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Surface Transportation Board  
395 E. Street, SW, Suite 1220  
Washington, D.C. 20423-0001

FD 35081

Attention: Rachel Campbell

RE: Canadian Pacific Railroad's proposal to buy Dakota Eastern Railroad Corp.

Dear Rachel,

Thank you and Susan Hagel for explaining how a protest can be filed against Canadian Pacific Railroad's proposal to buy Dakota Eastern Railroad Corporation. You were very helpful and we appreciate it.

The basis for our protest is as follows:

The Canadian Pacific Railroad wants to expand the number of miles that it is responsible for maintaining. They do not maintain the tracks currently under their control in a safe manner. The Canadian Pacific Railroad has shown that it is not capable or willing to put the money into track maintenance that is needed to make these tracks safe. They do put many millions into maintenance but it is not adequate to correct safety issues. The current management has made it very clear that they will not spend more on maintenance if it means cutting into record dividends. Their formula for success seems to be: Increase dividends and decrease maintenance expenses, while derailments are increasing. The public's safety does not seem to be very high on their priority list.

Our past experience with this Railroad has shown that they are not a socially responsible company. We faxed letter to every member of Congress. Copies of these letters is enclosed. As you will see in those letters, the CP Railroad had a derailment in which a high school boy was burned beyond recognition. As a result of that derailment it was determined that about 60 miles of track was worn out and needed replacement. If it was not to be replaced The railroad was to inspect it using a x-ray machine on a regular basis Six years later another derailment occurred on the same stretch of track. This resulted in the largest anhydrous ammonia spill in the world. The railroad had long before stopped their inspection of these tracks. They were ordered to replace this worn out track. Five years after this second derailment they still had not done this required work. Only after they received pressure directly from Congress did repair work start. We still don't know if it has been completed.

Events since these letters to Congress were written are as follows:

We are still waiting for a decision from the Eight Circuit Court of appeals. CP Railroad still claims that they are immune from prosecution. They are still running from their social responsibilities.

CP Railroad has had three new train derailments in this area in the past year. Luckily none was dangerous. Derailments continue around the United States and in Canada on CP's tracks. Their own maintenance people say the tracks are no longer safe.

This company continues to pay record dividends while track maintenance continues to suffer. The following web site, <http://www.indynews.ca/article.php?from=archives&id=1273&month=all&year> discusses these cuts in maintenance and the dangers involved.

This company continues to act as a bully. Striking maintenance workers, while legally picketing were physically abused by CP's private police force. A video and other information about this can be found at the web site [http://www.tcrcmwd.ca/eng/NEWS/shocking\\_video.htm](http://www.tcrcmwd.ca/eng/NEWS/shocking_video.htm) and [http://www.tcrcpreasttrainmen.ca/06\\_1\\_2007.htm](http://www.tcrcpreasttrainmen.ca/06_1_2007.htm) and [http://www.tcrcmwd.ca/ENG/NEWS/CPR\\_Strike\\_Issues.htm](http://www.tcrcmwd.ca/ENG/NEWS/CPR_Strike_Issues.htm).

This company continues to force settlements on victims of the Minot derailment under the duress that they will never get to go to court. Accept what the RR is willing to give you out of the goodness of their hearts, because they still contend that they are immune to prosecution. They continue to show how socially irresponsible their management is.

The number of Railroad accidents is increasing. Information can be found at [www.ffwdweekly.com/Issues/2006/0504/city.htm](http://www.ffwdweekly.com/Issues/2006/0504/city.htm). A copy is attached.

The management of this company brags about it's safety record while decreasing maintenance on tracks they already know to be unsafe and increasing tonnage. What can be more unsafe. And this attitude comes from the top down so there is very little chance of changing it.

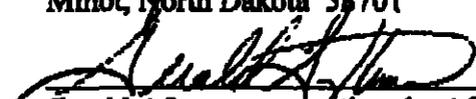
If you would like additional information you may contact us at 701-240-9837. If you would like to talk with victims of the Minot derailment I am sure that we could arrange a local forum. You could talk to both victims who have settled and those that haven't. I think you will find that their experiences are very similar.

**Thank you for giving our concerns your consideration.**

**The Aftem Family**

**519 14<sup>th</sup> St NW**

**Minot, North Dakota 58701**



**Gerald Aftem, representing the Aftem family**

**Cc: Senator Byron Dorgan**

**Senator Kent Conrad**

Dear Honorable Congressman

The Federal Railroad Safety Act is set to expire this year. Congress is currently working on a new bill to take its place.

Congress has studied and determined that the intent of Congress was never to grant preemption or immunity to the railroads for their negligence. However, the eighth Circuit court of Appeals has ruled that the wording in the current law does give the railroads immunity.

On January 18, 2002, while the citizens of Minot, ND slept, the Soo Line (Canadian Pacific) Railroad had a derailment on the edge of our city. The largest Anhydrous Ammonia spill in the world spread a cloud of poisonous gas through our city.

This Railroad and others across the country have rushed to use the eighth Circuit's ruling to claim immunity for all manner of negligence. The railroads have chosen not to be respectable and responsible members of our society and to instead avoid their responsibility any way possible.

They are currently pushing the blame for this situation on Congress, even though they know this was never Congress's intent. Congress acted in good faith when they passed this bill. The RR's seems to be showing that they have no respect for our government, our lawmakers, or the people. They have again become the Railroad Barron's of the 1800's.

In this particular situation, the railroad was found by the National Transportation Safety Board to be grossly negligent. The railroad admits that they were negligent and accepts blame, but claims immunity.

In 1994, 5 1/2 miles from the site of the Minot derailment, the same RR had another horrible derailment in which a 16 year old boy was burned beyond recognition. The cause of the derailment was identical - a broken rail joint. They agreed to replace this entire section of track after the first derailment, as it was not safe. They still had not done this in 2002 when the second derailment took place. After the first derailment, they agreed to inspect the track twice a year using a special x ray machine to look for stress fractures. They sold the machine when costs were too high.

After the second derailment, it was discovered that the railroad has never trained its employees in how to make a proper splice in the track. Is it any wonder all their splices were discovered to be inadequate. After the derailment, 1859 violations were discovered on this section of track.

The railroad begs to its stockholders that they have increased dividends by cutting maintenance costs. The night of the accident a crew for the railroad asked for permission to ride this section of track, as they were afraid it would be a problem with the

temporary change. They were told that there was no money in the budget for that. Hours later the derailment occurred where they wanted to inspect. Management has stated that it is cheaper to pay claims in this area than to repair the track.

This was not an accident. It was a foreseeable event that the Railroad was aware of and had been told to correct. A judge has found that the RR destroyed evidence in this case. The RR breaks the law, disregards the regulatory agency in charge of governing it and is then rewarded with immunity. Doesn't seem quite right. The RR made a decision to gamble and they lost. Now the victims are expected to pay the price of their gamble.

This family recently wrote a letter (copy attached) to all the Senators, many Representatives and many news organizations. This letter somehow got the RR's attention and we were called in for mediation. We were told that the RR would not be trying to settle any of the cases if we had not written to congress. They want favorable terms in the renewal of this law and do not want the congress upset with them.

We were told that Congress has two sets of wording as amendments to try to correct this injustice. If Congress passes the wording that it had never been Congresses intent to give the RR's immunity, then they will argue in court that a Congress seated in 2007 cannot know the intent of a Congress seated in 1972. If Congress uses the wording that makes liability for the RR's retroactive, they will argue that another law prevents them from being punished if they acted in good faith before the law was changed. Either way we will not get them into a courtroom.

The tactics the RR is using are offensive to anyone. Before the mediation started the mediator, a retired Federal Judge, told us that "in his 36 years on the bench he has never seen such an injustice as what is being done in this case". We were told that no one would be happy with the offers.

They are forcing the old and the weak to settle for pennies. Medical costs are not even being covered. We were told that the RR did not have to be talking to us and we were lucky they were making any offer. We were told that they would not be paying for many of the health problems they caused. The RR says there is no study showing that this chemical could cause these problems and they will therefore not even discuss them. If you go to OASHA's web site, CDC articles, or the chemical distributors web site these symptoms are listed as injuries caused by this chemical. The RR will not listen. Again they show their contempt for a government agency. They say that if they paid us for these problems they would have to pay everyone. It doesn't take a genius to figure out that if they caused the problem they should be paying everyone.

They offered a 24 year old man and his 19 year old sister \$2000 for the death of their 42 year old mother. These youngsters accepted their final offer. It was under \$20,000. They settled to get rid of the debt for their mother's funeral and to get rid of the emotional trauma and abuse they went through at the hands of the RR. We now know what a life is worth to the RR's. These figures will be used to lower awards across the country in

future derailments.

It is wrong for Congress to leave injured citizens of this country with no recourse to fight against a giant business like the RR. It is wrong that these elderly and weak victims are being forced to settle for little to nothing when their lives were so dramatically altered. Any Congressman who cannot identify with and feel a need to help these victims has blood on his hands. I cannot believe that any member of Congress could be that cold, but I have been surprised again. Senator Trent Lott and Representative Bill Schuster seem to have chosen to try to help the RR's avoid their responsibilities as members of this society. I hope that they have been misled by the RR's and that the truth will convince them to change their decision and stop supporting the RR.

The RR has claimed in each incident that no one has a good case. If that is the case, all they have to do is give up immunity and go into a courtroom again. We are not asking you to be a jury and decide our cases.

We are not the only victims. There have been many derailments since ours in 2002. People are being injured, property is being destroyed, and RR's are claiming immunity.

It is my understanding that the Airline, Trucking and Ocean Transportation industries are also looking into this immunity issue for their own use. This nightmare could grow.

It is not our intent to tell Congress what to do, but we do have some suggestions you might be able to use.

Please do anything that you can to either force the RR to give us our day in court and to act responsibly or to penalize them for their unconscionable behavior. Finally and most importantly, to force safety on an industry that has proven dividends and profits are much more important than peoples lives and health.

Please consider changing The Federal Railroad Safety Act to include provisions to force the Railroads to be responsible members of our society.

1. The National Transportation Safety Board needs to be given some real power when it comes to governing and enforcing their rules. They currently are not able or not willing to govern the railroads actions. They seem to have no ability to punish their behavior. The railroads act as if they are above the rules set by Congress.
2. Inspectors who work for the government need to inspect railroad tracks and equipment at least twice a year. A tax or fee should be charged the railroads to reimburse the government for the cost of hiring inspectors and buying equipment. If the RR's were socially responsible, the inspectors would not have been needed.
3. Congress needs to make sure that the new bill contains language that no one can misinterpret making the RR liable for future negligence.
4. Wording is needed that takes care of all the victims of all the derailments in the country that have fallen through the cracks as a result of the eighth Circuits rulings.

5. RR's seem to have problems with inadequate crossings everywhere we go. Victims of crossing accidents are always in the paper. We would like to suggest that the RR's be made liable for all accidents within a RR crossing. I hope that that would force them to upgrade every crossing in the country. It would also be good training lesson in social responsibility for an industry that needs it so badly.

Thank you very much for taking the time to read this letter. I hope that we can again thank you for supporting our cause. We would like nothing more than to write each of your local papers praising your action.

Please support the Thompson Amendment to the Rail and Public Transportation Security Act of 2007, or any other legislation that will clarify the intent of the Federal Railroad Safety Act and allow the victims of Railroad accidents to have their day in court. It is my understanding that there may be a move to remove the wording providing "retroactive" status from the Thompson Amendment. Please make sure that this retroactive wording to cover the Minot derailment is not removed.

The 14 injured members of the Aftem Family  
Minot, North Dakota

**Dear Honorable Congressman,**

**Our family recently wrote to all Congressmen regarding a railroad derailment in Minot, North Dakota. We were ridiculed and told that individuals could not change the mindset of Congress. While we understand that we were only a small part in the process, we do feel that the system worked and individuals can make a difference. We thank you for any help you gave us and the other victims of the Railroad.**

**Since we wrote to Congress the Railroad has been replacing track in our area at a very fast pace. They have also brought back the x-ray machine to inspect the track. While this progress is good news, we must not become complacent in improving railroad safety. These improvements were demanded of the Railroad 12 years ago. Only when congressional pressure was applied did the Railroad choose to comply with these standards. Because of the great difficulty in enforcing railroad safety regulations, the government must provide oversight to insure compliance with all safety regulations and agreements made with the Federal Rail Administration. In addition, there are three key areas that are crucial to creating a foundation of railroad safety for the future. These areas include:**

- Track inspections made by a third party.**
- Legal accountability for all negligent acts and contempt of court.**
- Prohibition of hazard material transport near cities.**

**Increasing stockholder dividends is the driving force behind all the Railroads actions. If left on their own to determine what tracks are "safe enough" the Railroad will always choose the most economical route: to keep using outdated and unsafe tracks. Therefore, there will never be true accountability for safe tracks in this country unless a third party conducts inspections. However, even though the Railroad cannot be trusted to conduct their own track inspections, it is still their responsibility. Therefore, money used to conduct the inspections should come out of the railroads pocket and not the pocket of the taxpayers. We urge the Congress to consider a tax on railroads from which the government can hire companies to inspect railroad tracks.**

**The second part of building a foundation of railroad safety is to insure complete legal accountability. The Railroads try to avoid responsibility for their negligence in all accidents. Destroying evidence is common practice in the railroad industry. A Google search of "Railroads Destroying Evidence" produced 1,140,000 hits. The internet site "<http://www.ediscoveryview.com/articles/case-summaries?i=20>" lists over 48 separate cases where the Railroad destroyed evidence. Another site with many examples is [http://transportation.northwestern.edu/sources/hogdanich\\_track\\_closings\\_121\\_071104.pdf](http://transportation.northwestern.edu/sources/hogdanich_track_closings_121_071104.pdf). The judge in the Minot derailment case also found that the Railroad had destroyed evidence (<http://www.ediscoveryview.com/articles/case-summaries/>). The Railroad seems to demonstrate an awful lot of contempt for our Judicial System as well as Congress and the Federal Agencies responsible for governing Railroads. Something is wrong. They have destroyed so much evidence it is no longer clear how many accidents could have**

been avoided by increasing railroad safety measures. Crossing accidents have been particularly difficult to decipher. The practice is so wide spread in the industry that Congress may again be the only power that can control their actions. Judges have levied the maximum penalties against the Railroad in many of these cases. It obviously has done no good in deterring the destruction of evidence. Congress should consider conducting an investigation into these acts. Clearly the Presidents of the railroad companies cannot be unaware of these actions and should be accountable through fines and imprisonment for their blatantly illegal actions. We urge congress to increase their support for the judicial systems authority over the railroads, by passing legislation making prison time mandatory for RR CEO's who are aware but do not correct their companies destruction of evidence.

