

1995

Alicia Jensen v. Union Pacific Railroad, Inc. : Brief of Appellant

Utah Court of Appeals

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J. Clare Williams; Morris O. Haggerty; Attorneys for Appellees.

Allen K. Young; Young & Kester; Attorneys for Appellant.

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UTAH
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

ALICIA JENSEN,

Plaintiffs/Appellants,

vs.

UNION PACIFIC RAILROAD, INC.

Defendants/Appellees.

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Appellate Court No.

950754-CA

950346

940400280

950452-CA

Priority No.

15

BRIEF OF APPELLANT

Appeal from the final order of the Fourth District Court, Utah
County, State of Utah, the Honorable Boyd L. Park presiding

Oral Argument Requested

J. CLARE WILLIAMS (3490)
MORRIS O. HAGGERTY (5283)
Attorneys for Respondent
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Appellant
101 East 200 South
Springville, UT 84663

FILED
Utah Court of Appeals

NOV 28 1995

Marilyn M. Branch
Clerk of the Court

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J. CLARE WILLIAMS (3490)
MORRIS O. HAGGERTY (5283)
Attorneys for Respondent
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Appellant
101 East 200 South
Springville, UT 84663

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

In this matter, jurisdiction is conferred on the Utah Court of Appeals by § 78-2-2(3)(j) of the Utah Code. Utah Code Annotated § 78-2-2(3)(j) (1953 as amended).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

ISSUE NO. 1: Whether material facts are in dispute which preclude the granting of Summary Judgment involving the failure of the train to sound its whistle prior to a grade crossing as is required by state law?

STANDARD OF REVIEW: This issue is one of judicial conclusion. The trial court found that there were no genuine issues as to material fact in dispute, and consequently, summarily judged for the defendant. However, plaintiff/appellant asserts that there are genuine issues of material fact in dispute. When reviewing an order granting summary judgment, the Utah Supreme Court has held, "we view the facts and all reasonable inferences therefrom that can be drawn therefrom in a light most favorable to party opposing the motion. The legal conclusions of the trial court are not accorded deference, but are reviewed in stead for correctness."

Baldwin v. Burton, 850 P.2d 207 (Utah 1993). The Court will review a trial court's interpretation of a statute for correctness. Beynon v. St. George-Dixie Lodge #1743, 854 P.2d 513 (Utah 1993).

ISSUE NO. 2: Whether material facts are in dispute which preclude the granting of summary judgment involving a grade crossing being more than ordinarily hazardous?

STANDARD OF REVIEW: Again an issue of judicial conclusion. However, in a negligence action, summary judgement should be used with great caution. Massey v. Utah Power & Light, 609 P.2d 723 (Utah 1985). And summary judgement is only appropriate in the most clear-cut case. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). In addition, because summary judgement is a matter of law, the Utah Supreme Court reviews the trial court's ruling for correctness. Christensen v. Swenson, 874 P.2d 125 (Utah 1994).

ISSUE NO. 3: Whether Union Pacific can be held liable for the injuries to plaintiff because the train was traveling in excess of the authorized speed limit?

STANDARD OF REVIEW: This issue is a question of law which the Court of Appeals reviews for correctness. Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990). See Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526 (Utah 1988).

DETERMINATIVE OR IMPORTANT PROVISIONS

The following provisions are set forth in Addendum A to this Brief:

Utah Code Annotated § 56-1-14 (1953 as amended).

49 C.F.R. § 213.9 (1992)

49 C. F. R. § 217 (1992)

STATEMENT OF THE CASE

Nature of the Case:

This appeal comes from Alecia Jensen. Ms. Jensen appeals the order dismissing her claim against Union Pacific Railroad Company entered on June 9, 1995 by the Fourth District Court, County of Utah, State of Utah, by the Honorable Boyd L. Park. Ms. Jensen's claim arises from a train/auto accident which occurred in Springville, Utah where Ms. Jensen was thrown from her automobile upon impact with a Union Pacific locomotive. As a result of the collision, Ms. Jensen suffered a broken neck resulting in permanent paralysis.

Course of the Proceedings and Disposition Below:

On May 16, 1994, Alecia Jensen, by and through her attorney Allen K. Young, filed a complaint and jury demand in the Fourth District Court for the County of Utah, State of Utah.

On February 6, 1995, a motion for summary judgement was filed by the Union Pacific Railroad company. Alleging that there were no issues of genuine fact regarding the three claims asserted by the plaintiff. The claims asserted by the plaintiff were that the train was traveling in excess of its federally agreed upon speed, that the operator of the train did not properly sound the whistle as is required by Utah Code Annotated § 56-1-14 (1953 as amended), and that the grade crossing was more than ordinarily hazardous assigning the railroad an additional duty of care.

On March 2, 1995, the plaintiff responded to the defendant's motion, averring that there were issues genuine issues of material fact and attaching affidavits of experts who would testify to the correctness of the plaintiff's assertions.

On April 11, 1995, the defendant filed a supplemental reply memorandum for summary judgement. This motion was only days before oral argument was scheduled by the Fourth District Court on the motion for summary judgement.

On May 15, 1995, the Honorable Boyd L. Park issued a memorandum decision finding for the defendant. Consequently, on June 9, 1995, Judge Park signed an order dismissing Ms. Jensen's complaint.

On July 5, 1995, Ms. Jensen filed her notice of appeal with the Utah Supreme Court which was "poured-over" to the Utah Court of Appeals on October 25, 1995.

STATEMENT OF FACTS

Alecia Jensen was riding as a passenger in her car, which was being driven by Bruce Brinkmeier. Brinkmeier stopped directly behind a truck with an attached camper at a railroad crossing in Springville, Utah. Directly across the grade crossing, a livestock auction was taking place as it does on most Saturday mornings throughout the year. The livestock auction leads to terrible congestion around the grade crossing as cars, trucks, and livestock trailers are packed into every available spot to park surrounding the grade crossing.

The truck proceeded across the grade crossing, and Brinkmeier followed and was struck in the passenger door by a Union Pacific Freight train. Brinkmeier escaped relatively unharmed, yet Jensen suffered a broken neck.

The railroad's speed graph shows that the train was traveling at a speed of between 50 and 51.3 miles-per-hour. (Affidavits of Reading, Andrews, and page 77 of the Union Pacific time table attached to their affidavits). The maximum speed limit for trains in the area of the collision according to the Union Pacific timetable in force on the date of the collision was 50 Miles per hour. (Affidavits of Reading, Andrews, and page 77 of the Union Pacific time table attached to their affidavits). According to the railroad's time table and pursuant to federal regulation, 50 miles per hour is the Federally enforceable speed, and speeds in excess of 50 violate Federal law. (Reading affidavit). Had the Defendants train travelled at 50 miles per hour or less for the three minutes immediately prior to the collision, the train would have been at least 392.25 feet southwest of the intersection, and would have been at least 5.35 seconds from the crossing, thereby avoiding a collision with the vehicle in which the Plaintiff was a passenger. (Affidavit of Andrews).

In addition, The Pulse Electronics, Inc. graph taken from the train at the scene does not reflect that a horn was sounded prior to the collision. (Pulse Electronic, Inc. graph attached to affidavits of Andrews and Reading). Furthermore, the

plaintiff as well as the driver of the car, Bruce Brinkmeier, did not remember hearing the horn being sounded. (Plaintiff's Memorandum in Opposition to Sum. Judgement--Jensen Affidavit; Brinkmeier depo. p. 15).

SUMMARY OF THE ARGUMENT

The trial court improperly dismissed this case on summary judgement because material facts are in controversy as to whether the train sounded its warning devise, and with regard to the grade crossing being more than ordinarily hazardous.

The trial court also made an erroneous judgement of law regarding train speed.

ARGUMENT

POINT NO. 1

Summary Judgment Should Not Be Granted Because Material Facts Are In Dispute

When a Motion for Summary Judgment is submitted, the moving party must establish that there are no material facts in dispute and that the moving party is entitled to judgment as a matter of law. Atkinson v. IHC Hospitals, Inc., 798 P. 2d 733 (Utah 1990). The Supreme Court also relates the facts and all reasonable inferences therefrom in the light most favorable to the non moving party. Christensen v. Swenson, 874 P.2d 125 (Utah 1994). Furthermore, the Utah Supreme Court has held that summary judgment is generally inappropriate to resolve negligence claims and should be employed "only in the most clear-cut case." Ingram v. Salt Lake City, 733 P.2d 126 (1987).

The plaintiff has disputed relevant facts that the defendant has set forth as uncontroverted. The Plaintiff and Bruce Brinkmeier both deny hearing any warning bells or whistles prior to the collision. The Pulse speed graph which has a line for the horn and whistle does not show that a whistle was blown prior to the collision. The railroad has made inconsistent statements in its answers to interrogatories and its affidavits about the nature and manner of whether the horn was sounded or not. All of these facts are material to a finder of fact. The undisputed affidavits of the experts retained by the Plaintiff show that the Train was speeding at the time of the collision and had been for at least three minutes prior to the collision. Had the train not been speeding, the accident would not have occurred according to expert Andrews.

If material facts are in dispute, summary judgment is inappropriate and should not be granted by the trial court. Therefore, on the factual basis alone, summary judgment in favor of the defendant should be denied. Nevertheless, the following argument establishes the reasons defendant is not entitled to summary judgment as a matter of law.

POINT NO. 2

Union Pacific Can Be Held Liable For The Injuries To Plaintiff Because The Train Was Traveling In Excess Of The Authorized Speed Limit

The defendant lays most of its eggs in the basket of CSX

Transportation, Inc. v. Easterwood, 113 S. Ct. 732; 123 L. Ed. 2d 387 (1993), which is an issue that has not been reconciled with Utah jurisprudence regarding more than ordinarily hazardous crossings regarding this factual matter. In that case, Lizzy Easterwood sued CSX Transportation for the wrongful death of her husband. Easterwood, 113 S.Ct. at 1736. Thomas Easterwood was killed when one of CSX's trains struck Mr. Easterwood's truck as he was proceeding across a grade crossing in Cartersville, Georgia. Id. Mrs. Easterwood claimed that CSX Transportation did not maintain adequate railroad grade crossings, and that the train was being negligently operated at excessive speeds, of which both claims were made pursuant to Georgia common law. The facts in the case were undisputed that the Federal Railway Administration had set a maximum authorized speed on the section of track in question at 60 miles per hour and the train which struck the plaintiffs' vehicle was going significantly slower than these prescribed limits. Justice White delivered the 7-2 opinion of the Court, which affirmed the Eleventh Circuit. Writing for the Court, Justice White held that the "speed limits must be read as not only establishing a ceiling, but also precluding additional State regulation of the sort which respondent seeks to impose on petitioner." Id. at 1742. Consequently, the Court held that Mrs. Eastwood's state, common law negligence claim regarding train speed was preempted by the federal regulation, holding "We thus conclude that the respondent's excessive speed claim cannot stand in light of the

Secretary's adoption of the regulations in § 213.9," upholding the motion for summary judgement. Id. At 1743.

