

August 8, 2012

To: Ms. Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E. Street, SW  
Washington, DC. 20423-0001  
(202) 245-0384

Ms. Rachel Campbell  
Director, Office of Proceedings  
Surface Transportation Board  
395 E. Street, SW  
Washington, DC. 20423-0001  
(202) 245-0357

AUG 9 2012

From: William W. Sharpe  
3736 Union Ave. Apt. # 5  
Steger, IL. 60475  
(708) 983-9057

232697

ENTERED  
Office of Proceedings

AUG 09 2012

Part of  
Public Record

Re: Objection to the sale or transfer of assets - Docket No. MCF 21046  
Professional Transportation Incorporated, Asset Acquisition of CUSA ES, LLC. and  
CUSA CCS, LLC.

Dear Ms. Brown and Ms. Campell,

I submit this letter of opposition and respectfully ask members of the Surface Transportation Board to please consider the following... As indicated by the STB, on June 29 2012, Professional Transportation Inc., an interstate passenger motor carrier (MC-217444), filed an application under 49 U.S.C. § 14303 to acquire the assets of two interstate motor passenger common carrier subsidiaries of non-carrier Coach America Holdings, Inc. / Cusa ES, LLC (MC-463168) and Cusa CSS, LLC (MC-522544) collectively, Coach America Subsidiaries. The application filed on May 31, 2012, was justifiably denied or temporarily delayed because of specific concerns raised by Mr. Michael Yusim on June 4, 2012 (ID # 232391, entered June 5, 2012) On this date, M. Yusim filed a letter in opposition, asserting that public interests would not be served by allowing this transaction to proceed ahead of matters now before the Secretary of Labor. (case no: 2011-STA-00042, case no: 2010-STA-00066)

Without attempting to make any assumptions, let me say that I believe the Surface Transportation Board was exercising a deliberate measure of caution in delivering their decision to postpone the process of approval. However I'm not completely convinced that this situation will remain free from political manipulation or unaffected by inappropriate attempts to persuade those who must ultimately decipher fact from fiction. Therefore I wish to present my own argument(s) with a genuine hope that it will help to establish an unbiased platform for further discussion and careful review.

As a former employee of Professional Transportation Incorporated, referred to hereafter as PTI, I feel compelled to disclose my personal, firsthand knowledge of their unfair employment practices and would like to make it publically known that PTI is currently facing a class action lawsuit for alleged violations of the Fair Labor Standards Act, 29 U.S.C. 201 et seq. (**See attached exhibit A., Gregory A. Matthews and Author L. Hickenbottom Jr. vs. PTI and Ronald D. Romain**) Please note that this is not the first instance in which PTI was challenged under threat of court action for violating federal wage laws. (**See attached exhibit B., Vickie Miller and Roxana Pettit vs. PTI and Ronald D. Romain**) In the first case of Miller and Pettit etc. 3:09-cv-0111-RLY-WGH, PTI wisely adopted advice from their legal representatives and eventually abandoned preparations to confront said plaintiffs in a courtroom environment. They did so because incontrovertible evidence and the looming prospect of a trial by jury made it clear that PTI was headed for a collision course with justice. To avoid this costly and embarrassing conflict, PTI settled out of court and not surprisingly, the terms that settlement included an agreement of confidentiality. In the end, PTI was legally obligated to compensate those who were wrongfully deprived of their rights. These are facts which cannot be obscured by amount of fiction.

That said, what remains is a fundamental question. Why would an organization like PTI knowingly violate federal statutes or other laws designed to protect workers from intentional harm or criminal behavior? The answer is easier to understand if we briefly examine PTI's past. Almost immediately and without too much effort, the first thing I stumbled on was a straightforward case of discrimination. The action brought against PTI by then Secretary of Labor Elaine L. Chao on May 13, 2004, involved a gentleman by the name of Thomas H. Bullington. (**See attached exhibit C., SOL case no. 04-10110**) Oddly enough, this case contains elements which are similar to some of the concerns recently raised by Mr. M. Yusim. Over the years, PTI has discovered that the financial reward for ignoring the law far exceeds any of the potential risks or penalties that may be imposed for non-compliance. It is this absolute arrogance and contemptuous behavior of PTI's owner, Ronald D. Romain that completely dominates the daily business culture at Professional Transportation Incorporated. In 2011, he was quoted in a regional news journal (Evansville Courier Press) as saying "Our success is gratifying, but I must say that I am rarely satisfied." Romain said he works closely with all his vice presidents and managers to ensure the companies' continued growth. From this we can reasonably assume that Mr. Romain is very well connected to the actions of his staff and would be the consenting authority whenever important business decisions or policies are executed. As my examination of PTI moved forward, I easily obtained a copy of a certified communication between the Georgia Public Service Commission and PTI. (**See attached exhibit D., June 30, 2010**) This was an official order for PTI to cease and desist operations and a reminder that in the State of Georgia, it is illegal to conduct business without a proper license or authority. Again, this is not the first time that PTI was accused of operating their transportation business outside of defined parameters. (**See attached exhibit E.**) In March of 1994, The West Virginia Public Service Commission determined that PTI did not possess the proper authority to provide transportation services to rail carrier CSXT. Once again, they were ordered to cease and desist from an unlawful operation. If asked to comment on any of these examples, PTI would likely retreat or fall back on their preferred strategy of trivializing facts or the people who reveal them. Moving on.., If PTI was as concerned about safety as they often claim, then we would be able to see some evidence of that in how they conduct their affairs. Instead, what we see are repeated actions to prevent the implementation of higher safety standards. (**See attached exhibit F.**) Maybe this can explain why on March 27, 2011 a PTI driver was violently killed (**See attached exhibit G.**) when he collided head-on with another vehicle occupied by two young women from state of Kentucky. And maybe PTI can explain why this driver was operating his motor vehicle on the wrong side of the highway? What I'd really like to find out is why the Federal Motor Carrier Safety Administration has not investigated any of PTI's serious accidents and why this agency is so strongly opposed to the idea of conducting a long overdue inspection of PTI's entire vehicle maintenance program? Perhaps if the FMCSA were more involved, we could get to the bottom of many unresolved issues. Maybe there would be fewer accidents involving loss of life. Could it be that the FMCSA is afraid to learn the real truth about railroad crew hauling contractors like PTI? If at any time the Federal Motor Carrier would like to get behind efforts to improve safety on our public highways I'm sure that they would be well received. Especially by many PTI drivers who are afraid to voice their legitimate concerns for fear of harassment and retaliation. Still moving forward.., and speaking of harassment, please look carefully at Ronald C. Tinsey vs. PTI. (**See attached exhibit H.**) Is this how PTI management treated William Caudill before his fatal accident? Is it the type of behavior that possibly contributed to the fatal accident that claimed the life of a driver by the name of Kenneth F. Adams? (**See attached exhibit I.**) Was Adams driving any of the vehicles listed in various mfr. recall notices? (**See attached exhibit J.**) Please (**See attached exhibits K, L, M, N, and O.**) There is a definite problem here ladies and gentlemen and it didn't develop overnight. We cannot continue to ignore these simple facts!

- |  |                |   |
|--|----------------|---|
| • K.) Collision with another vehicle.  | August 9, 2008 | } Debilitating injuries in each case...<br>By their own admission, PTI experienced<br>over 500 accidents in 2010 alone. While all<br>were not serious in nature, how many did<br>the DOT / FMCSA actually know about? |
| • L.) Roll-over accident.              | October 2008   |   |
| • M.) Collision with another vehicle.  | March 2004     |   |
| • N.) Head-on collision.               | April 22, 2006 |   |
| • O.) Collision with a parked trailer. | April 9, 2008  |   |

For a moment let us consider how PTI has profited from failing to pay their employees a fair wage. This matter is directly associated with the case outlined in exhibit A. First of all, by keeping the wages of their drivers artificially low or not paying them what they've already earned, PTI has situated itself in a much better position to gain market share. They have prospered greatly from an unfair advantage over other competitors. By withholding wages or basically taking money directly out of the pockets of their drivers, PTI has been able to consistently offer much lower service rates to railroad carriers. Many of PTI's drivers can easily be classified as "working poor" even with the number of long hours they usually work every day. It's not that PTI can't afford to pay fair wages; their profit margin is through the roof. In fact, PTI's owner and President, Ronald D. Romain was quoted as saying "Despite the tight economy, 2010 was a record year for United Companies." United Companies of course is the parent company of Professional Transportation Incorporated. PTI knew all along that they were required to pay their drivers overtime wages but instead willfully violated the law. (**See attached exhibits P, Q.**) When they were caught again, PTI predictably resorted to the type of behavior described in R. Evans, G. Booth vs. PTI (**See attached exhibit R.**) Their devious plan to suppress wages has allowed railroad carriers to save millions of dollars annually. In return, these same carriers have remained noticeably lenient with respect to vehicle maintenance issues. The railroad companies know that if PTI is forced to uphold higher standards, the costs for achieving those elevated standards will be passed along to them. They're not going to let this happen any time soon.

Recently an employee who was working for PTI as an assistant fleet manager stated that he was fired from his job after reporting conditions that negatively affected one of the vehicles in his charge. This is an individual who claims that he had no other disciplinary actions on file and said that PTI regularly instructed him to let certain vehicle conditions "slide." When asked what he meant by this, Mr. Guts Gatilao said he was told to ignore issues that could wait until PTI's maintenance budget would allow for the needed repairs. He also said that when he took vehicles in for mandatory safety inspections, the inspection lane operator would regularly allow vehicles to pass even when failing conditions were present. But don't take my word on this report, call Mr. Gatilao and ask him yourself about these statements. He can be reached at (773) 865-0129 or write to him at P.O. Box 761 Franklin Park IL. 60131. This employee was working out of a trailer / office in the Union Pacific railroad yard located in Melrose Park, Illinois. (Proviso Yard)

In reading some of the comments made by other respondents, specifically those made by Union Pacific railroad (ID #232597) and Burlington Northern Sante Fe railroad, (ID #232557) I found further reason to object to the sale or transfer of said assets in this case. Both of these carriers have urged the STB to expedite the process of approval arguing that unless PTI was granted these new authorities, their respective businesses would suffer great harm. I find these comments are disingenuous and self serving. What we need to remember here is that way before there was ever a "PTI" or "Coach America" railroad companies like those above hired their own employees to provide the type service now provided by crew hauling contractors. Years ago, railroad companies figured out they could do away with higher paying union jobs and in the process distance themselves from injury lawsuits by hiring these contractors. Now that it's become a real problem, they're crying to agencies like the Surface Transportation Board for help. BNSF took it a step further by making a reference to an imaginary eleventh hour crisis and by claiming the national economy would be negatively impacted if the STB didn't surrender to their "polite" demands. What TRULY harms our economy is when large corporations thumb their noses at the law and then ask for government assistance to dig them out of the huge hole they created. What hurts our economy is thousands of people in need of public assistance because even when they are working, they don't make enough to sustain themselves or their families. One last observation, by doing business with a company like PTI, a business that now stands twice accused of violating federal wage laws, don't both companies (Union Pacific & BNSF) run the risk of breaching their own business related policies and ethical standards? I can't help but wonder how either of these railroad companies would address a situation involving one of their own employees if that person was accused and eventually found guilty of dishonesty or fraud?

To make it clear once again, I am very opposed to any action that would allow PTI to obtain new operating authorities until such time when the charges specified in exhibit A., can be addressed and settled in court. Until then, I ask the STB not to fold under the pressure of special interest groups.

In closing let me say that when we allow criminal acts or behavior to prosper, its affect on society and the economy becomes like a terrifying cancer that races beyond anyone's ability to control it. In most circumstances, what we see on the surface does not accurately reflect the destruction that usually occurs on a much deeper level. At some point, there will be no path for turning back or running away. This is why each of us should continue to struggle for the preservation of justice... Especially during the so-called eleventh hour.

Most Sincerely,  
William W. Sharpe



Subscribed and sworn to before me

this 8<sup>th</sup> day of August 2012  
Chicago, County of Cook, State of Illinois.  
Notary Public Carmen Pierzchalski

William W. Sharpe  
8 Aug. 2012

cc:

Andrew K. Light  
Scopelitis, Garvin, Light, Hanson & Feary, P.C.  
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August 9, 2012

To: Ms. Cynthia T. Brown  
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Ms. Rachel Campbell  
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From: William W. Sharpe  
3736 Union Ave. Apt. #5  
Steger, IL. 60475  
(708) 983-9057

Re: Objection to the sale or transfer of assets - Docket No. MCF 21046  
Professional Transportation Incorporated, Asset Acquisition of CUSA ES, LLC. and  
CUSA CCS, LLC.

Atten: **Mr. Tim Cambridge**  
**Section of Administration**  
**(202) 245-0464 fax**

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Dear Mr. Cambridge,

On August 8, 2012.. I forwarded a letter of objection to the Surface Transportation Board and to other parties on the service list who are involved in the above matter. Unfortunately, and I'm not quite sure how it happened, I overlooked some of those contacts. Thank you very much for bringing this matter to my immediate attention and please be advised that this oversight has been rectified.

The following is a list of individuals who've been sent a duplicate copy of the original communication. Each of these parties has been notified by priority mail through the United States Postal Service.

Stephen A. Kessler  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

Richard E. Weicher  
Bnsf Railway Company  
2500 Lou Menk Dr, 3Rd Floor  
Fort Worth, TX 76131-2828

Larry C. Tobin  
Professional Transportation, Inc  
One Indiana Square, Suite 280  
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Gregory A. Ostendorf  
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Michael Yusim  
7499 Eagle Point Drive  
Delray Beach, FL 33446

Most Sincerely,  
William W. Sharpe



**EXHIBIT A.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION**

**FILED**  
**AUG 10 2011**  
**U.S. CLERK'S OFFICE**  
**EVANSVILLE, INDIANA**

GREGORY A. MATTHEWS and AUTHOR )  
LEE HICKENBOTTOM, JR., individually and )  
on behalf of similarly situated individuals, )

Plaintiffs, )

v. )

PROFESSIONAL TRANSPORTATION, INC., )  
and RONALD D. ROMAIN, individually and as )  
president and secretary of PROFESSIONAL )  
TRANSPORTATION, INC., )

Defendants. )

COLLECTIVE ACTION

Civil Action No. 3:11-CV-\_\_\_\_\_

**3 : 11 -cv- 97 RLY -WGH**

**COMPLAINT - COLLECTIVE ACTION**

COME NOW, plaintiffs, Gregory A. Matthews and Author Lee Hickenbottom, Jr., and all other similarly situated opt-in plaintiffs who are former and current employees of defendants, Professional Transportation, Inc. and Ronald D. Romain, by their counsel of record, Joseph H. Cassell of Redmond & Nazar, L.L.P., and for their cause of action against defendants, allege and state as follows.

**GENERAL ALLEGATIONS**

1. This is an action to recover (i) overtime compensation and minimum wages for uncompensated, non-driving work activity performed by over the road drivers, (ii) unpaid overtime compensation for over the road, radius, terminal and/or yard driving activity, and (iii) minimum wages due for all drivers.

2. This cause of action is brought pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").

### **JURISDICTION AND VENUE**

4. This court has original jurisdiction to hear this complaint and to adjudicate the claims stated herein under federal law, pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b).

5. Venue is proper in the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. § 1391 as defendants are residents of Indiana and the corporate headquarters are located in the Southern District of Indiana.

### **PARTIES**

6. Plaintiffs are or were employees of defendants engaged in driving vehicles on long hauls, and/or yard/terminal service.

7. Defendant Professional Transportation, Inc. (PTI) is an Indiana corporation. PTI is an employer defined by 28 U.S.C. § 203.

8. Defendant Ronald D. Romain ("Romain") is the chief executive officer, president and secretary of defendant PTI.

### **FEDERAL COLLECTIVE ACTION ALLEGATIONS**

9. Plaintiffs bring their federal law claim under the FLSA as a collective action on behalf of themselves and other similarly situated employees pursuant to 29 U.S.C. § 216(b).

10. All members of the proposed collective action are current and former drivers of vehicles owned or leased by defendants and all are operated on behalf of defendants.

11. Members of the proposed collective action were not paid overtime for hours worked in driving and non-driving work activity in excess of 40 during a seven-day period as required by 29 U.S.C. § 207, and were not paid minimum wages as required by 29 U.S.C. § 206.

### **STATEMENT OF CLAIMS**

12. Plaintiffs are all current or former drivers for defendant PTI.

13. Defendants, PTI and Romain, are "employers" as defined in 29 U.S.C. § 203. Romain sets all payroll and wage compensation policies for PTI.

14. Defendants are engaged in the transport of Class 1 railroad crews *via* van or other ground transportation.

15. Among these rail carriers are the Kansas City Southern, CSX, Norfolk Southern and the Union Pacific railroads.

16. Defendants are engaged in interstate commerce by virtue of their transporting railroad crews and crossing state lines.

17. Defendants conduct operations in the states of Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin and Washington, D.C.

18. Among the various transportation services provided by defendants are:

A. "Yard" transportation service. This service is for railroad crews and such services are usually confined to a specific rail yard or a set radius from a specific geographic point, usually a rail yard.

B. "Over-the-road" transportations service. "Over-the-road" is a term of art developed by Defendants to denote transportation services that exceed the geographic limits or are of such duration in time that is impractical for a yard van to provide such support services. Over-the-road drivers duties may consist of *inter alia*, deadheading of crews, crew assist of through freight trains, "dog catch" of trains that crews have expired service under the Federal Railroad Administration's hours of service regulations and one or two way transport of railroad crews in combined service operation.

19. When plaintiffs were interviewed by managers for defendants for the position of over-the-road driver, they were informed that they would be compensated for all miles driven.

20. When plaintiffs were interviewed by managers for defendant for the position of over-the-road driver, they were informed that they would be compensated on an hourly basis for all non-driving duties and activities.

21. Yard drivers are paid an hourly rate wage for most hours worked.

22. Yard drivers normally work a set schedule that may consist of working in excess of 40 hours per week or set seven-day period.

23. Yard drivers can also be called upon to work on their days off, furthering the number of hours worked in a week or seven day period.

24. Over-the-road drivers are paid an amount for miles driven and by the hour for most "wait time" and non-driving activities.

25. Defendants do not pay for all miles driven by over-the-road drivers.

26. Defendants base over-the-road drivers compensation on pre-determined "codes sets." A "code set" is a set mileage for pay purposes to pay over-the-road drivers.

27. "Code sets" are based on actual railroad miles, not highway miles from one point to another.

28. Defendants penalized over-the-road drivers for miles that defendants unilaterally determine a driver "over drove."

29. A driver may have been required to over drive a particular trip based on road or safety considerations or upon crew requirements for their particular trip.

30. Defendants method of penalization for drivers that "over drove" in a particular trip is to deduct compensation owed from the drivers' wait time payments.

31. As a result, drivers are not paid for all their wait time and are not compensated for all of the miles driven to complete the trip.

32. Over-the-road drivers do not work a set schedule. Drivers are subject to being on-call 24 hours a day, seven days a week, 365 days a year.

33. Plaintiffs are also compensated by what defendants refer to as an "efficiency trip."

34. An efficiency trip is a trip where by a driver is allegedly paid a premium for one leg of a trip.

35. Upon completing the first leg of the efficiency trip, the driver is then instructed to transport a crew from the destination of the first leg back to his point of origin or another location as directed by the rail carrier.

36. For their service on the second or subsequent legs of an "efficiency trip" drivers are not compensated based on the alleged premium they are paid for the first trip.

37. As a result of this practice of employment efficiency trips, many drivers' wages fall below state or federal statutory minimum wage as set forth by applicable statutes.

38. Defendants require all drivers to perform an inspection of their vehicles prior to allowing a railroad crew to enter the vehicle at the beginning of their trip or shift.

39. For yard drivers, this inspection must be accomplished after the previous driver has completed his or her post-trip or end of shift inspection.

40. The yard driver coming on duty must complete such inspection prior to the beginning of the normal shift.

41. Yard drivers are not compensated for their time required to perform such inspections that occur prior to the beginning of their shifts.

42. Over-the-road drivers are required to perform a pre-trip vehicle inspection of their van prior to the scheduled pick-up time.

43. Defendants do not compensate over-the-road drivers for the non-driving activity of pre-trip inspection of the vehicle they are assigned to use for that trip.

44. Regardless of the type of service, the pre-trip inspection of the vehicle consists of at least the following items:

- A. Tires – wear and pressure, to include the spare tire.
- B. Lights, front, read and side.
- C. Horn.
- D. Windshield wipers.
- E. Mirrors.
- F. Oil level.
- G. Radiator coolant level.
- H. Transmission fluid level.
- I. Power steering fluid level.
- J. Railroad radio.
- K. Spare tire (jack and lug wrench).
- L. Fire extinguisher.
- M. First aid kit.
- N. Road triangles or flares.
- O. Gauges.
- P. Air conditioner.
- Q. Refuel vehicle if necessary.
- R. Cleanliness of vehicle.

45. Any deficiencies noted must be corrected prior to the vehicle entering service for defendants.

46. Defendants' vehicles are also equipped with Global Positioning Systems (GPS) that allow the company to track the movements of its vehicles.

47. Over-the-road drivers are required to enter trip information in the GPS prior to departing the terminal for their run.

48. Often when an over-the-road driver is called to pick-up a railroad crew ASAP, by the time the driver arrives at the designated pick-up point, the railroad crew is already on duty and wanting to depart. As a result, the driver is not afforded the opportunity to input the information into the GPS.

49. When time affords the driver the opportunity, the driver will input the trip information into the GPS during a stop.

50. At the close of the trip as described above, agents for defendants will inquire as to why the information was not input into the GPS prior to departing for the trip.

51. When an over-the-road driver explains that the crew was waiting and ready to depart, drivers have been informed that they should arrive earlier than the departure time or railroad crew on duty time and inspect their van and input the required information into the GPS.

52. As a result, over-the-road drivers are not receiving full compensation for all the pre-trip activities.

53. In addition to inspecting and possibly being required to service the vehicle prior to the schedule pick-up time of a railroad crew, over-the-road drivers are also required to obtain certain information from defendants' dispatchers. This includes *inter alia*:

- A. Name of conductor or crew members to pick-up.
- B. Location of pick-up.
- C. Schedule pick-up time.
- D. Destination or type of run anticipated.
- E. Conditions of roads and other safety related information necessary to complete the required run safely.

54. Upon completing a run, an over-the-road driver is required to perform a post-trip inspection and servicing of the vehicle used. Among the times in this inspection are:

- A. Tires – wear and pressure to include spare.
- B. Horn.
- C. Windshield wipers.
- D. Mirrors.
- E. Oil level.
- F. Radiator coolant level.
- G. Transmission fluid level.

