COURT'S VERSION AS READ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Ronald Lee Munns,

Plaintiff

Case No. 3:07CV2507

FINAL JURY INSTRUCTIONS

CSX Transportation, Inc.,

Defendant

Members of the Jury:

I will now give you my final instructions. If you detect any conflict between these instructions and the initial instructions I gave you at the beginning of the trial, you must follow these instructions.

You may take the copies given to each of you with you to the jury room. If I make any changes while reading the instructions, I will note them on my copy and deliver it to you as the original and binding copy of the instructions.

I will first give you some general information about your duties. Then I will tell you about the legal issues in the case.

Please listen to all instructions carefully. Your thoughtful attention as I read the instructions is essential. First, the general instructions:

1. General Introduction

You must follow the law as I state it to you, and apply that law to the facts as you find them from the evidence in this case. Even if you disagree with the law as stated, you must follow the law. You cannot substitute your own views as to what the law should be for what I tell you in these instructions.

You must consider the instructions as a whole.

You can decide this case, and must base your verdict only on, the evidence that has come to you in the courtroom. You must not be affected in any way by bias, prejudice or favor toward any party. Individuals, corporations, and entities of all kinds are equally entitled to the same fair trial.

The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by me, and reach a just verdict regardless of the consequences.

2. Evidence

Evidence, as I told you in my initial instructions and reminded you from time to time during the trial, includes the sworn testimony of the witnesses and the exhibits admitted into evidence, which you will have with you in the jury room.

Witness testimony can be presented either in person in the courtroom or by video. No matter what the mode of presentation, witness testimony is evidence. You are to consider and evaluate witness testimony without regard to how it was presented.

Some evidence is "direct" evidence; other evidence is "circumstantial" evidence. You are to consider and evaluate each equally.

Direct evidence is direct proof of a fact, such as testimony of an eyewitness, or an exhibit that displays or relates a fact directly. Someone who tells you he saw it raining or shows you a picture of a thunderstorm provides direct evidence about the weather.

Circumstantial evidence is evidence that tends to prove or disprove the existence or nonexistence of certain other facts. Someone who walks in wearing wet clothing and shaking out an umbrella provides circumstantial evidence about the weather.

The law does not require a party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case. Do not speculate as to what has not come into evidence. You can only consider the evidence presented during the trial.

Something that I have told you to disregard is not evidence. If I have instructed you during the trial to disregard something that you heard or saw, you cannot consider it in your deliberations.

3. Opinion Testimony

Witnesses usually must testify only as to facts known to them. Where, however, witnesses have become knowledgeable through education or experience in some art, science, profession, calling or other area with which a court and jurors might not be familiar, such witnesses may testify as to their opinions about matters in issue, and give their reasons for those opinions.

You should consider the testimony of such witnesses along with all the other evidence.

If you find that an opinion is not based on sufficient education or experience, or conclude that the reasons offered in support of such opinion are not sound or outweighed by other evidence, you may disregard the opinion.

4. Demonstrative Materials

The attorneys have used materials – such as drawings, diagrams, charts, or summaries – as a way of helping you to understand the evidence presented by witnesses or in the exhibits. While such materials are not admitted as evidence and will not be with you in the jury room, you can use them to help you understand the evidence.

5. Questions and Statements by Lawyers and the Court

The lawyers' questions are not evidence. Only what the witnesses say in response to questions is evidence. Where a witness's response either affirms or denies an assertion in a question, such affirmation or denial is evidence, as is any elaboration or explanation by the witness in response to a question.

The lawyers' opening statements and closing arguments are not evidence. They express what the lawyers believe the evidence will be or what it means, and you can consider what they say in their opening statements and closing arguments as you evaluate and interpret the evidence. But on their own, such statements and arguments are not evidence, and cannot supply facts not found in the testimony of witnesses or exhibits.

Similarly, questions and statements by me are not evidence.

Just as my questions and statements cannot be considered by you as evidence, you also cannot view any such questions or statements as expressing any view on my part as to how you should decide the case. The decision on the outcome is for you alone to make on the basis only of the evidence.

6. Evaluation of the Evidence:
Credibility of Witnesses

You must consider all of the evidence. This does not mean that you must accept all of the evidence as true or accurate. It is solely and entirely up to you to determine what evidence to believe or disbelieve, and how much weight to give to any part of the evidence.

