**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, LAW DIVISION**

| | | |
|---|---|---|
| Melvin Ammons, | ) | |
| | ) | |
| Plaintiff/Counter-defendant, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Canadian National Railway Co. and Wisconsin Central, Ltd., | ) | |
| | ) | No. 15 L 1324 & |
| Defendants/Counter-plaintiffs, | ) | No. 16 L 4680 |
| Darrin Riley, | ) | consolidated |
| | ) | |
| Plaintiff/Counter-defendant, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Wisconsin Central, Ltd., | ) | |
| | ) | |
| Defendant/Counter-plaintiff. | ) | |

## MEMORANDUM OPINION AND ORDER

The Federal Employers' Liability Act voids any device used by a common carrier with the purpose or intent to exempt itself from liability. A state common-law counterclaim brought by a common carrier employer against an employee constitutes such a device because a successful counterclaim could reduce or effectively eliminate a damages award owed by an employer to an employee. For that reason, the plaintiffs' motion to dismiss the defendant's counterclaim must be granted.

### Facts

On December 13, 2014, Wisconsin Central, Ltd. (WC) employed Melvin Ammons as a locomotive conductor and Darrin

Riley as a locomotive engineer. On that date, Ammons and Riley jointly operated train A40481-11 on track 2 within WC's Joliet yard, near Joliet, Illinois. While Ammons and Riley operated the train, it collided with train U73851-7 that was standing on track 2. The collision allegedly injured both Ammons and Riley.

On February 9, 2015, Ammons filed a complaint (15 L 1324) against Canadian National Railway (CNR) and WC pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60.[1] On May 10, 2016, Riley filed his complaint (16 L 4680) against WC also based on FELA. On June 17, 2016, the Law Division's presiding judge consolidated the two cases for discovery and trial.

On November 3, 2016 Riley filed an amended complaint, and on March 3, 2017, Ammons filed his first-amended complaint. The two amended complaints are nearly identical in that each plaintiff alleges that WC owed a duty to furnish a safe workplace as required by FELA. The amended complaints further allege violations of the Signal Inspection Act, 49 U.S.C. § 20502(b) & 49 C.F.R. §§ 236.21 & 236.24, the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.*, and the Safety Appliance Act, 49 U.S.C. § 20302. Based on these allegations, the amended complaints claim that WC breached its duties by, among other things, failing to: (1) provide a safe workplace; (2) warn of dangerous conditions, including stationary cars, on the same track; (3) implement policies for proper communication between train crews; (4) have an adequate crew; (5) instruct the engineer how to operate an engine and train safely; (6) prevent the engineer from operating the engine and train at too great a speed; (7) instruct the engineer how to read and follow track signals; (8) prevent the engineer from disregarding track signals; (9) train and instruct the engineer on the proper and correct way to control the speed of an engine and train; (10) divert the engine and train onto another track; (11) prevent the engine and train from being operated at a speed beyond that permitted by 49 C.F.R. § 240.117; (12) prevent the

[1] On June 25, 2015, this court entered by agreement of the parties an order dismissing CNR without prejudice from the *Ammons* litigation.

creation of a blind approach in the yard; (13) provide the engine with adequate controls and stopping power; (14) provide the train with adequate brakes; and (15) provide positive train control.

On February 7, 2017 – before Ammons filed his first-amended complaint – WC filed an answer, amended affirmative defenses, and a counterclaim to Ammons's original complaint. Also on that date, WC filed a two-count counterclaim against Riley. Count one seeks compensation for property damage based on Ammons's alleged failure to prevent the train collision. The count alleges that Riley failed to follow signals indicating a diverging approach, meaning that a train must be traveling slow enough so that it can stop at the next signal, the so-called Ruff signal. The counterclaim alleges that train A40481-11 was travelling 23 miles per hour when it passed the bridge signal, 25 miles per hour when it switched to track 2, and 28.6 miles per hour approximately one minute later when it passed the Ruff signal. WC alleges that the train should not have been travelling more than 20 miles per hour. WC further alleges that Riley never engaged the emergency brakes before train A40481-11 struck train U73851-7. Based on these allegations, WC counterclaims that Riley failed to: (1) operate the train safely and efficiently in violation of CN's United States operating rule 104; (2) remain alert for signals; (3) observe and communicate the signal aspects; (4) know the train's speed; (5) reduce the train's speed; (6) reduce the train's speed at the bridge signal in violation of operating rule 812; (7) reduce the train's speed as it passed the bridge signal; (8) reduce the train's speed as it passed the Ruff signal; (9) reduce the train's speed so that it could stop within one-half of the engineer's range of vision in violation of operating rule 814; (10) prevent the train from travelling at an excessive speed; (11) slow the train to prevent a collision; and (12) remain alert and attentive. WC alleges that the collision caused more than $1 million in property damage arising from train car derailments, track damage, train car damage, and environmental remediation. Count two of the counterclaim seeks contribution pursuant to the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01 – 5.

