

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34156

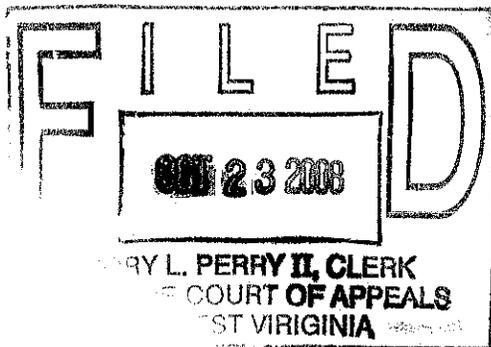
Freda M. Ratliff, Executrix
of the Estate of Sparrel Ratliff, Jr., Appellant

vs.

Norfolk Southern Railway Company, Appellee

Appeal from the Circuit Court of Kanawha County, West Virginia
The Honorable Arthur M. Recht, Judge
Civil Action No.: 02-C-9500

BRIEF OF APPELLEE NORFOLK SOUTHERN RAILWAY COMPANY



Luke A. Lafferre
West Virginia State Bar No. 2122
Alexis B. Mattingly
West Virginia State Bar No. 10286
HUDDLESTON BOLEN LLP
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722-2185
(304) 529-6181
(304) 522-4312 (fax)

*Counsel for Appellee,
Norfolk Southern Railway Company*

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I. TYPE OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is an appeal from a final order granting summary judgment to NSRC Norfolk Southern Railway Company ("NSRC") in which the lower court found that a release agreement signed by Appellant's decedent barred Appellant's claim against NSRC for the illness and death of Appellant's decedent. In October of 2005, Appellant Freda M. Ratliff sued NSRC under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, alleging that NSRC caused the illness and death of her late husband, Sparrel Ratliff, at age 78.

During the course of the litigation, NSRC discovered that Mr. Ratliff participated in a Voluntary Separation Program when he retired from his work with NSRC and that, in exchange for valid consideration comprised of a large, lump sum of money and other benefits, Mr. Ratliff had signed an all-encompassing release barring all claims against NSRC, other than those regarding vested pension rights. NSRC therefore moved for Summary Judgment because the release barred all of Appellant's FELA claims.

During the June 15, 2007 hearing on the parties' respective motions for summary judgment on the release question, the court initially was of the opinion to grant NSRC's motion, but decided to grant Appellant's request to conduct a trial only as to the issue of the intent of the parties in entering into the release agreement. However, rather than preparing for trial, at the July 20, 2007 pretrial conference Appellant renewed her Motion for Summary Judgment to bar NSRC's release defense. NSRC renewed its Motion for Summary Judgment based on the release, noting that Appellant had neither generated evidence on the issue of intent nor had moved for additional time to conduct discovery to discover such evidence after the June 15, 2007 hearing. NSRC therefore argued that there were no genuine issues of

material fact to resolve at the scheduled trial on the issue of intent. The court agreed and granted summary judgment to NSRC, finding that the language of the release barred Appellant's claim against NSRC and that there was no evidence showing that the parties intended anything other than what was described in the release.

II. STATEMENT OF THE FACTS

Appellant is the widow of Sparrel Ratliff, a former employee of NSRC¹. Before his service with NSRC, Mr. Ratliff served in the United States Navy from August 1944 to June 1946 working as a ship fitter, presumably with hands-on exposure to asbestos. Mr. Ratliff began work as a carman for NSRC at the Weller Yard in southwest Virginia but held that position for only eleven months. *See* R.11,² Sparrel Ratliff Deposition II, hereinafter "Depo. II," taken 6/14/05. The majority of Mr. Ratliff's career with NSRC was spent in the transportation department of the Weller Yard, first as a fireman and then as an engineer following his promotion in 1960. *See* R. 11, Sparrel Ratliff Deposition I, hereinafter "Depo. I," taken 6/13/05; R.16, Smith Deposition at 11. All evidence in the case showed that Mr. Ratliff was an intelligent and responsible person.

In the 1980's, NSRC decided to implement separation programs to reduce the number of its employees. *See* R.5, Kirchner Deposition at 16, 26, at internal Exhibit D. One such program was targeted at train and engine service employees like Mr. Ratliff, as NSRC had an excess of employees in this area in part due to a reduction in the number of crew members needed per train. *See* R.5, Kirchner Deposition at 16-17. Furthermore, employees in this

¹ Mr. Ratliff's work was with NSRC's predecessor Norfolk and Western Railway Company.

² Citations to the Record are reflected by the Reproduced Record Index Number ("R. ___") and a specific citation to the document cited.

particular area had expressed an interest in being offered a separation program. *See* R.5, Kirchner Deposition at 8; R.6 at internal Exhibit No. 1. This separation program was entirely voluntary and was designed to benefit both NSRC and the employees who chose to apply. *See* R.5, Kirchner Deposition at 8; R.6 at internal Exhibit No. 1. The written program's cover memorandum explained that applications would not be accepted if that employee's absence would affect railroad operations, and a toll-free number was provided for those who had questions regarding the program. *See* R.6 at internal Exhibit No. 1.

Along with the cover memorandum, employees like Mr. Ratliff to whom the program was offered also received a packet of information that included a program application and a program description. *See* R.5, Kirchner Deposition at 9; R.6 at internal Exhibit No. 2. The program description offered details about the program explaining its eligibility requirements, benefits, and terms. *See* R.6 at internal Exhibit No. 2. The benefits available varied according to the age of the applicant. *See id.* Were his application accepted, Mr. Ratliff would receive a lump sum payment of \$35,000, insurance benefits until the age of 65, and a death benefit of \$10,000. *See id.* Two months before receiving this Voluntary Separation Program packet, Mr. Ratliff reached sixty years of age and became eligible for standard, age-related retirement, meaning that he could have retired without participating in the voluntary separation program. *See* R.5, Kirchner Deposition at 16-17.

