No. 1-22-1583

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BILLY GUTHRIE, **Plaintiff-Appellee,** **vs.** **CSX TRANSPORTATION, INC.,** **Defendant-Appellant.**	**Appeal from the Circuit Court of Cook County, Law Division** **Case No. 2018 L 008451** **Honorable Karen L. O'Malley, Judge Presiding**

BILLY GUTHRIE'S ANSWER IN OPPOSITION TO CSX TRANSPORTATION'S RULE 308 APPLICATION FOR LEAVE TO APPEAL

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Summary

Billie Guthrie worked for CSX railroad beginning in 1981. After retirement in 2007, he was diagnosed with cancer. He brought a negligence action for damages against CSX under the FELA, alleging his exposure to environmental tobacco smoke ("ETS") during his railroad work caused his cancer. His industrial hygiene expert concluded CSX knew or should have known of the dangers of ETS exposure before 1981 but did not implement any limitations on workplace smoking until years later, and even then did not enforce the limitations it imposed, failing its duty to provide a safe workplace.

CSX sought summary judgment. It argued 1989 and 1990 decisions of the Public Law Board, an arbitral body for labor disputes under the Railway Labor Act ("RLA"), involving other railroads and their unions "preempted" Mr. Guthrie's FELA action, because those decisions "barred" or "estopped" it from prohibiting smoking indoors.

The trial court denied summary judgment, holding Public Law Board actions under the RLA do not preclude FELA claims, citing *Atchison Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). But it certified under Rule 308 whether a FELA claim can allege "breach of duty for failure to implement a workplace smoking ban during a period in which railroads were prohibited from unilaterally banning smoking by controlling decisions of the Public Law Board."

This Court should deny CSX's application for leave to appeal. The certified question is improper for Rule 308 review and depends on

the resolution of a host of disputed facts. There is no substantial ground for a difference of *legal* opinion whether Public Law Board decisions involving other railroads legally prohibited CSX from doing anything. The uniform law of the United States is they did not.

Instead, viewing the record most favorably to Mr. Guthrie, whether CSX's reliance on the Public Law Board decisions involving other railroads was reasonable is a disputed question of *fact*. CSX's only support is its expert's opinion, which Mr. Guthrie's expert countered. Moreover, Mr. Guthrie's claims go far beyond just not "banning" smoking in 1989-1990, but instead concern the railroad's failure to implement any smoking limitations as early as 1981 and then its failure to enforce the limitations it eventually implemented. Answering the certified question will not materially advance this case.

Statement of Necessary Facts

A. The facts must be viewed in the light most favorable to Mr. Guthrie, the summary judgment non-movant below.

When a Rule 308 certified question arises in an order denying a motion for summary judgment, the summary judgment standard of review of the facts continues to apply in this Court, just as it did in the trial court. *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 831 (1st Dist. 2004) (applying summary judgment standard of review of facts in answering Rule 308 certified question).

Therefore, "the motion and supporting documents must be viewed in a light most favorable to the nonmoving party." *Id.* Here, that is Mr. Guthrie.

Rule 308(c) requires an application for leave to appeal a certified question must "contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court." CSX's application contains what it calls a "statement of necessary facts" (App. 1-10). But it wholly fails to view the facts in the light most favorable to Mr. Guthrie, the summary judgment non-movant, as the standard of review requires. Mr. Guthrie offers this statement of facts to correct CSX's failure.

B. Mr. Guthrie's claims and Dr. Vance's conclusions

Plaintiff-Appellee Billy Guthrie, born in 1949, worked for Defendant-Appellant CSX Transportation, Inc., and its predecessors from 1981 through 2007, when he retired (Supplementary Supporting Record ["Supp. SR"] 5). Thereafter, he was diagnosed with squamous cell tongue cancer (Supp. SR 5).

