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7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 IN AND FOR THE COUNTY OF SACRAMENTO

9 RONALD BALTIMORE, NO. 123456
10 Plaintiff, PLAINTIFF'S MEDIATION BRIEF
11 v.

12 ATCHISON, TOPEKA AND SANTA
13 FE RAILWAY COMPANY, et al.
14 Defendants.

15 _____/
16 AND RELATED CROSS - ACTIONS.
17 _____/

18 **INTRODUCTION**

19 On November 30, 1993, plaintiff Ronald Baltimore was employed
20 as a brakeman/conductor and was working a road switcher job for his
21 employer, defendant Atchison, Topeka and Santa Fe Railway Company
22 upon the premises of the Valley Lift intermodel facility located in
23 Empire, California. At approximately 5:45 P.M., plaintiff was on
24 the ground assisting in the shoving movement of a cut of railcars
25 into ramp track 7923 at Valley Lift. Among those cars was
26 articulated container flatcar number NTTX 68009 which was partially
27 loaded with shipping containers to be delivered to Valley Lift.

28 NTTX 68009 consists of five (5) units and is over four hundred
(400) feet in length. Each unit is designed to carry two (2)
containers, either international (102" width) or U.S. (96" width)

1 with the use of lateral guides positioned at each of the four
2 corners of each container to keep it secured. Exhibit "A" attached
3 consists of photographs that depict the Lateral Guides in either
4 the up or down position. In addition, each unit is provided with
5 four (4) Pedestal Rods that are designed to be utilized by trainmen
6 and others to either raise or lower the Lateral Guide on the
7 opposite side of the car so that the operator is relieved of the
8 necessity of crossing over the car to move the device. Each
9 Pedestal Rod is constructed of round 3/4 inch diameter steel stock
10 and transverses the width of the car. The rod was produced with a
11 ninety (90) degree bend on the end opposite the Lateral Guide to
12 provide the requisite hand-produced torque to lift or lower the
13 Lateral Guide.

14 Each Pedestal Rod protrudes through several holes cut in the
15 car to act to guide and support the device. Each Pedestal Rod is
16 affixed at the end opposite the lever with a round, flat steel
17 washer that is welded on to the Pedestal Rod to keep it in place.
18 Exhibit "B" is a photograph that depicts the washer welded to the
19 end of a Pedestal Rod.

20 Each Lateral Guide is affixed to the end of a Pedestal Rod by
21 flat pieces of plate steel that are welded along the Pedestal Rod.
22 In this way, the Pedestal Rod, supported on either side by the rod
23 passing through holes drilled in the plate steel of the car, acts
24 as a hinge point for the Lateral Guide. Exhibit "C" depicts a
25 Lateral Guide affixed to a Pedestal Rod.

26 Previous to the plaintiff's accident, the Pedestal Rod that is
27 a subject of this action had fractured at or near the point where
28 it is welded to the Lateral Guide and the inboard hinge point. As

1 such, there was nothing keeping the Pedestal Rod in place and it
2 slowly worked its way out through the several guide holes allowing
3 it to protrude several feet from the side of the car.

4 At approximately 5:45 P.M. on the evening of the accident, the
5 plaintiff was standing along the compass west side of car NTTX
6 68009 as it was shoved into the Valley Lift facility to be de-
7 ramped. The cut of cars was moving eight (8) to ten (10) miles per
8 hour with plaintiff standing in a position facing north with his
9 back to the direction from which the cars were being moved so that
10 he could maintain eye contact with the conductor, Danny Fisher who
11 was guiding the point of the movement. At that moment, plaintiff
12 was struck in the low back, from behind, with the protruding
13 Pedestal Rod thereby causing his injuries as more completely
14 described below.

15 The manager of Valley lift and others searched the intermodel
16 facility premises for the missing Lateral Guide the next day to no
17 avail. The Lateral Guide has never been found to plaintiff's
18 knowledge. However, there was an abundance of physical evidence
19 left at the scene more fully discussed below.

20 The day after the accident, several Santa Fe employees
21 examined car NTTX 68009, taking several polaroid photographs that
22 are presently in the possession of counsel for defendant Santa Fe.
23 These photographs depict several interesting evidentiary features.
24 First, upon careful examination of the photographs, the Pedestal
25 Rod involved in this accident displays a slight bend in the bar
26 itself. Upon close examination of the actual rod, a 2 1/2 degree
27 bend can be observed at a point approximately thirty-nine (39)
28 inches from the hand lever bend. See Exhibit "D" for a photograph

1 depicting the bend. Plaintiff contends that the bend was caused by
2 the force of the Pedestal Rod striking his body.