On March 14, 2017, Riley filed a motion to dismiss WC's counterclaim pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-615. On March 21, 2017, Ammons filed a motion to join Riley's motion to dismiss. On April 13, 2017, WC filed its joint response brief, and on April 26, 2017, Riley filed the plaintiffs' reply brief.

**Analysis**

Although Ammons's and Riley's amended complaints allege violations of FELA and other federal statutes, WC's counterclaim for property damage is brought pursuant to state law. Since this court's task is to consider the plaintiffs' motion to dismiss that counterclaim, it is only appropriate to begin by considering the counterclaim's propriety under state law. To that end, the Code of Civil Procedure authorizes that:

> Any claim by one or more defendants against one or more plaintiffs . . . , whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action. . . .

735 ILCS 5/2-608(a). This and all other code provisions are to be liberally construed. *See* 735 ILCS 5/1-106.

The code's broad authorizing language would appear to end perfunctorily the state-law inquiry in WC's favor. Despite Ammons and Riley's failure to raise any arguments based on state law, there are at least two open issues that should be addressed. First, even the code's liberal construction does not permit the filing of a counterclaim for a fraudulent or improper purpose. *See* Ill. S. Ct. R. 137(a). The plaintiffs could have argued that WC's counterclaim is improper because WC, knowing that Ammons and Riley do not have the financial resources to pay all or even a portion of a judgment for liquidated damages, filed the counterclaim to harass them. Such a filing would arguably

constitute an improper purpose that would run counter to the statute's purpose. The plaintiffs, however, save a similar argument for the FELA portion of their response brief.

Second, despite the breadth of section 2-608(a), Illinois common law arguably prohibits the filing of a property-damage counterclaim to a plaintiff's personal-injury case. This argument's genesis lies with the proposition presented in a case both parties cite: "unless otherwise barred, it is well settled that an employer has a common law right of action against its own employees for property damage arising out of ordinary acts of negligence committed within the scope of employment." *Stack v. Chicago, Milwaukee, St. Paul & Pacific Ry.*, 94 Wash. 2d 155, 158 (1980) *citing Greenleaf v. Huntington & B.T.M.R. & Coal Co.*, 3 F.R.D. 24, 25 (E.D. Pa. 1942); *American S. Ins. Co. v. Dime Taxi Serv., Inc.*, 275 Ala. 51, 55 (1963); *Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 582 (1941); *Stulginski v. Cizauskas*, 125 Conn. 293, 296 (1939); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 185 (1927). This statement appears to be lifted directly from the law of agency. *See* Restatement (Second) of Agency § 401 ("An agent is subject to liability for loss caused to the principal by any breach of duty.").

This legal principle may be inapplicable in this case for at least three reasons. First, neither *Stack* nor any other case cites to Illinois precedent supporting the proposition. Second, this court has been unable to identify any court opinion adopting section 401 into Illinois common law. Third, and apart from section 401, this court has been unable to find any Illinois decision supporting the proposition that an employer may counterclaim for property damage in an exclusively two-party action brought by an employee for personal injuries received within the scope of employment. Rather, the cases in which an employer has successfully counterclaimed for property damage against an employee have arisen from scenarios in which the employee injured a third person, a circumstance that does not exist here. *See Palier v. Dreis & Krump Mfg. Co.*, 81 Ill. App. 2d 1, 5-6 (1st Dist. 1967) *distinguishing Holcomb v. Flavin*, 34 Ill. 2d 558 (4th Dist. 1962)

(third-person-plaintiff injured by employer's employee); *Embree v. Gormley*, 49 Ill. App. 2d 85 (2d Dist. 1964) (same).