In 2018, Mr. Guthrie filed a negligence action for damages against CSX under the FELA, 45 U.S.C. § 51, in the Circuit Court of Cook County, alleging his exposure to carcinogens during his railroad employment caused his cancer (CSX's Supporting Record ["SR"] 5). By the time of the summary judgment proceedings below that CSX's present application concerns, his claim was exposure to secondhand tobacco smoke during his railroad work, otherwise known as "environmental tobacco smoke" or "ETS," caused his cancer (SR 5).

As Mr. Guthrie's industrial hygienist expert, Dr. R. Leonard Vance, Ph.D., concluded,[1] Mr. Guthrie, who never used any tobacco,

> was exposed to his co-workers' tobacco smoke from the time he began work in 1981 until his retirement in 2007. During his early years with the Railroad, most co-workers smoked in the workplace. Fellow employees smoked inside trucks transporting him to work sites. They smoked inside buildings and in lodging he shared with them. They smoked at lunch. Often they were right next to him, smoking. The Railroad allowed its employees to smoke at will, anywhere. Mr. Guthrie would move away from smokers when he could, but that was often impossible. There were no signs prohibiting smoking.

(Supp. SR 6). Dr. Vance also recounted Mr. Guthrie's testimony that the smoking limitations CSX eventually did make were not enforced, and coworkers smoked by him despite those policies (Supp. SR 6-7).

Dr. Vance stated the dangers of ETS became widely known after a Surgeon General's report in 1972, followed by warnings to employers of the dangers of ETS from the National Institute for Occupational Safety and Health ("NIOSH") in 1979, the Environmental Protection Agency Office of Policy Analysis in 1981, a report from the Surgeon General in 1986 stating "involuntary smoking" is a cause of cancer in healthy nonsmokers, and again a NIOSH warning in 1991, which noted ETS resulted in benzene exposure (Supp. SR 7).

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[1] CSX omitted Dr. Vance's 2021 report from its supporting record and only included one page of his 2022 supplemental report. Both reports are contained in full in Mr. Guthrie's supplementary supporting record.

Dr. Vance concluded CSX knew of or should have known of the dangers of ETS before Mr. Guthrie began working there in 1981 (Supp. SR 27), but failed to prohibit smoking in the workplace in a timely manner, which failed its duty to provide a reasonably safe workplace and so fell below a reasonable standard of care (Supp. SR 29).

C. Dr. Bullock's conclusions and Dr. Vance's response

In response, CSX proffered Dr. William H. Bullock, DHSc, as both its corporate representative and its own expert (SR 162).

In its application, CSX presents as a flat fact that decisions of the Public Law Board "eliminated unilateral smoking bans as an available option" (App. 8). But all it cites for this is Dr. Bullock's deposition (SR 157 p. 71). Then, not citing any record at all, CSX further asserts "[i]t is undisputed that CSXT made diligent efforts to secure the union consent mandated by the Law Board rulings and to restrict or eliminate workplace smoking to the greatest extent possible" (App. 8).

CSX's suggestion that it is "undisputed" that it was precluded, prohibited, or banned in any way from prohibiting smoking in the workplace is wrong. This issue was hotly disputed in the trial court.

Dr. Bullock stated CSX implemented policies prohibiting smoking in certain areas in 1978, thought did not detail these (SR 164). He noted that *other* railroads, specifically Norfolk Southern and Amtrak, sought to prohibit smoking in the workplace in 1989, but *their* unions challenged it, resulting in arbitration decisions before a Public Law Board in *those* cases in 1989 and 1990 disallowing *those* railroads from

implementing smoking bans unilaterally (SR 91, 119, 122, 128, 135, 137, 164).

