

THE HONORABLE RONALD B. LEIGHTON

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT TACOMA**

MICHAEL ELLIOTT

Plaintiff,

vs.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendants.

NO. 3:14-CV-05054-RBL

**DECLARATION OF PLAINTIFF
MICHAEL ELLIOTT IN SUPPORT
OF PLAINTIFF’S RESPONSE TO
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

I, Michael Elliott, hereby declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct, that I am over the age of 18 and competent to testify to them, and that I do so from my own personal knowledge, except where otherwise specifically indicated below:

1. I am the Plaintiff in the above-captioned matter.
2. During my career with BNSF, I worked as a Locomotive Engineer and Trainman. From 2006-2012, I also held the office of Chairman of the Washington State Legislative Board, an elected position within the Brotherhood of Locomotive Engineers and Trainmen (“BLET”). Although I was terminated by BNSF in 2011, I held that position to the end of my term on December 31, 2012, and since then, I have continued working for the BLET as a Spokesperson/Lobbyist/Assistant to the current Chairman, at his discretion. My job has not changed since January 1, 2013: I continue advocacy for safer working conditions for Locomotive Engineers and Trainmen. The position of Chairman, Washington State

1 Legislative Board, is critical to my union membership because the rail industry has a history
2 of retaliating against employees who complain about unsafe conditions or file claims for
3 injuries sustained at work. Since I started working for BNSF in 1995, I have learned of many
4 BNSF workers who have been disciplined or terminated by BNSF because they raised safety
5 issues or reported workplace injuries. Fear of retaliation by BNSF management is prevalent
6 among workers and many employees refuse to speak out about unsafe working conditions
7 because they cannot risk losing their job.

8 3. As a Locomotive Engineer and Trainman, I worked on the entire Seattle Subdivision. The
9 Seattle Subdivision, running between Vancouver, Washington, and Seattle, is mostly double
10 mainline track, which on information and belief, is owned and maintained by BNSF. It carries
11 a high volume of freight and passenger traffic on a daily basis. In addition to BNSF,
12 AMTRAK, Union Pacific (UP), several Sounder Commuter trains, and limited short line
13 operators run on the Seattle Subdivision and depend on BNSF to maintain the Right of Way in
14 compliance with Federal safety regulations.

15 4. Based on my experience as a BNSF Locomotive Engineer and Trainman, and as Chairman of
16 the State Legislative Board for the BLET, I am aware that train crews who run on the Seattle
17 Subdivision have a particularly heightened awareness of signal issues, especially, on the
18 southern portion of the Seattle Subdivision near Kelso, WA. This awareness is at least in part
19 due to two head-on collisions, resulting in five deaths and two serious injuries, which occurred
20 exactly ten years apart at the same location, Longview Junction South. Wayside Signal issues
21 are believed to have played a role in both these collisions. The 1993 head-on collision killed
22 five railroad workers at this location. The 2003 collision left two railroad workers seriously
23 injured. Based on my personal experiences and membership input from both BNSF and UP
24 workers, scheduled workers continue to be very wary of BNSF's signal system and signal
25

1 maintenance practices, regardless of what safety board investigations ultimately attribute to
2 accident causation (e.g. human factors).

3 5. During 2010, I reported multiple safety concerns and other suspected faulty track and signal
4 trouble conditions to Doug Jones, Robert Johnson, Robert Raglin, and Jerry Specht, all
5 Division-level management located at BNSF's Northwest Division Headquarters in Seattle,
6 Washington. The UP members of the BLET and I also reported signal and vegetation issues
7 on the Seattle Subdivision to the Federal Railroad Administration (FRA). We reported these
8 issues to the FRA because we observed BNSF was not addressing the serious safety issues we
9 had reported to it. My escalation on these issues was unique in my career as BLET Chairman:
10 Never before had I openly advocated for Federal intervention into safety issues implicating
11 significant portions of a BNSF Right-of-Way. This was also the first time my advocacy
12 directly resulted in civil penalties being assessed against BNSF.

13 6. Based on my understanding and belief, BNSF train crews were not reporting signal or
14 vegetation issues on the BNSF-owned Seattle Subdivision during the latter half of 2010. I was
15 the only BNSF scheduled worker involved in bringing these issues forward, although I did so
16 under the auspices of my BLET Chairman role. Based on my interactions with other BNSF
17 scheduled workers during this time, I believe the cause of their reticence was fear of
18 retaliation by management. In contrast, the UP crews who complained about serious safety
19 issues, i.e., the signal problems on the Seattle Subdivision, were insulated from retaliation from
20 BNSF by the fact that they worked for a different railroad carrier (UP).