One of the most important aspects of railroad safety involves regulating the materials they carry. Most cities across the country prohibit trucks from transporting hazardous materials within city limits to avoid vehicle accidents that will dump toxic materials on their streets. This practice is good common sense. However, because railroads are federally controlled, cities cannot force these materials outside their city when transported on railcars. When the derailment in Minot occurred, it only took minutes for a large area of our town to be blanketed in a poisonous gas. Approximately 40% of the population was affected. We had no idea at the time that this was a train derailment. Many people thought that terrorists had struck. This was not long after the events of September 11<sup>th</sup>, so we felt our vulnerability to these kinds of disasters. Currently, Railroads carry thousands of times the amount of hazardous material that trucks do, and they travel right through our cities. A single train car can create a poisonous cloud 10 miles by 40 miles and could kill as many as 100,000 in 30 minutes. We have personally counted as many as 60 anhydrous ammonia cars on a single train. The night of the Minot dcrailment, only 6 cars derailed and it was the largest anhydrous spill anywhere. The cloud of anhydrous moved so quickly that the town could not evacuate. The gas was so thick that you could not see to drive safely, and many who tried had their vehicles die in route due to the lack of oxygen in the air. The gas was at the local hospital within minutes of the derailment. Gas started to fill the lobbies, but an evacuation plan was not feasible, because there was no way to move the patients or time to do it. The following internet site shows actual footage of the effects on the town that morning: "[www.mnforum.com/specials/minot/pd5.cfm?id=113517](http://www.mnforum.com/specials/minot/pd5.cfm?id=113517)". The video was taken by a police patrol car that stalled, forcing the police officer to run for nearby shelter. From the footage in this video it is clear that the death toll would have been much higher had an evacuation of the town been ordered.

We recently discovered an internet article stating that Washington DC sued in order to stop Railroads from carrying hazardous materials through our Capital. We cannot afford the time and money it would take for each city in the country to do the same. At a minimum, Congress needs to pass a bill requiring railroads to bypass all cities when carrying hazardous material. Upon further investigation into the safety of these materials it may be necessary to prohibit any transportation of these materials by railcar. It is simply

**easier to limit and control hazardous material carried in small quantities on trucks than in mass by railway. Such drastic measures are truly necessary even with safe tracks and legal accountability. It is impossible for anyone to guarantee the safe transport of deadly materials because accidents still happen and terrorism is still a threat. The risk is not worth the potential loss. The results of a 2006 safety study done on Hazardous Materials and the Railroads can be found at**

**<http://www.banwe.org/News/2006/11NOV/CRS%20Report.pdf> and [www.citizenstonerail.org/docs/CRS\\_PAPER1.doc](http://www.citizenstonerail.org/docs/CRS_PAPER1.doc)**

**We are grateful for all the hard work that Congress has already done to improve railroad accountability and hope you can again make strides to improve the safe and responsible use of railroads in our great country.**

**Thank you again.**

Letter to Editor being sent to Newspapers

Who is responsible?

The National Transportation Safety Act is set to expire this year. The 8<sup>th</sup> Circuit court of Appeals interpretation of this current law has allowed Soo Line and other railroads to claim immunity from any and all negligent actions.

Soo Line's 2002 derailment in Minot, ND created the largest anhydrous ammonia spill in the world, injuring thousands. The National Transportation Safety Board found Soo Line to be grossly negligent in this derailment. The railroad even admits negligence, but claims immunity. Citizens seeking compensation for their injuries have found the railroad's strong-arm mediation tactics to be insulting and cruel. There is no legal action left for citizens short of a Supreme Court ruling.

It is no surprise then to find that other transportation industries are looking at the precedence set by the 8<sup>th</sup> Circuit court. The airline, trucking, and ocean industries could also gain millions if they too can avoid responsibility when their actions injure people.

Congress currently has before them two sets of amendments trying to correct this injustice. Senator Trent Lott and Representative Bill Schuster are strong opponents of these amendments and seek to block progress towards correcting the injustice we now face.

Please write your representatives in Washington and ask for support in changing The National Transportation Act to include the following provisions:

1. Real power to governing and enforcing safety rules
2. Government inspection of trucks and equipment
3. Liability for future negligence.
4. Liability for previous negligence, supporting victims not compensated due to the 8<sup>th</sup> Circuit's rulings.

The 14 injured members of the Afton Family  
Minot, North Dakota

**Letter to Editor being sent to Newspapers**

**Immune or Irresponsible?**

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**Please contact your congressman and ask that they support the Thompson Amendment to the Rail and Public Transportation Security Act of 2007, or any other legislation that will clarify the intent of the Federal Railroad Safety Act and allow the victims of Railroad accidents to have their day in court**

**The 14 injured members of the Aftam Family  
Minot, North Dakota**

Letter to Editor

## **RAILROADS IMMUNE?**

**Railroads are great for this country, but should they be immune from prosecution when they are negligent?**

In 1972, Congress passed the National Transportation Safety Act. The intent of this bill was to make the Railroads subject to Federal Regulations rather than each individual States rules and regulations. For approximately 30 years, precedent was set that the railroads are responsible for their negligence in the individual States, even though the Federal Government governs them.

Recently the Eighth Circuit Court of Appeals has decided that vague wording in the 1972 National Transportation Act will now be interpreted to give the Railroad preemption or immunity from legal action in all derailments.

The Eighth Circuit Court of Appeals has arbitrarily decided to take away all citizens rights to due process of law if it involves a railroad. I thought that the constitution gave us the right to due process of law. If our military drives a car into your house, they are liable. Area 51 was found to be liable for injuring workers with hazardous waste. Most other government entities have no immunity from negligence.

The railroad carries some of the most dangerous chemicals known to humankind. If they are not responsible for their negligence, they have no reason to make safety a priority. In fact, it has been proven that the exact opposite is true. This is a very large and immediate public safety hazard all across this country.

Congress never intended to grant the Railroads immunity from prosecution for their negligence. Congress is now working on renewing the National Transportation Safety Act. An amendment to that bill would state that Congress never intended to grant the Railroad immunity from prosecution and makes the railroads liability retroactive.

Thousands of people were seriously injured in the largest anhydrous ammonia spill on the planet. The National Traffic Safety Board found the railroad to be grossly negligent. None of those people can currently collect anything from the RR. On Medicare, Medicaid, Social Security and private health and disability insurers have paid for many of these people. Why should your tax dollars pay for the Railroads negligence? New accidents are happening daily. Those people also have no rights.

We ask that you contact your Senators and Representatives and ask that they support the National Transportation Safety Act wording making liability retroactive.

5. RR's seem to have problems with inadequate crossings everywhere we go. Victims of crossing accidents are always in the paper. We would like to suggest that the RR's be made liable for all accidents within a RR crossing. I hope that that would force them to upgrade every crossing in the country. It would also be a good training lesson in social responsibility for an industry that needs it so badly.

Thank you very much for taking the time to read this letter. I hope that we can again thank you for supporting our cause. We would like nothing more than to write each of your local papers praising your action.

Please support the Thompson Amendment to the Rail and Public Transportation Security Act of 2007, or any other legislation that will clarify the intent of the Federal Railroad Safety Act and allow the victims of Railroad accidents to have their day in court. It is my understanding that there may be a move to remove the wording providing "retroactive" status from the Thompson Amendment. Please make sure that this retroactive wording to cover the Minot derailment is not removed.

The 14 injured members of the Aftem Family  
Minot, North Dakota

## THE NIGHT THAT CHANGED MY LIFE

January 18<sup>th</sup> 2002, while I slept, a railroad derailment caused the largest spill of anhydrous ammonia in the world, covering our city of 35,000.

I was 10 years old and extremely active. I played hockey and track and was good at both. It felt great to be fast enough to compete with kids much bigger than me. Today, I can't play outside. I can't participate in sports. I was an honor student, but have missed so many days for serious illness that I must be schooled at home. I have a potentially life threatening illness triggered by exposure to pollutants. It is destroying my immune system.

My parents were also injured. My mother was overcome by the chemical cloud coming home from work. My father went to rescue her. Now, my mother has asthma and my father has reoccurring pre-cancerous polyps. My parents don't take their own medicines so they can buy the medicines I need. Sometimes they can't afford all of my medicines.

The National Traffic Safety Board found the railroad grossly negligent for this derailment. They knew the tracks were dangerous because a 1994 derailment burned a 16 yr old boy beyond recognition. They admit blame, but refuse to pay our medical costs.

When I ask why the railroad can get away with injuring us and not paying, I am told that the 8<sup>th</sup> Circuit Court of Appeals has changed the interpretation of the National Traffic Safety Act. Their rulings make the railroad immune from negligence. I know that if I am denied my constitutional right to due process of law, then other families out there will suffer as we have.

Please contact your representatives in Washington to ask for their support in making railroads accountable for their actions.

Jeremy Aftem and the other 14 injured members of the Aftem Family  
Minot, ND

**Letter to Editor being sent to Newspapers**

### **The Cost of Safety**

**Railroad safety is costly. Protecting and maintaining each mile of track comes at high prices that eat into railroad dividends. What doesn't cost railroads nearly as much is paying claims to citizens injured by derailments? The 8<sup>th</sup> Circuit court of Appeals ruled that railroads are immune from negligence in derailments. This unconstitutional decision gives unlimited power to an industry with no concern for health and safety. They answer only to investors.**

**Citizens of Minot, ND learned this lesson the hard way. On January 18, 2002, the Soo Line Railroad derailed causing the largest Anhydrous Ammonia spill in the world to spread a cloud of poisonous gas through our city. The railroad admitted negligence for the derailment. In fact, in 1994, 5 miles from the second accident, a 16 year old boy was burned beyond recognition. Both incidents involved a broken rail joint. The railroad agreed to replace this entire section of track after the first derailment, but never did. They also agreed to x-ray tracks twice annually to look for stress fractures. They sold the machine.**

**Now in the aftermath of the Anhydrous spill and the courts rulings, victims are strong-armed into settlements below their medical costs. Wrongful death suits are worth as little as \$20,000. Asthma, heart attacks, and even death are worth so little to a company that does not answer to courts, congress, or citizens, but only to the almighty dollar.**

**So yes, railroad safety is costly. But allowing railroads to operate without safety is more than we can afford.**

**The 14 injured members of the Afton Family  
Minot, North Dakota**



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Week of June 13, 2007

Tues

# Maintenance 'not up to par'

**CPR workers union president says residents have right to be concerned of tracks safety**

By  
The Independent

Local residents have a right to be concerned about the safety of another train derailment according to Bill Bright, president of the CPR maintenance workers union.

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"The maintenance has definitely not been up to par across the system," he said. "I can understand Brighton's concern, especially after the propane explosion derailment in 2003."

Roughly 1,300 Canadian Pacific Railway maintenance workers across the country have been on strike since May 18. CPR sent out 1,200 hired management employees to cover maintenance links until a tentative agreement was recently reached.

That's 1,500 fewer maintenance workers. Couple that figure to an investigation by The Independent in 2005 which found over a span of 30 years the number of maintenance workers per mile is 48 while elsewhere, between Canada and the U.S., it's down to 12, and the concern about a "cancer" derailment seems quite valid.

"You can't take a guy out of office, give him two days of training and expect him to do the job," Mr. Bright said. "There's a lot more to maintaining track, there's a science to it. If you're off by just a little bit that train's going off the track."

Mr. Bright said the union has records that the CPR released every day to the train crews of where "slow orders" were issued. Slow orders are where trains lower their track speed over a certain area because there is a defect in the track that hasn't been fixed. These numbers doubled during the strike, he said.

"When we go back to work, we're going to have to fix all these defects," said Mr. Bright. "It's going to be an uphill battle for the next couple of months."

Residents who live along the railway are already gun-shy to say the least after the stretch of track that runs through the area has seen several derailments in recent years.

The Transportation Safety Board of Canada has determined that a piece of broken rail caused a CN train derailment in Brighton in 2005, that spilled lumber and paper products in a field close to town.

In 2003, a CPR train in Belleville, that had rolled through Brighton just minutes earlier, derailed sending four of the train's six tankers of propane to ignite or roll off the tracks, a fire sending a kilometre away.