*Palier* is instructive here although the plaintiff's claim arose under the Structural Work Act (SWA). *See* 81 Ill. App. 2d at 3-4. That statute is similar to FELA both as to the time of its enactment and its dedication to ensuring the rights of workers in a dangerous occupation. As the court wrote:

> [t]he [Structural Work] Act was enacted in 1907 some four years before the birth of the [then] Workmen's Compensation Act. It came into force and effect at a time when employers were continually escaping liability by imposition of the common law defenses against their employees, engaged in hazardous work. It was the Act's intent to rectify this hardship.

*Id.* at 11.

Like FELA, the SWA explicitly provided a right of action against any person involved in construction for the injury or death of any person killed during that construction. *See* 740 ILCS 150/1-9, *repealed* Feb. 14, 1995. Also like FELA, the SWA's purpose was to "prevent injuries to persons employed in [a] dangerous and extra-hazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal." *Palier*, 81 Ill. App. 2d at 10. Most important, like FELA, the SWA provided that "a plaintiff's comparative fault is not considered as an offset or a bar to the defendant's damages, in order to preserve the social interest in providing safe working conditions in those instances governed by the Act." *Downing v. United Auto Racing Ass'n*, 211 Ill. App. 3d 877, 897 (1st Dist. 1991).

The court in *Palier* raised two significant points of distinction that resonate here. First, as a matter of fact, other cases in which an employer's counterclaim withstood dismissal,

> involved indemnity actions by an employer against his employee. . , but only where the employee's own negligence injured a third party, thus creating a vicarious liability upon the employer-indemnitee. These cases are distinguishable from the case at bar, for in the instant case the alleged negligence of the employee occasioned injury only to himself.

81 Ill. App 2d at 6. Second, as a matter of law, "Palier's opportunity for recovery is specifically provided for by two statutes [– the SWA and the then Worker's Compensation Act – ] to the exclusion of the common law." *Id.* The court reasoned, therefore, that the liability, if any, owed by Palier's employer to the property owner:

> can only be predicated upon a violation of the [Structural Work] Act. It cannot be said that an indemnity action against an employee by an employer, whose indemnity counterclaim hinges upon the possibility of being liable to another under the provisions of the [Structural Work] Act, is an action separate and apart from such statute. We feel such a result would be incorrect.

*Id.* at 6-7.

Given the court's analysis in *Palier*, it is arguable that WC does not have a right of counterclaim against Ammons and Riley because their exclusive right of recovery is statutory – FELA. To allow WC to proceed with a state common-law counterclaim would defeat FELA's statutory purpose and thereby make WC's counterclaim impermissible as a matter of state law. This court repeats, however, that Ammons and Riley did not present these potentially viable state-law-based arguments and, as a result, this court cannot consider them. Rather, because of the generous authorization given to litigants by the code section 2-608(a), this court finds that, as a matter of state law, WC is may bring its counterclaim.

The more challenging portion of this court's analysis requires interpreting federal law to determine whether FELA authorizes the filing of WC's counterclaim. For its part, FELA renders common-carrier railroads "liable in damages to any person suffering injury while . . . employed by [the] carrier" if the "injury or death result[ed] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." 45 U.S.C. § 51. A railroad's violation of a safety statute is, therefore, considered negligence *per se*. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 438 (1958). Such a presumption is, however, rebuttable since FELA is not a strict liability statute, *see Williams v. Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999), meaning that a plaintiff must present some evidence to support a negligence finding. *See McGinn v. Burlington N. R.R.*, 102 F.3d 295, 300 (7th Cir. 1996).

The parties here contest whether FELA limits, if at all, the degree to which a railroad may limit its liability. The answer to that question, if there is an answer, lies in a subsequent statutory provision: "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. . . ." 45 U.S.C. § 55. The parties do not contest that in this case there exists no contract, rule, or regulation limiting WC's liability; thus, the ultimate question is whether a "device" prohibited by FELA includes a state-law counterclaim.

Such a determination requires this court to construe a federal statute. Before undertaking such a task, this court notes that our Supreme Court "has consistently recognized the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue." *State Bk. of Cherry v. CGB Enterps.*, 2013 IL 113836, ¶ 34. To that end, Illinois state courts are to consider federal courts' interpretation of federal laws as binding. *See Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 21 (2011). If, however, there exists a split in

federal authority, a state court is expected to construe federal statutes to achieve the correct result. *See Hiles v. Norfolk & Western Ry.*, 268 Ill. App. 3d 561, 563-64 (5th Dist. 1994), *rev'd* 516 U.S. 400, 411-13 (1996).

