

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

DONALD L. FAIN,

Plaintiff,

v.

NORFOLK SOUTHERN
RAILWAY COMPANY,

Defendant.

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Cause No. 3:03-CV-342 PS

COURT'S FINAL JURY INSTRUCTIONS

Date: January 14, 2005

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT

Court Instruction No. 1

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me.

Neither by these instructions, nor by any ruling or remark I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be. You are the sole judges of the facts.

Court Instruction No. 2

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both 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 the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair trial at your hands, and a corporate entity such as defendant Norfolk Southern Railway Company (“Norfolk Southern”) is entitled to the same fair trial as an individual. The law respects all persons equally; all persons, including Donald L. Fain (“Donald Fain”) and Norfolk Southern, stand equal before the law and are to be dealt with as equals in a court of justice.

Court Instruction No. 3

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term “evidence” includes sworn testimony of the witnesses, the exhibits admitted into evidence, evidence judicially noticed, and any stipulated facts. A stipulation is an agreed statement of facts between the parties, and you should regard such agreed statements as true. Any evidence to which I sustained an objection or that I ordered stricken must of course be disregarded. The only issues to be determined by you are those which I will set out in detail later in these instructions.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their respective sides of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding on you.

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

In determining any fact in issue you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Court Instruction No. 4

There are two types of evidence: direct and circumstantial. Direct evidence is the direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances that tend to show whether or not an asserted fact is true. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict

Court Instruction No. 5

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness you should consider: the witness’s relationship to any of the parties; the witness’s interest, if any, in the outcome of the case; the witness’s manner of testifying; the witness’s opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness’s candor, fairness and intelligence; and the extent to which the witness’s testimony has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The testimony of a single witness that produces in your minds a belief in the likelihood of its truth is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

Similarly, the weight of the evidence is not necessarily determined by whether the evidence is in the form of a document or the oral testimony of a witness. It is for you to determine based upon the circumstances surrounding each document and each piece of testimony what weight to give to that evidence.

Court Instruction No. 6

The law does not require any 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 at issue in this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned during this trial.

Court Instruction No. 7

A witness may be discredited or “impeached” by contradictory evidence, by a showing that he or she testified falsely concerning a material matter or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony.

If you believe that any witness has been so impeached, then it remains your exclusive province to give the testimony of that witness such credibility or weight, if any, that you think it deserves.

Court Instruction No. 8

When any witness is questioned about an earlier statement that the witness may have made, or earlier testimony that the witness may have given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of the witness's testimony at the trial. In addition, if that earlier statement was made under oath and is inconsistent with the witness's testimony at the trial, you may consider that earlier sworn statement as evidence of the truth or accuracy of such earlier statement.

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with the witness's trial testimony is entirely for you to determine.

Court Instruction No. 9

The purpose of the attorneys' opening statements is to acquaint you in advance with the facts the attorneys expect the evidence to show. The purpose of the attorneys' closing arguments is to discuss the evidence actually presented. Opening statements, closing arguments and other statements of counsel should be disregarded to the extent that they are not supported by the evidence.

During the course of a trial it often becomes the duty of counsel to make objections and for me to rule on them in accordance with the law. The fact that an attorney made objections should not influence you in any way. Nor should the nature or manner of my ruling on any objection influence you in any way.

Whenever I have sustained an objection to a question addressed to a witness you must disregard the question entirely, and draw no inference from the wording of it, or speculate as to what the witness would have said if he or she had been permitted to answer the question. You should also disregard any answer the witness may have given prior to my ruling on the objection.

Court Instruction No. 10

The burden of proof in this case is by a preponderance of the evidence, which means that you must be persuaded considering all of the evidence in the case, that the proposition on which the party has the burden of proof is more probably true than not true. When I say “if you find” or “if you decide” I mean if you find or if you decide by a preponderance of the evidence.

Court Instruction No. 11

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him or her what he or she would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

Court Instruction No. 12

During the trial, certain testimony was presented to you by the playing of video depositions. This testimony is entitled to the same consideration you would give it had the witness personally appeared in court.

