

January 21, 1999

J.D. Bashline, Esquire
McLeod, Alexander, Powel, et al.
802 Rosenberg Street
P.O. Box 629
Galveston, TX 77553-0629

RE: Cause No. 96-01882-C
Henkel vs. Burlington Northern Santa Fe Railway Co., et al.

Dear Mr. Bashline:

As you may recall, over one year ago by letter dated September 15, 1997, we notified you of deficiencies in BNSF's answers to Plaintiff's First and Second Sets of Interrogatories and responses to Plaintiff's Requests for Production. We have confirmed your office's receipt of this letter. According to our records, we have not received any supplemental answers or responses in the 16 months that have elapsed. This letter will adopt and incorporate by reference as well as supplement our September 15, 1997 letter in a good faith effort to resolve a potential discovery dispute without the necessity for the court's intervention. Please consider this letter to be in further fulfillment of our discovery conference obligations under Rule 191.2 of the TEXAS RULES OF CIVIL PROCEDURE.

I. First Set of Interrogatories. Despite the more than adequate passage of time to conduct a reasonable inquiry and provide full and complete answers to Plaintiff's First Set of Interrogatories, BNSF has not provided answers to a majority of the interrogatories, nor has it supplemented its initially defective answers.

J.D. Bashline, Esq.
January 21, 1999
Page Two

A. As called to your attention more than 16 months ago, BNSF has still not provided substantive responses, respectively, subject to its objections, to the following interrogatories:

Nos. 11, 16, 17, 19, 20, 21, 22, 25

Plaintiff is entitled to full and complete answers, subject to whatever objections BNSF chooses to lodge.

B. BNSF likewise provided non-responsive answers to the following interrogatories:

Nos. 7, 8

Nos. 7 and 8 are non-responsive because the period of plaintiffs' employment with BNSF's predecessor and his duties were provided in plaintiffs' work history sheet. These answers were thus evasive or incomplete. For purposes of a Motion to Compel, an evasive or incomplete answer is treated as a failure to answer. TEX. R. CIV. P. 215(c). The phrase "evasive or incomplete answer" is easily understood and is not vague. See Ex parte Durham, 921 S.W.2d 482, 487 (Tex. App.—Corpus Christi, 1996, no writ) (citing Ex parte Alloju, 894 S.W.2d 85, 90 (Tex. App.—Houston [14th Dist.], orig. proceeding) (denying relief), *relief granted on other grounds*, 907 S.W.2d 486 (Tex. 1995)). The answers identified above satisfy the "evasive and incomplete" standard of Rule 215(c), because they appear to be calculated to misinform and withhold discoverable information under the guise of providing an answer. As such, they amount to no answer at all.

C. Moreover, BNSF has indicated that it will supplement its responses to the following interrogatories or these interrogatories are otherwise subject to supplementation:

Nos. 4, 5, 6, 9, 10, 14, 15, 18 and 24.

According to our records, no supplemental responses have been received to date. As you are well aware, regardless of what BNSF may have offered to do, the TEXAS RULES OF CIVIL PROCEDURE *require* that BNSF file and serve supplemental answers if the original answers were "incorrect or incomplete when made" within the meaning of TEX. R. CIV. P. 193.5. Moreover, the timing of supplementation is not left up to the convenience of the party who previously provided such answers; the duty to effectuate supplementation arises as soon as the need to do so becomes apparent. Id.; see also Campos v. State Farm Gen. Ins. Co., 943 S.W. 2d 52, 54 (Tex. App.—San Antonio 1997, writ denied)(interpreting 166b(6)(a)(1), containing similar language). BNSF has utterly failed in its duty to supplement since it knew and acknowledged that it had or was in the process of obtaining additional information which would be provided, but was not.

J.D. Bashline, Esq.
January 21, 1999
Page Three

In addition, the supplementation of inaccurate answers patently extends beyond supplementing those answers it acknowledged should be supplemented. BNSF owes Plaintiffs the obligation to review *all* previous objections and answers to interrogatories and responses to Requests for Production that were not answered fully or with factual correctness, such as No. 24.

Moreover, BNSF's failure to provide any substantive answers to the above-referenced interrogatories discloses that BNSF has not undertaken any reasonable inquiry into this information. BNSF has a duty to undertake reasonable inquiry, including inquiry into all information known *by the organization*, before responding to Plaintiffs' Interrogatories. See TEX. R. CIV. P. 193.1; see also Stewart v. Vaughn, 504 S.W.2d 600, 602 (Tex. App. -- Houston [14th] 1974, no writ).

Please provide full and complete answers to the above-referenced Interrogatories *by* _____, *January* __, 1999. If we do not receive full and complete answers by that date, we are prepared to file a Motion to Compel as to Plaintiff's First Set of Interrogatories.

II. Second Set of Interrogatories. Similarly, despite the passage of 16 months to conduct a reasonable inquiry and provide a "complete response" to Plaintiff's Second Set of Interrogatories, BNSF has neither responded fully nor supplemented its initially defective answers.

A. BNSF still has not provided any substantive responses, respectively, subject to its objections, to the following interrogatories:

Nos. 10, (11), (12), 17, 18, 21, 22, 24

Plaintiff is entitled to full and complete answers, subject to whatever objections BNSF chooses to lodge.

