TESTIMONY OF WILLIAM G. JUNGBAUER

YAEGER JUNGBAUER & BARCZAK, PLC
745 KASOTA AVENUE
MINNEAPOLIS, MN 55414
(800) 435-7888

BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
OCTOBER 25, 2007

INTRODUCTION

Mr. Chairman, Members of the Transportation and Infrastructure Committee, it is a great honor and pleasure to be here today. My name is Bill Jungbauer. I have been practicing law in the field of railroad law and FELA litigation for nearly 30 years. I am President of the law firm of Yaeger, Jungbauer and Barczak. Our firm has represented injured railroad workers and their families for over 75 years in virtually every state and with every major railroad in the country. I have been personally designated by the Brotherhood of Locomotive Engineers and Trainmen as a Designated Legal Counsel. Our firm has been designated by numerous other unions representing rail labor. My curriculum vitae is attached as Exhibit 1. I have personally been involved in many cases where rail carriers have harassed, intimidated, threatened, and/or disciplined injured railroad employees. I have personally deposed many rail carrier officials on the subject of rail carrier policies, procedures and methods of dealing with injured employees. I am aware of many cases that have also been handled by my law firm involving harassment of injured employees by rail carriers. I am further aware of cases handled by other lawyers and union officials of many unions involving the same issues. I am personally disgusted with the rail industry and the abominable manner in which they treat their injured employees.

SCOPE OF THE PROBLEM OF CARRIER HARASSMENT/INTIMIDATION OF INJURED RAILROAD WORKERS & UNDER-REPORTING OF FRA STATS

Railroad carrier harassment and intimidation of their injured employees for the purpose of under-reporting of accident/injury statistics is a national problem that includes Railroads of all sizes from all parts of the country.

The FRA has failed to prevent harassment and intimidation of injured workers. FRA claims it has "zero tolerance" for carrier under-reporting/harassment yet rail carriers continue to SCARE employees into not reporting or under-reporting or misreporting accidents or injuries. Rail carrier Internal Control Plans (ICP's) have not stopped harassment and intimidation of injured employees. ICP's provide false cover for offending railroads and FRA top officials who have neither the will nor the manpower to prevent railroads from abusing their injured employees. FRA and Rail carriers can point to some examples of action taken to prevent such tactics. If FRA's "zero tolerance" policy had worked over the past decade there should be zero incidents of

harassment of injured employees and/or under-reporting of accidents. Today's testimony will clearly show that the FRA's "zero tolerance" policies have failed.

Rail carrier programs and policies actually encourage harassment and intimidation of injured railroad employees. The General Accounting Office documented in 1989 the problem of railroad under-reporting of accident and injury statistics and data. FRA Internal Control Plan regulation 49 CFR 225.33 was supposed to correct the problem in 1996. All the new regulation accomplished was to cause rail carriers to find new ways to under-report accident and injury statistics.

Why would rail carriers under-report accident and injury statistics? Such statistics are supposed to be used by FRA and Congress to consider the need for new safety, hazard elimination and risk reduction programs and legislation. New safety, hazard elimination and risk reduction programs and legislation cost money and affect corporate profits. Railroads apparently decided that if they could harass and intimidate injured employees causing them to fail to report injuries -- accident and injury statistics reported to the FRA would drop. Accident and injury statistics reported to the FRA have dropped significantly in the past decade; harassment and intimidation of injured employees has sky rocketed during the same period.

In addition to the harassment/intimidation methods of reducing reportable injuries, some railroads can use one or more of the following methods to under-report statistics: (1) forcing employees to use family medical leave act time for lost work time; (2) forcing employees to take personal days or vacation days for lost work time; (3) enacting draconian "availability policies" that force injured employees who return to work to work on days when they should not due to pain just to keep their job; 4) computer programming of call records that will not allow an injured employee to mark off "old injury"; and 5) fire the injured employee and have no lost work days to report to the FRA. Finally, FRA statistics in the past decade show that a large percentage of injuries are due to "human factors", a code name for blaming the injured employee. Due to a glitch in the reporting rules, carriers do not need to notify injured employees if the carrier claims the accident was caused by the human factor of the injured person.

STATE LEGISLATION TO COMBAT HARASSMENT/INTIMIDATION PREEMPTED

The problem of rail carrier harassment and intimidation of injured employees is so great that several states including Minnesota and Illinois have passed legislation due to the abject failure of the FRA and rail carrier internal control plans to prevent harassment and intimidation of injured employees. Amazingly, rail carriers have filed lawsuits in Federal Court in an attempt to block or destroy such state statutes. In the state cases, rail carriers have claimed that the Federal Rail Safety Act preempts any state laws or action in the field of preventing railroad carrier harassment and intimidation of injured employees. Rail Carriers argue that it does not matter whether or not the FRA through existing laws and regulations actually succeeds in preventing harassment; it matters only that the federal laws and regulations cover the same subject matter. Illinois passed

legislation that would make the prevention of medical services by rail carriers to their injured employees a crime. Rail Carriers sued and successfully convinced a federal court to overturn the Illinois statute.

Minnesota passed legislation in 2005 that made it a crime under section (a) of its statute for a railroad to deny, delay or interfere with an injured employee seeking medical treatment or first aid and further under section (b) made carrier harassment, intimidation, threat or discipline of an injured employee a crime. Every large and small railroad affected by the legislation joined together to sue in federal court to overturn the Minnesota Statute. Section (b) was overturned by the federal judge. The rail carriers were not satisfied. They appealed to the Eighth Circuit Court of Appeals to attempt to overturn section (a) of the Minnesota Statute.

Many of the rail carriers that sued to prevent Minnesota from using a criminal statute to stop rail carriers from intentionally harassing, intimidating, threatening and/or disciplining their injured employees are present at this hearing and will testify that current legislation, FRA action and rail carrier Internal Control Plans are sufficient to protect their injured employees. The list of rail carriers who sued in Minnesota to stop criminal actions against them are:

Burlington Northern Santa Fe Railway Company
Union Pacific Railroad Company
Canadian Pacific/Soo Line Railway Company
National Railroad Passenger Corporation (AMTRAK)
Dakota, Minnesota & Eastern Railroad
Ottertail Valley Railroad

Even little railroads want to be free to harass and intimidate their injured employees.

The rail carriers who sued in federal court in Illinois to prevent the State of Illinois from using a criminal statute to protect its injured railroad citizens were:

Burlington Northern Santa Fe Railway Company
Union Pacific Railway Company
Canadian Pacific/Soo Line Railway Company
CSX Transportation, Inc.
National Passenger Railway Corporation (AMTRAK)
Norfolk Southern Railway Company
Kansas City Southern Railroad Company
Illinois Central Railroad Company
Toledo, Peoria and Western Railway

Every railroad testifying here today and others represented by the AAR has proven that they do not want states to prevent them from abusing their injured employees to allow carriers to under-report injury/accident statistics. They don't want Congress to prevent them from abusing their

own injured employees for such purposes. Under the current system they can abuse their injured employees with impunity and they like that very much.

If these railroads and others would simply stop harassing, intimidating, threatening and/or disciplining their own injured employees and/or preventing them from access to medical treatment they would have nothing to fear from the Minnesota Statute, the Illinois statute nor section 606 of the House Bill.

In the Minnesota U.S. District Court case, rail carriers and the Attorney General of Minnesota presented what the court deemed to be "dueling evidence regarding whether the ICP Regulation effectively prevents harassment and intimidation calculated to interfere with the medical care of injured employees and whether the FRA properly enforces the ICP Regulation" Page 14 Court Opinion. Affidavits from the litigation are attached hereto as Exhibit 2.

The court recognized that "the determination whether state law is preempted by Federal Law does not concern an examination of the compliance with or adequacy of the Federal Regulation" "Neither the United States Supreme Court nor the Eighth Circuit Court of Appeals requires a railroad to prove FRA compliance before allowing state law preemption." Both courts deem coverage rather than compliance to be preemption's touchstone. In laymen's terms, if the FRA and carrier ICP programs TALK A GOOD GAME but actually FAIL TO PROTECT injured rail employees from harassment, intimidation, threats and discipline, that's sufficient to prevent any state from doing so. In laymen's terms again, it'll take an "Act of Congress" to stop the abuse of injured railroad employees by their employers.

INTERNAL CAUSES OF RAIL CARRIER HARASSMENT AND INTIMIDATION

Management Compensation Programs tied to injury Statistics/Performance:

Upper management may claim that they have no knowledge of any policies or procedures that encourage under reporting of accidents or injuries and/or encourage harassment and intimidation of injured railroad workers. The root cause that makes middle management and first line supervisors consider under reporting and harassment/intimidation of injured employees is the compensation system for such company officers. Middle managers and first line supervisors know that part of their total compensation with the railroad depends on whether or not goals are met for injury reduction statistics. (Ex. 3, testimony of carrier officials on compensation) It does not matter whether or not an official does his/her best in injury preventions; if statistics do not meet company reduction goals. Monetary rewards/penalties cause a true conflict of interest for middle management personnel wishing on one hand to earn as much money as possible and yet wishing to please upper management by achieving a lower accident reporting rate. Injured employees can be coerced through the carrier's discipline process into not filing FRA reportable accidents due to direct or indirect threats of selective enforcement of carrier disciplinary rules and procedures. The only missing piece to the puzzle is how the harassment or intimidation is

actually accomplished. That is done through various programs that each railroad has that allow for selective enforcement of various penalties including ultimately dismissal of employees. A number of years ago I personally advised FRA Director, Jolene Molitorous of the problem with compensation of middle and lower railroad management being tied to accident statistics. FRA refused and/or was unable to investigate this problem.

EXTERNAL CAUSES OF THE PROBLEM

FRA will claim that its system of fines is a deterrent to carrier misdeeds. A dirty little secret that few people know is that FRA fines of rail carriers are often bundled together and settled for pennies on the dollar. Billion dollar corporations do not fear thousand dollar fines that get negotiated down to hundred dollar fines. FRA claims it will investigate cases where medical treatment is denied, but FRA attorneys have personally told me they will not or cannot investigate other types of harassment such as carrier discipline of injured employees as a harassment tool. Our office recently asked the FRA for a copy of a Class 1 carrier's Internal Control Policy. The FRA responded that it did not have a copy of the policy. How can FRA know that the ICP's of various carriers are effective or not if they don't even have a copy of such policy, much less investigate compliance of any such policy.

I am aware that time is precious in these hearings and that I must end my prepared remarks. I am prepared to offer examples of specific cases involving a number of rail carriers present today and some not present today to illustrate the scope and breadth of the problem.

PROPOSED ACTION

The House Bill contains a section that would make it clear to states, rail carriers, the FRA, and injured railroad employees that this Congress will not tolerate rail carrier harassment and intimidation of injured railroad workers. Unfortunately, the Senate version of the bill does not contain similar language. It is incomprehensible to believe that any Senator or Member of the House of any political party would be in favor of allowing rail carriers to harass or intimidate injured rail workers. However, unless the House and Senate Bill are reconciled to include language of the House Bill the intent of Congress will be interpreted by courts around the country to allow rail carrier harassment and intimidation of injured railroad workers.

Thank you for your time and for allowing me to be here today.

William G. Jungbauer

ADDITIONAL DOCUMENTS AND SPECIFIC EXAMPLES OF HARASSMENT

1. Justin Cloud, CSX employee. Transcript between Mr. Cloud and CSX Terminal Superintendent (Ex. 4).

2. Lucas Litowitz, fired BNSF employee. Order from Federal District Court, Western District of Washington granting Protective Order. (Ex. 5). Plaintiff Litowitz Motion in Support of Protective Order [Ex. 6]. Defendant BNSF's Memorandum Opposing Protective Order. [Ex. 7].

3. Letter from Mr. John McArthur, Vice General Chariman of the Brotherhood of Railroad Signalmen dated September 10, 2007 summarizing three examples of harassment in the cases of Mr Vasquez, Union Pacific, Mr. Chavez, Union Pacific, and Mr. Lacsina, Amtrak. Supporting documentation for each case of harassment is attached. [Ex. 8].