Under the "terms and conditions" description of the written Voluntary Separation Program, employees were notified that a condition of accepting the benefits was that the employee had to execute a "resignation and release form" that would terminate "all employment rights with any Norfolk Southern Company." *Id.* A copy of the proposed resignation and release was included and was further described as being "*a total and absolute*

release of any employment rights with any Norfolk Southern Company and *of any claims of any kind whatsoever* arising from your employment relationship with the Company.” *Id.* (emphasis added). This section also informed employees that taxes³ would be deducted from the gross amount of the payout “as required by law.” *Id.*

The program description also told employees where they could get answers to any questions they might have regarding the program. *See id.* In addition to restating the toll-free number from the cover memorandum, **it recommended that questions regarding Railroad Retirement benefits be directed to the nearest Railroad Retirement Board office and that any tax or legal questions be directed to the employee’s tax or legal advisor.** *See id.* Employees with pending FELA claims who were considering participating in the separation program could and did get exemptions of those claims from the operation of the Resignation and Release. This exemption process occurred whether or not the employee was represented by an attorney. *See* R.5, Kirchner Deposition at 30-31.

On October 27, 1986, at the age of sixty, Mr. Ratliff submitted his application to participate in the voluntary separation program. *See* R.5, Application at internal Exhibit A. On December 12, 1986, Mr. Ratliff left the employ of NSRC at the age of sixty by signing the resignation and release agreement. *See* R.5, Executed Resignation and Release. By signing the Resignation and Release, and in exchange for \$35,000.00, medical coverage, and a death benefit under the Norfolk Southern Corporation Separation Program, Mr. Ratliff agreed to surrender any right to employment with NSRC and affiliated companies, and to:

...release and forever discharge [NSRC] from any claim (with the exception of vested pension rights), demand, action or cause of action, of any kind

³ *See* I.R.C. § 61(a); *Gajda v. Commissioner*, 158 F.3d 802, 805 (5th Cir. 1998); *Sodoma v. Commissioner*, 71 T.C.M. (CCH) 3178 (1996).

whatsoever, known or unknown, which I have or could have on account of, or in any manner arising out of or connected with, my employment by [NSRC], or the termination thereof, including but not limited to any claim or right asserted under or arising out of any agreement, regulation, condition or statute affording me employment protection, protecting me from employment or covering the conditions of my employment.

Id.

The Resignation and Release also states:

This resignation and release and the deductions authorized herein are fully understood by me. This document is executed voluntarily and solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever having been made or offered to me by the Company or any agent, employee, or representative of the said Company.

Id.

The intent of NSRC when drafting the release was to include a broad range of potential claims that might be brought under a variety of laws, including the FELA. *See* R.5, Kirchner Deposition at 31-32. While the release was not unlimited in scope since it excepted "vested pension rights," it otherwise was intended to include all potential claims. *See* R.5, Resignation and Release at internal Exhibit B. Among the claims intended to be included was mesothelioma. NSRC had been sued by its employees for asbestos-related injuries, including mesothelioma, several times before the Voluntary Separation Program was instituted. In addition, NSRC had recommended that any of its employees who had been exposed to asbestos see their physician. *See* R.13. Two months after Mr. Ratliff signed the Release, he also submitted an application for retirement benefits. *See* R.6, Kirchner Deposition at internal Exhibit 5.

In the two years that this case was pending below, and in the several months between the dates on which Mr. Ratliff's depositions were taken and the date on which the case was

filed, Appellant had ample opportunity to discover evidence in her favor bearing on the issue of the release generally, and of the knowledge and intent of Mr. Ratliff in entering into the release specifically. Appellant discovered and disclosed no such evidence, and cites none in her Brief. Thus, the only evidence regarding the release shows that it was intended to bar Appellant's claim.

III. RESPONSE TO ASSIGNMENT OF ERROR

The trial court properly evaluated the Release signed by the decedent under current law and properly determined that the Release was not a prohibited device under 45 U.S.C. § 55. Therefore, the trial court properly found that the Release signed by the decedent was valid, enforceable, and barred Appellant's claims against NSRC in this civil action.

IV. DISCUSSION OF LAW

A. Standard of Review and Applicable Law

The Court's standard of review is *de novo*. The validity of the Release Agreement in this FELA case is governed by federal rather than state law. *See Maynard v. Durham and S. Ry. Co.*, 365 U.S. 160 (1961). **Under federal law, Appellant has the burden of showing the release is invalid.** *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 630 (1948). In *Callen*, the Court was urged to abandon this precedent and instead place the burden on the railroad Defendant, the party pleading the contract as a defense to claims, to establish the validity of the settlement contract. *See id.* at 629-630. However, the Court declined to reassign the burden, reasoning that Congress was the proper entity to make any such change and that until any such change is made "the releases of railroad employees stand on the same

basis as the releases of others.” *Id.* at 630. The *Callen* decision was rendered over sixty years ago and has not been diminished by later judicial decision or legislative act.

The lower court’s ruling on summary judgment is procedural in nature and is governed by state law. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). In interpreting Rule 56, W.Va.R.Civ.P. the Supreme Court of Appeals of West Virginia has held that “summary judgment is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant demonstrates entitlement to judgment as a matter of law.” Syl. pt. 2, *Gentry v. Mangum*, 466 S.E.2d 171 (W.Va. 1995). This Court has explained, “a party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. pt. 6, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 133 S.E.2d 770 (W.Va. 1963).

However, the non-moving party cannot stand idly by in the summary judgment process. Instead, “the party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in [the opposing] party’s favor.” *Painter v. Peavy*, 451 S.E.2d 755, 758-59 (W.Va. 1994).

In 2005, this Court said:

2. “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

3. “If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no

genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Syl. Pts. 2 and 3, *Goodwin v. Bayer*, 624 S.E.2d 562 (W.Va. 2005).