The logic of the Supreme Court in Easterwood is that the Court did not want states or municipalities to interfere with Federal law, the Federal Railway administration, or interstate commerce. In that case, the plaintiffs made claims under state common law negligence issues and claims that the defendants exceeded reasonable speeds.

Not only are the facts in this case are very different, but so is the legal theory. In this case, the defendant Union Pacific Railroad Co., pursuant to 49 C. F. R. 217, has filed with the Federal Railway Administration its Timetable evidencing that the MAXIMUM authorized speed at the intersection of this collision is 50 miles per hour. See Exhibit 2, page 77 of the Union Pacific Railroad System Timetable No. 9 attached to Plaintiff's Memorandum in Opposition to Motion for Summary Judgement. The rules, regulations and Timetables filed with the Federal Railway Administration are enforceable against the defendant, and train speeds in excess of those Timetables violate Federal law. See the Affidavit of Bruce Reading, attached to his Affidavit contained within Plaintiff's Memorandum in Opposition to Motion for Summary Judgement.

The undisputed fact is that the defendant's train was traveling in excess of 50 miles per hour immediately prior to the collision and had averaged, for three miles immediately prior to the collision, a speed of 51.5 miles per hour. See the

Affidavit of J. Bruce Reading attached as Exhibit 1 contained within Plaintiff's Memorandum in Opposition to Motion for Summary Judgement. See also the Affidavit of Dennis Andrews, attached within Defendant's Motion For Summary Judgement/Points and Authorities.

The plaintiff in this case does not attempt to impose upon the defendant Union Pacific Railroad Co. a state speed regulation which is more stringent than its Federal counterpart. Rather, the plaintiff claims that the defendants train was exceeding its own maximum authorized Timetable speed (thereby violating Federal law) and in so doing was negligent. Plaintiff submits that this negligence was a cause in fact of the collision which so horribly injured the plaintiff. Furthermore, the trial court relied on Southern Pacific Transportation Co. v. Public Util. Comm'n of Oregon, 9 F.3d 807 (9th Cir. 1993), which also confuses this point of law. In that case, Oregon passed a statute permitting authorities to ban the warning horns and whistles of trains under certain conditions. The circuit court held that because the Federal Railroad Administration did not approve or adopt these specific rules the rules advocated by Oregon did not have the force of law. However in this case 49 C.F.R. § 217 specifically provides for the registering of time tables. Further, the § 217 is titled "Operating Rules."

POINT NO. 3

**Compliance With Requirements of U.C. A. § 56-1-14
Is An Issue of Genuine Material Fact**

Whether Union Pacific fulfilled its duty to conduct the proper procedure required by Utah law is a disputed issue of genuine material fact. Utah Code Annotated § 56-1-14 requires:

Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than eighty rods from any city or town street or public grade crossing until such city or town street or public highway grade crossing shall be crossed except in towns and in terminal points, the sounding of the locomotive whistle or siren at least one-fourth of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid.
. U.C.A § 56-1-14 (Emphasis added).

§ 56-1-14 was clarified by Justice Maughan in Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046 (Utah 1978); Justice Maughan wrote for the Utah Supreme Court, "[t]he statute requires a bell to be rung for 80 rods (one quarter mile) before the crossing, for the purpose of warning approaching traffic of the train's approach. The sounding of the whistle is a substitute for the bell, but there is no reason to assume the warning purpose is in anyway changed." Justice Maughan also held, "[t]he clear intent of the statute is to require either the ringing of a bell or the sounding of a whistle for one quarter of a mile before entering the crossing. Allowing the sounding of a whistle at any point before reaching one quarter of a mile from the crossing would produce obviously absurd results. And in Footnote 1 of the opinion, Justice Maughan wrote that it is "common knowledge" that railroads require four blasts in a pattern of two long, one short, and another long blast which continues through the grade crossing. Effectively

Justice Maughan clarified the standard of care for railroads which must comply with §56-1-14 as sounding the warning at a quarter mile before the grade crossing and continuing through the grade crossing.

The Plaintiff, nor the driver of the vehicle Bruce Brinkmeier ever heard the train sound its horns or whistles. (Defendant's motion for summary judgment; Brinkmeier depo. p. 15). Train horns and whistles are historically very loud. The failure of the plaintiff or her driver to hear them certainly creates an issue of fact about whether the engineer ever or in what manner sounded the horns or bells.

In the statements of witnesses Gerald and Whitney Hill, and Ryan Puffer, the engineer, there is no mention of the train's horn blowing or bell sounding as is required by law. See Exhibit A to Defendant's Motion for Summary Judgment, the Utah County Sheriff's Department Report, Voluntary Statements. Gerald and Whitney Hill were occupants of the automobile which proceeded across the grade crossing immediately before the defendant's train struck plaintiff's car as it started across the grade crossing. The plaintiff argues that the Hills' statements are not only proof that the whistle was not blown, but also of the "more than ordinarily dangerous" nature of the grade crossing, which is specifically addressed in section D of this response.

Furthermore, the defendant's Statement of Fact varies from its Answers to Plaintiff's First Set of Interrogatories. In its

answer to plaintiff's Interrogatory asking, "How many times, and at what intervals, was the whistle of the defendant's train activated in the minute prior to the collision with the vehicle in which the plaintiff was a passenger?" the defendant answered, "continuously from approximately one quarter mile prior to the crossing in a two long, one short, one long repeat sequence." Yet according to Number 15 of Defendant's Memorandum of Points and Authorities, "Puffer turned the bell on when he started sounding the whistle for the 5950 South crossing. He never turned the bell off until after the accident. Puffer operated the whistle and bell continuously from more than one quarter mile away up to the point of accident." The first account of the whistle blowing mentions a pattern or "sequence"; however, the second record does not mention any such pattern. It merely states that the bell and whistle were operated "continuously" (Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, page 5).

The Event Record taken from the train by the Utah County Sheriff at the time of the collision indicates that no whistles or bells were sounded by the train. See Defendant's Motion for Summary Judgment. It is a question of material fact as to whether or not the recorder was working properly, or if the train did not in fact sound any whistles or bells, and is a question for a finder of fact, to be determined by evidence and testimony at trial.

The plaintiff, Alicia Jensen, did not hear the train sound

its whistle or bells. See the Affidavit of Alicia Jensen. See also, the taped statement of Bruce Brinkmeier, the driver of the Jensen vehicle, taken by Lawrence Curley, Union Pacific Claims Representative, wherein Mr. Brinkmeier stated that he did not hear the train blow its whistle. See Brinkmeier Affidavit, Defendant's Motion for Summary Judgment. Whether Alicia Jensen and Bruce Brinkmeier did not hear the train's whistle or bells because they were not blown, or because the sound was muffled by the sounds of the auction, is a question of material fact.

However, in their reply memorandum in support of motion for summary judgment, defendant states that because there was no witness specifically listening for the train's horn, the testimony is merely negative testimony and does not establish fact. (Defendant's Reply Motion for Summary Judgment p.6) As to proof of the sounding a warning, the Utah Supreme Court has held that witnesses do not have to be positively listening for the whistle or the horn. Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1066 (Utah 1978); Hudson v. Union Pacific Railroad Co., 20 Utah 245, 233 P.2d 357 (1951). In other words, negative testimony is adequate to find a railroad at fault for not sounding its warning horn.

In Curtis, the Court overruled a directed verdict for the defense where the trial court held that the plaintiff had only negative evidence. The Court argued that because the plaintiff's three witnesses were very near to the accident, they could testify as to whether or not the warning was actually

sounded regardless of whether they were specifically listening for the warning or not. Furthermore, whether the warning was sounded or not is an issue of fact for the jury.

After proof one necessarily turns to damages. § 56-1-14 states, "Every person in charge of a locomotive violating the provisions of this section is guilty of a misdemeanor, and the railroad company shall be liable for all damages which any person may sustain by reason of such violation."

In sum, the issue of whether Union Pacific actually operated its bell and whistle, as is required by law, is a genuine issue of material fact to which a fact finder--jury--needs to determine whether or not the horn was in fact blown and apportion damages if they find that the horn was not blown.

POINT NO. 4

Plaintiff Is Claiming That Grade Crossing is More than Ordinarily Dangerous, Which Is An Issue For Trial.

Plaintiff's Complaint avers that the crossing was "more than ordinarily hazardous" (Plaintiff's Complaint, Paragraph 7). Under the holding in English v. Southern Pacific Co., 13 Utah 407, 45 P.47 (1986), a crossing that is "more than ordinarily hazardous" adds an additional duty of care to the railroad. The English standard was recently applied in Gleave v. Denver & Rio Grande Western Railroad Company, 749 P. 2d 660 (1988), for injuries caused in a grade crossing accident. In Gleave, the Court held that the plaintiff could not argue any defect which was the responsibility of UDOT, meaning any permanent warning

devices. However, if the plaintiff had proven that the crossing was more than ordinarily dangerous, "it was a matter for the jury to determine whether or not the railroad was at fault. Id. at 633. The Gleave jury found Rio Grande at fault because trees blocked the view of the train; the jury's verdict was upheld by the Utah Supreme Court.

Recently, in Duncan v. Union Pacific Railroad, 842 P. 2d 832 (1992), a car containing a driver and three passengers was struck by a train on Droubay Road in Tooele County. The Duncan Court upheld precedent established in English v. Southern Pacific Co., 13 Utah 407, 45 P. 47 (1896), that railroad companies are not responsible for crossing conditions unless the crossing is "more than ordinarily hazardous." Id. at 833. The Utah Supreme Court, in Duncan, held that the crossing was not more than ordinarily hazardous as 'plaintiffs could not demonstrate, or even suggest, what more Union Pacific could have done to make this crossing safer, short of installing automatic warning lights and signs and gates, which admittedly was not its responsibility." Id. at 833. However, in Duncan, the plaintiff's claim centered around the warning devices issue, to which the Utah Court of Appeals held that "the plaintiffs could not prove or claim that there were any other reasons for the train company's negligence." Id. at 833.