- H. Power steering fluid level.
- I. Spare tire jack and lug wrench.
- J. Fire extinguisher.
- K. First aid kit.
- L. Air conditioner.

55. Over-the-road drivers are also required to insure the vehicle is filled with fuel and clean (inside and out) for the next driver that may be assigned to use the vehicle.

56. Upon completing a trip or run, over-the-road drivers are required to "close" their trip out with defendants. Over-the-road drivers must submit the following information to defendants:

- A. Name.
- B. Run number.
- C. Authorization number.
- D. Schedule pick-up time of crew.
- E. Your arrival at the original terminal.
- F. Time you departed the original terminal and beginning odometer reading.
- G. Arrival time at first destination of trip and odometer reading.
- H. Departure and arrival time for each leg of trip, plus odometer readings.
- I. What occurred during each wait time (train or crew not available, eat, back haul or train assist/tending).
- J. Arrival time back at original terminal.

57. It is Defendants' practice to cease paying long haul drivers for non-driving activities upon the time they reported arriving back at their home terminal, even though they are required to perform the post-trip inspection, service and if necessary clean the vehicle for the next driver after such arrival time.

58. While the actual call to defendants' agent may only last a few minutes, it is not uncommon for drivers to wait on hold for several minutes before an agent of defendants comes on the line to take the information from the over the road driver.

59. In the course of their duties as over-the-road drivers, drivers routinely work in excess of 40 hours in a week or seven day period.

60. Section 7 of the FLSA, codified at 29 U.S.C. § 207, requires each covered employer to compensate all non-exempt employees at a rate of pay not less than one and one-half times their regular rate of pay for the work performed in excess of 40 hours in a week or set seven day period.

61. Section 13 of the FLSA, codified at 29 U.S.C. § 213, exempts certain categories of employee from the requirements of overtime compensation contained in 29 U.S.C. § 207. None of the FLSA exemptions apply to named plaintiffs, or the proposed class or other similarly situated employees.

62. In response to employee inquiries, defendants and/or their manager/agents have provided employees with various documents purporting to justify defendants' reliance on particular statutory exemption from paying overtime.

63. The practice of not paying overtime compensation violates the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, specifically 29 U.S.C. § 207(a)(1). As a result, plaintiffs and the similarly situated class of current and former employees have suffered unpaid overtime that is required by the FLSA.

64. Plaintiffs are "Covered Employees" as defined by SAFETEA-LU Technical Corrections Act of 2008, PL 110-244, 122 Stat. 1572 § 306(c) and are not exempt from § 207 of the FLSA.

65. This court has already found in Miller v Professional Transportation, Inc., No. 09 CV 00111, 2010 U.S. Dist. LEXIS 87940, \*18 (S.D. Ind. August 25, 2010) that

defendants have been in violation of the FLSA with respect to the failure to pay overtime compensation.

66. Defendants are not common carriers of members of the general public.

67. Defendant PTI's transportation operations are limited to employees and equipment of the various railroads with which they maintain contracts.

68. Not including this cause of action, defendant PTI has been sued at least twice previously for unpaid overtime and at least once for unpaid minimum wage.

69. Defendants have previously been required to make payments of unpaid wages to employees by the United States Department of Labor (U.S. DOL).

70. Defendants do not own, lease, rent, or operate any equipment that would be considered necessary to conduct operations as a rail carrier as defined by Part A of subtitle VI, Title 49 of the U.S. Code, codified at 49 U.S.C. § 10102. This includes railroad locomotives, cabooses, powered or unpowered maintenance of way equipment designed and used on railroad tracks, railroad cars of any sort, such as box cars, covered and uncovered hopper cars, flat cars, tank cars, gondolas, or intermodal equipment.

71. All of defendants' transportation operations are conducted on property that is owned, leased, operated, and maintained by a rail carrier as defined by 49 U.S.C. § 10102 and/or on public streets, roads or highways.

72. In case of accident or injury, defendants' employees are covered under the various states workers compensation laws for treatment and compensation for any injury.

73. Defendants are not covered under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*

74. Defendants' employees are not covered by the Railroad Retirement Act, 45 U.S.C. § 231, *et seq.*

75. Defendants' employees are not eligible to receive retirement that would otherwise be available under the Railroad Retirement Act, 45 U.S.C. § 51, *et seq.*

76. Defendants are not an employer as defined by the Railroad Retirement Act at 45 U.S.C. § 231(a)(1)(i), which defines "employer" as "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49."

77. Defendant PTI is not owned, directly or indirectly, by any rail carrier as defined by part A of subtitle IV of Title 49.

#### **NATIONAL COLLECTIVE ACTION PURSUANT TO THE FLSA**

78. Plaintiffs restate the allegation contained in ¶¶ 1 through 77, as if fully restated herein.

79. At all times material herein, plaintiffs have been entitled to the rights, benefits and protections provided by the Fair Labor Standards Act 29 U.S.C. § 201, *et seq.*, for unpaid overtime and minimum wages for all hours worked.

80. At all times material herein, defendants have been engaged in interstate commerce.

81. Defendants' operations do not qualify for any exemption defined by 29 U.S.C. § 213, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), 119 Stat. 1144 (2005) or the SAFETEA-LU

Technical Corrections Act of 2008, 112 Stat. 1572 (2008), and accordingly, plaintiffs are entitled to overtime compensation at one and one-half times their regular rate of pay, as defined in 29 U.S.C. § 207(e), for all hours worked in excess of 40 in a week or specific seven day period.

82. Upon information and belief, defendants have not compensated all employees for time worked over 40 hours in a week with but few exceptions.

83. Defendants' practice of not compensating employees at a rate equal to one and one-half times their regular rate of pay is enterprise wide, uniform and continuing.

84. Plaintiffs and all similarly situated employees are entitled to damages equal to the overtime compensated as defined in 29 U.S.C. § 207 for all weeks in which plaintiffs worked at least twenty-one percent of their time in over the road service.

85. Plaintiffs may also be entitled to unpaid minimum wage as defined by 29 U.S.C. § 206 based on the fact that their average hourly compensation, which is arrived at by dividing the total monetary compensation by the total number of hours "worked" as defined by law, may not rise to the average hourly compensation set forth by the FLSA.

86. Because defendants do not act in good faith and actively attempted to mislead plaintiffs' and other similarly situated current and former employees, plaintiffs' are entitled to liquidated damages in the amount of, and in addition to, their unpaid overtime compensation and the difference between the average hourly rate of pay that plaintiffs were paid and the statutory minimum wage as defined by 29 U.S.C. § 206, as allowed for by 29 U.S.C. § 216(b).

87. Based on defendants bad faith, prior litigation, deficiencies as found by the U.S. DOL, as well as defendants' active deception of the class of current and former employees, the statute of limitations of three (3) years will apply to this action pursuant to 29 U.S.C. § 216(b).

88. In addition to the aforementioned damages of unpaid overtime compensation, minimum wages and liquidated damages, plaintiffs are entitled to reasonable attorney fees and associated costs with bringing this action pursuant to 29 U.S.C. § 216(b).

#### **PRAYER FOR RELIEF**

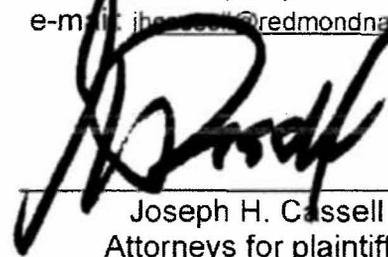
WHEREFORE, plaintiffs, Gregory A. Matthews and Author Lee Hickenbottom, Jr., and all other similarly situated opt-in plaintiffs who are former and current employees of defendants, Professional Transportation, Inc. and Ronald D. Romain, pray for judgment as follows:

- A. Issuance of notice pursuant to 29 U.S.C. § 216(b) as soon as possible to all drivers who are currently employed by or have been employed by any defendant for a period of three (3) years immediately preceding this action. This notice should inform the class members that this action has been filed, describe the nature of the action and explain their right to opt-in to this action if they have not been compensated for their hours worked, for driving and non-driving activities, in excess of 40 hours in a week at the overtime rate of one and one-half times their regular rate of pay during the statutory period, and for minimum wages due;
- B. Judgment against defendants for their willful failure to pay minimum wages and overtime compensation at one and one-half times the regular rate of pay for all drivers;
- C. An amount of liquidated damages equal to the sum of minimum wages and unpaid overtime due for defendants' willful refusal to pay such required minimum wages and overtime compensation;
- D. Attorney fees and costs associated with this cause of action;

- E. Leave to allow additional opt-in plaintiffs to join and
- F. All other relief this court deems just and equitable.

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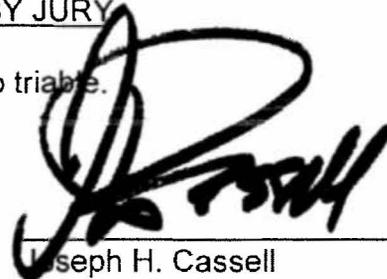
By:



Joseph H. Cassell  
Attorneys for plaintiffs  
Gregory A. Matthews and Author  
Lee Hickenbottom, Jr.

REQUEST FOR TRIAL BY JURY

Plaintiffs request a trial by jury on all issues so triable.



Joseph H. Cassell



only issues related to established exemptions to the provisions of 29 U.S.C. § 207, requiring an employer to pay overtime compensation. PTI contends that the rail carrier exemption, the terminal exemption, and the motor carrier exemption each provide separate and independent grounds for precluding recovery of overtime wages and defeating Plaintiffs' FLSA claim. Plaintiffs contend that these exemptions do not apply to them, and that therefore, they are entitled to overtime wages under the FLSA. For the reasons set forth below, the court finds that the Plaintiffs are not subject to the motor carrier exemption, and thus, are entitled to overtime pay pursuant to the FLSA.

**I. Facts**

1. PTI is in the business of transporting railroad crews and railroad equipment to railroad terminals, hotels, motels, restaurants, and along rail lines. (Affidavit of Robert S. Tevault ("Tevault Aff.") ¶ 7).
2. PTI provides these rail crew transportation services pursuant to written contracts with federally regulated railroads, including Union Pacific Railroad Company, CSX Transportation, Inc., and Norfolk Southern Railway Company. PTI also has separate written agreements with brokers to provide railroad crew transportation services to the Kansas City Southern Railway Co., CP Rail Systems (Soo Line), and Amtrak. Approximately 99.7% of PTI's business is covered by these six contracts. (*Id.* ¶ 5).
3. When PTI provides these rail crew transportation services under its contracts with the rail carriers, PTI is not permitted to transport members of the public unless

instructed to do so by the rail carrier. (*Id.* ¶ 6).

4. Plaintiffs are current and former drivers for PTI. (Declaration of Vickie Miller (“Miller Dec.”) ¶ 3; Declaration of Roxana Pettit (“Pettit Dec.”) ¶ 3; Declaration of Sue Whitaker (“Whitaker Dec.”) ¶ 3; and Declaration of Hurshel Naylor (“Naylor Dec.”) ¶ 3).
5. Plaintiffs’ work is primarily performed in seven (7) passenger vans that have a gross vehicle weight of less than 10,000 pounds. (Miller Dec. ¶¶ 6, 16; Pettit Dec. ¶¶ 6, 16; Whitaker Dec. ¶¶ 6, 16; Naylor Dec. ¶¶ 6, 16; Tevault Aff. ¶ 17).
6. Plaintiffs are employed by PTI as Designated Yard Van drivers (“DYV drivers”) and/or Over the Road drivers (“OTR drivers”). (Tevault Aff. ¶ 10).
7. DYV drivers shuttle railroad personnel by van within the confines of a single railroad yard (or terminal) as well as short distances, generally within a 25-mile radius of the terminal, between the yard and local establishments. (*Id.* ¶ 11). DYV drivers are paid on an hourly basis. (Miller Dec. ¶ 18; Pettit Dec. ¶ 18; Whitaker Dec. ¶ 18; Naylor Dec. ¶ 18).
8. OTR drivers transport railroad crews by van to and from the railroad yards, including transporting railroad crews between railroad yards in different locations (sometimes in different states) and to intermittent sites along rail lines. A substantial number of PTI’s OTR drivers cross state lines while transporting railroad crews. (Tevault Aff. ¶ 13).
9. OTR drivers are paid in a combination of a set amount per mile and a set amount

per hour for “wait time ” – i.e., non-driving time. (Miller Dec. ¶ 17; Pettit Dec. ¶ 17; Whitaker Dec. ¶ 17; Naylor Dec. ¶ 17).

10. As employees for PTI, drivers who have contacted Plaintiffs’ counsel have not and did not receive compensation for any hours worked over 40 in a seven-day period. (Miller Dec. ¶ 36; Pettit Dec. ¶ 36; Whitaker Dec. ¶ 33; Naylor Dec. ¶ 33).
11. PTI did not have knowledge that there was any legislative activity with respect to the long-standing exemption from overtime pay requirements until after August 9, 2006. (Tevault Aff. ¶ 18).

## **II. Summary Judgment Standard**

A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court’s function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party. *Heft v. Moore*, 351 F.3d 278, 283 (7th Cir. 2003). The moving party bears the burden of demonstrating the “absence of evidence on an essential element of the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party may not, however, simply rest on the pleadings, but must demonstrate by

specific factual allegations that a genuine issue of material fact exists for trial. *Green v. Whiteco Industries, Inc.*, 17 F.3d 199, 201 (7th Cir. 1994) (citing *Celotex*, 477 U.S. at 322)).

### **III. Discussion**

Defendants argue that the motor carrier exemption of the FLSA, 29 U.S.C. § 213(b)(1), the rail carrier exemption of the FLSA, 29 U.S.C. § 213(b)(2), and the terminal exemption of the FLSA, 29 U.S.C. § 213(b)(2), defeat Plaintiffs' claim for overtime compensation. The court will first address the motor carrier exemption.

#### **A. Motor Carrier Exemption**

The overtime provisions of the FLSA do not apply to “any person with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49.” 29 U.S.C. § 213(b)(1). This exemption is known as the motor carrier exemption. Defendants, as the party seeking to invoke the protections of the exemption, carry the burden of showing that they are entitled to the exemption. *Vidinliev v. Carey Int'l, Inc.*, 581 F. Supp. 2d 1281, 1285 (N.D. Ga. 2008) (citing *Jeffery v. Sarasota White Sox*, 64 F.3d 590, 594 (11th Cir. 1995)).

##### **1. Before August 10, 2005**

Until August 10, 2005, “motor carrier” was defined as a “person providing motor vehicle transportation for compensation.” 49 U.S.C. § 13102(12) (2004). Thus, an employee who drove a motor vehicle as a major part of his/her employment was

considered to be exempt from the overtime provisions of the FLSA. Plaintiffs concede that they were not entitled to the overtime provisions of the FLSA before August 10, 2005.

## **2. After August 10, 2005**

Effective August 10, 2005, Congress, through the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), amended the definition of “motor carrier” by inserting the phrase “commercial motor carrier” for “motor carrier.” 49 U.S.C. § 13102(14) (2005). As a result, the definition of “motor carrier” in § 13102, after August 10, 2005, read as follows: “The term ‘motor carrier’ means a person providing commercial motor vehicle (as defined in section 31132) transportation for compensation.” 49 U.S.C. § 13102(14). Section 31132 defines a “commercial motor vehicle” as:

a self-propelled or towed vehicles used on the highways in interstate commerce to transport passengers or property, if the vehicle –

- (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;
- (B) is designated or used to transport more than 8 passengers (including the driver) for compensation;
- (C) is designated or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation;  
or
- (D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

49 U.S.C. § 31132(1). As noted by the district court in *Tews v. Renzenberger, Inc.*, “[a]fter the passage of SAFETEA-LU, then, many employees who were previously exempt under the prior definition of ‘motor carrier’ lost their exempt status because they did not operate ‘commercial motor vehicles.’” 592 F. Supp. 2d 1331, 1344 (D. Kan. 2009). It is undisputed that the Plaintiffs in this case did not operate “commercial motor vehicles” on August 10, 2005, or at any time thereafter. Thus, it would appear that Plaintiffs were entitled to the overtime provisions of the FLSA after August 10, 2005.

### **3. June 6, 2008 Amendment**

On June 6, 2008, the Technical Corrections Act of 2008, Pub.L. 110-224, 122 Stat. 1572 (“TCA”), became effective. Section 305 of the TCA replaced the previously changed language in SAFETEA-LU and restored the “motor carrier” language in lieu of “commercial motor vehicle.” However, Section 306 of the TCA provides that “the Fair Labor Standards Act of 1938 (29 U.S.C. § 207) shall apply to a covered employee notwithstanding section 13(b)(1) of that Act (29 U.S.C. § 213(b)(1)).” Section 306, therefore, makes “covered employees” eligible for overtime wages if they so qualify. To qualify as a “covered employee,” the individual employee must be:

- (1) . . . employed by a motor carrier or motor private carrier (as such terms are defined by section 13102 of title 49, United States Code, as amended by Section 305;
- (2) whose work, in whole or part, is defined as:
  - (A) that of a driver, driver’s helper, loader, or mechanic;  
and

- (B) affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles –
  - (i) designed or used to transport more than 8 passengers (including the driver) for compensation;
  - (ii) designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or
  - (iii) used in transporting material . . . .; and
- (3) who performs duties on motor vehicles weighing less than 10,000 pounds or less.

Pub.L 110-224, 122 Stat. 1572, Section 306(c).

The net result of this change is that employees, who drive vehicles denoted in the Act as part of their employment that were once exempt from overtime prior to the passage of SAFETEA-LU, are now eligible for the benefits of overtime compensation by virtue of the fact that they are “covered employees.” Covered employees are those that drive vehicles weighing 10,000 pounds gross vehicle weight or less and are designed or used to transport 8 or fewer passengers, including the driver. *See Glanville v. Dupar, Inc.*, 2009 U.S. Dist. LEXIS 88408, at \*11 (S.D. Tex. Sept. 25, 2009) (“TCA reconfirmed that the [motor carrier] exemption does not apply to drivers operating motor vehicles that weigh 10,000 pounds or less.”). In the instant case, Plaintiffs are covered employees. The evidence is undisputed that Plaintiffs are/were employed by a motor carrier (PTI) as drivers of vehicles (vans) weighing 10,000 pounds or less on public highways in interstate

or foreign commerce.

#### 4. Retroactive Effect

This is not the end of the story, however. PTI contends that Congress meant for the TCA modification of the term “motor carrier” to be applied retroactively such that the definition of “motor carrier” applies to claims even after August 10, 2005. If PTI is correct, then the Plaintiffs would be exempt from the overtime provisions of the FLSA under the motor carrier exception both before and after August 10, 2005 – as if SAFETEA-LU were never enacted.

Whether a statute is retroactive is a question of law. *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799, 801 (7th Cir. 2005) (citing *Arevalo v. Ashcroft*, 344 F.3d 1, 10 (1st Cir. 2003)). In making this determination, the court employs a two-part test set forth by the Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). First, the court must determine whether Congress has spoken as to whether the statute should have retroactive effect. *Faiz-Mohammad*, 395 F.3d at 801 (citing *Landgraf*, 511 U.S. at 280). If the statute is silent on this issue, the court must next consider whether retroactive application of the statute “would impair rights a party possessed when he acted, [would] increase a party’s liability for past conduct, or [would] impose new duties with respect to transactions already completed.” *Id.* at 802 (quoting *Landgraf*, 511 U.S. at 280). If application of the statute creates a retroactive effect, “our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.” *Landgraf*, 511 U.S. at 280.

In support of their argument that Section 305 of the TCA applies retroactively, Defendants focus on § 121(b)(2) of the TCA, which states,

SEC. 121. EFFECTIVE DATE.

- (a) IN GENERAL – Except as otherwise provided in this Act (including subsection (b)), this Act and the amendments made by this Act take effect on the date of enactment of this Act.
- (b) EXCEPTION –
  - (1) IN GENERAL – The amendments made by this Act (other than the amendments made by sections 101(g), 101(m)(1)(H), 103, 105, 109, and 201(o)) to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Public Law 109-59; 119 Stat. 1144) shall –
    - (A) take effect as of the date of enactment of that Act; and
    - (B) be treated as being included in that Act as of that date.
  - (2) EFFECT OF AMENDMENTS – Each provision of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Public Law 109-59; 119 Stat. 1144) (including the amendments made by that Act) (as in effect on the day before the date of enactment of this Act) that is amended by this Act (other than sections 101(g), 101(m)(1)(H), 103, 105, 109, and 201(o)) shall be treated as not being enacted.

Given the language above, it is not clear that Congress intended for Section 305(b) of the TCA to apply retroactively. While Section 121 of the TCA establishes that each provision of the SAFETEA-LU “shall be treated as not being enacted,” Section 306(c) of the TCA establishes no liability for overtime violations of the FLSA, for certain covered employees, if: (1) the violation occurred within one year beginning August 10, 2005; and

(2) as of the date of the violation, the employer did not have actual knowledge that it was subject to the requirements of such section with respect to those employees. *Id.* As noted by the court in *Vidinliev*:

If the definition of motor carrier in section 305 applied retroactively, then the one-year defense in section 306 is nothing more than surplusage. A legal defense is meaningless unless there is actual underlying liability. In this case, the one-year defense assumes that, as a result of the SAFETEA-LU definition, employers are liable for overtime pay to employees whose work primarily involves non-commercial motor vehicles. But that liability disappears if § 305 applies retroactively. . . . Under these circumstances, applying section 305 retroactively would violate the rule that a statute should be ‘interpreted so that no words shall be discarded as meaningless, redundant, or mere surplusage.’ *United States v. Canals-Jimenez*, 943 F.2d 1284, 1286 (11th Cir. 1991).

581 F. Supp. 2d at 1291; *see also Tews*, 592 F. Supp. 2d at 1347. For this reason, and for the additional reasons cited by the *Vidinliev* and *Tews* courts, the court finds that Congress did not clearly and unambiguously indicate that Section 305 of the TCA should apply retroactively. Thus, the TCA takes effect on the date of its enactment, June 6, 2008.