B. Under Section 5 of the FELA, the Release Agreement at Issue is Valid, Enforceable, and Bars Appellant’s Claims Against NSRC Because it Only Exempts NSRC from Future Liability for Past Negligence.

1. Section 5 of the FELA prohibits only those release agreements that purport to exempt Railroads from future liability for future negligence.

Appellant claims that Section 5 of the FELA (also referenced by its location in the U.S. Code, Title 45 U.S.C. § 55) “prohibited employers from exempting themselves from FELA through contract.” See Brief of Appellant at 10 (citing *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 542-3 (1994)). Appellant misrepresents FELA’s impact on release contracts as interpreted by federal and state courts.

Under § 5 of the FELA, an employer may not use a contract or other device to exempt itself from **future liability for future negligence**. Title 45 U.S.C. § 55, provides:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act ...shall to that extent be void.

Section 5 was enacted in response to the practice, apparently common at the time, whereby companies secured releases from employees prior to any injury and attempted to apply them prospectively. See *Bay v. Western Pacific R.R. Co.*, 595 F.2d 514, 516 (9th Cir. 1979) (“The [United States Supreme] Court noted that the practice of obtaining waivers prior

to accidents and as an incident of employment was well-known to Congress.”) (quoting *Philadelphia, Baltimore & Washington Railroad Co. v. Schubert*, 224 U.S. 603, 612-613 (1912)). “To begin with, ...§ 5 of FELA was designed to prevent employers from making the waiver of claims a *quid pro quo* of the employment contract.” *Wicker v. Conrail*, 142 F.3d 690, 698 (3rd Cir. 1998) (cert. den. 525 U.S. 1012 (1998)).

The policy behind prohibiting railroads from attempting to exempt themselves from future liability for future negligence is not implicated in this case. There is no sound policy purpose served by prohibiting NSRC from obtaining a valid release from Appellant at the time of his separation from railroad employment for any claim, even a *future* claim, arising out of allegations of *past* negligence. As Mr. Ratliff was leaving the employment of NSRC, there was no possibility of future negligence by NSRC with regard to Mr. Ratliff. Thus, Section 5 of the FELA does not affect the Resignation and Release at issue in this case.

2. General, all-encompassing release agreements are permitted and are enforceable under the FELA.

The United States Supreme Court has interpreted § 5 of the FELA to allow carriers to make frequent use of release agreements without offending the statutory intent of the FELA. In *Callen*, the United States Supreme Court declared, “a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility.” 332 U.S. at 630. Analyzing *Callen* and *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), the Court of Appeals of Georgia recognized that “a general release of claims known and unknown” does not violate “45 USC § 55 as a matter of law,” and quoted the *Hogue* Court, to point out that “the Court specifically noted that a ‘release may otherwise bar recovery.’” *Loyal v. Norfolk Southern Corp.*, 507 S.E.2d, at 502 (Ga. App. 1998) (citing

Callen, 332 U.S. at 626; *Hogue*, 390 U.S. at 518) (emphasis in original).

1. In *Callen*, the United States Supreme Court refused to invalidate a general release of "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Company," 332 U.S. at 626, even though the plaintiff in *Callen* contended that such release "violates § 5 of the Federal Employers' Liability Act." *Id.* at 630. Further, in *Hogue v. Southern R. Co.*, 390 U.S. 516 (88 S. Ct. 1150, 20 L. Ed. 2d 73) (1968), the Court examined a contract that released an employer for injury in excess of that known at the time the release was signed. The Court determined that there was "no occasion to decide whether the release here involved violated [45 USC § 55]," and the Court specifically noted that a "release may otherwise bar recovery." *Id.* at 518. **These results could not have been obtained if a general release of claims known and unknown is in violation of 45 USC § 55 as a matter of law, as argued by Loyal.**

Loyal 507 S.E.2d at 501-2 (footnote omitted) (emphasis added).

Therefore, general, all-encompassing release agreements are permitted and are enforceable under the FELA. Furthermore, "[t]he fact that this action was brought under the Federal Employers' Liability Act does not remove it from the realm of the law of contracts." *Good v. Pennsylvania R.R. Co.*, 384 F.2d 989, 990 (3rd Cir. 1967). The parties to a release may preclude recovery for any and all injuries or claims, known or unknown, if they so intend and such an intention will be found where the releasee is "buying his peace." 66 Am. Jur. 2d, *Release*, § 32. Accordingly, many courts have held that a general release clearly discharging the releasee from liability for all claims and demands, known or unknown, operates as a complete bar to a subsequent action against the releasee on any such claims. *See Virginia Impression Prod. Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *Loyal*, 507 S.E.2d at 502 ; *Gortney v. N&W Railway Co.*, 549 N.W.2d 612 (Mich. Ct. App. 1996); *Page v. Means*, 192 F. Supp. 475 (N.D. W.Va. 1961); *Askew v. F&W Express, Inc.*, 556 F. Supp. 440 (E.D. Mo. 1982), *aff'd*, 723 F.2d 624 (1983), *cert. denied*, 469 U.S. 916 (1984); *Trevathan v. Tesseneer*, 519 S.W.2d 614 (Ky. 1975); *Emery v.*

Machiewicz, 240 A.2d 68 (Pa. 1968); *Kennedy v. Bateman*, 123 S.E.2d 656 (Ga. 1961) .