As distinguished from Duncan, Plaintiff/Appellant has suggested numerous recommendations which Union Pacific could apply which would reduce the likelihood of a train/automobile

accident at this particular grade crossing. Some of which are: 1) slow the trains down, 2) post a flag man on Saturday mornings when there are livestock auctions, 3) mail a copy of your time table to the auction yard. If a jury found that this particular grade crossing is in fact more than ordinarily dangerous, the railroad could respond to its duty of heightened care by acting in a responsible manner. Yet the railroad cites, U.C.A. § 41-6-19, which states that property owners have the duty to "remove from his property any tree, plant, shrub, or other obstruction, or part of it, which, by obstructing the view of any operator, constitutes a traffic hazard." Utah Code Annotated § 41-6-19 (1953 as amended). However, the auction yard does not own all of the property which its participants park upon. Moreover, the parked cars are not the only hazard, for the commotion, atmosphere, and moving traffic also add to the heightened risk at this grade crossing. This foreseeable risk has been interpreted by Utah courts as imposing a heightened duty upon the railroad. See Duncan v. Union Pacific Railroad, 842 P. 2d 832 (1992); English v. Southern Pacific Co., 13 Utah 407, 45 P. 47 (1896); Bridges v. Union Pacific R.R., 488 P.2d 738 (1971); Hobbs v. Denver & Rio Grande W. R.R., 677 P.2d 1128 (Utah 1984); Gleave v. Denver & Rio Grande Western Railroad Company, 749 P. 2d 660 (1988).

So reading English in the light of Duncan, a plaintiff must aver that the rail crossing was extra hazardous for reasons other than warning devices, which the plaintiff has done,

arguing that the auction barn accompanied by the busy nature of a livestock auction, including trucks and trailers parked near the crossing as well as accompanying traffic, creates all of the elements of a more than ordinarily dangerous crossing (plaintiff's Complaint, Paragraph 7). In Duncan, the Court stated the criteria for a "more than ordinarily dangerous crossing":

a crossing might be found to be more than ordinarily hazardous if it was in a thickly populated portion of a city; if the view of the tracks was obstructed because of the railroad itself or because of the natural objects; if the crossing was frequented by heavy traffic so that approaching trains could not be heard; or if, for any reason devices employed at the crossing were rendered inadequate to warn the public of the danger of an approaching train. . . Duncan v. Union Pacific Railroad, 842 P. 2d 832 at 834 (1992) [emphasis added].

This line of argument is directly in conflict with Defendant's Motion for Summary Judgment (Defendant's Motion for Summary Judgment, Section 2 p. 9). Union Pacific "denies that the crossing was more than ordinarily dangerous", yet plaintiff claims the auction barn as well as the traffic which accompanies a livestock auction complies with the criteria established in English and upheld in Duncan. The grade crossing which was the scene of the accident is as busy during an auction as any suburban city street; furthermore, the noise and commotion resulting from a livestock auction created noise and commotion so that a driver might not hear the train's whistle or bell when properly operated. Defendant's photographs, taken on the sixth of February, the Sunday following the accident, do not capture

the full story of the grade crossing on an auction day.

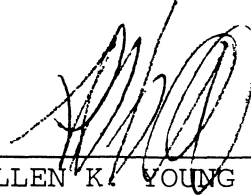
CONCLUSION

Based upon there being material facts in dispute, facts surrounding the sounding of the warning horn, and facts about the nature of the grade crossing, summary judgement in this case was inappropriate. Furthermore, the trial court made an error in interpreting federal regulation, which mandates that a railroad's time table becomes law. In sum, the trial court summarily dismissed a case which should have its day in court.

REQUEST FOR ORAL ARGUMENT

The plaintiff respectfully requests this Court to hear oral argument on this issue. The issue presents an issue of law which has not been heard by an appellate court in Utah, making the disposition of this case jurisprudentially important.

RESPECTFULLY SUBMITTED, this _____ day of November, 1995.



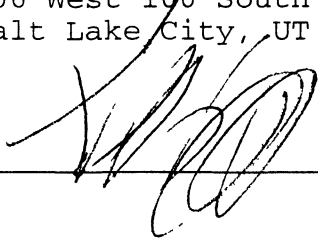
ALLEN K. YOUNG
Attorney for Appellant
101 East 200 South
Springville, Utah 84663

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing postage pre-paid on the

21 day of November, 1995 to:

J. CLARE WILLIAMS (3490)
MORRIS O. HAGGERTY (5283)
Attorneys for Respondent
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101



ADDENDA

A

(c) A railroad freight car subject to the notice prescribed in paragraph (a) of this section may be moved from the place where it was found to be unsafe for further service to the nearest available point where the car can be repaired, if such movement is necessary to make such repairs. However, the movement is subject to the further restrictions of §215.9 of this chapter.

[41 FR 18657, May 6, 1976, as amended at 41 FR 43153, Sept. 30, 1976]

§216.13 Special notice for repairs—locomotive.

(a) When an FRA Motive Power and Equipment Inspector determines a locomotive is not safe to operate in the service to which it is put, whether by reason of nonconformity with the FRA Locomotive Inspection Regulations set forth in part 230 of this chapter or by reason of any other condition rendering the locomotive unsafe, he notifies the railroad in writing that the locomotive is not in serviceable condition. After receipt of the Special Notice, the railroad shall remove the locomotive from service until it is restored to serviceable condition. The locomotive may not be deemed to be in serviceable condition until it complies with all applicable requirements of part 230 of this chapter and until all additional deficiencies identified in the Special Notice have been corrected.

(b) The carrier shall notify the FRA Regional Director of Railroad Safety in writing when the locomotive is returned to service, specifying the repairs completed. The carrier officer or employee directly responsible for the repairs shall subscribe this writing under oath.

§216.15 Special notice for repairs—track class.

(a) When an FRA Track Inspector or State Track Inspector determines that track does not comply with the requirements for the class at which the track is being operated, as defined in the Track Safety Standards (49 CFR part 213), he notifies the railroad in writing that the track is being lowered in class and that operations over that track must comply with the speed limitations prescribed in part 213 of this chapter. The notice describes the con-

ditions requiring the track to be lowered in class, specifies the exact location of the affected track segment, and states the highest class and corresponding maximum speeds at which trains may be operated over that track. After receipt of such notice, the speeds at which trains operate over that track shall not exceed the stated maximum permissible speeds, until such time as the track conforms to applicable standards for a higher class.

(b) The railroad shall notify the Regional Director in writing when the track is restored to a condition permitting operations at speeds authorized for a higher class, specifying the repairs completed.

[41 FR 43153, Sept. 30, 1976]

§216.17 Appeals.

(a) Upon receipt of a Special Notice prescribed in §§216.11, 216.13, or 216.15, a railroad may appeal the decision of the Inspector to the FRA Regional Director of Railroad Safety for the region in which the notice was given. The appeal shall be made by letter or telegram. The FRA Regional Director assigns an inspector, other than the inspector from whose decision the appeal is being taken, to reinspect the railroad freight car, locomotive, or track. The reinspection will be made immediately. If upon reinspection, the railroad freight car or locomotive is found to be in serviceable condition, or the track is found to comply with the requirements for the class at which it was previously operated by the railroad, the FRA Regional Director or his agent immediately notifies the railroad, whereupon the restrictions of the Special Notice cease to be effective. If on reinspection the decision of the original inspector is sustained, the FRA Regional Director notifies the railroad that the appeal has been denied.

(b) A railroad whose appeal to the FRA Regional Director for Railroad Safety has been denied may, within thirty (30) days from the denial, appeal to the Administrator. After affording an opportunity for informal oral hearing, the Administrator may affirm, set aside, or modify, in whole or in part, the action of the FRA Regional Director.

(c) The requirements of a Special Notice issued under this subpart shall remain in effect and be observed by railroads pending appeal to a Regional Director for Railroad Safety or to the Administrator.

Subpart C—Emergency Order—Track

§216.21 Notice of track conditions.

(a) When an FRA Track Inspector or State Track Inspector finds track conditions which may require the issuance of an Emergency order removing the track from service under section 203, Public Law No. 91-458, 84 Stat. 972 (45 U.S.C. 432), the Inspector may issue a notice to the railroad owning the track. The notice sets out and describes the conditions found by the Inspector and specifies the location of defects on the affected track segment. The Inspector provides a copy to the FRA Regional Track Engineer and the FRA Regional Director for Railroad Safety.

(b) In the event the railroad immediately commences repairs on the affected track and so advises the FRA Regional Track Engineer, the Regional Track Engineer assigns an Inspector to reinspect the track immediately on the completion of repairs. If upon reinspection the Inspector determines that necessary repairs have been completed, he withdraws the Notice of Track Conditions.

§216.23 Consideration of recommendation.

Upon receipt of a Notice of Track Conditions issued under §216.21, the FRA Regional Director for Railroad Safety prepares a recommendation to the Administrator concerning the issuance of an Emergency order removing the affected track from service. In preparing this recommendation, the FRA Regional Director considers all written or other material bearing on the condition of the track received from the railroad within three (3) calendar days of the issuance of the Notice of Track Conditions and also considers the report of the FRA Regional Track Engineer.

§216.25 Issuance and review of emergency order.

(a) Upon recommendation of the FRA Regional Director for Railroad Safety, the Administrator may issue an Emergency order removing from service track identified in the notice issued under §216.21.

(b) As specified in section 203, Public Law No. 91-458, 84 Stat. 972 (45 U.S.C. 432), opportunity for review of the Emergency order is provided in accordance with section 554 of title 5 of the U.S.C. Petitions for such review must be submitted in writing to the Office of Chief Counsel, Federal Railroad Administration, Washington, DC 20590. Upon receipt of a petition, FRA will immediately contact the petitioner and make the necessary arrangements for a conference to be held at the earliest date acceptable to the petitioner. At this conference, the petitioner will be afforded an opportunity to submit facts, arguments and proposals for modification or withdrawal of the Emergency order. If the controversy is not resolved at this conference and a hearing is desired, the petitioner must submit a written request for a hearing within fifteen (15) days after the conference. The hearing will commence within fourteen (14) calendar days of receipt of the request and will be conducted in accordance with sections 556 and 575, title 5, U.S.C.

(c) Unless stayed or modified by the Administrator, the requirements of each Emergency order issued under this subpart shall remain in effect and be observed pending decision on a petition for review.

§216.27 Reservation of authority and discretion.

The FRA may issue Emergency orders concerning track without regard to the procedures prescribed in this subpart whenever the Administrator determines that immediate action is required to assure the public safety.

PART 217—RAILROAD OPERATING RULES

Subpart A—General

- Sec.
- 217.1 Purpose.
- 217.3 Application.
- 217.4 Definitions.
- 217.5 Penalty.
- 217.7 Operating rules; filing and record-keeping.
- 217.9 Program of operational tests and inspections; recordkeeping.
- 217.11 Program of instruction on operating rules; recordkeeping; electronic record-keeping.
- 217.13 Information collection.