Congress enacted FELA in 1908 – one year after the SWA – to "shift part of the 'human overhead' of doing business from employees to their employers." *Conrail v. Gottshall*, 512 U.S. 532, 542 (1994), *quoting Tiller v. Atlantic Coast Line Ry.*, 318 U.S. 54, 58 (1943). The court later avoided such dialectical prose to indicate that FELA's purpose is to give railroad employees "a right to recover just compensation for injuries negligently inflicted by their employers." *Dice v. Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 362 (1952); *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958) ("The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense between the worker and the carrier."). To further that end, Congress barred several common-law tort defenses that had up to that point effectively limited a railroad employee's recovery, including the fellow-servant rule, contributory negligence (in favor of comparative negligence), contracts exempting employers from liability, and the assumption-of-risk defense. *Conrail*, 512 U.S. at 542-43; 45 U.S.C. §§ 51-55.

Although there exists an extensive body of FELA case law, courts are also permitted to rely on Jones Act cases for interpretative purposes.[2] This is so because the Jones Act incorporates by reference the same liability doctrine as FELA. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958) (addressing similar language in prior codification at 46 U.S.C. § 688(a)). As currently provided:

---

[2] The purpose of the Jones Act, formally known as the Merchant Marine Act of 1920, is to provide workers on navigable waters with a statutory remedy for their illness or injury in addition to the traditional admiralty remedies of maintenance and cure. *See O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943).

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104. Despite the Supreme Court's liberal construction of FELA, the Court has cautioned that "FELA, and derivatively the Jones Act, is not to be interpreted as a workers' compensation statute and that unmodified negligence principles are to be applied as informed by the common law." *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436-37 (4th Cir. 1999), *citing Conrail*, 512 U.S. at 543-44.

The ambiguity of what constitutes a "device" under FELA has resulted in highly inconsistent federal decisions interpreting that word. For example, four federal courts of appeal have explicitly held that in a FELA or Jones Act case brought by an employee for personal injury, an employer may pursue a counterclaim against the employee for property damage arising from the same set of facts. *See Cavanaugh v. Western Maryland Ry.*, 729 F.2d 289, 292-94 (4th Cir. 1984); *Sprague v. Boston & Maine Corp.*, 769 F.2d 26, 30 (1st Cir. 1985); *Nordgren v. Burlington N. R.R.*, 101 F.3d 1246, 1251 (8th Cir. 1996); and *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 845 & n. 6 (5th Cir. 2005). Since each of the three later cases relied on the Fourth Circuit's reasoning in *Cavanaugh*, it is best to address that court's analysis.

Cavanaugh served as the engineer of a train that collided with another headed in the opposite direction on the same track. *See* 729 F.2d at 290. Cavanaugh sued the railroad defendants for personal injuries under FELA, and the railroads counterclaimed for property damage under West Virginia common law. *See id.* The federal district court granted Cavanaugh's motion to dismiss, holding that the counterclaim violated sections 5 and 10 of FELA

and was contrary to the public policy underlying the statute. *See id.*

The Fourth Circuit reversed, recognizing initially the "well accepted common law principle that a master or employer has a right of action against his employee for property damages suffered by him 'arising out of ordinary acts of negligence committed within the scope of [his] employment'. . . ." *Id.* at 290-91, *quoting Stack*, 94 Wash. 2d at 158 *citing* cases. According to *Cavanaugh*, the West Virginia Supreme Court had implicitly recognized this principle. *See id., citing National Grange Mut. Ins. Co. v. Wyoming Cty. Ins. Co.*, 156 W. Va. 521 (1973) (insurance company had right to damages against agent who had issued coverage declined by company). The *Cavanaugh* court acknowledged, however, that, "[o]f course . . . , the action may be defeated if the master or employer has contributed to his damages by his own negligence." *Id.* at 291 n.3, *citing Kentucky & Indiana Terminal R.R. v. Martin*, 437 S.W.2d 944, 948 (Ky. 1969).

According to the majority, the key to understanding the word "device" is understanding the word "exemption":

> It is only when the "contract . . . or device" qualifies as an exempt[ion] itself from any liability" that it is "void[ed]" under Section 5. But a counterclaim by the railroad for its own damages is plainly not an "exempt[ion] . . . from an liability" and is thus not a "device" within the contemplation of Congress.