In *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1458 (9th Cir. 1988), the Ninth Circuit Court of Appeals stated as follows when addressing a case involving the application of a personal injury release:

Written instruments, fixing the parties' rights and responsibilities by mutual consent, bring an important measure of order to life and greatly facilitate the adjudicatory process. While interpreting contract language is not always easy, sticking to the words the parties actually used limits substantially the bounds of legitimate disagreement. This objective rule "favors the orderly settlement of disputes and avoids multiplicity of suits and the chaos which would result if the releases were not treated seriously by the courts." (citations omitted)

Further, in the case of *Gortney*, 549 N.W.2d 612., the Michigan Court of Appeals addressed a situation similar to that presented in this case. The plaintiff in *Gortney* alleged that the plaintiff's decedent died from lung cancer caused by exposure to diesel fumes while working for N&W. *See id.* at 614. The language of *Gortney's* release was identical to the language of Mr. Ratliff's release, and the amount of consideration paid to Mr. Gortney was similar to that paid to Mr. Ratliff: Mr. Gortney received \$40,000 and Mr. Ratliff received \$35,000. *Compare id.* at 613, with Executed Resignation and Release at R.5, Executed Resignation and Release. Relying on federal law, the *Gortney* court recognized that "The scope of a release is controlled by the intent of the parties as it is expressed in the release." *Gortney*, 549 N.W.2d at 614 (citing *Taggart v. United States*, 880 F.2d 867, 870 (6th Cir. 1989); *Virginia Impression*, 448 F.2d at 265) (other citations omitted). The court further recognized that "[t]he fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity." *Id.* (citing *Int'l Union of Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985)) (other citations omitted).

In considering language identical to that of the *Ratliff* release, the *Gortney* court found

no ambiguity in the release's "broad, all-encompassing language" that stated that the defendant would be released from liability for "any claim[,] ...demand, action or cause of action, of any kind whatsoever, known or unknown, which [decedent had] or could have [had] on account of, or in any manner arising out of or connected with, [his] employment." *Id.* at 615; *see* R.5, Executed Resignation and Release. The *Gortney* court concluded that "the release is capable of but one reasonable interpretation; that decedent released all claims, including personal injury claims, in exchange for a substantial monetary consideration." *Gortney*, 549 N.W.2d at 615.

3. Although a split of authority has developed regarding these issues, the best-reasoned decisions support the majority rule.

The majority of reported decisions addressing the subject hold that a release does not violate the FELA as long as it is executed for "valid consideration as part of a settlement" and is limited to known risks. "[T]he parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury." *Wicker*, 142 F.3d 690, 700-1. *See SeaLand Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). The extreme minority rule, conversely, holds that the only valid release under §5 of the FELA is a release of a known claim for a specific existing injury. The minority rule is represented by *Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89 (3d Cir. 1997).

This split of opinion was discussed in *Loyal*, 507 S.E.2d 499, a case in which a railroad employee sued NSRC under the FELA for occupational hearing loss. The lower court granted summary judgment for the railroad defendant based on a release executed by the employee as part of his participation in a voluntary separation program. *See id.* at 500. The release, which is identical to the release at issue in this matter, specifically stated that the

employee “does hereby release and forever discharge [Norfolk Southern] from any claim (with the exception of vested pension rights), demand, action or cause of action, of any kind whatsoever, known or unknown, which I have or could have on account of, or in any manner arising out of or connected with, my employment.” *Id.* (alteration in original).

The *Loyal* court recognized that the execution of a general release of all claims by an employee did not, as a matter of law, violate the provision of the FELA prohibiting contracts, rules, regulations, or devices intended to enable common carriers to exempt themselves from FELA liability. *See id.* at 502. The court specifically held that the release was an unambiguous compromise and settlement of all claims for injuries known or unknown that might arise under the FELA, and that the release was valid and barred plaintiff’s subsequent lawsuit. In its opinion, the *Loyal* court observed:

Only the Sixth Circuit has adopted a bright line rule that a release may be valid only with regard to injuries that are known at the time the release is executed. *See Babbitt v. Norfolk & C. R. Co.*, 104 F.3d 89 (6th Cir. 1997); *Damron v. Norfolk & C. R. Co.*, 925 F. Supp. 520 (N.D. Ohio 1995). **The majority of courts have not so found.** *See Panichella v. Pennsylvania R. Co.*, 268 F.2d 72 (3d Cir. 1959); *Wilson v. CSX Transp.*, Civil Action No. 91-1398 (W.D. Pa. 1994); *Williams v. Norfolk Southern Corp.*, CA 1:92-CV-545 (N.D. Ga. 1993); *Satterfield v. CSX Transp.*, No. 93-002 (W.D. Va. 1993); *Loose v. Consolidated Rail Corp.*, 534 F. Supp. 260 (E.D. Pa. 1982); *see also Virginia Impression Products Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971).

Id. at 502 n.4 (emphasis added).

The court also held that “a valid release may encompass an injury that is unknown at the time of its execution, if the possibility of such injury is known.” *Id.* at 502. The rationale for such a holding is well-reasoned, because by upholding release agreements that cover known future risks, courts increase judicial economy, while encouraging the compensation of injured plaintiffs. *See Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).

Yet, it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about **potential liability** and damages related to **known risks** even if there is no present manifestation of injury.

Wicker, 142 F.3d, at 700-1. (emphasis added).

As the *Loyal* court explained in its decision, in an industry in which there are many alleged occupational risks, it is important “to both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery.” 507 S.E.2d 499; *see also Capocy v. Kirtadze*, 183 F.3d 629 (7th Cir. 1999) (upholding a grant of summary judgment to Amtrak in a FELA case and stating that to do otherwise would “severely undercut the parties’ willingness to enter into a settlement agreement”).

4. The release at issue here is not a prohibited device and, therefore, is enforceable under the FELA.

The release at issue was signed by Mr. Ratliff as a part of a voluntary separation program and is not the type of release prohibited by the FELA. The release *does not* purport to release NSRC from liability for *future negligence*, but for *past negligence*, if any there was, distinguishing it from those prospective, pre-emptive releases commonly used 100 years ago that motivated enactment of Section 5 of the FELA. The purpose of the release in this case was to settle, as a part of the termination of the employment relationship with NSRC, any and all claims arising out of past negligence. As recognized by the *Callen* Court, a valid release, such as Mr. Ratliff’s release, does not attempt “to exempt from liability” but, instead recognizes the possibility of liability and seeks to settle it beforehand. *See Callen*, 332 U.S. at 630. The language of the release allowed NSRC to “buy its peace” with Mr. Ratliff for all

time – including peace against the personal injury claim of mesothelioma. *See, e.g.*, R.13. In fixing the settlement amount, the parties not only took into consideration Mr. Ratliff's then-present condition, but the future risk that he might or might not subsequently develop an unknown disease, such as cancer, from his possible workplace exposures. *See* R.5, Executed Resignation and Release. The Resignation and Release is clear evidence that all personal injury claims based upon Mr. Ratliff's employment with NSRC were settled with NSRC and "peace" was "bought" with him for all time.