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES

AUTHORITY: 49 U.S.C. 20103, 20107, 20111, 20112, 21301, 21304, 21311 (1994) (formerly codified at 45 U.S.C. 431, 437, 438); Pub. L. 103-272 (1994); and 49 CFR 1.49(m).

SOURCE: 39 FR 41176, Nov. 25, 1974, unless otherwise noted.

Subpart A—General

§217.1 Purpose.

Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.

§217.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

[40 FR 2690, Jan. 15, 1975, as amended at 54 FR 33229, Aug. 14, 1989]

§217.4 Definitions.

As used in this part—

Class I, Class II, and Class III have the meaning assigned by regulations of the Interstate Commerce Commission (49 CFR part 1201; General Instructions 1-1), as those regulations may be revised

and applied by order of the Commission (including modifications in class thresholds based revenue deflator adjustments).

Division headquarters means the location designated by the railroad where a high-level operating manager (e.g., a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office.

System headquarters means the location designated by the railroad as the general office for the railroad system.

[59 FR 43070, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43070, Aug. 22, 1994, §217.4 was added effective November 21, 1994.

§217.5 Penalty.

Any person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

[53 FR 28599, July 28, 1988, as amended at 53 FR 52927, Dec. 29, 1988]

§217.7 Operating rules; filing and recordkeeping.

(a) On or before December 21, 1994, each Class I railroad, Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area that is in operation on November 21, 1994, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on November 21, 1994. Each Class I railroad, each Class II railroad, and each railroad providing commuter

service in a metropolitan or suburban area that commences operations after November 21, 1994, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable special instructions before it commences operations.

(b) After November 21, 1994, each Class I railroad, each Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area shall file each new amendment to its code of operating rules, each new timetable, and each new timetable special instruction with the Federal Railroad Administrator within 30 days after it is issued.

(c) On or after November 21, 1994, each Class III railroad and any other railroad subject to this part but not subject to paragraphs (a) and (b) of this section shall keep one copy of its current code of operating rules, timetables, and timetable special instructions and one copy of each subsequent amendment to its code of operating rules, each new timetable, and each new timetable special instruction, at its system headquarters, and shall make such records available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

[59 FR 43070, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43070, Aug. 22, 1994, §217.7 was revised effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

§217.7 Filing of operating rules.

(a) Before February 1, 1975, each railroad that is in operation on January 1, 1975, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on January 1, 1975. Each railroad that commences operation after January 1, 1975, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable instructions before it commences operations.

(b) Each amendment to a railroad's code of operating rules, each new timetable, and each new timetable special instruction which is issued after January 1, 1975, shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

§217.9 Program of operational tests and inspections; recordkeeping.

(a) *Requirement to conduct operational tests and inspections.* Each railroad to which this part applies shall periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetable special instructions in accordance with a written program retained at its system headquarters and at the division headquarters for each division where the tests are conducted.

(b) *Written program of operational tests and inspections.* On or after November 21, 1994, or 30 days before commencing operations, whichever is later, each railroad to which this part applies shall retain one copy of its current program for periodic performance of the operational tests and inspections required by paragraph (a) of this section and one copy of each subsequent amendment to such program. These records shall be retained at the system headquarters of the railroad and at the division headquarters for each division where the tests are conducted, for three calendar years after the end of the calendar year to which they relate. These records shall be made available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours. The program shall—

(1) Provide for operational testing and inspection under the various operating conditions on the railroad;

(2) Describe each type of operational test and inspection adopted, including the means and procedures used to carry it out;

(3) State the purpose of each type of operational test and inspection;

(4) State, according to operating divisions where applicable, the frequency with which each type of operational test and inspection is conducted;

(5) Begin within 30 days after November 21, 1994, or the date of commencing operations, whichever is later; and

(6) Include a schedule for making the program fully operative within 210 days after it begins.

(c) *Records of individual tests and inspections.* Each railroad to which this part applies shall keep a record of the date, time, place, and result of each

Sec.

- 217.1 Purpose.
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 217.11 Program of instruction on operating rules; recordkeeping; electronic record-keeping.
 217.13 Information collection.

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES

AUTHORITY: 49 U.S.C. 20103, 20107, 20111, 20112, 21301, 21304, 21311 (1994) (formerly codified at 45 U.S.C. 431, 437, 438); Pub. L. 103-272 (1994); and 49 CFR 1.49(m).

SOURCE: 39 FR 41176, Nov. 25, 1974, unless otherwise noted.

Subpart A—General**§217.1 Purpose.**

Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.

§217.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

[40 FR 2690, Jan. 15, 1975, as amended at 54 FR 33229, Aug. 14, 1989]

§217.4 Definitions.

As used in this part—

Class I, Class II, and Class III have the meaning assigned by regulations of the Interstate Commerce Commission (49 CFR part 1201; General Instructions 1-1), as those regulations may be revised

and applied by order of the Commission (including modifications in class thresholds based revenue deflator adjustments).

Division headquarters means the location designated by the railroad where a high-level operating manager (e.g., a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office.

System headquarters means the location designated by the railroad as the general office for the railroad system.

[59 FR 43070, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43070, Aug. 22, 1994, §217.4 was added effective November 21, 1994.

§217.5 Penalty.

Any person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

[53 FR 28569, July 28, 1988, as amended at 53 FR 52927, Dec. 29, 1988]

§217.7 Operating rules; filing and recordkeeping.

(a) On or before December 21, 1994, each Class I railroad, Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area that is in operation on November 21, 1994, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on November 21, 1994. Each Class I railroad, each Class II railroad, and each railroad providing commuter

service in a metropolitan or suburban area that commences operations after November 21, 1994, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable special instructions before it commences operations.

(b) After November 21, 1994, each Class I railroad, each Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area shall file each new amendment to its code of operating rules, each new timetable, and each new timetable special instruction with the Federal Railroad Administrator within 30 days after it is issued.

(c) On or after November 21, 1994, each Class III railroad and any other railroad subject to this part but not subject to paragraphs (a) and (b) of this section shall keep one copy of its current code of operating rules, timetables, and timetable special instructions and one copy of each subsequent amendment to its code of operating rules, each new timetable, and each new timetable special instruction, at its system headquarters, and shall make such records available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

[59 FR 43070, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43070, Aug. 22, 1994, §217.7 was revised effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

§217.7 Filing of operating rules.

(a) Before February 1, 1975, each railroad that is in operation on January 1, 1975, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on January 1, 1975. Each railroad that commences operation after January 1, 1975, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable instructions before it commences operations.

(b) Each amendment to a railroad's code of operating rules, each new timetable, and each new timetable special instruction which is issued after January 1, 1975, shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

§217.9 Program of operational tests and inspections; recordkeeping.

(a) *Requirement to conduct operational tests and inspections.* Each railroad to which this part applies shall periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetable special instructions in accordance with a written program retained at its system headquarters and at the division headquarters for each division where the tests are conducted.

(b) *Written program of operational tests and inspections.* On or after November 21, 1994, or 30 days before commencing operations, whichever is later, each railroad to which this part applies shall retain one copy of its current program for periodic performance of the operational tests and inspections required by paragraph (a) of this section and one copy of each subsequent amendment to such program. These records shall be retained at the system headquarters of the railroad and at the division headquarters for each division where the tests are conducted, for three calendar years after the end of the calendar year to which they relate. These records shall be made available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours. The program shall—

(1) Provide for operational testing and inspection under the various operating conditions on the railroad;

(2) Describe each type of operational test and inspection adopted, including the means and procedures used to carry it out;

(3) State the purpose of each type of operational test and inspection;

(4) State, according to operating divisions where applicable, the frequency with which each type of operational test and inspection is conducted;

(5) Begin within 30 days after November 21, 1994, or the date of commencing operations, whichever is later; and

(6) Include a schedule for making the program fully operative within 210 days after it begins.

(c) *Records of individual tests and inspections.* Each railroad to which this part applies shall keep a record of the date, time, place, and result of each

operational test and inspection that was performed in accordance with its program. Each record shall specify the officer administering the test and inspection and each employee tested. These records shall be retained at the system headquarters of the railroad and at the division headquarters for each division where the tests are conducted for one calendar year after the end of the calendar year to which they relate. These records shall be made available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

(d) *Annual summary on operational tests and inspections.* Before March 1 of each calendar year, each railroad to which this part applies, except for a railroad with less than 400,000 total manhours, shall retain, at each of its division headquarters and at the system headquarters of the railroad, one copy of a written summary of the following with respect to its previous year's activities: The number, type, and result of each operational test and inspection, stated according to operating divisions where applicable, that was conducted as required by paragraphs (a) and (b) of this section. These records shall be retained for three calendar years after the end of the calendar year to which they relate and shall be made available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

(e) *Electronic recordkeeping.* Each railroad to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in paragraphs (b) through (d) of this section, provided that all of the following conditions are met:

(1) The railroad adequately limits and controls accessibility to such information retained in its electronic database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the system headquarters and at each division headquarters;

(3) Each such terminal has a desk-top computer (i.e., monitor, central processing unit, and keyboard) and either a facsimile machine or a printer connected to the computer to retrieve and

produce information in a usable format for immediate review by FRA representatives;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(5) The railroad provides representatives of the Federal Railroad Administration with immediate access to these records for inspection and copying during normal business hours and provides printouts of such records upon request.

[39 FR 41176, Nov. 25, 1974, as amended at 59 FR 43070, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43070, Aug. 22, 1994, §217.9 was amended by revising paragraphs (a), (b) introductory text, (b)(5), (c), and (d), and adding paragraph (e) effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

§217.9 Program of operational tests and inspections; recordkeeping.

(a) Each railroad to which this part applies shall periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetables special instructions in accordance with a program filed with the Federal Railroad Administrator.

(b) Before March 1, 1975, or 30 days before commencing operations, whichever is later, each railroad to which this part applies shall file with the Federal Railroad Administrator, Washington, DC 20590, three copies of a program for periodic conduct of the operational tests and inspections required by paragraph (a) of this section. The program shall— * * *

(5) Begin within 30 days after it is filed with the Federal Railroad Administrator; and

* * * * *

(c) Each amendment to a railroad's program for periodic conduct of operational tests and inspections required under paragraph (a) of this section shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

(d) *Records.* Each railroad shall keep a record of the date and place of each operational test and inspection performed in accordance with its program. Each record must provide a brief description of the operational test or inspection, including the characteristics of the operation tested or inspected, and the results thereof. Records must be retained for one year and made available to represent-

atives of the Federal Railroad Administration for inspection and copying during regular business hours.

§217.11 Program of instruction on operating rules; recordkeeping; electronic recordkeeping.