4. Letter from Kevin T. Christians, Local Chairman BLET Division 6 dated October 14, 2007. [Ex. 9].

5. BNSF Risk Assessment Program. [Ex. 10].

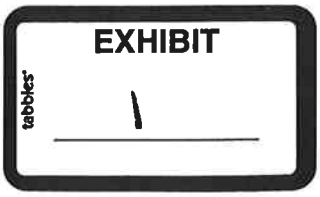
6. Union Pacific UPGRADE Policy. [Ex. 11].

7. Tanner v. Union Pacific. Mr. Tanner is a fired Union Pacific Employee. Attached is the deposition of Cameron Scott. [Ex. 12].

WILLIAM G. JUNGBAUER

Yaeger, Jungbauer, & Barczak
745 Kasota Avenue
Minneapolis, Minnesota 55414
(612) 333-6371
(612) 333-3619
1-800-435-7888

- Juris Doctor Degree, University of Minnesota Law School 1978
- President of Law Firm of Yaeger, Jungbauer, & Barczak
- Senior Trial Attorney, practicing with firm that has been in existence since 1929 practicing in the field of railroad litigation, personal injury and wrongful death litigation
- The law firm has handled cases in 48 out of 50 states across the country
- Board Certified Civil Trial Specialist by National Board of Trial Advocacy
- Past National Chairman and Board Member of Academy of Rail Labor Attorneys
- Past National Chairman of Association of Trial Lawyers of America; Railroad Law Section, now known as AAJ, American Association of Justice.
- Listed in Best Lawyers of America; Railroad Law Section
- Lectured at the Western Economic Association International on "Calculation of Wrongful Death Damages"
- Co-author of Train Accident Reconstruction and FELA and Railroad Litigation: Volume I, Volume II, Volume III, and Volume IV.
- Contributing author to Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption by Thomas Ireland and Thomas Depperschmidt
- Brotherhood of Locomotive Engineers and Trainmen (BLET) Designated Legal Counsel
- Past National Chairman of Brotherhood of Locomotive Engineers and Trainman (BLET) Designated Legal Counsel



- Bar Admissions:

Supreme Court, State of Minnesota, September 29, 1978

U.S. District Court, District of Minnesota, October 11, 1978

U.S. District Court, Eastern District of Wisconsin, August 30, 1979

U.S. Court of Appeals, Eighth Circuit, March 26, 1980

U.S. Supreme Court, November 30, 1981

U.S. Court of Appeals, Ninth Circuit, June 30, 1986

Supreme Court, State of Wisconsin, April 24, 1989

U.S. District Court, Central District of Illinois, March 20, 1990

U.S. District Court, District of Montana, February 21, 1992

Supreme Court, State of Montana, May 13, 1993

U.S. District Court, District of Colorado, November 9, 1993

Supreme Court, State of Colorado, December 29, 1993

U.S. District Court, Northern District of Illinois, July 26, 1994

U.S. District Court, Southern District of Illinois, August 20, 1999

U.S. District Court, Southern District of Texas, October 4, 1999

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF DENNIS DEAN

EXHIBIT

tabbies

2

A.D.

AFFIDAVIT OF DENNIS DEAN

State of Minnesota)
)
County of Dakota)

Dennis Dean being first duly sworn on oath, states as follows:

1. Your affiant's name is Dennis Dean. I reside at 25415 140th Street, Spirit Lake, IA 51360. I am 58 years old. I have been married to my wife, Anita, for 35 years.

2. I was hired by the Union Pacific Railroad on September 18, 2006.

3. Prior to going to work for the Union Pacific Railroad I served in the United States Navy and have previously worked as a cook, a sheet metal worker, a truck driver, and have worked various factory jobs including dye-cast metals, hydraulics, and inventory control. I have also worked for a hospital and for a cleaning business.

4. My wife and I were thrilled when I received the job offer from the Union Pacific because it would provide a good income and health insurance benefits for both of us. I looked at this job as being my best and final job before retirement, which I was planning on taking when I reached the age of 66.

5. I feel I was an exemplary employee for the Union Pacific. I passed all of my tests, was getting along well with my co-workers and supervisors and was enjoying the work.

6. On December 19, 2006, I was injured. On that date, we were working a train that originates out of Worthington and switches a number of elevators south of Worthington. I started my shift at 1630 on December 18, 2006, and completed my shift at 0430 on December 19, 2006. I had to stop at that point because I was "dead on the law", meaning the law does not permit me to work any longer than 12 hours per shift. At that point, I stayed in the locomotive by a siding and waited for a cab to pick us up. About one hour later an Armadillo cab arrived. As I got off the train, I crossed over the main-line tracks and started to descend a slope moving towards the Armadillo cab. This slope was about 10 to 12 feet in length and was very steep. As I was about 2 feet from the bottom of the ditch the ballast rocks rolled out from underneath me despite my best efforts to walk at an angle. I was carrying my grip and a lantern. I was attempting to shine the lantern ahead of me, as the lighting in the area was not very good. I fell down on my right hand and jammed my right hand, wrist, and arm. I felt immediate pain in my right hand and wrist.

7. I was told that the rules of Union Pacific Railroad were that, if an injury occurs, I must file a request with the MOP (Manager of Operating Practices) before I can seek medical attention. I attempted to reach the MOP, but he was unavailable, and accordingly I contacted another supervisor, the MTO (Manager of Train Operations) at approximately 0645 hours. I informed the MTO that I had been injured that day while at work. The MTO told me to wait at the terminal and that I must wait for him before I could get medical attention. The MTO arrived at the terminal at 0800 hours.

8. George Zettles (MTO), Eric Schundeman (MOP) and Dan Schedeman (a Mankato Roadmaster) all converged on me at about 0800 hours at the terminal. (The spelling of the supervisors' names is a guess.) I believe the three supervisors arrived specifically for the purpose of interrogating me. They made it clear that I had to complete the interrogation before I could get medical attention. They interrogated me for about 40 minutes. Eric then brought me to the Worthington hospital while the other two supervisors said they would go to the injury site.

9. I received an x-ray that revealed a broken ulna and was told by the physician that I had a bad break and that he was going to consult with a surgeon. The surgeon agreed that the break was bad but that surgery was not necessary. I was placed in a splint and was discharged at 1110 hours. Eric was with me the whole time.

10. At this point, I had been at work for 19 hours, had a broken arm, and was in a lot of pain. I very much wanted to go home to my family. Instead, Eric said we should go back to the depot to fill out reports and undergo more interrogation. I was in the probationary period of my employment and was hardly in a position to disagree.

11. Eric and I returned to the depot in Worthington at 1120 hours. I filled out a personal injury report form and then was questioned by five managers for yet another two hours from 1130 hours to 1330 hours. During this interrogation, I was required to take a toxicology test and a urinalysis test, which I believe were undertaken at approximately 1200 hours. While I was being questioned, my supervisors indicated that they did not believe my statement as to how I was hurt and asked whether there was an altercation or a fight between me and another crew member. Other than having a broken arm, they had no reason to believe that a fight or an altercation had occurred or that I was otherwise being untruthful as to how I was injured.

12. I finally departed for home at approximately 1330 hours.

D.D

13. Following my injury I performed light-duty work in Mankato, approximately 100 miles from my house. I drove almost four hours a day to light-duty and back with a broken arm.

14. On the final day of my probationary period, in fact 1.5 hours before my probationary status was set to expire, I was at my light-duty work station and was approached by management and told that I was terminated. I was not given a reason for my termination.

15. I am now unemployed.

FURTHER, affiant sayeth not.

Date: January 30, 2007

Dennis Dean

Dennis Dean

Subscribed and sworn to before me this 30th day of January, 2007

Notary Public

TONYA R. SALTER
Notary Public
Minnesota
My Commission Expires January 31, 201

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF RITA M. DESMOND

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

RITA M. DESMOND, being duly sworn deposes and says:

1. I am a legal assistant with the Minnesota Attorney General's Office.

2. In connection with the above-captioned matter, I listened to and made duplicate copies of the official tapes of Senate and House proceedings listed below, as maintained by the Legislative Reference Library at the State Office Building in St. Paul, Minnesota.

3. Attached as Exhibit A is a transcript of a portion of the testimony before the House Public Safety Policy and Finance Committee Hearing on H.F. 1703, March 22, 2005.

4. Attached as Exhibit B is a transcript of a portion of the testimony before the Senate Crime Prevention and Public Safety Committee Hearing on S.F. 1606, March 22, 2005.

5. Attached as Exhibit C is a transcript of a portion of the testimony before the Senate Crime Prevention and Public Safety Committee Hearing on S.F. 1606, March 22, 2005.

6. Attached as Exhibit D is a transcript of a portion of the testimony before the House Public Safety Policy and Finance Committee Hearing on H.F. 1703, March 22, 2005.

FURTHER YOUR AFFIANT SAYETH NOT.

RITA M. DESMOND

Subscribed and sworn to before me on

this 24 day of January 2007.

NOTARY PUBLIC

AG: #1739382-v1

EXHIBIT A

From the House Public Safety Policy and Finance Committee, Hearing on H.F. 1703, March 22, 2005.

Phillip Qually:

"First I'd like to say that the nature of this problem is difficult. The railroads in this union have a productive working relationship in this State. There's many things that we work together on. But the nature of delaying and denying and interfering railroad workers' medical treatment is such that, well we've protested this, the injured people themselves have protested this, at the time of injury and the time of delay. We simply have to bring it to the State's attention. We believe it's within the State's interest to act to protect injured workers.

***

The first case was brought to my attention October 11, 2003 in Shakopee, Minnesota. The gentlemen cannot be here today because he's at work. He had a torn ligament at 2:30 in the morning. He called the manager immediately by telephone. The manager did not address nor call 911 emergency or make any arrangements for him to be taken to the hospital. The manager arrived at 3:15. Excuse me. He called the manager back at 3:15 and they were still not there. The manager arrived and then took the worker to the hospital at 4:15 until and we had a one hour and 45 minute delay on the front end from the time that the first call for emergency went in and when the carrier responded to it. At the hospital, the worker was given two levels of pain killers and told to ice the foot, keep it up, keep it compacted in a cast. Instead, the worker was taken back to the yard office and held for another hour and a half with a claim agent and three other train

masters circling and asking him questions. Again, the worker was not allowed to go home until approximately 8:00 a.m. And this is six hours, pardon me, 5-1/2 hours after the time of injury.

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It's very unfortunate. Basically a worker broke an ankle on a train at 4:50 in the morning. The crew sought to get an ambulance and essentially a decision was made somewhere in the line that an ambulance was not called. We have records it was not called and finally a carrier manager took the injured worker then to the hospital.

At the hospital the injured worker was diagnosed with a broken ankle and then told to go directly to your own orthopedist. This cannot be set, you have to have this reset. Instead, the train master took her in the opposite direction from her home back to the injury site and photographed the area, then took her to her home."

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AG: #1736778-v1

EXHIBIT B

From the Senate Crime Prevention and Public Safety Committee Hearing on S.F. 1606, March 22, 2005.

Senator Mee Moua:

> "This bill relates to railroads' crimes and addresses a disturbing pattern of conduct by railroad management personnel. Since the year 2003 and as recently as February 2005, the carriers have intentionally denied, delayed and interfered with first-aid medical treatment of injured railroad workers. And if passed into law, S.F. 1606 will make this conduct unlawful . . . ."

AG: #1731215-v1

EXHIBIT C

From the Senate Crime Prevention and Public Safety Committee, Hearing on S.F. 1606, March 22, 2005.

Mr. Clyde Larson:

"Thank you Mr. Chairman. My name is Clyde Larson. I'm General Chairman of DMNI Railroad in Duluth, the United Transportation Union . . . ."

* * *

"[W]e see a trend where men and women are getting hurt out in the yard. They don't have their arms cut off, but they're brought into the yard office. They ask for medical treatment; they're held from anywhere from 45 minutes to an hour and fifteen before the carrier comes and will come with other managers. They will take them to the medical treatment facility; they've tried to get in and intervene in that treatment. Then when the doctors have said "go back and keep that leg up, keep it on ice, keep it compacted, they're taking the workers back to the yard office and holding them on duty against doctor's orders with a claim agent there, trying to get statements. We have three cases of this specifically. And these are ranging from periods of delay to an hour and half, before medical treatment and then after hour medical treatment . . . ."