*Id.* at 292 (quoting statute). The court then quotes an extended section of the House Report on the bill addressing the common practice of railroads to require their employees to enter into contracts releasing the railroads from liability for damages arising out of the negligence of other employees. *See id.* at 292-93, *quoting* House Report No. 1386, 42 Cong. Rec. (1908), pp. 4436, *et seq.* The court further finds nothing in the statute to support the argument that a railroad's counterclaim will "unfairly coerce or intimidate the injured employee from filing and pursuing his

FELA action." *Id.* at 293. Further, "Congress . . . never expressed any interest in denying to the defendant railroad the right of counterclaim. . . ." *Id.* at 294. The court then poses a hypothetical that if the railroad were first to file its property-damage claim followed by an employee's personal-injury claim, the employee's counterclaim would not be barred. *See id.*

In a spirited dissent, Judge Hall comments on and quotes from the oral argument transcript in which the railroad's attorney admitted that:

> railroads generally do not bring actions against their employees for property damage because they have no reasonable expectation of recovery and because their employees may in fact be judgment proof. "In this case, [Cavanaugh] is not going to be judgment proof when he recovers a vast sum of money, which he is attempting to recover from the Railroads . . . [a]nd that is why this [counterclaim] has been asserted. . . .

*Id.* at 295 n.1 (J. Hall, dissenting). Based on these admissions, Judge Hall concludes that "it is clear to me that the railroads filed their counterclaim either to coerce Cavanaugh into settling his claim or . . . to strip him of any damages by means of an offset." *Id.* More to the point, Judge Hall finds that the filing of a counterclaim,

> "would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee." To allow the railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers.

*Id.* at 296, *quoting Stack*, 94 Wash. 2d at 155.

In contrast to *Cavanaugh* and the three other courts of appeal, the Seventh Circuit would apparently find otherwise. *See Deering v. National Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010). This court purposefully uses the conditional mood because, as explained below, the *Deering* court did not address the precise question at issue here; consequently the court's discussion is merely *dicta*.

Deering suffered substantial injuries and nearly drowned after a surge of water swamped and sank the towboat he had captained. *See id.* at 1041. He filed a Jones Act claim based on the defective steering mechanism that his employer, National, had failed to repair. *See id.* For its part, National filed a common-law counterclaim for the value of the sunken vessel and to limit its liability under the Limitation of Liability Act. *See id.* at 1041-42; *see also* 46 U.S.C. § 30505(a). Deering filed a motion to dismiss the state-law counterclaim, and the district court granted the motion because the statute forbids setoffs to Jones Act claims. *See id.* at 1042. National appealed. *See id.*

The *Deering* court first looks back to the time when Congress enacted FELA. Then, "a railroad's right to recover damages from an employee on account of property damage caused by the employee's negligence was limited . . . to setoffs against claims by employees for unpaid wages." *Id.* at 1043. In addition, most contracts at the time expressly required employees to assume liability for damage to the employer's property; thus, "[i]t would be surprising if Congress had meant to countenance an identical result based on a tort right asserted by employers to which the worker had not waived objections in his employment contract." *Id.* at 1044.

As to the express language of section five, the court does not believe that the word "device" is similar to "contract," "rule," or "regulation" in the same string. *See id.* Congress attached the word "whatsoever," connoting that "device" is a catchall, "in recognition of the incentive of employers to get around the FELA's generous provisions . . . for injured employees." *Id.* According to

the court, a "device" in that sense is much like a "contract" in which National would waive its liability under the Jones Act if Deering had been injured in an accident that caused property damage to National. *See id.* "[S]uch a contractual provision would be unenforceable. So why shouldn't a differently named 'device' of identical purpose and consequence likewise be unenforceable?" *Id.* The court continued by exploring the possibility that Deering's potential damages for his personal injuries could be wiped out if National were to succeed on its counterclaim, given the value of the vessel. *See id.* at 1044-45, *citing Cook v. St. Louis-San Francisco Ry.*, 75 F.R.D. 619 (W.D. Okla. 1976).

The *Deering* court then proceeds to criticize *Cavanaugh*, *Withart*, *Sprague*, and *Nordgren* as wrongly decided, in part for overlooking the Supreme Court's explanation of section five. To the court,

> the evident purpose of Congress [in enacting section 5, which replaced a similar provision in a 1906 predecessor statute to the FELA] was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever. . . .' It includes every variety or agreement or arrangement of this nature . . . .