(a) To ensure that each railroad employee whose activities are governed by the railroad's operating rules understands those rules, each railroad to which this part applies shall periodically instruct each such employee on the meaning and application of the railroad's operating rules in accordance with a written program retained at its system headquarters and at the division headquarters for each division where the employee is instructed.

(b) On or after November 21, 1994, or 30 days before commencing operations, whichever is later, each railroad to which this part applies shall retain one copy of its current program for the periodic instruction of its employees as required by paragraph (a) of this section and one copy of each subsequent amendment to that program. The system headquarters of the railroad shall retain one copy of all these records; the division headquarters for each division where the employees are instructed shall retain one copy of all portions of these records that the division applies and enforces. These records shall be made available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours. This program shall—

(1) Describe the means and procedures used for instruction of the various classes of affected employees;

(2) State the frequency of instruction and the basis for determining that frequency;

(3) Include a schedule for completing the initial instruction of employees who are already employed when the program begins;

(4) Begin within 30 days after November 21, 1994, or the date of commencing operations, whichever is later; and

(5) Provide for initial instruction of each employee hired after the program begins.

(c) Each railroad to which this part applies is authorized to retain by electronic recordkeeping its program for periodic instruction of its employees

on operating rules provided that the requirements stated in §217.9(e)(1) through (5) of this part are satisfied.

[39 FR 41176, Nov. 25, 1974, as amended at 59 FR 43071, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43071, Aug. 22, 1994, §217.11 was amended by revising the section heading and paragraphs (a), (b) introductory text, (b)(4), and (c) effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

§217.11 Program of instruction on operating rules.

(a) To ensure that each railroad employee whose activities are governed by the railroad's operating rules understands those rules, each railroad to which this part applies shall periodically instruct that employee on the meaning and application of the railroad's operating rules in accordance with a program filed with the Federal Railroad Administrator.

(b) Before March 1, 1975 or 30 days before commencing operations, whichever is later, each railroad shall file with the Federal Railroad Administrator, Washington, DC 20590, three copies of a program for the periodic instruction of its employees as required by paragraph (a) of this section. This program shall— * * *

(4) Begin within 30 days after it is filed with the Federal Railroad Administrator;

* * * * *

(c) Each amendment to a railroad's program for the periodic instruction of its employees required under paragraph (a) of this section shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

§217.13 Information collection.

(a) The information collection requirements in this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Public Law 96-511, and have been assigned OMB control number 2130-0035.

(b) The information collection requirements are found in the following sections:

- (1) Section 217.7.
- (2) Section 217.9.
- (3) Section 217.11.
- (4) Section 217.13.

[50 FR 7919, Feb. 27, 1985. Redesignated and amended at 59 FR 43071, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43071, Aug. 22, 1994, §217.13 was removed and §217.15 was

redesignated as §217.13 and amended by removing paragraph (b)(4) effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

§217.13 Annual report.

Before March 1 of each year, each railroad to which this part applies except for a railroad with fewer than 400,000 total manhours, shall file with the Federal Railroad Administrator, Washington, DC 20590, a written report of the following with respect to its previous year's activities:

(a) The total number of train miles which were operated over its track.

(b) A summary of the number, type, and result of each operational test and inspection, stated according to operating divisions where applicable, that was conducted as required by §217.9.

(c) The number of operational tests and inspections conducted as required by §217.9 per 10,000 train miles.

[39 FR 41176, Nov 25, 1974, as amended at 50 FR 7919, Feb 27, 1985, 50 FR 31578, Aug 2, 1985, 53 FR 47131, Nov 21, 1988, 54 FR 53279, Dec 27, 1989, 55 FR 22794, June 4, 1990, 58 FR 68235, Dec 23, 1993]

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES¹

Section	Violation	Willful violation
217.7 Operating rules		
(a)	\$2,500	\$5,000
(b)	\$2,000	\$5,000
(c)	\$2,500	\$5,000
217.9 Operational tests and inspections		
(a) Program	\$5,000	\$7,500
(b) Record of program	2,500	\$5,000
(c) Record of tests and inspections	\$5,000	\$7,500
(d) Annual summary	\$5,000	\$7,500
217.11 Program of instruction on operating rules		
(a)	\$5,000	\$7,500
(b)	\$2,500	\$5,000

¹ A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[59 FR 43071, Aug 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43071, Aug 22, 1994, appendix A to part 217 was revised effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES¹

Section	Violation	Willful violation
217.7 Filing of operating rules		
(a)	\$2,500	\$5,000

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES¹—Continued

Section	Violation	Willful violation
(b)	2,500	5,000
217.9 Program of operational tests and inspections and recordkeeping		
(a)	5,000	7,500
(b) and (c)	2,500	5,000
(d)	1,000	2,000
217.11 Program of instruction on operating rules		
(a)	5,000	7,500
(b)	2,500	5,000
(c)	2,500	5,000
217.13 Annual report		
(a) and (c)	1,000	2,000
(b) and (d)	2,500	5,000

¹ A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[53 FR 52927, Dec 29, 1988]

PART 218—RAILROAD OPERATING PRACTICES

Subpart A—General

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- 218.7 Waivers
- 218.9 Civil penalty
- 218.11 Filing, testing, and instruction

Subpart B—Blue Signal Protection of Workers

- 218.21 Scope
- 218.22 Utility employee
- 218.23 Blue signal display
- 218.25 Workers on a main track
- 218.27 Workers on track other than main track
- 218.29 Alternate methods of protection
- 218.30 Remotely controlled switches

Subpart C—Protection of Trains and Locomotives

- 218.31 Scope
- 218.35 Yard limits
- 218.37 Flag protection
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APPENDIX A TO PART 218—SCHEDULE OF CIVIL PENALTIES

APPENDIX B TO PART 218—STATEMENT OF AGENCY ENFORCEMENT POLICY ON BLUE SIGNAL PROTECTION FOR UTILITY EMPLOYEES

APPENDIX C TO PART 218—STATEMENT OF AGENCY ENFORCEMENT POLICY ON TAMPERING

AUTHORITY: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342, and 49 CFR 1.49(m).

SOURCE: 44 FR 2175, Jan 10, 1979, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to Part 218 appear at 58 FR 43292, Aug 16, 1993.

Subpart A—General

§218.1 Purpose.

This part prescribes minimum requirements for railroad operating rules and practices. Each railroad may prescribe additional or more stringent requirements in its operating rules, timetables, timetable special instructions, and other special instructions.

§218.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate rolling equipment on standard gage track which is part of the general railroad system of transportation.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation, or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

[44 FR 2175, Jan 10, 1979, as amended at 53 FR 28599, July 28, 1988]

§218.5 Definitions.

Absolute block means a block in which no train is permitted to enter while it is occupied by another train.

Blue signal means a clearly distinguishable blue flag or blue light by day and a blue light at night. When attached to the operating controls of a locomotive, it need not be lighted if the inside of the cab area of the locomotive is sufficiently lighted so as to make the blue signal clearly distinguishable.

Camp car means any on-track vehicle, including outfit, camp, or bunk cars or modular homes mounted on flat cars used to house rail employees. It does not include wreck trains.

Car shop repair track area means one or more tracks within an area in which the testing, servicing, repair, inspection, or rebuilding of railroad rolling equipment is under the exclusive control of mechanical department personnel.

Controlling locomotive means a locomotive arranged as having the only controls over all electrical, mechanical and pneumatic functions for one or more locomotives, including controls transmitted by radio signals if so equipped. It does not include two or more locomotives coupled in multiple which can be moved from more than one set of locomotive controls.

Effective locking device when used in relation to a manually operated switch or a derail means one which is

- (1) Vandal resistant,
- (2) Tamper resistant, and
- (3) Capable of being locked and unlocked only by the class, craft or group of employees for whom the protection is being provided.

Flagman's signals means a red flag by day and a white light at night, and a specified number of torpedoes and fuses as prescribed in the railroad's operating rules.

Group of workers means two or more workers of the same or different crafts assigned to work together as a unit under a common authority and who are in communication with each other while the work is being done.

Interlocking limits means the tracks between the opposing home signals of an interlocking.

(6) A statement signed by the assignee acknowledging the assignment to him of responsibility for purposes of compliance with this part.

(d) If the Administrator is satisfied that the assignee is competent and able to carry out the duties and responsibilities of the track owner under this part, he may grant the petition subject to any conditions he deems necessary. If the Administrator grants a petition under this section, he shall so notify the owner and the assignee. After the Administrator grants a petition, he may hold the track owner or the assignee or both responsible for compliance with this part and subject to penalties under §213.15.

(e) A common carrier by railroad which is directed by the Interstate Commerce Commission to provide service over the track of another railroad under 49 U.S.C. 11125 is considered the owner of that track for the purposes of the application of this part during the period the directed service order remains in effect.

[47 FR 39402, Sept. 7, 1982]

§213.7 Designation of qualified persons to supervise certain renewals and inspect track.

(a) Each track owner to which this part applies shall designate qualified persons to supervise restorations and renewals of track under traffic conditions. Each person designated must have—

(1) At least—

(i) One year of supervisory experience in railroad track maintenance; or

(ii) A combination of supervisory experience in track maintenance and training from a course in track maintenance or from a college level educational program related to track maintenance;

(2) Demonstrated to the owner that he—

(i) Knows and understands the requirements of this part;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(3) Written authorization from the track owner to prescribe remedial ac-

tions to correct or safely compensate for deviations from the requirements in this part.

(b) Each track owner to which this part applies shall designate qualified persons to inspect track for defects. Each person designated must have—

(1) At least—

(i) One year of experience in railroad track inspection; or

(ii) A combination of experience in track inspection and training from a course in track inspection or from a college level educational program related to track inspection;

(2) Demonstrated to the owner that he—

(i) Knows and understands the requirements of this part;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(3) Written authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements of this part, pending review by a qualified person designated under paragraph (a) of this section.

(c) With respect to designations under paragraphs (a) and (b) of this section, each track owner must maintain written records of—

(1) Each designation in effect;

(2) The basis for each designation; and

(3) Track inspections made by each designated qualified person as required by §213.241.

These records must be kept available for inspection or copying by the Federal Railroad Administrator during regular business hours.

[36 FR 20336, Oct. 20, 1971, as amended at 38 FR 875, Jan. 5, 1973]

§213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraphs (b) and (c) of this section and §§213.57(b), 213.59(a), 213.113(a), and 213.137 (b) and (c), the following maximum allowable operating speeds apply:

(In miles per hour)

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under §213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

(c) Maximum operating speed may not exceed 110 m.p.h. without prior approval of the Federal Railroad Administrator. Petitions for approval must be filed in the manner and contain the information required by §211.11 of this chapter. Each petition must provide sufficient information concerning the performance characteristics of the track, signaling, grade crossing protection, trespasser control where appropriate, and equipment involved and also concerning maintenance and inspection practices and procedures to be followed, to establish that the proposed speed can be sustained in safety.