In the lower court, the burden was on Appellant to produce evidence supporting its argument that Mr. Ratliff's intent in signing the release was anything less than the intent to release all claims. *Callen*, 332 U.S., at 630. However, Appellant has failed to do so. Therefore, the Court must construe and apply the plain language of the Release which, as stated above, shows that NSRC "bought its peace" with Mr. Ratliff for all time for all claims.

a. The release was executed for valid consideration and as part of a settlement.

Applying the majority rule, that an enforceable FELA release is one that was executed (1) for valid consideration, (2) as part of a settlement, and (3) and is limited to known risks, the Ratliff release is valid. *See Wicker*, 142 F.3d at 702 (discussing rule); *see also SeaLand*, 231 F.3d at 852 (discussing rule). Relative to the rule's first requirement, the consideration that Mr. Ratliff received in exchange for signing the release was considerable, particularly for 1986. He received \$35,000, approximately five years of insurance benefits, and a death benefit of \$10,000. Additionally, although not enumerated specifically, is the benefit of "retiring" early without foregoing his pension or insurance.

As to the second requirement, the consideration at issue here was part of a settlement.

In *Loyal*, the court noted that Mr. Loyal could have retired at the same time *without* signing a release because he qualified for medical disability. 507 S.E.2d at 503. The *Loyal* court explained “because early retirement is a choice that results in the cessation of employment, seeking a settlement of all employment-related claims through the signing of a release was neither unrelated, unreasonable, nor tangential to the purpose for offering and accepting the early retirement option.” *Id.*

In the deposition of NSRC official Marcellus Kirchner, Mr. Kirchner testified that Mr. Ratliff was not required to participate in the Voluntary Separation Program in order to retire. *See* R. 5, Kirchner Deposition at 16-17. Mr. Ratliff’s situation is practically identical to the situation in *Loyal* because, as Mr. Loyal was eligible to retire based on a medical disability, Mr. Ratliff was eligible to retire *before* the Voluntary Separation Program was offered to him because he had reached sixty years of age.

i. Appellant’s argument that the claim or controversy requirement is lacking is flawed.

Appellant argues that an early retirement agreement cannot satisfy the need for a “claim or controversy” in order for a FELA release to survive scrutiny. *See* Brief of Appellant at A-4. In support of this assertion, Appellant relies on *Boyd v. Grand Trunk Western R.R.*, 338 U.S. 263 (1949); however, this reliance is misplaced. The *Boyd* decision did void an agreement in which the defendant sought to limit the employee’s choice of venue, but, in so doing, highlighted the fact that *Section 6* of the FELA specifically established the concurrent jurisdiction of federal and state courts over FELA claims such that the employee’s “right to bring the suit in any eligible forum is a right of *sufficient substantiality* to be included within the Congressional mandate of §5.” *Id.* at 265 (emphasis added). The U.S. Supreme Court

went on to clarify its position on FELA-related releases:

We there [in *Callen*] distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held *did not* contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause.

Id. at 266 (emphasis added) (citations omitted).

This quotation illustrates that Appellant's flippant statement that "even a release limitation on future *venue choices* for a FELA action violates §55" stretches *Boyd's* application far beyond the limited facts of that case.

Beyond this, Appellant's argument is flawed for reasons discussed above. Appellant discusses the 6th Circuit's extreme bright-line approach in *Babbitt* and a few lower court decisions that explicitly rely on it. *See* Brief of Appellant at 12 *et seq.* The fact noted by the Georgia court in 1997 remains true: no other U.S. Court of Appeals has taken the same approach as the Sixth Circuit. *See Loyal*, 507 S.E.2d at 502 n.4. Nevertheless, Appellant cites decisions of state and federal trial courts sitting inside the boundaries of the Sixth Circuit that follow that court's approach, perhaps hoping to paint a picture of broad support for *Babbitt's* unique holding. *See* Brief of Appellant at 12, *et seq.* This exercise by Appellant does little more than establish that her argument is founded, almost entirely, on an approach rejected by all federal appellate courts that have addressed it, save one.

However, "the appropriate federal rule" to apply in the face of inter-circuit disagreement is "the best-reasoned decisions in the general common law development of the subject." *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 116 (4th Cir. 1983). Here, the best-reasoned decisions follow the majority rule, which holds that a release does not violate the FELA as long as it is executed for "valid consideration as part of a settlement,"

and is limited to known risks. *Wicker*. 142 F.3d at 702; *see also SeaLand Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000).

The *Wicker* decision does not dictate invalidation of the release here. The *Wicker* court held that the FELA permits employers and employees to negotiate a “release of claims” as long as the risks contemplated **are risks known at the time**. *Wicker*, 142 F.3d at 702. The *Wicker* court determined that the releases before it did not satisfy the “known risk” requirement because the plaintiffs *produced evidence* that they were not aware of the dangers of the chemicals they used at their jobs until after they signed the releases. *See id.* In this case, however, Appellant has not demonstrated that the decedent did not appreciate before he signed the Release the risks of the manifestation of occupational disease in the future. Appellant produced no evidence bearing on the issue of intent, and neither asked for more time to conduct discovery and investigation, nor filed an affidavit “explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” *See* Syl. Pt. 3, *Goodwin*, 624 S.E.2d 562.