AG: #1731223-v1

EXHIBIT D

From the House Public Safety Policy and Finance Committee, Hearing on H.F. 1703, March 22, 2005.

Michael Nelson:

"I live in Circle Pines, Minnesota. I've got 30 years of service on the C&W and Union Pacific Railroad. February 8, 2004 I was injured in St. Paul and I called the manager right about, just before 10:00 p.m., when I injured myself, when I was injured, and I asked for help and I asked him if they could take me to the hospital right away, because I was in a lot of pain. I had apparently torn my achilles tendon and I was in quite a bit of pain. And he said that he'd get back to me. He had to make some phone calls first. Well then he hung up. Well, we waited and waited. And it's only about 15 minutes or less from where he had to come from. And, it had gone about half an hour, 35 minutes and nobody had showed up so we called again and he said, "well, I'm on my way now. I've still got to make some more phone calls. He finally showed up and finally we're on the way to the hospital. I finally got to the hospital probably about, oh, 11:20-11:25 at night.

***

And, I had been examined and everything there and I got back to the yard office. They took me back to where my vehicle was about 1:30 a.m., finally. And there was six people there waiting for me and my co-worker, they had already sent him home. And they wanted me, they were all asking me questions and more questions and I had a hard time focusing because they put me on some pain killers

and I was on crutches and the doctor had told me to go home and immediately put my leg on ice, my foot on ice and keep it elevated the rest of the night and stay off of it so I could go in the following day for some more tests. Well, they were just, each of the managers were circling me and asking me all types of questions and I said I wanted to go home and then they were wanting me to fill out all these different types of papers and I said well, I'd rather go home, I'm in a lot of pain, I don't know what's going on here right now. They said I could not leave the company property until I had signed these papers. So, he started reading them to me and I filled out some and then they finally said I could go home. And this was at about a quarter to three, ten minutes to three in the morning."

AG: #1737259-v1

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF PHILLIP QUALY

AFFIDAVIT OF PHILLIP QUALY

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Phillip Qualy, being first duly sworn upon oath, states as follows:

1. I am the State Legislative Director for the United Transportation Union.

2. In my capacity as Legislative Director, I participated in the enactment of the Minnesota Injured Railroad Workers Medical Treatment Act of 2005 ("Act").

3. The purpose of the Act was to reduce the incidence of "swarming" which would occur when a worker was injured and not permitted to seek medical treatment until an interrogation by management had been completed.

4. I am aware that management at most railroads will earn a bonus based on different performance factors.

5. One of the performance factors is the frequency and severity of injuries that occur by the railroad workers under their supervision.

6. It has become a standard in Minnesota for railroad management to interrogate injured workers before getting medical treatment because of the belief that an untreated worker is vulnerable and will be induced to answer leading questions in a manner favorable to the interrogator because they are in pain, they need immediate medical treatment, and they are not focused on the questions being asked.

7. A term utilized in the railroad industry to describe a pre-medical and post-medical interrogation is "swarming." "Swarming" can be described as several managers surrounding the injured worker, prior to the worker receiving medical treatment, and interrogating him or her about the injury until they get favorable answers or until the worker cannot provide more

information. Thereafter, a second "swarm" may occur after the worker gets treatment, with up to five managers conducting the interrogation. The "swarm" will be conducted at a time the injured worker is just discharged by medical attendant, is tired, is in pain, perhaps sedated or heavily medicated, and has been told by the physician to go home and rest. In many cases, the physician will tell the injured worker to put the legs up, to have bed rest, and to lower their stress level. Instead of following the medical instructions, the managers take the worker in for another "swarm." During the "swarm" the injured worker may be taken to the injury site and told to reenact what happened to cause the injury.

8. The purpose in enacting the Act was not to stop interrogations or to stop the ability of a railroad to determine the cause for an accident. The purpose is simply to make sure that a worker is able to get prompt medical attention.

9. Through the 2005 session there were several amendments that were proposed that were part of the debate concerning the issue of "swarming" and the need for prompt medical attention. At no time did representatives of the railroad industry state that prompt medical attention would be a problem for them as it relates to injured workers.

10. Indeed, on May 31, 2005 the lobbyists representing the railroad industry lobbyist sent to me a fax, a copy of which is attached as Exhibit A, that states that the railroad industry agrees to draft amendment language regarding criminal penalties for impeding an injured railroad worker. The memo is drafted by John Apitz, a lobbyist who represents the railroad industry. The memorandum states that the amendment language for the $1,000 penalty is "consistent with the agreement that the railroads reached with the UTU."

11. Attached as Exhibit 1 to Mr. Apitz's memo, which again is Exhibit A to my affidavit, is the draft of the stipulated amendment. Please note that the draft language amends Minn. Stat. § 609.849, a criminal statute, and further that it provides for a $1,000 fine.

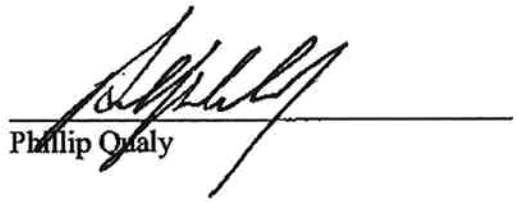
Minnesota Chapter 609 is the criminal code for the State of Minnesota. The Act was placed in the criminal code because both the railroads and the union agreed that the issue concerning "swarming" finally be addressed as such.

12. The only change from the amendment attached to Apitz's exhibit and the final Act was the addition of the word misdemeanor. The purpose of adding the word misdemeanor was to make it clear that the Act is criminal in nature.

13. I interviewed Ms. Dyer about the La Crescent, Minnesota incident which is referred to in Mr. Canny's affidavit (Exhibit B). She told me that Mr. Knickel picked her up in the switch shed approximately 40 minutes after she called for help on her radio. Mr. Knickel then took Ms. Dyer to the hospital in La Crosse, Wisconsin. The emergency room physician told her that her ankle was severely fractured and that they could not set the fracture in the emergency room. They told her to go to an orthopedic surgeon to get the fracture set that morning.

14. Rather than taking Ms. Dyer to an orthopedic surgeon, Mr. Knickel took her back to the injury site, which is approximately three or four miles West of La Crosse, to interrogate her about the incident.

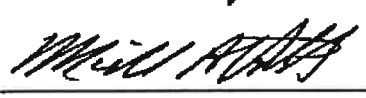
FURTHER YOUR AFFIANT SAYETH NOT.



Phillip Qualy

Subscribed and sworn to before me on

this 31st day of January, 2007.



NOTARY PUBLIC

AG: #1741065-v1

To: Doug Franzen
Fax # 612/340-7900

Fr: John Apitz 651/260-0885 (cell)

Attached is the draft amendment language regarding penalties for impeding injured railroad workers. It is consistent with the agreement that the railroads reached with the UTU.

If this works, hopefully you can ask Bakk to offer it.

Exhibit A

05/31/05

CEB SCH1976A-7

Senator ..... moves No. 1976, in conference committee, as follows:

On RS

Page 80, after line 3, insert:

"Sec. 85. Laws 2005, chapter 136, article 17, section 50, is amended to read:

Sec. 50. [609.849] [RAILROAD THAT OBSTRUCTS TREATMENT OF AN INJURED WORKER.]

(a) It shall be unlawful for a railroad or person employed by a railroad ~~negligently or~~ to intentionally ~~to~~:

(1) deny, delay, or interfere with medical treatment or first aid treatment to an employee of a railroad who has been injured during employment; or

(2) discipline, harass, or intimidate an employee to discourage the employee from receiving medical attention or threaten to discipline an employee who has been injured during employment for requesting medical treatment or first aid treatment.

(b) Nothing in this section shall deny a railroad company or railroad employee from making a reasonable inquiry of an injured employee about the circumstance of an injury in order to gather information necessary to identify a safety hazard.

(c) It is not a violation under this section for a railroad company or railroad employee to enforce safety regulations.

(d) A railroad or a person convicted of a violation of paragraph (a), clause (1) or (2), ~~is guilty of a gross misdemeanor and may be sentenced to imprisonment for not more than one year or to payment of a fine of~~ may be fined not more than ~~$3,000, or both~~ $1,000.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to crimes committed on or after that date."

Renumber the sections in sequence and correct the internal references

Amend the title accordingly

Exhibit 1 To Exhibit H

State of Minnesota

Public Safety Criminal Omnibus Bill: H.F. 1 Article 17, Section 27.

H.F. 1, Art. 17. Sec. 27. [609.849] [RAILROAD THAT OBSTRUCTS TREATMENT OF AN INJURED WORKER.]

(a) It shall be unlawful for a railroad or person employed by a railroad to intentionally:

(1) deny, delay, or interfere with medical treatment or first aid treatment to an employee of a railroad who has been injured during employment; or

(2) discipline, harass, or intimidate an employee to discourage the employee from receiving medical attention or threaten to discipline an employee who has been injured during employment for requesting medical treatment or first aid treatment.

(b) Nothing in this section shall deny a railroad company or railroad employee from making a reasonable inquiry of an injured employee about the circumstance of an injury in order to gather information necessary to identify a safety hazard.

(c) It is not a violation under this section for a railroad company or railroad employee to enforce safety regulations.

(d) A railroad or person convicted of a violation of paragraph (a), clause (1) or (2), may be fined not more than $1,000, misdemeanor not subject to incarceration.

[Effective Date.] This section is effective August 1, 2005, and applies to crimes committed on or after that date.

Exhibit B.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF HUGH CANNY

AFFIDAVIT OF HUGH CANNY

STATE OF WISCONSIN)
) ss.
COUNTY OF COLUMBIA)

Hugh Canny, being first duly sworn upon oath, states as follows:

1. I am 48 years of age. I reside at 327 North First Street in Randolph, Wisconsin 53956. I have been employed in the railroad industry for 30 years. I currently am an engineer.

2. On February 4, 2005, I was an engineer on a train going from Saint Paul, Minnesota to Portage, Wisconsin. Susan Dyer was the conductor and I was the engineer on the two-person crew. There were at least 70 cars on the train. At the time, the temperature was around zero degrees.

3. Sometime at approximately 0400 on February 4, 2005 our train passed a "wild detector" near Red Wing, Minnesota. A "wild detector" is a sensor attached to the track which detects the "out of round" wheels on freight cars. The "wild detector" signaled to our train that several freight cars were "out of round." The protocol when a freight car with a "out of round" wheel is identified is to detach the freight car at the next freight yard. In this case, the next freight yard was located in La Crescent, Minnesota.

4. We drove the train to La Crescent, Minnesota and, because we were running up to 11 hours on our shift, and because we are not permitted to work more than a 12 hour shift, another crew had been called to relieve us at the La Crescent freight yard.

5. The La Crescent freight yard is very isolated. There was ice and snow surrounding the environment. It was in the middle of winter. It was in the dark of night. The

protocol for removing a freight car with a bad wheel is for the conductor to get off of the locomotive and go back to the damaged freight car. She then radios the engineer to move the train until the damaged freight car is near a switch stand. At that point, the conductor disengages the freight cars behind the damaged freight car, radios to the engineer to pull the forward cars forward, moves the switch, and then backs the damaged freight car off of the mainline onto the siding. Once the damaged freight car is disengaged, the engineer is told to move the train forward back onto the mainline. The switch is then reversed by the conductor, and the engineer then backs the train up and hooks the remaining freight cars together.

6. The work involved in changing a freight car is extensive. This is done in an isolated location in a very rugged environment.

7. While the conductor was trying to place the damaged freight cars on the siding, she radioed to me in the locomotive and told me that she had hurt her ankle. She said she would try to complete the change of the damaged freight cars. At the time, I was on the locomotive, which was approximately 70 cars ahead of the conductor, which is approximately one mile.