"It's scary except for when we're back out there we know what to look for and hopefully we will be able to catch all these defects and we will keep the track speed at a level where it's safe," Mr. Bright said.

Local residents such as Leigh Bergay, owner of Memory Junction Museum which fronts onto the rail line, is concerned about the safety of surrounding townships.

"It's always a worry what's going to happen because you used to see preventative maintenance with men always on the tracks," said Mr. Bergay. "Now you don't see anyone going up and down, and then a train happens and there's ever is our warning. It makes you wonder if or when it will happen right here."

The Municipality of Brighton does have a railway committee that includes Mr. or Herrington.

Ms. Herrington said that she has not been in contact with the CPR, but added the railway committee will continue to look after the safety issues that face the Brighton area.

Tell Us What You Think

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UIC



More News

Source: Vancouver Sun  
 Published: June 1, 2007  
 Photo: [unreadable]

Click here to watch the video footage

Striking CP Rail workers are taking the company to court and to the Canada Industrial Relations Board alleging unlawful arrest and unfair labour practices after six pickets were arrested by CP police on Tuesday

The Teamsters Canada Rail Conference Maintenance of Way Employees Division -- which represents the 3,200 striking maintenance workers -- and the six arrested individuals seek damages for wrongful arrest, false imprisonment and assault, as well as an injunction to prohibit the Canadian Pacific Railway Co from unlawfully arresting its members.

The TCRC is also asking the Canada Industrial Relations Board to declare that the actions of CP constitute unfair labour practices.

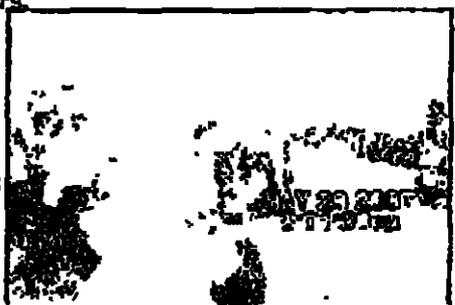
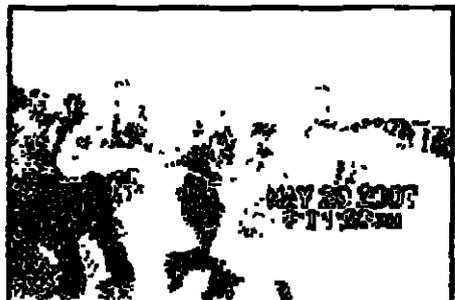
'It's been many years since we've seen this kind of misconduct and mistreatment of peaceful pickets [in this province],' the union's lawyer Leo McGrady said in an interview.

The alleged mistreatment, captured on videotape and shown at a news conference hosted by the TCRC on Thursday, involves the handcuffing and arrest of the six members by CP police at CP's yard in Port Coquitlam, including forcing one picket to the ground.

Jim Sinclair, president of the B.C. Federation of Labour, called the behaviour 'outrageous'

The B C Federation of Labour will be seeking a public inquiry into the role of private police forces, Sinclair said at the news conference

'When I saw the video and heard what happened, it's so far out of the ordinary it really does require a hard look,' Sinclair said in an interview after the



conference. "CP Rail doesn't get to decide what's legal and what's illegal in this country."

So far the court has taken "a very measured approach" to the strike, McGrady said.

CP has been to court twice seeking injunctions to limit union picketing. On May 18, the B.C. Supreme Court turned down the application but ordered that the court's reasons be provided to picket line captains. Last week CP brought another application which was successful with respect to CP's intermodal facility in Pitt Meadows but was refused for its other locations in B.C. The company's request for an enforcement order to enable the RCMP to act on the injunction was also turned down.

"So CP then just goes in and uses its own private police force to do essentially the same thing plus more," McGrady said.

"We think that the use of a private police force in this fashion by a struck employer is appalling," he added.

CP spokesman Mark Seland said the CP police force was publicly accredited, unlike a private security firm. "Their primary accountability is to the public and community safety and the protection of customers' valuable products," Seland said.

"But when it comes down to it, we do need to protect our business and our customers' interest," he added.

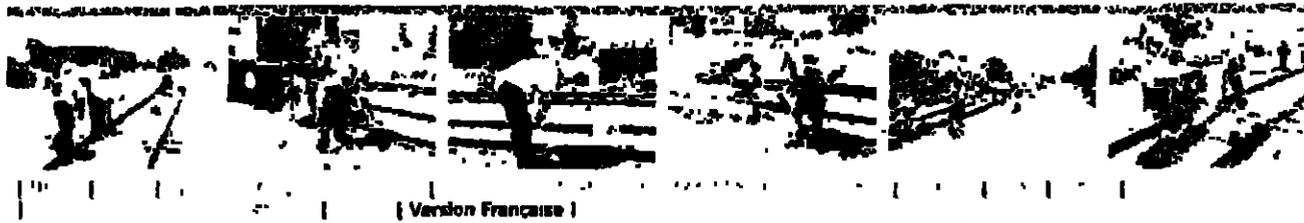
Seland said the arrests came only after five warnings had been given to the pickets to move out of the way to let a truck access the yard. "The last thing [the CP police] want to do is arrest their colleagues," he said.

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# TEAMSTERS CANADA

Mail Conference  
at the... of... ..



[ Version Française ]

## CPR Strike Issues

May 29, 2007

### Brothers and Sisters:

Last Friday, May 25th, Fred Green, President and CEO of CP Rail, sent out a letter addressed to his "engineering service managers, supervisors and replacement management employees " This was posted on the CPR.ca website.

The letter is an attempt to boost the obviously seriously sagging morale of these replacement workers and perhaps still the increasing complaints from customers and questions from shareholders. As President and CEO of CPRail, that is Mr. Green's job, just as protecting tracks for the safe passage of trains, is ours.

It is never my intention to deflect attention away from the real issues, so normally I wouldn't respond to such a letter. But, in this case, for the sake of accuracy I believe that some of the statements made, demand comment.

Mr Green talks about what he calls the company's "metrics".-By this he means the company's operating numbers. He talks about volumes, fluidity and slow orders. Basically, he says that everything is working at peak efficiency (if not better).

Fred Green is entitled to his opinions, but anyone directly involved with operations on the ground knows that the reality is very different. You don't have to be an investigative journalist to see what's going on. All you have to do is visit a yard these days to see the delays, backlogs and congestion. Members of both the running trades and the RTC repeatedly tell us that significant train delays exist everywhere. In addition, the existence of delays, backlogs and innumerable slow orders has been repeatedly corroborated by on-site managers (who, for obvious reasons, wish to remain nameless) and by the GBOs.

It is understandable that CPRail would tell their replacement workers, customers and shareholders that everything is going great, but I would remind everyone to keep CPRail's agenda in mind.

Mr. Green talks about the "illegal" activities of picketers. Remember, you have a legal right to picket at both CP properties and at secondary properties. This right has been confirmed by the Supreme Court of Canada.

Mr. Green may believe that the right to picket amounts to nothing more than the right to hold up a placard and to nod politely when someone crosses the picket line. But that's not what the law says. What's going on now is a legal strike and legal picketing. It's not just informational picketing. We have a right to talk to people who wish to cross our lines and to persuade them (legally) not to cross. Furthermore, they have a right to stop and talk to us. The injunction that was issued in Vancouver

## News

**Teamsters Union Releases Shocking Video Footage of Picket Line Arrests by CP Rail Police Force**

**Charges Under Article XIX, Section 3 of the IBT Constitution**

**Cool Links**

**Meeting with MP Sukh Dhaliwal**

### Newsletter

**Pacific Region Newsletter  
A letter to Fred Green**

**Message from Lou Viani**

**Messages from other Unions**

**Rectification Letter - Will be mailed by or before June 18th**

**Big win for unions as ruling says bargaining protected**

**June 6, 2007  
Memorandum of Settlement**

**Dealing with Strikebreakers**

**Thanks to the Minister of Labour**

**CPR Settlement  
Return to work for CU employees**

**We have tentative agreement  
CPRail Agreement reached**

**BC FED letter to the Prime Minister  
PICKET LINE KENORA**

last week happened not because of any illegal activity on the part of the picketers, but because so many people who didn't want to cross our line stopped to talk to us. Obviously, this created a massive backlog and many problems for CPRail. But that is what happens during a strike, the employer is disrupted.

Mr. Green says that he has heard of "instances of vandalism and other destruction of (our) property." Yes, allegations have been made. But remember, allegations are just that, allegations. They're not proof. I haven't heard of any genuine instances of vandalism and, as far as I know, no one has been charged with any property related offense since the strike started. I don't know of a single criminal charge against a picketer since the strike began. In truth, CPRail supervisor Libbey has told me (and corroborated it in an affidavit) that an instance of vandalism where he suspected picketer involvement, has been investigated and found to have no involvement of picketers

One comment from Mr. Green's letter that especially bothers me is when he writes

"The media and general public continue to have selective interest in our situation, driven mostly by the union leader's inflammatory comments about dangerous goods, potential derailments and unqualified employees. These comments are not supported by fact and have been easily abated."

This comment implies that an expression of concern about dangerous goods, potential derailments and unqualified employees performing our work, is wrong.

In spite of Mr. Green's statements, the truth is that the state of the track worries us all. Every maintenance of way employee knows what I'm talking about. None of us wants to see another derailment. Aside from the danger to life and limb, CP Rail carries many dangerous commodities that, if spilled, would cause serious harm. We and our predecessors have been maintaining the company's tracks for more than a century. No one can do it better than us. The current replacement workers, most of whom are office employees, simply do not possess our levels of ability and experience. Hence, our perfectly legitimate and realistic concern for track safety.

Mr. Green also talks about negotiations and how, in effect, the Union is being unreasonable by asking for a 13% wage increase over three years. Mr. Green in effect dismisses our concerns by saying "we will not break the pattern of settlements."

But what Mr. Green fails, or refuses, to acknowledge is that we are the lowest paid unionized employees in the railway. What the company is saying is that if any employee gets a 3% annual increase, then so must every other employee. But if one employee makes \$40,000 a year and another makes \$80,000 (and they each get a 3% raise) the first employee will get a \$1200 raise while the second employee will get a \$2400 raise. What kind of equal treatment is that? How is that fair? You can see how, over time, the difference in earnings between the two employees will grow and only get more pronounced. Our position is that the time has come for this kind of earnings drift to stop and for us, all of us, every CP employee, to be treated equally and with the respect we deserve.

Although Mr. Green doesn't mention it, the bargaining issues between the parties involve more than just the "pattern." There are benefit issues, work rule issues, expense issues, seniority issues, health and safety issues, clothing allowance issues, etc. Some of these issues cut deep and could have a tremendous impact on many of us (for example, a significant expansion of seniority territories for many TP&E employees).

Finally, Mr. Green says "we remain open to any opportunity to engage in meaningful talks with the Teamsters-MWED should such an opportunity present itself."

The Union has already revised its position and made two offers to the company, which have not been responded to with a counter. The company's last offer was made on March 23rd and that continues to be their final position. That is unfortunate

Talks on June 4th

Letter from Robert Bourlier

All those who are concerned about the rights of labor union members should contact CP Rail in Canada and protest

An Unsolicited response

Court update from Onquidam

Meeting in Ottawa on Monday

CP Rail going to court over "illegal arrest"

Message from Sudbury

Picket line arrests merit public inquiry

CP Rail going to court over "illegal arrest"

SOSA Delerille Sub Pickets and Support

Pickets arrested

News Archives

because the simple truth is that if the company had responded to the Union's last offer (dated May 8th), we would possibly not be on strike today. By twice refusing to revise their March 23rd position, they left us no choice.

Being careful not to take Mr. Green out of context, I will add that if he is serious when he says "we remain open to any opportunity to engage in meaningful talks" all he has to do is direct his negotiators to counter our May 8th offer. That, in our view, will permit the dialogue to start moving forward again. To avoid any confusion, I will send a message to that effect to the company.

Stay safe, stay strong, stay united,

Bill Brehl  
President  
TCRC MWED



...the attributes the increase in train accidents to the reduction of the number of employees and spacing  
lines and could bring other major, once duties

"You do the math," he says. "There is half the number of people now as there was 10 years ago. There aren't  
enough employees to keep the tracks safe. If you want to make sure the track is safe, you have to  
have people to inspect it."

Industry concerns have hit Peter, Julien, the state safety policy on the New Brunswick, calling on the federal  
government to conduct an inquiry into railway safety in Canada.

In a move to transport Minister Lawrence Cannon, Julien writes. "It is a sad and costly reality that  
track errors have been steadily increasing in recent years. Accidents have multiplied and the  
costs are rising. In 2007, it seems that the real problem lies with the industry's eagerness to bring down labour costs  
and increase profit margins - hence the move towards 125-foot length trains to increase the volume and  
value of goods that are shipped, and the cutbacks to staffing."

To date the Canadian government has not agreed to conduct an inquiry into railway safety. However, at a  
meeting of industry officials in Toronto, Cannon said Transport Canada, and representatives from the  
railway industry, are examining ways to improve safety.

In Calgary, Wilson remains pessimistic about discussions to improve the safety of Canada's railways.

"The rail industry is exempt from any rules," he says. "It's difficult to work with them."

### High derailments on the rise

Both Canadian National Railway Co. and Canadian Pacific Railway Ltd. have experienced a marked increase in  
so-called high derailments over the past seven years, according to the Transportation Safety Board.

CP had a 35 per cent increase in derailments last year, while its main competitor, CN, had a five per cent  
increase. The data in 2005 included 103 high derailments for CN and 66 for CP, 26 of which were for  
CPK.