[36 FR 20336, Oct. 20, 1971, as amended at 38 FR 875, Jan. 5, 1973; 38 FR 23405, Aug. 30, 1973; 47 FR 39402, Sept. 7, 1982; 48 FR 35883, Aug. 8, 1983]

§213.11 Restoration or renewal of track under traffic conditions.

If during a period of restoration or renewal, track is under traffic conditions and does not meet all of the requirements prescribed in this part, the work on the track must be under the

continuous supervision of a person designated under §213.7(a) who has at least one year of supervisory experience in railroad track maintenance. The term "continuous supervision" as used in this section means the physical presence of that person at a job site. However, since the work may be performed over a large area, it is not necessary that each phase of the work be done under the visual supervision of that person.

[47 FR 39402, Sept. 7, 1982]

§213.13 Measuring track not under load.

When unloaded track is measured to determine compliance with requirements of this part, the amount of rail movement, if any, that occurs while the track is loaded must be added to the measurement of the unloaded track.

[38 FR 875, Jan. 5, 1973]

§213.15 Civil penalty.

Any person (including a railroad, any manager, supervisor, official, or other employee or agent of a railroad, any owner of track on which a railroad operates, or any person held by the Federal Railroad Administrator to be responsible under §213.5(d) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix B to this part for a statement of agency civil penalty policy.

[36 FR 20336, Oct. 20, 1971, as amended at 53 FR 28598, July 28, 1988; 53 FR 52924, Dec. 29, 1988]

§213.17 Exemptions.

(a) Any owner of track to which this part applies may petition the Federal Railroad Administrator for exemption

B

J. CLARE WILLIAMS, #3490
MORRIS O HAGGERTY, #5283
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101-1151

JUN 12 1995

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

ALECIA JENSEN,)
)
 Plaintiffs,) **ORDER GRANTING SUMMARY JUDGMENT**
)
 vs.)
)
 UNION PACIFIC RAILROAD)
 COMPANY) Civil No. 940400280
)
 Defendant.) Judge Boyd L. Park
)
 _____)

Defendant, Union Pacific Railroad Company's Motion for Summary Judgment came on for hearing by the Court on April 17, 1995; with defendant being represented by J. Clare Williams and plaintiff, who was present in the courtroom, being represented by Allen K. Young; and with the parties having filed written briefs and exhibits and having argued their respective positions to the Court, and the Court being fully advised in the premises, now rules as follows:

The Court finds and concludes:

- (1) That the speed of defendant's train was not a proximate cause of the accident;
- (2) That defendant was not responsible for any conditions which may have been present at the time of the accident and created a "more than ordinarily hazardous"

crossing; and

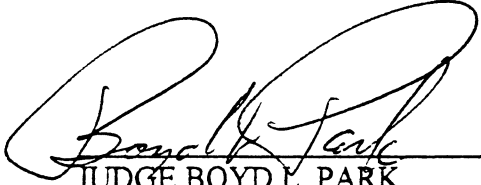
(3) That defendant did sound the train's bell and whistle as it approached the crossing.

Therefore, the Court finds that there is no genuine issue as to any material fact to prevent it from acting on defendant's motion as a matter of law.

Accordingly, the Court hereby grants defendant's Motion for Summary Judgment and orders plaintiff's Complaint dismissed with prejudice, with each party to pay its own costs and expenses.

DATED this 9 day of June, 1995.

BY THE COURT:


JUDGE BOYD L. PARK

Approved as to form this _____ day
of _____, 1995.

Allen K. Young
Attorney for Plaintiff

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✓ ✓ ✓ ✓ ✓

MAY 13 1995

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
4 5-17-95 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

<p>ALECIA JENSEN, Plaintiff, vs. UNION PACIFIC RAILROAD, INC., Defendant.</p>	<p>MEMORANDUM DECISION CASE NO. 940400280 DATE May 15, 1995 JUDGE BOYD L. PARK</p>
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This matter came before the Court on April 17, 1995 for oral argument on defendant's Motion For Summary Judgment. The Court, having received and reviewed the motion, memorandum in support, memorandum in opposition, reply memorandum, and supplemental reply memorandum; having heard oral arguments; and having reviewed the applicable law, now makes the following findings and conclusions:

1. This Court has jurisdiction to decide this case. Although plaintiff is a resident of Salt Lake County, State of Utah, defendant Union Pacific Railroad is a Utah corporation authorized to do business in the State of Utah and in Utah County, State of Utah. The accident which gave rise to this cause of action occurred in Utah County, State of Utah, and therefore jurisdiction and venue are properly vested in this Court.
2. On February 5, 1994, the parties were involved in a collision between defendant's train and plaintiff's automobile. Plaintiff was a passenger in her automobile, which was crossing the railroad tracks at approximately 5950 South 650 West in Utah County when the automobile was struck by a train owned and operated by defendant. Plaintiff alleges she suffered severe and permanent injuries as a direct and proximate result of this collision.
3. On February 7, 1995 defendant filed with this Court a Motion For Summary Judgment and an accompanying Memorandum of Points and Authorities in Support of Motion For Summary Judgment. On March 2, 1995 plaintiff filed a Memorandum in Opposition to

Defendant's Motion For Summary Judgment and a Request for Hearing on Plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment. On March 15, 1995 Defendant's Reply Memorandum in Support of Motion For Summary Judgment was filed. On April 12, 1995 Defendant's Supplemental Reply Memorandum in Support of Motion For Summary Judgment was filed with the Court. Oral arguments on this motion were heard on April 17, 1995.

4. The accident giving rise to this cause of action occurred at approximately 12:10 p.m. on February 5, 1994 at a public railroad crossing of defendant's Provo Subdivision mainline trackage located near 650 West and 5950 South in Spanish Fork, Utah County. At the time of the accident, plaintiff's automobile was being driven by plaintiff's boyfriend, Bruce Brinkmeier, also a minor at the time of the accident. Brinkmeier was cited for driving without a license. The train in question was an empty coal train with three locomotives and 46 trailing empty coal cars. The train weighed 1424 tons and was 2622 feet in length.

5. According to the train's engineer, the train was traveling from Milford to Provo in a southwest to northeast direction. *See* Affidavit of Ryan Puffer, defendant's Memorandum in Support, Exhibit D. The trackage at that location is relatively straight and flat. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(e). Plaintiff's automobile was traveling southbound on 650 West. The road (650 West) is straight and flat for hundreds of feet before reaching the crossing. *Id.* The trackage and road intersect at an angle greater than 90 degrees with reference to the directions of approach of the train and car. *Id.* at ¶ 5(a).

6. The crossing is located in a rural farming area and is surrounded by open fields on the approach side. A Utah Livestock Auction building and animal pens are located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which plaintiff's automobile approached. The northwest quadrant, which is the view quadrant for the approaching train and car, is an open field. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B. At the time of the accident, a

livestock auction was taking place. There was a considerable amount of traffic, and trucks and trailers were parked near the crossing.

7. An advance stop sign warning sign was posted alongside 650 West approximately 572 feet north of the crossing. Also posted were an advance railroad crossing warning sign, an advance railroad crossing sign painted on the road, railroad crossing "crossbuck" signs, and a stop sign. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B.

8. Defendant alleges that its engineer began sounding the locomotive whistle and bell approximately 1/4 mile away from the 5950 South crossing and continued to sound them up to the point of the accident at the 650 West crossing. *See* Affidavit of Ryan Puffer, ¶¶ 7-8, defendant's Memorandum in Support, Exhibit D. The distance between the 5950 South and 650 West crossings is approximately 1,100 feet. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(b).

9. At about the time the train passed over the 5950 South crossing, the engineer noticed a truck pulling a horse trailer begin to drive over the tracks in a southbound direction. Shortly after seeing the truck/horse trailer clear the crossing, the engineer noticed plaintiff's automobile rolling towards the crossing. The car was following a few seconds behind the truck/horse trailer and moving past the stop sign. The engineer placed the train in emergency braking immediately upon seeing the car. *See* Affidavit of Ryan Puffer, ¶¶ 9-11, defendant's Memorandum in Support, Exhibit D.

10. The train was a few hundred feet from the crossing when the engineer first saw plaintiff's car approaching the intersection. *See* Affidavit of Ryan Puffer, ¶ 10, defendant's Memorandum in Support, Exhibit D. It took the train approximately 1,400 feet to stop after emergency braking was initiated. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(g). The left side of the snowplow of the leading locomotive struck the right front portion of the car. *See* Affidavit of Ryan Puffer, ¶ 10, defendant's Memorandum in Support, Exhibit D; Affidavit of Lawrence Curley, defendant's

Memorandum in Support, Exhibit B, at ¶ 4(g)-(h). Both occupants were ejected from the car and thrown in the same northeasterly direction. Neither occupant was wearing a seatbelt.

11. Defendant alleges that plaintiff and Brinkmeier played a "wish" game upon arrival at the crossing, lifting their feet from the floor of the car and looking for something metallic within the car to touch with their fingers while simultaneously making a wish and crossing the tracks. Plaintiff admits this, but asserts that she has no recollection of doing so just prior to the collision. The parties agree, for the purpose of the summary judgment motion, that plaintiff and Brinkmeier never saw or heard the train prior to impact.

12. The parties agree that the "authorized speed limit" for the trackage in question was set by the Federal Railroad Administration (FRA) at 60 m.p.h. for freight trains and 80 m.p.h. for passenger trains. However, defendant Union Pacific voluntarily filed with the FRA a lower "timetable" speed of only 50 m.p.h. for its freight trains. Plaintiff argues that it is this timetable speed that applies rather than the FRA's authorized speed limit of 60 m.p.h.

13. Defendant claims that the train was traveling between 49 and 51 m.p.h. for at least the last three miles before the engineer initiated emergency braking. *See* Affidavit of Ryan Puffer, ¶ 5, defendant's Memorandum in Support, Exhibit D; Affidavit of George E. Ohlsson, ¶ 7, defendant's Memorandum in Support, Exhibit F. Plaintiff argues that the train was traveling an average speed of 51.5 m.p.h. for the three minutes prior to the collision. *See* Affidavit of Dennis Andrews, ¶ 8, Plaintiff's Memorandum in Opposition, Exhibit 2.

14. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* U.R.C.P. 56; *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789 (Utah Ct. App. 1991). Furthermore, "[a]lthough summary judgment may on occasion be appropriate in negligence cases, it is appropriate only in the most clear-cut case." *Ingram v. Salt Lake City*, 733 P.2d 126, 126 (1987) (citing *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982)).

