UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PETER DELVECCHIO,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil No. 3:03cv803 (MRK)
	:	
METRO-NORTH RAILROAD COMPANY,	:	
	:	
Defendant.		

RULING AND ORDER

This is a personal injury action arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*. Plaintiff Peter Delvecchio, a railroad conductor flagman, claims that he permanently injured his left foot while working for Defendant Metro-North Railroad Company ("Metro-North"). Specifically, Mr. Delvecchio alleges that on December 7, 2001, he was assigned to work as a flagman protecting a crew from Metro-North's outside contractor, Massachusetts Electric Construction Company ("Mass Electric"). Mr. Delvecchio was assigned to work on a Mass Electric high-rail car along with the Mass Electric crew he was protecting, and while he was disembarking from the Mass Electric high-rail car to protect the crew, Mr. Delvecchio injured his left foot. Mr. Delvecchio claims that the configuration of the sill step and handhold on the Mass Electric high-rail car was unsafe because the lone sill step was 30 inches above the top of the rail and the lone handhold by the door was 16 inches in length and 64 inches from the top of the rail. As a consequence, Mr. Delvecchio alleges that he could not step safely down to the ground and instead had to dangle from the handhold and drop down to the ballast on

the rail below, thereby occasioning the injury to his foot.

Among other evidence that Mr. Delvecchio seeks to introduce in support of his claims are photographs (Proposed Exhibit 3), testimony and other evidence (including a stipulation) establishing that in 2001, Metro-North's own high-rail cars had a different handhold and sill step configuration than the Mass Electric high-rail car to which Mr. Delvecchio was assigned on December 7, 2001. Specifically, it appears that Metro-North high-rail cars had a series of three steps along with two vertical handholds; the lowest sill step is only 10 inches from the top of the rail, which, Mr. Delvecchio claims, allows employees to safely climb down to the ground without losing contact with the steps or the handholds. Metro-North contends that such evidence is inadmissible under Rule 403 of the *Federal Rules of Evidence* on the ground that whatever probative value the evidence has is substantially outweighed by the danger of prejudice and confusion.[1] Metro-North filed both filed a Motion in Limine [doc. #30] asserting that position, and the company objected to Plaintiff's evidence in the parties' Joint Trial Memorandum [doc. #28] on the same ground.

Metro-North's argument is founded on its contention that under FELA, a railroad is not made the insurer of the safety of its employees and is not required to furnish its employees with the best, or most perfect, appliance or equipment for a job; instead, the duty of a railroad under

---

[1] Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

FELA is only to provide its employees with a "reasonably safe place to work." *See* Motion in Limine [doc # 30] at 3, 4-5 (citing cases). From this premise, Metro-North argues that Mr. Delvecchio's evidence regarding the sill step and handhold configuration of Metro-North's own high-rail cars should not be admissible, because whether purportedly better equipment existed is not probative of whether the actual equipment used was reasonably safe.

None of the cases relied on by Metro-North hold that such evidence is irrelevant *as a matter of law*, as suggested by counsel for Metro-North at the final pretrial conference. *See, e.g.*, *Stillman v. Norfolk & West. Ry. Co.*, 811 F.2d 834, 838 (4th Cir. 1987). Instead, the decisions Metro-North cites merely observe or hold that evidence of other alternatives, even safer alternatives, "does not establish negligence on the part of the railroad." *Seymour v. Illinois Cent. R.R. Co.*, 25 F. Supp. 2d 734, 738 (S.D. Miss. 1997) (emphasis added). The Court agrees. It is undoubtedly true that "proof of a safer alternative is not *necessarily* proof of negligence." *Taylor v. Illinois Cent. R.R. Co.*, 8 F.3d 584, 586 (7th Cir. 1993) (emphasis added); *Plunk v. Illinois Cent. R.R. Co.*, No. 02A1-9707-CV-00167, 1998 WL 227772, at *16 (Tenn. Ct. App. 1998). However, it is equally true that proof of alternatives is not necessarily irrelevant to the issue of a defendant's negligence.

Here, the evidence will show that at the same time as Metro-North assigned Mr. Delvecchio to work on the Mass Electric high-rail car, Metro-North was using other high-rail cars on the same line that had a different configuration. Mr. Delvecchio claims that the sill and handhold configurations of Metro-North's own high-rail cars allow for safe alighting from the cars. Mr. Delvecchio also expects to show that the Mass Electric high-rail car did not conform to certain safety standards; by contrast, the Metro-North car appears to have complied with these

standards. This case does not present a situation involving post-accident design changes; nor does this case involve purportedly safer alternatives used by other companies in the industry or for different purposes. Rather, the defendant railroad in this case was assigning its employees to work on two, quite differently configured high-rail cars. In those circumstances, the Court believes that evidence regarding the configuration of Metro-North's own high-rail cars does bear on the issue of whether the Mass Electric high-rail car to which Metro-North assigned Mr. Delvecchio was reasonably safe in view of its sill step and handhold configuration. That is, the Court concludes that the evidence Mr. Delvecchio seeks to introduce is relevant – though by no means determinative – of whether Metro North's conduct measures up to what a reasonable and prudent person would have done under the same or similar circumstances. *See*, *e.g., L.R. Willson & Sons, Inc. v. OSHRC*, 698 F.2d 507, 514 (D.C. Cir. 1983).

Of course, relevance is only a necessary prerequisite; it is not sufficient. As Rule 403 provides, there may be other factors – such as prejudice, surprise, confusion, delay and the like – that may "substantially outweigh" an item's probative value. Here, the Court believes that Metro-North is correct that this proposed evidence poses some risk of prejudice and confusion because a jury might be misled into thinking that Metro-North's obligation was to provide the safest equipment possible (as evidenced by its own cars) and not just a reasonably safe workplace (a standard that Metro-North claims the Mass Electric high-rail car satisfied). However, the Court believes that any such prejudice or danger of confusion does not "substantially" outweigh the probative value of Mr. Delvecchio's proposed evidence. And that any such prejudice or confusion can be ameliorated, if not eliminated altogether, through appropriate cautionary instructions at the time the evidence is received and in the final charge to the jury regarding

Metro-North's duty to Mr. Delvecchio.

Therefore, while the Court will permit Mr. Delvecchio to introduce evidence regarding the configuration of Metro-North's high-rail cars, the Court will also provide the jury with appropriate cautionary instructions both when the evidence is initially introduced as well as in the Court's final charge. *See, e.g., Plunk*, 1998 WL 227772, at *15 (noting with disapproval that trial court did not provide defendant "proper protection" through suitable instructions to the jury regarding proof of alternatives). The parties are directed to provide the Court with proposed language for such instructions no later than **December 13, 2004**.

Accordingly, the Court admits Plaintiff's Exhibit 3 as a full trial exhibit (subject to an appropriate cautionary instruction), and the Court DENIES Plaintiff's Motion in Limine [**doc. #30**] to the extent it sought to exclude evidence regarding the sill step and handhold configurations of the Metro-North high-rail cars that were in use in December 2001.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: December 9, 2004.