3 Second, the polaroid photographs clearly depict that the
4 Lateral Guide is missing. Most importantly, certain physical
5 evidence can be seen on the on the inside as well as the outside of
6 the remaining plate steel structure designed to support the
7 Pedestal Rod and the Lateral Guide assembly. On the inside plate
8 steel support, a rusty arc that has been gouged from the metal can
9 be seen. This wear is attributed to the Lateral Guide dropping
10 slightly, after the Pedestal Rod fractured and separated, leaving
11 it with no support on the inboard side of the steel supporting
12 structure. The fact that the wear is weeks or months old is
13 supported by the fact that the Lateral Guide swung free for a
14 considerable time so as to create the gouged arc and that the area
15 of wear is rusty.

16 The area on the outside of the plate steel support indicates that
17 the steel washer affixed to the far end of the Pedestal Rod rubbed
18 the top of the metal facing the washer which is consistent with the
19 Lateral Guide hanging down at a slight angle. This area is also
20 rusty indicating that the Lateral Guide swung free due to the
21 fracture of the Pedestal Rod for a considerable period of time,
22 weeks or months, before the plaintiff's accident. See exhibit "E"
23 for drawings depicting the rusted areas.

24 For the greater part of this litigation, defendant Atchison,
25 Topeka and Santa Fe was under the impression that they were in
26 possession of the Pedestal Rod involved in this accident. This was
27 not the case. Santa Fe lead carman Jerry Johnston was in
28 possession of the rod actually involved in the accident immediately

1 after the inspection on the following day. The Atchison Santa Fe
2 Claim's Department was in possession of an entirely different
3 Pedestal Rod. Upon inspection, each rod had fractured at almost
4 the same exact location.

5 **TRAILER TRAIN CORPORATION**

6 Defendant Trailer Train Corporation (TTX) was the lessee of
7 car NTTX 68009 at the time of the accident and the lessor was
8 defendant Teco Investments, Inc. TTX in turn leases the
9 articulating railcar to the defendant Santa Fe Railway Corporation.
10 Defendants Teco Investments and TTX are strictly liable in tort as
11 they had actual or constructive control of the product in this
12 case, railcar NTTX 68009. Plaintiff need not show that Teco
13 Investments and/or TTX failed to exercise due care, only that the
14 product was defective.

15 Railcar NTTX 68009 was either manufactured in a defective
16 manner so as to cause the Pedestal Rod(s) to break and/or designed
17 in such a manner so as to cause the Pedestal Rod(s) to fracture
18 thereby creating a defective product. Plaintiff's claim with
19 regard to Teco Investments and TTX is based upon strict products
20 liability law and liability is abundantly clear.

21 **ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY**

22 The Atchison, Topeka and Santa Fe owed the plaintiff a non-
23 delegable duty to provide him with a safe place to work. The
24 plaintiff attaches herewith Exhibit "F" which are copies of BAJI
25 11.10 and 11.11 which set forth the responsibilities of the
26 defendant railroad as well as the Concurring Cause and Negligence
27 Need Not be the Sole Cause jury instructions, BAJI 11.15 and 11.16,
28 respectively.

1 Plaintiff Ronald Baltimore contends that the Atchison, Topeka
2 and Santa Fe failed in their non-delegable duty to provide him with
3 a safe place within which to work, failed to adequately inspect the
4 equipment on which plaintiff was required to work and failed to
5 provide adequate, if any, carmen in the area of the Valley Lift
6 facility where approximately 100 cars are moved each day by
7 defendant Santa Fe. The discovery in this action has determined
8 that the Lateral Guide from which the Pedestal Rod separated had
9 been missing for a considerable period of time and certainly within
10 adequate time parameters within which a reasonable inspection
11 should have disclosed that it was missing. A search was conducted
12 for the Lateral Guide but it was not to be found at or near the
13 premises of the Valley Lift intermodel facility. As such, the
14 defendant railroad failed to provide a reasonable inspection of
15 said railcar NTTX 68009 thereby failing to provide plaintiff with
16 a safe place to work.

17 It has been the testimony at depositions that none of the
18 Atchison, Topeka and Santa Fe carmen had been instructed by the
19 defendant railroad as to the proper inspection procedure of the
20 railcar NTTX 68009. In fact, only ten (10) of these five (5)
21 packer type railcars were ever manufactured for use in the United
22 States by defendant Hyundai Precision & Industries Co., Ltd.
23 Hyundai did not provide TTX, Teco Investments, Gunderson, Inc.
24 and/or the Atchison, Topeka and Santa Fe Railway Company with any
25 written or other procedure for conducting an inspection of said
26 railcar. It is the non-delegable duty of the defendant railroad to
27 conduct a reasonable inspection of each railcar once it enters its
28 track, and such an inspection was never conducted at the time NTTX

1 68009 left Birmingham, Alabama or at points between, towards its
2 ultimate destination of the Valley Lift facility at Empire,
3 California.

4 Defendant Atchison, Topeka and Santa Fe was the end user of
5 railcar NTTX 68009, using the car to transport shipping containers
6 across the United States in high utilization service. 49 CFR
7 215.13 (a), (b) and (c) prescribes that all freight cars shall be
8 inspected upon departing, before or after being placed in a train,
9 to wit:

10 (a) At each location where a freight car is placed in a
11 train, the freight car shall be inspected before the
12 train departs. This inspection may be made before or
after the car is placed in the train.

13 (b) At a location where an inspector designated under
14 Section 215.11 is on duty for the purpose of inspecting
15 freight cars, the inspection required by paragraph (a)
of this section shall be made by that inspector to deter-
mine whether the car is in compliance with this part.

16 (c) At a location where a person designated under Section
17 215.11 is not on duty for the purpose of inspecting freight
cars, the inspection required by paragraph (a) shall, as a
18 minimum, be made for those conditions set forth in Appendix
D to this part.

19 Appendix D provides:

20 At each location where a freight car is placed in a train
21 and a person designated under Section 215.11 is not on duty
22 for the purpose of inspecting freight cars, the freight car
23 shall, as a minimum, be inspected for the imminently hazard-
ous conditions listed below that are likely to cause an
accident or casualty before the train arrives at its destin-
ation. These conditions are readily discoverable by a train
crew member in the course of a customary inspection.

24 1. Car body: ...

25 (e) Object extending from side.

26 And,

27 6. Any other apparent safety hazard likely to cause an
28 accident or casualty before the train arrives at its
destination.

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In this particular case, the train car in question was assigned and loaded with freight at Birmingham, Alabama on November 25, 1993 and departed on Burlington Northern track on November 26, 1993. NTTX 68009 arrived in Avard, Oklahoma on November 27, 1993 and departed that same day for Clovis, New Mexico, arriving there on November 28, 1993. However, prior to arriving in Avard, the car had been travelling on Burlington Northern rail and had been interchanged. Exhibit "G" consists of the records obtained from Valley Lift as to the travel route and lading for NTTX 68009.

The Atchison, Topeka Santa Fe Railway Company ultimately merged with the Burlington Northern, but this did not take place until after plaintiff's accident. Defendant Atchison, Topeka Santa Fe Railway Company and many other rail carriers are members of the Association of American Railroads (AAR). The AAR is an intra-industry governing body which promulgates operating rules, of which Rule 1 of the 1988 Field Manual of the AAR Interchange Rules provides in part as follows:

Rule 1 - Care of Freight Cars:

1. Inspection

1(a) Each railroad is responsible for the condition of all cars on its line ...

As such, each time a particular railroad utilizes the track of another railroad, and then interchanges to yet another railroad, or back to its own track, the railroad company operating the train and railcar(s) is required to make an inspection of each such railcar making up the train. The evidence speaks for itself; the missing

1 Lateral Guide should have made it abundantly clear to any car
2 inspector or other railroad employee that something was amiss and
3 that the car should have been "bad ordered". In addition, the
4 loose and/or protruding Pedestal Rod(s) would have been
5 unquestionably apparent to any qualified individual making the
6 required inspection of NTTX 68009.

7 NTTX departed Clovis, New Mexico on November 28, 1993 and
8 arrived at the Valley Lift intermodel facility on November 30,
9 1993. The distance between Birmingham, Alabama and Empire,
10 California is in excess of two thousand (2,000) miles and certainly
11 as a matter of prudent behavior, defendant railroad should have
12 inspected the railcar involved in this accident at the transfer
13 point(s).

14 **HYUNDAI PRECISION & INDUSTRIES CO., LTD.**

15 Defendant Hyundai Precision & Industries Co., Ltd., a South Korean
16 Corporation, designed and manufactured railcar NTTX 68009 into sub-
17 assemblies to be assembled into the completed product by defendant
18 Gunderson, Inc. As set forth above, not one, but two Pedestal Rods
19 fractured at the exact same location on the rod, where it begins to
20 be affixed to the Lateral Guide by an electric arc welding process.
21 Said area where the Pedestal Rod was attached to the steel plate of
22 the Lateral Guide was of poor and insufficient quality and/or
23 failed to provide adequate penetration of the metal components
24 thereby causing it to not be able to withstand the substantial
25 twisting torque forces applied to the device upon operation. In
26 addition, defendant Hyundai failed to test the Pedestal Rod/Lateral
27 Guide assemblies which would have disclosed design and/or
28 manufacturing defects in the Pedestal Rod - Lateral Guide

1 assemblies. Lastly, Hyundai failed to utilize a simple,
2 inexpensive keeper fastened to the Pedestal Rod to keep it from
3 protruding from the side of the railcar and creating a hazard. It
4 is plaintiff's position that defendant Hyundai is strictly liable
5 under a theory of product liability for the defective design and/or
6 manufacturing defect which was a substantial factor in the cause of
7 plaintiff's injuries.

8 **GUNDERSON, INC.**

9 Defendant Gunderson, Inc. is an Oregon corporation that received
10 the sub-assemblies from defendant Hyundai for final assembly in the
11 United States. Plaintiff's theory of liability against defendant
12 Gunderson is also based upon product liability. The assembler of
13 components negligently manufactured by another is liable even where
14 Gunderson could not have discovered the defect through the exercise
15 of due care.

16 **JURY INSTRUCTIONS**

17 Attached as Exhibit "F" are the following BAJI instructions for the
18 aid of the mediator:

- 19 6.51 Duty of a Common Carrier;
20 9.00.3 Manufacturing Defect - Essential
Elements;
21 9.00.5 Design Defect - Essential Elements;
22 9.21 Products Liability - Negligence -
Duty of Manufacturer;
23 9.22 Products Liability - Negligence -
Duty of a Maker of a Component Part;
24 9.23 Products Liability - Negligence -
Seller Assuming Role of Manufacturer;
25 9.24 Products Liability - Negligence -
Seller's Duty to Inspect as to
Defects;
26 9.25 Products Liability - Negligence by
Lessor/Bailor - Introductory;
27 9.25.1 Products Liability - Negligence by
Lessor or Bailor for Hire;
28 9.26 Products Liability - Negligence -
Duty of Bailor of Article Other Than

- 1 for Use;
- 2 11.10 FELA - Duty RE Place to Work;
- 3 11.11 FELA - Duty Re Tools, Appliances, Etc;
- 4 11.14 FELA - Cause;
- 5 11.15 FELA - Concurring Causes;
- 6 11.16 FELA - Negligence of Defendant Need
Not be Sole Cause;
- 7 11.40 FELA - Measure of Damages - Personal
Injury.

THE INJURY

7 Plaintiff Ronald Baltimore, as a result of the accident,
8 sustained injury to his low back, consisting of a sprain/strain
9 which was superimposed over a preexisting degenerative lumber
10 condition which had not caused plaintiff any previous
11 difficulties. As a result thereof, plaintiff has been rendered
12 permanently disabled from performing his usual occupation as a
13 brakeman/conductor. Plaintiff's medical condition is substantiated
14 by the attached short medical note of treating physician Dr. James
15 H. Holmes indicating that plaintiff remains disabled and will
16 continue to do so in the future. All relevant medical records and
17 reports are attached hereto and further identified as exhibit "I".

WAGE LOSS

18
19 As a result of the accident, the plaintiff was caused to suffer a
20 substantial loss of wages. Dr. Barry Ben-Zion, an economist, has
21 calculated Ronald Baltimore's past and future wage losses at
22 \$691,100.00 without mitigation. Plaintiff is attending courses to
23 be trained as a locksmith. If plaintiff can successfully pursue
24 this endeavor, his mitigated wage loss would be \$498,250.00
25 according to Dr. Ben-Zion's report attached hereto as exhibit "J".
26 All figures are in present value taking into consideration income
27 tax. Income tax does not have to be deducted as to the third party
28 defendants, but only for the FELA defendant Atchison, Topeka and

1 Santa Fe Railway Company. At the time of trial, as to Hyundai and
2 any other third party defendant, the amount of income taxes will
3 not be deducted from the wage losses, and as such, the economic
4 damages will be increased accordingly.

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DATED: _____, 1998.

ABLE & BAKER
Attorneys for Plaintiff

By: ROBERT C. BAKER