8. I then received a call from the conductor who stated that she could not complete the task and that she was injured. She indicated that she was on the ground.

9. I then called the dispatcher by both radio and cell phone. The dispatcher received my call and I told him that the conductor was injured, could not walk, and she needed medical attention.

10. The dispatcher then called me back and asked for a description of how an ambulance could get to the location where the conductor was located. I told the dispatcher to contact the rail yard switch crew in La Crosse, Wisconsin who would probably know the directions to get to the switch shed located in La Crescent, Minnesota. The purpose of his

telephone call was to get directions for the ambulance. He made that clear to the La Crosse switch crew. The radio dispatch was heard by me in my locomotive.

11. About 10 minutes later, the dispatcher called me and told me that the road manager, Jerry Knickel, was going to pick up the conductor.

12. Approximately 30 minutes later, a replacement crew from Saint Paul, which had headed to La Crescent to relieve us because we were nearing the end of our shift, arrived on the scene. Terry Burns, the replacement conductor, said that they immediately went to the shed and found the conductor, Ms. Dyer, huddled in the shed and appeared to be going into shock.

13. Mr. Burns advised me that, approximately 15 minutes after they arrived, Mr. Knickel arrived on the scene and picked up Ms. Dyer.

14. Upon information and belief the ambulance located in La Crescent could have arrived on the scene within five minutes. By not ordering an ambulance, Ms. Dyer sat in a zero degree switch shed for approximately 40 minutes.

FURTHER YOUR AFFIANT SAYETH NOT.

Hugh Canny

Subscribed and sworn to before me on
this 31 day of January, 2007.

NOTARY PUBLIC

AG: #1740968-v1

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ORIGINAL

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANTA
IN AND FOR THE COUNTY OF YELLOWSTONE

CHARLES R. EHLENFELDT,

Plaintiff,

vs. Case No. DV 05-0322

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant.

DEPOSITION OF JEFFREY WHITACRE
Taken on behalf of the Plaintiff
March 14, 2007

- - -

BE IT REMEMBERED THAT, pursuant to the Washington Rules of Civil Procedure, the deposition of JEFFREY WHITACRE was taken before KATHERINE S. VANGRINSVEN, a Certified Shorthand Reporter, #3085, on March 14, 2007, commencing at the hour of 1:17 p.m., the proceedings being reported at 3810 East Boone, Spokane, Washington.

NAEGELI REPORTING COURT REPORTING & VIDEOGRAPHY

EXHIBIT
3

1 that you've listed a personal injury?
2 A Yes, sir.
3 Q And if you get enough points, the next time you
4 have discipline of any kind, including a soup can incident,
5 you could be fired?
6 A Not exactly.
7 Q Well, then, why don't you explain how it works.
8 A You are, you are assessed points, but just
9 because you have points, doesn't mean if you have one, one
10 incident that you would be fired.
11 Q But if you have the switch incident, which again,
12 the court and jury haven't had a chance to rule on whose
13 fault it is, but your company's already ruled by the mere
14 fact that it happened that you've assessed points against
15 his record, haven't they?
16 MR. SIMPSON: Objection, foundation.
17 THE WITNESS: We assess points for the personal
18 injury, yes.
19 BY MR. JUNGBAUER:
20 Q Why is that fair when we don't know whose fault
21 it is until the jury rules?
22 A I couldn't answer that. I don't assess -- I
23 didn't come up with the system.
24 Q Okay. Could that be -- and, now, our previous
25 witness testified to us that managers on the Burlington

1 Northern Santa Fe, their bonuses can be affected or their
2 total compensation, by the number -- by the safety record
3 and number of personal injuries that are filed in their
4 territory, correct?
5 A That's a possibility, yes.
6 Q Doesn't that create a huge conflict of interest
7 for someone who's deciding what penalty to give to an
8 individual on a soup can incident if he already knows that,
9 "Hey, this guy's got a personal injury for the, for the
10 switch. That's going to hurt my bonus. And now we've got
11 the soup can thing. That's going to hurt my bonus. So
12 let's fire him to make an example out of him for everybody
13 else." Isn't there a conflict of interest like that?
14 A I don't believe I've ever viewed it that way.
15 Q Well, let's look at it that way right now, and
16 tell the jury whether or not you think there is a potential
17 for conflict of interest if the person whose bonus is at
18 risk, that's the managing person that's going to fire or
19 not fire somebody, if he can use discretion of whether to
20 fire or not fire somebody and his own personal bonus is
21 affected by what happens long-term. Isn't that a conflict
22 of interest?
23 MR. SIMPSON: Objection, argumentative.
24 THE WITNESS: I'm not sure because the safety
25 aspect is only a fraction of the bonus potential.

1 BY MR. JUNGBAUER:
2 Q But if it affects a hundred dollars, much less
3 thousands of dollars, wouldn't an official want to make an
4 example of somebody like Mr. Ehlenfeldt so other people
5 don't turn in accident reports? Isn't there a conflict of
6 interest there?
7 MR. SIMPSON: Same objection.
8 BY MR. JUNGBAUER:
9 Q There's at least the potential for conflict of
10 interest, isn't there?
11 A Possibly could be.
12 Q Okay. And that's what I'm --
13 MR. JUNGBAUER: Go ahead.
14 THE WITNESS: Thank you.
15 BY MR. JUNGBAUER:
16 Q Now, you worked as a, as a conductor trainman
17 also?
18 A Yes, sir.
19 Q As we look at this Exhibit No. 4 [sic], can you
20 tell me what types of switches there are specific
21 instructions on how to throw switches?
22 A You're asking for the different types?
23 Q Yes.
24 A How many different types?
25 Q Yes. And I think if you go through there and

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ORIGINAL

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANTA
IN AND FOR THE COUNTY OF YELLOWSTONE

CHARLES R. EHLENFELDT,

Plaintiff,

vs. Case No. DV 05-0322

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant.

DEPOSITION OF THOMAS CLARK SIMMONS
Taken on behalf of the Plaintiff
March 14, 2007

BE IT REMEMBERED THAT, pursuant to the Washington Rules of Civil Procedure, the deposition of THOMAS CLARK SIMMONS was taken before KATHERINE S. VANGRINSVEN, a Certified Shorthand Reporter, #3085, on March 14, 2007, commencing at the hour of 10:10 a.m., the proceedings being reported at 3810 East Boone, Spokane, Washington.

1 A On many -- in, in many cases, if the manager
2 knows what he's doing, he can, he can contact the data
3 inputters, the people that input the data -- the data
4 inputters, that's great grammar there -- but he can contact
5 them and say, "Hey, I think that this situation, the guy
6 shouldn't be assessed points."
7 Q So the manager kind of has a little input into
8 whether points are assessed or not?
9 A If he's familiar with the process, yes.
10 Q Okay. Isn't it true that managers have bonus
11 systems where if accidents occur on their territory, it can
12 affect the overall compensation for that territory?
13 MR. SIMPSON: Objection, lack of foundation.
14 THE WITNESS: Accidents or injuries?
15 BY MR. JUNGBAUER:
16 Q Accidents or injuries, you tell me.
17 A We are rated, we are rated on safety, yes, sir.
18 Q I know. But let's say that an engine comes from
19 a different territory and it malfunctions in your
20 territory, so you have a malfunctioning engine that causes
21 an accident in your territory. You get assessed for it,
22 don't you?
23 A If there's an injury involved with it and I get
24 the man hours for the employee, that, that could be the
25 case, yes, sir.

1 Q And that's totally unfair, isn't it, that
2 somebody else doesn't do the proper maintenance on an
3 engine in a different territory, and you as a manager, just
4 because the accident occurs in your territory, get
5 assessed, right?
6 A That's unfair?
7 Q Don't you think that's unfair?
8 A No, sir. I think that's a system, a process we
9 have in place, and that's what we have to live with. I,
10 I --
11 Q Don't you also think that it's a, that it puts
12 pressure on middle management people to try to say to
13 employees, "Don't report injuries because, otherwise, it
14 gets on my" -- "my family doesn't eat"?
15 A I -- I, personally, I can't speak for the rest of
16 BNSF Railway, but it is what it is. If the injury happens
17 on my territory, it's my injury, and I'm willing to accept
18 that.
19 Q But it can affect your compensation?
20 A In the long run, yes, sir, it can. It can affect
21 my, it can, it can affect my compensation, that is
22 correct.
23 Q Right. And other managers' compensation also?
24 A That is correct.
25 Q So why would a manager ever want to give a break

COPY

TRANSCRIPT OF RECORDED TELEPHONE CONVERSATIONS

BETWEEN

JUSTIN CLOUD, CONDUCTOR, CSX RAILROAD

AND

DEWAYNE BARTON, TERMINAL SUPERINTENDENT, CSX RAILROAD
AND
MAX COX, ENGINEER/CONDUCTOR MENTOR, CSX RAILROAD

* * * * * * * * * * * * * *

The following pages contains a transcript of one (1) recorded message and six (6) recorded telephone conversations been Justin Cloud, Conductor, and Dewayne Barton, (Former) Terminal Superintendent, and Max Cox, Engineer/Conductor Mentor, all being employed by CSX Railroad.

EXHIBIT
tabbies
4

Phone Message:

DEWAYNE: Hey, this is Dewayne. I think we had a misunderstanding this morning. When I was talking to you, the speech I have to give to anyone that gets hurt. If I didn't, you know, that's why I said I'd come over there and take you to the doctor. It didn't have anything to do with you. It's a speech that everybody that gets hurt gets that speech, buddy, so it didn't have nothing to do with you personally. That's why I said I'll be down there in five minutes if you needed me to because Max called me after I called him and said you wanted to see how you could do, you know. I'm willing to work with you. I'll do anything to keep you out of trouble. That's what I want you to know but I wanted you to be well, too, so I hope everything turns out alright and you know, I'll give you until Sunday, four or five days, so you can get rested up there. You can give me a call 304-1400. Thank you, buddy.

* * * * *

Phone Conversation #1

DEWAYNE: ... and we'll go from there. See what I'm saying?

JUSTIN: About the accident report or...

DEWAYNE: Yeah, I'd like you just to show up for work and when you're out here, we'll say something flew up and hit you in the head, and fill out the paperwork and we'll just take you to the doctor and they'll tell you the same thing, you know, fill out the paperwork.

JUSTIN: Alright. He's supposed to call me back in the morning or something about that test and have me come in.

DEWAYNE: Okay. But I mean, I'm sure it, it was precautionary if it was just a mild concussion. Did they tell you class 1?

JUSTIN: Class 2. I don't know what that means but...

DEWAYNE: Do what?

JUSTIN: I'm not really sure what a class 2 concussion means. That's just what he said.

DEWAYNE: Yeah, I think that, I think that means a mild concussion. But hopefully everything is going to be alright. I'm sure you got hit pretty hard. Hopefully we'll get through this and all, like I said, we'll help you through whatever you need. I told Max if it costs anymore than what your insurance paid, we'll get you a day here or there

to make up the difference on it, so.

JUSTIN: Alright.

DEWAYNE: You don't have to worry about that.

JUSTIN: He said they was going to try to run some more tests or something. He said I may have done, pulled something in my neck. I told him it was stiff, it wasn't hurting really that bad. He just wanted to run a bunch of stuff, make sure I didn't mess anything up. My doctor is real precautious like that.

DEWAYNE: Ah, you're young. I'm sure, as good a shape as you're in, it didn't, but that's good that he's taking precaution.

JUSTIN: Yeah.

DEWAYNE: Big and strong as you are, I doubt, you know, I think you'll be alright. I hope you'll be.

JUSTIN: You and me both.

DEWAYNE: But like I said, we'll get you through it, so. Alright?

JUSTIN: Alrighty, I appreciate it.

DEWAYNE: Alright, if you need anything, just, you've got my number there, just call me but just get some rest there and like I said, if it takes, you know, being off six or seven days, we'll help you out

there.

JUSTIN: Alright.

DEWAYNE: Alright, buddy.

JUSTIN: I'll talk to you later.

DEWAYNE: Alright. See you.

* * * * *

Phone Conversation #2:

DEWAYNE: Well, did you hear anything yet?

