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\$3.2M Award For Widow, Other Lawyers Turned Away

By **THOMAS B. SCHEFFEY**

As far as Metro North Railroad Co. was concerned, assistant conductor Robert J. Ard's death just after midnight on the Stamford station railroad tracks was tragic, but entirely his own fault.

He should have been inside a train car, it contended, not between the rails, facing away from a train as it backed up over him on March 10, 2004. Furthermore, the railroad agreed with engineer Phillip Waisonovitz, who testified that Ard radioed him to "shove back," then sent a second call to keep backing up. The men were on a switching crew, assembling commuter trains for the early morning rush.

When Ard's widow, Diane, took the wrongful death case to some of New York and Connecticut's top train law and personal-injury firms, they politely declined to take the case, on grounds it wasn't clear that the railroad was at fault.

New Haven railroad lawyers George J. Cahill Jr. and Charles C. Goetsch saw it differently, and so did a Bridgeport federal court jury. On March 8, it awarded Ard's estate over \$3 million, even after a 25 percent reduction for Ard's comparative negligence.

At trial, Goetsch and Cahill began with video depositions of officials in charge of safety rules, from top Metro North executives down to the workers in the rail yard.

Two key rules were central to Ard's case, Goetsch said in an interview. When the engineer is backing up in a "shoving move," Metro North's Operating Rule 38 requires a qualified employee to be on the back end of the train to act as the engineer's eyes and ears. "That's a failsafe rule that protects employees from getting killed by engineers shoving blindly backwards," Cahill said.

The second key "failsafe" is the radio rule, which requires the engineer to wait for a clear radio command from the conductor before moving the train. Although a number of people were listening in on the common radio frequency, Waisonovitz is the only one who said he heard Ard radio an OK to shove back, and then a second time, to keep shoving back. "No one else in the yard heard that on the radio, not the conductor, not the yardmaster, not the trainmaster, not the general foreman who had just been talking to Bob Ard on the radio," said Cahill.

Waisonovitz and Ard had moved the

train forward, and east, on track 20, past a switch that made a "Y" of track 20 and track 22, running parallel and a few feet to the south. The six-car train picked up two additional cars on track 22. Then, for the third move of this four-part maneuver, it headed east once again on track 20, past the switch.

Metro North contended the train went completely past the switch. Its lawyers, Nancy Ledy-Gurren and Debora Bass, contended Ard had enough time to reposition the train to travel on the upper track 20, but that he'd failed to switch the track, leading to his own demise.

Goetsch said the engineer's behavior was telling. After the train crashed backward into other cars, with no further word from Ard, Waisonovitz ran to the head conductor, Raymond Durkin, who had left to work on a different train. "The engineer found [Durkin] and said, 'Raymond, I think I killed Bobby,' and was highly distraught. He fell on the ground. He could hardly breathe. He was hyperventilating, acting like he was about to have a heart attack," Goetsch said. "Durkin went up and found Bob Ard within the rail, obviously dead."

Commented Cahill, "The engineer didn't act like someone who had done nothing wrong, other than witness a terrible accident."

Afterward, the Federal Railroad Administration and Metro North used the train's "event recorder" to stage a reenactment of the accident. The event recorder is a little like an airplane's black box, and records the time and distance between the train's maneuvers. Cahill and Goetsch, in depositions, established that the test was done with a six-car train, when in actuality the train in question had picked up an additional two cars.

The additional two cars added 170 feet to the train, and Ard's experts calculated that the train never got past the switch, which therefore couldn't have been switched. The testimony was highlighted with advanced evidence software, Sanction, provided by Tempe, Ariz.-based Verdict Systems. Dan Bowen, its chief operating officer, attended the trial and operated the high-tech presentation.

Goetsch gives the software high marks. "Judge [Janet] Hall has one of these courtrooms of the future; every federal court has a courtroom wired with computer screens in front of every juror. The witness, the judge, the clerks and both counsel all have

screens. With the Sanction program, you plug into this. If you want to underline a sentence in exhibit 56, it's blown up in front of everybody," he explained. "It just worked very well in this case. It was a very complicated railroad yard, a complex series of movements."

Bowen, in an interview, added, "[W]hen they did the reenactment, Metro North said the train cleared the switch by 109 feet. But this was an eight-car train that hit Bob. Isn't each car 85 feet? Yes. So that's an additional 170 feet, so it means you didn't clear the switch by 61 feet."

The deposition testimony could be played as video sound bites on each juror's screen.

Appeal In The Works

Initially, Metro North officials said the margin of error for the event data recorder was one hundredth of a mile, or 52.8 feet. After the discrepancy about the eight-car train arose, the railroad revised its expert testimony and contended that the margin of error for its "black box" was over 700 feet—a distance that would allow the train to pass completely past the switch.

But with the revisions arising almost on the eve of trial, Hall declined to allow Metro North to change its story. The ruling was akin to a sanction, "although it wasn't called one," said Ledy-Gurren in an interview. Her firm, Ledy-Gurren, Bass & Siff of New York City, is preparing post-trial motions and intends to appeal on behalf of the railroad, she said.

Ledy-Gurren noted that the jury found Ard had been negligent in failing to ride in the lead cab of the train, and for walking between the rails and having his back to the oncoming train. The jury awarded loss of earnings damages of \$2.98 million and loss of Ard's services to his family of \$279,458. The loss to Ard's two teenage daughters of his ongoing care was set at \$1.09 million, for an unadjusted total of \$4.34 million.

The jury apparently believed Ard was killed so quickly he literally didn't know what hit him, and awarded zero for conscious pain and mental anguish. When adjusted for comparative negligence, the award is \$3,258,040.

Ledy-Gurren said Metro North will be contesting Hall's exclusion of its evidence about the black box margin of error, excessive "care" damages, and "an improper division of liability" in the case. ■