¶ 6.

However, SAS No. 78 explicitly relates to what auditors must consider when *planning* an audit—it does

not dictate precisely what information the resulting audit itself must include. *See id.* at p. 2, ¶ 1 (emphasizing that "[i]n particular, this Statement provides guidance about implementing the second standard of field work[,]" and that "[a] sufficient understanding of internal control is to be obtained to plan the audit and to determine the nature, timing, and extent of tests to be performed") (footnote omitted). In other words, though SAS No. 78 directs that auditors examine internal company controls before finalizing the audit plan and deciding what information to collect from the company and how to collect it, it does not purport to require auditors to include all such information in the audit produced. Rather, SAS No. 78 repeatedly limits the scope of included information to details tied to the company's financials. *See*, *e.g.*, *id.* at p. 3, ¶ 9 ("Although an entity's internal control addresses objectives in each of the categories referred to in paragraph 6, not all of these objectives and related controls are relevant to an audit of the entity's financial statements."); *id.* at p. 4, ¶ 10 ("Generally, controls that are relevant to an audit pertain to the entity's objective of preparing financial statements for external purposes . . . "); *id.* at p. 6, ¶ 14 ("[T]he auditor's primary consideration, however, is whether a specific an internal control structure policy or procedure affects financial statement assertions[.]"). SAS No. 78 thus does not contradict or refute Johnson's testimony—or the typical practice—that audits center around a company's financial details, rather than any general review of company policy.

In the end, Plaintiff suggests that the audit would reveal "for example, the procedure establishing authorizations for approving actions and transactions within the company, *i.e.*, what level of company officer has authority to approve budgets, hiring decisions, purchases over a certain level or other capital transactions." [DE 44, at Page ID # 297]. But Mattingly has already had an adequate opportunity to probe those very topics during depositions and written discovery. As noted, Johnson testified in detail about the budget process, and Mattingly could have asked any questions he wished on the topic. [DE 44-1, at Page ID # 305-06]. Booher discussed how payroll and hiring would impact budgetary review, noting that Mattingly could ask Johnson further questions about that matter. [DE 44-3, at Page ID # 319]. Nor is there any reason to believe that Mattingly could not have queried any of the R.J. Corman representatives about company procedure regarding approval of large transactions or expenditures. Information of the sort Mattingly seeks from the audits was undoubtedly available to him through other discovery efforts. And the sort of details that only the audits themselves could provide—namely, the financial specifics—are not reasonably needed to develop Plaintiff's case, as Mattingly concedes in suggesting their redaction.

For these reasons, the Court is not persuaded that the audit would reveal any appreciable quantum of evidence that Mattingly has not or could not have previously obtained in this action. Mattingly has had ample opportunity to explore the categories of proof he argues

the audit would cover through depositions and written discovery. The financial specifics are not relevant, and there is simply no non-speculative evidence that the audit would include broader policy and procedure review. Rather, R.J. Corman has provided testimony stating that the opposite is true, and such testimony is not inconsistent with the auditing and accounting standards Mattingly cites. Plaintiff's hypothetical doubt that R.J. Corman is honestly and fairly representing the audit's scope is precisely the sort of "fishing" effort that the Court may not indulge. *See Surles ex rel. Johnson*, 474 F.3d at 305. Accordingly, given Mattingly's prior access to the sought information, the audits are likely cumulative and of relatively low importance to the issues at stake in this litigation, even if they have base relevance to Mattingly's case. *See Brown*, No. 2017 WL 2832631, at *1.

Against the relatively low evidentiary value of the audits in this case, the Court balances the burden on and prejudice to R.J. Corman if such production were compelled. *E.E.O.C. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994) ("Essentially, this court's task is to weigh the likely relevance of the requested material to the investigation against the burden . . . of producing the material."). R.J. Corman argues that the audit contains confidential financial details about nonparties (*e.g.*, other Corman entities and information about the Corman family trust that controls the Corman entities generally) and that disclosure risks undue intrusion into sensitive and minimally relevant information. The Court agrees. *See*, *e.g.*, *Equal Employment*

Opportunity Comm'n v. Tepro, Inc., No. 4:12-CV-75-HSM-SKL, 2014 WL 12562856, at *6 (E.D. Tenn. Aug. 29, 2014) (citing *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 365 (6th Cir. 1999)) (observing that "[t]he Sixth Circuit has recognized privacy interests in discovery disputes, particularly with respect to the privacy interests of nonparties"). In response, Mattingly asserts that the audits could be produced with all financial figures fully redacted.

However, under the circumstances, the Court perceives this solution both as unwarrantedly burdensome and as insufficiently protective of the private information contained in the audits. First, though the record is silent as to the nature and extent of any redaction burden, the Court recognizes that at least some time, cost, and effort would be required to redact all financial figures in documents explicitly focused on company finances. And the likelihood of additional litigation stemming from the redactions themselves is particularly strong. Even setting that aside, redaction of the sensitive financial information does little to guarantee the privacy of R.J. Corman's financial data. For instance, even if R.J. Corman were to redact all numbers in any given audit category, the mere inclusion of a particular category—or the existence of a lengthy section under a particular heading—would reveal significant information about the state of a private company's finances and about nonparty entities. Context alone, even without the numbers, could be harmful when discussing a detailed financial audit.