Among the most high profile derailments of 2005 was a CP train that went off its tracks in August along the  
north shore of Watkins Lake, located west of Edmonton, spilling more than 700,000 litres of Bunker C oil  
and wood preservative into the water.

It was the derailment at Lake Watkins highlighted the lack of coordination that exists between  
railways and emergency services, with local officials often being unprepared and ill-equipped to respond to a  
train derailment involving hazardous materials.

In response to the Watkins incident, Ken Howell, former CEO of SNC-Orion, was appointed by Alberta  
Environment Minister Gary Boutilier to chair the Environmental Protection Commission, which was asked to  
make recommendations on how to improve emergency responses to environmental incidents.

The final report, titled Learning the Lessons and Building Change, was submitted to the provincial  
government in November 2005. The report made numerous recommendations on how to improve a system that has  
fragmented, it stated. A risk reduction system has five pillars: prevention and mitigation; preparedness;  
response, recovery; and research and knowledge. Without a body of strength in each of these, Alberta  
will face additional costs, potential loss of life and environmental damage as a result of a serious accident.

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**STATE OF MINNESOTA  
COUNTY OF HENNEPIN**

**DISTRICT COURT  
FOURTH JUDICIAL DISTRICT**

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Court File No. 04-007726

In re the Soo Line Railroad Company  
Derailment of January 18, 2002 in Minot, ND

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**PLAINTIFFS' MEMORANDUM OF LAW  
IN SUPPORT OF THEIR OMNIBUS MOTION TO AMEND  
THEIR COMPLAINTS TO ADD A CLAIM  
FOR PUNITIVE DAMAGES AGAINST SOO LINE RAILROAD COMPANY AND  
CANADIAN PACIFIC RAILWAY**

**INTRODUCTION**

When a corporation responsible for mass injuries is found to have ignored the probability of human suffering or to have simply made it part of a cost-benefit analysis, the law must step in and realign the priorities of that entity. This is the hallmark of and purpose for imposing punitive damages. Unlike compensatory relief afforded by civil law, which is designed simply to make the non-breaching party whole, punitive damages seek to deter certain conduct. That is, while breaching a common law duty under some circumstances may be a "rational" choice as long as the benefits outweigh the cost, punitive damages are designed to make actors conform their conduct to the public policy of not harming others, eliminating the cost-benefit calculus of human suffering.

While Soo Line CP pontificates about the "justice" of choice of law issues, the railroad must be reminded that, under any rational and just law, it cannot be permitted to prioritize making money over the value of human lives and health. Despite a nearly identical rail joint disaster that horribly disfigured and permanently disabled a 16-year old boy in 1994 just miles

from Minot, Soo Line CP continued to cut maintenance budgets and double its freight tonnage through that corridor in the period leading up to this derailment. Despite its recognition that ultrasonic joint bar inspections would have prevented the 1994 tragedy, Soo Line CP abandoned such inspections in the years leading up to this derailment. Despite all signs that the improperly maintained, lighter weight, secondhand 100 lb. rail was manifestly unsafe, especially when carting hazardous materials, Defendants would not maintain or replace the rail for one reason – money. For Soo Line CP, profits prevailed over safety, even if it meant eliminating necessary and overdue maintenance and capital expenditures.

#### STATEMENT OF FACTS

On January 18, 2002, at 1:18 a.m., Defendants' track catastrophically failed on the outskirts of Minot, North Dakota, derailing freight train 292-16 and sending train cars hurling through the subzero air. The crash caused the massive release of a cloud of noxious anhydrous ammonia that blanketed the town and its residents. One resident, John Grabinger, died as a result of breathing in the ammonia vapor; a multitude of others suffered serious, long-term injuries to their lungs, eyes, and skin – everywhere the noxious gas touched human flesh. Investigators and experts subsequently attributed the derailment to a broken "temporary" joint bar placed about 20 months earlier when a "plug" of rail was spliced into this old, used, continuous welded 100 lb. rail. Affidavit of Florence Cone. The temporary joint bars were still in place because Soo Line CP would not spend the money to weld these temporary joints, would not inspect the joints, and would not replace the worn, substandard 100 lb rail.<sup>1</sup> Unfortunately, a

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<sup>1</sup> The track at issue, like most mainline track in North America, is constructed of continuous welded rail ("CWR"). CWR is constructed of long lengths of rail, approximately 1400 feet which are joined together. "Maintenance work on continuous welded rail track requires considerably more care to assure safe operation of trains than does similar work on lines with conventional bolted rail." Exh. 1 at CP072346 ("Exh [ ]" refers to the respective exhibits

major derailment on this poorly maintained, substandard rail due to a broken joint bar was neither unprecedented nor unpredictable. In fact, an eerily similar derailment occurred only a few miles down the track eight years earlier.

**I. A Strikingly Similar 1994 Derailment Gave Soo Line CP Notice of the Dangers of Its Inspection and Maintenance Practices.**

On February 27, 1994, a Soo Line CP freight train derailed near Burlington, North Dakota, less than 5 ½ miles from the site of the 2002 Minot derailment. Like the Minot derailment, the cause of the 1994 derailment was a broken joint bar. Like the Minot derailment, the 1994 derailment occurred on 100 lb. rail in the Portal Subdivision.<sup>2</sup>

The 1994 derailment occurred mere feet away from the home of the Yale family. As Mr. and Mrs. Yale's 16-year-old son, Chad, stepped out his back door to investigate, a car loaded with butane exploded, engulfing him in a fireball that burned his body so severely that he was left with burns over 80 to 85% of his body. He survived, but remains disabled with profound skin injuries. Exh. 6. Soo Line CP subsequently opined that it would have been better for the boy to have died than to live with his injuries Exh. 7, Spence Dep. 48:18-21.

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to the Affidavit of David M. Cialkowski.). Moreover, "[t]he track time required to carry out maintenance on CWR is increased." Id. at CP072347. Notably, in CWR, joints "are the weakest components of this track structure" Exh. 2, CP033546. Not surprisingly, temporary joints are required to be welded "*as soon as possible after the rail is laid*" Exh. 3 SPC 12 2.3(c) at 2 (emphasis added); see also Exh. 4, Hanson Interview at 61 (June 12, 2002). To minimize the longitudinal forces of the expanding and contracting rail, the track is anchored into place with anchors that both clamp the rail and butt up to cross ties. Anchors both decrease the stress of tensile forces and control longitudinal movement of the rail—critical issues in maintaining a joint. "Rail anchors are vital and must be maintained to the higher standards for CWR." Exh. 2 at CP072347.

<sup>2</sup> The site of the Minot derailment is in a segment of Soo Line track known as the Portal Subdivision, which includes approximately 152 miles of track from Portal to Harvey, North Dakota. Exh. 5. The Portal Subdivision is part of Soo Line's St. Paul Service Area, which includes approximately 1500 miles of track running from Portal, North Dakota, to St. Paul, Minnesota.

The National Transportation Safety Board ("NTSB") determined that "the probable Cause(s) of this accident was: a joint bar or bars broke under the dynamic forces of the moving train, and the failure of the railroad to properly maintain the track structure." Exh. 8, CP078997. In documents produced in litigation between CP and its insurers over coverage of settlement payout amounts, Soo Line CP admitted that the joint bar that ultimately caused the train to derail had a preexisting crack that would have been detectable with a Kraut Kremer – a simple machine that can detect joint bar cracks not visible to the human eye. Exh. 9, ZR 000059.

After the Yale tragedy, Soo Line CP faced a major lawsuit by the Yale family. Soo Line CP hired Thomas Spence to assess its exposure. Mr. Spence's first stop was a meeting with Mirek Wierucki, CP's Chief Engineer of Tests, in January of 1996. In addition to confirming for Mr. Spence the findings of his preliminary report on the cause of the 1994 derailment – the broken joint bar – Mr. Wierucki told Mr. Spence that the cracked joint bar could have been detected, and replaced, prior to the derailment. Documents reflect Soo Line CP's own conclusion that there was a "considerable body of evidence indicating that the railroad had made a conscious decision to terminate the regular testing of rail joint bars in the area of the subject accident for financial reasons," citing the last Kraut Kremer test as having taken place seven months prior to that derailment. O'Rourke Dep. 101:23-102:5; Exh. 10 at 4. Soo Line had shut down the program of Kraut Kremer testing on joint bars in August 1993. Exh. 11, CP081942; Exh. 7, Spence Dep. 27:7-19. Although there was a qualified employee who asked to go back on the Kraut Kremer job in the area where the 1994 derailment eventually occurred, the employee was told that he would not be returning to that job until the following spring Id. at 27:19 - 28:3. Soo Line CP simply chose not to fill the position.

Two months after the Yale disaster, Soo Line CP conducted joint bar inspections on the 100 lb. rail in the Portal Subdivision. Exh. 12, CP081915. The inspection uncovered 62 joint bar defects on joint bars in the 100 lb. rail. Id. at CP081912.

Soo Line CP submitted to the Minnesota Court of Appeals a memorandum prepared by Defendants' attorney based upon his interview of Soo Line personnel. This memorandum admits that Mirak Wierucki,

[did] not believe a visual inspection by the track inspector would have revealed any of these [joint bar] fractures when one considers the fact that they would have been hairline at best and covered with dirt and debris. \*\*\* He also believes that had a Kraut-Kremer inspection been conducted in the fall of 1993, it probably would have revealed these cracks. \*\*\* He repeatedly went back to the fact that it was very unfortunate that the Kraut-Kremer broke down and the job was blanked in August of 1993. I had the impression that he felt this was probably one of the most significant problems in the case.

Exh. 9, ZR000059. Soo Line CP's own lawyers came to the conclusion that the railroad's suspension of the Kraut Kremer inspection program was its "Achilles heel" in the *Yale* case, Exh. 9, D009338, and that Soo had "a fairly certain punitive damages exposure," repeating that such exposure was "significant." Exh. 10, pp. 7-9. Indeed, the effectiveness of the Kraut Kremer device in detecting joint bar cracks was demonstrated by the 62 joint bar defects on the 100 lb. joint bars in that area. Exh. 12, Dep. Ex. 106, CP081915.

Due to overwhelming evidence of poor inspection and maintenance practices and deferred track upgrades, Soo Line CP settled the *Yale* case.<sup>3</sup> Soo Line CP felt that its conduct, if brought to light in a public trial, would expose it to punitive damages, would hurt its

<sup>3</sup> Although the settlement terms were supposed to remain confidential, the settlement amounts were subsequently made public when Soo Line disclosed them in the subsequent insurance coverage suit. Plaintiffs in the present matter will provide the Court the settlement amount under seal.

relationship with its carrier customers, and would result in increased scrutiny of railroad industry practices, translating into a loss of industry goodwill. Exh. 13, ZR001205. Additionally, Soo Line CP was worried that the government would shut its track down and require it to upgrade the track. Id.

When the Yale case settled and the NTSB completed its investigation, Soo Line CP simply discarded the evidence and rail components from the 1994 derailment. Defendants did no further investigation to come up with a corrective action plan, despite the instruction of Soo Line CP's Manager of Train Accident Prevention and Testing that "determining the cause of a train accident is critical to preventing a recurrence." Wierucki Dep. 196:9-13, 167.23 - 168:9, Exh. 14, CP035067.

**II. Soo Line CP Knew the 100 Pound Rail In the Portal Subdivision Was Substandard, But Did Not Replace It.**

The CWR at the Minor and Yale derailment locations consisted of 100 lb. rail on mainline track. One hundred pound CWR is extremely rare, as the industry uses at least 115 pound rail for mainline CWR track. In fact, of approximately 14,000 miles of track, the Soo and CP line have only a total approximately 63 miles of 100 lb. mainline CWR -- all of which are in the Portal and Carrington Subdivisions of the St. Paul Service Area. Exh. 15, O'Rourke Interview 30-31.

Moreover, the 45 miles of 100 lb. CWR in the Portal Subdivision, where the Minor and Yale derailments occurred, was old and worn out. It had been manufactured in 1948 and installed in Wisconsin in the 1950s. Carroll Dep. 77.18-24. Soo Line then re-laid the secondhand rail ("relay" rail) in the Portal Subdivision in 1973 after the railroad upgraded to heavier, 132 lb. rail in Wisconsin. Exh. 16. By the time the 100 lb. rail was installed in the

Portal Subdivision, it had already accumulated 312 MGT (million gross tons) of traffic. Carroll Dep. 98:11-13; O'Rourke Dep. 128:17-20; Exh. 16.

The railroad's own internal documents reveal criticism of its own use of 100 lb. rail on main line track. As early as 1994, CP also admitted the 100 lb. rail was "not adequate for the loads that were run on the line." Exh. 10, p. 6 (ZR001022). CP has admitted that 100 lb. rail is only "marginally adequate for non-main line track" by industry standards. *Id.* (emphasis added).