CSX was not a party to any of these rulings (SR 91, 119, 122, 128, 135, 137). Instead, CSX never attempted a unilateral smoking ban or engaged in any collective bargaining on the subject (SR 158-59). Rather, it made a policy limiting smoking in some areas from 1990-1995, which Dr. Bullock stated would have been enforced through employee complaints, though he had no idea whether such complaints were recorded, and the policy was not enforced between 1991 and 1993 (SR 147, 149, 158-59). CSX eventually banned smoking in all enclosed spaces in 1999, having not previously banned smoking in vehicles at all (SR 143, 147, 158-59). Even then, Dr. Bullock had no idea how that policy was monitored (SR 148-49). Mr. Guthrie had testified this policy was not enforced (Supp. SR 6-7).

Below, CSX did not introduce any evidence of its smoking policies before 1989. It did not introduce any of its collective bargaining agreements, either.

After reviewing Dr. Bullock's report, deposition, and its exhibits, Dr. Vance prepared a supplemental opinion stating Dr. Bullock's statements did not change his opinions:

> Railroads were on notice by at least 1972 of the carcinogenicity of ETS in the workplace. See the 1972 Surgeon General's Report, The Health Consequences of Smoking, cited in my initial February 28, 2021 report. Workplace smoking policies adopted by CSX in 1987, 1991, 1993, and 1999, and as described by Dr. Bullock, were not enforced with respect to Mr. Guthrie during his years of

> work, 1981-2007, except for the last two or three years he worked, and came too late. CSX could have engaged in collective bargaining to engage in ETS mitigation at any time after the issuance of the 1972 Surgeon General's Report. Dr. Bullock's testimony that CSX had to await dispute resolution involving other railroads is not supported by the decisions cited as exhibits or by collective industry knowledge since 1984 or earlier. It was well known by at least 1984 that ETS was an important employment health concern to be addressed by individual railroads.

(Supp. SR 1).

Dr. Vance attached a report of the Association of American Railroads from June 1984, which CSX omitted from its supporting record, discussing the need for smoking policies to separate smokers from non-smokers, including "considerations of banning smoking at all office facilities including meetings whether within the company's facilities or in outside facilities" (SR 3).

D. Summary judgment proceedings

CSX moved for summary judgment on Mr. Guthrie's FELA claim (SR 71). One of its arguments was the trial court lacked jurisdiction because the claim was "preempted"[2] by the Public Law Board decisions arbitrating the Norfolk Southern and Amtrak disputes under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, "since there can be no duty on a railroad under the [FELA] to violate controlling law" (SR 71).

Drawing solely on Dr. Bullock's testimony, CSX argued the Public Law Board decisions involving Norfolk Southern and Amtrak

[2] CSX now uses the term "preclusion" or "precluded" (App. 1-4, 9-14).

meant it was "prohibited" or "estopped" from banning smoking (SR 73-75). It argued it therefore could not be negligent under the FELA, as it was complying with federal law, analogizing this to compliance with other laws that had been held to preclude FELA actions (SR 76).

In response, Mr. Guthrie pointed out that taking Dr. Vance's statements as true, it was not merely CSX not banning smoking from 1989 to 1999 that was at issue, but CSX's failure to limit smoking at all, having known of the dangers of ETS before 1981, as well as its failure to enforce the policies it eventually did implement (SR 16-17, 24, 29-32). He argued Dr. Bullock's assertion that the Public Law Board's decisions involving other railroads meant CSX could not limit smoking was a question of fact, not law:

> What we're talking about is at best a defense that they might be able to raise to a jury saying, look, we tried to implement it. We were told that we shouldn't. We were told that we couldn't, and so we just sort of waited until a federal court told us that we could. Now, that has nothing to do with the knowledge that they knew that smoking was harmful years before and has nothing to do with the fact that they didn't do anything while this was pending.

(SR 17). He argued,

> At best what the railroad can say in front of the jury in this case is that, okay, we were aware that smoking was a problem. We were aware of the Surgeon General's warning in 1972 and then again in the '80s. I forget exactly when -- and we decided to address it, and we decided to implement it. I think the earliest they did it was '89, but I think CSX actually was in the '90s. And it took some time, but that has nothing to do with preempting a railroad worker's injury claim.

(SR 21).