JUSTIN: No, they said it's going to be in the morning before I get my test results back.

DEWAYNE: In the morning? ... I had one of those one time and it just, it took them, they didn't tell me after it got finished.

JUSTIN: Yeah.

DEWAYNE: How you feel?

JUSTIN: Pretty shitty right now. He said I might feel this way for a few days. They said if the CAT, or the CAT scan come up negative, I'll probably feel this way for a few days and then hopefully it will all go away.

DEWAYNE: Yeah. Okay, alright. Huh, huh, huh. How in the world did you get hit anyway, do you know?

JUSTIN: I have no idea. I didn't even see it hit me.

DEWAYNE: That's a good thing it hit you in the head. I mean, rather than an eye or something like that.

JUSTIN: Everybody says that my head has always been pretty hard.

DEWAYNE: Well, I mean, I didn't want to say that but you know, if you're like your brother, it'd be a whole lot better to hit you in the head than it would be (laughs)

JUSTIN: Yeah.

DEWAYNE: Is your head hurting right now?

JUSTIN: Yeah, I got a terrible headache. They just told me to take some Ibuprofen and stuff, nothing to make me drowsy.

DEWAYNE: Yeah. Well, well, well. Alright then, you know, I hope everything, hope it all works out. Now, you, you're off, so...

JUSTIN: What'd you say?

DEWAYNE: I just, can you hear me?

JUSTIN: Yeah, I can hear you now.

DEWAYNE: I said, we've got you marked off and everything so just let me know whatever you need.

JUSTIN: Yeah, tomorrow is my off day I think.

DEWAYNE: Yeah, well, I've still got you, I guess what they'll do is just keep you marked off till, you

know, Sunday or Monday, whatever.

JUSTIN: Alright. I'll call you tomorrow after I get back from my test results.

DEWAYNE: Yeah. Okay, alrighty, I hope everything is okay. I had one of those one time.

JUSTIN: It's kind of weird, ain't it?

DEWAYNE: Well, I, it happened at a ballgame. That was on a Thursday night but then when I woke up, it was Saturday night, so I'd been out, I'd been out a long time.

JUSTIN: Yeah.

DEWAYNE: And it may have, it was a awful weird feeling.

End of Conversation

* * * * *

Phone Conversation #3:

JUSTIN: Hey, this is Justin.

DEWAYNE: This is Dewayne. I was calling to see if you, if you went back to the doctor today?

JUSTIN: Yeah.

DEWAYNE: What did that MRI show?

JUSTIN: He said the MRI pretty much was negative. He said he's going to send me to a optometrist, that my eyesight should be better by now. He took a x-ray

of my neck because I've got some stiffness back there, just check and make sure everything is alright. He hadn't got back to me on that yet.

DEWAYNE: Okay. So that CAT scan was negative then. Well, what do you want to do? Do you want to come in, turn this thing in and go from there on Friday, or do you want to give it a shot here for about a week?

JUSTIN: Well, he pretty much told me I was going to be off a while, going back and forth to the doctor, and getting tested and make sure everything goes away, so I guess that's the only thing I can do is turn it in.

DEWAYNE: Well, I mean, if that's the way you want to go, then just come on. I mean, I can get you while you're going back and forth to the doctor, until, you know, a week, till next, you not come back until next Friday or Saturday, or whatever, you know, if it's nine days or whatever, seven days. If not, I guess, you know, we'll turn it in and go from there. It's up to you.

JUSTIN: Well, the way he talked, he pretty much told me that's what I needed to do. And that I needed to see the optometrist anyway and I don't have any

vision insurance, so I'm going to have to see how that's going to work out.

DEWAYNE: Well, are you just going to come in Friday then and we're going to turn it in and then go from there then?

JUSTIN: Can I do it today or tomorrow or what?

DEWAYNE: It'll have to be on... We're going to have... What you're going to have to do, since you didn't want, you went that way with Max, we're just going to have to say it happened Friday.

JUSTIN: Well, I was kind of wondering about that. I was talking to Max about it and you know how they said they was going to, you said they was going to send me a charge letter and whatnot.

DEWAYNE: Oh, that goes with everybody, just like I said.

JUSTIN: Oh, I understand that but what happens when they do that and if they make a big deal out of it and they pull my medical background and... x-rays and doctors appointments before the injury is on file? I mean that's going to put me up the shit creek.

DEWAYNE: Oh, I was going to take you to a different doctor and let him look at you and refer you that a way.

JUSTIN: But I mean, even in an investigation, if they pull my medical background period, it's going to show

my CAT scan, my x-rays and all that and that's going to show an injury before it was reported and I'm trying to screw them over or something is what I'm, you know, I don't know what else...

DEWAYNE: When did it happen, Tuesday night?

JUSTIN: Yeah. Tuesday morning, one o'clock in the morning.

DEWAYNE: Okay.

JUSTIN: And I'm just afraid, you know, they're going to end up screwing me on it or something. I mean, you know what I mean?

DEWAYNE: ... I should have just, it .... we all probably get fired over this. You know what I'm saying? I just don't know what to do.

JUSTIN: Well, I'm just trying, you know, to keep them from coming back and saying, you know, you're lying and you're fired and I wouldn't never have a job trying to fake an injury if that's what everybody thought.

DEWAYNE: It's the same way by not turning one in, everybody's going to get fired, you know what I'm saying? I'm just trying to look out for you and Max and everybody involved best interest. You know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: I don't know anything, well, just go with it, and see how you are next Friday and see if everything is alright?

JUSTIN: Well, Dennis wants me to call him before I actually do anything, so I guess I could talk it over with him and see what his situation is on it.

DEWAYNE: Well, I mean, I don't want any of us to get in trouble. I mean, if you, if there's any possible way, I mean, we'll make up whatever the optotritian costs, you know, whatever, you know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: But, the way we got to look at this is keep you out of trouble, Max, me, everybody, if we can get through this, then we'll go on from there and if anything else happens, we'll know better and just turn it in right there, you know what I'm saying?

JUSTIN: Yeah, I know what you're saying.

DEWAYNE: And I'll, we'll make up anything that you have to pay out of your pocket, loss of time or... you know what I mean?

JUSTIN: Yeah.

DEWAYNE: And you know, I just don't want any of us, we're

all going to get in trouble now, is what I'm saying.

JUSTIN: Well, that's the last thing I'm wanting to happen but if something ends up being wrong and it's next week, you know, and he's like you know you're going to be off work for a while, there's no getting out of it, that's just going to be that much worse is the only thing I'm thinking.

DEWAYNE: But now, I mean, what, what could be wrong, I mean?

JUSTIN: Well, he's wanting me to see the optometrist to check the back of my retinas because my vision should be cleared by now and it's not and he don't understand why it's not.

DEWAYNE: I don't think, if anything was wrong, it would showed up in that CAT scan, you know, so...

JUSTIN: Well, your CAT scan don't do your vision. It does your brain activity.

DEWAYNE: Right, that's what I'm saying. I mean...

JUSTIN: It don't have anything to do with my eyes, the CAT scan doesn't.

DEWAYNE: And the only other thing, if we turn this in, you know, you're going to go, the way this works....and I don't want that to happen to you,

you know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: I don't know, buddy.

JUSTIN: Well, let me talk it over with Dennis. I have my eye, my eye doctor appointment tomorrow at three o'clock, so let me talk to Dennis, and I'll give you a call back.

DEWAYNE: Okay, buddy, well, just, like I say, keep it between us and I'm here to help you and we'll do whatever we have to do to get through it and keep everybody a job, okay?

JUSTIN: Alrighty.

DEWAYNE: Alright, buddy, I appreciate you.

JUSTIN: No problem.

DEWAYNE: Alright, see you.

End of Conversation

* * * * *

<u>Phone Conversation #4:</u>

JUSTIN: Hello.

DEWAYNE: Hey, this is Dewayne.

JUSTIN: Hey, how's it going?

DEWAYNE: I was calling you back there.

JUSTIN: Well, I talked to, do what?

DEWAYNE: Go ahead.

JUSTIN: I talked to Dennis and he said there's no way I can do that, it was illegal and I'll get fired.

DEWAYNE: Okay. What we're going to do is, go ahead, run this by him. He said that you had a recording of me talking to you, is that right?

JUSTIN: Do what now?

DEWAYNE: Max said that you had a recording of me talking to you.

JUSTIN: I said that I had them other guys listening when I talked to you down there that night.

DEWAYNE: Oh, I didn't say nothing, you know, out of the way to you. What we can do, we have two options. We can go ahead and try to fill out now but try to get us for late reporting or I can keep it from going through investigation. When you show up Friday, I'm going to tell them that somebody threw a rock and hit you in the head, you're going to mark off, we'll ... till Saturday, you mark off for a doctor's appointment Sunday, go Monday get the paperwork, we'll file the paperwork on Friday and you get the CJ 24 filled out and we'll go right from there and no investigation. We'll say somebody threw a rock at work and hit you in the

head .....

JUSTIN: Okay, now go over, I don't understand what you mean.

DEWAYNE: If you come in tomorrow night, ... Saturday, you come over, we fill out the paperwork, somebody threw a rock and hit you in the head. Okay?

JUSTIN: Okay.

DEWAYNE: That means we won't have to go to no investigation. It's passive. There won't be anything done about... You will mark, we'll get you safety...seminar on Saturday just like we're supposed to. Okay. And then you mark off Sunday to go to the doctor Monday. You go get that paperwork, that CJ 24 filled out, you'll put on there, see optometrist, okay?

JUSTIN: Okay.

DEWAYNE: After that, we'll go from, if he says you're able to come back to work on Tuesday, whatever, great, it's non reportable. If you don't, that's fine too. You won't be charged, we'll go from there.

JUSTIN: Okay, what if I can't come back to work for a while after I see the optometrist tomorrow?

DEWAYNE: Well, you can go back and see him again and then you just go the claim agent and say he can't, he

can't see me. It will be reportable but it won't be charged is what I'm telling you.

JUSTIN: So that's going to keep me from getting a charge letter?

DEWAYNE: That's right. We're going to say somebody threw it. We tried to find them but they ran off. I got to get me a... if that's the way you want to go, just let me know.

JUSTIN: Okay, I'll think about it.

DEWAYNE: I'll call you right back and this will keep us all out of trouble, okay?

JUSTIN: Alright.

DEWAYNE: I'll call you right back.

JUSTIN: Okay.

End of Conversation

* * * * *

Phone Conversation #5:

MAX: CSX.

JUSTIN: Hey Max?

MAX: Yeah.

JUSTIN: This is Justin.

MAX: Hey, big fellow.

JUSTIN: How's it going?

MAX: Well, I've heard that they's been, I've had 75 different calls from everybody. What's the final verdict?

JUSTIN: Well, the final verdict, I can't really tell you. I got two more doctors appointments for Monday and Tuesday.

MAX: Okay, then that's going to, I guess that's going to go reportable then?

JUSTIN: Yeah, it'll have to be. I got, I'm going to have to get glasses and all that stuff and I don't have vision insurance yet.

MAX: Well, now, is it because of this or is it because of something else, do you know, or did the doctor say?

JUSTIN: Okay, say that again, I don't, what?

MAX: I said is the reason you're going to have to have glasses, not because of this thing, is it?

JUSTIN: Yeah, it's because of this.

MAX: Oh, okay. Well, I didn't know that. They, everybody is telling me that can't happen, so I don't know. I thought that's where, I say everybody and now, I'm not, I'm a lying to you, Dennis told me that. (Laughs) He ain't a doctor so I don't know.

JUSTIN: Yeah, Dennis is a professional doctor.

MAX: Yeah, well, alright, well, so it, well, well, well. I was going to say I could get you in for Safety tomorrow. That wouldn't make you mark off and I may could convince them to call extra crew where you wouldn't have to do nothing Monday, Tuesday and Wednesday but if it's going to go reportable, then it'll go reportable. You know, I can't stop that, but...

JUSTIN: Yeah.

MAX: Well...

JUSTIN: I'm supposed to be on bedrest until Monday when I go to the doctor.