Even the Federal Railroad Administration ("FRA") was concerned about the 100 lb. rail. The FRA met with Soo in February 1995 to address its concerns about the condition of the 100 lb. rail in North Dakota. Defendants acknowledged the high defect rate of the rail, and specifically a concern regarding the growing percentage of service failures on the 100 lb. rail in the Portal Subdivision. Exh. 17, CPE0053858. Of course, "service failures," which get their name from train stoppages due to track defects, evidence the most serious defects. Carroll Dep. 201.9-12,

In response to the FRA crackdown, Soo Line CP provided the FRA a plan to control rail defects. Most important, Soo Line CP agreed to increase the frequency of ultrasonic rail testing because "testing frequency will reduce the incidents of service defects." Exh. 18, CPE0042309. But Soo Line CP employees continued to express concerns about the adequacy of the rail, stating that the biggest concern with this rail was the safety of the operation, and pointing out that the high service defect rates on the 100 lb corridor will cause a derailment. Ed Howard stated, in a June 1995 memorandum,

OUR BIGGEST CONCERN WITH THIS RAIL IS THE SAFETY OF OUR OPERATION. WITH THE HIGH DEFECT RATE WE ARE CONCERNED THAT AN UNDETECTED SERVICE FAILURE WILL CAUSE A DERAILMENT.

Exh. 19, CPE0136716-18. Mr. Howard then stressed the need to eliminate the joints in the 100

lb. rail in a memo dated August 3, 1995:

The 100# CWR between MP 316 to MP 334.4 on the Carrington Sub and between MP 469.3 to 514.4 on the Portal Sub will be scrap by the year 1999-2000 if we do not eliminate the joints that now exist. If we do eliminate the joints in 1996 I est. that the rail will be servicable to the year 1993-1994 [sic]. The reason that this rail was not shown in the present 4 year plan was that we had to prioritize our estimated needs and I felt that we should put this rail in the revised 4 year plan for relay in the year 2000.

Exh. 20, CPE0136645. A few days later, on August 18, 1995, Soo Line CP compared the costs of replacing the rail versus the cost of welding - \$13.7 million versus \$1.2 million - and ultimately decided to weld as opposed to replace the rail. Exh. 21; O'Rourke Dep. 169, 128:21-129:2.

Soo Line CP management finally met in Minot to inspect the rail in mid-1996. At that time, the rail was described as follows.

What we have here is 45.1 miles of 1947+- 100 RE rail that came off the old Soo main line near Chicago in the early 1970's, was cropped, welded and laid in between MP469.3 and MP514.4 on the Portal Sub in 1973 and 74. The anchors are pretty good, but the rail ends are quite battered. Over the years we have cut-in quite a few repair rails. The FRA is on-our-back about the high number of service failures and we have a 30 MPH order on the rail. The majority of the defects are in the joints.

We have a similar situation on the Carrington Sub between MP 316.2 and MP 334.5 This 100 RE CWR was laid new in 1957 and we are having joint problems because of old anchors and cut-in rail. This is a better rail than on the Portal Sub.

We need to make a decision on whether the rail can be saved and if so, for how long.

Exh 22, CPE0008487. To address the concerns over jointed, lightweight rail, Mr. Howard recommended in June 1996 that Soo Line reset all anchors and dedicate a five-man crew to weld 1,036 joints on the 100 lb rail from May through September in 1996, 1997, and 1998. Finally.

he recommended that, even with this extensive maintenance, the rail be replaced in 1999 and 2000. Exh. 22; Exh. 23; Howard Dep. 97; Carroll Dep. 216-17.

At the same time, Defendants again acknowledged the specific problem with "cracked bars" in the area:

The old Soo Line policy was not to weld their CWR Strings together, and also any repair that were out in the strings were not thermite welded. Thus there has been an accumulation of joints over the years, which is almost approaching a jointed rail condition making it difficult to hold surface. Also there is a problem of cracked bars. This condition is beyond the capability of a small thermite welding crew's ability to eliminate the joints and requires the use of Holland's in track welding production.

Exh. 24, CPE0002384. Defendants categorized the level of necessity for this work as "Essential to Operations & Safety." Id.

On March 18, 1997, Ed Howard collaborated with Larry Carroll to create a "4 Year Plan" for the St. Paul Service Area. Exh. 25. The plan scheduled the 45 miles of 100 lb rail running through Minot to be replaced in 1998. Id.; Howard Dep. 104:24-105.8. The plan represented the concerns of people on the ground in the service area who knew the conditions of the track McCall Dep. 161:1-6. Thus, Soo Line CP realized that there was a need to remove 100 lb. rail as early as March 1997. Id. at 161.7-14. Eight days later, a fifth revision of the plan reduced the number of miles to be replaced from 45 to 24.4, and in the process postponed replacement of the track running through milepost 471.65 until 1999 Exh. 26; Howard Dep 108:7-109:2.

By April 5, 1997, Soo Line management had eradicated all plans to replace the 100 lb. rail in the Portal Subdivision with new rail at any time, planning instead to replace the rail with "relay" (used), 115 lb. rail in 1999. Exh. 27; Howard Dep. 110:5-111:7. But this, too, was never done Instead, by the year 2000, there was no real plan to replace the line of 100 lb rail at all

between the years of 2000 and 2004. Soo Line replaced only the curves with 115 lb. rail, leaving all of the old, used, tangent (i.e., straight) 100 lb. rail in the Portal Subdivision.

**III. . . . Soo Line Applied a Band-aid Approach. Restressing the 100 lb. Rail to Save Money.**

Knowing that the proper remedy was to replace the 100 lb. rail, on September 2, 1998, Mike Hanson dictated that Soo Line would simply not spend the money needed for new or relay rail or even thermite welding of existing rail:

Notwithstanding the *physical need* that we see for doing a certain amount of work on the track structure, the dollars we have available for doing all of the work is a finite and absolute amount, and *although it does not satisfy our needs and desires, there is no more money.* The plan is the plan, and the plan for 1999 is to meet the financial spending levels set in the [multi-year plan] for 1999.

Exh. 28; Howard Dep. 213:14-25 (emphasis added). Management stated that it could save money by welding the rail rather than replacing it. *Id.* In short, instead of performing admittedly "needed" rail replacements, Soo Line CP opted to "restress" the existing rail in the Fall of 1998 so that the railroad could avoid the cost of having to replace the 100 lb. rail with heavier rail. Carroll Dep. 80:9-21; O'Rourke Dep. 104:17-23.

Restressing the 100 lb. rail involved knocking off existing anchors, heating the rail to a neutral laying temperature,<sup>4</sup> welding the joints, and re-anchoring the rail. Howard Dep 32:8-12; Carroll Dep. 219:13-15. Restressing attempts to correct the longitudinal movement of the rail created by temperature changes and by trains passing over the rail. *Id.* at 42:20-43:7.

Time proved that the 1998 restressing did nothing to halt or even slow the further infestation of rail defects and creation of joints. Soo Line CP management admits it knew that restressing would do nothing to extend the life of the rail because vertical or horizontal wear is

<sup>4</sup> Laying temperature is a preferred temperature at which CWR should be laid. See generally, Exh. 3, SPC 12-2.6).

not curtailed by restressing. McCall Dep. 70:17-24, O'Rourke Dep. 161:6-8. Moreover, Edgar Schoenberg, the section crew foreman maintaining the 100 lb. rail, testified that "restressing didn't really help" -- that there were still many problems with the rail. In fact, he says the track was "overstressed" and that some of the problems in the track were worse after the 1998 restressing. Schoenberg Dep. 46:13-22. The defect rate in the 100 lb rail went from 5 defects per mile prior to the 1998 restressing to .95 defects per mile after restressing. Hanson Dep. 194:14-18, 195: 1-4. Furthermore, from 1999 to 2001, the 100 lb. rail in the Portal Subdivision demonstrated a defect rate three times that of the adjacent 115 lb rail. Id. at 201:24-202:2.

With these defects came the cutting in of replacement plugs and the installation of "temporary" joints. By October 1999, Track Maintenance Specialist Larry Carroll reported to Mike Hanson that the Portal Subdivision had 935 joints, 146 of which occurred in the Kenmare section (100 lb. rail). Hanson Dep. 197:19-23 Every year, 600 new joints were installed in the St. Paul Service Area. Hanson Dep. 239:4-6. The creation of new joints greatly outpaced the meager efforts to eliminate them.

In short, the railroad knew the 100 lb. rail was bad and should be replaced. Instead of incurring the costs of replacing the rail, the company applied a band-aid -- restressing the rail. That band-aid did not, and could not, change reality, however, and in fact the restressed track was soon filled with many new "temporary" joints. Thus, the same issues of bad rail and joints that had plagued the track prior to the Yale disaster continued to plague the track in the time leading up to this derailment.

Soo Line CP's knowledge of the state of the 100 lb. rail shows that it deliberately chose to sacrifice safety in order to draw increased profits. CP knew that it should replace the 100 lb rail but deliberately left this safety hazard in place. The reason was simple. Bringing the rail up

to industry standards of at least 115 lb. rail would have entailed diverting profits to track expenditure budgets – a thought that CP could not countenance.

**IV. While Slashing the Budget, Soo Line CP Eliminated the Kraut Kremer Testing, Which Soo Knew is Imperative to Eliminate Cracked Joint Bars in the Track.**

Another significant and unconscionable way Defendants cut the budget in favor of larger profits, and at the expense of safety, involves Soni-rail testing, also known as Kraut Kremer testing. In 1996, Defendants admitted that failing to inspect temporary joint bars on 100 lb. rail with a Kraut Kremer device was the "Achilles's heel" of the 1994 derailment. Soo Line CP knew that temporary joints were accumulating in the rail, and that they were being left there for months and sometimes years. Defendants knew this was light weight, 100 lb. rail, and that a significant tonnage of traffic was beating over that track.

Despite this clear knowledge of the need for Kraut Kremer inspection to detect broken and cracked joint bars, at no time prior to the Minot derailment did Soo Line CP reinstate the Kraut Kremer position. As Brian O'Rourke testified, he could have recommended annual or semi-annual Kraut Kremer inspections, but he never did so. O'Rourke Dep. 71-72. In fact, at no time prior to the Minot derailment did the company make ultrasonic inspection of the joint bars the standard. Instead, the company relied on visual inspections, which could not detect internal, hairline cracks. Id. at 72-73.

Brian O'Rourke, who was the head of CP's track operations, has testified that a Kraut Kremer operator was not in the budget in 1999, 2000 or 2001. O'Rourke Dep. 99. In fact, Mr. O'Rourke testified that the Kraut Kremer position was not funded for the 4 years prior to the Minot derailment. Id. at 101. In 2000, as part of the budget cutting process to maximize profits, Soo Line CP eliminated the Soni-rail position altogether, and also eliminated the one, much needed, five-man thermite welding crew. Howard Dep. 204-9 - 205.11; Exhs. 29 and 30.

The fractured joint bars from the derailment site show progressive deterioration that could have been detected early using the Kraut Kremer inspections. Cone Aff. Larry Carroll admits that joint bar testing allows one to detect cracks in joint bars even before they can be seen visually. Such cracks would require "immediate" replacement. Carroll Dep. 107:22-108:6.

Instead of using the Kraut Kremer, Soo Line CP employees inspect the track by hi-rail on a weekly basis, using only their eyes and an apparently intuitive sense of how the track "feels" under the wheels of a hi-rail vehicle.<sup>5</sup> Employees admit that hi-rail inspection can only detect blatantly obvious, broken joint bars by sight or by "the feel" of the hi-rail vehicle over the rails. They cannot "feel" cracked joint bars, and they cannot see hairline cracks in joint bars from a hi-rail. They only see if a joint bar is "completely broken and the rail is pulled." Moreover, the inspector "only ha[s] visibility on three sides of the rail. You can see the inside of one, and both sides of the rail you are sitting on, but ... on the passenger side, you cannot see the outside." Exh. 31, Enge Interview at 39.

A Kraut Kremer is the only piece of equipment that can detect internal cracks in joint bars. Carroll Dep. 108:3-6. By the time the rail restressing was done in 1998, CP had completely abandoned any routine Kraut Kremer testing on the 100 lb. rail. See Hanson Dep. 162:2-5 (no Kraut Kremer inspection program in 1999) Though Defendants attempt to justify this lack of testing based upon the 1998 restressing, their position is untenable. O'Rourke Dep. 104:10-16 Not only did Defendants know that restressing does nothing to halt the creation of new joints, but they also had actual knowledge that, just one year after the 100 lb. rail was

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<sup>5</sup> A hi-rail is a truck that sits up on the rails and drives down the rail, during which the driver makes observations concerning the general condition of the track. Howard Dep. 235, 23-236.2.

restressed, Soo Line had already installed 146 "temporary" joints in that track. Exh. 32, CP 060513

The decision not to do Kraut Kremer testing was a conscious decision Soo Line CP made for financial reasons:

Q Are you telling me that the CP doesn't have the ability to hire somebody to do a Kraut-Kremer inspection when it wants to get it done?

A They had the ability to do it, *but then they would pay a time claim* because this was work assigned to the maintenance of way union people, and you can't go and hire people to do jobs that the maintenance of way people have the capability of doing.

Q Presumably, if the maintenance of way people didn't want to do the job, you *could have also raised the hourly rate* or wage paid and you would have probably found people to do it, right?

A That was the assumption, I suppose, correct.

Q Or if no one from the union steps up, then you have the ability to go and do it out-of-house, but *it's going to cost you a little more money*, right?

A Yes.

Q So again, *it's a money issue*, right?

A Yes.

Q And CP chose not to spend the money to make sure that that 100-pound rail in the Portal subdivision was ultrasonically tested with Kraut-Kremer devices on a regular basis, correct?

A Year-round, yes.

Carroll Dep. 110:18-111:16 (emphasis added); see also id. at 135.23-136:16 (although Carroll would bulletin Kraut Kremer job from time to time for union employees, Soo Line CP would not fill it if no one volunteered because it would be "expensive"). Of course, CP's Chief Engineer of Tests had stated that use of the Kraut Kremer would have revealed the cracks in advance of the Yale derailment had it been used. Exh. 9, ZR000059.