Court Instruction No. 13

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved requires knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding on you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in light of all the evidence in the case.

Court Instruction No. 14

Plaintiff claims damages under the Federal Employer's Liability Act or "FELA" for personal injuries alleged to have been suffered as a result of the negligence of defendant Norfolk Southern.

Defendant Norfolk Southern asserts a defense that plaintiff, Donald Fain, was not injured as a result of any negligence by the defendant Norfolk Southern, and that instead he was injured as a result of his own negligence.

Court Instruction No. 15

Section 1 of the Federal Employer's Liability Act or "FELA" under which the plaintiff, Donald Fain, claims the right to recover damages against Norfolk Southern in this action, provides in part that:

Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51 (1999).

It is agreed that, at the time and place alleged by plaintiff, Donald Fain, the defendant was a common carrier by railroad, engaged in interstate commerce; that plaintiff, Donald Fain, was then an employee of the defendant railroad, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case against defendant Norfolk Southern is governed by the provisions of the Federal Employer's Liability Act.

Court Instruction No. 16

On the plaintiff's FELA claim the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the defendant was negligent; and
2. the defendant's negligence was a cause of an injury to the plaintiff.

If you find that both of these elements have been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

If you find for the plaintiff, you should then consider Norfolk Southern's defense. With respect to the June 19, 2002, incident, defendant Norfolk Southern, has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff was negligent; and
2. the plaintiff's negligence was a cause of the plaintiff's own injury.

If you find that both of these elements on which Norfolk Southern has the burden of proof have been proved, the plaintiff's recovery will be reduced by the percentage of fault attributable to the plaintiff.

Court Instruction No. 17

“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. It is the failure to use ordinary care under the circumstances in the management of one’s person or property.

Court Instruction No. 18

For purposes of plaintiff's action against defendant, Norfolk Southern, injury or damages are said to be caused or contributed to by any act or failure to act when it appears from a preponderance of the evidence in the case that any act or omission of Norfolk Southern played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of Norfolk Southern contributed in any way toward any injury or damage suffered by plaintiff Donald Fain, you may find that such injury or damage was caused, in whole or in part, by Norfolk Southern's act or omission.

Stated differently, an act or omission is the cause of injury or damage if the injury or damages would not have happened but for the act or omission, even though the act or omission of Norfolk Southern combined with other causes.

This does not mean that the law recognizes only one cause of an injury or damage, consisting of only one fact or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage. In such a case, each may be a cause for the purposes of determining liability.

Court Instruction No. 19

Since a corporation can act only through its officers, or employees, or other agents, the burden is on plaintiff, Donald Fain, to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the defendant Norfolk Southern, was a cause of any injuries and consequent damages sustained by the plaintiff.

In other words, any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his or her duties, is held in law to be the negligence of the corporation.

Court Instruction No. 20

It was the continuing duty of Norfolk Southern, as an employer, at the time and place in question, to use ordinary care under the circumstances in furnishing the plaintiff, Donald Fain, with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This is an affirmative non-delegable duty. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work, and the mere fact that an accident happened, standing alone, does not require the conclusion that the accident was caused by anyone's negligence. The extent of the defendant's duty is to exercise ordinary care under the circumstances to see that the place in which the work is to be performed is reasonably safe.

Court Instruction No. 21

The term “ordinary care” is that care that reasonably prudent people exercise in the management of their own affairs in order to avoid injury to themselves or their property or the persons or 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 the light of all the surrounding circumstances as shown by the evidence of the case.

Court Instruction No. 22

If you should find from a preponderance of the evidence that defendant Norfolk Southern was negligent, you must consider whether plaintiff Donald Fain was also negligent and whether such negligence was a legal cause of the plaintiff's own injury.

Section 3 of the FELA provides in part that:

In all actions . . . brought against any . . . common carrier by 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.

45 U.S.C. § 53 (1999).

If you should find, from a preponderance of the evidence in the case, that Norfolk Southern was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff, you must then decide whether Donald Fain was himself negligent. If you find, from a preponderance of the evidence in the case, that the plaintiff, Donald Fain, himself was guilty of some negligence which contributed, in whole or in part, toward bringing about his own injury, you must specify the percentage of negligence you attribute to both the plaintiff Donald Fain, and to defendant Norfolk Southern.