The trial court denied CSX's motion for summary judgment (SR 1). It held that because no state-law claims were at issue, the question was "whether or not in this case when we have two federal statutes whether one federal statute precludes a claim under another federal statute," not preemption (SR 53). It pointed to the U.S. Supreme Court's decision in *Atchison Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), which it stated held "the fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration did not deprive the worker of its opportunity to bring a FELA Act for damages as there was no basis to find that the RLA provided exclusive remedy or the injuries alleged" (SR 53-54).

Therefore, the court did "not find that the RLA and decisions made pursuant to the RLA preclude an action under the FELA given the facts presented here. And the Court does not find that one federal statute here, the RLA, would preclude the claim brought by the plaintiff under the FELA act" (SR 55).

Over Mr. Guthrie's objection (SR 66), however, the trial court certified this question to this Court under Supreme Court Rule 308:

> Whether a plaintiff can assert a claim for negligence under the Federal Employer's Liability Act (45 U.S.C. § 51, et seq.) based on a railroad's alleged breach of duty for failure to implement a workplace smoking ban during a period in which railroads were prohibited from unilaterally banning smoking by controlling decisions of the Public Law Board applying the Railway Labor Act (45 U.S.C. § 153 First).

(SR 2).

Argument

A. Rule 308 appeals of certified questions are limited to the exact question certified, and where answering such a question would require resolution of any disputed factual issues, the question is improper for Rule 308 review and leave to appeal should be denied.

Illinois Supreme Court Rule 308 allows a trial court to certify to this Court in an interlocutory order "a question of law as to which there is substantial ground for difference of opinion" when "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The appellant then must apply in this Court for leave to appeal that question, which requires the appellant to prove to this Court that all the requisites are present: (1) a question of law, (2) for which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id.*

"Appeals under Illinois Supreme Court Rule 308 should be reserved for exceptional circumstances, and the rule should be sparingly used." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. They "should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law and where a determination of the issue would materially advance the litigation." *Kincaid v. Smith*, 252 Ill.App.3d 618, 622 (1st Dist. 1993). "The rule should be strictly construed and sparingly exercised." *Id.*

At the outset, the certified question must be a pure question of law, without any factual resolution needed at all. "By definition, certified questions are questions of law subject to de novo review." *Rozsavolgyi*, 2017 IL 121048, ¶ 21. This means they "must not seek an application of the law to the facts of a specific case." *Id.* And "[i]f addressing a certified question will result in an answer that is advisory or provisional, the certified question should not be reached." *Id.*

So, "if an answer is dependent upon the underlying facts of a case, the certified question is improper." *Id.* "As too often happens, a certified question is framed as a question of law, but the ultimate disposition depends on 'the resolution of a host of factual predicates.'" *Id.* (quoting *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 32 (citation omitted). If so, leave to appeal should be denied. *Id.*

At the same time, an appeal under Rule 308 "must be strictly limited to the question certified by the trial court and this court should not expand upon the question to answer other issues that might have been included." *McMichael v. Michael Reese Health Plan Found.*, 259 Ill. App. 3d 113, 116 (1st Dist. 1994). This means that if the question is incorrectly worded or overbroad, this Court should decline to answer it. *Rozsavolgyi*, 2017 IL 121048, ¶ 26.

Therefore, whenever resolution of a certified question "will depend on the resolution of a host of factual predicates," "any answer [in a Rule 308 appeal] would be advisory and provisional," and so the Court should deny leave to appeal it. *Morrissey v. City of Chicago*, 334

Ill. App. 3d 251, 258 (1st Dist. 2002) (quoting *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 469 (1998)). This is true whenever "[t]he certified question, as phrased, necessarily involves factual considerations and can only be answered equivocally." *Id.*

For example, when viewing the record most favorably to a summary judgment non-movant, the movant is not entitled to summary judgment, and the certified question arose in the order denying that motion for summary judgment, a Rule 308 appeal is improper. *Id.* (denying leave to appeal for this reason). Leave to appeal must be denied whenever "[t]he record on appeal … discloses a number of factual variables which present a range of possible conduct by the defendants but remain unresolved." *Dowd & Dowd*, 181 Ill. 2d at 476. So, when the issue is the scope of a duty, and it remains a factual issue whether the defendant has breached that duty, leave to appeal must be denied. *Id.* (denying leave to appeal for this reason).