There is no record of the joint at Milepost 471.65 ever being tested by the Kraut Kremer, and indeed, since the testing job had been blanked (i.e., abolished) years before, the only reasonable conclusion is that the joint was not tested. See Exh. 33, CP 090191; O'Rourke Dep. 71:7-12. This decision saved Soo Line CP money, but it cost John Grabinger his life and left thousands of others with painful chemical injuries.

V. The Joint at the Derailment Site, Milepost 471.65, Failed Because of Defendants' Refusal to Allocate Money to Replace the 100 lb Rail, to Weld and Eliminate Temporary Joints, and to Invest in Proper Inspections and Maintenance of the Track.

The story of the joint at the Minot derailment is consistent with the larger picture of deliberate indifference to the safety issues in the 100 lb. rail and, more specifically, the joints in that track. The joint that failed in Minot is one of the many "temporary" joints that Soo Line CP allowed to accumulate in its track. The plug was installed at milepost 471.65 in May 2000, creating two joints, when the local section crew removed some defective rail from the track. Hanson Dep. 48:18-22, 75:15-76:1. The crew cut in a plug and used joint bars to create "temporary" joints connecting the plug to the ends of the CWR. The joints were allowed to remain in the track for nearly two years. Exh. 34, Schoenberg Test. at 32-34.

There was specific notice about problems at the area of this joint. First, in December of 2000, two joint bars at a joint at milepost 471.6 broke and had to be replaced.<sup>6</sup> Exh. 35, CP034217, Exh. 36. The breakage was notice that the rail was pulling on this track. The following Spring 2001, the section crew replaced the original bolts of the joint bars at the derailment site (milepost 471.65) because the bolts were bent in a manner that indicated that the

<sup>6</sup> A review of the inspection and repair reports reveals that neither Mr. Enge nor Mr. Schoenberg reported mileposts to the hundredth. They reported to the tenth degree – such that 471.65 would be reported as 471.6 or perhaps 471.7.

rail was pulling apart. Exh. 34, Schoenberg Test. at 55-56; Exh. 37, Schoenberg Interview, March 27, 2002, at 47-48. During the course of the year 2001, track maintenance employees reported to Soo Line CP management that they encountered five incidents of broken joint bars within a mile from milepost 471.65. Exh. 35. Workers also reported three broken rails within three miles of the derailment site. Id. And there were three pull-aparts within five miles of the derailment. Id. All of these problems indicate that the tensile forces were pulling at the joints in the track.

Post-accident evidence confirms that the rail was, in fact, pulling at the joint. The bolts found in the joint bars at the derailment site indicated double bending, consistent with tensile loading of the rail. Cone Aff. Moreover, there was evidence of longitudinal movement. Id.

Still, Defendants did not take the logical corrective action – schedule the joints in that area for welding. Instead, Soo Line CP allowed the “temporary” joints at the derailment site to remain in the track for 20 months. Finally, one of the joints catastrophically failed and caused the Minot anhydrous ammonia disaster. Exh. 33, Schoenberg Test. at 32-34.

#### VI. Soo Line Slashed the Budget for St. Paul Service Area, Eliminating Maintenance Crews and Cutting Overtime.

The decision not to replace the 100 lb. rail was not the only budgetary cut that contributed to the Minot derailment. As Mr. O'Rourke admits, CP was doing everything in its power to increase its value in the eyes of shareholders with an eye toward spinning off the company or making it go independent. O'Rourke Dep. 130:8-13

In September 1995, Soo had reduced its “Basic Track Maintenance Force” (day-to-day maintenance employees) by 14% (72 positions) in order “to improve the competitive position of the railroad.” -Exh. 38, CPE0001309. Even knowing that it had problematic track and short staffing, Soo Line's track engineering department stated that it could live with a hiring freeze in

the St. Paul Service Area.<sup>7</sup> Exh. 39, CPE0114282. While such a hiring freeze would leave that line with an admitted shortage of 11 men, Ed Howard, Manager of Track Maintenance, stated that "we can work around this." Id.

In February 1999, Ed Howard announced that overtime would be cut by 30%. Exh. 40. Approximately one month later, Soo Line CP again reduced the basic track force, including Soo Line District employees, due to an alleged "downturn in revenue." At that time, Mike Hanson reported that the Portal Subdivision was understaffed by 35.5 positions. Exh. 41, CPE0098406. Despite this acknowledgement, Mr. Hanson asked his team to provide a plan for even further reductions in labor and staffing levels. Exh. 42.

Importantly, Ed Howard's response indicated, among other things, that such cuts meant that maintenance workers would no longer have the time to do any thermite welding, and if there were a 7.5% cut, there would be no more Soni-rail (Kraut Kremer) testing on the joint bars. Howard Dep. 204:9 - 205:11; Exh. 29. Ultimately, Mr. Howard directed human resources to reduce Soo Line's engineering operating budget by 18 employees, which, importantly, eliminated two Soni-rail men (i.e., men to do the Kraut Kremer testing) and an entire five-man thermite welding gang. Exh. 30. Thus, Defendants had not only decided not to replace the 100-lb. rail, but had abolished positions that would eliminate the joints and had also cut the joint bar inspection positions. Soo Line CP eliminated another one million dollars from its maintenance budget in 2000. Hanson Dep. 259:17-25.

Soo Line CP was on notice that the maintenance workers were short staffed, particularly those working on the 100 lb. rail in the Portal Subdivision. In the Fall 2000, the railroad asked

<sup>7</sup> Soo Line, headquartered in the Twin Cities, is responsible for track engineering and maintenance in the St. Paul Service Area, including the Portal Subdivision, which contains Milepost 471.65. Carroll Dep. 38:19-25.

all Engineering Services employees to respond to a questionnaire concerning training, safety, rules, policies, and attitude. Maintenance employees responded that they lacked manpower to perform tasks both timely and properly, that Defendants were placing productivity ahead of safety, and that program employees were not getting "necessary training." Exh. 43, CP069119.

Despite this information and the increasing tonnage on the track, Defendants continued to cut the budget and refused to add necessary maintenance personnel.

**VII. While Slashing the Budget, Soo Refused to Allocate Money to Thermite Welding Program, Which Is Necessary to Eliminate Joints.**

One of the most important, and most unconscionable, budgetary decisions Defendants made was to refuse to fund a thermite welding program that would eliminate joints from the track in a timely manner Defendants admit that reductions in the 1996 capital budget for joint elimination in its 100 lb rail would "negatively affect" "the current level of safe operation of the Soo Line." Exh. 44, CPE0125367. Yet, they refused to fund the welding program to eliminate the joints.

By 1999, management had locked in an operations budget that would cover only 3% of thermite welds that engineers deemed necessary. Despite the need for 7,379 thermite welds in the Soo District (from Portal, ND to Chicago, IL), Defendants allocated a scant \$50,000 for joint elimination in that district. Exh. 45. Larry Carroll estimates that the \$50,000 would pay for only 100 welds. Carroll Dep. 242:20-25; Hanson Dep. 228:17-20. In 2000, only \$75,000 was allocated for joint elimination, providing a total of only 150 welds, and 2001 rendered only \$250,000 for a total of 500 welds Over a period of three years, there was funding for only 750 welds for the entire line from Portal to Chicago. Notably, 1,252 of the "thermite weld requirements" in 1999 were in the Portal Subdivision alone Carroll Dep 241-42 Thus, the

funding over three years for the entire area from Portal to Chicago was not even sufficient to cover the needs for the 152 miles in the Portal Subdivision in one year. Hanson Dep 229:5-9.

Soo Line CP management knew that the installation of new joints was far outpacing its meager joint elimination efforts but, once again, refused to incur the costs to assure safety. *Id.* at 240:3-18. Further, in April 2000, Soo Line CP eliminated entirely one of two thermitic welding crews from its expense budget and shifted it over to its severely strained capital budget (\$75,000 for 2000, cf. *supra.*). Hanson Dep. 254:5-19.

The financial picture reveals Defendants' low priority for joint elimination. Out of a capital improvement budget of approximately \$85 million from 1999-2001, Defendants devoted only \$375,000 (.4%) to joint elimination. Hanson Dep. 232:16-235:13 Mr. Hanson admits that these actions showed no significant dedication to joint elimination. *Id.* Despite knowing that joints are a weak spot in the track, knowing the substantial increase in traffic over the rail, and knowing that the railroad was "falling farther and farther behind" with the creation of new joints, Soo Line CP deliberately budgeted amounts that paid for less than 5% of welds that were needed. *Id.* at 236:13-17, 237:15-238.2, 239:2-10, 240:3-18.

**VIII. Soo Line CP Substantially Increased the Tonnage Going Over the Track in the Portal Subdivision.**

While Soo Line CP deliberately did nothing to maintain its track, Defendants increased tonnage over the rail dramatically. From the time it was installed until the Minot derailment, the track in the Portal Subdivision saw a continual and significant increase in traffic, as set out

below:

1973 to 1975	5.5 MGT
1975 to 1980	6.5 MGT
1980 to 1985	8.5 MGT
1985 to 1990	9.6 MGT

1990 to 1995	14.6 MGT
1996	17.5 MGT
1997	18.4 MGT
1998	20.4 MGT
1999	20.9 MGT
2000	24.0 MGT
2001	25.8 MGT
2002	28.2 MGT
2003	30.1 MGT

Exh. 46, CP091450; Exh. 47, CPE0102225. As Defendants admit, increased train tonnage, frequency, and speed all increase the longitudinal movement of the rail. Howard Dep 43:8-21. Increased tonnage also means more stress on joint components, translating to a need for more maintenance. Management was aware that increased tonnage required more manpower. Carroll Dep. 50:16-18.

**IX. Soo Line CP Knowingly Failed to Create a Safe Joint at Milepost 471.65, In Direct Violation of Its Own Policies and Procedures.**

In May 2000, a crew "cut in" a new piece of rail at milepost 471.65 to replace defective rail, and thereby created the joint that ultimately failed on January 18, 2002. Hanson Dep. 48:18-22, 75:15-76:1. The crew used joint bars to create joints connecting the plug to the cut out ends of the CWR. The crew placed 4 bolts in the joint bars, even though the joint bars can take 6 bolts, and suspended the joint itself between the two rail ends, as opposed to placing the joint between the rail ends on a tie. Wierucki Dep. 138:20-139:21; Hanson Dep. 45:5-47:5. By leaving the middle area of the joint bars (where the rail ends meet) unbolted and placing the joint between cross ties, the crew facilitated the expected immediate welding of the rail ends and elimination of the joint. Wierucki Dep. 146:23-147:25; Carroll Dep. 69:13-17.

According to Soo Line CP's Standard Practice Circular ("SPC") 14, which governs the placement of joints in CWR territory and took effect on April 1, 2000, such a four bolt joint is a

"temporary" joint. Exh. 48, O'Rourke Dep. 110-112.<sup>8</sup> SPC 14, Section 3.2 mandates that temporary joints be replaced when batter exceeds 0.015 inches. O'Rourke Dep. 112-113. Instead, this "temporary" joint was allowed to remain in place until January 18, 2002, when the broken joint bar caused the derailment. At the time of the derailment, the batter on the rail ends exceeded 0.015, and the temporary joints should have been made permanent joints.<sup>9</sup>

Thus, not surprisingly, a temporary joint must be just that – temporary. Dan Krause, who was part of the crew in the Minot area, has testified that the practice was to place a temporary joint only if it was anticipated that a welding crew will weld the joint in the next 30 to 50 days. Krause Dep 62:23-63:1. Of course, as set forth above, the chances of having a joint actually welded in the Soo District at this time were slim to none. Here, the joints were allowed to remain in the track for nearly two years in violation of Soo Line CP's own standards. Exh. 34, Schoenberg Test. at 32-34. The fact that the joint broke on January 18, 2002, and caused the derailment is the direct result of Soo Line CP's policy favoring cash over safety.

Soo Line CP also ignored its own anchoring requirements. To minimize the longitudinal forces of the contracting rail, rail is anchored into place with anchors that simultaneously clamp the rail and butt up against the cross ties. Anchors both decrease the stress of tensile forces and control longitudinal movement of the rail – critical issues in maintaining a joint. As the Soo Line CP SPCs provide, "rail anchors are vital and must be maintained to the higher standards for

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<sup>8</sup> The SPCs are CP's own standards for how it should operate its rail. O'Rourke Dep. 110.

<sup>9</sup> In this regard, the 4 bolt joints are not nearly as strong as the 6 bolt "permanent" joints. Four bolts can only restrain 50,000 lbs of tension, as opposed to the 75,000 lbs. six bolts can restrain

CWR." Exh 49, SPC 19. SPC 19, which governs the anchoring of joints cut into CWR, explicitly states that:

For those joints created in CWR through the process of cutting in rails, box anchor every tie for the first 195 feet on either side of the strings that butt up to the newly installed rail.

Id. O'Rourke Dep. 264-65. SPC 19, along with SPCs 12 and 28, make clear that anywhere a CWR string ends or a joint appears, every tie on the attached CWR string must be box anchored for at least a total distance of 195 feet. See Exh. 49, SPC 19 2.0 at 2; Exh 50, SPC 28 10.0 at 4. Here, the ends of the CWR strings at the derailment site were box anchored only at every other tie. As Brian O'Rourke admitted in his deposition, Soo Line CP was not in compliance with SPC 19 at the derailment site. O'Rourke Dep. 265-66.