Appellant also emphasizes *Jaqua v. Canadian National R.R., Inc.*, 734 N.W.2d 228 (Mich. Ct. App. 2007). *Jaqua* stands for little beyond its acknowledgment that *Wicker* is a better reasoned decision than *Babbitt*. *See id.* at 235, 236. The court identified the issue in that case:

The narrow question here is whether § 5 permits a release of only known injuries or conditions that exist at the time of the release, as the Court of Appeals for the Sixth Circuit has ruled, or whether § 5 also permits the release of known risks of future injuries or conditions, as the Court of Appeals for the Third Circuit has ruled.

Id. at 229.

In *Jaqua*, the plaintiff signed a release that released the defendant from liability for

personal injury claims for occupational illnesses, including cancer. *See id.* When the plaintiff later contracted cancer from claimed exposure to asbestos dust, defendant moved for summary judgment. *See id.* at 230. The question was only whether the release, by its terms applicable to cancer claims, could be enforced over the plaintiff's argument that a railroad employee could not release a claim for an illness he did not have at the time of signing. *See id.* at 229, 230. The *Jaqua* court rejected the Sixth Circuit's *Babbitt* approach, adopting instead the general holding of *Wicker* to enforce a release that spelled out the claim addressed. *See id.* at 229, 236.⁴

Further, although Appellant has argued that the trial court below "ignored *Callen's* 'claim or controversy' requirement," this is inaccurate. *See* Brief of Appellant at 19. At the hearing on June 15, 2007, counsel for Appellant addressed the need for a claim or controversy and noted what he believed the controversy to be, *e.g.* pending overtime claims. *See* R.9, June 15, 2007, transcript at 10-11. The court disagreed, explaining:

THE COURT: The one could argue that you could achieve the same thing about reducing the work force and whatever cost savings that would be associated with that -- without using such a broad language in the release and specifically reserving to them - - it's everything other than a pension fight. Anything beyond that. That's one way to look at that; in other words, they were specific in that regard.

There's no question, obviously, and we have to see what is the legal

⁴ Appellant seems to believe it is important that "*Gortney*, a state court decision, was decided within the geographical area of the Sixth Circuit." *See* Brief of Appellant at 15. As pointed out in the *Jaqua* decision, the location of a state court applying federal law is irrelevant in terms of precedent. In addressing the identical question, the *Jaqua* court said, though "lower federal court decisions may be persuasive, they are not binding on state courts." *Jaqua*, 734 N.W.2d at 231-32 (citing *Abela v. General Motors Corp*, 677 N.W.2d 325 (2004)). "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Jaqua*, 734 N.W.2d at 231-32 (quoting *Abela v. General Motors Corp*, 677 N.W.2d 325 (citing *Chesapeake & O.R. Co. v. Martin*, 283 U.S. 209, 220-221 (1931); *Winget v Grand Trunk W.R. Co.*, 177 N.W. 273 (1920); 21 CJS, Courts, § 159, pp 195-197; 20 Am. Jur. 2d, Courts, § 171, pp 454-455)).

effect of it, that, in 1986, I think this Court could take judicial notice that there were -- the whole concept of the effects of exposure to asbestos were -- they were just reaching -- I mean, the cases were -- they were pending at that time.

Things started to really move a little bit -- about when it started, maybe a little earlier. It depends on -- I look at an article in the New Yorker back in the early '80s that laid the whole thing out, and, of course, with Ness Motley and that group discovering, much to their happiness, the Saranac papers, and things really started to move. So they knew that.

The point is - - and I think I could take judicial notice of the temporal aspect of the thing so that a release at that time certainly could have contemplated not just claims under the Federal Employer Liability Act, but could have been specific in regard to asbestos claims.

Now, recently, the railroads are now faced with a number of other claims that are still kind of in the embryonic phases, and those are the solvent and toxic exposure cases, and that would not have been, I don't think, contemplated in '86. An asbestos claim would be.

See R.9, June 15, 2007, transcript at 12:7-24; 13: 1-16.

Just as in *Wicker*, the court below pointed out that while some risks, such as solvent-related injuries which were not well-known at the time Mr. Ratliff signed the Release, might not be included in its application, *See Wicker*, 142 F.3d at 701 (observing that "controversies" cannot exist relative to unknown risks), other known risks would be. This case concerns asbestos injuries and claims, which were notorious, known risks by 1986. Therefore, there was a controversy when the Release was signed, as was recognized by the lower court.

ii. Other trial courts have ruled in accord with the trial court below here.

The trial court here is certainly not alone in enforcing a release like the one in this case. Another West Virginia court has granted summary judgment to NSRC in a FELA case due to a resignation and release similar to the one at issue here. The Circuit Court of Mingo County, West Virginia in *Clarence H. Mitchell v. N&W*, Civil Action Number 93-415, by Order

entered May 1, 1995, found the following:

1. There is no evidence of a Mutual Mistake of Fact which might affect the release. The intent and scope of the release by the defendant is abundantly clear ("any claim ...demand, action or cause of action, of any kind whatsoever, known or unknown, which I have or could have...");
2. There is no evidence that the release does not cover the occupational hearing-loss injury alleged by the plaintiff. The limiting words to the release are very specific ("...with the exception of any vested pension rights...");
3. The court finds as a matter of law that the matters complained of by the plaintiff C. H. Mitchell are covered by the unambiguous release in question, and that the paid consideration of \$50,000 is adequate to support that release;
4. Since the filing of this case in May of 1993 no evidence has been presented by the plaintiff to successfully withstand the presentation of the release. It is well-settled that some showing beyond allegations and argument are required for the non-moving party to withstand a properly-supported Motion for Summary Judgment. No such showing has been successfully made by the plaintiff C.H. Mitchell.

R.8, Order, pages 3-4 in *Clarence H. Mitchell v. N&W*, Circuit Court of Mingo County, West Virginia, Civil Action Number 93-415, at internal Exhibit A.