Ultimately, compelling production of the audits and requiring R.J. Corman to take the risk of revealing such confidential information is unjustified in this case. Weighing the redaction burden on R.J. Corman and the potential harm to nonparties' legitimate privacy interests in the content of the audits against the minimal importance of the audits to Mattingly's case, the Rule 26 proportionality calculus does not favor compelling their production under the circumstances. Mattingly has had adequate access to the relevant information sought via substantially less intrusive sources, and there is no evidence that the audits would provide any new and noncumulative relevant information. *See* Fed. R. Civ. P. 26(b)(2)(C). Accordingly, production of the sought audits is not proportionate to the reasonable discovery needs in this case per Rule 26, and the Court, in its discretion, declines to compel it.

III. CONCLUSION

For all of these reasons, the Court **DENIES** Mattingly's motion seeking additional or modified discovery relief [DE 39] insofar as he seeks to compel production of the audits, and the Court **DENIES AS MOOT** the motion's remaining requests. The undersigned enters this Memorandum Opinion pursuant to 28 U.S.C. § 636(b)(1)(A). Within fourteen (14) days after being served with a copy of this Memorandum Opinion, either party may appeal this decision to Judge Hood pursuant § 636(b)(1)(A) and FED. R. CIV. P. 72(a).

Entered this 17th day of February, 2021.

Signed By:
[SEAL] **Matthew A. Stinnett** /s/ MAS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL MINUTES – GENERAL

Case No. 19-170-JMH-MAS At Lexington

Date April 13, 2021

Mattingly v. R.J. Corman Railroad Group, LLC et al

PRESENT: HON. MATTHEW A. STINNETT, U.S. MAGISTRATE JUDGE

Samantha Howard	Audio File
Deputy Clerk	Court Reporter

Attorney Present for Plaintiff:	**Attorney Present for Defendants:**
Joseph H. Mattingly, III	J.T. Blaine Lewis
William C. Robinson	Patrick Shane O'Bryan

I, Samantha Howard, Deputy Clerk, CERTIFY the official record of this proceeding is an audio file KYED-LEX_5-19-cv-170-JMH-MAS_20210413_133355

PROCEEDINGS: **TELEPHONIC CONFERENCE**

The parties appeared for a telephonic conference based on a discovery dispute, as noted. After hearing statements of counsel, the Court **PROVISIONALLY RESOLVES** each discussed issue as follows:

1. Requests No. 44/63D: Plaintiff Joseph Brent Mattingly ("Mattingly") seeks production of a purported "Supervisor's Manual" and related "SV Policies." Defendants R.J. Corman Railroad Group ("Group") and R.J Corman Railroad Services ("Services") (collectively, "R.J.

Corman") maintain that no Supervisor's Manual (pertinent to the parties and timeframe at issue, as sought) exists. Mattingly concedes that he has no basis to dispute that representation. The Court **DENIES** this request as it relates to the purported Supervisor's Manual. As to the SV Policies, R.J Corman contends that it has produced any such responsive documents that are in existence and available to it. Though Mattingly believes that additional responsive documents exist, the Court is without a concrete, non-speculative evidentiary basis to so conclude and must **DENY** Plaintiff's request to this extent.

2. Requests No. 45-49: Mattingly seeks R.J. Corman's five-year plan for rail line rehabilitation and maintenance. Plaintiff contends that the plan documentation is relevant because it may reveal details about the degree of coordination between different R.J. Corman entities (*e.g.*, whether certain construction plans integrate various R.J. Corman companies and what the individual companies' roles are in the projects, among other things.). Though Defendants counter that the plan documentation is simply a spreadsheet that reveals little on these topics and contains private financial data, there is little information currently available to Plaintiff (in the form of deposition testimony, etc.) about the actual content of the spreadsheet. Plaintiff has not had opportunity to question R.J Corman representatives about it. The sought information may potentially be relevant to Mattingly's case theory. And, unlike with the prior financial

audit (*see* DE 53), there is no indication that redaction of all financial information / numbers is unfeasible or insufficiently protective in this instance. Nor is the document inherently sensitive (although it may be confidential under the terms of a protective order). Accordingly, balancing the potential benefit to Plaintiff – albeit likely minimal – with the limited prejudice to Defendants, the Court **GRANTS** this request as it pertains to a **redacted** version of the five-year plan spreadsheet. R.J. Corman may omit all financial figures in the disclosed version of the document.

3. Request No. 63: Mattingly seeks three document sets, described generally as (1) SV Policies; (2) employee guidelines; and (3) transportation policies. For the reasons noted in ¶ 1 above, the Court **DENIES** the request as to the SV Policies. As it pertains to the transportation policies, the Court likewise DENIES the request. It appears that such policies simply outline regulations applicable to over-the-road drivers employed by Defendants, and there is no indication that they relate to Plaintiff's role in the company or contain any broader information about R.J. Corman's structure or integration between entities. Finally, consistent with the parties' agreement during the hearing, the Court GRANTS the request as to any employee guidelines, to the extent that Defendants shall produce any such guidelines/policies in effect at the time of Plaintiff's accident.