B. BNSF likewise provided non-responsive and/or evasive or incomplete answers to the following interrogatories:

Nos. 3, 4, 7, 8, (9), (10), 16, 19

The answers to nos. 3 and 5 are evasive and incomplete because no attempt was made to answer the subparts. BNSF's answer to no. 4 is non-responsive because it provides information only as to Medical Officers of certain of its predecessors, whereas all predecessor companies are encompassed within the definition of the defendant. In addition, the addresses and telephone numbers were not provided. Its answer to nos. (13) and (15) which cross-reference No. 4 are likewise flawed; No. 15 provided a generalized answer concerning all employees whereas the question is specific as to the

J.D. Bashline, Esq.
January 21, 1999
Page Four

Safety Department. BNSF's answers to nos. 7, 8, and 9 are likewise vague and generalized, and do not respond to the question asked; the answers do not refer to Defendant's knowledge that the specific diseases mentioned were caused by asbestos exposure; BNSF likewise failed to identify what information was obtained, who in the company had the information and when, who is the custodian of the information, and other specifics called for in the subparts. BNSF's answer to nos. 16 and 19 are non-responsive because BNSF knows that Plaintiff worked for BNSF's predecessor(s) and such entities are clearly encompassed within Definition 1. It is not burdensome to search for these predecessor records, given BNF's self-described computerized system of document retrieval, capable of locating responsive information within a matter of minutes. BNSF's answers to no. 25 is clearly non-responsive and thus evasive because BNSF has claimed it has no knowledge concerning Plaintiff's craft or trade. This information is provided in Plaintiff's work history sheet.

In addition, please confirm whether or not the information called for in response to any interrogatory or request (e.g., First Set, No. 24) is in the asbestos document collection currently housed at the Brasher Law Firm, as testified to by the BNSF records custodian, or whether BNSF searched these asbestos records for responsive information prior to providing these answers. If not, please do so before supplementing.

C. Moreover, BNSF has indicated that it will supplement its responses to the following interrogatories:

Nos. 1, 2, 6, 13, 14, 15, 16, 20, and 23.

No supplemental responses have been received to date.

In all events, please provide full and complete answers to the above-referenced Interrogatories *by* _____, *January* __, 1999. If we do not receive full and complete answers by that date, we are prepared to file a Motion to Compel.

III. Requests for Production.

A. BNSF still has not provided any documentation, subject to its objections, that is responsive to the following requests for production:

Nos. 4, 5, 6, 7, 13, 14, 18, 23, 27, 28, 30, 31, 32, 33, 36, 37, 39, 40, 42, 43, 44, 44, 45, 46, 47 and 49.

J.D. Bashline, Esq.
January 21, 1999
Page Five

BNSF's objections that the requests are "burdensome" conflict with the sworn testimony of BNSF's own witnesses. As noted previously, BNSF witnesses have already testified under oath that BNSF records are highly organized, that those of its predecessors are archived, and that its records can be easily identified and retrieved by way of BNSF's computerized records management database and its keyword and date-range search capability, and that such retrieval can be accomplished in as little as a few minutes.

In addition, BNSF has provided no privilege log as to those documents it claims are subject to some privilege.

B. BNSF's answer to no. 21 is non-responsive. It calls for a document, not an explanation of what is in a document being withheld.

C. Moreover, BNSF has indicated that it will supplement its responses to the following requests for production or the following requests are otherwise subject to supplementation:

Nos. 1, 2, 3, 8, 9, 10, 11, 12, 15, 16, 17, 19, 21, 22, 24, 25, 26, 34, (35) and 38.

According to our records, no supplemental responses have been received to date.

Please provide all documentation responsive to the above-referenced requests for production *by* _____, *January* __, 1999. If we do not receive full and complete documentation by that date, we are prepared to file a Motion to Compel.

IV. Requests to Admit

A. BNSF failed to respond to the following request to admit:

No. (15).

B. BNSF indicated it would supplement the following requests or the following requests are otherwise subject to amendment or supplementation:

Nos. 5, 9, 13, (14) 20, 25.

J.D. Bashline, Esq.
January 21, 1999
Page Six

According to our records, no amended and/or supplemental responses to the above-referenced requests have been received to date.

Please provide answers to the above-enumerated requests to admit *by* _____, *January* __, *1999*. If we do not receive amended or supplemental responses by that date, we are prepared to file a Motion to Compel.

The vast majority of your objections and refusals to provide discovery are based on your assertion that BNSF has no idea where Plaintiff worked or what he did. The work history sheet in your possession amply provided that information. BNSF has no justification for continuing to withhold answers and responsive documents on this basis.

V. Purportedly Privileged Materials and Information Being Withheld.

In addition, pursuant to TEX. R. CIV. P. 193.3(b), this will hereby request, *within 15 days of the postmark date of this letter*, a privilege log providing the information set forth in TEX. R. CIV. P. 193.3(b)(1) and (2) as to all material and information being withheld by BNSF on grounds of privilege. If we do not receive it within such period, we will assume you are withdrawing your claims of privilege.

We will assume you are opposed to any Motion to Compel necessitated by BNSF's failure to provide full and complete answers to the foregoing interrogatories and requests unless we hear from you in writing to the contrary.

Of course, if you wish to discuss cooperating with us by supplying substantive responses to any of the foregoing, or if full and complete answers to all outstanding discovery, as set forth above, and the privilege log are en route to our offices, please advise me immediately in writing.

Yours very truly,

Lou Thompson

J:\DOCS\HOLLY\BNSF-DC.FBI