## **5. Defendants’ Knowledge**

The remaining issue for the court is the commencement of the Plaintiffs’ claim for overtime. As noted above, Section 306(b) of the TCA provides a one-year safe harbor (August 10, 2005 to August 10, 2006) for an employer who, on the date of the violation, did not have knowledge of the overtime requirements found in Section 207 of the FLSA. The only evidence before the court is from the Affidavit of Robert Tevault, Vice President of PTI, who states that “PTI did not have knowledge that there was any

legislative activity with respect to the long-standing exemption from overtime pay requirements until after August 9, 2006.” (Tevault Aff. ¶ 18). As this is undisputed, the court hereby finds, as a matter of law, that the Defendants’ DYV and OTR drivers (Plaintiffs) are entitled to overtime compensation, to the extent each member falls within the class, pursuant to Section 207 of the FLSA, from August 10, 2006, to the present.

### **B. Rail Carrier Exemption**

Section 213(b)(2) of the FLSA exempts “any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49.” Part A of subtitle IV of Title 49 contains a definition section codified at 49 U.S.C. § 10102. Section 5 defines “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.” 49 U.S.C. § 10102(5). Thus, in order for Defendants to be entitled to this exemption, they must show that they provide “common carrier” railroad transportation services for compensation.

“A common carrier is defined as an entity that holds itself out to the public as engaged in the business of transporting persons from place to place for compensation and that offers its service to the public in general.” *Connolly v. Samuelson*, 671 F.Supp. 1312, 1315 (D. Kan. 1987) (citing 13 Am.Jur.2d *Carriers* § 2 at 560); *see also Strykowski v. Ne. Ill. Reg. Commuter R.R. Corp.*, 1994 WL 287395, at \*8 (7th Cir. June 28, 1994) (noting that under the Federal Employer’s Liability Act, a common carrier is defined as “one who

holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public, generally.”) (internal quotation and citations omitted). Defendants contend that PTI is a common carrier because PTI’s fleet of motor vehicles used for transporting railroad crews “are operated under common carrier licenses or other authority issued by states in which PTI conducts its transportation services.” (Tevault Aff. ¶ 17). However, PTI admitted in its statement of facts that 99.7% of its business is providing railroad crew transportation services pursuant to its contracts with the railroads, and that it is not allowed to transport members of the public unless otherwise instructed to do so by the rail carrier. (*Id.* ¶¶ 5-6). There is no evidence in the record that Plaintiffs ever transported a member of the public at the direction of a rail carrier during the class period. Accordingly, the court finds that PTI is not a common carrier, and thus, does not meet the definition of a “rail carrier” for purposes of the rail carrier exemption. Defendants’ DYV and OTR drivers are thus not exempt from the overtime provisions of the FLSA under the rail carrier exemption.

### **C. Terminal Area Exemption**

Like the rail carrier exemption, an employer may demonstrate that it is subject to part A of subtitle IV of Title 49 by showing that “its activities fall within the ‘terminal area’ exception to jurisdiction under the Motor Carrier Act.” *Scott v. Raudin McCormick, Inc.*, 2009 WL 3561301, at \* 4 (D. Kan. Oct. 30, 2009); 49 U.S.C. § 13503(b)(1). The Motor Carrier Act’s terminal area exemption provides, in relevant part:

- (1) Except to the extent provided by paragraph (2) of this subsection,

neither the Secretary [of Transportation] nor the [Surface Transportation] Board has jurisdiction under this subchapter over transportation by motor vehicle provided in a terminal area when the transportation –

- (A) is a transfer, collection, or delivery; and
- (B) is provided by a person as an agent or under other arrangement for –
  - (i) a rail carrier subject to jurisdiction under chapter 105 of this title.

- (2) Transportation exempt from jurisdiction under paragraph (1) of this subsection is considered transportation provided by the carrier . . . for whom the transportation was provided and is subject to jurisdiction under chapter 105 of this title when provided for such a rail carrier . . . .

49 U.S.C. § 13503(b). The effect of this subsection places the Surface Transportation Board’s jurisdiction over rail carriers under chapter 105 of part A of subtitle IV of Title 49. Thus, “an employer that is able to demonstrate that it provides motor vehicle transportation pursuant to 49 U.S.C. § 13503(b) is exempt from the overtime provisions of the FLSA in providing that transportation.” *Scott*, 2009 WL 3561301, at \* 4.

Two recent district court cases from the District of Kansas are directly on point. They are *Tews* and *Scott, supra*. The *Tews* court conducted a thorough analysis of the terminal area exemption, and, relying in part on the Seventh Circuit’s decision in *Cederblade v. Parmelee Transp. Corp.*, 166 F.2d 554 (7th Cir. 1948), found that the terminal area exemption applies only if the employer provides transportation services within a terminal area for a rail carrier subject to jurisdiction under 49 U.S.C. § 13503(b).

The *Scott* court, relying on *Tews* and *Cederblade*, came to the same conclusion. 2009 WL 3561301, at \*6 (“Therefore, consistent with the Court’s analysis in *Tews*, we find that an employer is only exempt from the overtime provisions of the FLSA under the terminal area exception of the [Motor Carrier Act] when providing transportation service by motor vehicle within a terminal area, and only for those employees furnishing such service, providing 49 U.S.C. § 13503(b)(1)(B) is also satisfied.”). The court finds these cases highly persuasive, and adopts the reasoning set forth therein.

Defendants employ DYV drivers and OTR drivers. DYV drivers provide railroad crew transportation services in a terminal area, while OTR drivers provide railroad crew transportation services outside of a terminal area. The court finds, based upon the foregoing, that Defendants’ DYV drivers, when providing services in a terminal area, are exempt from the overtime provisions of the FLSA under the terminal area exemption. However, Defendants’ OTR drivers are not exempt from the FLSA’s overtime provisions for the transportation service they perform outside of the rail carriers’ terminal area.

**IV. Conclusion**

For the reasons set forth above, the court hereby **GRANTS in part** Plaintiffs' Motion for Partial Summary Judgment (Docket # 110) and **DENIES in part** Defendants' Cross-Motion for Partial Summary Judgment (Docket # 150).

**SO ORDERED** this 25th day of August 2010.



RICHARD L. YOUNG, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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**EXHIBIT C.**

RECEIVED  
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UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

ELAINE L. CHAO,  
Secretary of Labor,  
United States Department of Labor,  
  
Plaintiff,  
  
v.  
  
PROFESSIONAL TRANSPORTATION, INC.,  
  
Defendant.

FILE NO.  
2:04CV466-B

COMPLAINT  
(Injunctive Relief Sought)

This cause of action, which arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq., hereinafter the "Act," is brought by the Plaintiff, Secretary of Labor, for injunctive and other appropriate relief, seeking to enforce the provisions of § 11(c)(1) of the Act, 29 U.S.C. § 660(c)(1).

I

Jurisdiction over this action is conferred upon the Court by § 11(c)(2) of the Act.

II

Defendant, Professional Transportation, Inc., having a place of business and doing business in Montgomery, Alabama, at all times hereinafter mentioned has been a corporation engaged in the operation of a transportation service, within the jurisdiction of this Court.

III

Professional Transportation, Inc., a person within the meaning of § 3(4) of the Act, at all times material hereto has been an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act.

IV

During the period from February 7, 2003 to March 10, 2003, Thomas H. Bullington, Jr. was an employee of Professional Transportation, Inc., within the meaning of § 3(6) of the Act.

V

During the course of the aforesaid employment, on or about March 10, 2003, Thomas H. Bullington complained to the Alabama Department of Public Safety Motor Carrier Safety Division in Montgomery, Alabama, about driving logs for employees of Professional Transportation, Inc. Professional Transportation, Inc. was aware of this activity.

VI

On March 10, 2003, Professional Transportation, Inc. discharged Thomas H. Bullington from his employment with Professional Transportation, Inc.

VII

The discharge of Thomas H. Bullington was a result of his exercise of rights afforded under § 11(c)(1) of the Act.

VIII

On or about March 11, 2003, Thomas H. Bullington filed a timely administrative complaint with the Plaintiff alleging that the aforesaid discharge constituted discrimination in violation of § 11(c)(1) of the Act.

IX

Upon receipt of such complaint, the Plaintiff caused an investigation to be conducted by the Occupational Safety and Health Administration (OSHA) pursuant to § 11(c)(2) of the Act, wherein it was determined that Thomas H. Bullington's discharge by Professional Transportation, Inc. was in violation of § 11(c)(1) of the Act.

X

Professional Transportation, Inc. to date continues to discriminate against Thomas H. Bullington in violation of § 11(c)(1) of the Act in that the unlawful discharge has not been remedied through the provision of appropriate relief.

WHEREFORE, cause having been shown, Plaintiff prays for judgment:

(1) Permanently enjoining Professional Transportation, Inc., its officers, agents, servants, employees and all persons in active concert or participation with it, from violating the provisions of § 11(c)(1) of the Act.

(2) Ordering Professional Transportation, Inc. to pay Thomas H. Bullington back pay and reimbursement for lost benefits and other losses resulting from its aforesaid unlawful discrimination, plus interest on said back pay and reimbursement.

(3) Ordering Professional Transportation, Inc. to post in a prominent place for a period of sixty (60) consecutive days, a notice stating it will not in any manner discriminate against any employee for engaging in activities protected by Section 11(c) of the Act.

(4) Further ordering such other appropriate relief as may be necessary, including costs of this action.

ADDRESS:

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U. S. Department of Labor  
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By:   
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Attorneys for the Secretary  
of Labor, United States  
Department of Labor.

SOL Case No. 04-10110

# EXHIBIT D.

COMMISSIONERS:  
LAUREN 'BUBBA' MCDONALD JR, CHAIRMAN  
H. DOUG EVERETT,  
ROBERT B. BAKER, JR.  
CHUCK EATON  
STAN WISE



DEBORAH K. FLANNAGAN  
EXECUTIVE DIRECTOR

REECE MCALISTER  
EXECUTIVE SECRETARY

## Georgia Public Service Commission

244 Washington Street SW  
Atlanta GA 30334-5701  
(404) 656-4501 or 1 (800) 282-  
5813  
fax: (404) 656-2341  
[www.psc.state.ga.us](http://www.psc.state.ga.us)

June 30, 2010

### REGULAR AND CERTIFIED MAIL

Professional Transportation, Inc  
3700 East Morgan Ave.  
Evansville, GA 47715

Dear Michael Roth:

The Georgia Public Service Commission has received a complaint against Professional Transportation, Inc. alleging that you are operating as a for hire shuttle van service company without being properly licensed. This is a reminder that in order to operate as a shuttle van service in Georgia, you must be licensed and approved by the Commission and a Certificate must be granted. If you are presently conducting operations you are doing so illegally, (O.C.G.A. §46-7-85.3), and must **CEASE AND DESIST** from conducting such operations until a certificate has been granted by the Commission. Georgia law provides for a fine to be imposed on those carriers that operate illegally.

Therefore, if seen conducting business, your van will be stopped and your driver(s) will have to produce valid commercial liability insurance, proper certification and vehicle identification documentation or risk having your vehicle(s) impounded. Notice can be served for you to appear at a rule nisi hearing (O.C.G.A. §46-7-85.3, O.C.G.A. §40-5-143-145).

If you have questions pertaining to the fine that may be imposed or questions concerning this letter, you may contact me at (404) 463-7741.

Sincerely,

Carolyn Harrison  
Transportation Unit  
Georgia Public Service Commission

Cc: Lydia Holmes/Branch Manager  
976 Jefferson St.  
Atlanta, GA 30318

## Illegal Bus Carriers

Note: Complaints typically involve Damage and Loss, Rates and Charges and Service

| Name                                | Address / Phone  | Complaints for 2010 | Complaints for 2009 | Complaints for 2008 |
|-------------------------------------|--|---------------------|---------------------|---------------------|
| All American Coachlines, LLC        | 5222 Old Dixie Highway Forest Park, GA 404-839-3134      |                     | 1                   |                     |
| Atlanta Coach-Prince Limo & Shuttle | 4838 Embarcadero Lane, Building # 34-4 College Park, GA  |                     |                     |                     |
| Bi City Transportation              | 1711 Wildwood #B Columbus, GA                            |                     | 1                   |                     |
| Budget Motor Coach                  | 4854 Old National HWY #600 College Park, GA 404-471-5155 |                     |                     |                     |
| Horizon Motorcoach                  |  |                     |                     |                     |
| J.T. Travel & Charter, Inc.         | 2158 Sylvan Road East Point, GA 404-766-1999             |                     |                     |                     |
| Professional Transportation, Inc    | Savannah, GA   |                     | 1                   |                     |
| Rick's Transportation               | 2856 Portland Place Macon, GA 478-731-9692               |                     |                     |                     |
| Superior Coaches of Atlanta, Inc.   | 1060 Jefferson Street Atlanta, GA 404-876-8552           |                     | 1                   |                     |
| Superior Transportation Group       | 1060 Jefferson NW Atlanta, GA                            |                     |                     | 1                   |
| Thomas Transportation               |  |                     | 1                   |                     |
| Thriller Travel                     | 3477 Mogul Road Macon, GA 478-335-2665                   |                     |                     |                     |
| Top Shelf Entertainment             | 1425 Market Blvd. Ste 330-55 Atlanta, GA 678-543-0020    |                     | 1                   |                     |
| Williams Charter, Inc.              | 123 Foster Ball Road DeSoto, GA 229-874-1572             |                     |                     |                     |

**NOTES:** The charter bus companies listed on this site are believed to be operating within the State of Georgia without the lawful authority necessary to legally conduct intrastate transportation of passengers and their luggage. (O.C.G.A § 46-7-3) Information contained on this site is derived from complaints received by the Commission or from public advertisements of companies proclaiming themselves to be legal passenger carriers when in fact such companies are not licensed with the Commission. Some carriers listed on this site may have had their operating authority cancelled by the Commission and because of this they may not currently operate as a licensed passenger carrier within Georgia. All information contained on this site pertains to carriers that transport passengers and their luggage entirely within the State of Georgia, (intrastate), and does not pertain to companies that conduct operations that cross state lines, (interstate). To insure accuracy you should contact the Commission at (404) 463-7741 to verify the dependability of the information contained on this site. Information found on this site is believed to be reliable but is not guaranteed to be

|                   |
|-------------------|
| <b>EXHIBIT E.</b> |
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< up

294 F.3d 607

Perry WILLIAMS; Teddi Williams, d/b/a Williams Transport,  
Plaintiffs-Appellees,

v.

PROFESSIONAL TRANSPORTATION, INCORPORATED; United  
Leasing, Incorporated; CSX Transportation, Incorporated, Defendants-  
Appellants.

Perry Williams; Teddi Williams, d/b/a Williams Transport, Plaintiffs-  
Appellants,

v.

Professional Transportation, Incorporated; United Leasing, Incorporated;  
CSX Transportation, Incorporated, Defendants-Appellees.

*No. 99-1011.*

*No. 99-1080.*

**United States Court of Appeals, Fourth Circuit.**

*Argued December 1, 1999.*

*Decided July 1, 2002.*

COPYRIGHT MATERIAL OMITTED ARGUED: John Harlan Mahaney, II, Huddleston, Bolen, Beatty, Porter & Copen, Huntington, West Virginia, for Appellants. Michael Warren Carey, Carey, Hill, Scott, Winter & Johnson, P.L.L.C., Charleston, West Virginia, for Appellees. ON BRIEF: Andrew S. Zettle, Huddleston, Bolen, Beatty, Porter & Copen, Huntington, West Virginia, for Appellants. Pamela C. Deem, Carey, Hill, Scott, Winter & Johnson, P.L.L.C., Charleston, West Virginia, for Appellees.

Before WIDENER and LUTTIG, Circuit Judges, and SEYMOUR, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed in part and reversed in part by published opinion. Judge WIDENER wrote the opinion, in which Judge LUTTIG and Judge SEYMOUR concurred.

OPINION

WIDENER, Circuit Judge.

Defendant, CSX Transportation, Inc. ("CSXT"), a subsidiary of CSX Corporation, appeals from the district court's judgment order and accompanying findings of fact and conclusions of law enforcing a previous settlement agreement between CSXT and plaintiff, Williams Transport ("Williams"). CSXT also appeals the district court's award of attorneys' fees to Williams. Williams cross-appeals the district court's denial of an award of punitive damages. We affirm the district court's grant of Williams' motion to enforce the settlement; however, we reverse the district court's award of attorneys' fees to Williams. We also affirm the district court's denial of punitive damages to Williams.

## I.

Williams is a common carrier authorized under the laws of West Virginia to provide specialized limousine service to the public. CSXT has utilized Williams for transport of its train crewmen and property in areas of West Virginia since 1987. The settlement agreement at issue in this case stems from an underlying dispute between the parties that began in 1993.

On February 11, 1993, Williams filed a complaint against CSXT, Professional Transportation, Inc. ("Professional"), and United Leasing Inc. ("United Leasing") before the West Virginia Public Service Commission ("Public Service Commission") alleging that Professional and United Leasing displaced Williams pursuant to an illegal contract with CSXT. On March 18, 1994, the Public Service Commission determined that neither Professional nor United Leasing had authority to provide transportation services to CSXT and ordered them to cease and desist from operation of the unlawful transportation services. Following the Public Service Commission's February 2, 1995 decision, Williams filed a complaint in the district court against Professional and United Leasing alleging that the unlawful transportation services provided for CSXT resulted in injury to Williams. While that district court case was pending, CSXT filed a complaint against Williams before the Public Service Commission alleging that Williams had billed CSXT improperly under its tariff. Subsequently, Williams filed a petition with the Public Service Commission to clarify the tariff. The parties disputed the correct interpretation of Williams' tariff and whether a \$30 per hour alternative rate could be charged for waiting time.

Before the scheduled jury trial commenced in the district court, the parties met to explore settlement options. On May 23, 1997, Williams and CSXT, participating on behalf of Professional and United Leasing pursuant to an indemnity agreement, reached a settlement agreement at a settlement conference held before the district court.<sup>1</sup> The settlement agreement contained the following terms:

1. CSXT would pay to Williams \$140,000;
2. CSXT and Williams would enter into a five-year noncancellable, but transferrable contract, whereby Williams would be the exclusive provider of intrastate service to CSXT in certain areas in accordance with the Public Service Commission's rules, regulations and Williams' tariff; and
3. CSXT agreed to dismiss its overcharge case against Williams in the Public Service Commission.

In order to avoid a conflict with a settlement agreement CSXT had entered in a similar but unrelated action, the settlement agreement between CSXT and Williams was contingent upon Williams' success in a proceeding it had instituted against Mack's Transportation, one of its competitors, to have the Public Service Commission declare Mack's operating certificates dormant. The court noted that if the contingency did not come to fruition, the case would not be settled. The settlement agreement also permitted Williams to continue its tariff clarification petition in the Public Service Commission.<sup>2</sup>

After the May 23rd settlement conference, the following occurred: CSXT dismissed its overcharge case against Williams; the Public Service Commission declared Mack's Transportation dormant on April 10, 1998, removing the contingency for the settlement agreement to commence; and the parties met several times to negotiate the terms of the five-year contract, never reaching agreement on the terms. As previously agreed, the parties continued to litigate the tariff clarification and interpretation in the Public Service Commission. While the rate dispute continued, the parties agreed that Williams would charge and CSXT would pay for the services according to the billing practices used previously, that CSXT's payment of such charges did not constitute its admission of the charges' correctness, and that CSXT would forgo any right to initiate a complaint case or seek a refund of its

payments pending resolution of the rate matter. On December 4, 1997, the parties filed a joint motion to dismiss without prejudice the tariff clarification case in the Public Service Commission. After the dismissal, the parties continued under the previous billing scheme until March of 1998 when CSXT began rejecting most of Williams' invoices and returning them to Williams for recalculation and resubmission. CSXT again claimed the bills were overcharges. Nonetheless, the parties continued their unsuccessful negotiations over terms of the five-year contract. On May 4, 1998, CSXT filed a formal complaint in the Public Service Commission in which it alleged that after the May 23, 1997 settlement, Williams continued to overcharge CSXT for its services.

10 Although the parties continued to propose and counter-propose terms for their contract, on June 2, 1998, Williams informed CSXT it would seek a hearing before the district court to enforce the settlement agreement. Williams reiterated it was still willing to negotiate, but not under its current tariff. On July 21, 1998, the district court held a hearing on Williams' motion to reopen<sup>3</sup> and enforce the settlement agreement. The district court issued its memorandum opinion and order on August 20, 1998, granting the Williams' motion to enforce the settlement agreement and finding that CSXT violated the terms of the agreement by not negotiating in good faith, by refusing to pay Williams' invoices, and by filing a second complaint in the Public Service Commission. The court also granted the Williams' attorneys' fees. Subsequently, CSXT filed a motion described on the docket sheet as one for clarification and/or reconsideration. On October 27, 1998, the court granted the motion to reconsider and set the matter for rehearing, withdrawing its previous memorandum opinion and order.<sup>4</sup> After the rehearing, the court issued its findings of facts and conclusions of law and judgment order on December 11, 1998, enforcing the settlement agreement; ordering CSXT to pay Williams all past due invoices at the rates specified in Williams' tariff; ordering CSXT and Williams to enter into the five-year exclusive, noncancellable, but transferable contract at Williams' current tariff rate, or at an agreed upon rate to be approved by the Public Service Commission; and ordering CSXT to pay Williams all its reasonable costs and attorneys' fees incurred incident to these proceedings. The court denied Williams' request for punitive damages. Both parties appeal from that order.

## II.

11 As an initial matter, CSXT asserts that the district court's order exceeds the scope of its jurisdiction specified by the Johnson Act of 1934, 28 U.S.C. § 1342. The Johnson Act provides in pertinent part:

12 [T]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or rate-making body of a State political subdivision where: (1) Jurisdiction is based solely on diversity of citizenship ... and,

13 (2) The order does not interfere with interstate commerce; and,

14 (3) The order has been made after reasonable notice and hearing; and,

15 (4) A plain, speedy and efficient remedy may be had in the courts of such State.

16 28 U.S.C. § 1342. The Johnson Act's limitation on federal jurisdiction applies only when all four of its conditions are met. See *Aluminum Co. of Am. v. Utilities Comm'n of N. C.*, 713 F.2d 1024, 1028 (4th Cir.1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984). The party invoking the Johnson Act has the burden to show the conditions have been met. See *US West, Inc. v. Nelson*, 146 F.3d 718, 722 (9th Cir.1998) (citing *Nucor Corp. v. Nebraska Pub. Power Dist.*, 891 F.2d 1343, 1346 (8th Cir.1989)). We must first determine if the district court's order is an "order affecting rates chargeable by a public utility." 28 U.S.C. § 1342; *Shrader v. Horton*, 471 F.Supp. 1236, 1238-39 (W.D.Va.1979), *aff'd*, 626 F.2d 1163 (4th Cir.1980).