4. Request No. 68: Mattingly seeks employee sharing agreements between Services and other R.J. Corman entities. Defendants maintain that no such documents exist. To the extent that they do, the Court finds the items relevant and **GRANTS** this request. Should no responsive documents indeed exist, Defendants shall supplement their discovery requests to reflect as such.

5. Request No. 71: Defendants have provided, and Plaintiff has now reviewed, a privilege log pertaining to the sought email communication. As Mattingly concedes that he lacks current basis to challenge the privilege assertion, the Court **DENIES** this request as withdrawn. Should Mattingly later ascertain grounds to challenge the log, he may renew this request with Defendants and/or the Court as appropriate.

6. Request No. 77: Plaintiff seeks the company bylaws of Memphis Line, an R.J. Corman entity, which is not currently a party to this case. Mattingly's motion to join Memphis Line as a party pends. The Court is not persuaded that the bylaws of a non-party – a singular R.J. Corman entity – would contain relevant information about overall company structure or operation. Accordingly, the Court **DENIES** this request at this time. If Memphis Line becomes a party to the case, Mattingly may renew, and the Court will revisit, this request.

7. Request No. 86: Plaintiff seeks any yet-unproduced documents pertaining to the project

> Mattingly was working on at the time of the accident. Though Defendants believe there likely no additional, responsive documents, R.J. Corman agrees to conduct an additional inquiry to ensure nothing remains. Per the parties' agreement, the Court thus **GRANTS** this request to that extent. Defendants shall produce any responsive documents uncovered.

This is a provisional ruling that resolves the pending dispute, subject to any later order. Either party now has leave to file a motion seeking additional or modified relief as to the matters addressed herein. If either party files such a motion, the Court will set a briefing schedule and issue an order that will be appealable to Judge Hood.[1]

Copies: COR Initials of Deputy Clerk: slh TIC: /40

Signed By:
[SEAL] **Matthew A. Stinnett** /s/ MAS
United States Magistrate Judge

[1] The Court here notes the upcoming April 30, 2021 discovery close. [DE 52]. Any request for scheduling relief, if later applicable, should be directed to Judge Hood.

45 U.S.C. § 51 provides:

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.

45 U.S.C. § 55 provides:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 57 provides:

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

F.R.Civ.P. § 56(f) provides:

Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

R. J. Corman Senior Staff Policy

Policy No. RJC–SSP-020-POL
Pages: 2
Effective Date: 01/2012
Supersedes Policy Dated 09/2005

Senior Staff Railroad Rehab And Maintenance Policy

PURPOSE

Inform all Senior Staff of proper policy for developing and implementing a 5 year rehabilitation and maintenance plan for each RJ Corman Railroad.

SCOPE

The policy affects all Senior Staff members.

DEFINITION

A five year plan outlining the maintenance and potential project plans of each individual line segment that will be evaluated and updated periodically to meet our organizational needs.

POLICY

1) The Chief Engineer and VP of Construction will make a joint inspection of the railroad. This inspection will be made near the end of the prior year or by the end of the first month of the current year.

2) A written plan will be submitted by the Railroad and Construction companies as follows:

   a) General maintenance programs.

      i) This will include a detail of scope of work, cost assessment, as well as M.P. locations. Maintenance should include any regular inspections and maintenance including rail testing, vegetation control, ditching, joint elimination, etc.

   b) Capital work listed by priority. Example: Priority 1, Priority 2, etc. These plans should be for the next five (5) years. Plans should include pricing that covers the purchase and installation of all material. This plan should also conform to the expected tie installation per year over the entire system.

      i) Capital projects should include larger scale tie installation programs, rail programs, cut and slide programs, etc. Plan and schedules should reflect current project awards. Projects not under contract should be used as a guideline for what is needed over the course of the next year.

      ii) The following 4 year plans should be devised in succession to the current year and should indicate a rolling plan to outline needed projects over the course of the plan.

   3) These plans are to be submitted to the Railroad Group President and VP of Operations of Shortlines for review and approval of plans.

4) Approved and completed plans will be distributed by the VP of Operations of Shortlines to all parties involved including finance department.

5) Approved Capital Plans will not be changed without approval of the Railroad Group President or VP of Railroad. If changes are made, the new plans must be distributed to all parties involved including finance department.

6) Once in receipt of approval plans, work will be scheduled. Consideration will be made of project time frames and construction project schedules.

7) Monthly status meetings for capital projects will be scheduled by Funded Projects and attended by the VP of Railroad, VP of Construction and the Finance Department. Agenda will be to review plans for relevance and review status of all work and schedules. Minutes will be recorded and distributed by Railroad Company.

    a) The minutes report will be distributed to the attendees, Railroad Group President, VP of Operations of Construction and VP of Operations of Shortline.

Attachments:
None

References:
None