In assessing the accuracy and truthfulness of the evidence, and how much weight to give to it, there are several things that you may consider. Among these are the personal, financial, or other significant relationship to the plaintiff or defendant; how the outcome of the case may affect the witness; the witness's opportunity and ability to observe or acquire knowledge about the facts about which the witness testified; the witness's intelligence, fairness, candor, and manner of testifying; and the extent to which other evidence supports or contradicts a witness's testimony or an exhibit.

You should also consider whether a witness has been discredited or impeached by contradictory evidence, a showing that the witness testified falsely concerning a material matter, or evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's testimony.

If you believe that any witness has been discredited or impeached, you can give the witness's testimony such credit or weight, if any, you think it deserves.

If you conclude a witness knowingly testified falsely about any material matter, you can, if you so choose, distrust such witness's other testimony, give it only such partial credit you think it deserves, or entirely reject the witness's testimony.

You may accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not necessarily determined by the number of witnesses

testifying as to the existence or nonexistence of any fact. You may find testimony by a smaller number of witnesses as to a fact more credible than contrary testimony by a larger number of witnesses.

7. Drawing Inferences; Reaching Conclusions

Though you may consider only the evidence in the case, you can draw such reasonable inferences from the evidence as you find justified in the light of common experience.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts established by the testimony and the evidence in the case.

8. Burden of Proof

The plaintiff has the burden of proving every essential element of any claim by a preponderance of the evidence.

The defendant has the burden of proving every essential element of any defense by a preponderance of the evidence.

In your determination as to whether a fact in issue has been proven by a preponderance of the evidence, it does not matter which party called a particular witness or produced a particular exhibit.

9. "Preponderance of the Evidence"

To establish a claim or defense by a "preponderance of the evidence" means showing that the claim or defense is more likely true than not true.

A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

To have proven by a preponderance of the evidence means simply that the proverbial balance has tilted, however slightly, in favor of what is sought to be proved.

This concludes the general instructions, and now I shall instruct you on the law applicable to the specific claims at issue in this case.

10. Law Applicable to Plaintiff's Claims

The plaintiff seeks to recover on the basis of two federal statutes enacted by Congress: 1) the Federal Employers' Liability Act [the FELA]; and 2) the Locomotive Inspection Act [the LIA].

11. Statute of Limitations

Though I previously told you about the statute of limitations, that is no longer an issue in the case.

12. Federal Employers' Liability Act

A. Elements of Plaintiff's Burden of Proof

In pertinent part, the Federal Employers' Liability Act states that a railroad

> shall be liable in damages to any person suffering injury while he is employed by [the railroad where the injury results] 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.

To prevail on his FELA claim, the plaintiff must prove:

1. The defendant was negligent; and

2. The defendant's negligence caused, in whole or in part, the some injury and consequent damage sustained by the plaintiff.

If you conclude that the plaintiff has failed to prove by a preponderance of the evidence both that 1) the defendant was negligent and 2) the defendant's negligence was a cause, in whole or part, of injury to the plaintiff, you must cease deliberating as to plaintiff's FELA claim and return a verdict for the defendant as to the plaintiff's FELA claim.

If you find by a preponderance of the evidence that the defendant was negligent and its negligence was a cause, in whole or part, of injury to the plaintiff, you must then consider whether the plaintiff's own negligence was a cause, in whole or part, of injury to the plaintiff.

B. Elements of Defense of Contributory Negligence

With regard to contributory negligence, the FELA provides:

> In all actions . . . brought against any . . . railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

To prove the plaintiff's contributory negligence, the defendant must prove by a preponderance of the evidence:

1. The plaintiff was negligent; and

2. The plaintiff's negligence caused, in whole or in part, to some injury and consequent damage sustained by the plaintiff.

If you find that the defendant has failed to prove by a preponderance of the evidence both that 1) the plaintiff was negligent and 2) the plaintiff's negligence was a cause, in whole or part, of injury to the plaintiff, you shall proceed to determine the damages which plaintiff has proven he should recover by a preponderance of the evidence.

If you find that the defendant has proven by a preponderance of the evidence both that 1) the plaintiff was negligent and 2) the plaintiff's negligence was a cause, in whole or part, of injury to the plaintiff, you shall proceed to determine the percentage of negligence on the part of the defendant and plaintiff, with the total of those percentages equaling 100.

13. Employer's Duty - FELA

The defendant had a continuing duty to use ordinary care under the circumstances in furnishing plaintiff with a reasonably safe place in which to work, and to maintain and keep such place of work in a reasonably safe condition.

This does not mean that defendant is a guarantor or insurer of the safety of the place to work. The defendant must, however, exercise ordinary care under the circumstances to see that where the plaintiff is to perform his work is reasonably safe under the circumstances shown by the evidence.