The United States District Court for the Western District of Virginia in Roanoke has likewise addressed the issue. In *Satterfield v. CSX Transportation, Inc.*, No. 93-002-R, Order (W.D. Va. December 23, 1993), the plaintiff worked for the defendant for over forty years and signed a broad settlement and release of claims in 1987 in exchange for a lump sum payment. See R.8, Order in *Satterfield v. CSX Transportation, Inc.* at internal Exhibit B. In 1987, a doctor diagnosed the plaintiff as having a hearing loss unrelated to his employment. See *id.* In 1991, another doctor diagnosed the plaintiff's hearing loss as noise-related and he filed a lawsuit against CSX. See *id.* The plaintiff argued that regardless of the language contained in the release, it was not his intention to release any claim for hearing loss. The court, citing the broad language of the

release, found the plaintiff's arguments unpersuasive and instead agreed that the parties had indeed settled all claims by execution of the release. The court opined:

In the instant case, the language of the release is wholly unambiguous and clearly applies directly to the facts at hand. Satterfield released all claims -- present and future, known and unknown -- including claims for employment related hearing loss. He may not simply ignore a valid and binding release when it pleases him. As CSX properly argues, parties who execute a general release settle permanently all matters between them... (citations omitted). From the clear and unambiguous language of the release agreement, Satterfield cannot maintain his cause of action and CSX is entitled to judgment as a matter of law.

Id.

Thus, courts have strictly applied the clear language found within the four corners of various contracts of release in FELA cases to bar claims for later manifested diseases. A strict application of the language contained within the agreement in the instant action is especially appropriate since that language is clear and all-encompassing.

b. Mr. Ratliff's injuries were known risks at the time of the execution of the release.

With two of the requirements for the *Wicker/Loyal* majority rule satisfied, the only remaining requirement is whether the risk of developing mesothelioma from work on the railroad was a "known risk." In an attempt to argue that the "known risk" requirement is not satisfied in this case, Appellant asserts that "the material facts are undisputed showing that this appeal involves a 'future accruing claim.'" See Brief of Appellant at 11. Appellant cites *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949),⁵ as Appellant terms it, for the "venerable rule that FELA disease claims do not accrue until manifestation." See Brief of Appellant at 11. The

⁵ NSRC notes that Appellant's inclusion of Justice Kennedy's discussion of the effects of mesothelioma for no apparent purpose other than to evoke an emotional response, as it provides no cognizable support to Appellant's "future accruing claim" argument. See Brief of Appellant at 10-11.

U.S. Supreme Court's holding, though, was not focused on whether something may have been known or appreciated at the time of the execution of a release; rather, the *Urie* decision addressed time of injury relative to the construction of the FELA statute of limitations. *Urie*, 337 U.S. at 168-169. The Court ruled that, for purposes of the statute of limitations, an employee is considered to have been "injured" only when the accumulated effects of the deleterious [inhaled] substances manifest themselves." This conclusion was made in an effort to serve the "traditional purposes of a statute of limitations, which conventionally require the assertion of claims within a specified period of time after the invasion of legal rights." *Urie*, 337 U.S. at 170. Since the statute of limitations is not at issue in this case, Appellant's discussion of *Urie* is wholly irrelevant. Further, the accrual of a claim is not necessary to satisfy the definition of a "known risk."⁶

In the *Loyal* case, the court noted that:

...Loyal was a railroad union member and attended railroad safety meetings. Both Loyal and the railroad knew of the risk of hearing loss to engineers.... In fact, at the time of Loyal's retirement, cases involving hearing loss as a result of railroad employment were legion all over the country. Accordingly, under the facts of this case, job related hearing loss was a risk known to Loyal at the time he signed the release.

Loyal, 507 S.E.2d at 503-504.

Mr. Ratliff's situation was similar to Mr. Loyal's situation. Even though Appellant was deposed, and Mr. Ratliff was deposed twice, there is no evidence provided by Appellant suggesting that Mr. Ratliff was not an intelligent, responsible, and active man, or that NSRC

⁶ Appellant also discusses the "separate disease rule." However, such discussion is also wholly irrelevant to the case at hand, as it is clear in this case that by executing the release in question, Mr. Ratliff was releasing claims for any and all claims arising from any and all injuries or diseases as opposed to releasing claims for just one particular injury or disease. Appellant appears to base this discussion upon her assertion that this case involves a future accruing claim. However, as discussed above, the accrual of a claim is not necessary to satisfy the definition of a "known risk."

somehow misled him.

It is unquestioned that the possibility of disease from exposure to asbestos was a commonly known risk by 1986. The Fifth Circuit reported that as of 1983 over 20,000 lawsuits had been filed claiming injury from working with asbestos. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986) (citing R. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 37 n.1 (1983)). The Fifth Circuit showed concern over the situation, stating “Courts, including those in our own circuit, have been ill-equipped to handle this ‘avalanche of litigation.’” *Id.* (quoting Note, *Who Will Compensate the Victims of Asbestos-Related Diseases? Manville's Chapter 11 Fuels the Fire*, 14 *Envtl. L.* 465, 466-67 (1984)); see also Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 *Rev. Litig.* 583, 589 (2007) (“During the 1970s, about 950 cases were filed in federal courts and perhaps twice that many again in state courts.... The number of filings in federal courts increased sharply in the early 1980s; from 1980 to 1984 about 10,000 cases were filed in federal courts, leading one federal court to declare that it was ‘ill-equipped to handle this avalanche of litigation.’”)