This lack of compliance was no mistake, but a result of a conscious failure on the part of Soo Line CP management to adequately train its employees in the new SPCs, which took effect on April 1, 2000. At the time the rail plug was installed in May 2000, Soo Line CP claims that the Minot employees had not yet been trained on the new SPCs. O'Rourke Dep. 266. When they were trained, the training was inadequate, and clearly did not take. Even after the derailment, O'Rourke surveyed the crew, and they did not know that Soo Line CP required the rail abutting the joints to be box anchored for 195 feet. O'Rourke Dep. 276-280, Exh. 51

Again, this should have come as no surprise to Soo Line CP. A safety audit conducted in 1997 of Soo Line concluded that there was a lack of training on the SPCs and that the SPCs were not always adhered to. Exh. 52; O'Rourke Dep. 253. Soo Line CP's only response to this finding was a one-day training session on the new SPCs that were rolled out in 2000, which amounted to one day of training on some 40 new SPCs. O'Rourke Dep. 254-56. Thus, the failure of the Minot crew to correctly anchor the rail at milepost 471.65 was a direct result of a conscious

decision by Soo Line CP to ignore the finding of its own safety audit, to refuse to fund adequate training for the Soo Line CP employees, and to foster a culture of ignoring the SPCs in place, including the SPCs governing joint bars, temporary joint bars and anchors. Given this pattern and practice, it was never a question of whether a derailment would occur on the 100 pound rail, just a matter of when.

X. The Railroad's Motivation for Its Substandard Practices Was to Increase Profits. The reason the inspection and maintenance practices in the St. Paul Service Area were inadequate, and the reason CP and Soo cut so many workers, slashing maintenance budgets in numerous respects, boils down to one word: Profits. In March 2001, Neal Foot, CP Vice President of Engineering and Mechanical Services, and Ed Dodge, Executive Vice President of CP, issued a memorandum informing Mr. Hanson, the St. Paul Service Area manager, of a decision to spin off all of the parent company's subsidiaries. Exh. 53; Hanson Dep. 275:12-276:17. Soo Line management, including Mr. Hanson, was asked to make major changes to existing capital and expense projects related to maintenance operations. Exh. 53; Hanson Dep 277:7-11. Soo was asked not to fill any vacant positions. Hanson Dep. 279:12-19.

In August 2001, Soo was asked to make even more budgetary cuts in order to live up to "plans for long term success" that CP senior executives had told investors at the end of July 2001. Exh. 54. Budget reductions were sought "in addition to the reductions that have already been undertaken." *Id.* Specifically, there was a push to reduce overtime. *Id.* Notably, Soo management had *already* cut its use of overtime to times "only when we need it." Hanson Dep. 283:21-25. Nevertheless, Soo Line CP made further cuts to track maintenance overtime. *Id.* at 286.2-6; Exh. 55.

Management represented that the staff cuts and reductions in overtime were necessary because of a "downturn in revenue"; however, Soo Line CP's public filings paint a very different

picture. Revenues (excluding non-recurring items) were nearly \$3.7 billion in 2001 compared to \$3.4 billion in 1998. During that same period of time, because of the cuts, operating expenses attributable to "compensation and benefits" declined significantly from \$1.3 billion in 1999 to \$1.12 billion in 2001.

All of the budget cuts can be understood against the backdrop of the railroad's Integrating Operating Plan ("IOP"), adopted in 1999. The purpose of the IOP was to create more efficient scheduling. The impact of the IOP was to "operate longer and heavier trains" and "significantly reduce the cost basis of operations." See Exh. 56, Corporate Profile, p. 26. Beginning in 1999, with the implementation of the IOP, the railroad engaged in aggressive cost cutting

The railroad's management was very proud of its aggressive cost reduction activities.<sup>10</sup> The comments of Robert Ritchie, CP's President and CEO, are instructive. In 2000, Ritchie stated:

The numbers for 2000 show that our revenues increased \$159 million, expenses were up \$79 million and operating income ... rose \$83 million ... compared to 1999. What is not readily apparent in these numbers is our successful expense containment effort. Expenses rose 3% on 10% more volume and high fuel prices, meaning that we flowed better than two-thirds of the additional business directly to the bottom line.

Exh. 58, 2000 Annual Report, p. 1. Likewise, in his message to shareholders in 2001, Ritchie stated:

Looking forward, we expect continued uncertainty in the economy through the first half of 2002, and possibly continuing into the second half. We will continue to attack costs aggressively, and we have the ability to do what's needed.

See Exh. 59, 2001 Annual Report, p. 7.

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<sup>10</sup> Reduced expenses and increased revenue deliver an increase in operating margins which, in turn, increase the personal wealth of top management. See Exh. 57 pp. 12-14

Neal Foot, CP's Senior Vice President Operations, conveyed a similar message. Foot stated in 2002:

Since we implemented the operating plan in 1999, it has taken more than \$300 million out of CPR's cost base. It has transformed the way we run our trains and serve our customers. It allows us to move more freight on time with fewer resources than at any other time in recent history.

Exh. 56, p. 25. Similarly, CFO Michael Waites told the railroad's shareholders in 2001, "With this continued cost discipline, CPR expects to drive more revenue and volume growth to the bottom line." Exh. 59, at 9

In its 2000 year end report to shareholders, the railroad noted:

Continuing cost containment programs are seen as vital to the achievement of the Company's financial performance targets. In 2001, CPR expects to complete a program of cost reductions which started in 1999. Two of the main elements of these cost reduction initiatives were the introduction of a new operating plan and the elimination of 1,900 permanent positions.

Exh 58, p. 27. There is little doubt that in the time period preceding the accident, the Company was driven to reduce costs, and the reduction in cost was encouraged by a Board of Directors which incentivized management to meet certain financial criteria through a bonus program. See Affidavit of Harvey A. Levine, Ph.D.

**XI The Railroad Was Being Warned At Several Levels that Its Budget Cutting Practices Were Making the Track Dangerous.**

Eerily, on January 17, 2002, the day before the derailment, TrainsCan.com, an online information resource for the Canadian railway community, reported:

BMW is worried that CPR has cut too far into their maintenance of way crews to be able to guarantee the safety of the public. John Kruk, BMW System Federation General Chairman noted that, "It took a lot of cuts over the last few years before we came forward with concern, but we feel strongly that CPR has now crossed the line on safety and we all need to be aware of this." \*\*\* "These trains are often comprised of 85 ton

rail cars filled with dangerous commodities like liquefied petroleum gas, chlorine, caustic soda, sulphuric acid, etc. It is clear to see the potential for disaster for those who live alongside CPR Tracks."

Exh. 60, www.traincan.com., 2/26/2003 (emphasis in original).

The BMWE at large was not the only one voicing concerns about Soo Line CP's lack of maintenance. Edgar Schoenberg attended a safety meeting on January 17, the eve of the derailment. Schoenberg Dep. 102:15-22. Mr. Schoenberg asked management whether and when they would replace the 100 lb. rail running through Minot, because he and his co-workers were concerned about it. Id. at 112:4-11, 113:5-13. The maintenance workers had voiced concerns in the past and wanted the company to replace the 100 lb. rail as soon as possible. Id. at 113:14-17.

In fact, Mr. Schoenberg and his crew were somewhat nervous about the 100 lb. CWR track on January 17, 2002, because the temperatures were dropping outside and no one had ridden over the track to inspect it. Id. at 105:23 - 106:1. "If temperature drops, you can usually look for trouble the next day." Id. at 56:8-11. So Mr. Schoenberg asked management if he and his crew could hi-rail the track on their way home to inspect it. Id. at 114:4-6. In typical fashion, and despite all it knew about the 100 lb. rail and joints, management denied Mr. Schoenberg's request. Id. at 114:7-10. A ride on the rail would have meant that the company would have to pay overtime. Id. at 114:21-25.

Later that night, a train derailed on the track, spewing hundreds of thousands of gallons of anhydrous ammonia and creating a giant, poisonous, aerosol cloud. Fear, chaos, serious injury, and death ensued. This happened a mere 5 ½ miles from the previous disaster that had left 16-year-old Chad Yale disfigured for life

**XII. See and CP Actually Quantified the Value of Risk and Lives. Finding that the Risks Presented by the Track Was Worth the Savings In Money.**

Defendants have articulated a chilling comfort level with death and human injury caused by track failures. As part of its "Capital Programs Risk Assessment Matrix," developed in August 2000, Defendants categorized the risk of "death or permanent disability" (catastrophic) that is "unlikely but can be expected to occur sometime" (remote) as "tolerable with mitigation." Exh. 61, CPE0117960-61.<sup>11</sup> Defendants further determined that permanent partial disability or temporary total disability was tolerable when the event was "likely to occur sometime over a few years" Id. Defendants also concluded that minor injuries that would certainly occur several times over a few years were perfectly acceptable. Id. This analysis is precisely the type of cost/benefit analysis of human suffering that punitive damages curtail

**ARGUMENT**

**THE MOTION TO AMEND SHOULD BE GRANTED UNDER MINNESOTA LAW, BUT PUNITIVE DAMAGES ARE APPLICABLE UNDER BOTH MINNESOTA AND NORTH DAKOTA LAW.**

This motion addresses only whether Plaintiffs are entitled to amend their Complaints to seek punitive damages. As set forth below, Plaintiffs are entitled to such an amendment under either Minnesota or North Dakota law.

Defendants have brought a Motion for Partial Summary Judgment on Choice of Law. Defendants seek the application of North Dakota's punitive damages statute. The reason is straightforward. Defendants' chosen home state, Minnesota, does not place a limit on punitive

<sup>11</sup> Text of matrix is misaligned in original. A proper alignment of text is recreated by plaintiffs in a table at end of document

damages. North Dakota, one of fourteen states in which the Defendants do business, limits punitive damages to the greater of \$250,000 or two times compensatory damages.

The issue of which state's punitive damages law should apply will be fully addressed in response to Defendants' motion. In short, however, it is telling that Defendants' 25-page brief arguing for the application of North Dakota's punitive damages statute fails to cite a single case addressing the choice of law analysis applicable to punitive damages. Minnesota has the far stronger interest in punishing a forum state defendant as a deterrent effect with respect to future conduct.

In that regard, cases and commentators consistently note that the most significant choice of law factor regarding punitive damages is the interest of the defendant's home state in punishing and regulating conduct. In re Air Crash Disaster Near Chicago, IL, on May 25, 1979, 644 F.2d 594, 612-13 (7<sup>th</sup> Cir. 1981); Kelly v. Ford Motor Co., 933 F. Supp. 465, 469 (E.D. Pa. 1996); Keene Corn. v. Inv. Co. of N. Am., 597 F. Supp. 934, 938 (D. D.C. 1984). The Minnesota Supreme Court has explained that parties who purposely seek the advantages offered by a state ought not be allowed to avoid the burdens associated with their choice. Jepson v. General Casualty Company of Wisconsin, 513 N.W.2d 467, 471-72 (Minn. 1974). Appropriately, the Court in Jepson described forum shopping in the context of a party who deliberately takes advantages of the benefits of the state, then attempts to avoid the obligations related to those benefits. Id. at 471-72

Here, Defendants purposely chose to make Minnesota their home state and to seek the advantages offered by Minnesota in doing so. Defendants now seek to avoid Minnesota's punitive damages law which is designed to punish and deter wrongful conduct by allowing for

unlimited punitive damages. Minn. Stat. § 549.20; Fanselow v. Rice, 213 F. Supp.2d 1077, 1085-86 (D. Neb. 2002).

Defendants' efforts at misdirection go so far as to relabel the fourth choice of law factor applied by Minnesota courts. As actually stated, the fourth factor is the "advancement of the *forum's* governmental interest." As described by Minnesota courts, this factor involves inquiry into the choice of law that would most effectively advance a significant interest of the *forum* state. Danielson v. Nat'l Supply Co., 670 N.W.2d 1, 8 (Minn. Ct. App. 2003); Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 455 (Minn. Ct. App. 2001).

Rather than address this factor as actually worded and applied, Defendants simply restate it as the "advancement of the states' governmental interest" and proceed to discuss North Dakota's interest in the Minot derailment. As part of that argument, Defendants discuss at length North Dakota's interest in capping punitive damages to promote entrepreneurial activity within North Dakota. North Dakota, however, has little interest in limiting the punishment of an out-of-state corporate defendant that caused enormous damages within the State of North Dakota. See Fanselow, 213 F. Supp. 2d at 1085 (finding a state has little interest in applying its punitive damages law where its only connection is that it was the location of the accident).

Accordingly, Plaintiffs are confident that Defendants' motion will be rejected when fully briefed and heard on the merits. This Court, however, need not resolve the choice of law issue in order to allow Plaintiffs to amend their Complaint to seek punitive damages as Plaintiffs are entitled to such an amendment under the standards as set forth in either state.

**A. Plaintiffs Have Established a Prima Facie Case Supporting Punitive Damages Under Minnesota Law.**

Minnesota Statutes section 549.20 provides the substantive standard for awarding punitive damages. It states in relevant part:

Subd. 1 (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights and safety of others.

(b) A defendant has acted with deliberate disregard of the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

M.S.A. § 549.20.

Under Section 549.191, a plaintiff must obtain leave of court to amend its complaint to seek punitive damages. Olson v. Snap Prods., Inc., 29 F. Supp.2d 1027, 1034 (D.Minn. 1998).

"The plaintiff is not required to demonstrate an entitlement to punitive damages *per se*, but only an entitlement to allege such damages." Id.