21 7. The issues I and my UP membership reported to the BNSF and the FRA included "dropped
22 signals," where a green or "clear" signal changes to red or "stop" when there was no train on
23 the track ahead. We also reported "signal rainbows," where the signal was observed cycling
24 from red to yellow to green. BNSF claims its signal system is "fail-safe," meaning that a
25 faulty signal will automatically "fail" to a red "stop" signal. On more than one occasion, UP

1 train crews reported to me that they observed faulty signals “rainbowing.” From this
2 information, I concluded that the “fail-safe” signal system does not operate in the manner
3 BNSF represents: it is not always “fail-safe.” This observation caused me significant concern
4 regarding the overall safety of the BNSF signal system, which put train crews and the
5 traveling public at risk along the busy Seattle Subdivision.

6 8. By late December 2010, I was concerned and frustrated with BNSF’s lack of meaningful
7 response to my signal system reports about the Seattle Subdivision. The number of complaints
8 about signal issues was not decreasing, as I would expect if the issues were being resolved. I
9 was concerned that the problem was systemic, and that BNSF’s localized fixes were not
10 addressing the root cause of the problems. I perceived that BNSF was unwilling to make the
11 capital investment required to effectively address the signal system issues. These factors
12 motivated me to advocate for increased scrutiny by the FRA, *i.e.*, a formal inspection. The
13 results of the FRA inspection validated my concerns; BNSF was cited for a federal violation
14 and scores of federal defects.

15 9. After Dennis Kautzmann attacked me on 3/3/11, BNSF had me arrested and suspended from
16 work. I was not permitted to work for BNSF following that event, and I earned no pay,
17 although BNSF did not formally terminate my employment until 4/25/11.

18 10. Because I believe BNSF terminated my employment in retaliation for my complaints about
19 the signal system, I filed a complaint with the Occupational Safety and Health Administration
20 (OSHA) under the Federal Rail Safety Act. My complaint resulted in OSHA investigating the
21 facts and circumstances of both of BNSF’s terminations of my employment: 4/25/11 and
22 9/28/11.

23 11. When BNSF scheduled a personnel hearing on the allegation that I failed to report my 2007
24 felony conviction, I knew that the driver’s license certification documents I had previously
25 submitted to BNSF Engineer Certification would show that I had, in fact, submitted a driver’s

1 license abstract which disclosed my conviction for vehicular assault. When I filled out the
2 Engineer Certification form in 2008, I did not complete Section 8A. My understanding was
3 Washington is unique among the states in that only the driver himself, me, can obtain a copy
4 of the driver's license abstract. BNSF could not obtain this information from the State of
5 Washington on its own. I submitted the 2008 abstract itself instead of completing Section 8A
6 of the form, because the abstract clearly showed that my license was revoked on 2/24/08 due
7 to my conviction of vehicular assault.

8 12. My union representative, Rich Reeves, asked BNSF Hearing Officer Ben Marx to furnish a
9 copy of my 2008 driver's license abstract and license certification submission, and to make
10 available to us the manager of BNSF Engineer Certification, Kathy Conkling, so we could ask
11 her questions about BNSF's procedures for maintaining this information in my engineer
12 certification files. Mr. Marx denied our request, depriving me of the opportunity to present
13 favorable persuasive evidence. I wanted to question Ms. Conkling about the 2008 driver's
14 license abstract and her recollection of being contacted by Roland Hackney in response to the
15 2007 reporting of my felony conviction.

16 13. Mr. Marx's decision to not make Ms. Conkling available for questions harmed my defense
17 against BNSF's allegations, because without Ms. Conkling's testimony, Mr. Marx appeared to
18 rely solely on Mr. Hackney's assertion that he did not recall receiving my timely 2007 report
19 of the conviction. Further, Mr. Hackney had signed my jail work release documents while I
20 served my sentence.

21 14. In November 2007, my union representative Dave Beech and I had contacted Mr. Hackney the
22 day after the jury's decision and reported that I had been convicted of a felony. Mr. Hackney
23 promised us that he would contact Ms. Conkling to get guidance on the rules relevant to
24 maintaining my engineer certification after an alcohol-related felony conviction. I believe Mr.
25 Hackney did contact Ms. Conkling, because a few days later, I was put in contact with the

1 BNSF Employee Assistance Program (EAP) manager, whose purpose was to assess my
2 condition and offer an alcohol treatment program, ensuring I was compliant with BNSF's
3 policies and federal regulations, thus, enabling me to maintain my engineer certification. I
4 voluntarily entered and completed the alcohol treatment program, keeping my engineer
5 certification active and in compliance with BNSF policies and federal guidelines.