*Id.* at 1045-46, *quoting Philadelphia, Baltimore & Washington R.R. v. Schubert*, 224 U.S. 603, 611 (1912).

After all of this discussion, the *Deering* court transforms nearly all of its analysis into mere *dicta* so as to avoid a conflict with *Cavanaugh*. *See id.* at 1048. The reason is that, as noted above, National filed a state-law, property-damage counterclaim as well as an admiralty based cause of action to limit its liability to the value of the vessel as provided by the the Limitation of Liability Act. *See id.*; *see also* 46 U.S.C. § 30505(a).

> We leave for a future day (*which may be long in coming, given the paucity of cases such as this*) the resolution of the issue whether a shipowner who does not seek to limit his liability should nevertheless be forbidden to set off damages for negligent damage to property against a Jones Act claim.

*Id.*, emphasis added.

It would be presumptuous for this court to suggest that the day for such a decision has arrived in this case. It is, however, necessary for this court to determine whether WC's property-damage counterclaim may continue. This court has determined that it cannot for at least three reasons.

The first reason is time, a conclusion based, in part, on the hypothetical posed by the *Cavanaugh* court – whether an employee's personal-injury counterclaim would lie against an employer's suit for property damage. Here, WC did not seek to file a property-damage claim within the two-year statute of limitation that expired on December 13, 2016. Indeed, the only reason WC's February 7, 2017 counterclaim is timely at all is because Ammons and Riley effectively saved it by filing their personal-injury actions before the statute expired. In other words, WC appears not to have cared about its property-damage claim until after its employees sued for their personal injuries. Such a tactic has been called "coercive" because it "creates [an] impermissible chill on rights created by Congress" and that extend to FELA plaintiffs and their families. *Kozar v. Chesapeake & Ohio Ry.*, 320 F. Supp. 335, 385 (W.D. Mich. 1970). *See also Yoch v. Burlington N. R.*, 608 F. Supp. 597, 598 (D. Colo. 1985) (defendant railroad may not counterclaim for property damage based on incident giving rise to employee's injuries or death); *Waisonovitz v. Metro-North Commuter R.R.*, 462 F. Supp. 2d 292, 295-96 (D. Conn. 2006) (railroad liable for employee's injuries barred from seeking contribution or indemnification from second employee); *Illinois Central Gulf R.R. v. Haynes*, 592 So.2d 536, 542-43 (Ala. 1991)

(FELA bars employer's third-party complaint for indemnification against co-employee of injured worker).

Second, this court believes that permitting the counterclaim to continue would run counter to one of FELA's basic purposes: "to persuade railroad employers to exercise caution in selecting and supervising its employees. . . ." *Henson v. Baltimore & Ohio R.R.*, 1985 U.S. Dist. LEXIS 21048, at *13 (W.D. Pa. 1985). In other words, "to permit an employer to seek indemnification [against an employee] . . . would violate the intent of Congress rather than foster it." *Illinois Central Gulf*, 592 So.2d at 540. Even if this court were to assume that Ammons and Riley were incompetent at their jobs, their incompetency is a cost of doing business for an employer that hires, trains, or supervises its employees negligently. As has been made plain by this point, FELA is a purely employee-favoring statute; there is no indication that Congress ever intended to permit an employer to shift its fault and damages to an employee, regardless of their alleged conduct leading to their personal injury and the employer's property damage.

The third reason flows from the second – *respondeat superior*. "Generally, a principal is liable for the acts of its agent committed within the scope of his authority." *Vorpagel v. Maxell Corp. of America.*, 333 Ill. App. 3d 51, 59 (2d Dist. 2002), *citing Brubakken v. Morrison*, 240 Ill. App. 3d 680, 686 (1st Dist. 1992). There is nothing to indicate, and WC has not suggested, that Ammons and Riley acted outside the scope of their authority by colliding a moving train into a stationary one. There is, of course, a vast difference between negligent and unauthorized conduct, but WC cannot at this point seek to shift its losses onto the very employees whom WC authorized to act on its behalf.

**Conclusion**

For the reasons presented above:

1. Ammons and Riley's motion to dismiss the counterclaim is granted; and
2. This case is set for case management conference on June 15, 2017 at 11:00 a.m. in courtroom 2209.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich
JUN 14 2017
Circuit Court 2075