Minnesota Courts have defined *prima facie* evidence as that evidence which, if unrebutted, would support a judgment in that party's favor. Id. *Prima facie* does not refer to a quantum of evidence, but rather, to a procedure for the winnowing of nonmeritorious punitive damages claims. Olson, 29 F. Supp.2d at 1034. In turn, a plaintiff's motion should be granted if the motion and supporting affidavits reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with deliberate disregard. See Swandlund v. Shimano Industrial Corp., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990). Minnesota courts do not review any facts defendants may present, but rather focus solely on the facts plaintiffs may present at trial without contradiction or rebuttal. Id. -A mere showing of negligence is not sufficient; instead, the conduct must be done with malicious, willful, or reckless disregard for the rights of others. Olson, 29 F. Supp.2d at 1035.

Where the evidence is sufficient to permit the jury to conclude that it is highly probable that the defendant acted with deliberate disregard to the rights or safety of others, the clear and convincing standard is satisfied. *Id.* at 1036. The clear and convincing standard was met in Olson, where the defendant recognized a hazard and failed to take adequate measures to minimize the hazard, thereby disregarding the public's well-being. *Id.* at 1038-39. Similarly, in Grvc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980) there was sufficient evidence for punitive damages where the defendant was aware of the flammable characteristics of the pajamas it marketed and knew of economically feasible measures to prevent the flammable hazards, but nonetheless decided to save costs by not treating the pajamas with flame retardant materials. *Id.* at 739-741.

Following this case law, district courts have granted punitive damages amendments in a variety of cases where the conduct at issue, while serious, did not rise to the level of egregious conduct presented here. Plaintiffs' counsel obtained the following sample of orders granting punitive damages amendments locally:

- *Lee v. Warner-Lambert*, Court File No. C0-00-282, pp. 9-10 (McLeod County, Minn. Dist. Ct., August 13, 2001) (punitive damages permissible where, despite awareness by defendant drug manufacturer of tendency of consumers to misunderstand label, resulting in overdoses of drug and death, defendant did not change label);
- *Turner v. Multicare Associates*, Court File No. C8-95-14938 (Anoka County, Minn. Dist. Ct., July 25, 1996) (punitive damages permissible where, despite defendant doctor's knowledge that possibly cancerous abnormality appeared on plaintiff's chest x-ray, defendant never made sure nurse called plaintiff, nor did defendant inform plaintiff during four follow-ups);
- *Duvernay v. Murray*, Court File No. C3-04-860 (Anoka County, Minn. Dist. Ct., August 12, 2004) (punitive damages permissible where defendant chiropractor, after injuring plaintiff's spine, failed to timely record treatment notes, failed to properly file plaintiff's records, and actually altered plaintiff's records);
- *Morrissey v. Wilkinson*, Court File No. C7-98-03461 (Ramsey County, Minn. Dist. Ct., December 11, 1998) (where institutional defendant permitted inadequately trained

employees to provide care for plaintiff's decedent, employees permitted to make decisions that have safety implications bind corporation to answer for punitive damages);

- *Anderson v. Wolf & Associates*, Court File No. PI 00-325 (Hennepin County, Minn. Dist. Ct., January 25, 2001) (where plaintiff lost arm in coal-handling "Tripper," defendant machine manufacturer was held susceptible to punitive damages claim where it had actual knowledge that workers were scraping residue while the machine was running but failed to warn them that such activity was dangerous);
- *John v. Adamek*, Court File No. C7-02-322 (Morrison County, Minn. Dist. Ct., June 27, 2003) (where defendants, pumpkin stand operators, knew that their dog had history of intimidating and being aggressive toward invitees, and where defendant concealed fact from plaintiff bite victim's nurse that dog had not had rabies vaccination, punitive damages claim was warranted);
- *Maniglia v. Parker*, Court File No. 93-16704 (Hennepin County, Minn. Dist. Ct., December 29, 1994) (punitive damages claim was properly added where, although defendant doctor knew pregnant patient had two previous cesarean deliveries and fetus showed signs of distress after three days of inducing labor, defendant did not deliver the fetus by cesarean and child was stillborn);
- *IDS Bond Fund v. Gleacher NatWast, Inc.*, Court File No. 99-116 (D. Minn. September 14, 2001) (where defendant corporation misled investors in presentation and where defendant failed to cure misrepresentations, punitive damages claim was proper);
- *Law Offices of Michael Hall v. Northern States Power Co.*, Court File No. C3-99-2293 (Stearns County, Minn. Dist. Ct., December 11, 2001) (where construction crew hit gas natural line, causing explosion, punitive damages claim was appropriate against defendant that oversaw construction and had no safety program or training in place to avoid hitting gas lines);
- *Cooksey v. Hawkins Chemical, Inc.*, Court File No. PI 95-003603 (Hennepin County, Minn. Dist. Ct., February 12, 1997) (punitive damages amendment proper where defendant chemical company failed to install sprinkler system based on cost/benefit analysis, despite its knowledge that its storage of hazardous and toxic chemicals posed known and substantial risk to its employees and neighbors, who were injured by explosion of chemicals);
- *Kurvers v. National Computer Systems, Inc.*, Court File No. MC 00-11010 (Hennepin County, Minn. Dist. Ct., September 17, 2002) (when standardized testing errors caused defendant testing company to report, incorrectly, that 8,000 Minnesotan students failed test required for graduation, punitive damages claim was appropriate where defendant had committed previous testing errors, but reshuffled problematic employees to less profitable projects and understaffed testing development and quality control teams in order to boost profits).

Exh 62 (copies of unpublished orders granted punitive damages amendments).

In this case, the record is replete with conduct that constitutes willful and conscious disregard of the rights and safety of others. Defendants knew that the 100 lb. rail in the Portal Subdivision was substandard. They consciously disregarded this problem and did not replace the rail. Defendants knew that they needed to get the temporary joints out of the track, but made a conscious decision to let those joints accumulate and sit in the track for months and even years. Defendants knew that the joints were weak spots and required special maintenance attention in CWR. Yet they failed in numerous respects to assure that the installation and maintenance of the joints were compliant with the standards enunciated by CP's own engineering experts. Defendants had the inspection and repair records, had hi-railed the track during inspections, and knew the inadequacy of the hi-rail inspections for locating cracked joints bars. Yet, Defendants allowed these inspections to continue in an inadequate manner and did not require that the inspections be done in a way that the joint bars could be visibly inspected. Defendants also knew that their failure to inspect joint bars in the 100 lb. rail with the Kraut Kremer would mean that many defective joint bars would continue to be used in the worn out and light-weight track. Yet, Soo Line CP abolished the Kraut Kremer testing positions. Most troubling, Defendants knew that ignoring all of these issues and putting profits ahead of safety had already led to a catastrophic derailment on this 100 lb. rail. Nonetheless, Defendants decided the risk to human lives was "tolerable" and even "perfectly acceptable," and acted accordingly. This case certainly cries for punitive damages.

**B. Plaintiffs Likewise Have Established a Prima Facie Case Supporting Punitive Damages Under North Dakota Law.**

The same evidence of Defendants' conscious disregard supports an award of punitive damages under North Dakota law. N.D.C.C. § 32-03.2-11, enacted in 1995, provides in relevant part:

In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence *of oppression, fraud, or actual malice*, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

N.D.C.C. § 32-03.2-11 (emphasis added).

N.D.C.C. § 32-03.-07, the predecessor statute to N.D.C.C. 32-03.2-11 had allowed for punitive damages upon a showing of “. . . oppression, fraud, or malice, *actual or presumed*” (emphasis added). Thus, in 1995, the North Dakota legislature eliminated presumed malice but retained actual malice as a basis for punitive damages. Actual malice has been a basis for exemplary damages in North Dakota since the enactment of the statutory predecessor to § 32-03.2-11 in 1865. Ehrman v. Feist, 568 N.W.2d 747, 754 nn. 2 & 3 (N.D. 1997). North Dakota courts have consistently defined actual malice as that term is explained in Neidhardt v. Siverta, 103 N.W.2d 97, 102 (N.D. 1960):

‘Malice in fact,’ or ‘actual malice,’ relates to the actual state or condition of the mind of the person who did the act, and is a question of fact, upon the circumstances of each particular case, to be found by the jury. \* \* \*

While it is true that express or actual malice refers or relates to the mental state or purpose of the party who committed the act, and its existence must be proved, the law does not require direct evidence of such mental state or purpose; but the character of the act itself, with all its surrounding facts and circumstances, may be inquired into for the purpose of ascertaining the motive or purpose which influenced the mind of the party in committing the act; *and if, upon a full consideration of these, that motive is found to be*

*improper and unjustifiable, the law authorizes the jury to find it was malicious.*

*Id.* (emphasis added). Dahlen v. Landis, 314 N.W.2d 63, 69 (N.D. 1981) (citing Neidhardt for the definition of actual malice); Stoner v. Nash-Finch, Inc., 446 N.W.2d 747, 754 (N.D. 1989) (same). Similarly, the North Dakota Supreme Court has held that punitive damages were proper if the defendant acted "with the intent to vex, injure or annoy, or *with a conscious disregard of the plaintiff's rights.*" Ingalls v. Paul Revere Life Ins. Group, 561 N.W.2d 273, 284 (N.D. 1997) (emphasis added). Accord Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 646 (N.D. 1979) (quoting Silberg v. California Life Ins. Co., 521 P.2d 1103, 1110 (Cal. 1974)).

Accordingly, actual malice may be proven by the act itself along with the surrounding facts and circumstances. Punitive damages are appropriate if the defendant acts with motives found to be improper and unjustifiable or with a conscious disregard for the plaintiff's rights. Neidhardt, 103 N.W.2d at 102; Corwin Chrysler-Plymouth, Inc., 279 N.W.2d at 646; Ingalls, 561 N.W.2d at 284. However, mere reckless conduct (presumed malice) is no longer sufficient to justify punitive damages. Slaughbaugh v. Slaughbaugh, 466 N.W.2d 573, 581 (N.D. 1991); Dahlen, 314 N.W.2d at 69.

California decisions provide guidance as to the meaning of "actual malice" as the North Dakota Century Code and the California Civil Code share a common derivation in a code drafted by David Dudley Field. McLean, 490 N.W.2d at 246 n.1. Due to the similarity of the two codes, "California court decisions construing Field Code sections, while not binding, are entitled to respectful consideration and 'may be persuasive and should not be ignored.'" *Id.* (citing Glatt v. Bank of Kirkwood Plaza, 383 N.W.2d 473, 477 n.4 (N.D. 1986)). In that regard, California decisions interpreting that state's exemplary damages provision, Cal. Civil Code § 3294, are

useful in construing the similar North Dakota exemplary damages provision, N.D.C.C. § 32-03.2-11. Id.<sup>13</sup>

Like North Dakota, California courts hold that exemplary damages must ultimately be proven by clear and convincing evidence of 'malice in fact' (actual malice). Angie M. v. Superior Court, 44 Cal. Rptr.2d 197, 204 (Cal. Ct. App. 1995); Toole v Richardson-Merrell Inc., 60 Cal Rptr. 398, 415 (Cal. Ct. App. 1967). As do the North Dakota cases, California courts explain that actual malice does not mean actual intent to harm, but rather, the conscious disregard of the probable dangerous consequences of the defendant's conduct. Angie M., 44 Cal. Rptr. 2d at 204

Thus, in order to amend their complaints under North Dakota law, Plaintiffs need to present evidence of a prima facie case that Defendants acted with a motive found to be improper and unjustifiable or with conscious disregard for their rights and safety. Here, as fully set forth above, Plaintiffs have provided ample evidence of Defendants' conscious disregard for Plaintiffs' safety.

Moreover, Defendants' motivation to increase profits was improper and unjustifiable, particularly because Defendants deliberately sacrificed the safety of others in order to maximize those profits. See Granite Const. Co. v. Rhynes, 817 P.2d 711, 712 (Nev. 1991). In Granite Const., the court affirmed an award of punitive damages to a plaintiff who struck a large bull on

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<sup>13</sup> Section 3294(w) states as follows: In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others Cal. Civil Code § 3294(c)(1).

Interstate 80. The defendant had been awarded a contract for highway construction, which included money to construct a fence to keep livestock from straying upon the right-of-way Id. at 712-13. In order to save time and money, the defendant deliberately chose not to construct the fence, despite awareness of at least one bull adjacent to the highway. Id. at 713. The court found the defendant's conscious disregard for the safety of motorists justified the punitive damages. See also Potter v. Firestone Tire & Rubber Co., 25 Cal. Rptr.2d 550, 573 (Cal. Ct. App. 1993) (finding "especially reprehensible" that the defendant actively discouraged compliance with its internal policies and California law solely for the sake of reducing corporate costs).

Defendants made numerous conscious choices not to comply with reasonable standards for maintaining its track, especially its joints. These decisions, driven by the goal of reducing costs and maximizing profits, allowed the track to pose huge safety problems and were reprehensible and unconscionable. This is the conduct of actual malice – i.e., conscious disregard for safety and conduct driven by an improper and unjustifiable motive. A punitive damages claim is warranted.

**CONCLUSION**

Based on the foregoing points and authorities, Plaintiffs respectfully request that this Court grant their omnibus motion to amend their complaints to add claims for punitive damages.

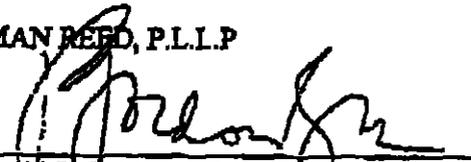
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