MAX: Yeah. Alright. Well, okay then I guess, well, I'll just call, I'll call them up and tell them just to, I guess if that's what you want now, let it go reportable and then we'll just, you know, whatever falls, falls, but like I say, the only, the best I could do is for you to come in... and I don't even know if Dewayne, it may be too far, you know, too much out of the way to even call extra crews and stuff like that, but I, I, you know, .. convince them to call extra crew just to have you just, just to sit around, do nothing or talk to

somebody, but if you feel like it's going to go reportable with your eyes and everything, then it'll, we might as well go ahead and turn the paperwork in.

JUSTIN: Yeah, it's going to have to go reportable. I mean, they ain't no really way around it.

MAX: Okay. Alright...

JUSTIN: That was Barton, he called me a minute ago, I was going to call him back.

MAX: Okay. Alrighty, well, let me know now. You know, I'll quit aggravating you and everything unless, just let me know what I can do for you and everything.

JUSTIN: Alright, I appreciate it.

MAX: You know, instead of me a calling you and they'll be doing a lot of stuff and he'll want you to come in and you'll have to come in and put a statement together, you know, what happened and, and all of that type of stuff, and then, of course, what he'll do is just as soon as I call him up or if you call him, as soon as I call him up, then he'll, he'll call the home office or he'll at least call the general manager and he'll tell him and then from there on, you know, it's, it's just

whatever.

JUSTIN: Yeah.

MAX: You know. My suggestion would be, of course, here I am attending to your business again, I'd let, I'd go through the dad gone claims person, claims agent, because that way you can get paid right on. You know, you get, you get your, you get money right, they'll pay you money right on and all that stuff. Of course, that's my suggestion. Man gets a lawyer, then he's going to get, they'll quit paying you automatically and then they'll, then he, the lawyer is going to get thirty percent of it, but if that's what you want to do, I'd do. From this point on, I'd do exactly what you felt was, was right. Don't you listen to me. Don't you listen to nobody else. You do what old, the big boy thinks, you know.

JUSTIN: Yeah.

MAX: And then just let the chips fall where they may and, and all of that.

JUSTIN: Alright.

MAX: But I, I sure hate it, I sure hate it for you.

JUSTIN: I do too.

MAX: Yeah, I really do because they ain't nothing I can

do about it, other than just like I said, but if you, if it's going to be glasses and all of that, then, you know, you, but anyway, I hate it for you, son, I really do.

JUSTIN: Well, I appreciate all your help.

MAX: Well, I just, well, whatever, now you call me up. I don't care if it's two o'clock in the morning and you get up and you ain't got nobody to talk to or you're worried or, or anything like that, you give me a call.

JUSTIN: Alright.

MAX: Alright. Don't, don't let, don't let anybody mess over you. You just do what you think is right.

JUSTIN: Alright, I appreciate it, Max.

MAX: Alrighty, see you, buddy.

JUSTIN: See you.

End of Conversation

* * * * *

Phone Conversation #6

DEWAYNE: Hello.

JUSTIN: Dewayne?

DEWAYNE: Yes.

JUSTIN: This is Justin Cloud.

DEWAYNE: Hey, buddy.

JUSTIN: How's it going?

DEWAYNE: I left you a message there.

JUSTIN: My cellphone...

DEWAYNE: I got all that paperwork turned in and everybody talked to and stuff, so.

JUSTIN: Okay, my phone didn't have no service, I couldn't.

DEWAYNE: Okay. No problem. I got all that turned in. Actually I put it in the computer last night, got all the rest of the paperwork filled out today, and I'm going to get the statements from the other crew so we can put it in that file here in the morning before they get off.

JUSTIN: Okay.

DEWAYNE: Moore and Cromer. And if you get out there Monday, if you can, we'll come by and fill out a, a written statement from you and get it in that file, and I'll just tell you what I put....you know.

JUSTIN: I couldn't hear you. You was breaking up.

DEWAYNE: Employee walking down the ... was struck by what appeared to be a rock in the head and apparently may have been thrown by a trespasser, is all I'll put, so.

JUSTIN: Alright.

DEWAYNE: So, how, how you feeling now? Any better?

JUSTIN: Not, not too good, really. I went to the eye doctor and I don't know if you heard that or not.

DEWAYNE: I knew you were going. I didn't know what, what developed, was said.

JUSTIN: They wrote me a prescription, said I was going to have to start wearing glasses.

DEWAYNE: Okay. What, for vision?

JUSTIN: Yeah. They said that fuzziness that I got from my eyesight...say that again?

DEWAYNE: Can you hear me?

JUSTIN: What'd you say?

DEWAYNE: You broke up then, what'd you say?

JUSTIN: He said that the blurriness that they thought was part of my concussion was something that has happened to my vision and he wrote me a prescription and he's going to run some tests Tuesday to see why my eyes are messed up like they are and check out my peripheral vision because he said that it's not good right now.

DEWAYNE: Okay, so he, he's saying it may have been due to getting hit in the head?

JUSTIN: Yeah, because my, all my records of eyesight was perfect until a couple of days ago. It was 20/20 vision.

DEWAYNE: Okay, alright, well, well I've already got you off injury in the computer there, so that's taken care of, too. And I, besides your statement and that stuff, it'll be done with. Just let us know how you're doing.

JUSTIN: Alright, well, I appreciate everything.

DEWAYNE: No problem, and like I said, if you took that the wrong way when I told you that before, you know, there's no, I hope there's no hard feelings and I didn't mean it that way, and that's why, or in the morning there, you know, just telling you the facts, so.

JUSTIN: Okay.

DEWAYNE: And like I said, there's nothing coming out of this. You don't have to expect nothing from our end of it as far as getting charged or anything like that. It, it's what they call a passive injury and told them it was probably a trespasser. We don't know, you know, why, it just come out of nowhere and hit you, so.

JUSTIN: Alright then.

DEWAYNE: Something you had no control over, so. And from here on out, the best thing, we'll get you set up there after Monday when we do your statement, let you talk to the claim agent so he can pick up any medical bills that insurance don't cover and your lost time and stuff.

JUSTIN: Alright.

DEWAYNE: And just between me and you, if you, if you'll work with him, he'll work with you, so.

JUSTIN: Okay.

DEWAYNE: You know, you know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: If you just work with him and go one on one with him, you know, he'll be fair with you and do, do whatever needs to be done to get you back to work and make sure you get paid for it, so.

JUSTIN: Alright, then.

DEWAYNE: But just, just for, it's in the computer and you're covered from here till you retire now, so just let us know how you're doing.

JUSTIN: Alright.

DEWAYNE: That's the only thing we, we're concerned about now. So just keep us updated and come, come give me that written statement and tell me how you're

doing.

JUSTIN: Okay, I appreciate it.

DEWAYNE: Take care of yourself.

JUSTIN: Alright.

DEWAYNE: Alright. See you, buddy.

End of Conversation

* * * * *

I, Justin Cloud, being a party to the foregoing tape recorded messages, do hereby state that the transcript of the tape recording is true and accurate, to the best of my knowledge.

JUSTIN CLOUD

CERTIFICATE

I, Janice A. Tolliver, Certified Court Reporter and Notary Public in and for the Commonwealth of Kentucky at Large, do hereby certify that the foregoing pages are a true and accurate transcription, to the best of my ability, of tape recorded telephone conversations between Justin Cloud, Dewayne Barton and Max Cox, all being employees of CSX Railroad; that the tape recording was provided to me by

Justin Cloud for transcription and that the full identification of the parties involved in the tape recorded conversations were provided to me by Justin Cloud; that I have transcribed said tape recording on the computer to the best of my ability, with some places being inaudible; and further, I certify that I am not related to nor employed by any party or entity involved herein.

Given under my hand this 4th day of October, 2007.

My commission expires 7-27-2010.

JANICE A. TOLLIVER
NOTARY PUBLIC/SCAR
COMMONWEALTH OF KY. AT LARGE

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Risk Identifiers Based On The Following Points

Incident(s) Date	POINTS					
	Reportable Injury (excludes 9A/B)	Non-Reportable Injury (excludes 9A/B)	Reportable Human Factor Accident (excludes H312)	Non-Reportable Human Factor Accident (excludes H312)	Ops Testing Failure (excludes 600 series)	Ops Testing Failure (600 series, including 699)
0 – 12 months	40	5	30	15	20	5
13 – 36 months	25	3	15	8	13	3
37 – 60 months	10	1	5	3	7	2
60 + months	0	0	0	0	0	0

Listed below are the thresholds for each work group.

	Red	Yellow	Green
MOE	25+	6-24	0-5
MOW	28+	10-27	0-9
OTHER	11+	1-10	0
TYE	47+	24-46	0-23

EXHIBIT

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BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Risk Identifiers Based On The Following Points

Incident Date	POINTS					
Months	Reportable Injury (excludes 9A/B)	Non-Reportable Injury (excludes 9A/B)	Reportable Human Factor Accident (excludes H312)	Non-Reportable Human Factor Accident (excludes H312)	Ops Test Failure EXCLUDES: 310, 311, 312, 313, 314, 315, 316 600 Series 700 Series 802, 804, 805, 806, 807, 809, 810 998, 999	Ops Test Failure INCLUDES: 310, 311, 312, 313, 314, 315, 316 600 series, (incl 699) 700 Series 802, 804, 805, 806, 807, 809, 810 (excludes 998 and 999)
0 – 12	40	5	30	15	20	5
13 – 36	25	3	15	8	13	3
37 – 60	10	1	5	3	7	1
60 +	0	0	0	0	0	0

Thresholds by work group listed below

	Red	Green
MOE	25+	0-24
MOW	28+	0-27
OTHER	11+	0-10
TYE	47+	0-46

Effective 4/18/2004

BNSF RAILWAY COMPANY

Risk Identifiers Based on Injuries, Human Factor Caused Rail Incidents, and Ops Test Failures

	POINT DISTRIBUTION				
Months	Injury Reportable (EXCLUDES 9A/B)	Injury Non-Reportable (EXCLUDES 9A/B)	Human Factor Accident Reportable & Non-Reportable (EXCLUDES H312)	Ops Test Failure INCLUDES: 101-108 201-209 301-308 316-317 320-323 506, 512, 518, 520, 522, 525 803, 811, 812, 824, 872	Ops Test Failure INCLUDES: All remaining test numbers [Except 180, 380, 381, 610, 611, and 900 series which receive ZERO points]
0 – 12	40	5	30	20	5
13 – 36	25	3	15	13	3
37 – 60	10	1	5	7	1
60 +	0	0	0	0	0

Thresholds by work group listed below

	Green	Red
MOE	0 - 24	25 +
MOW	0 - 27	28 +
TYE	0 - 46	47 +
OTHER	0 - 10	11 +

Effective February 18, 2007

(history events prior to 2/2007 re-stated to reflect these revisions)

BNSF RAILWAY COMPANY

PERSONAL PERFORMANCE INDEX

Months	POINT DISTRIBUTION				
	Injury Reportable (EXCLUDES 9A/B)	Injury Non-Reportable (EXCLUDES 9A/B)	Human Factor Accident Reportable & Non-Reportable (EXCLUDES H312)	Ops Test Failure INCLUDES: 101 - 108 201 - 209 301 - 308 316 - 317 320-323 506, 512, 518, 520, 522, 525 803, 811, 812, 824, 872	Ops Test Failure INCLUDES: All remaining test numbers [Except 180, 380, 381, 610, 611, and 900 series which receive ZERO points]
0 – 12	40	5	30	20	5
13 – 36	25	3	15	13	3
37 – 60	10	1	5	7	1
60 +	0	0	0	0	0

Thresholds by work group listed below

MOE	25 +
MOW	28 +
TYE	47 +
OTHER	11 +

Effective February 18, 2007

Revised July 19, 2007

UNION PACIFIC RAILROAD POLICY AND PROCEDURES FOR ENSURING RULES COMPLIANCE

Effective October 15, 1998
(Revised November 1, 2006)
PB-20861

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INTRODUCTION

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, shareholder value is created, and the safety of the public and our employees is our top priority.