B. The Court should deny CSX's application for leave to appeal, because the certified question depends first on the resolution of a number of unresolved factual disputes, does not involve a legal question for which there is a substantial ground of difference, and an answer would be equivocal and advisory at most.

In this case, as in *Dowd*, *Morrisey*, and *Rozsavolgyi*, the Court should deny CSX's Rule 308 application for leave to appeal because the resolution of the certified issue depends on the resolution of a host of factual disputes. Viewing the record in the light most favorable to Mr. Guthrie, the non-movant, CSX could not have been entitled to

summary judgment, making Rule 308 review improperly advisory and equivocal.

Like the certified questions in *Dowd* and *Morrisey*, the question the trial court certified here presumes facts that remain in dispute. It asks whether a FELA negligence claim lies for failure to implement a workplace smoking ban "during a period in which railroads were prohibited from unilaterally banning smoking by controlling decisions of the Public Law Board applying the Railway Labor Act (45 U.S.C. § 153 First)." But whether this was so at all – whether CSX was "prohibited" from banning smoking – is plainly a disputed question of fact. Leave to appeal should be denied for this reason alone.

1. Whether the Public Law Board's decisions in individual arbitrations involving solely other railroads actually "prohibited" CSX from limiting smoking at any time is a disputed question of fact, not a question of law.

Perhaps knowing this is a problem for it, CSX attempts to frame the issue whether it could have prohibited smoking at all as "undisputed" that decisions in 1989 and 1990 of the Public Law Board "eliminated unilateral smoking bans as an available option" and it "made diligent efforts to secure the union consent mandated by the Law Board rulings and to restrict or eliminate workplace smoking to the greatest extent possible" (App. 8). But its only source for this is Dr. Bullock's testimony (App. 8) (citing SR 157). Conspicuously, CSX cites no legal authority at all how Public Law Board decisions involving *other* disputes between *other* railroads and *their* unions *legally bound* it

from limiting smoking at all. Instead, Dr. Bullock's testimony was that this was as a reasonable matter, not a legal prohibition (SR 157).

CSX's suggestion that this is in any way an undisputed issue is wholly untrue. Not a single one of the Public Law Board's arbitration decisions CSX cites involved CSX. And they were only in 1989 and 1990. As Mr. Guthrie's expert, Dr. Vance, explained, "CSX could have engaged in collective bargaining to engage in ETS mitigation at any time after the issuance of the 1972 Surgeon General's Report. Dr. Bullock's testimony that CSX had to await dispute resolution involving other railroads is not supported by the decisions cited as exhibits or by collective industry knowledge since 1984 or earlier" (Supp. SR 1).

In the only two decisions CSX cites in which a railroad's compliance with another federal law were held to preclude a FELA action based on that compliance, two things were present that are plainly absent here: (1) an express federal law or regulation that applied directly to the railroad at issue; and (2) no dispute of fact that the railroad complied with that law or regulation. *See Bahus v. Union Pac. R.R. Co.*, 2019 IL App (1st) 180722, ¶ 63 ("The record is undisputed that the placement of the retrofitted GURU valves was a question of engine design and that Union Pacific followed the manufacturer's directions in installing the valves," in compliance with Locomotive Inspection Act, so FELA claim for that placement was precluded because no dispute that duty was not breached, summary judgment affirmed); *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773,

775 (7th Cir. 2000) (undisputed that railroad complied with Federal Railroad Safety Authorization Act in adequacy of crossing warning devices and railroad speed, so FELA claim of inadequate warning and excessive speed precluded, because no dispute that duty was not breached, summary judgment affirmed). These were issues of fact, and the facts were undisputed that the railroads had complied with the laws that directly governed the respective plaintiffs' claims.