CSXT argues that the court's order established the price Williams may collect, which CSXT contends is above the lawful price set forth in the tariff, and that by setting this price, the court's order restrains the operation of or compliance with the Public Service Commission's specific rate order. As a matter of fact, however, the court ordered CSXT to pay the past invoices it had returned unpaid to Williams "at the rates specified in Williams' current tariff in the amounts set forth in those invoices." As to the five-year contract rate, the court reiterated that "[t]he contract rate shall be the rate contained in Williams' current tariff unless, and until, the parties agree on a new, or different, rate," but recognized "that any contract rate is subject to P[ublic] S[ervice] C[ommission] approval." The court did not resolve the rate interpretation dispute between the parties, rather it directed the parties to submit disputes about the interpretation of the tariff to the Public Service Commission.

18 We agree with Williams' characterization of the court's order as one merely enforcing a settlement agreement. Williams' underlying suit in this case was not a challenge to any order of the Public Service Commission, instead it alleged two causes of action: (1) injury caused by violation of certain statutes relating to the illegal transportation of passengers and (2) tortious interference. The settlement agreement encompassed a compromise of the parties' claims. Furthermore, any rate disputes and new rates agreed upon by the parties must be submitted to the Public Service Commission. The court declined to make any orders affecting these rates. We are thus of opinion that the Johnson Act does not bar federal jurisdiction in this matter. In that respect, we observe that the case of *Shrader v. Horton*, *infra*, even if not on all fours, is so near thereto as to be persuasive, and we follow that precedent.

### III.

19 Neither party appeals the portion of the judgment order ordering CSXT to pay Williams the sum of \$140,000 with interest from April 10, 1998.<sup>5</sup> CSXT appeals the portions of the judgment ordering immediate payment to Williams of all past due invoices at Williams' current tariff and payment of all submitted invoices until the parties execute their new contract. CSXT also disputes the court's construction of the settlement agreement as barring CSXT from instituting its second overcharge case in the Public Service Commission. The court found that CSXT breached the settlement agreement by "[f]iling a new overcharge complaint case with the PSC alleging that invoices were billed improperly under Williams' tariff despite the fact that a virtually identical case had been dismissed as part of the settlement." The May 23, 1997 settlement agreement required CSXT to dismiss its pending overcharge case in the Public Service Commission, which it did. However, on May 4, 1998, CSXT filed a second complaint asserting approximately the same factual and legal claims advanced in the first overcharge case.

20 A trial court possesses the inherent authority to enforce a settlement agreement and to enter judgment based on that agreement. *Petty v. Timken*, 849 F.2d 130, 132 (4th Cir.1988). A settlement agreement upon a contract must be interpreted as such. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975). Because contract construction is a question of law, we review the district court's interpretation of the settlement agreement *de novo*. *Nehi Bottling Co. v. All-American Bottling Corp.*, 8 F.3d 157, 161 (4th Cir.1993). We review the district court's order enforcing the settlement agreement for abuse of discretion. *Young v. FDIC*, 103 F.3d 1180, 1194 (4th Cir.1997).

21 Both parties agreed they reached a binding settlement agreement, and both sides asked the court to enter an enforcement order. After a hearing on the matter, the court interpreted the settlement agreement as barring CSXT's second overcharge case because CSXT agreed to forego the prior overcharge case based on the same claims. CSXT argued that it never agreed to forego claims against Williams for overcharges occurring after May 23, 1997 and that it could file its overcharge case despite having just dismissed it. The court, having participated at length in the original settlement negotiations, found CSXT's position "totally inconsistent with [its] undertakings as part of the settlement. It strains credibility to suppose ... that Williams

would have settled this case knowing that CSXT would presently refile a new case for overcharges." We agree with the district court's reading of the original settlement agreement and with the district court's finding that by filing an identical overcharge case against Williams after agreeing to dismiss the same, CSXT breached the May 23rd settlement agreement.<sup>6</sup>

22 CSXT also asserts that the district court's ruling requiring the parties to enter promptly into the five-year contract is flawed.<sup>7</sup> CSXT believes the five-year contract should have a retroactive commencement date of April 10, 1998, the date upon which the contingency for settlement was removed. CSXT did not present this contention to the district court and raises it for the first time on appeal. In fact, CSXT's counsel argued at the last hearing before the district court on November 16, 1998 that the agreed five-year service under the contract should begin on November 16, 1998.

23 Issues raised for the first time on appeal are generally not considered absent exceptional circumstances. See *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (allowing consideration of issues first raised on appeal only when failure to do so is plain error or results in miscarriage of justice). The date a contract should begin is not an exceptional circumstance that warrants consideration of the issue in this case.

24 In conclusion, we are of opinion the district court did not abuse its discretion by enforcing the settlement order in the manner it did.

#### IV.

25 CSXT appeals the district court's award of attorneys' fees to Williams. Under the American Rule, each party bears its own costs of litigation unless statutory authority exists for an award of attorneys' fees or an exception to the rule applies. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245-47, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). One exception to the rule allows a district court to assess attorneys' fees against a losing party when it has acted in bad faith, vexatiously, or wantonly. See *Alyeska*, 421 U.S. at 258, 95 S.Ct. 1612; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In this case, the district court found the following to support its award of attorneys' fees: CSXT willfully breached the settlement agreement by prolonging the negotiations; CSXT refused to pay the invoices submitted by Williams;<sup>8</sup> CSXT filed a new over charge complaint case; CSXT continued to support McLine Transportation ("McLine") in McLine's effort to obtain Public Service Commission approval to operate statewide in West Virginia; and CSXT had an obligation to notify the court that the settlement was in jeopardy. While CSXT may have breached the settlement agreement by refusing to pay Williams' invoices and by refileing its overcharge case, we are of opinion that these actions do not support the award of attorneys' fees to Williams. CSXT's actions do not rise to the level of bad faith required for an award. Furthermore, CSXT's support of McLine's application for approval in the Public Service Commission does not constitute a breach of the settlement agreement. The settlement agreement has no provision requiring CSXT to refrain from supporting such applicants. Additionally, even if McLine obtained statewide authority to operate, CSXT admits McLine would not replace Williams in the areas covered by the settlement agreement. The award of attorneys' fees to Williams is reversed.

#### V.

26 Williams appeals the district court's denial of punitive damages. Punitive damages in a breach of contract case are available only in an exceptional case in which the breach amounts to an independent and willful tort. *Goodwin v. Thomas*, 184 W.Va. 611, 403 S.E.2d 13, 16 (1991); see also *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F.2d 522, 526-27 (4th Cir.1987). We affirm the district court's denial of punitive damages on its reasoning that CSXT's conduct was not sufficient to support such an exceptional award.

27 Accordingly, the judgment order of the district court entered December 11, 1998 is affirmed

in each respect except the award of attorney's fees to the Williams is reversed. The award of costs to the Williams is also affirmed if the brief of CSXT may be taken as contesting that item.

28

*AFFIRMED IN PART, REVERSED IN PART.*

---

Notes:

1

According to Williams, the final settlement conference was off the record. Neither a transcript nor notes from the conference are provided in the Joint Appendix

2

On May 13, 1997, CSXT filed a written protest with the Public Service Commission in Williams' tariff clarification proceeding to protest Williams' interpretation of its tariff. The Public Service Commission allowed CSXT to intervene as a party to prosecute its opposition

3

In February 1998, the district court closed the case for statistical purposes. The court reserved its authority to reopen the action upon motion of any party and for good cause shown

4

On December 9, 1998, the court ordered the joinder of CSXT as a party to the action. Prior to the order, CSXT had participated in the action because it assumed the defense of Professional and United Leasing under an indemnity agreement

5

On April 10, 1998, the Public Service Commission affirmed the determination of Mack's Transportation's dormancy, removing the settlement agreement's contingency factor

6

CSXT argues that West Virginia law prohibits waiver of future over-payments. CSXT bases its argument on West Virginia Code § 24A-2-4. § 24A-2-4 prohibits a carrier from receiving or charging greater or less than the rates legally established and filed with the Public Service Commission. W.Va. Code § 24A-2-4. The court acknowledged such supervision by the Public Service Commission and incorporated that into its findings of facts and conclusions of law and its order. Any rate differentials between customers or customer classes are subject to approval by the Public Service Commission *West Virginia AAA Statewide Ass'n v. Public Serv. Comm'n of West Va.*, 186 W.Va. 287, 412 S.E.2d 481, 485 (1991).

7

We do not further address CSXT's argument regarding the rate structure because the district court's order amply covers the issue by recognizing the Public Service Commission's authority over new rates and by requiring tariff interpretation disputes to be submitted to the Public Service Commission

8

The court noted the "dramatic disparity" in financial and bargaining power between the two parties as part of this finding

# EXHIBIT F.

February / 2010

## In Frankfort: Railroads Under Attack?

In an unusual twist on Thursday morning this week, the House – Labor & Industry Committee voted HB 432 out of Committee, with a favorable recommendation. HB 432 establishes new safety requirements and safety standards for railroad crew haulers, including strict record-keeping and accounting systems, and a requirement that railroad employers carry \$5 million liability insurance on all employees. The bill has been sponsored by Rep. Rick Nelson (Middlesboro) who also chairs the House – Labor & Industry Committee. **The bill was opposed by Professional Transportation Inc. (PTI) at the Committee meeting.** Other rail carriers have also voiced opposition to the legislation. KBT believes the measure is misguided, offering a solution for a problem that doesn't exist in Kentucky. In recent years, Kentucky's railroads have not been faced with safety issues, or insurance issues. Furthermore, in Kentucky, many railroad employees are located in "border" cities (Ashland, Louisville, Northern Kentucky, Owensboro and Paducah) and a new, burdensome state law might encourage them to relocate... just on the other side of the border. At a time when our state and nation's economy is soft, we need to encourage rail freight, not discourage it.



?

# EXHIBIT G.

## William R. Caudill

Published in the Evansville Courier Press on March 29, 2011

Evansville, Ind. — William "Ray" Caudill, 68, of Evansville, IN. passed away Sunday, March 27, 2011 as the result of a "head-on" vehicle accident in Tennessee. Ray was born in Waynesburg, Kentucky on September 29, 1942 to Raymond and Opal Caudill.

He was a transportation driver for Professional Transportation Incorporated Ray served in the United States Army as a Military Police Officer and was a member of Scott Township General Baptist Church. Ray enjoyed fishing and spending time with his grandchildren. Ray is survived by: son, Bill Caudill (Dawn) of Evansville, IN. daughters, Angie Smith (Steve) of Evansville, IN. and Christy Gibson (Damon) of Evansville, IN. sisters, Bobbie Baker of AK., Linda Leech, Shelia Jenkins, Dana Padgett, brothers, Roy Caudill (Phyllis), Phil Caudill, Roger Caudill all of Kentucky and grandchildren Nicole Smith and Braylen Gibson. Ray is preceded in death by his parents and wife Lydia Caudill. Funeral services will be held 1:00 PM Wednesday March 30, 2011 at Browning Funeral Home 738 Diamond Avenue with Rev. Rick Dimmett officiating. Burial will be held at Sunset Memorial Park Cemetery where the Retired Veterans Memorial Club will conduct military rites. Friends may visit from 9:00 AM until service time Wednesday, March 30, 2011 at Browning Funeral Home.

## Driver killed, two hurt in head-on I-24 wreck near Clarksville

The Leaf-Chronicle, 10:04 P.M. March 28, 2011

An Evansville, Ind., man was killed and two others were injured Sunday night in a head-on collision on Interstate 24 near Exit 1. The wreck occurred at approx. 9:45 pm. when the Toyota Sienna driven by Caudill was driving down the wrong side of the highway and collided with a Chevrolet pick-up truck in the west-bound lane, according to a Tennessee Highway Patrol report. Caudill, 68 of Evansville, died at the scene. The TN accident report (# 311014017) stated that Caudill was not wearing a seat belt.

The two women in the pickup truck — driver Courtney P. Coley, 20, of West Paducah, Ky., and Christa J. Leigh, 19, of Paducah — were transported to Vanderbilt University Medical Center with undisclosed injuries, according to THP spokeswoman Jennifer Donnals. Both women were wearing seat belts. Leigh was listed in stable condition Monday afternoon. Coley's status could not be confirmed according to a hospital spokeswoman.

Brian Eason  
City government reporter  
Leaf-Chronicle  
1 (931)245-0262

Bill Caudill, son of diseased driver  
uknuts@insightbb.com  
812-479-8301

**EXHIBIT H.**

**RECEIVED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

OCT 28 2010

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

Ronald C. Tinsey,  
Plaintiff,

vs.

**10 CV 6936**  
JUDGE SHADUR  
MAGISTRATE JUDGE DENLOW

Professional Transportation, Inc.,  
Billy (last name unknown) Supervisor,  
Defendant(s),

**COMPLAINT AT LAW**

NOW COMES the Plaintiff, Ronald C. Tinsey, pro se litigant, and complains of Defendant(s)' termination of his employment as a van driver. Plaintiff brings his cause of action pursuant to the Common Law Tort of Discharge in Violation of Public Policy (Wrongful Termination), violation of Plaintiff's procedural and substantive due process rights and disparate treatment discrimination.

## **JURISDICTIONAL STATEMENT**

**The District Court enjoys “Diversity of Citizenship Jurisdiction” and “Federal Question Jurisdiction” in the instant case as Plaintiff is a resident of the State of Illinois and Defendant, Professional Transportation, Inc., is a foreign corporation doing business in Illinois but incorporated in the State of Indiana; and the issue of Substantive Due Process rights give rise to a Federal Question and allegations of disparate treatment discrimination violates Federal Statutes.**

## **THE PARTIES**

**(1) Defendant, Professional Transportation, Inc., (hereafter, PTI) 2040 East 106<sup>th</sup> Street, Calumet Yard, Chicago, Illinois; is a business that provides transportation services for Norfolk railroad workers. PTI is a foreign corporation conducting business in the State of Illinois but is incorporated in the State of Indiana. PTI’s registered agent is National Registered Agents, Inc., 200 West Adams, Chicago, Illinois, 60606.**

**(2) Defendant, Billy (last name unknown) was Plaintiff’s supervisor and was also employed by PTI.**

**(3) Plaintiff, Ronald C. Tinsey, 6152 South Campbell, Chicago, Illinois, is a resident of Illinois and at all times relevant to the instant allegations was a resident of Illinois.**

#### **STATEMENT OF FACTS**

**(4) Tinsey began his employment as a van driver for PTI on or about September 7<sup>th</sup>, 2010. Tinsey worked at 2040 East 106<sup>th</sup> Street, Chicago, Illinois. This location is referred to as the Calumet Yard or East 78. Ostensibly, PTI is contracted by Norfolk Railroad to transport railroad workers from some pick-up point (usually Cicero, Illinois) to a destination (oftentimes Fort Wayne, Indiana).**

**(5) On September 11<sup>th</sup>, 2010, Tinsey drove to a hotel in Cicero, Illinois, and picked-up 4 railroad workers-their destination was Fort Wayne, Indiana.**

**(6) Tinsey left Chicago at approximately 5:45 pm Central Daylight Time (CDT), arriving in Fort Wayne, Indiana at approximately 10:40 pm Eastern Daylight Time (EDT)-Fort Wayne is a hour ahead of Chicago time: so that when it is 9:40 pm (CDT) in Chicago, Illinois, it is 10:40 pm (EDT) in Fort Wayne, Indiana.**

**(7) As Tinsey traveled the highway en route to Fort Wayne, Indiana, he noted that some 45 minutes before he arrived in Fort Wayne, a heavy fog was developing and the fog was heading in the same direction as Tinsey was driving.**

**(8) When Tinsey arrived in Fort Wayne, Indiana, he noted that the fog had rendered visibility "0" on the highway he had just exited from and much of Fort Wayne. As he drove the railroad workers to their destination, the descending fog was quickly becoming denser and the situation was only helped by the fact that there were street lights helping to illuminate the city streets.**

**(9) Tinsey delivered the railroad workers to their destination, and began driving back toward the highway. By this time, there was "0" visibility: Tinsey could not see beyond the hood of the van.**

**(10) Tinsey is an elder gentleman who wears eye glasses and tends to drive very cautiously as his senses and reflexes are not what they use to be.**

**(11) Notwithstanding, Tinsey continued to drive toward the highway, getting on the highway and driving some 3 or 4 blocks in zero visibility fog: he could not even see past the hood of the van.**

**Moreover, the highway dividing lines could not be seen.**

**(12) Because the fog rendered visibility zero, Tinsey believed it fool hearty and very risky to attempt to drive back to Chicago.**

**(13) During his arrival in Fort Wayne, Tinsey noticed that he passed by a hotel named Wayne's Hotel-he decided to rent a room at this hotel and wait out the fog.**

**(14) Once in the hotel room he called Calumet City, the job site, and told a supervisor that it was too dangerous to attempt to drive back to Chicago. Tinsey explained that the fog was extremely dense and that visibility had to be zero, as he could not see the hood of the van.**

**(15) This un/identified supervisor began screaming and hollering, telling Tinsey to get the van back, no matter how long it takes. He said just to drive slow and put the emergency flashers on and drive on the side of the road.**

**(16) Tinsey told the supervisor that he could not see and to attempt to drive the van in that kind of fog would put him at risk of having an accident.**

**(17) This un/identified supervisor then said he was going to call his supervisor, Billy.**

**(18) Billy called Tinsey and said that today was his day off and that he did not want to be bothered with this “bullshit.” Billy told Tinsey, “just get my van back, you’ve got 2 hours.”**

**(19) Tinsey told Billy that he could not drive back in the fog, that visibility was zero, that he could not see pass the hood of the van, and that he did not want to tear up the van or injure himself. Tinsey told Billy that he had rented a hotel room and would wait until the fog dissipated.**

**(20) Billy called Tinsey at least 5 more times, issuing threats, saying that Tinsey was fired, and insisting that Tinsey bring the van back in 2 hours, then 1 hour and continued to issue altering deadline(s).**

**(21) Tinsey did not get back with the van until 10:00 or 10:30 am on September 12<sup>th</sup>, 2010.**

**COUNT I  
DISCHARGE IN VIOLATION OF PUBLIC POLICY**

**(22) Plaintiff states that PTI’s insistence, under threat of discharge, that Tinsey drive the van back to Chicago in dense fog with zero visibility violates policy public that every citizen is charged with acting in a responsible manner; not to drive under conditions that pose grave risk to others or oneself.**

**(23) Moreover, Supervisor Billy's admonition to Tinsey that he would be fired for not driving in dense fog with zero visibility violates Tinsey's substantive due process right of self-protection. In addition, the Secretary of State "rules of the road" mandates that a driver experiencing zero visibility fog pull over and wait until the fog dissipates, but under no circumstances continue to drive. Hence, where an employer orders an employee to engage in employment activity that poses almost certain injury and requires, as a condition of his continued employment, the engagement of said risk, such behavior is illegal and violates public policy.**

**(24) Tinsey states that driving in zero visibility fog also puts other citizens at risk of property damage and/or physical injury. Such behavior negates the State of Illinois policy public expectation that citizens will conduct themselves in an appropriate and reasonable manner given the circumstances.**

**(See Attached Exhibit A, highlighted sections, (timeanddate.com, weather print out documenting zero visibility for Fort Wayne, Indiana for September 11<sup>th</sup>, 2010, at 11:00 pm and 1 mile visibility by September 12, 2010, 12:54 am).**

**(25) Tinsey believed then, and still believes now, that had he attempted to drive back to Chicago in the zero visibility fog that existed in Fort Wayne, Indiana and the highway on September 11<sup>th</sup>, 2010, he would have been acting with gross negligence; would have violated the rules of the road, and would have un/necessarily placed other drivers and himself at risk of great property damage and/or serious injury.**

**(26) Tinsey respectfully request \$40,000.00 dollars in damages for the wrongful discharge he experienced in violation of public policy.**

**COUNT II  
VIOLATION OF SUBSTANTIVE DUE PROCESS AND  
PROCEDURAL DUE PROCESS RIGHTS**

**(27) Wrongful Termination, among other violations, violates an employee's legal protection against retaliation for asserting or exercising a legal right. Tinsey has the substantive due process right to refuse to drive a van in zero visibility fog on a highway-because Courts have viewed the due process clause and through extrapolation, substantive due process, as embracing those fundamental rights that are "implicit in the concept of ordered liberty."**

**(28) Tinsey has an absolute substantive due process right not to be coerced to engage employment activity that almost certainly would result in serious injury; and the doctrine of at-will employment does not negate this fundamental and substantive right.**

**(29) Moreover, Tinsey's due process right to be treated fairly was abridged by PTI, as the dictates of due process requires that an employee be provided, at the very least, minimal due process especially when an employee is discharged for cause.**

**(30) PTI did not provide Tinsey with notice of the accusations against him; did not provide Tinsey an opportunity to address the accusations against him; did not provide Tinsey an opportunity to exercise his confrontation and compulsory process clause rights; by PTI policy, refused to provide Tinsey with a disciplinary hearing and review as is provided to other similarly-situated employees, ostensibly PTI employee policy denies due process to probationary employees.**

**(31) Tinsey respectfully request \$40,000.00 dollars in damages for PTI's violation of his substantive and procedural due process rights.**

**COUNT III  
DISPARATE TREATMENT DISCRIMINATION**

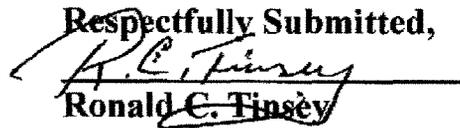
**(32) PTI maintains a policy that denies employees, during their introductory period (probationary period), the normal steps in PTI's disciplinary procedure. (See Attached Exhibit B, (Excerpt from PTI's Driver's Manual).**

**(33) Tinsey was denied the normal steps in PTI's disciplinary procedure relative to his "discharge in violation of public policy" ostensibly because of what PTI calls an introductory period. However, other similarly-situated employees are provided disciplinary procedure protections. These similarly-situated employees drive vans as did Tinsey; are required to meet the same qualifications as Tinsey in terms of maintaining a valid drivers license, attending driving safety classes, etc., perform exactly the same employment activities and report to the same supervisor(s).**

**(34) Tinsey respectfully request \$40,000.00 dollars in damages for  
PTT's intentional violation of his right to be free from disparate  
treatment discrimination.**

**(35) PLAINTIFF DEMANDS A JURY TRIAL.**

**Respectfully Submitted,**

  
Ronald C. Tinsey

**6152 South Campbell  
Chicago, Illinois  
773/858/1578**

EXHIBIT A

timeanddate.com  
print out of weather conditions in  
Fort Wayne, Indiana, on  
September 11<sup>th</sup>, 2010 at 10:40 pm  
EDT through September 12<sup>th</sup>,  
2010 12:54 am EDT  
(See highlighted sections).