A document entitled "Special Interrogatories to the Jury" is being provided to assist you in this process.

Court Instruction No. 23

I will now instruct you concerning the plaintiff, Donald Fain's claims of damages. The fact that I give you instructions regarding damages does not mean that I believe the plaintiff is entitled to recover or not recover damages in this case, that is entirely up to you. Instructions about damages are given to you merely as a guide in the event that you find from a preponderance of the evidence that the plaintiff is entitled to recover, since it is my duty to charge you fully on all the law that may be applicable to this case.

Court Instruction No. 24

If you find from a preponderance of all the evidence that the defendant, Norfolk Southern, is liable to the plaintiff and that its negligence caused the plaintiff to suffer damages, you must decide the total amount of money that would fairly compensate the plaintiff for each proven element of damage.

In deciding these damages, you may consider the following elements:

The nature and extent of the injuries and the effect of the injuries on the plaintiff's ability to function as a whole person.

Whether the injuries are temporary or permanent.

The physical pain and mental suffering experienced and reasonably certain to be experienced in the future due to the injuries.

The value of lost earnings and loss or impairment of earning capacity.

Remember, throughout your deliberations 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 your award any sum for court costs or attorney fees.

If you assess a percentage of negligence to plaintiff, do not diminish the total amount of damages by the percentage of negligence you assess to plaintiff. The court will do this computation.

Court Instruction No. 25

If you should find that defendant Norfolk Southern has proved, by a preponderance of the evidence, that plaintiff Donald Fain within the limitations of any disability the plaintiff may have sustained failed to seek out or take advantage of a business or employment opportunity that was reasonably available to him under all the circumstances shown by the evidence, then you should reduce the amount of plaintiff Donald Fain's damages by the amount he could have reasonably realized if he had taken advantage of such opportunity.

Court Instruction No. 26

If you find for plaintiff Donald Fain, you should compensate him for any bodily injury and any resulting pain and suffering, disability, 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. No evidence of the value of such intangible things as mental or physical pain and suffering has been or need be introduced.

In that respect it is not value you are trying to determine, but an amount that will fairly compensate plaintiff Donald Fain 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.

Court Instruction No. 27

If you find for plaintiff Donald Fain, you should compensate him 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 that 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.

Court Instruction No. 28

If you find that plaintiff Donald Fain is reasonably certain to lose earnings in the future then you must determine the present value in dollars of such future damage, since 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. Therefore, you must decide what those future losses will be and then make a reasonable adjustment for the present value.

Non-economic damages, such as pain and suffering and disability are not reduced to present value.

“Present value” means the sum of money now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages will be incurred or would have been received.

The rate of return to be applied in determining present value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill. You should also consider decreases in the value of money which may be caused by future inflation.

Court Instruction No. 29

Plaintiff, Donald Fain, will not be required to pay any federal or state income taxes on any amount that you award. Thus, when calculating Donald Fain's lost earnings, if any, you should use after tax earnings.

Court Instruction No. 30

Upon retiring to the jury room, you should first select one of your number to act as your foreperson. The foreperson will then preside over your deliberations and act as your spokesperson here in court.

You will take the “Special Interrogatories to the Jury” and verdict forms with you to the jury room. When you reach unanimous agreement as to your verdict, the foreperson should fill in the verdict form, all of you should sign it, and then you should tell the court security officer to inform me that you have reached a verdict.

If, during deliberations, you should desire to communicate with the court, please reduce your message or question to writing and have the foreperson sign the note and include the date and time. Then, pass the note to the courtroom security officer, 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 in person.

With respect to any message or question that you provide to the court during your deliberations, please be advised of the following rules. First, do not state or specify, your numerical division at any time; that is, do not inform the court or even hint at how many among you were or are in favor or against reaching any particular verdict. Also, please be advised that the court cannot supply you with transcripts of any of the trial testimony.

Court Instruction No. 31

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own view, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to seek the truth from the evidence on the case.