6 15. Mr. Marx chose not believe me or my witness, David Beech, when we testified about when
7 and how we reported the conviction to Mr. Hackney. I later learned that Dennis Kautzmann
8 had also been involved in addressing my engineer certification issues following my report of
9 the conviction, but we were not provided copies of this 11/29/07 email communication or the
10 notes from my EAP counsellor, proving Mr. Hackney, Ms. Conkling, Mr. Hein (Kautzmann's
11 supervisor), and Mr. Kautzmann were all timely aware of my conviction, although Mr.
12 Kautzmann and Mr. Hackney later denied this fact.

13 16. In the course of OSHA's investigation, on information and belief, the investigator requested
14 and obtained a true and correct copy of my 2008 driver's license abstract, as I had submitted
15 to BNSF back in July, 2008. If BNSF had made this document available, as my union
16 representatives requested at the April 2011 hearing held by Mr. Marx, I could have
17 demonstrated proof positive I had not attempted to conceal my 2007 conviction from BNSF,
18 and had no need to do so, because I had timely reported the conviction to Mr. Hackney.

19 17. I am an alcoholic. I completed alcohol treatment in 2008 to ensure my condition was in
20 remission and so I could maintain my Locomotive Engineer certification. I deeply regret the
21 injury accident I caused in November 2006. I have not consumed alcohol since the accident.
22 Although I have paid my debt to society, I still am very sorry for having caused harm to
23 another person.

24 18. Because of Dennis Kautzmann's history of conflict with me, when working at BNSF, I did
25 everything I could to limit or eliminate any contact with him. In approximately January 2011,

1 I voluntarily remained demoted from the Locomotive Engineer craft, working instead in the
2 Conductor craft to eliminate the requirement I interact with Mr. Kautzmann.

3 19. In 2009, after a series of unpleasant encounters with Mr. Kautzmann, where his behavior
4 toward me was hostile, extremely aggressive, and intimidating, I complained to Doug Jones
5 and BNSF Human Resources about Mr. Kautzmann, and asked that he be removed from his
6 job. Based on my own experiences with him, and on personal accounts shared with me by
7 other BNSF Locomotive Engineers, I believed Mr. Kautzmann's behavior presented a risk to
8 the safe operation of trains. His unwarranted aggressiveness, hostility, and intimidating
9 behavior distracted me from concentrating on my work. Mr. Jones did not remove Mr.
10 Kautzmann from his job as I had requested.

11 20. On 8/27/09, I was working at the BNSF West Seattle Yard, where I had transferred from
12 Tacoma in an effort to avoid interaction with Mr. Kautzmann. Despite my efforts, on that
13 day, he showed up at the West Seattle Yard Office, demanding that I sign a document I had
14 already signed. I told him I had already signed it, but he insisted I sign it again. He threatened
15 to withhold me from service, i.e., suspend me, if I did not sign. Mr. Kautzmann's conduct
16 was so hostile and aggressive that another member of my crew that day, D.J. Carr, became ill
17 as a result. His hands were shaking so badly he could not dial the phone to call the Terminal
18 Manager. He was unable to complete the day's work, and went home.

19 21. On 3/3/11, my work duty for the day was an 8-hour CPR refresher course. As I was clocking
20 off for the day, "tying up" in railroad jargon, Dennis Kautzmann approached me from behind.
21 I did not know he was behind me until I heard him address me in a raised voice. Because I
22 was off duty, I was not required to interact with him, per the Federal Hours of Service Law.
23 Nor did I wish to have any interaction with Mr. Kautzmann. He had caused a lot of trouble
24 for me in the past, and his tone of voice on 3/3/11 caused me immediate fear he was trying to
25 cause trouble for me again. I did not know what he wanted, but I told him I would find out,

1 and I left as quickly as possible. Later, I learned that his excuse for raising his voice at me
2 was to confirm that I would attend a Network Simulator (NetSim) ride evaluation scheduled to
3 take place over a week in the future. A NetSim ride evaluation is a routine certification
4 requirement for Locomotive Engineers, where you demonstrate your competency to operate a
5 locomotive and control a train in a simulated, classroom environment.

6 22. I am sure I did not tell Mr. Kautzmann that I might have questions for him about the NetSim
7 ride. I would never invite interaction with Mr. Kautzmann because of our difficult history. I
8 had no questions about the NetSim ride evaluation process. I had successfully completed
9 NetSim rides several times during my career at BNSF, and I knew they were mandatory, not
10 optional. Further, prior to 3/3/11, I had already been notified of my schedule for the
11 upcoming NetSim ride evaluation through BNSF's electronic notification system. That
12 notification system alerted me each time I logged onto the BNSF computer system, which was
13 every day at work, if there was something important needing my attention.

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15 Signed at Seattle, Washington, this 24 day of April, 2015.

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18 MICHAEL ELLIOTT, PLAINTIFF

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DECLARATION OF MICHAEL ELLIOTT IN
SUPPORT OF PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY

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