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Time/General | **Weather** | Time zone | DST | Sun & Moon

## Fort Wayne, Indiana, United States

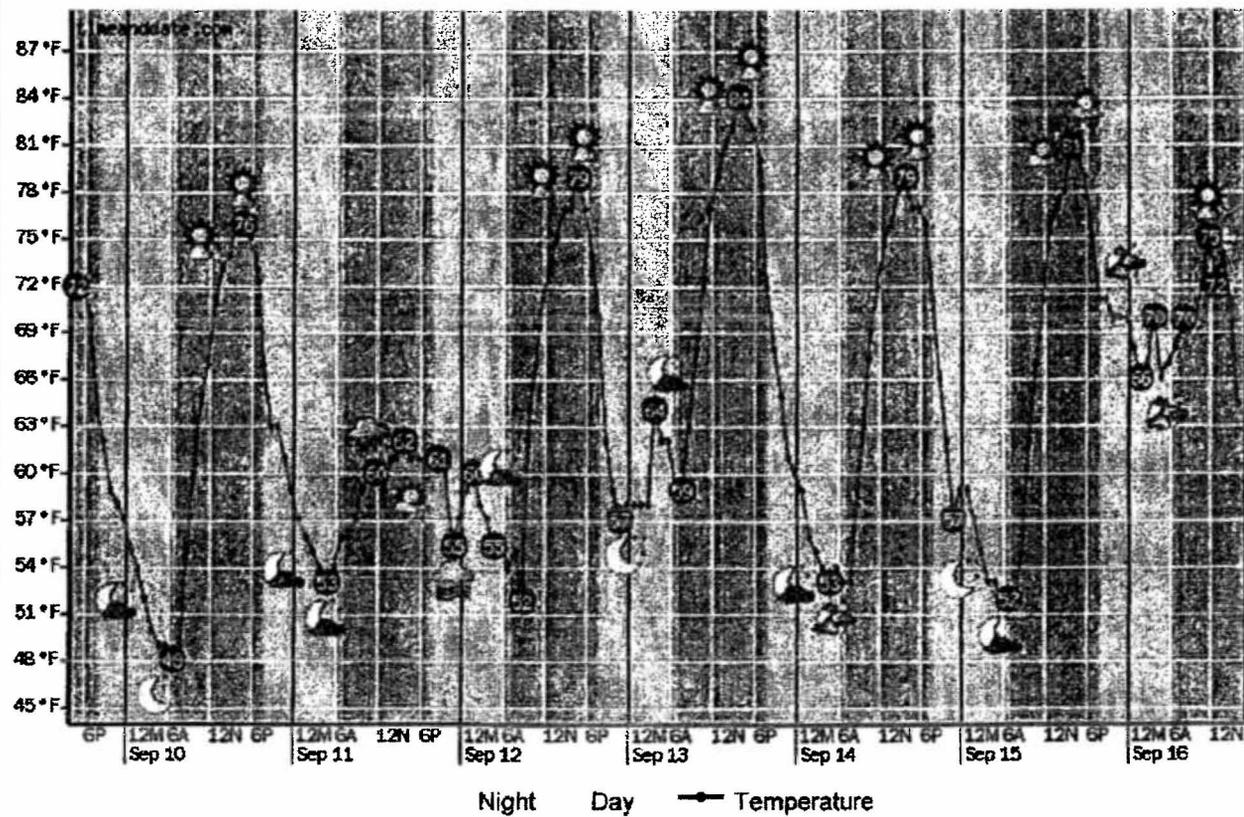


**Weather overview** | Two-week forecast | Hour-by-hour | Past week

°C | °F

Current Time Thursday, September 16, 2010 at 5:06:16 PM EDT

### Recent weather Fort Wayne



**Summary of observations in Fort Wayne**

Note that the numbers below should be used very carefully. These numbers are not official recordings and are based on previous observations in Fort Wayne. There may be observations in between those listed here that have higher or lower values.

|             | Value     | Lowest Time       | Value     | Highest Time      |
|-------------|-----------|-------------------|-----------|-------------------|
| Temperature | 48 °F     | Sep 10 at 6:54 AM | 84 °F     | Sep 13 at 3:54 PM |
| Humidity    | 32%       | Sep 14 at 3:54 PM | 100%      | Sep 11 at 7:05 PM |
| Barometer   | 29.71 "Hg | Sep 16 at 1:54 PM | 30.21 "Hg | Sep 15 at 9:54 AM |

**Detailed list of observations in Fort Wayne**

Detailed list for all week

| Date  | Time     | Weather   | Weather                          | Temp  | Wind Speed | Dir | Hum. | Barometer | Visibility |
|---|----------|---|----------------------------------|-------|------------|-----|------|-----------|------------|
| <input checked="" type="checkbox"/> Weather on Sep 9  |          |   |                                  |       |            |     |      |           |            |
| <input checked="" type="checkbox"/> Weather on Sep 10 |          |   |                                  |       |            |     |      |           |            |
| <input checked="" type="checkbox"/> Weather on Sep 11 |          |   |                                  |       |            |     |      |           |            |
| Sep 11  | 12:54 AM |    | Passing clouds. Cool.            | 57 °F | 9 mph      | ←   | 72%  | 29.97 "Hg | 10 mi      |
| Sep 11  | 1:54 AM  |    | Passing clouds. Cool.            | 56 °F | 8 mph      | ←   | 77%  | 29.97 "Hg | 10 mi      |
| Sep 11  | 2:54 AM  |    | Clear. Cool.                     | 55 °F | 7 mph      | ←   | 80%  | 29.96 "Hg | 10 mi      |
| Sep 11  | 3:54 AM  |    | Clear. Cool.                     | 54 °F | 7 mph      | ←   | 83%  | 29.96 "Hg | 10 mi      |
| Sep 11  | 4:54 AM  |    | Passing clouds. Cool.            | 53 °F | 7 mph      | ←   | 83%  | 29.94 "Hg | 10 mi      |
| Sep 11  | 5:54 AM  |    | Passing clouds. Cool.            | 54 °F | 6 mph      | ←   | 83%  | 29.93 "Hg | 10 mi      |
| Sep 11  | 6:54 AM  |    | Passing clouds. Cool.            | 56 °F | 7 mph      | ↖   | 81%  | 29.93 "Hg | 10 mi      |
| Sep 11  | 7:54 AM  |    | Partly sunny. Cool.              | 56 °F | 7 mph      | ←   | 81%  | 29.93 "Hg | 10 mi      |
| Sep 11  | 8:54 AM  |  | Mostly cloudy. Cool.             | 57 °F | 6 mph      | ←   | 78%  | 29.93 "Hg | 10 mi      |
| Sep 11  | 9:54 AM  |  | Mostly cloudy. Cool.             | 59 °F | 5 mph      | ←   | 78%  | 29.91 "Hg | 10 mi      |
| Sep 11  | 10:54 AM |  | Light rain. Mostly cloudy. Cool. | 60 °F | 6 mph      | ←   | 78%  | 29.88 "Hg | 10 mi      |
| Sep 11  | 11:54 AM |  | Drizzle. Mostly cloudy. Cool.    | 60 °F | 6 mph      | ↙   | 80%  | 29.88 "Hg | 10 mi      |
| Sep 11  | 12:54 PM |  | Rain. Fog. Cool.                 | 59 °F | 8 mph      | ↙   | 87%  | 29.87 "Hg | 1 mi       |
| Sep 11  | 1:09 PM  |  | Light rain. Fog. Cool.           | 59 °F | 7 mph      | ←   | 88%  | 29.88 "Hg | 4 mi       |
| Sep 11  | 2:04 PM  |  | Light rain. Fog. Cool.           | 61 °F | 8 mph      | ←   | 88%  | 29.86 "Hg | 5 mi       |
| Sep 11  | 2:54 PM  |  | Light rain. Mostly cloudy. Cool. | 61 °F | 6 mph      | ↖   | 90%  | 29.84 "Hg | 8 mi       |
| Sep 11  | 3:54 PM  |  | Cloudy. Cool.                    | 62 °F | 6 mph      | ↖   | 83%  | 29.85 "Hg | 10 mi      |
| Sep 11  | 4:54 PM  |  | More clouds than sun. Cool.      | 61 °F | No wind    | -   | 90%  | 29.85 "Hg | 8 mi       |
| Sep 11  | 5:54 PM  |  | Light rain. Mostly cloudy. Cool. | 61 °F | No wind    | -   | 93%  | 29.86 "Hg | 1 mi       |
| Sep 11  | 6:54 PM  |  | Fog. Cool.                       | 61 °F | No wind    | -   | 97%  | 29.86 "Hg | 1 mi       |
| Sep 11  | 7:05 PM  |  | Drizzle. Low clouds. Cool.       | 61 °F | No wind    | -   | 100% | 29.87 "Hg | 1 mi       |
| Sep 11  | 7:54 PM  |  | Drizzle. Fog. Cool.              | 61 °F | No wind    | -   | 97%  | 29.89 "Hg | 1 mi       |
| Sep 11  | 8:54 PM  |  | Fog. Cool.                       | 61 °F | No wind    | -   | 97%  | 29.90 "Hg | 2 mi       |
| Sep 11  | 9:54 PM  |  | Fog. Cool.                       | 60 °F | 6 mph      | ↗   | 96%  | 29.91 "Hg | 3 mi       |

| Date   | Time     | Weather   | Weather    | Temp  | Wind Speed | Dir. | Hum. | Barometer | Visibility |
|--------|----------|---|------------|-------|------------|------|------|-----------|------------|
| Sep 11 | 11:00 PM |  | Fog. Cool. | 55 °F | 3 mph      | →    | 100% | 29.93 "Hg | 0 mi       |
| Sep 11 | 11:09 PM |  | Fog. Cool. | 55 °F | 3 mph      | →    | 100% | 29.93 "Hg | 0 mi       |
| Sep 11 | 11:54 PM |  | Fog. Cool. | 57 °F | 3 mph      | →    | 96%  | 29.93 "Hg | 0 mi       |

- [Weather on Sep 12](#)
- [Weather on Sep 13](#)
- [Weather on Sep 14](#)
- [Weather on Sep 15](#)
- [Weather on Sep 16](#)

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## Fort Wayne, Indiana, United States



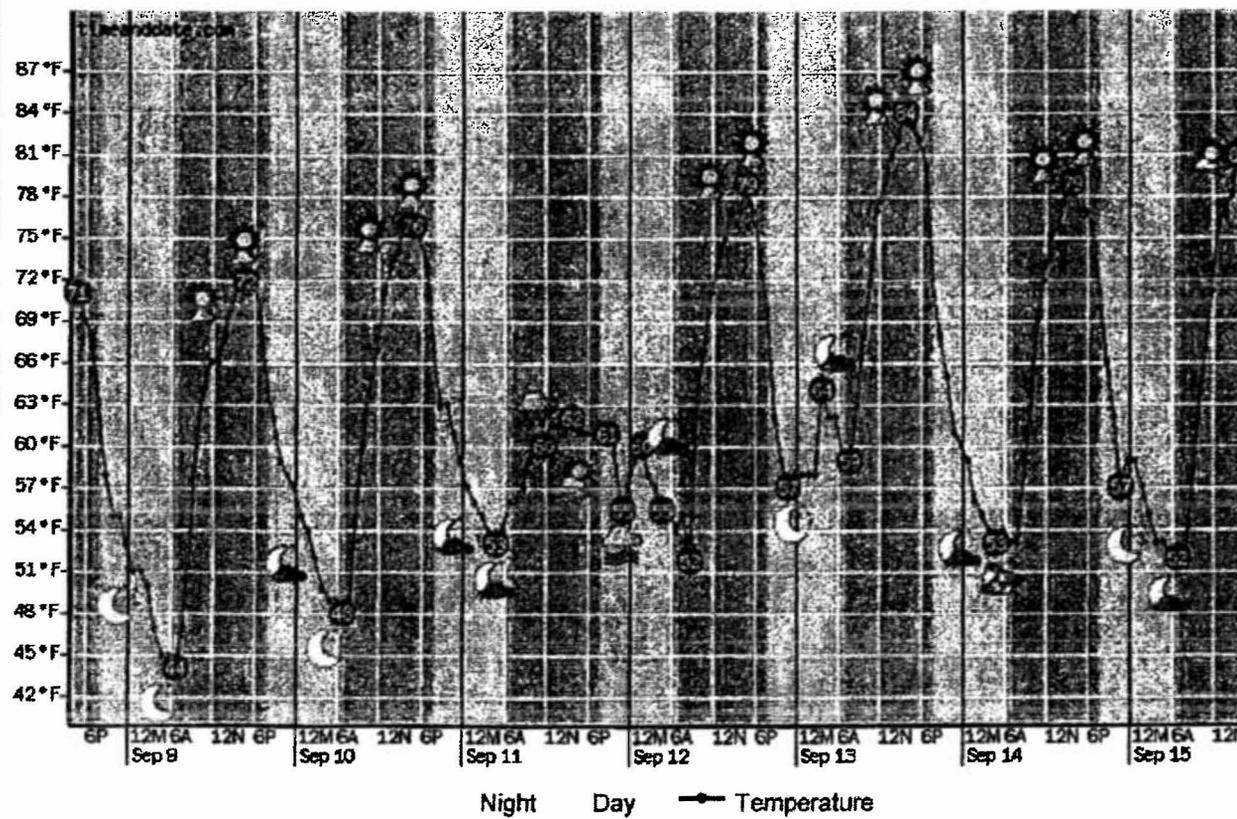
Weather overview | Two-week forecast | Hour-by-hour | Past week

°C | °F

Current Time

Wednesday, September 15, 2010 at 6:02:18 PM EDT

### Recent weather Fort Wayne



**Summary of observations in Fort Wayne**

Note that the numbers below should be used very carefully. These numbers are not official recordings and are based on previous observations in Fort Wayne. There may be observations in between those listed here that have higher or lower values.

|             | Value     | Lowest Time       | Value     | Highest Time      |
|-------------|-----------|-------------------|-----------|-------------------|
| Temperature | 44 °F     | Sep 9 at 6:54 AM  | 84 °F     | Sep 13 at 3:54 PM |
| Humidity    | 32%       | Sep 14 at 3:54 PM | 100%      | Sep 11 at 7:05 PM |
| Barometer   | 29.84 "Hg | Sep 11 at 2:54 PM | 30.21 "Hg | Sep 15 at 9:54 AM |

**Detailed list of observations in Fort Wayne**

Detailed list for all week

| Date  | Time     | Weather   | Weather                            | Temp  | Wind Speed | Wind Dir. | Hum. | Barometer | Visibility |
|---|----------|---|------------------------------------|-------|------------|-----------|------|-----------|------------|
| <input checked="" type="checkbox"/> Weather on Sep 8  |          |   |                                    |       |            |           |      |           |            |
| <input checked="" type="checkbox"/> Weather on Sep 9  |          |   |                                    |       |            |           |      |           |            |
| <input checked="" type="checkbox"/> Weather on Sep 10 |          |   |                                    |       |            |           |      |           |            |
| <input checked="" type="checkbox"/> Weather on Sep 11 |          |   |                                    |       |            |           |      |           |            |
| <input checked="" type="checkbox"/> Weather on Sep 12 |          |   |                                    |       |            |           |      |           |            |
| Sep 12  | 12:54 AM |    | Fog. Cool.                         | 59 °F | 7 mph      | ↗         | 96%  | 29.94 "Hg | 1 mi       |
| Sep 12  | 1:54 AM  |    | Fog. Cool.                         | 60 °F | 3 mph      | →         | 96%  | 29.96 "Hg | 2 mi       |
| Sep 12  | 2:54 AM  |    | Fog. Cool.                         | 58 °F | 6 mph      | →         | 97%  | 29.96 "Hg | 2 mi       |
| Sep 12  | 3:54 AM  |    | Fog. Cool.                         | 57 °F | 7 mph      | →         | 96%  | 29.98 "Hg | 2 mi       |
| Sep 12  | 4:54 AM  |    | Fog. Cool.                         | 55 °F | 7 mph      | →         | 100% | 29.99 "Hg | 6 mi       |
| Sep 12  | 5:54 AM  |    | Passing clouds. Cool.              | 56 °F | 8 mph      | →         | 93%  | 30.01 "Hg | 8 mi       |
| Sep 12  | 6:54 AM  |   | Clear. Cool.                       | 54 °F | 7 mph      | →         | 97%  | 30.03 "Hg | 8 mi       |
| Sep 12  | 7:54 AM  |  | Sunny. Cool.                       | 55 °F | 6 mph      | →         | 93%  | 30.05 "Hg | 8 mi       |
| Sep 12  | 8:54 AM  |  | Sunny. Cool.                       | 52 °F | 7 mph      | →         | 100% | 30.07 "Hg | 8 mi       |
| Sep 12  | 9:54 AM  |  | Sunny. Mild.                       | 64 °F | 8 mph      | ↘         | 81%  | 30.08 "Hg | 10 mi      |
| Sep 12  | 10:54 AM |  | Sunny. Mild.                       | 67 °F | 7 mph      | →         | 73%  | 30.10 "Hg | 10 mi      |
| Sep 12  | 11:54 AM |  | Passing clouds. Mild.              | 71 °F | 9 mph      | ↘         | 57%  | 30.10 "Hg | 10 mi      |
| Sep 12  | 12:54 PM |  | Passing clouds. Mild.              | 73 °F | 12 mph     | ↘         | 48%  | 30.10 "Hg | 10 mi      |
| Sep 12  | 1:54 PM  |  | Partly sunny. Mild.                | 75 °F | 13 mph     | ↘         | 43%  | 30.09 "Hg | 10 mi      |
| Sep 12  | 2:54 PM  |  | Scattered clouds. Pleasantly warm. | 77 °F | 15 mph     | ↘         | 39%  | 30.08 "Hg | 10 mi      |
| Sep 12  | 3:54 PM  |  | Scattered clouds. Pleasantly warm. | 77 °F | 12 mph     | ↘         | 36%  | 30.07 "Hg | 10 mi      |
| Sep 12  | 4:54 PM  |  | Passing clouds. Pleasantly warm.   | 79 °F | 16 mph     | →         | 35%  | 30.05 "Hg | 10 mi      |
| Sep 12  | 5:54 PM  |  | Passing clouds. Pleasantly warm.   | 77 °F | 12 mph     | ↘         | 36%  | 30.04 "Hg | 10 mi      |
| Sep 12  | 6:54 PM  |  | Sunny. Mild.                       | 74 °F | 5 mph      | ↘         | 41%  | 30.04 "Hg | 10 mi      |
| Sep 12  | 7:54 PM  |  | Sunny. Mild.                       | 70 °F | No wind    | -         | 51%  | 30.04 "Hg | 10 mi      |
| Sep 12  | 8:54 PM  |  | Clear. Cool.                       | 62 °F | 7 mph      | ↑         | 70%  | 30.03 "Hg | 10 mi      |
| Sep 12  | 9:54 PM  |  | Passing clouds. Cool.              | 59 °F | 6 mph      | ↑         | 75%  | 30.03 "Hg | 10 mi      |
| Sep 12  | 10:54 PM |  | Passing clouds. Cool.              | 57 °F | 5 mph      | ↗         | 78%  | 30.03 "Hg | 10 mi      |

| Date   | Time     | Weather   | Weather      | Temp  | Wind Speed | Dir. | Hum. | Barometer | Visibility |
|--------|----------|---|--------------|-------|------------|------|------|-----------|------------|
| Sep 12 | 11:54 PM |  | Clear. Cool. | 58 °F | 7 mph      | ↗    | 75%  | 30.03 "Hg | 10 mi      |

- [Weather on Sep 13](#)
- [Weather on Sep 14](#)
- [Weather on Sep 15](#)

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**EXHIBIT B**

**PTI's Policies and Rules  
Driver's Manual  
Excerpt of PTI's Disciplinary Procedure  
Relative to Employee Introductory Period  
(See highlighted section).**

## **NATURE OF EMPLOYMENT**

The provisions set forth in this manual are only to serve as guidelines and may be modified or rescinded by PTI at any time, without advance notice.

Nothing contained herein shall be construed or interpreted either directly or indirectly to constitute an employment contract between the Company and an employee. Employment can be terminated, either with or without cause, at any time, at the option of the Company or the employee.

PTI reserves the right to make changes to the policies, procedures and other statements made in the manual. Business conditions, Federal and State laws, and organizational needs are constantly in a state of change and may require that portions of this manual be rewritten, added to, or removed. If any portion of this manual is rendered invalid by a Federal, State, or Local law, the law shall supercede the manual.

## **INTRODUCTORY PERIOD**

The first 90 days of your employment is considered an "introductory period." During the trial period you are encouraged to ask questions, to familiarize yourself with your new job, and to evaluate your working environment. This period provides the company the opportunity to determine whether an employee is suited to the job and capable of satisfactorily performing the work assigned.

Upon satisfactory completion of the 90-day period, you will become a regular employee and are then entitled to the company sponsored employee benefits.

Any unsatisfactory performance or an unsatisfactory accumulated work record during the introductory period may result in your immediate termination regardless of normal steps in our disciplinary procedure.

# EXHIBIT I.

## **Evansville Courier & Press**

**Staff report originally published 01:17 p.m., 01/02/08**

An Evansville man, 61-year-old Kenneth F. Adams, was killed yesterday afternoon when the company van he was driving collided with a semi tractor-trailer south of Vincennes, Indiana.

Knox County Sheriff Stephen P. Luce said Adams was southbound on U.S. 41 near the 50-mile marker when he crossed the median and struck a northbound tractor trailer head-on around 4:36 p.m. EST. Witnesses told police Adams was swerving erratically.

Adams, employed by Professional Transportation Inc. out of Evansville for three months, was pronounced dead at the scene by the Knox County coroner.

The driver of the semi, Jeffrey Scott of Stockbridge, Ga., was unable to avoid a collision. Police said alcohol was not a factor. Scott was given a citation for a log book violation, but police said that did not contribute to the accident.

A spokesman for Professional Transportation said Adams' job involved transporting railroad crews but that he was alone at the time of the accident.

Rich Davis

## **Published responses to the above news article**

---

Posted by: lovelyghirl34 on January 2, 2008 at 3:16 p.m.

I used to drive for professional transportation & there is nothing professional about them. I drove out of Nashville, Tenn. I was back and forth from Alabama to Nashville. They didn't let us get enough rest between runs. It's a shame but he probably fell asleep at the wheel.