14. "Negligence" - FELA

"Negligence" is the doing of some act that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do when prompted by considerations that ordinarily regulate the conduct of human affairs.

Negligence is the failure to use ordinary care under the circumstances in the management of one's person or property.

The defendant must protect its employees against those risks or dangers of which it had knowledge or by the exercise of due care should have had knowledge. The defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.

In determining whether defendant knew or, through the exercise of reasonable care, should have known of a particular risk or danger, you may consider:

1. Evidence of knowledge on the part of defendant or its supervisors or agents;

2. Evidence as to whether the risk of injury was brought to the attention of defendant or its supervisors or agents, by such means as statements, complaints, or protests that a particular condition or assignment was dangerous; and

3. Whether a reasonably prudent person would have performed inspections that would have brought the dangerous condition to defendant's attention or otherwise would have known of the condition.

If you find by a preponderance of the evidence that a reasonably prudent person would have taken reasonable precautions against the risk based on actual knowledge, statements, complaints, protests, or reasonable inspections, and you find the defendant failed to take such reasonable precautions, then you may find that defendant was negligent.

Even if you find defendant violated or failed to enforce a safety rule or failed to take customary precautions, such violation or failure does not require a finding of negligence.

Before you may impose liability on defendant you must still find that defendant CSX Transportation, Inc., failed to exercise reasonable care under the circumstances.

Any negligence act or omission of an officer, employee, or other agent of the defendant in the performance of that person's duties is in law negligence on the part of the defendant.

15. "Ordinary Care"

Ordinary care is the care reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or to avoid injury to persons or the property of others.

Ordinary care is not an absolute term, but a relative one. In deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in light of all the surrounding circumstances as shown by the evidence in the case.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required in the use of ordinary care varies with the nature of what is being done, and all the surrounding circumstances. As the danger that should reasonably be foreseen increases, the amount of care required by law also increases.

16. Locomotive Inspection Act

In pertinent part, the Locomotive Inspection Act states:

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

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

2) have been inspected as required [by law]; and

3) can withstand every test prescribed by [law].

To prevail on his LIA claim, the plaintiff must prove:

1. The defendant's locomotives were not in proper condition and safe to operate without unnecessary peril to life or limb; and

2. This condition caused injury, in whole or part, to the plaintiff.

If plaintiff fails to prove both of these elements, you must return a verdict for the defendant on plaintiff's LIA claim.

If plaintiff proves both of these elements, you must return a verdict for him on his LIA claim.

17. Causation

An injury is caused by an act or failure to act when it is proven by a preponderance of the evidence that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage.

An act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes.

18. Damages

If you find in favor of plaintiff then you must award plaintiff such sum as you find by the preponderance of the evidence will fairly and justly compensate him for the damage he has sustained and is reasonably certain to sustain in the future as a direct result of the occurrence described in the evidence.

You should consider the following elements of damages:

1. The physical pain and mental suffering plaintiff has experienced and is reasonably certain to experience in the future;

2. The nature and extent of plaintiff's injury, whether the injury is temporary or permanent including any aggravation of a pre-existing condition;

3. The reasonable expenses of medical care and supplies reasonably needed by and actually provided to plaintiff to date and the present value of reasonably necessary medical care and supplies reasonably certain to be received in the future;

4. The earnings plaintiff has lost to date and the present value of earning plaintiff is reasonably certain to lose in the future.

You must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy. You may not include in you award any sum for court costs or attorneys' fees.

The burden is on the plaintiff to prove by a preponderance of the evidence:

1) the injuries complained of by him exist; and

2) those injuries are the result of defendant's negligence, if any, in connection with plaintiff's work activities.

Defendant is not to be held responsible for any ailments which plaintiff may suffer which resulted from any cause other than that proved by a preponderance of the evidence. Any physical disability which you find to be attributable to any prior or subsequent incident or illness and which

is not a direct result of the conduct for which you have found defendant liable cannot be a basis for any part of an award of damages.

You are to make a determination of plaintiff's total damages. Do not reduce that amount by any percentage of negligence that you have found by the preponderance of the evidence to be attributable to him. I will complete the final computation when appropriate.

19. Bodily Injury, Physical Pain and Mental Suffering

You should compensate plaintiff for any bodily injury and any resulting pain and suffering, disability, disfigurement, mental anguish, and, loss of capacity for the enjoyment of life experienced in the past and that you find from the evidence that the plaintiff is reasonably certain to suffer in the future from the injury in question.