15. Defendant's Motion For Summary Judgment addresses three areas of analysis: 1) Union Pacific was not negligent in traveling in excess of the timetable speed limit; 2) Union Pacific did not fail to reduce the speed of its train through what plaintiff alleged to be a "more than ordinarily hazardous crossing"; and 3) Union Pacific complied with requirements of U.C.A. § 56-1-14, which governs the use of whistles and bells when approaching railroad crossings. The Court will analyze these issues individually.

Authorized Speed Limit

16. Although the FRA has set the speed limit for freight trains at 60 m.p.h., Union Pacific has voluntarily chosen to set a lower "timetable" speed limit of 50 m.p.h. for its freight trains, 10 m.p.h. below the speed limit mandated by the FRA. According to plaintiff's accident reconstructionist, the train was averaging a speed of 51.5 m.p.h. for the three minutes prior to the collision. *See* Affidavit of Dennis Andrews (Plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment, Exhibit 2). At oral arguments, plaintiff presented a speed graph obtained from the train's recorder. That graph indicated variations in the train's speed prior to the accident, and recorded the train's speed as varying from 50 m.p.h. to as much as 52.5 m.p.h.

17. Based on data retrieved from the train's Pulse Electronics "speed recorder" device which electronically recorded the train's speed on tape prior to the accident, defendant claims that the train was traveling between 49 and 51 m.p.h. for at least the last three miles before emergency braking was initiated. *See* Affidavit of George Ohlsson (defendant's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibit F); *see also* Pulse Electronic printout (defendant's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibit A). In the Affidavit of George E. Ohlsson, Manager of Operating Practices for Union Pacific Railroad (*see* defendant's Memorandum in Support, Exhibit F), Mr. Ohlsson stated the following:

It is difficult for even the most competent engineer to maintain a long and heavy train at a certain and undeviating speed. The curvature and undulation of the trackage will retard and increase the speed of a long and heavy train even though an engineer is holding a steady throttle on the locomotive. A train which travels for a number of miles at a speed which does not deviate more than one or two miles an hour is, in my professional opinion, going at a steady speed. It is simply not possible to control a train's speed any better than that.

Id. at ¶ 8.

18. Defendant argues that the FRA's "authorized speed limit" of 60 m.p.h. for freight trains preempts plaintiff's claim of excessive speed. Defendant cites *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993) in support of its argument that plaintiff's claims of common law negligence are unfounded. In *Easterwood*, the plaintiff sued for the death of her husband resulting from a railroad crossing accident, alleging that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The authorized speed limit for the track in *Easterwood* was set at 60 m.p.h. and, while conceding that the train was traveling at a speed under 60 m.p.h., Easterwood nevertheless claimed that CSX breached its common-law duty to operate its train at a moderate and safe rate of speed.

19. The federal regulations involved in *Easterwood* had been issued by the Secretary of Transportation pursuant to the Federal Railroad Safety Act of 1970 (FRSA), which established an authorized speed limit of 60 m.p.h. for freight trains. A clause of the FRSA permits states to adopt or continue in force any state law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary adopted a regulation covering the subject matter of such state requirement. The preemption clause of the FRSA (45 U.S.C.S. § 434) confers on the Secretary of Transportation the power to preempt state common law. Given the Secretary's adoption of train-speed regulations pursuant to the FRSA (49 C.F.R. § 213.9(a)), a state's common-law restrictions on train speed are *not* preserved by a saving clause in 45 U.S.C.S. § 434, under which a state may continue in force an additional or

more stringent law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard and when not incompatible with any federal law. *Easterwood*, 113 S.Ct. at 1743 (1993).

20. The Court in *Easterwood* found for CSX, who had argued that Easterwood's claim was preempted because the federal speed limits are regulations covering the subject matter of the common law of train speeds. The Court further stated that to hold otherwise would be to deprive the Secretary of the power to preempt state common law, a power clearly conferred by § 434. Therefore, the Court found that Easterwood's reliance on the common law was incompatible with both the FRSA and the Secretary's regulations. *Id.* at 1743.

21. In the case now before this Court, defendant argues that its train was traveling well below the federally imposed speed limit of 60 m.p.h. for freight trains. "The fact that the Union Pacific had set a lower 'timetable' speed limit than that specified by the FRA is irrelevant since any claim based upon a violation of the railroad set limit would be but a variation of plaintiff's common law negligence claim of excessive or unreasonable speed." *See* Defendant's Memorandum in Support at 8, ¶ 1.

22. Plaintiff argues that, because defendant filed its timetable with the FRA pursuant to 49 C.F.R. 217, the Court should consider that action as evidence that the maximum authorized speed at the intersection of the collision is 50 m.p.h. and that timetables filed with the FRA are therefore enforceable against the defendant, and train speeds in excess of those timetables violate federal law. *See* Affidavit of Bruce Reading (plaintiff's Memorandum in Opposition, Exhibit 1). Furthermore, plaintiff claims that this case is distinguishable from *Easterwood* because there is no attempt to impose on Union Pacific a state-enforced speed regulation which is more stringent than its federal counterpart. Instead, plaintiff claims that defendant's train was exceeding its own maximum authorized timetable speed, thus violating federal law, and that defendant was therefore negligent.

23. Given the ruling in *Easterwood* and the parties' arguments, the issue now before the Court is (a) whether Union Pacific's timetable speed of 50 m.p.h. for freight trains is a

variation of plaintiff's common law negligence claim of excessive speed and thus preempted by federal law governing the "subject area," or (b) whether the FRSA covers speed limits self-imposed by Union Pacific and, if not, whether defendant was negligent in exceeding its speed limit for freight trains.

24. The FRSA specifically permits states to adopt or continue in force any state law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary adopts a regulation covering the subject matter of such state requirement. This legislation was designed to prevent states from interfering with regulations established by the FRA. In this case, it is clear that the FRA had designated an "authorized speed limit" of 60 m.p.h. for freight trains traveling along this stretch of track. However, the State of Utah has not attempted to impose a more stringent law, rule, or regulation regarding authorized train speed. Instead, Union Pacific has created its own timetable speed of 50 m.p.h. The Court finds the present case to be distinguishable from *Easterwood*, where the State of Georgia tried to impose law, rules, or regulations governing train speed. The Court in *Easterwood* did not explain how the FRSA addresses the question of timetable speeds which are a) self-imposed by railroad companies and not by States; and b) lower than the federally authorized train speeds.

25. In his affidavit, plaintiff's witness Bruce Reading alleges that, under federal law, each railroad company is required to file a copy of its Operating Rules and Timetables with the FRA, and concludes that the speed limits mandated in the Union Pacific Railroad Company Operating Rules and Timetables thus become the federally mandated guidelines and maximum speed limits for the railroad company and are enforceable by the FRA. See Affidavit of Bruce Reading, ¶¶ 4-9, Plaintiff's Memorandum in Opposition, Exhibit 1. Accordingly, Union Pacific's self-imposed timetable speed of 50 m.p.h. would become its federally authorized speed and could not be preempted by the FRA.

26. Defendant argues that 49 C.F.R. § 217 does not authorize timetables to change the federal speed limits set in 49 C.F.R. § 213.9 and that timetable filings therefore have no

effect on the maximum speeds at which a railroad may operate its trains. According to defendant, section 217 requires only the filing of operating rules and timetables, which may or may not contain speed limits, and does not require that speed limit changes be filed with the FRA. Defendant again turns to the *Easterwood* decision and argues that it is § 213.9 which sets the "ceiling" or "maximum" speed, not timetables, and asserts that "[i]mplicit in such holding is the understanding that while a railroad may not exceed such limit, it may by internal fiat voluntarily operate its trains at any slower speed deemed appropriate." See Defendant's Reply Memorandum in Support at 4.

27. The *Easterwood* case does not provide any clear rule as to how one should address the issue of timetable speeds within 49 C.F.R. §§ 217 and 213.9. However, plaintiff has equally failed to provide any case law which would substantiate her claim that Union Pacific's timetable filing under § 217 has an effect on the maximum speed at which a railroad may operate its train under § 213.9. Defendant has provided the Court with the recent case of *Southern Pacific Transp. Co. v. Public Util. Comm'n of Oregon*, 9 F.3d 807 (9th Cir. 1993), which supports defendant's argument that the FRA, by requiring Union Pacific to file its timetable speed limits, does not thereby adopt that timetable limit as a federal law enforceable against the railroad and preemptive of the speed limits set forth in 49 C.F.R. § 213.9. In *Southern Pacific*, an Oregon law permitted local authorities to ban the sounding of locomotive whistles under certain conditions. Southern Pacific Transportation Company argued that the state law was preempted by three federal statutes and moved for summary judgment. The state of Oregon made a cross-motion for summary judgment, claiming that its regulations were not preempted as a matter of law. Following the Supreme Court's decision in *Easterwood*, the circuit court held that the state law and regulations were not preempted by any of the three federal statutes cited by Southern Pacific and affirmed the district court's grant of partial summary judgment in favor of the State of Oregon.

28. In addressing Southern Pacific's claim that the Oregon statute was also preempted by 45 C.F.R. § 217, which requires railroads to keep their operating rules on file with the

FRA, the circuit court stated that "[b]ecause the FRA neither approves nor adopts the railroad's rules in any manner, the rules do not have the force of law and therefore cannot preempt the Oregon statute." *Southern Pacific*, 9.F3d at 812 n.5. This statement is equally applicable in the case now before this Court, in that it supports defendant's argument that 49 C.F.R. § 217 does not authorize timetables to change the federal speed limits set in 49 C.F.R. § 213.9. The railroad's rules and timetable filings submitted to the FRA in accordance with section 217 are not approved or adopted by the FRA and therefore do not have the force of law.

29. Even if defendant were bound by its timetable speed of 50 m.p.h., there still remain the questions of (a) whether Union Pacific was negligent in exceeding that speed, and (b) if the train's speed was a proximate cause of the collision.

30. The train's speed in this matter was not a causal factor unless the train could have stopped, prior to collision, from the point at which plaintiff first saw the danger. The Court agrees with the holding in *Dombeck v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 129 N.W.2d 185 (Wisc. 1964). In that case, the Wisconsin Supreme Court determined that, even under an assumption that the train's speed was negligent, such speed as a matter of law could not be causal:

In order to be causal the train's speed must either have misled . . . the driver of the car or it must have interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision.