2. Public Law Board decisions are not preclusive of court actions over issues they decide even as to the parties before them, and there is no substantial ground for difference of opinion otherwise.

Both factors are absent here. First, nothing besides Dr. Bullock's testimony, which Dr. Vance disputed, suggests the Public Law Board's decisions in collective bargaining arbitration cases involving Norfolk Southern and Amtrak "prohibited" (as the trial court put it in the certified question) CSX from unilaterally limiting smoking. Indeed, the presence of two separate arbitrations, one involving Norfolk Southern and one involving Amtrak, indicates Public Law Board decisions involving one railroad *are not* binding on another railroad.

Instead, Public Law Board decisions are just individual arbitrations over individual disputes. As Dr. Vance pointed out, nothing precluded CSX from engaging in its own collective bargaining. It is entirely possible that would have turned out differently. But CSX did not try. Moreover, CSX has not introduced any of its collective bargaining agreements.

Numerous decisions from throughout the United States have confirmed Public Law Board decisions through the RLA have no preclusive effect on later litigation involving even the same issues and the same parties. The trial court cited *Buell*, 480 U.S. at 557, in which a unanimous Supreme Court held the availability of an arbitration under the RLA did not preclude an injury claim under the FELA.

CSX counters that "*Buell* addressed the preclusive effect of the RLA on *how* an employee can pursue his negligence claim, not on *whether* the railroad can be deemed negligent" (App. 11) (emphasis CSX's). But the uniformity of case law nationwide rejects applying Public Law Board decisions as preclusive of FELA actions even on claims that the Public Law Board decisions decided, because they are nothing more than regulatory arbitrations. *See, e.g.*, *Kulavic v. Chicago & Illinois Midland Ry. Co.*, 1 F.3d 507 (7th Cir. 1993) (Public Law Board decision upholding discharge of railroad employee did not have preclusive effect on his FELA claim); *Pothul v. Consolidated Rail Corp.*, 94 F.Supp.2d 269 (N.D.N.Y. 2000) (employee's FELA claim to recover future lost wages and benefits related to his personal injuries was not barred by previous Public Law Board proceedings resulting in employee's discharge for insubordination); *Graves v. Burlington N. & Santa Fe Ry. Co.*, 77 F.Supp.2d 1215 (E.D. Okla. 1999) (plaintiff entitled to present evidence as to his future earning capacity as it related to his injury under the FELA despite decision of Public Law Board); *cf. Norfolk S. Ry. Co. v. Johnson*, 740 So.2d 392, 399 (Ala. 1999)

(Public Law Board's decision finding employee made false statements and employer's termination was excessive did not preclude employee's state-law retaliatory discharge action).

This is because a Public Law Board arbitral proceeding is not "sufficiently protective of [a plaintiff's] federal statutory right to recover under the FELA." *Kulavic*, 1 F.3d at 517. This is true generally of regulatory arbitral bodies, whose decisions never have preclusive effect over statutory claims even involving the parties to the arbitrations. *See McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) (action under 42 U.S.C. § 1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII action); *Coppinger v. Metro-N. Commuter R.R.*, 861 F.2d 33, 36 (2d Cir. 1988) (same).