---

Posted by: vanwatchdog on January 3, 2008 at 10:36 a.m.

PTI has a history of driving their drivers to death. They are masters of staying under the radar to avoid all state and federal laws and often violate their own safety rules.

# EXHIBIT J.

## 2007 Chevrolet Recalls & Technical Service Bulletins

NHTSA Campaign 09E005000  
Number:

Vehicle/Equipment Make: CHEVROLET  
Vehicle/Equipment Model: UPLANDER  
Model Year: 2007

Mfg Campaign Number:  
Mfg Component Desc: **STEERING**  
Mfg Involved in Recall: GENERAL MOTORS CORP.  
Manufacture Dates:  
Type of Report: (E) Vehicle  
Potential # of Units Affected: 979

Date Owner Notified by  
Mfg:  
Recall Initiated By: MFR  
Mfg Responsible for Recall: DORMAN PRODUCTS, INC.

Report Recieved Date: 02-17-09  
Record Creation Date: 02-17-09

Regulation Part Number:  
FMVSS Number:

Defect Summary: DORMAN IS RECALLING 979 STEERING KNUCKLES, DORMAN P/NOS. 697-902 AND 697-903, SOLD UNDER DORMAN'S "OE SOLUTIONS<SUP>TM</SUP>" BRAND NAME, AND NAPA P/NOS. 7-8502 AND 7-8503 WHICH WERE SOLD FOR REPLACEMENT USE ON THE VARIOUS VEHICLES LISTED ABOVE. A POTENTIAL MATERIAL OR DESIGN DEFECT COULD RESULT IN THE STEERING KNUCKLE BREAKING IN THE HUB AREA.

Consequence Summary: **A BROKEN STEERING KNUCKLE COULD RESULT IN LOSS OF STEERING CONTROL AND A POSSIBLE CRASH WITHOUT WARNING.**

Corrective Summary: DORMAN WILL NOTIFY OWNERS AND REPLACE THE DEFECTIVE STEERING KNUCKLES FREE OF CHARGE AND REIMBURSE THE REPAIR FACILITY OR OWNER FOR LABOR. **THE RECALL IS EXPECTED TO BEGIN ON OR ABOUT MARCH 20, 2009.** OWNERS MAY CONTACT DORMAN'S TOLL-FREE HOTLINE AT 1-800-523-2492.

## 2007 Chevrolet Recalls & Technical Service Bulletins

NHTSA Item Number: **10026002**

Service Bulletin #: 08-05-25-004

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2007

Mfg Component Code: 046400 SERVICE BRAKES, AIR: ANTILOCK: ABS WARNING LIGHT

Date of Bulletin: 2008-07-01

Date Added: 2008-09-23

Summary: GMC: ANTILOCK BRAKE SYSTEM (ABS), TRACTION CONTROL SYSTEM (TCS) OR STABILITRAK LIGHT ON, DTCS C0035-C0052 SET (PERFORM DIAGNOSTIC COMPONENT TEST PROCEDURE AND REPAIR AS NECESSARY). \*PE

NHTSA Item Number: **10025666**

Service Bulletin #: PIC-4868

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2007

Mfg Component Code: 024000 SUSPENSION: AUTOMATIC STABILITY CONTROL (ASC)

Date of Bulletin: 2008-05-01

Date Added: 2008-08-28

Summary: ABS, TRACTION CONTROL, OR STABILITY TELL TALES ON (DTC C0035-C0052). THE ABS, TRACTION CONTROL, OR SERVICE STABILITY SYSTEM (IF EQUIPPED) WARNING TELLTALES ILLUMINATE. \*PE

NHTSA Item Number: **10025561**

Service Bulletin #: 08-07-30-002

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2007

Mfg Component Code: 103000 POWER TRAIN: AUTOMATIC TRANSMISSION

Date of Bulletin: 2008-01-01

Date Added: 2008-08-21

Summary: INFORMATION ON 4T65-E MN7, M15 AND M76 FRONT WHEEL DRIVE AUTOMATIC TRANSMISSION VALVE BODY RECONDITIONING, DTCS P0741, P0742, P0757, P842, HARSH SHIFTS OR SLIPS. \*PE

## 2007 Chevrolet Recalls & Technical Service Bulletins

**NHTSA Item Number:** 10025666

**Service Bulletin #:** PIC-4868

**Replacement #:**

**Vehicle/Equipment Make:** CHEVROLET

**Vehicle/Equipment Model:** UPLANDER

**Model Year:** 2007

**Mfg Component Code:** 025000 **ELECTRONIC STABILITY CONTROL**

**Date of Bulletin:** 2008-05-01

**Date Added:** 2008-08-28

**Summary:** **ABS, TRACTION CONTROL, OR STABILITY TELL TALES ON (DTC C0035-C0052). THE ABS, TRACTION CONTROL, OR SERVICE STABILITY SYSTEM (IF EQUIPPED) WARNING TELLTALES ILLUMINATE. \*PE**

**NHTSA Item Number:** 10025683

**Service Bulletin #:** 07-06-02-006

**Replacement #:**

**Vehicle/Equipment Make:** CHEVROLET

**Vehicle/Equipment Model:** UPLANDER

**Model Year:** 2007

**Mfg Component Code:** 061000 **ENGINE AND ENGINE COOLING: ENGINE**

**Date Added:** 2008-08-29

**Summary:** **COOLANT LEAKING FROM ENGINE (REPLACE COOLANT CROSSOVER PIPE GASKETS). VEHICLES WITH 3.5L OR 3.9L ENGINE. \*PE**

**NHTSA Item Number:** 10026704

**Service Bulletin #:** PIT-3046E

**Replacement #:**

**Vehicle/Equipment Make:** CHEVROLET

**Vehicle/Equipment Model:** UPLANDER

**Model Year:** 2007

**Mfg Component Code:** 091200 **FUEL SYSTEM, OTHER: STORAGE: FUEL GAUGE SYSTEM**

**Date of Bulletin:** 2008-08-01

**Date Added:** 2008-12-04

**Summary:** **GMC: FUEL GAUGE FLUCTUATION IN PARK OR NEUTRAL, CAUSING THE LOW FUEL LIGHT TO ILLUMINATE. \*PE**

## 2006 Chevrolet Uplander Recalls & Technical Service Bulletins

NHTSA Campaign 09E005000  
Number:

Vehicle/Equipment Make: CHEVROLET  
Vehicle/Equipment Model: UPLANDER  
Model Year: 2006

Mfg Campaign Number:  
Mfg Component Desc: **STEERING**  
Mfg Involved in Recall: GENERAL MOTORS CORP.  
Manufacture Dates:  
Type of Report: (E) Vehicle  
Potential # of Units 979  
Affected:

Date Owner Notified by  
Mfg:  
Recall Initiated By: MFR  
Mfg Responsible for Recall: DORMAN PRODUCTS, INC.

Report Recieved Date: 02-17-09  
Record Creation Date: 02-17-09

Regulation Part Number:  
FMVSS Number:

**Defect Summary:** DORMAN IS RECALLING 979 STEERING KNUCKLES, DORMAN P/NOS. 697-902 AND 697-903, SOLD UNDER DORMAN'S "OE SOLUTIONS<SUP>TM</SUP>" BRAND NAME, AND NAPA P/NOS. 7-8502 AND 7-8503 WHICH WERE SOLD FOR REPLACEMENT USE ON THE VARIOUS VEHICLES LISTED ABOVE. A POTENTIAL MATERIAL OR DESIGN DEFECT COULD RESULT IN THE STEERING KNUCKLE BREAKING IN THE HUB AREA.

**Consequence Summary:** A BROKEN STEERING KNUCKLE COULD RESULT IN LOSS OF STEERING CONTROL AND A POSSIBLE CRASH WITHOUT WARNING.

**Corrective Summary:** DORMAN WILL NOTIFY OWNERS AND REPLACE THE DEFECTIVE STEERING KNUCKLES FREE OF CHARGE AND REIMBURSE THE REPAIR FACILITY OR OWNER FOR LABOR. THE RECALL IS EXPECTED TO BEGIN ON OR ABOUT MARCH 20, 2009. OWNERS MAY CONTACT DORMAN'S TOLL-FREE HOTLINE AT 1-800-523-2492.

## 2006 Chevrolet Uplander Recalls & Technical Service Bulletins

NHTSA Item Number: **10021821**

Service Bulletin #: 070232003

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2006

Mfg Component Code: 016000 **STEERING: ELECTRIC POWER ASSIST SYSTEM**

Date of Bulletin: 2007-05-01

Date Added: 2007-06-21

Summary: **POWER STEERING CLUNK, KNOCK NOISE. \*KB**

NHTSA Item Number: **10019445**

Service Bulletin #: 3861

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2006

Mfg Component Code: 020000 **SUSPENSION**

Date of Bulletin: 1969-12-31

Date Added: 2006-03-15

Summary: **STIFF REAR SUSPENSION OR SHOCKS CLUNK OVER BUMPS. \*TT**

NHTSA Item Number: **10023472**

Service Bulletin #: 3743

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2006

Mfg Component Code: 046400 **SERVICE BRAKES, AIR: ANTILOCK: ABS WARNING LIGHT**

Date of Bulletin: 2007-12-13

Date Added: 2007-12-13

Summary: **VARIOUS ABS DTC'S AND INTERMITTENT CONCERNS. \*NJ**

## 2006 Chevrolet Uplander Recalls & Technical Service Bulletins

NHTSA Item Number: **10020812**

Service Bulletin #: 060309003

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2006

Mfg Component Code: 022000 **SUSPENSION: REAR**

Date of Bulletin: 2006-05-01

Date Added: 2007-01-22

Summary: **REVISED BALL JOINT INSPECTION PROCEDURE AND INDEPENDENT REAR SUSPENSION. \*KB**

NHTSA Item Number: **10022957**

Service Bulletin #: 070523003

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2006

Mfg Component Code: 045300 **SERVICE BRAKES, AIR: DISC: ROTOR**

Date of Bulletin: 2007-08-01

Date Added: 2007-10-09

Summary: **PULSATION/VIBRATION WHEN APPLYING BRAKES (REPAIR ROTOR VARIATION AND INSTALL NEW FRONT BRAKE SHIELDS) \*NJ**

NHTSA Item Number: **10025561**

Service Bulletin #: 08-07-30-002

Replacement #:

Vehicle/Equipment Make: CHEVROLET

Vehicle/Equipment Model: UPLANDER

Model Year: 2006

Mfg Component Code: 103000 **POWER TRAIN: AUTOMATIC TRANSMISSION**

Date of Bulletin: 2008-01-01

Date Added: 2008-08-21

Summary: **INFORMATION ON 4T65-E MN7, M15 AND M76 FRONT WHEEL DRIVE AUTOMATIC TRANSMISSION VALVE BODY RECONDITIONING, DTCS P0741, P0742, P0757, P842, HARSH SHIFTS OR SLIPS. \*PE**

## 2006 Chevrolet Uplander Recalls & Technical Service Bulletins

**NHTSA Item Number:** 10017235

**Service Bulletin #:** 3332B

**Replacement #:**

**Vehicle/Equipment Make:** CHEVROLET

**Vehicle/Equipment Model:** UPLANDER

**Model Year:** 2006

**Mfg Component Code:** 063130 ENGINE AND ENGINE COOLING: **EXHAUST SYSTEM:**  
**EMISSION CONTROL:** GAS RECIRCULATION VALVE (EGR VALVE)

**Date of Bulletin:** 1969-12-31

**Date Added:** 2005-10-28

**Summary:** DIAGNOSTIC TROUBLE CODE P0404 **EGR CONCERN.** \*TT

# EXHIBIT K.

## Union Pacific conductor sues over accident on way to work 3/23/2010 8:52 AM By Kelly Holleran

A Union Pacific employee claims he suffered a herniated disc after a driver collided with another vehicle while transporting the employee to work.

Christopher Wardwell filed a lawsuit March 9 in St. Clair County Circuit Court against Union Pacific Railroad Company, Professional Transportation and Regeania Broughton.

Wardwell claims Broughton, who worked for Professional Transportation, picked him up at Dupo yard and drove him to a train in Chester, where he intended to perform his conductor duties on Aug. 9, 2008. However, in the midst of the drive to Chester, Broughton collided with a vehicle driven by Erin Behnken, according to the complaint.

Because of the accident, in addition to his herniated disc, Wardwell suffered annular tears in his lumbar spine and an aggravation of a pre-existing degenerative disc disease, had to undergo surgery, lost wages, incurred medical costs and experienced pain and suffering, the suit states. In addition, he experienced a diminished ability to work and enjoy his normal activities, the complaint says.

Wardwell blames Union Pacific in part for causing his injuries, saying the company failed to provide him with a safe place to work and failed to require its managers not to place employees in vans on the road after 10 p.m. and before 6 a.m. to avoid an accident with an intoxicated driver.

He also names Professional Transportation and its employee, Broughton, as defendants, saying they negligently failed to keep a proper lookout for an approaching vehicle, failed to follow the rules of the road and failed to provide Broughton with adequate rest time.

In his three-count complaint, Wardwell seeks a judgment of more than \$150,000, plus costs.

Mark P. DuPont of Dupo will be representing Wardwell.

St. Clair County Circuit Court case number: 10-L-106.

# EXHIBIT L.

By Andrea Dearden  
10/21/2010 8:12 AM

A former railroad engineer blames Union Pacific and a transportation company for a rollover crash he says left him permanently injured.

Scott D. Nation filed the lawsuit against Professional Transportation Inc., Nolan B. Hawkins Jr. and Union Pacific Railroad Company Sept. 30 in St. Clair County Circuit Court.

Nation says the three defendants are responsible for an alleged crash that happened in October 2008 on Highway 100 in Osage County, Missouri while Nation was working as an engineer.

Nation says Hawkins was working for Professional Transportation Inc. and was responsible for driving Nation from one work site to another. According to the complaint, Hawkins was on Highway 100 near the intersection of County Road 219 when he missed a curve, drove off the road and rolled the vehicle down and embankment.

Nation says he suffered severe and permanent injuries in the crash and, as a result, has been unable to work or participate in the activities he enjoyed before the incident.

Nation contends the defendants are liable for damages because Hawkins negligently failed to drive at a proper speed, failed to slow down to avoid leaving the road and failed to keep a proper lookout.

Nation is seeking damages from each defendant for physical pain, mental anguish, medical expenses and court costs.

William P. Gavin of the Gavin Law Firm in Belleville is representing Nation.

St. Clair County Circuit Court Case No. 10-L-513

## EXHIBIT M.

### Railroad Conductor Neck Injury and Surgery from a Motor Vehicle Accident

COURT/DATE: Jacksonville, FL (Duval County State Court)/October 2005 HSC  
STAFF: Richard N. Shapiro, attorney; Donald Case, Charles Cunningham, investigators; Jackie Tilton, paralegal; Blair Gray, legal assistant  
WHAT HAPPENED: R.D. was a conductor with over twenty years of experience who was being transported in a taxi operated by Defendant PTI (Professional Transportation, Inc.) when he was injured when the van crashed during March 2004. R.D. was seated in the third van row behind the driver and was sleeping. **The PTI van operator fell asleep at the wheel, and the van smashed into the trailer portion of a vehicle being operated by a truck. The van went off the road as did the truck and both suffered substantial damages. R.D. was transported from the scene by rescue squad. Medical testing revealed that R.D. had a fracture of his neck which required delicate cervical/neck surgery. After considerable rehabilitation, R.D. underwent functional capacity testing which indicted he could function at light to medium physical work levels, which medically disqualified him from his job duties with CSX railroad.** R.D. was earning just over \$50,000 per year annual wages. Given that R.D. was 50 years old, he was not able to find a new job but instead entered the local community college to try to re-train. HSC STRATEGY: Counsel carefully reviewed the federal motor carrier safety regulations relating to the operation of this passenger van operated by PTI. It appeared that there were multiple federal regulatory violations because the van driver was called in for a second shift after working all night. It appears that the driver, and the company, violated multiple federal regulations by requiring excessive hours of operation from the driver. Also, if this was a knowing violation of federal regulations, Florida law may have allowed plaintiff to amend his complaint and assert punitive damages. The attorney representing PTI and the railroad argued that R.D. must not have been wearing his seatbelt although R.D. claimed he was. There was no clear evidence that R.D. failed to wear his seatbelt. HSC agreed to early mediation of the case after filing suit, and threatened to assert punitive damages if the case could not be resolved voluntarily. However, during October 2005, the case was settled with mediator Michael Burnett, with all the financial details of the settlement being confidential.

**EXHIBIT N.**

**COFFEY KAYE MYERS & OLLEY**  
**BY: MITCHELL A. KAYE, ESQUIRE**  
**IDENTIFICATION NO. 19349**  
**Suite 718, Two Bala Plaza**  
**Bala Cynwyd, PA 19004**  
**(610) 668-9800**

**Attorneys For: Plaintiff**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLINTON L. GARLAND and  
CARLA GARLAND, h/w  
P. O. Box 165  
Springfield, WV 26763

CIVIL ACTION

and

ELIZABETH A. WEAVER  
321 Fayette Street  
Cumberland, MD 21502

Plaintiffs

vs.

CSX TRANSPORTATION, INC.  
C/O Terminal Agent  
Delaware Avenue & Ritner Streets  
Philadelphia, PA 19148

JURY TRIAL DEMANDED

and

JAMES E. TALLENTIRE  
170 Main Street – Route 281  
Markleysburg, PA 15459

and

PROFESSIONAL TRANSPORTATION, INC.  
a/k/a PTI  
1700 Theatre Drive  
Evansville, IN 47715

Defendants

NO.

**COMPLAINT**

**COUNT ONE**

**CLINTON L. GARLAND vs. CSX TRANSPORTATION, INC.**

1. The plaintiff herein is Clinton L. Garland, a citizen and resident of the State of West Virginia, residing therein at P.O. Box 165, Springfield.

2. This action arises under the Act of Congress, April 22, 1908, c. 149, 35 Stat. 65, and amendments thereto, U.S.C.A. Title 45, . 51 et seq., and further amended by the Act of Congress, approved by the President of the United States on August 11, 1939, Chapter 685 - First Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act" and under "The Federal Safety Appliances Act," Title 49, U.S.C.A., . . 20301, et seq., and "The Federal Boiler Inspection Act," Title 49 U.S.C.A., . . 20702, et seq.

3. The defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Virginia, and at all times material hereto did and regularly does business in the Eastern District of Pennsylvania.

4. At the time and place hereinafter mentioned and for a long time prior thereto, the defendant, as a common carrier, operated trains carrying passengers, freight, express packages, baggage and foreign and domestic mail, in commerce, between the different states of the United States and its territories.

5. At the time and place hereinafter mentioned, the acts of omission and commission, causing the injuries to the plaintiff, were done by the defendant, its agents, servants, workmen and/or employees, acting in the course and scope of their employment with and under the control of the defendant.

6. At the time and place hereinafter mentioned, the plaintiff and the defendant were engaged in interstate commerce between the different states of the United States and its territories.

7. At all times material hereto, plaintiff was employed by defendant CSX Transportation, Inc.

8. All of the property, equipment and operations involved in the accident herein referred to were owned by and under the control of the defendant, its agents, servants, workmen and/or employees.

9. As a result of the accident herein referred to, plaintiff has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of his aforesaid injuries; has been unable to attend to his usual duties and occupation and will be unable to attend to the same for an indefinite time in the future, all to his great detriment and loss.

10. The accident herein referred to was caused solely and exclusively by the negligence of the defendant, its agents, servants, workmen and/or employees, and was due in no manner whatsoever to any act or failure to act on the part of the plaintiff.

11. On or about April 22, 2006, at or about 4:30 a.m., and for sometime prior thereto plaintiff was employed by defendant CSX Transportation, Inc. On that date, in the performance of his duties, plaintiff was seated in the left rear seat of a van which was transporting the plaintiff between Cumberland, Maryland and Connellsville, Pennsylvania. The van was transporting the plaintiff pursuant to a contract between the van owner and CSX and plaintiff was located in the van and was being transported by the van for the benefit of, and at the direction of, CSX.

12. On the aforementioned date, and at the aforementioned time, the van was proceeding westbound on State Route 0040, in or near Henry Clay Township, Fayette County, Pennsylvania. As a result of the negligence and carelessness of the defendant, its agents, servants, workmen and/or employees, including the operator of the aforementioned van, said van collided head-on with a vehicle traveling eastbound on the same roadway. As a result of this collision, plaintiff was violently thrown against the left rear door and interior parts of the van, causing him to sustain the serious painful and permanent personal injuries more particularly hereinafter set forth.

13. The aforesaid accident was caused by the negligence of the defendant, its agents, servants, workmen and/or employees, and by the defendant's violation of "The Federal Employers' Liability Act," "The

Federal Safety Appliances Act" and "The Federal Boiler Inspection Act," and was due in no manner whatsoever to any act or failure to act on the part of the plaintiff.

14. As a result of the aforesaid accident, plaintiff sustained injuries to his body, including but at this time not limited to, its bones, cells, tissues, nerves, muscles and functions. Plaintiff sustained injuries to his head; closed head injury; injuries to his lower back; lumbar sprain; lumbar spondylitis; thoracic and lumbosacral neuritis; coccyx fracture; bilateral sacroilitis. Some or all of the above injuries are or may be permanent in nature. The full extent of plaintiff's injuries are not presently known.

**COUNT TWO**

**ELIZABETH A. WEAVER vs. CSX TRANSPORTATION, INC.**

15. The plaintiff herein is Elizabeth A. Weaver, a citizen and resident of the State of Maryland, residing therein at 321 Fayette Street, Cumberland.

16. This action arises under the Act of Congress, April 22, 1908, c. 149, 35 Stat. 65, and amendments thereto, U.S.C.A. Title 45, § 51 et seq., and further amended by the Act of Congress, approved by the President of the United States on August 11, 1939, Chapter 685 - First Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act" and under "The Federal Safety Appliances Act," Title 49, U.S.C.A., § 20301, et seq., and "The Federal Boiler Inspection Act," Title 49 U.S.C.A., § 20702, et seq.

17. The defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Virginia, and at all times material hereto did and regularly does business in the Eastern District of Pennsylvania.

18. At the time and place hereinafter mentioned and for a long time prior thereto, the defendant, as a common carrier, operated trains carrying passengers, freight, express packages, baggage and foreign and domestic mail, in commerce, between the different states of the United States and its territories.

19. At the time and place hereinafter mentioned, the acts of omission and commission, causing

the injuries to the plaintiff, were done by the defendant, its agents, servants, workmen and/or employees, acting in the course and scope of their employment with and under the control of the defendant.