Compliance with company rules is required to meet the commitments of Union Pacific. The intent of this policy is to provide a uniform structure to address rule and policy violations in a consistent and fair manner. This policy serves as a tool to change behavior to ensure the safe and efficient operation of the railroad and for the protection of the public, our employees, our customers and our shareholders. Certain rule violations and/or patterns of behavior may be so serious, however, that dismissal is the only option. In all cases, the policy will be used to protect the safety of the public and our employees and otherwise meet the commitments of Union Pacific.

This policy is effective *November 1, 2006* and supersedes previous company discipline policies.

DISCIPLINE POLICY - UPGRADE

Policy Guidelines:

1. All collective bargaining agreements apply.

2. When practicable, incidents involving possible rule violations, except certain Level 5 violations, should be reviewed with the Employee to determine whether sufficient cause exists **prior** to proceeding to a formal hearing or waiver offer, as appropriate.

3. Employees must be allowed the opportunity to discuss waivers of formal hearing with Union Representatives when considering whether to waive or proceed with hearing. *Reduced retention periods, according to the table on page 3, will be offered to employees who choose to waive investigations.*

4. Managers are strongly encouraged to use informal coaching with Employees when appropriate.

5. All discipline is determined using the Discipline Assessment Table and Progressive Discipline Table following procedures described herein.

6. Current Discipline Status corresponds to the most recent level of discipline assessed, begins with the date of the incident prompting the disciplinary action, and remains the status for the retention period specified below. If there is no further disciplinary action within the retention period specified, the status reverts to Level 0 for future reference.

Retention Period Table (Months)		
Level	**Waiver**	**Hearing**
2	9	12
3	12	18
4	18	24
4C	24	24

Note 1: Employees who are assessed Level 4 by virtue of a single incident will have their status reduced to Level 3 after a 6-month period from the date of the incident if there is no further disciplinary action during that period. However, **if an employee commits two Level 4/4C infractions under this policy within a 24-month period, the discipline will be assessed at Level 5.**

7. Existing policy and procedures pertaining to Rule 1.5 violations shall continue to be followed and such cases shall be considered Level 5 violations. Employees returning to service through the Employee Assistance Program (EAP) after a first offense for Rule 1.5 will revert to the discipline status in effect prior to the Rule 1.5 dismissal.

8. Corrective Action Plans, when appropriate, are required for all Employees assessed discipline at Levels 2-4C.

9. FRA Engineer Certification Requirements, with regard to suspension of certificate for certain rules infractions, are not preempted by this policy.

10. The Regional Vice President, equivalent senior manager, or their designated representative will be consulted before an Employee is charged with a Level 5 offense, other than for Rule 1.5. Dismissal for Level 5 offenses, except for Rule 1.5, will be only with the concurrence of the Vice President or equivalent.

11. Except when totally exonerated, an employee returned to service from Level 5 dismissal (for other than Rule 1.5) as the result of an arbitration award, will be returned at the employee's previous status level or a status Level 3, whichever is greater. The retention period begins with the date of return to active service.

DISCIPLINE ALTERNATIVES

Conferencing, counseling, coaching and education are effective tools for rules compliance. Informal Coaching or Formal Conferencing may be used at the discretion of the manager. Managers will be accountable for the fair and consistent application of the Discipline Policy.

INFORMAL COACHING

Employees may be provided informal coaching without being formally charged with a rule violation. The intent of informal coaching is to assist an employee in changing behaviors that are not in compliance with company rules and/or policies. Informal coaching is not documented.

FORMAL COACHING (Level 1 Violations)

Employees charged with Level 1 infractions will be coached without being formally charged with a rule violation. Employees will be allowed up to two coaching sessions for Level 1 violations within a six month period. A third Level 1 violation within a six month period will result in violation of Rule 1.13, a Level 2 violation. The formal coaching session(s) will be documented and entered into the employee's record. No new discipline level is established for the first two violations within a six month period.

FORMAL CONFERENCING: (Level 2 Violations)

Employees charged with Level 2 infractions may be offered the opportunity to divert from the normal discipline process to a Corrective Action Plan consisting of formal conferencing, counseling, and/or education as outlined below. When formal conferencing is utilized, no new discipline level is established.

Guidelines for Formal Conferencing.

1. For formal conference, the employee may arrange for union representation and the supervisor will meet with the employee's union representative and the employee to discuss appropriate rules application and provide suitable assistance/education.

2. Formal conferencing will be conducted while the employee is under pay.

3. The formal conferencing session will be documented on a form signed by the employee and a copy will be placed in the employee's personal record file. The form will record the rule(s) discussed and the date of the incident. The formal conference agreement will also be noted in the Employee's electronic discipline record.

4. The formal conference will consist of the following:
   - Discussion of the reason for conference.
   - A review of related or associated rules/policies regarding incident.
   - Discussion on how the incident could have been prevented.
   - Q & A and discussion by conference participants.
   - Review and completion of the Conference Form – including signatures.

TRAINING / EDUCATION (Level 3 and 4 violations)

For Level 3 and 4 violations, employees may be offered education in lieu of discipline by the Superintendent (or equivalent) or his/her representative.

The agreement on a formal education session will be recorded on a form signed by the employee and a copy will be placed in the employee's personal record file. The form will record a date of occurrence and the corresponding discipline level for retention purposes only. The formal education agreement will also be noted in the employee's electronic discipline record.

Note: The Discipline Policy will recognize a Level 4 disciplinary diversion event as a Level 4 violation for the purpose of assessing discipline in the event that the employee is determined to be responsible for committing a subsequent Level 4 violation within 24 months following the date of the first Level 4 occurrence.

Training / Education for FRA De-Certifiable Events

For events that resulted in the revocation of their 49 CFR Part 240 certification for 30 days or less, employees may be offered the opportunity to receive remedial training and to qualify for a reduced certificate revocation period as permitted by 49 CFR part 240.117(h)(5). All train crew members charged with responsibility for a decertifiable event, as defined by 49 CFR Part 240, except rules identified as 4C such as failure to stop for a signal when required or occupying Main track without authority, will serve a minimum of a 15-day suspension.

DISCIPLINE MONITORING PROCESS

I. Labor or management may request a quarterly review of the discipline process at the Superintendent or Regional Vice president level.

II. To ensure that the discipline policy is meeting its stated goals and likewise being fairly administered, Senior Management will conduct semi-annual reviews of the administration and effectiveness of the discipline policy as part of the overall safety and rules compliance effort. Upon request, labor representatives from the labor / management Culture & Discipline committee may participate in this review. Measures reviewed will include the number of discipline cases, including conferencing and training in lieu of formal discipline, personal injuries, human-factor caused accidents, 4-C violations, and any other similar measures deemed to provide insight into policy effectiveness.

Discipline Assessment Table

Introduction

Use the chart below to determine the appropriate discipline level for any rule infraction, and to find the level of discipline called for.

Discipline Assessment Table		
	Results in…..	
Violation of these rules*	**Level ^**	**Discipline**
General Code of Operating Rules - Chapter 1.0 General Responsibilities - Chapter 3.0 Standard Time - Chapter 4.0 Timetables - Chapter 5.0 Signals & Their Use **UPRR Safety Rules (Ch. 70-83)**	1	**Employee coaching session. If more than two Level 1 violations occur in six month period, the employee will be charged with violation of Rule 1.13, a Level-2 rule.**
General Code of Operating Rules - Rule 1.1.4 Condition of Tools & Equipment - Rule 1.2.5 Reporting - Rule 1.6.1 M.V. Driving Records - Rule 1.6.2 – Notification of Felony Convictions - Rule 1.6.3 – Notification of Deteriorating Vision or Hearing - Rule 1.9 Respect of Railroad Co. - Rule 1.11 Sleeping - Rule 1.13 Comply with Instructions - Rule 1.15 Duty – Reporting or Absence (No Show) - Rule 1.33 Inspection of Freight Cars - Rule 5.4 – 5.5 Flags and Signs (Placement) - Rule 5.6 Unattended Fusee - Rule 5.9 – 5.9.5 Headlight Display - Rule 5.10 – 5.10.2 Markers - Chapter 2.0 Railroad Radio Rules - Chapter 6.0 Movement of Trains and Engines - Chapter 7.0 Switching - Chapter 8.0 Switches **Train Dispatcher Rules (Ch. 20-26)** **Air Brake and Train Handling Rules (Ch. 30-34)** **Hazardous Materials Instructions (Form 8620)** **Maintenance of Way Rules (Ch. 40-57)** - Rules 1.3.1 & 1.3.3 (Chief Engrs. Inst; Proc. Manual & Stnds.; Signal Dept. FRA Insp, & Mtce. Inst.; Book of Standards.) **Timetable and Special Instructions**	2	**Up to one day or one round trip alternative assignment with pay to develop a Corrective Action Plan to modify behavior.** **Pay will be in accordance with Employee Involvement Guidelines.**

See footnotes on page 10

Discipline Assessment Table		
	Results in.....	
Violation of these rules*	Level ^	Discipline
General Code of Operating Rules - Rule 1.47 Duties of Crew Members - Rule 2.13 (Radio) in Place of Hand Signals - Rule 2.6 Comm. Not Understood - Rule 5.3.3 Signal Disappearance - Rule 5.3.7 Radio Response - Rule 5.8.1 Ringing Engine Bell - Rule 5.8.2 Sounding Whistle - Rule 6.4 Reverse Movements - Rule 6.13 Yard Limits - Rule 6.14 Restricted Limits - Rule 6.16 Approaching Railroad Crossings - Rule 6.19 Flag Protection - Rule 6.23 Emergency Stop or Severe Slack Action - Rule 6.29 Inspecting Trains - Rule 7.1 Switching Safely and Efficiently - Rule 7.5 Testing Hand Brakes - Rule 7.6 Securing Cars or Engines - Rule 8.2 Position of Switches - Rule 8.3 Main Track Switches - Rule 8.12 Crossover Switches - Rule 8.15 Switches Run Through - Rule 8.20 Derail Location and Placement - Chapter 9.0 Block System Rules - Chapter 10.0 Rules App. Only in CTC - Chapter 11.0 Rules App. Only in ACS/ATS - Chapter 12.0 Rules App. Only in ATS - Chapter 13.0 Rules App. Only in ACS - Chapter 14.0 Rules App. Only within TWC - Chapter 15.0 Track Bulletin Rules - Chapter 16.0 Rules App. Only in DTC - Chapter 17.0 Rules App. Only in ATC **Air Brake and Train Handling Rules** - Rule 32.1 Securing Equipment **UPRR Safety Rules** - Rule 74.8 Seat Belts - Rule 78.8 Electrical Power Supply Turned Off - Rule 78.10 L.O.T.O. Electrical Power **Cardinal Safety Rules,** as designated by the employing department, will be Level 3 unless listed by specific rule number at a higher level. Employees are responsible for all Cardinal Safety Rules which may apply to the nature of the work being performed. **Maintenance of Way Rules** - Chapter 42 On-Track Operations - Rule 56.1.2 Testing for Quality **Chief Engineer's Bulletins** - CE Bulletin 135.3.2 L.O.T.O. for Roadway Machines and Work Equipment - CE Bulletin 136 On-Track Safety **Engineering Track Mntce Field Handbook** - Chapter 4.5.1 through 4.5.6 Rail and Joints - Chapter 4.15.1 through 4.15.8 Rail and Joints - Chapter 6.3 through 6.3.11 R of W and Other Facilities - Chapter 7.5 through 7.8.7 Track Buckling Prevention Guidelines	3	**<u>Five days</u> off work without pay or up to one day training without pay. A Corrective Action Plan must be developed upon return to work.**