Indeed, in another case involving ETS, Norfolk Southern even used to its advantage the fact that one of the very Public Law Board decisions CSX invokes here was not legally preclusive. In *Thaxton v. Norfolk S. Ry. Co.*, 239 Ga. App. 18, 18, 520 S.E.2d 735 (1999), the plaintiff, a widow of a railroad worker who died of lung cancer, filed a wrongful death action against Norfolk Southern under the FELA, "claiming that his cancer was caused by the environmental tobacco smoke generated by his co-workers when he stayed in sleeping trailers while working on the railroad's tracks and railyards." When the railroad sought to attack the medical link between ETS and lung cancer, the widow moved to preclude this, relying on its statements

before the Public Law Board in the arbitration between it and its union in which it "acknowledged the causal link between environmental tobacco smoke and lung cancer." *Id.* at 23-24. The Georgia court agreed with Norfolk Southern that because the Public Law Board's decision was not a court decision, estoppel did not lie. *Id.*

Accordingly, there is no substantial ground for difference of *legal* opinion whether CSX was "prohibited," "barred," or "estopped" from instituting a workplace smoking ban because of Public Law Board decisions in individual arbitrations involving other railroads but not CSX. The uniform, complete law of the United States it that it was not.

3. Whether CSX reasonably relied on the Public Law Board decisions and its collective bargaining agreement (which is not in the record) in not prohibiting workplace smoking is an issue of fact in dispute, not an issue of law.

Instead, as Mr. Guthrie pointed out below, this is a *factual* question. It goes to a defense CSX may have that it wanted to ban smoking, but did not believe it reasonably could do so. Dr. Bullock testified that *as a reasonable matter*, the decisions of the Public Law Board in the Norfolk Southern and Amtrak arbitrations led CSX not to ban smoking in the workplace (SR 157). But Dr. Vance stated this did not actually preclude CSX from doing so, and it still breached its duty because it could have prohibited smoking earlier and engaged in its own collective bargaining despite those decisions (Supp. SR 1). On the present record, a jury could find for Mr. Guthrie that CSX breached that duty. Therefore, Rule 308 review is improper. *Morrissey*, 334 Ill. App. 3d at 258; *Dowd & Dowd*, 181 Ill.2d at 476.

The FELA gave CSX a duty to provide Mr. Guthrie "a reasonably safe workplace …." *Bahus*, 2019 IL App (1st) 180722, ¶ 33. "To show a breach of this duty, [Mr. Guthrie] 'must show circumstances in the workplace that the railroad could have reasonably foreseen as creating a potential for harm.'" *Id.* (citation omitted). Viewing the record most favorably to Mr. Guthrie, he showed that ETS in the workplace was such a harm. CSX effectively argues it did not breach that duty despite that harm, due to its collective bargaining agreement, which is not in the record, and its own internal policies were enough.

It is well-established that a railroad relying on compliance with its collective bargaining agreement or its own internal rule is a factual defense to a FELA claim, not a legal one. The FELA "expressly prohibits covered carriers from adopting any regulation, or entering into any contract, to limit their FELA liability." *Buell*, 480 U.S. at 561 (citing 45 U.S.C. § 55).

Therefore, "[a]lthough [a collective bargaining agreement] may be relevant evidence concerning whether a duty was breached, it is not determinative of that issue," and a railroad "cannot rely on the contractual provisions of [a collective bargaining agreement] to escape liability under the FELA," as "mere compliance with a CBA provision is" not "ipso facto reasonable care with respect to a negligence claim under the FELA." *Corns v. Grand Trunk W. R.R., Inc.*, No. No. 4:06-cv-150, 2009 WL 3430029, *4 (W.D. Mich. Oct. 21, 2009) (railroad's compliance with work rules set forth in a collective bargaining

agreement did not automatically absolve it of liability under FELA, denying motion to dismiss FELA claim); *see also Abernathy v. Union Pac. R.R. Co.*, No. 4:08CV04187-BRW, 2011 WL 1773087, *2-3 (E.D. Ark. May 9, 2011 (denying railroad's motion in limine to preclude evidence of inadequate train crew size due to collective bargaining agreement, holding the agreement cannot preempt a railroad's duty to provide a safe workplace); *Cato v. Atlanta & Charlotte Air Line Ry. Co.*, 164 S.C. 123, 162 S.E. 239, 247-48 (1931) (railroad's compliance with own rule it adopted could not be used as device to escape liability for its breach of its duty under the FELA to provide a safe workplace).