20. At the time and place hereinafter mentioned, the plaintiff and the defendant were engaged in interstate commerce between the different states of the United States and its territories.

21. At all times material hereto, plaintiff was employed by defendant CSX Transportation, Inc.

22. All of the property, equipment and operations involved in the accident herein referred to were owned by and under the control of the defendant, its agents, servants, workmen and/or employees.

23. As a result of the accident herein referred to, plaintiff has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of her aforesaid injuries; has been unable to attend to her usual duties and occupation and will be unable to attend to the same for an indefinite time in the future, all to her great detriment and loss.

24. The accident herein referred to was caused solely and exclusively by the negligence of the defendant, its agents, servants, workmen and/or employees, and was due in no manner whatsoever to any act or failure to act on the part of the plaintiff.

25. On or about April 22, 2006, at or about 4:30 a.m., and for sometime prior thereto plaintiff was employed by defendant CSX Transportation, Inc. On that date, in the performance of her duties, plaintiff was seated in the front passenger seat of a van which was transporting the plaintiff between Cumberland, Maryland and Connellsville, Pennsylvania. The van was transporting the plaintiff pursuant to a contract between the van owner and CSX and plaintiff was located in the van and was being transported by the van for the benefit of, and at the direction of, CSX.

26. On the aforementioned date, and at the aforementioned time, the van was proceeding westbound on State Route 0040, in or near Henry Clay Township, Fayette County, Pennsylvania. As a result

of the negligence and carelessness of the defendant, its agents, servants, workmen and/or employees, including the operator of the aforementioned van, said van collided head-on with a vehicle traveling eastbound on the same roadway. As a result of this collision, plaintiff was violently thrown about within the van, causing her to sustain the serious painful and permanent personal injuries more particularly hereinafter set forth.

27. The aforesaid accident was caused by the negligence of the defendant, its agents, servants, workmen and/or employees, and by the defendant's violation of "The Federal Employers' Liability Act," "The Federal Safety Appliances Act" and "The Federal Boiler Inspection Act," and was due in no manner whatsoever to any act or failure to act on the part of the plaintiff.

28. As a result of the aforesaid accident, plaintiff sustained injuries to her body, including but at this time not limited to, its bones, cells, tissues, nerves, muscles and functions. Plaintiff sustained injuries to her head; closed head injury; injuries to her neck; cervical strain; herniated disc at C2-3; injuries to her back; lumbar sprain and strain; herniated disc at L3-4 and L4-5; injuries to her right shoulder; bruises and contusions about the body. Some or all of the above injuries are or may be permanent in nature. The full extent of plaintiff's injuries are not presently known.

**COUNT THREE**

CLINTON L. GARLAND and CARLA GARLAND vs. JAMES E. TALLENTIRE

29. Plaintiffs, Clinton L. Garland and Carla Garland, are husband and wife and individual citizens of the State of West Virginia, residing therein at P.O. Box 165, Springfield.

30. Defendant, James E. Tallentire, is an individual citizen and resident of the Commonwealth of Pennsylvania, residing therein at 170 Main Street- Route 281, Markleysburg.

31. All the acts alleged to have been done or not to have been done by the defendant, were done or not done by its respective agents, servants, workmen and/or employees, acting in the course and scope of their employment for and on behalf of said defendant.

32. Jurisdiction is founded upon diversity of citizenship and the amount in controversy is in excess of One Hundred Fifty Thousand Dollars (\$150,000.00), exclusive of costs and interest.

33. On or about April 22, 2006, at or about 4:30 a.m., plaintiff was a passenger in a vehicle being driven westbound on State Road 0040, in or near International Pike, Henry Clay Township, Fayette County, Pennsylvania.

34. On the aforementioned date, and at the aforementioned time, the defendant was operating his motor vehicle eastbound on the same roadway.

35. On the aforementioned date, and at the aforementioned time, the defendant operated his motor vehicle in a negligent and careless manner, crossing over from the eastbound to the westbound lane of traffic, and proceeding eastbound in the westbound lane of traffic.

36. As a result of the aforementioned negligence by the defendant, including but not limited to proceeding eastbound in a westbound lane of traffic, the defendant collided head-on with the van in which husband-plaintiff was a passenger.

37. This accident was caused by the negligence and carelessness of the defendant, individually and/or its agents, servants, workmen and/or employees, and was not caused by any conduct on the part of the husband-plaintiff.

38. The aforementioned accident was caused by the negligence and carelessness of the defendant and the operation of his motor vehicle, the defendant's violation of the traffic laws and regulations of the Commonwealth of Pennsylvania and its municipalities, and the defendant's driving of his vehicle eastbound in a westbound lane of traffic.

39. As a result of the aforesaid, husband-plaintiff has or may incur other financial expenses or losses which do or may exceed amounts which he may otherwise be entitled to receive, to his great detriment and loss.

40. As a result of the aforesaid, husband-plaintiff has been, or will in the future be obliged to

receive and undergo medical attention and care and to incur various reasonable expenses as described in applicable statutes, and which expenses may or will exceed the statutory amounts, for which excess plaintiff demands recovery from the defendant.

41. Husband-plaintiff has lost wages in the past and will continue to lose wages into the future which are recoverable. Further, husband-plaintiff has suffered a loss of earning capacity and ability which will continue into the future.

42. As a further result of the aforesaid, husband-plaintiff has undergone, or in the future will undergo, medical attention and care, has incurred various medical expenses and has and will suffer a severe loss of earning capacity or power, all of this to his great detriment, for which plaintiff demands recovery from the defendant.

43. As a result of the aforesaid, husband-plaintiff has undergone great physical pain and mental anguish, and he will continue to endure the same for an indefinite time in the future, to his great detriment and loss.

44. As a result of the aforesaid accident, husband-plaintiff sustained injuries to his body, including but at this time not limited to, its bones, cells, tissues, nerves, muscles and functions. Plaintiff sustained to his head; closed head injury; injuries to his lower back; lumbar sprain; lumbar spondylitis; thoracic and lumbosacral neuritis; coccyx fracture; bilateral sacroilitis. Some or all of the above injuries are or may be permanent in nature. The full extent of plaintiff's injuries are not presently known.

45. As a result of the accident herein referred to, husband-plaintiff has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of his aforesaid injuries and has been unable to attend to the same for an indefinite time in the future, all to his great detriment and loss.

46. As a result of the injuries sustained by husband-plaintiff as aforesaid, wife-plaintiff has been deprived of the society, companionship and consortium of her husband-plaintiff herein, and she will be deprived of the same for an indefinite time in the future, to her great detriment and loss.

**COUNT FOUR**

ELIZABETH A. WEAVER vs. JAMES E. TALLENTIRE

47. Plaintiff, Elizabeth A. Weaver, is an individual citizen and resident of the State of Maryland, residing therein at 321 Fayette Street, Cumberland.

48. Defendant, James E. Tallentire, is an individual citizen and resident of the Commonwealth of Pennsylvania, residing therein at 170 Main Street- Route 281, Markleysburg.

49. All the acts alleged to have been done or not to have been done by the defendant, were done or not done by its respective agents, servants, workmen and/or employees, acting in the course and scope of their employment for and on behalf of said defendant.

50. Jurisdiction is founded upon diversity of citizenship and the amount in controversy is in excess of One Hundred Fifty Thousand Dollars (\$150,000.00), exclusive of costs and interest.

51. On or about April 22, 2006, at or about 4:30 a.m., plaintiff was a passenger in a vehicle being driven westbound on State Road 0040, in or near International Pike, Henry Clay Township, Fayette County, Pennsylvania.

52. On the aforementioned date, and at the aforementioned time, the defendant was operating his motor vehicle eastbound on the same roadway.

53. On the aforementioned date, and at the aforementioned time, the defendant operated his motor vehicle in a negligent and careless manner, crossing over from the eastbound to the westbound lane of traffic, and proceeding eastbound in the westbound lane of traffic.

54. As a result of the aforementioned negligence by the defendant, including but not limited to proceeding eastbound in a westbound lane of traffic, the defendant collided head-on with the van in which

plaintiff was a passenger.

55. This accident was caused by the negligence and carelessness of the defendant, individually and/or its agents, servants, workmen and/or employees, and was not caused by any conduct on the part of the plaintiff.

56. The aforementioned accident was caused by the negligence and carelessness of the defendant and the operation of his motor vehicle, the defendant's violation of the traffic laws and regulations of the Commonwealth of Pennsylvania and its municipalities, and the defendant's driving of his vehicle eastbound in a westbound lane of traffic.

57. As a result of the aforesaid, plaintiff has or may incur other financial expenses or losses which do or may exceed amounts which she may otherwise be entitled to receive, to her great detriment and loss.

58. As a result of the aforesaid, plaintiff has been, or will in the future be obliged to receive and undergo medical attention and care and to incur various reasonable expenses as described in applicable statutes, and which expenses may or will exceed the statutory amounts, for which excess plaintiff demands recovery from the defendant.

59. Plaintiff has lost wages in the past and will continue to lose wages into the future which are recoverable. Further, plaintiff has suffered a loss of earning capacity and ability which will continue into the future.

60. As a further result of the aforesaid, plaintiff has undergone, or in the future will undergo, medical attention and care, has incurred various medical expenses and has and will suffer a severe loss of earning capacity or power, all of this to her great detriment, for which plaintiff demands recovery from the defendant.

61. As a result of the aforesaid, plaintiff has undergone great physical pain and mental anguish, and she will continue to endure the same for an indefinite time in the future, to her great detriment and loss.

62. As a result of the aforesaid accident, plaintiff sustained injuries to her body, including but at this time not limited to, its bones, cells, tissues, nerves, muscles and functions. Plaintiff sustained to her head; closed head injury; injuries to her neck; cervical strain; herniated disc at C2-3; injuries to her back; lumbar sprain and strain; herniated disc at L3-4 and L4-5; injuries to her right shoulder; contusions and abrasions about the body. Some or all of the above injuries are or may be permanent in nature. The full extent of plaintiff's injuries are not presently known.

63. As a result of the accident herein referred to, plaintiff has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of her aforesaid injuries and has been unable to attend to the same for an indefinite time in the future, all to her great detriment and loss.

**COUNT FIVE**

CLINTON L. GARLAND and CARLA GARLAND vs. PROFESSIONAL TRANSPORTATION, INC.

64. Plaintiffs, Clinton L. Garland and Carla Garland, are husband and wife and individual citizens of the State of West Virginia, residing therein at P.O. Box 165, Springfield.

65. Defendant, Professional Transportation, Inc. is a corporation duly organized and existing under and by virtue of the laws of a State other than Maryland or West Virginia, with its principal place of business and/or registered office for service of legal process located at 1700 Theatre Drive, Evansville, IN.

66. At all times material hereto the defendant did business as, was known as, and/or traded as PTI.

67. At all times material hereto, Professional Transportation, Inc., a/k/a PTI, owned a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport husband-plaintiff on its behalf.

68. At all times material hereto, Professional Transportation, Inc., a/k/a PTI possessed a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport husband-plaintiff on its behalf.

69. At all times material hereto, Professional Transportation, Inc., a/k/a PTI maintained a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport husband-plaintiff on its behalf.

70. At all times material hereto, Professional Transportation, Inc., a/k/a PTI controlled a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport husband-plaintiff on its behalf.

71. At all times material hereto, Professional Transportation, Inc., a/k/a PTI leased a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport husband-plaintiff on its behalf.

72. At all times material hereto, Professional Transportation, Inc., a/k/a PTI operated a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport husband-plaintiff on its behalf.

73. On or about April 22, 2006, at or about 4:30 a.m., and for sometime prior thereto, husband-plaintiff was employed by defendant CSX Transportation, Inc. On that date, in the performance of his duties, husband-plaintiff was seated in the left rear seat of said PTI van which was transporting husband-plaintiff between Cumberland, Maryland and Connellsville, Pennsylvania. The aforementioned PTI van was transporting the husband-plaintiff pursuant to a contract between the van owner and CSX and plaintiff was located in the van and was being transported by the van for the benefit of, and at the direction of CSX.

74. On the aforementioned date, and at the aforementioned time, the van was proceeding westbound on State Route 0040, in or near Henry Clay Township, Fayette County, Pennsylvania. As a result of the negligence and carelessness of the defendant, its agents, servants, workmen and/or employees,

including the operator of the aforementioned van, said van collided head-on with a vehicle traveling eastbound on the same roadway. As a result of this collision, husband-plaintiff was violently thrown against the left rear door and interior parts of the van, causing him to sustain the serious painful and permanent personal injuries more particularly hereinafter set forth.

75. Jurisdiction is founded upon diversity of citizenship and the amount in controversy is in excess of One Hundred Fifty Thousand Dollars (\$150,000.00), exclusive of costs and interest.

76. The aforementioned accident was caused by the negligence of defendant, Professional Transportation, Inc., individually and/or through its respective agents, servants, workmen and/or employees.

77. As a result of the accident herein referred to, husband-plaintiff has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of his aforesaid injuries; has been unable to attend to his usual duties and occupation and will be unable to attend to the same for an indefinite time in the future, all to his great detriment and loss.

78. As a result of the aforesaid accident, husband-plaintiff sustained injuries to his body, including but at this time not limited to, its bones, cells, tissues, nerves, muscles and functions. Husband-plaintiff sustained injuries to his head; closed head injury; injuries to his lower back; lumbar sprain; lumbar spondylitis; thoracic and lumbosacral neuritis; coccyx fracture; bilateral sacroilitis. Some or all of the above injuries are or may be permanent in nature. The full extent of husband-plaintiff's injuries are not presently known.

79. As a result of the injuries sustained by husband-plaintiff as aforesaid, wife-plaintiff has been deprived of the society, companionship and consortium of her husband-plaintiff herein, and she will be deprived of the same for an indefinite time in the future, to her great detriment and loss.

**COUNT SIX**

**ELIZABETH A. WEAVER vs. PROFESSIONAL TRANSPORTATION, INC.**

80. Plaintiff, Elizabeth A. Weaver is an individual citizen and resident of the State of Maryland, residing therein at 321 Fayette Street, Cumberland.

81. Defendant, Professional Transportation, Inc., is a corporation duly organized and existing under and by virtue of the laws of a State other than Maryland or West Virginia, with its principal place of business and/or registered office for service of legal process located at 1700 Theatre Drive, Evansville, IN.

82. At all times material hereto the defendant did business as, was known as, and/or traded as PTI.

83. At all times material hereto, Professional Transportation, Inc., a/k/a PTI, owned a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport plaintiff on its behalf.

84. At all times material hereto, Professional Transportation, Inc., a/k/a PTI possessed a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport plaintiff on its behalf.

85. At all times material hereto, Professional Transportation, Inc., a/k/a PTI maintained a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport plaintiff on its behalf.

86. At all times material hereto, Professional Transportation, Inc., a/k/a PTI controlled a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport plaintiff on its behalf.

87. At all times material hereto, Professional Transportation, Inc., a/k/a PTI leased a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport plaintiff on its behalf.

88. At all times material hereto, Professional Transportation, Inc., a/k/a PTI operated a certain vehicle, believed to be a van, which was hired by CSX Transportation, Inc. to transport plaintiff on its behalf.

89. On or about April 22, 2006, at or about 4:30 a.m., and for sometime prior thereto, plaintiff was employed by defendant CSX Transportation, Inc. On that date, in the performance of her duties, plaintiff was seated in the front passenger seat of said PTI van which was transporting plaintiff between Cumberland,

Maryland and Connellsville, Pennsylvania. The aforementioned PTI van was transporting the plaintiff pursuant to a contract between the van owner and CSX and plaintiff was located in the van and was being transported by the van for the benefit of, and at the direction of CSX.

90. On the aforementioned date, and at the aforementioned time, the van was proceeding westbound on State Route 0040, in or near Henry Clay Township, Fayette County, Pennsylvania. As a result of the negligence and carelessness of the defendant, its agents, servants, workmen and/or employees, including the operator of the aforementioned van, said van collided head-on with a vehicle traveling eastbound on the same roadway. As a result of this collision, plaintiff was violently thrown about the van, causing her to sustain the serious painful and permanent personal injuries more particularly hereinafter set forth.

91. Jurisdiction is founded upon diversity of citizenship and the amount in controversy is in excess of One Hundred Fifty Thousand Dollars (\$150,000.00), exclusive of costs and interest.

92. The aforementioned accident was caused by the negligence of defendant, Professional Transportation, Inc., individually and/or through its respective agents, servants, workmen and/or employees.

93. As a result of the accident herein referred to, plaintiff has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of her aforesaid injuries; has been unable to attend to her usual duties and occupation and will be unable to attend to the same for an indefinite time in the future, all to her great detriment and loss.

94. As a result of the aforesaid accident, plaintiff sustained injuries to her body, including but at this time not limited to, its bones, cells, tissues, nerves, muscles and functions. Plaintiff sustained to her head; closed head injury; injuries to her neck; cervical strain; herniated disc at C2-3; injuries to her back; lumbar sprain and strain; herniated disc at L3-4 and L4-5; injuries to her right shoulder; contusions and abrasions about the body. Some or all of the above injuries are or may be permanent in nature. The full extent of

plaintiff's injuries are not presently known.

WHEREFORE, the plaintiffs demand judgment against the defendants, jointly and severally, upon each of the forgoing Counts, for a sum in excess of One Hundred Fifty Thousand Dollars (\$150,000.00).

COFFEY KAYE MYERS & OLLEY

BY: \_\_\_\_\_  
MITCHELL A. KAYE  
Counsel for Plaintiffs

# EXHIBIT O.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVIDA FRITCHMAN :  
 :  
 v. : CIVIL ACTION  
 :  
 NORFOLK SOUTHERN RAILWAY CO. : NO. 08-2559  
 and NORFOLK SOUTHERN CORP. :

**SURRICK, J.**

**MARCH 17, 2009**

## MEMORANDUM & ORDER

Presently before the Court are Defendants' Notice of Removal (Doc. No. 1) and Plaintiff's Motion in Opposition to Defendants' Notice of Removal (Doc. No. 2). For the following reasons, the case will be remanded.

### **I. BACKGROUND**

Davida Fritchman ("Plaintiff") was a full-time jitney van driver employed by Professional Transportation, Inc. ("PTI"). (Compl. ¶ 9.) Plaintiff's job was to drive employees of Norfolk Southern Railway Company and Norfolk Southern Corporation ("Defendants") around the Morrisville Rail Yard in East Langhorne, Pennsylvania. (*Id.*) At approximately 4:00 a.m. on October 7, 2007, Plaintiff picked up one of Defendants' freight conductors at the southwest end of the rail yard. (*Id.* ¶ 13.) The conductor told Plaintiff to drive along the north side of the rail yard so that he could attend to some switches. (*Id.*) After that, the conductor told Plaintiff to take him to a clearance point on another track and directed her to wait there until a train passed. The conductor put a handbrake on one of the trains at the clearance point and then told Plaintiff to take him to another point on the track where he could "cut some cars." (*Id.*) After cutting the cars, the conductor directed Plaintiff to drive him to a different track where he could throw a

switch. The conductor threw the switch and returned to the van, instructing Plaintiff to “drive down [another] side of the yard to the clearance point on [the] track and to wait there in the van with him until the train was in the clear.” (*Id.*) He told Plaintiff to “drive him up toward the head end of the train so [that] he could apply handbrakes.” (*Id.*) As Plaintiff was driving the conductor toward the head end of the train so that he could apply the handbrakes, Plaintiff’s van collided with a parked trailer. (*Id.* ¶ 20.) Plaintiff’s left arm was severed just below the shoulder as a result of the collision. Plaintiff’s left arm ultimately had to be amputated. (*Id.* ¶¶ 20, 26.)

On April 9, 2008, Plaintiff filed a two-count complaint in the Court of Common Pleas of Philadelphia County asserting claims against Defendants under the Federal Employers Liability Act (“FELA”) and common law negligence. (*See* Compl. ¶¶ 16-18, 65.) On June 2, 2008, Defendants filed a Notice of Removal. (*See* Doc. No. 1.) Defendants contend that removal is proper under 28 U.S.C. § 1332 as there is complete diversity of citizenship and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. (*Id.* ¶ 4.) Plaintiff filed a “Motion in Opposition to Defendants’ Notice of Removal.” (Doc. No. 2.) Plaintiff contends that removal is improper since an “FELA case filed in state court may not be removed to federal court,” and that the case should be remanded to state court. (*Id.* ¶ 6.)

## **II. LEGAL STANDARDS**

### **A. The FELA**

The FELA “was passed in 1908 in an effort to provide a tort compensation system for railroad workers who, at that time, experienced among the highest accident rates in United States history.” *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991) (citation omitted). The FELA requires the plaintiff to prove four elements: (1) the defendant is a common carrier by

railroad engaged in interstate commerce; (2) the plaintiff was employed by the defendant and assigned to perform duties which furthered such commerce; (3) the plaintiff's injuries were sustained while the plaintiff was employed by the common carrier; and (4) the injuries resulted from the defendant's negligence. *Felton v. SEPTA*, 952 F.2d 59, 63 (3d Cir. 1991). The FELA accords a cause of action to individuals employed directly by a railroad as well as to individuals who serve as (1) a borrowed servant; (2) a dual servant; or (3) a subservant of the railroad. See *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (citing three ways in which a plaintiff can establish "employment" with a railroad). "The primary factor to be considered in determining whether a plaintiff was employed by the defendant [under the FELA] is whether the latter had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured." *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1350 (3d Cir. 1991), *reh'g en banc denied*, (3d Cir. 1991) (citing *Tarboro v. Reading Co.*, 396 F.2d 941, 943 (3d Cir. 1968)).