See footnotes on page 10

Discipline Assessment Table		
	Results in.....	
Violation of these rules*	Level ^	Discipline
F.R.A. Regulations (Part 213 Track Safety Standards) **System Special Instructions** - Item 8 Descending Grade Operations - Item 10B Remote Control Operations - Item 10K Main Track Switches in Non-Signaled Terr.	3	**Five days off work without pay or up to one day training without pay. A Corrective Action Plan must be developed upon return to work.**
General Code of Operating Rules - Rule 1.23.1 Tampering with Safety Devices - Rule 5.4-5.5 Flags & Signs (Speed & Stopping Requirements) - Rule 5.12 Protection of Occ. Outfit Cars - Rule 5.13 Blue Signal Protection of Workers - Rule 5.14 Signs Protecting Equipment - Rule 6.2 Initiating Movement - Rule 6.3 Main Track Authorization - Rule 6.5.1 Remote Control Movements - Rule 6.7 Remote Control Zone - Rule 6.25 Movement Against Curr. Of Traffic - Rule 6.27 Movement at Restricted Speed - Rule 6.28 Movement. Other than Main Track. (except Subrules .1, .2, .3) - Rule 6.31 Max. Authorized Speed (when exceeds auth. speed by 10 mph or ½ auth. speed, whichever is less) - Rule 9.15 Track Permits - Rule 14.1 Authority to Enter TWC Territory - Rule 15.1 Track Bulletins - Rule 15.3 Auth. Movement Against Current of Traffic **Air Brake and Train Handling Rules** - Rule 30.10 Initial Terminal Brake Test - Rule 30.11 Transfer Train Movements Test - Rule 30.12 1000 Mile Test - Rule 30.15 Application and Release Test **Maintenance of Way Rules** - Rule 42.3 Main Track Authority - Rule 42.4 Track and Time - Rule 42.4.2 Using Track and Time Authority - Rule 42.5 Use of Yard Limits - Rule 42.7 RR Crossings at Grade - Rule 42.13 Lineups - Rule 42.15 Flag Protection - Rule 42.16 Foul Time - Rule 43.10 Protecting Against Passing Equip. - Rule 44.2 Excavation - Rule 56.1.3 Compromising Signal Safety **UPRR Safety Rules** - Rule 78.7 Boom Near Overhead Power Lines **Chief Engineer's Bulletins** - C.E. Bulletin 121 Protection for Gangs from Trains on Adjacent Tracks - C.E. Bulletin 122.3.1 Bridge Worker Safety - C.E. Bulletin 136.4 – 136.5 On Track Safety **Timetable and Special Instructions** - Rules 9.2.15, 9.2.18, 9.2.22 - Item 10-B.A.1 – Operators Manual and Equipment - Item 10-B.B.B.1 -- Linked and Tested - Item 10-B.C.(1-4) – Operating the Equipment	4	**Level 4: Thirty days off work without pay or up to five days training without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed upon return to work.**

See footnotes on page 10

Discipline Assessment Table

Violation of these rules*	Results in..... Level ^	Discipline
General Code of Operating Rules - Rule 1.47 Failure to Maintain Conductors Log (Missing Multiple Entries) - Rule 6.3 Main Track Authorization (Resulting in FRA Decertification Event) - Rule 6.27 Restricted Speed (Resulting in FRA Decertification Event) - Rule 6.5 Handling Cars ahead of Engine (Unprotected Shove) - Rule 7.6 and 32.1, 32.1.1, 32.1.2, 32.1.3 Securing Cars or Engines (Resulting in Uncontrolled Movements) - Rule 8.3 Switch Left in Other than Normal Position in Non Signaled Territory - Rule 9.5 Where Stop Must be Made (except Rule 9.5.5) (Resulting in FRA Decertification Event) - Rule 15.2 Protection by Track Bulletin Form B.	4C	**<u>180 days</u> off work without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed which will include remedial training upon return to work.** **If EQMS score is 950 or greater, <u>120 days</u> off work without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed which will include remedial training upon return to work.**
General Code of Operating Rules - Rule 1.5 Drugs and Alcohol (Rule "G") - Rule 1.12 Weapons - Rule 1.6 Conduct. Employees must not be: 1. Careless of Safety 2. Negligent 3. Insubordinate 4. Dishonest 5. Immoral 6. Quarrelsome (excludes 1.6.1) - Rule 1.7 Altercation - Felony Conviction; Fraud; or Theft - EEO Policy Infractions*** - Overstaying Leave of Absence Without Authority - Workplace Violence Policy Infractions^^	5	**Permanent dismissal**

* Where Chapter Numbers are shown, all Rules within Chapter(s) are Violation Level indicated EXCEPT FOR: Specific Rules which may be listed by rule number at a different level. Where rule numbers are shown, it includes Sub-Rules unless specified otherwise. Rules include any modification to rule through General Order, M of W General Order, SALERT, Timetable Special Instruction, or change of rule number.

^ Any rule violation which results in $150,000 property damage will receive the next higher level discipline except when a level 4 status results from a one time occurrence or for 4C rule violations.

*** A lesser Level of Discipline may be issued in some EEO cases when consistent with EEO Policy Application and when recommended be the Director-EEO.

^^ A lessor Level of Discipline may be issued in some cases pursuant to review and recommendation of the Workplace Violence Committee.

GLOSSARY

The following definitions, while not all inclusive or absolute, are intended to guide the determination of whether various acts by employees meet necessary criteria to be considered a violation of applicable Level 5 Rules.

ALTERCATION: When an employee's actions cause or result in a vehement quarrel characterized by physical activity such as pushing, shoving or fighting.

CARELESS OF SAFETY: When an employee's actions demonstrate an inability or an unwillingness to comply with safety rules as evidenced by repeated safety rules infractions. When a specific rule(s) infraction demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees, or the public.

DISHONEST: When an employee's actions or statements constitute lying, cheating or deception.

FELONY CONVICTION: The conduct of an employee leading to the conviction of a felony in state or federal court is prohibited. Guilty pleas, diversion programs, deferred decisions or adjudication, and other alternative sentencing or adjudication procedures, regardless of local nomenclature, are considered convictions under this policy.

FRAUD: When an employee's actions or statements are intentional misrepresentations of fact for the purpose of deceiving others so as to secure unfair or unlawful gain.

IMMORAL: When an employee's actions are contrary to commonly accepted moral principles.

INSUBORDINATION: When an employee's actions or statements indicate a refusal (as opposed to a failure for cause) to carry out the instructions of a supervisor which are work, safety or policy related and which conform to accepted Company and industry practice, or when an employee demonstrates gross disrespect towards a supervisor. NOTE: Any failure to comply with Union Pacific's Drug and Alcohol Policy will be considered insubordination.

NEGLIGENT: An employee demonstrates negligence when his or her behaviors/actions cause, or contribute to, the harm or risk of harm to the employee, other employees, the general public or company property.

QUARRELSOME: When an employee's continued behavior is inclined or disposed toward an angry verbal confrontation with others in the workplace.

THEFT: When an employee's action is intended to and/or results in the taking and/or removing of property or other items of value from the Company, its customers, or other employees without proper authority.

PROGRESSIVE DISCIPLINE TABLE

Introduction

Determining the correct level of discipline to be assessed for a current rules infraction requires use of the Progressive Discipline Table. Accurate use of the Progressive Discipline Table requires knowledge of the Current Discipline Level, the Level of the Infraction, and the Discipline Assessment Table.

Progressive Discipline Table

If the Alleged Violation Level is..	And	
1	If less than two Level-1 coaching sessions in the last six months, hold coaching session.	
	If two Level-1 coaching sessions have been held in the last six months, Rule 1.13 applies. (Go to Level-2 section of table.)	
If the Alleged Violation Level is..	And the Current Discipline Status is..	Then the Discipline Level to assess is..
2	0	2
	2	3
	3	4
	4	5*
	4C	5*
3	0	3
	2	3
	3	4
	4	5
	4C	5
4	0	4
	2	4
	3	4
	4	5
	4C	5
4C	0	4C
	2	4C
	3	4C
	4	5
	4C	5

* If the employee's discipline status is Level 4 or 4C due to a single violation and the current violation is Level 2, the discipline will again be assessed at Level 4 and will no longer be considered as being due to a single violation.

NOTE: If an employee commits three repetitions of the same rule infraction during a 36 month period (excluding missed calls and tardiness) the discipline will be assessed at Level 5 – Permanent Dismissal.

GUIDE TO DETERMINING DISCIPLINE LEVEL

Step 1 – Determine the primary (highest level) alleged rule violation.

Step 2 – Complete the Discipline Calculation Worksheet as follows:

a. Specify the rule(s) violation(s) in Section One.

b. Check or list the applicable rule(s) or policy publications in Section One.

c. Determine the level of alleged rule infraction by reviewing the Discipline Assessment Table. Locate the Discipline Level corresponding to the primary rule and complete Section Two.

d. Obtain the Employee's current discipline status (level):

- For Level 2 through 4C violations, review the PeopleSoft Discipline History for the previous 24 months.

- Apply the Discipline Level Retention Periods from the Policy Guidelines found in the retention table (retention period changes if employee waived a hearing) to the most recent entry in the discipline record to determine whether the status reflected remains in effect for current consideration.

e. Utilizing the Progressive Discipline Table and the information from Sections Two and Three, complete Section Four-A.

f. Determine whether the infraction resulted in property damage greater than $150,000 requiring the next higher level of discipline. Complete Section Four-B. **This is the Level of Discipline required for the infraction.**

DISCIPLINE CALCULATION WORKSHEET

FORM 20063

DISCIPLINE CALCULATION WORKSHEET			TODAY'S DATE FILE NUMBER
Last Name	First Name / MI		Emp ID#
Job Title	Hire Date	Dept / Svc Unit	Work Location / Gang

SECTION ONE

EVENT DESCRIPTION, LOCATION AND DATE:

_____

_____

_____

Event described indicates possible violation of Rule(s)

_____

_____

_____

Found in the following Union Pacific Railroad publication(s):
Check the appropriate box:

- ☐ Union Pacific Rules
- ☐ Timetable
- ☐ Other: (specify) _____

SECTION TWO

Under the Discipline Assessment Table, violation of the rule(s) listed in Section One requires a minimum discipline of:
LEVEL____

SECTION THREE

Disciplinary action within the past 24 months for which retention period has not expired. (Rule and description)

RULE	DESCRIPTION OF VIOLATION	LEVEL	DATE

This equates to a Current Discipline Status of: LEVEL _____.

SECTION FOUR

A. Using the Progressive Discipline Table, a current violation of the rule(s) cited in Section One plus the Current Discipline Status requires the assessment of: LEVEL_____

B. The incident ___ Did ___Did Not have results requiring assessment of the next higher level of discipline per the footnote to the Discipline Assessment Table. Therefore, **the required discipline is:** LEVEL _____.

LEVEL 1 COACHING SESSION FORM

FORM 20064

Date:_____ Employee Name:_____

Emp. ID:_____ Manager Name:_____

Manager Title:_____

Description of Event:_____

_____

_____

_____

_____

_____

Rules(s) Discussed:_____

_____

_____

_____

_____

Previous Level 1 coaching session(s) in last six months: _____

_____

Comments:_____

_____

_____

_____

NOTE: This form is to be used for Level 1 coaching events. The third level 1 violation in a six month period will result in a disciplinary charge of violating Rule 1.13 – Complying with Instructions.

FORMAL CONFERENCING / TRAINING

FORM 20065

Date:_____ Name:_____

Employee ID:_____ Check One:
__ Conference (L 2)
__ Training (L 3 / 4)

Mr. / Ms. _____

This is to confirm our conference on _____, 20_____, at _____ AM / PM at _____ in connection with
(location)
events described below:

Description of Event: _____

_____

_____

_____

Rule(s) Discussed: _____

_____

_____

___ I agree to have a conference. ___ I agree to Training.

___ I decline to have a conference. ___ I decline Training.

_____ _____
Employee Signature Manager's Signature

_____
Title

Comments:_____

_____

_____

_____

NOTE: This letter is NOT a form of discipline and will not be used in any subsequent disciplinary proceedings as evidence the employee previously allegedly violated the rules cited.

NOTE: The Discipline Policy will recognize a Level 4 disciplinary diversion event as a Level 4 violation for the purpose of assessing discipline in the event that the employee is determined to be responsible for committing a subsequent Level 4 violation within 24 months following the date of the first Level 4 occurrence.

NOTES: