

NO. 95-12951-D

JEANIE LEIGH FLEMING, Individually and as Personal Representative of the Heirs and Estate of ROY FLEMING, Deceased; and THOMAS RICHARD GORMAN and ROSE MARY GORMAN,	)	IN THE DISTRICT COURT
Plaintiffs,	)	
v.	)	DALLAS COUNTY, TEXAS
OWENS-CORNING FIBERGLAS CORPORATION; ET AL	)	
Defendants.	)	95TH JUDICIAL DISTRICT

ANSWERS OF DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY TO SECOND SET OF INTERROGATORIES PROPOUNDED BY PLAINTIFFS THOMAS RICHARD GORMAN AND ROSE MARY GORMAN

Subject to the Court's ruling on Defendant' Special Appearance, Defendant Norfolk and Western Railway Company ("NW"), for its response to the Second Set of Interrogatories propounded by Plaintiffs, Thomas Richard Gorman and Rose Mary Gorman, states as follows:

The following answers are being provided after diligent investigation and inquiry by defendant. However, because many of the events relating to the matters inquired about by plaintiff's interrogatories occurred more than forty-five (45) years ago, the availability of persons involved and the existence of applicable documents has been limited.

As a result of the foregoing factors, many of the individuals who might have had personal knowledge of the matters to which plaintiff's interrogatories relate are deceased,

retired, or are otherwise unavailable to NW, and investigations to date indicate that at least some documents which relate to matters inquired about by these interrogatories may have been destroyed in keeping with normal corporate record retention policy. Accordingly, some answers are possibly incomplete. NW's investigation is continuing and should additional information surface, supplemental answers will be submitted. The following is a part of and is incorporated by reference in every answer provided hereinafter:

> This answer is accurate as of the date of the Answers and Objections of Defendant Norfolk and Western Railway Company to Plaintiff's Interrogatories. Norfolk and Western objects to answering this interrogatory in regard to any period of time other than the period during which it or Nickel Plate Railroad allegedly employed plaintiff and further objects to providing information about geographic locations and operating units within its system other than those at which and for whom plaintiff allegedly worked. The bases for such objections are that any answers would be irrelevant to the subject matter of the pending litigation, would not be reasonably calculated to lead to the discovery of admissible evidence, and would be burdensome and oppressive.

NW objects to the instructions and definitions supplied by plaintiff with regard to these interrogatories, on the bases that the definitions are overbroad, vague and often inconsistent with the normal usage and meaning of such words. The instructions are overbroad, burdensome and constitute an unreasonable expansion of the interrogatories themselves. NW therefore gives notice that it does not consider itself bound by the instructions and definitions propounded by plaintiff, and instead has answered these interrogatories in a manner consistent with the normal understanding of the language used in the interrogatory and to the extent necessary to fairly and fully answer the interrogatory.

NW objects to these interrogatories to the extent that they call for more than thirty answers.

The answers that follow, unless otherwise apparent from the context, are limited to the years 1948-1950, the period that plaintiff was allegedly employed as a laborer by the New York, Chicago and St. Louis Railroad Company (Nickel Plate) at Lima, Ohio. NW acquired Nickel Plate in 1964 by merger. NW has not found any evidence of plaintiff's employment by NW or Nickel Plate, and demands strict proof of same.

All previously filed objections to these Interrogatories are incorporated herein and are not waived.

INTERROGATORIES

INTERROGATORY NO. 1: At any time prior to 1980 did Defendant or anyone at the direction of Defendant, conduct an investigation, survey or other process to identify the primary emission sources of airborne asbestos fibers and/or to assess and/or sample for the detection of, the quantity of, or threshold limit value of airborne asbestos fibers in relation to Defendant's railroad? If so, please identify with particularity the entity and/or persons conducting such investigation(s), survey(s) or test(s), the dates conducted and the results.

ANSWER: See Preliminary Statement and General Objection. NW knows of none by Nickel Plate. Nickel Plate stopped using steam locomotives, the major user of asbestos-containing products, in 1958.

INTERROGATORY NO. 2: Did Defendant ever arrange for any labor agency, insurance company, government agency, inspectors or anyone from your company to go into any of Defendant's railway car(s) and/or engine(s) and/or locomotive(s) and/or roundhouses and/or shops to take dust level counts related to asbestos dust? If so, identify with

particularity the party(ies) conducting such procedure(s), the dates conducted, the purpose of such procedure(s), and all results of such procedure(s).

ANSWER: See Answer to Interrogatory No. 1.

INTERROGATORY NO. 3: Did Defendant obtain facts, knowledge or information from any industry, insurance company, governmental agency, union, and/or any other entity regarding the potential health effects and/or health hazards created for persons exposed to airborne asbestos dust? If so, please list all sources of such information and the dates received.

ANSWER: See Preliminary Statement and General Objection. Unknown as to Nickel Plate. NW knows of none during the time of plaintiff's alleged employment and the exact date is unknown. In 1977 NW received a letter from Mr. J. E. Martin, Vice President, Association of American Railroads, which attached a copy of a letter from Mr. Donald W. Bennett, Associate Administrator for Safety of the Department of Transportation, Federal Railroad Administration, which had originally been sent to Mr. John A. Risendahl, Executive Director, Safety and Special Services Division of the Association of American Railroads. Mr. Bennett's letter concerned a NIOSH survey of tradename products containing one or more carcinogens currently regulated by OSHA. The letter pointed out that asbestos is considered a carcinogen and that some railway employees might be exposed to a risk of exposure during certain rail welding processes.

In 1978 NW's General Manager of Safety, Mr. G. W. Gearhart, obtained a Superintendent's General Notice issued on the Rock Island Lines concerning asbestos composition brake shoes and precautions to be taken in regard to the residue dust. At Mr. Gearhart's request, said notice was placed upon the agenda for discussion by the Steering Committee of the Association of American Railroads Safety Section for its March 14-15, 1978 meeting. Prior to that meeting AAR staff pursued the matter further and learned that there were conflicting views as to the existence of any "hazards" with respect to the composition brake shoe residue dust, and at the Steering Committee meeting a discussion revealed no known problems by the carriers represented on the Steering Committee.

INTERROGATORY NO. 4: List each person who has acted in a medical advisory capacity to your company at any time during the past 40 years, including, but not limited to, physicians (including those physicians who would have been responsible for conducting physicals, evaluations or screenings of Defendant's employees) and industrial hygienists, and the current address, telephone number and job title of each of those individuals who has had or may have had any knowledge regarding the hazards of airborne asbestos dust.

ANSWER: See Preliminary Statement and General Objection. Unknown as to Nickel Plate. NW chief medical officers (during the years of plaintiff's alleged employment) were as follows:

1. Bertram E. Topham, M.D., deceased, --October 1, 1946 to March 31, 1955.

NW did not have an industrial hygienist as an employee or available for its use during the time of plaintiff's alleged employment.

INTERROGATORY NO. 5: Does Defendant have in its possession any books, pamphlets, memoranda, or written materials of any kind or character that would indicate that asbestos fibers, when inhaled, can be hazardous to the health of human beings? If so, state:

A. The name of each such publication;

B. The date of publication and the names of the author and publisher (if any);

C. The date received by Defendant;

D. The name, job title, and address of each person who currently has possession of each publication and its present location.

ANSWER: OBJECTION. NW objects to this Interrogatory for the reason that it is vague, overbroad, burdensome and intended to and annoy harass NW. Without waiving its objection, NW states that its counsel has obtained many such articles in connection with the defense of NW in asbestos-related FELA actions. All such articles are equally available to plaintiff's counsel.

INTERROGATORY NO. 6: Has Defendant at any time been a member of any trade organization or association that published or disseminated any documents or information relating to the hazards of airborne asbestos? If so, state:

A. The name and address of each such association or organization;

B. The dates during which Defendant member;

C. The names and dates of any publications, minutes, or reports published, written, or disseminated by any of the named associations or organizations;

D. Whether any of those publications are still in your possession, and if so:
1. A description of the publications, including the date;
2. The current location of such publications;
3. The custodian of such publications;
4. The method or manner in which such publications are maintained.

ANSWER: See Preliminary Statement and General Objection. At the time of the 1964 merger Nickel Plate and NW were members of the Association of American Railroads (AAR), Washington, D.C., which published materials relating to the subject. Copies of those Medical and Surgical Section documents are retained at the AAR by Mr. Marvin Pelon. Neither Nickel Plate nor NW has any of those documents in their files, and no records indicate receipt of them.

Also, documents produced by the Illinois Central Railroad in another action indicate that Nickel Plate was a member of the General Managers' Association of Chicago (GMA), which published documents concerning this topic. Copies of those documents are in the custody of Richard A. Boyle, Esq., Gundlach, Lee, Eggmann, Boyle & Roessler, 5000 West Main Street, Belleville, Illinois 62223. NW has been unable to locate any record of Nickel Plate's membership in the General Managers' Association; locate the so-called "Alton Documents" in Nickel Plate files, or establish its receipt of same.

INTERROGATORY NO. 7: As to the disease asbestosis, state:

A. The date on which Defendant first learned that such disease was caused by inhalation of asbestos fibers;

B. How Defendant became aware of the existence of the disease;

C. Who within the company first discovered, recognized or understood the adverse consequences or effects of the disease;

D. What information was disseminated within Defendant's company or its subsidiary or predecessor regarding such adverse consequences or effects;

E. Whether any such information is still maintained by Defendant or its subsidiary or predecessor in any written form;

F. Who is the custodian of such information;

G. The date on which you first received knowledge or information that asbestosis was caused by inhalation of asbestos fibers alone or in conjunction with second hand smoke.

ANSWER: Unknown as to Nickel Plate. In 1950 NW received notice that an employee, Ancel Wheeler, was claiming to have contracted asbestosis as a result of grinding asbestos-containing lagging at NW's Portsmouth, Ohio facilities. See also Answer to Interrogatory No. 3 and preceding interrogatories for NW information on possible adverse health effects.

INTERROGATORY NO. 8: As to the disease lung cancer, state:

A. The date on which Defendant first learned that such disease was caused by inhalation of asbestos fibers;

B. How Defendant or its subsidiary or predecessor became aware of the disease and its relationship to asbestos exposure;

C. Who within the company or its subsidiary or predecessor first discovered or recognized the adverse consequences or effects of asbestos exposure;

D. What information was disseminated within Defendant's company or its subsidiary or predecessor regarding such adverse consequences or effects;

E. Whether any such information is still maintained by Defendants or its subsidiaries or predecessors in a written form;

F. Who is the custodian of such information;

G. The date on which you first received knowledge or information that lung cancer was caused by inhalation of asbestos dust and fibers.

ANSWER: Unknown. See Answer to Interrogatory No. 3 and preceding interrogatories for NW information on possible adverse health effects.

INTERROGATORY NO. 9: As to the disease mesothelioma, state:

A. The date on which Defendant first learned such disease was caused by inhalation of asbestos fibers;

B. The date on which Defendant first suspected that mesothelioma was caused by inhalation of asbestos dust and fibers;

C. How Defendant or its subsidiary or predecessor became aware of the disease and that it was caused by exposure to asbestos;

D. Who within the company or its subsidiary or predecessor first discovered or recognized the adverse consequences or effects of asbestos exposure;

E. What information was disseminated within Defendant's company or its subsidiary or predecessor regarding such adverse consequences or effects;

F. Whether any such information is still maintained by Defendants or its subsidiary or predecessor in a written form;

G. Who is the custodian of such information;

H. Whether Defendant agrees that there is no known medical cure for mesothelioma.

ANSWER: Unknown. See Answer to Interrogatory No. 3 and preceding interrogatories for NW information on possible adverse health effects.

INTERROGATORY NO. 10: As to gastro-intestinal cancer, laryngeal cancer, pharyngeal cancer or lymphatic cancer, state:

A. The type of cancer and the date on which Defendant first learned that such diseases were caused by inhalation of asbestos fibers by humans;

B. What cancers has the Defendant or its subsidiary or predecessor become aware can be caused by exposure to asbestos fibers;

C. The date on which Defendant first suspected other cancers were caused by asbestos inhalation;

D. Who within the company or its subsidiary or predecessor first discovered the adverse consequences or effects of asbestos exposure;

E. What information was disseminated with Defendant's company or its subsidiary or predecessor regarding such adverse consequences or effects;

F. Whether any such information is still maintained by Defendant or its subsidiary or predecessor in a written form;

G. Who is the custodian of such information.

ANSWER: Unknown. See Answers to Interrogatory No. 3 and preceding interrogatories for NW information on possible adverse health effects.

INTERROGATORY NO. 11: Did Defendant maintain written minutes of corporate meetings, either board of directors, departmental, or otherwise, which reflect discussions pertaining to any subject matter related to asbestos, asbestos health hazards or asbestos products? If so, for each such set of minutes, state:

A. The dates of each such meeting;

B. The general subject matter discussed at each meeting;

C. Who was in attendance at each meeting;

D. Where and by whom the written minutes are presently maintained;

E. By whom the minutes were taken and put into final format;

F. Whether the minutes were abstracted and reports disseminated to other individuals, and if so, the names and job titles of those individuals.

ANSWER: See Preliminary Statement and General Objection. NW objects to this Interrogatory to the extent it extends to matters within the attorney-client privilege or attorney work product doctrine. Without waiver NW states that it

has no board of directors minutes discussing such subjects. Unknown as to Nickel Plate.

INTERROGATORY NO. 12: Does Defendant intend to call a company representative as a witness at the trial of any of this case? If so, list:

A. The name, address, and job title of each company representative who may be called;

B. A summary of the testimony expected to be given by each such witness;

C. List any and all previous times that the named witnesses have either given deposition or trial testimony in an asbestos-related case, including the jurisdiction, style of the case, case number, date of testimony, and the name of the attorney taking the deposition for the Plaintiffs in that case.

ANSWER: See previously filed objections.

INTERROGATORY NO. 13: Does your company have, or has it ever had, a Medical Department of Medical Section? If so, state:

A. The year such Medical Department or Section was established;

B. Whether or not such Medical Department or Section has operated continuously since being established;

C. The name of each director, chief, or head of your Medical Department or Section year by year, beginning with the first year of its existence and the last known address and phone number of each;

D. State the duties and responsibilities of such Medical Department or Section.

ANSWER: Yes. See answer to Interrogatory No. 4. NW's Medical Director is responsible for maintaining the physical and mental health of its employees, and for arranging for medical and surgical services in the case of employees who are injured during the course of their work. The duties of the other members of the Medical Department are to assist the Medical Director in carrying out his duties. Nickel Plate had a Medical Director at the time it

merged into NW in 1964, but further information about its activities and staff are unknown.

INTERROGATORY NO. 14: Please state whether written warnings were placed at any locations adjacent to or near asbestos in place on railroad(s), at anytime from 1930 to the present. If so, please describe with specificity such signs, including size, color, wording, etc. Additionally, please state the number of such signs that were installed and indicate the specific location of each such sign and the dates such sign was at that location.

ANSWER: Unknown as to Nickel Plate. Prior to 1983 NW did not specifically inform employees regarding potential hazards of asbestos and/or diseases potentially associated with asbestos exposure, because it had no reason to believe that its employees were at risk.

INTERROGATORY NO. 15: Does Defendant have, or has it ever had, a Safety Department? If so, state:

A. The year such Safety Department was established;

B. Whether or not such Safety Department has operated continuously since being established;

C. The name of each director, chief, or head of your Safety Department year by year, beginning with the first year you had a Safety Director or Safety Department, and the last known address and phone number of each;

D. State the duties and responsibilities of such Safety Department.

ANSWER: See Preliminary Statement and General Objection. NW has had a Safety Department for many years and during the time of plaintiff's alleged employment. It is unknown exactly when the Safety Department was established. The current Safety Department directs planning and implementation of programs to reduce employee personal injury accidents, grade crossing accidents, hazardous material incidents and others with subsequent impact on and reduction of overall costs; establishes and maintains liaison with industry, shippers, Federal, State and others in safety, hazardous materials, property loss prevention and related activities. Nickel Plate had a

Safety Department at the time it merged into NW in 1964, but further information about its activities and staff are unknown.

INTERROGATORY NO. 16: Please state whether a medical monitoring program, medical examination program or other medical surveillance was provided to your employees and specifically to Plaintiff. If so, please indicate what records of such program, examination or surveillance concerning Plaintiff exist at this time, including but not limited to reports, x-rays and medical notes.

ANSWER: See Preliminary Statement and General Objection. It is unknown if any such "medical monitoring" program, per se, existed at the time of plaintiff's alleged employment by Nickel Plate. During that time NW employees were subject to physical examinations to qualify for employment, as well as periodic physical examinations, and examinations to qualify for return to employment after illness or injury. At some locations records indicate that NW employees were periodically screened by chest x-ray for tuberculosis.

INTERROGATORY NO. 17: Please state whether Defendant has at any time provided safety equipment to the Plaintiff and/or the railroad workers of Defendant present at any time during Plaintiff's alleged employment by Defendant for protection against the inhalation of airborne asbestos dust, including but not limited to; masks, respirators, other breathing devices, protective clothing, protective gloves, etc. For each such item of equipment, please indicate when such item was first provided, under what circumstances provided, and the name, address and telephone number of the person most knowledgeable concerning such provision.

ANSWER: See Preliminary Statement and General Objection. Unknown as to Nickel Plate. NW purchased respirators and dust masks which were stocked and made available to employees. It is unknown exactly when this practice started. It is unknown as to specific instructions pertaining to maintenance and/or use of equipment which are normally supplied in instructions provided by the manufacturer with each item. An employee's supervisor would have made

respirators and masks available and instructed employees if any questions arose as to their use. Prior to 1983 NW did not specifically inform employees regarding potential hazards of asbestos and/or diseases potentially associated with asbestos exposure, because it had no reason to believe that employees were at risk. In 1983 a warning to current and former employees was issued (see previous answers) and on March 1, 1984, NW instituted an Asbestos Safety Program and Asbestos Respirator Program.

INTERROGATORY NO. 18: Please state whether Defendant ever agreed by contract, agreement, negotiation, collective bargaining or otherwise, to provide masks to Plaintiff and other crew members and/or employees of Defendant working with or around asbestos products. If so, please state verbatim the specific agreement or contract and/or other document by which Defendant agreed to provide such masks. Include the date the agreement was entered into, the period of time covered by the agreement and the parties to the agreement.

ANSWER: See Preliminary Statement and General Objection. Not to NW's knowledge.

INTERROGATORY NO. 19: Please state the precise State and/or Federal regulations, laws, statutes, or other authority pertaining to industrial hygiene or worker safety and health that governed, regulated controlled and/or were applicable to airborne asbestos exposure in your operations and/or in relation to Defendant's railroad.

ANSWER: See Preliminary Statement and General Objection. At this time it is unknown exactly what laws governed asbestos exposure at Nickel Plate's Lima, Ohio facilities during plaintiff's alleged employment during the late 1940s and 1950.

INTERROGATORY NO. 20: Please describe each and every occasion during the past thirty years when any regulatory agency or other governing body inspected Defendant's railroad to ascertain whether health and safety regulations were being followed or adhered to,

including the date of such inspection and/or meeting, the results, and whether a written report was produced.

ANSWER: See Preliminary Statement and General Objection. OBJECTION. NW objects to Interrogatory No. 20 for the reason that it requests information about a time period that is subsequent to plaintiff's alleged employment. Without waiver NW states, it is unknown whether any such inspections may have been made at Nickel Plate facilities during the time of plaintiff's alleged employment by Nickel Plate. To NW's knowledge there are no records of any such inspections which gave rise to negative reports.

INTERROGATORY NO. 21: Please state whether any asbestos-containing products in place or in use on Defendant's railroad, has been removed or abated at any time from 1965 to the present. If so, please answer the following:

A. List each and every abatement company or other contractor involved with the removal of asbestos, including address and telephone number, dates of such removal, and whether a contract for such removal exists;

B. Indicate the total amount in dollars spent by Defendant to abate or remove asbestos from the railroads.

C. State whether any "removal plan" or organized written criteria or other document related to asbestos removal on the railroad(s) was ever prepared by Defendant;

D. State whether corporate documents discussing or relating generally to the removal of asbestos are in existence and, if so, where they are maintained;

E. State precise dates and locations when and where such removal or abatement took place for each railroad.

ANSWER: See Preliminary Statement and General Objection. NW knows of no asbestos abatements conducted by Nickel Plate, and has no records of any such activities at Nickel Plate's Lima, Ohio facilities.

INTERROGATORY NO. 22: As to either the threshold limit values or maximum allowable concentrations of both asbestos dust and total dust provided by the American Conference of Governmental Industrial Hygienists, state:

A. The year in which Defendant was first advised of such limits or concentrations;

B. The name of the employee or official of the company receiving such advice;

C. How Defendant received notice of such limits or concentrations.

ANSWER: See Preliminary Statement and General Objection. NW currently has documents concerning OSHA's permissible exposure limit for airborne contaminants, as well as earlier OSHA documents on TLV. NW trial counsel have also assembled historical documents on TLV issues.

INTERROGATORY NO. 23: Please state whether and when Defendant received a copy of the Fleischer/Drinker Report published in 1945/1946.

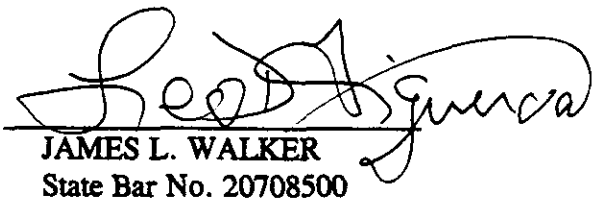
ANSWER: It is unknown if either Nickel Plate or NW ever received a copy of the Fleischer/Drinker report. NW states that its counsel have obtained articles, including Fleisher and Drinker's report, in connection with the defense of asbestos-related FELA actions. All such articles are equally available to plaintiff's counsel.

INTERROGATORY NO. 24: Please describe all actions taken by Defendant to comply with the Boiler Inspection Act, previously 45 U.S.C. §23 during the past thirty-five (35) years, now designated at 49 U.S.C. §20701 et seq.

ANSWER: See Preliminary Statement and General Objection. The interrogatory as framed is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The timeframe referred to in this Interrogatory is subsequent to plaintiff's alleged employment by Nickel Plate. NW has no records on this issue concerning Nickel Plate.

RESPECTFULLY SUBMITTED,

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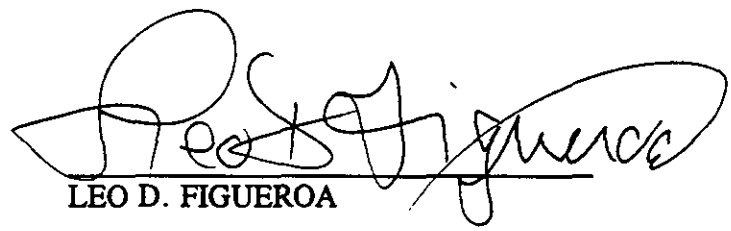
By: 
JAMES L. WALKER
State Bar No. 20708500
LEO D. FIGUEROA
State Bar No. 06984100

ATTORNEYS FOR DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was served by hand-delivery to Mr. Peter Kraus / Ms. Kimberly A. Castles, Baron& Budd, A Professional Corporation, 3102 Oak Lawn Avenue, Suite 1100, Dallas, Texas 75219, on this the 8th day of August, 1997.

All defense counsel may request a copy of this document.


LEO D. FIGUEROA

1615173/02

Norfolk and Western Railway Company

By: T. M. Brady
T. M. Brady
Assistant to the General Manager
Casualty Claims
Norfolk Southern Corporation

STATE OF VIRGINIA)
)
CITY OF NORFOLK)

T. M. Brady, being first duly sworn upon his oath, says that he has read the above and foregoing Answers and Objections of Defendant Norfolk and Western Railway Company to Plaintiff's Interrogatories Directed to Norfolk and Western Railway Company; that he does not have personal knowledge regarding the answers thereto but that the matters set forth therein are true, according to his best information and belief; and that he is authorized to execute these answers on behalf of the Norfolk and Western Railway Company.

T. M. Brady
T. M. Brady
Assistant to the General
Manager Casualty Claims
Norfolk Southern Corporation

Subscribed and sworn to before me this 6th day of August, 1997.

Virginia A. Jefferson
Notary Public

My Commission Expires:
8-31-2000