Rather, Mr. Guthrie's "dispute with [CSX] is not a labor dispute. It is a claim for damages for personal injuries arising from alleged negligence on the part of [CSX]. The duty to provide a safe working environment arises independently from the obligations of [CSX] under its collective-bargaining agreement." *Tyner v. Ill. Cent. R.R. Co.*, 2000 WL 516218, *3 (S.D. Miss. Apr. 24, 2000) (rejecting RLA preclusion of FELA action based on compliance with collective bargaining agreement and remanding FELA action back to state court where it was filed). Otherwise, "[a]ny allegation of railroad negligence in failing to provide an employee with [a safe working environment] could be characterized as a [labor] dispute over working conditions." *Id.* (quoting *Yawn v. S. Ry. Co.*, 591 F.2d 312, 317 (5th Cir. 1979). CSX is free to defend itself against Mr. Guthrie's claim of breach as an issue of fact, but this is not a question of law.

4. Additional disputes of fact remain precluding summary judgment for CSX, regardless of its reliance on the Public Law Board decisions.

Finally, as even CSX acknowledges (App. 14), Mr. Guthrie's claim is not limited to its failure to prohibit ETS during the 1989-1990 period when the Public Law Board actions on which CSX relies occurred, and instead remains subject to a genuine dispute of fact as to its breach of its FELA duty regardless of the Public Law Board actions.

Mr. Guthrie began working for the railroad in 1981, long before 1989. But CSX had information about the carcinogenicity of ETS in the workplace as early as 1972, and certainly knew it by the 1979 NIOSH report, yet failed to prohibit ETS or make any policy at all concerning it until much later, long after Mr. Guthrie began working (Supp. SR 6). Additionally, once the railroad did make some smoking policies, it did not enforce them (Supp. SR 6-7). Therefore, viewing the record most favorably to Mr. Guthrie and drawing all inferences in his favor, CSX already had enough evidence about the adverse health effects of ETS by the time of his employment in 1981 and could have begun actively protecting its workers from this hazard, even by less than an outright ban, but failed to do so.

Therefore, as in *Dowd*, *Morrisey*, and *Rozsavolgyi*, Rule 308 review would be improper, and the Court should deny CSX's application for leave to appeal. The answer to the question the trial court certified, as phrased, "is dependent on the underlying facts of [the] case" and "the ultimate disposition depends on 'the resolution of a

host of factual predicates,'" *Rozsavolgyi*, 2017 IL 121048, ¶ 21, including whether CSX breached its duty to provide Mr. Guthrie a safe workplace beginning in 1981, whether it could have prohibited or otherwise limited smoking inside the workplace during the period of his work, and whether the smoking limitations it did impose were effective.

Viewing the record most favorably to Mr. Guthrie, all of these issues of whether CSX breached its duty to Mr. Guthrie under the FELA are disputed. Therefore, any answer the Court could give to the certified question at this point "would be advisory and provisional." *Morrissey*, 334 Ill. App. 3d at 258 (quoting *Dowd & Dowd*, 181 Ill.2d at 469. "The certified question, as phrased, necessarily involves factual considerations and can only be answered equivocally." *Id.*

There is no substantial ground for difference of legal opinion, and given these open issues of material fact, an answer to the trial court's certified question would do nothing to materially advance the litigation.

Conclusion

The Court should deny CSX's application for leave to appeal.

Respectfully submitted,

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Certificate of Filing and Proof of Service

I certify that on November 14, 2022, I electronically filed the foregoing answer in opposition and its supplementary supporting record with the Clerk of the Appellate Court of Illinois, First District, by using the Odyssey E-Filing System.

I further certify that on November 14, 2022, I served each of the appellant's counsel named below by e-mail with copies of the foregoing answer in opposition and its supplementary supporting record:

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I certify that everything in this Certificate of Filing and Proof of Delivery is true and correct. I understand that a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

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