An “avalanche” of lawsuits was not the only indicator, however. By 1985, many of the companies sued for asbestos-related injuries were in bankruptcy,⁷ “including a number of

⁷ “The ‘first wave’ of asbestos bankruptcies occurred between 1978 and 1985 when seven major asbestos manufacturers and suppliers declared bankruptcy including North American Asbestos Corp. (1978), Johns-Manville (1982), Amatex Corp. (1982), UNR Industries (1982) (including Union Asbestos & Rubber), Waterman Steamship Corp. (1983), Wallace & Gale Co. (1984), and Forty-Eight Insulations (1985).” Richard L. Cupp, Jr., *Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions: Asbestos Litigation and Bankruptcy, A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 *Pepp. L. Rev.* 203 at n.13 (2003).

companies previously considered to be immune from financial difficulty.”⁸ *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11532 (D. Tex. 1995) (citing *In re Asbestos Products Liability Litigation*, 771 F. Supp. 415, 420 (J.P.M.L. 1991); see also *In re Johns-Manville Corp.*, 34 B.R. 587, 588 (Bankr. D. La. 1983) (recognizing that the Manville Corporation, “one of the largest companies to seek relief under the Bankruptcy Code”).

Railroad companies, including NSRC, were not absent from the asbestos free-for-all in the early 1980’s, either. Many cases had been filed against railroads, including NSRC, well before Mr. Ratliff applied for Voluntary Separation. More specifically, NSRC had been sued for the alleged injury of mesothelioma by 1984. See R.13. As the listed cases demonstrate, the favored place to sue N&W was in the Western District of Virginia, where, incidentally, Mr. Ratliff lived. See *In re: FELA Asbestos Litigation, Wingo v. Norfolk & Western Railway Co.*, 638 F. Supp. 107 (W.D. Va. 1986) (The case was filed in 1983 and had been tried to a jury verdict prior to this opinion); *In re: FELA Asbestos Litigation, Palmer et al. v. Norfolk & Western Railway Co.*, 646 F. Supp. 610 (W.D. Va. 1985) (This opinion regarded four plaintiffs, all of whom were suing the N&W for injuries from asbestos exposure. According to the civil action numbers, Mr. Palmer’s case was filed in 1984 and the rest were filed in 1983.); *Watts v. Norfolk & Western Railway Co.*, 1988 U.S. Dist. LEXIS 18004 (W.D. Va. 1988) (This opinion regards two separate plaintiffs who filed suit for employment-related asbestos exposure in July and October 1986.); see also *In re Erie L. R. Co.*, 803 F.2d 881, 883 (6th Cir. 1986) (This opinion regards two plaintiffs seeking recovery “for asbestos-related

⁸ “Beginning in 1982 with Unarco Industries, Inc. and Manville, the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc. Fibreboard Exh. 919, Tab 4.” *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11532 (D. Tex. 1995).

injuries that they alleged had been caused by asbestos exposure during their railroad employment.” The cases were filed somewhere between November 30, 1982, and June 18, 1985.); *Lott, et al. v. Seaboard Systems Railroad, Inc.*, 109 F.R.D. 554 (S.D. Ga. 1985) (This opinion concerns fifteen (15) separate plaintiffs, not including spouses, who had filed suit for injuries from employment-related asbestos exposure. The suit was filed some time before August 1985, the date of the corporate representative deposition giving rise to this opinion.); *Schweitzer v. Consolidated Rail Corporation*, 36 B.R. 469, 471 (E.D. Pa. 1984) (“Subsequent to the consummation date, December 31, 1980, several former employees [eight addressed in this opinion] of Reading brought actions against it and Consolidated Rail Corporation pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 1 et seq., seeking to recover for asbestos-related injuries resulting from their employment with the defendants.”); *Consolidated Rail Corp. v. Reading Co.*, 654 F. Supp. 1318, 1321 (Regional Rail Reorg. Ct. 1987) (“This non-FELA opinion addressing the Rail Act regards several cases, including the FELA case of *Puishis, et al. v. Amtrak and Conrail*, C.A. No. 85-2, filed January 1985, wherein three plaintiffs sought relief “for asbestos-related injuries arising from plaintiffs' employment with Conrail's and Amtrak's predecessors.”); *Dale v. B&O Railroad Co.*, 519 A.2d 450 (Pa Super. Ct. 1986); *rev. by Dale v. B&O*, 520 Pa. 96; 552 A.2d 1037 (1989); *overruled, in part, by Norfolk & Western Ry. v. Ayers*, 538 U.S. 135 (2003) (according the civil action number, this asbestos FELA case was filed in 1983).

Even the *railroad unions* were aware of the risk and at least one had begun notifying its members as early as 1982. *Watts*, 1988 U.S. Dist. LEXIS 18004 (Wherein one of the plaintiffs “attended a union-sponsored asbestos screening clinic and received ‘a screening letter dated July 15, 1982 (which) diagnosed an asbestos related disease.’”).

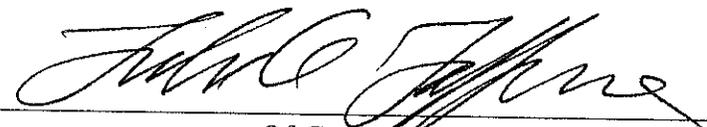
NSRC accepted the risk that it was "buying peace" from a man who might never contract any illness or injury related to his work. The fact that Mr. Ratliff executed the release supports the conclusion that Mr. Ratliff must have believed it meant something, and there is no evidence to the contrary.

V. CONCLUSION

The lower court properly granted summary judgment to NSRC and dismissed Appellant's case. The release's only purpose was to settle any and all claims as a part of the termination of the employment relationship Mr. Ratliff had with NSRC, and this practice is not in any way prohibited under the FELA. Although Appellant argues that Mr. Ratliff did not intend to release the claims asserted in this lawsuit, Appellant had the burden to put forth evidence of such a lack of intent and failed to do so.

WHEREFORE, NSRC respectfully requests the Court affirm the decision of the trial court below that granted summary judgment to NSRC.

NORFOLK SOUTHERN RAILWAY COMPANY

By: 
Of Counsel

Luke A. Lafferre
West Virginia State Bar No. 2122
Alexis B. Mattingly
West Virginia State Bar No. 10286
HUDDLESTON BOLEN LLP
Post Office Box 2185
Huntington, WV 25722-2185
Telephone No. 304-691-8308

Counsel for Defendant,
NORFOLK SOUTHERN RAILWAY COMPANY