In *Williamson*, the Third Circuit emphasized that "the control factor" is determinative of employment status under the FELA. *Id.* at 1350; see also *id.* at 1354 (Nygaard, J., dissenting) ("The issue is quite simple: Did [the railroad] have the right to control [the plaintiff] on the job during which he was injured?"). The plaintiff in *Williamson* was an employee of a railroad's wholly-owned subsidiary who loaded and unloaded trailers from trains. The railroad had contracted with the subsidiary to handle the loading and unloading of trains at the terminal. *Id.* at 1347. The plaintiff was using a forklift to transfer cargo from one trailer to another when the trailer collapsed while the plaintiff was inside of it, causing injury. The plaintiff sued the railroad under the FELA. At the time of the accident, the plaintiff was on the payroll of the subsidiary, not the railroad. However, the railroad and the subsidiary had "a close relationship" in which the

railroad's employees "sometimes gave direction to [the subsidiary's] employees." *Id.* at 1351. The subsidiary shared office space with the railroad, and railroad clerks had the power to assign work to the subsidiary's employees and to change assignments given them by their supervisors. *Id.* at 1350. On the day in question, the railroad had an inspector present to monitor the plaintiff's work. The plaintiff testified that he considered himself under the control and direction of the railroad's inspector. The railroad's inspector told the plaintiff "when to stop the cargo transfer, when to resume it and how to place the cargo in the replacement trailer." *Id.* at 1347. The inspector selected the trailer into which the plaintiff was directed to transfer cargo. The Third Circuit found that there was sufficient evidence "that [the railroad] directly controlled [the plaintiff's] activities when he was injured," and thus a reasonable jury could "infer that [the plaintiff] was either [the railroad's] borrowed servant or a dual servant of [the subsidiary] and [the railroad] when he was injured." *Id.* at 1352. The court noted that "[t]he law does not require that the railroad have full supervisory control." *Id.* (quoting *Lindsey v. Louisville & Nashville R.R. Co.*, 775 F.2d 1322, 1324 (5th Cir. 1985)). "It requires only that the railroad, through its employees, plays a significant supervisory role as to the work of the injured employee." *Id.* (citations and internal quotations omitted); see also *Williams v. CSX Transp., Inc.*, No. 01-3433, 2002 WL 31618455, at \*4 (E.D. Pa. Nov. 15, 2002) (finding genuine issue of material fact as to whether railroad had right to control the plaintiff for FELA liability where the defendant "played a supervisory role to [the plaintiff] while she was working in the [rail yard]" by speaking with employees on a daily basis, conducting safety meetings, providing tools, and inspecting work). Thus, the court reinstated a jury verdict in favor of the plaintiff. See *Williamson*, 926 F.2d at 1354.

## **B. Removal**

Removal is the procedure by which defendants who are brought before a state tribunal on claims otherwise within the scope of federal jurisdiction may compel transfer of the case to federal court. *See* 28 U.S.C. § 1441(a). A plaintiff may challenge removal through a motion to remand. *See id.* § 1447(c). The question presented on a motion to remand is whether the case as pending in the state court is removable. *See id.* §§ 1441(a), 1446. An action under the FELA filed in state court is not removable. *See* 28 U.S.C. § 1445(a) (“A civil action in any State court against a railroad . . . , arising under [the FELA], may not be removed to any district court of the United States.”). Removal statutes “are to be strictly construed against removal and all doubts should be resolved in favor of remand.” *In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2006) (*citing Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992)); *see also Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (internal quotations omitted) (noting same). “Ruling on whether an action should be remanded to the state court from which it was removed, the district court must focus on the plaintiff’s complaint at the time the petition for removal was filed” and “must assume as true all factual allegations of the complaint.” *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987) (*citing Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985)); *see also Parlin v. DynCorp Int’l, Inc.*, 579 F. Supp. 2d 629, 632 (D. Del. 2008) (noting same).

## **III. DISCUSSION**

The issue in this case is whether Defendants may remove Plaintiff’s FELA action notwithstanding the statutory provision that bars removal. Defendants agree that Plaintiff presents “a non-removable claim under the FELA.” (Doc. No. 1 ¶ 7.) Defendants nevertheless

ask us to “take the . . . approach used by federal courts when dealing with the issue of fraudulent joinder of a non-diverse party which destroys diversity jurisdiction” to find that there exists “no reasonable possibility” that Plaintiff’s FELA claim will prevail, thereby justifying dismissal of the FELA claim and allowing us “to continue to retain jurisdiction on diversity grounds.” (Doc. No. 1 ¶ 10.)

Specifically, Defendants ask us to follow the approach taken by the court in *Toney v. Lowery Woodyards & Employer’s Ins. of Wausau*, 278 F. Supp. 2d 786, 790 (S.D. Miss. 2003). In *Toney*, the plaintiff brought an action in state court against his former employer and insurer seeking damages for their alleged bad faith refusal to pay workers’ compensation benefits. The insurer removed the action based on diversity, and the plaintiff filed a motion to remand. The plaintiff’s employer was non-diverse, sharing the same citizenship as the plaintiff. The employer offered an unrefuted affidavit establishing that it had no active role in handling or adjusting the underlying workers’ compensation claim. *Id.* at 791. Based on this undisputed evidence, the court concluded that the plaintiff had no viable basis for recovery against the employer and thus dismissed the non-diverse defendant and denied a motion to remand the case. *Id.* at 794.

Defendants here would like us to “pierce the pleadings” and consider “summary judgment type evidence which speaks to the issue of whether Defendants exercised the requisite level / degree of control over Plaintiff to render her an employee under the FELA.” (Doc. No. 1 ¶ 10.) Defendants “request that this Court retain jurisdiction . . . and allow for reasonable time for the parties to conduct discovery regarding the issue of whether Norfolk Southern exercised the requisite level / degree of control over Plaintiff to render her an employee under the [FELA].” (*Id.* ¶ 12.) “At the close of the court-ordered discovery period,” Defendants ask us to “issue a

briefing schedule for the filing of motions for summary judgment regarding Plaintiff's FELA claims." (*Id.*)

There is no basis in fact or in law for Defendants' removal here. The statute clearly provides that "[a] civil action in any State court against a railroad . . . , arising under [the FELA], may not be removed to any district court of the United States." 28 U.S.C. § 1445(a). The instant case falls squarely within the statute. Defendants would have us except the instant case from the statute, permit discovery, and then allow Defendants to file a summary judgment motion on Plaintiff's FELA claim. Apparently, Defendants' position is that we can assume jurisdiction now and justify it later, once discovery shows that Plaintiff's FELA claim fails. (*See* Doc. No. 1 ¶ 11 ("If this Court finds that Plaintiff cannot, as a matter of law, prevail on her FELA claims, then the dismissal thereof would allow this Court to continue to retain jurisdiction on diversity grounds.")) It is far from certain that discovery will show that Plaintiff's FELA claim fails. In any event, we will not assume jurisdiction where clearly none exists.

This is not a case where Plaintiff's inclusion of an FELA claim appears to be fraudulent. Nor is this a case where there exists "no reasonable possibility" that Plaintiff's FELA claim will prevail. Even though PTI hired Plaintiff and paid her, Plaintiff's Complaint sets forth detailed factual averments that establish Defendants' control over her activities during the course of her employment at the Morrisville Rail Yard and at the time of the accident. The Complaint alleges that immediately before the accident, Defendants' agent controlled Plaintiff's movements by "telling her where he wanted her to drive him." (Compl. ¶ 13.) Indeed, the Complaint recites a litany of specific instructions that Defendants directed at Plaintiff in the moments before the accident. For example, Defendants' conductor told Plaintiff to drive along the north side of the

rail yard and then drive to a clearance point on another track. The conductor directed Plaintiff to wait there, and then told her to drive to another point on the track. The conductor then directed Plaintiff to drive to a different track and thereafter instructed her to “drive down [another] side of the yard to the clearance point on [the] track and to wait there in the van with him until the train was in the clear.” (*Id.*) He told Plaintiff to “drive him up toward the head end of the train so [that] he could apply handbrakes,” and while Plaintiff was complying with this instruction, the accident occurred.

The Complaint also alleges facts showing that Defendants’ control was not limited to this single occurrence. The Complaint alleges that:

- (a) [Plaintiff’s] movements in driving [Defendants’] employees around the Morrisville Rail Yard were controlled by [Defendants,] not PTI;
- (b) [Plaintiff’s] supervisor in picking up [Defendants’] employees was [Defendants’] Yardmaster, who ran things from his office at the Abrams Yard in King of Prussia, and communicated with the other jitney drivers by radio;
- (c) If a train was late or [Plaintiff] had a question about when a particular train was coming into the yard, she would call [Defendants’] Yardmaster. She would not call PTI;
- (d) There was no PTI supervisor on duty at the Morrisville Rail Yard;
- (e) There was no PTI office at the Morrisville Rail Yard. PTI had no yard offices, but only had a district office, located in South Philadelphia;
- (f) [Plaintiff] would communicate with her PTI district supervisor only about once a month;
- (g) PTI had no involvement at all in [Plaintiff’s] day-to-day driving of [Defendants’] employees;
- (h) PTI did not act as an intermediary between [Plaintiff] and the instructions she received from [Defendants]. PTI did not have to approve the directions given to [Plaintiff] by [Defendants];
- (i) Once [Plaintiff] picked up [one of Defendants’] conductor[s], she came under the director supervision of that conductor. She would drive the conductor to whatever parts of the yard he would instruct her to go so that he could throw railroad switches and handbrakes and make up his train[.]

(Compl. ¶ 13.)

Moreover, Plaintiff filed an affidavit in opposition to Defendants' removal that restates many of the allegations in her Complaint. The affidavit states that "[Plaintiff's] movements in driving Norfolk Southern employees around the . . . Rail Yard were controlled by Norfolk Southern, not by [her employer]." (Pl.'s Aff. ¶ 5.) The affidavit further states that Plaintiff "came under the direct supervision of [Defendants'] conductor" and "rarely" heard from her employer's district supervisor. (*Id.* ¶¶ 6, 11.) The affidavit supports the allegations in the Complaint that in the moments before the accident, Plaintiff was acting on instructions from Defendants' conductor. (*See id.* ¶ 8.)

This is not a case like *Toney* where the defendant has offered an unrefuted affidavit. Indeed, it is Plaintiff – not Defendants – who has offered an unrefuted affidavit that speaks precisely to the issue of Plaintiff's employment status under the FELA. Defendants have not proffered a basis for excepting the instant case from the statutory prohibition on removal of FELA cases. *See* 28 U.S.C. § 1445(a). Accepting as true the allegations in Plaintiff's Complaint, there is evidence that Defendants supervised and controlled Plaintiff during her employment and at the time of the accident, subjecting them to FELA liability. *See Williamson*, 926 F.2d at 1350 ("The primary factor to be considered in determining whether a plaintiff was employed by the defendant [under the FELA] is whether the latter had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured.") Removal is therefore improper and the case will be remanded.

#### **IV. CONCLUSION**

For all of these reasons, the case will be remanded.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVIDA FRITCHMAN :  
 :  
 v. : CIVIL ACTION  
 :  
 : NO. 08-2559  
 NORFOLK SOUTHERN RAILWAY CO. :  
 and NORFOLK SOUTHERN CORP. :

**ORDER**

AND NOW, this 17<sup>th</sup> day of March, 2009, upon consideration of Defendants' Notice of Removal (Doc. No. 1) and Plaintiff's Motion in Opposition to Defendants' Notice of Removal (Doc. No. 2), it is ORDERED that this case is REMANDED to the Court of Common Pleas of Philadelphia County. The Clerk is directed to mark this case as closed.

IT IS SO ORDERED.

BY THE COURT:



---

R. Barclay Surrick, J.

# EXHIBIT P.

**From:** Coburn, David [DCoburn@step toe.com]  
**Sent:** Monday, June 09, 2008 3:20 PM  
**To:** Fin Neve; Bill Bergstrom; George Maney; George Hanthorn Contact; Bill Smith; btevault@uniteddevv.com; KAREN@renzenberger.com; scott.boyes@railcrewexpress.com; smcclellan@uniteddevv.com; WShawn@ShawnCoulson.com; Verma, Richard; Barnette, James  
**Subject:** RE: Report on Legislative Meeting

# Redacted

Regards. David

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**From:** Coburn, David  
**Sent:** Friday, June 06, 2008 11:55 AM  
**To:** 'Fin Neve'; Bill Bergstrom; George Maney; George Hanthorn Contact; Bill Smith; btevault@uniteddevv.com; 'KAREN@renzenberger.com'; scott.boyes@railcrewexpress.com; 'smcclellan@uniteddevv.com'; 'WShawn@ShawnCoulson.com'; Verma, Richard; Barnette, James

**Subject:** Report on Legislative Meeting

## Privileged and Confidential

All -- On June 5, Rich Verma and I met with senior staff of the Senate Commerce Committee to discuss the possibility of remedial legislation to clarify that rail crew drivers fall within the scope of the FLSA motor or exemptions. The staff was receptive generally to the situation. However, they made clear that the industry would have to agree to become subject to the DOT hours of service/safety rules in order to fall within an FLSA exemption. In other words, they could not help us achieve an FLSA exemption if the DOT exemption were inapplicable to relevant vehicles. In that regard, they noted that other industries have recently, and unsuccessfully, sought an FLSA exemption since they were not able to fall within some alternative hours of service regulation.

My assumption is that agreeing to become subject by a change in law to DOT safety regulation (in return for an FLSA exemption) would not be a problem for the industry, but if my assumption is wrong please let me know as soon as possible. My understanding is that your companies are already subject to DOT hours of service requirements by virtue of contractual obligations with the railroads.

The staff also cautioned, however, that getting anything done this year will be difficult. The only possible legislative vehicle would be the rail safety bill, which may move toward passage this year. (The Senate is expected to soon pass its bill; the House has already done so.) However, our provision would have to be added in the anticipated Senate-House conference on that bill as it is too late to change the Senate bill. This is possible, but not easy. We will explore this possibility further with House staff and then report back to Senate staff.

We will also meet with another Senate Committee that has jurisdiction over FLSA matters generally, although it appears that the Commerce Committee is prepared to take the lead.

The Senate staff also cautioned that the Chair of the Commerce Committee, Senator Inouye, may be reluctant to interject a legislative solution into a situation where litigation is pending. However, there may be ways of addressing this concern, such as making the legislation prospective only. We will give some further thought to this matter.

# Redacted

Regards. David

David H. Coburn  
Stephoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036  
202.429.8063 Direct  
202.261.0565 Direct Facsimile  
202.429.3902 Central Facsimile  
[dcoburn@stephoe.com](mailto:dcoburn@stephoe.com)

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## EXHIBIT Q.

**WASHINGTON** ► House Republicans are trying to pass a transportation bill that would strip certain workers of their minimum-wage and overtime protections. As it turns out, several of the companies that would benefit from the change have recently been sued by their employees for allegedly violating federal wage laws. One of those companies, Evansville, Indiana based Professional Transportation, Inc. or PTI, has aggressively lobbied lawmakers to have its workers exempted from the Fair Labor Standards Act, the 1938 federal law that guarantees basic labor rights. Ronald Romain, the president of PTI's parent company (United Companies) and his wife Connie Romain, donated more than \$55,000 to GOP election efforts last year including a combined \$10,000 to Evansville-based Rep. Larry Bucshon (R-Ind.), according to campaign contribution records from the Center for Responsive Politics. Rep. Bucshon sits on the House Transportation and Infrastructure Committee both of which produced the transportation bill. Bucshon's office did not return requests for comments made earlier this week. Nor did Ronald Romain or any of the representatives of Steptoe & Johnson, which is the lobbying firm that was hired by PTI. It doesn't take much to figure out why they're all suddenly quiet. The change inserted into the House bill, listed under the heading "Technical Correction," would remove wage protections for several thousand "long-haul drivers" who transport railroad crews from worksite to worksite. Many of those drivers are working for roughly minimum wage and sometimes log 60 hours a week, often driving several hundred miles at a time across state lines. These drivers are currently entitled to overtime pay but would lose it under the amended House bill. Some of the firms that could benefit from the GOP provision other than PTI include RailCrew Xpress, Renzenberger and Coach America, all of which have faced employee lawsuits over alleged wage violations. All are part of an alliance that was secretly created to achieve the stated goal. Joseph Cassell, a lawyer in Wichita, Kansas has successfully sued PTI and other rail transport companies for violating federal wage laws. He says exempting the workers from minimum wage and overtime protections would take money out of an already meager paycheck. Drivers are compensated on a per-mile basis and quite often their pay doesn't even reach a level equal to minimum wage standards according to Mr. Cassell. "These drivers work hard..." says Cassell. "They need work and that's why so many are willing to work under such punishing conditions and long hours... if anybody deserves to be paid overtime, it's these low wage drivers." These crew haul contractors are making big money and even when they have to pay a little overtime, they're still making enormous profits. Apparently that's not enough to satisfy the monstrous greed of these shameless business owners. They are without conscience and do not have an ounce of human decency or respect between the entire lot. It's rather interesting to see how closely they've aligned themselves with Republican leaders. These are the very same Republicans who'll swear up and down that they are fighting 24/7 to protect American interests and this nation's embattled workforce. Thankfully, very few voters now believe in the nonsense that House speaker Boehner and other Republicans are simultaneously spewing from both ends. Rep. George Miller (D-Calif.) has filed an amendment to the House bill that would maintain wage protections for these drivers. "It's outrageous that House Republicans are trying to take away overtime protections for a class of workers at the behest of a special interest," Miller said of the provision in an earlier statement to the Huffington Post, "These workers deserve the right to overtime pay. It's not only a matter of fairness, but also a matter of public safety."

The transportation bill will not come up for a vote until late February, and Republicans are still trying to rally support for it. The \$260 billion, five-year bill has generated plenty of controversy, with Transportation Secretary Ray LaHood, a former GOP congressman, calling it "the worst transportation bill I've ever seen during 35 years of public service" and "the most partisan transportation bill that I have ever seen."

Many elements of the House transportation bill are unlikely to be accepted by the Senate, where the committee has produced a bill with strong bi-partisan support. President Obama has threatened to veto the House bill if it doesn't include significant changes.

**EXHIBIT R.**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA**

ROBBIE PICKETT EVANS and  
GEORGE R. BOOTH,

Plaintiffs,

v.

PROFESSIONAL TRANSPORTATION,  
INC.,

Defendant.

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CASE NO. \_\_\_\_\_

**COMPLAINT**

Come the Plaintiffs, by and through their attorneys, and for their claims against the Defendant would show unto the Court as follows:

1. This is a case to redress violations of the Fair Labor Standards Act, as amended. Jurisdiction exists in this Court by virtue of the provisions of 29 U.S.C §215(a)(3), 28 U.S.C §1331, 28 U.S.C §1332, and 28 U.S.C §1337.

2. The Plaintiff, Robbie Pickett Evans, is a resident and citizen of the State of Tennessee. At all times material until her termination, she served as the Branch Manager or Co-Manager of the Chattanooga Branch.

3. The Plaintiff, George R. Booth, is a resident and citizen of the State of Georgia. At all times material until his termination, he served as either the Branch Manager or Assistant Branch Manager of the Chattanooga Branch.

4. The Defendant, Professional Transportation, Inc., is a corporation organized under the laws of the State of Indiana. For years, the Defendant has done business in

Chattanooga at 34 Scruggs Street. Its business includes the provision of transportation to railroad employees.

5. Venue is proper in the United States District Court for the Eastern District of Tennessee pursuant to 28 U.S.C. § 1391 as a substantial part of the events giving rise to this action occurred within this district.

6. The Defendant is an employer engaged in or affecting interstate commerce. It is subject to the minimum wage and overtime provisions of the Fair Labor Standards Act, as amended, 29 USC §§ 201, et seq. and is considered an employer pursuant to that statute.

7. Until April 2, 2012, Plaintiff were employed by Defendant as branch managers and also had driving-related duties for which they were paid an hourly wage for waiting time and a mileage rate for driving time.

8. Both Plaintiffs worked a considerable amount of overtime for the Defendant.

9. In August of 2011, a group of Plaintiffs filed a wage and hour lawsuit against the Defendant in the United States District Court for the Southern District of Indiana styled *Gregory a. Matthews, et al. v. Professional Transportation, Inc. and Ronald Romain*, 3:11-cv-97. This lawsuit was brought under the Fair Labor Standards Act and was brought to recover overtime compensation and minimum wages for uncompensated non-driving activity performed by drivers, unpaid overtime for over the road, radius, terminal and/or yard driving activity, and minimum wages due for all drivers.

10. The *Matthews* case was conditionally certified as a collective action on November 17, 2011.

11. Plaintiffs were invited to and did opt into the *Matthews* case in late February of 2012 and their opt-in forms were filed on ECF on March 1, 2012 (see attached).

12. Immediately after the filing of their opt-in notices, Plaintiffs were subjected to retaliation in the terms and conditions of their employment.

13. For example, on March 14, 2012, the Defendant suspended the driving privileges of the two Plaintiffs. Having branch managers who can also drive was one tool that branch managers had to keep branch numbers favorable. The driving privileges of branch managers who did not opt into the *Matthews* suit were not likewise suspended.

14. Also by example, around that time the Defendant suspended the ability of the Plaintiff to use cab companies in their branch. This, along with the suspension of Plaintiff's driving privileges, was an attempt to negatively affect the performance of the branch.

15. Also by example, after the Plaintiffs opted in the Defendants did not timely deal with and address maintenance and mechanical problems with the vans utilized by the Chattanooga branch. This was also an attempt to negatively affect the Plaintiffs' performance.

16. Plaintiffs were then terminated on April 2, 2012. The reasons given at the time were "management change" or "poor performance."

17. In fact, prior to the Plaintiffs opting into the *Matthews* litigation, their branch was reviewed favorably in company newsletters for its performance and productivity.

18. Prior to Plaintiffs opting into the *Matthews* litigation, their branch ranked very high on the Defendant's *Absolute on Time Performance Report*, which was the main standard by which branch performance was measured.

19. Prior to their opting in, Plaintiffs had not received any discipline from the Defendant.

20. The *Matthews* litigation is not the first FLSA collective action certified against the Defendant. The Defendant had a similar collective action filed against it in 2009 in the same Court styled *Vickie Miller, et al. v. Professional Transportation, Inc.*, 3:09-cv-00111.

21. During the *Miller* litigation, both Plaintiffs had discussions with Defendant's management about employees who opted into that collective action. In those discussions, management made clear that there was a company intention to terminate people who opted into that litigation.

22. For example, Plaintiff Evans was told by a Regional Manager, Ken Lanzon, that people who opted into that and won would no longer be allowed to work for the Defendant.

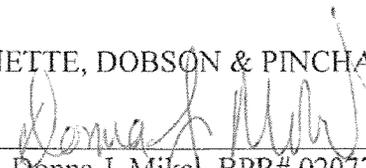
23. The terminations of Plaintiffs were in retaliation for their assertion of rights and/or opposition to practices believed to be unlawful under the Fair Labor Standards Act.

24. The actions of the Defendant in terminating the employment of Plaintiffs are in violation of the anti-retaliation provision, Section 15(a)(3) of the Fair Labor Standards Act.

25. The actions of the Defendant were willful.

26. Plaintiffs pray for an appropriate Order awarding them all back pay due and an equal amount of liquidated damages, damages for humiliation and embarrassment, damages for emotional distress, reinstatement or front pay in lieu thereof, prejudgment interest, and an appropriate award of attorneys fees.

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