Neither party has any burden of producing evidence of the value of such intangibles as mental or physical pain and suffering.

You are not trying to determine a value, but rather an amount that will fairly compensate plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage.

Any such award should be fair and just in the light of the evidence.

20. Pre-Existing Conditions

You should compensate plaintiff for any aggravation of an existing disease or physical defect or activation of any such latent condition resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation.

However, if you cannot make the determination or if it cannot be said that plaintiff's condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

21. Present Value of Future Loss

If you find that plaintiff is reasonably certain to lose earnings in the future or to incur medical expenses in the future, then you must determine the present value in dollars of such future damage, because the award of future damages necessarily requires that payment be made now in one lump sum and plaintiff will have the use of the money now for a loss that will not occur until some future date.

You must decide what those future losses will be and then make a reasonable adjustment for the present value.

22. Plaintiff's Life Expectancy

The life expectancy in this country of a male person 62 years of age is 80.4 years.

This expression of life expectancy is merely an estimate of the probable average remaining length of life of all persons in the United States of a given age and sex. This estimate is based upon a limited record of experience. The inference that may reasonably be drawn from such estimate of life expectancy applies only to one who has the average health and exposure to danger of people of that age and sex.

In determining the reasonably certain life expectancy of plaintiff, you should consider, in addition to the estimate of 80.4 years, all other facts and circumstances in evidence bearing on plaintiff's life expectancy, including his occupation, habits, past health record and present state of health.

When considering life expectancy, in determining any reasonably certain future damage, keep in mind the distinction between entire-life expectancy and work-life expectancy, which is shorter than entire-life expectancy. You can determine lost earnings, if any, only on the basis of plaintiff's remaining work-life expectancy, not his entire-life expectancy.

23. Income Tax Effects

Plaintiff will not be required to pay any federal or state income taxes on any amount that you award.

When calculating lost earnings, if any, you should, however, use after-tax earnings.

24. Mitigation of Damages

Plaintiff must make every reasonable effort to minimize or reduce his damages for loss of earnings by seeking employment. This is referred to as "mitigation of damages."

The defendant has the burden of proving by a preponderance of the evidence that plaintiff failed to mitigate his damages for loss of earnings.

If you determine plaintiff is entitled to lost earnings, you must reduce the loss by:

1. What plaintiff has actually earned since leaving the defendant; and

2. What plaintiff could have earned by reasonable effort during the period from when he last worked for the defendant until the date of trial.

Plaintiff must accept employment that is "of a like nature." In determining whether employment is "of a like nature," you must consider:

1. The type of work

2. The hours worked

3. The compensation

4. The job security

5. The working conditions

6. Other conditions of employment

You must decide whether plaintiff acted reasonably in not seeking or accepting a particular job. If you find plaintiff did not make reasonable efforts to obtain another similar job, you must decide whether any damages resulted from plaintiff's failure to do so.

You must not compensate plaintiff for any portion of his loss of earnings resulting from his failure to make reasonable efforts to reduce his loss of earnings.

25. Nominal Damages

If you find that the plaintiff is entitled to a verdict in accordance with these instructions, but do not find that the plaintiff has sustained actual damages, you may return a verdict for the plaintiff in some nominal sum such as one dollar.

The fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in any way as an indication that I believe the plaintiff should, or should not, prevail in this case.

26. Deliberations; Verdict

On retiring to the jury room, you should select a foreperson. That member of the jury will preside over your deliberations and sign any communications with the Court before the final return of your verdict. Status as a foreperson does not give that individual any greater weight or say in your deliberations. You all participate as equals in the discussion.

Only discuss the case when all of you are present in the jury room – and only discuss it in the jury room. Do not talk with anyone else about the case until after you have returned your verdicts and been discharged.

Your verdict must represent the considered judgment of each juror.

To return a verdict, it is necessary that each juror agree thereto: your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges–judges of the facts in this case. Your sole interest is to seek the truth from the evidence in the case.

I have prepared verdict forms for you to sign once you have reached your unanimous verdicts.

Once you have reached your verdicts, fill out the form so that it accurately reflects those verdicts and place the date, time and your signatures on the form.

[Explain verdict and interrogatories]

If, during your deliberations, you desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson, and give the note to the Clerk, who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

With regard to any message or question you might send, never state or specify your numerical division at the time.

If you recess during the day or adjourn for the night, notify the Clerk that you are doing so. You alone determine when to deliberate. If you desire meals or other amenities, notify the Clerk.

The mark-up of these instructions and exhibits will be sent to the jury room shortly.