Id. at 192. As to the first prong of this test, whether Brinkmeier, as driver, or plaintiff, as passenger, were misled as to the speed of the train, plaintiff stated in her affidavit that she did not see the train prior to the collision, nor did she hear the train blow its whistle or sound its horn prior to the collision. *See* Affidavit of Alicia Jensen, ¶¶ 7-8, Plaintiff's Memorandum in Opposition, Exhibit 3. In his recorded statement, Mr. Brinkmeier also stated that he did not hear the train or its horn. *See* the recorded statement of Bruce

Brinkmeier at 15, Plaintiff's Memorandum in Opposition, Exhibit 4. The Court finds that, because both plaintiff and Brinkmeier admit that they were not looking or listening for a train, and because both stated that they never saw or heard the train prior to impact, neither could have been misled as to the speed of the train in estimating its time of arrival at the crossing. As to the second prong of this test, whether the train's speed interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision, the Court finds that plaintiff has made no argument or produced any evidence that the train could have been stopped or sufficiently slowed to have allowed plaintiff's automobile to safely cross the tracks if the train had indeed been traveling 50 m.p.h. at the time the engineer activated the emergency brakes. Defendant, however, provided the Court with the Affidavit of Ryan Puffer, the engineer. *See* defendant's Memorandum in Support, Exhibit D. In his affidavit, Engineer Puffer stated that he placed the train into emergency braking as soon as he saw plaintiff's automobile, because it was his impression that the car was not going to stop and was going to come onto the track directly in front of the train. He further stated that "[a] long heavy train takes a number of seconds, after placing it into emergency braking, before it even begins to slow down. On this occasion the train did not even begin to slow down before the accident happened." *Id.* at ¶ 11. In addition, defendant provided the Court with the affidavit of George E. Ohlsson, Manager of Operating Practices for Union Pacific Railroad Company. *See* defendant's Memorandum in Support, Exhibit F. In his affidavit, Mr. Ohlsson stated that the small difference between the 50 m.p.h. timetable speed and an actual speed of approximately 51 m.p.h. "would not have made any significant difference in terms of how far the train would have gone before slowing down or stopping after the brakes were applied. A matter of 1 m.p.h. is, in my opinion, insignificant in terms of stopping time and distance." *Id.* at ¶ 10.

31. For these reasons, the Court finds that, even if the train had been traveling one or two miles above the timetable speed limit of 50 m.p.h., the train's speed was not a proximate cause of the accident.

Dangerous Crossing

32. According to the Utah Supreme court in *English v. Southern Pacific Co.*, 45 P.47 (1896), a crossing that is "more than ordinarily hazardous" places an additional duty of care on the railroad. Plaintiff argues that several conditions existed at the time of the accident which created a "more than ordinarily hazardous" crossing. These conditions include (a) an auction barn near the tracks accompanied by the busy nature of a livestock auction; and (b) trucks and trailers parked near the crossing which may have impeded vision or caused plaintiff to not hear the train as it approached. According to plaintiff, the accident occurred during a time when the commotion and noise of a livestock auction rendered the nearby crossing "more than ordinarily hazardous."

33. More recently, the Utah Court of Appeals applied the *English* standard of "more than ordinarily hazardous" in *Gleave v. Denver & Rio Grande Western R.R. Co.*, 749 P.2d 660 (Utah App. 1988). In *Gleave*, the plaintiff was hit by an empty coal train at a crossing in Springville, Utah. The court instructed the jury that "UDOT was statutorily given ultimate responsibility for crossing design and warning and safety devices and that, accordingly, [the jury] could not find Rio Grande negligent 'based upon any defects which might exist with respect to the design of the 1600 South crossing or based upon any problems you may perceive in the lack of traffic warning devices' there." *Id.* at 663. The jury found the crossing to be more than ordinarily hazardous and then further found that Rio Grande failed to exercise reasonable care in driving the train across the roadway "given the crossing's design, its physical characteristics, and the existing warning signs." *Id.* at 664. The conditions that contributed to this "hazardous" crossing in *Gleave* included a dangerous crossing angle, a mound of earth, and a curving track.

34. In *Duncan v. Union Pacific R.R.*, 842 P.2d 832 (Utah 1992), a car containing a driver and three passengers was struck by a freight train in Tooele County on Droubay Road. While the road intersected the track at 43 degrees on the north and 136 degrees on the south, nothing obstructed the motorist's view of the tracks for several thousand feet. The Utah Supreme court in *Duncan* affirmed the trial court's finding that the "crossing was not 'more than ordinarily hazardous' because plaintiffs could not demonstrate, or even suggest, what more Union Pacific could have done to make this crossing safer, short of installing automatic warning lights and signs and gates, which admittedly was not its responsibility." *Id.* at 833. However, the *Duncan* court did reiterate the criteria used in the *English* case to determine whether a crossing would be found to be more than ordinarily hazardous:

[A] crossing might be found to be more than ordinarily hazardous if it was in a thickly populated portion of a city; if the view of the tracks was obstructed because of the railroad itself or natural objects; if the crossing was frequented by heavy traffic so that approaching trains could not be heard; or if, for any reason, devices employed at the crossing were rendered inadequate to warn the public of the danger of an approaching train.

Id. at 834 (quoting *English*, 13 Utah at 419-20, 45 P. at 50 (1896)).

35. In light of the criteria set forth in *English* and reiterated in *Duncan*, the plaintiff in this case now argues that conditions present at the time of the accident, namely the auction barn and the traffic and commotion which accompany a livestock auction, meet the criteria of a "more than ordinarily hazardous" crossing. Plaintiff further argues that a factfinder should therefore be allowed to determine if the crossing was hazardous and, if so, whether defendant exercised reasonable care when driving the train across this particular railroad crossing.

36. While not agreeing that the crossing was more than ordinarily hazardous, defendant argues that, assuming *arguendo*, "such a scenario does not impose a duty upon Union Pacific to reduce the train's speed below the federally mandated limit." See defendant's Memorandum in Support at 9, ¶ 1. Defendant argues that the plaintiff in *Easterwood* also

alleged unsafe crossing conditions requiring additional warning devices. However, despite the *Easterwood* court's finding that plaintiff may have had a viable claim for an unsafe crossing, the Court found that the railroad had no duty to reduce the train's speed below the federal limit. Defendant argues that its train was traveling 10 m.p.h. below the federal limit and that because the FRA sets train speeds with crossing safety concerns already in mind, plaintiff's allegation of defendant's failure to reduce the speed of its train through the "more than ordinarily hazardous" crossing is unfounded.

37. Defendant further argues that, when a crossing is deemed to be extrahazardous, a railroad's duty of care is limited to those unsafe conditions which it created or over which it has responsibility. See defendant's Reply Memorandum at 13. Defendant cites *Gleave v. Denver & Rio Grande Western R.R.*, 749 P.2d 660 (Utah Ct. App. 1988), and *Duncan v. Union Pacific R. Co.*, 842 P.2d 832 (Utah 1990), in alleging that a railroad's duty of care extends only to obstructions to view or sound caused by the railroad or located on railroad right of way or property. Defendant then cites Utah Code Ann. § 41-6-19, which places a duty of care on property owners to remove vegetation or other obstructions on their property which constitute a traffic hazard by obstructing the view of any motor vehicle operator, and Utah Code Ann. § 54-4-14 *et seq.*, which delegates to the Utah Department of Transportation (UDOT) the responsibility for regulating the safe travel of motorists on roads and highways, including those which pass over and across railroad tracks.

38. This Court finds that, even if a jury could determine the existence of conditions that would make the accident site a "more than ordinarily hazardous" crossing, those conditions were not the responsibility of defendant. The noise around the auction was not something within defendant's control. The fact that there were "No Parking" signs posted around the area following the accident to prevent parked cars from obstructing drivers' views of the railroad track does not imply any lack of care on defendant's part prior to the accident, since such precautions are not the defendant's responsibility.

39. For these reasons, the Court finds that, even if the railroad crossing was a "more than ordinarily hazardous" crossing when a livestock auction was in progress, any unusually hazardous conditions resulting from the auction were not defendant's responsibility.

U.C.A § 56-1-14 (Locomotive Bells & Whistles)

40. Utah Code Ann. § 56-1-14 governs the operation of locomotive whistle and bell devices at public railroad crossings. It provides as follows:

Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than than 80 rods from any city or town street or public highway grade crossing until such city or town street or public highway grade shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least 1/4 of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid. . .

Id. According to defendant, where the grade crossing is in a rural area such as the one in question, the requirement is that either the bell or the whistle must be operated beginning "at least" 1320 feet from the crossing. Defendant argues that Engineer Puffer sounded both the bell and the whistle approximately 1/4 of a mile from the crossing, well in excess of the statutorily required distance of 1320 feet.

41. Plaintiff argues that neither the driver nor the passenger of the car ever heard the train's whistle or bells prior to the accident. See Affidavit of Alicia Jensen, Plaintiff's Memorandum in Opposition, Exhibit 3, and the recorded statement of Bruce Brinkmeier, Plaintiff's Memorandum in Opposition, Exhibit 4. Plaintiff alleges that the Pulse Electronics graph, attached to the Affidavit of Bruce Reading, indicates that no whistles or bells were sounded by the train as it approached the crossing. Plaintiff points to the statements of several witnesses who were near the crossing at the time of the accident. In their voluntary statements to police, Gerald and Whitney Hill made no mention of the train's whistle or bells at the time of the accident. Other witnesses also made voluntary statements to police and said nothing about hearing the train's whistle or bells at the time of the accident. However,

plaintiff has not provided the Court with any such statements in affidavit form, as required by Rule 4-501 of the Utah Code of Judicial Administration.

42. The failure of the Pulse Electronics graph to record the whistle or bells of the train prior to the accident is explained by George E. Ohlsson in his Supplemental Affidavit. Mr. Ohlsson stated that the event recorder device installed on the locomotive used only 8-track cassettes, which do not have sufficient channels to record everything relative to the operation of the train; specifically, the 8-track cassette does not have a channel for showing whether the horn or whistle was being sounded. *See* Supplemental Affidavit of George E. Ohlsson, ¶ 2. Mr. Ohlsson further stated that Union Pacific is beginning to replace the 8-track cassette event recorders with solid state event recorders which are capable of recording the sounding of a train's whistle. *Id.* at ¶ 4. Furthermore, there is testimony in the police record to support defendant's claim that the train did sound its whistle and bells at some point before reaching the crossing, and that there were witnesses to the accident who did hear the train's whistle and bells. *See* defendant's Memorandum in Support, Exhibit A (Voluntary Statements of Johnny Starks and Robert Craw). Ryan Puffer, engineer of the train, stated that he began sounding the whistle and the bells approximately 1/4 mile away from the crossing at 5950 South, and then continued operating the bells and whistle from 5950 South for another 1100 feet until the train reached the crossing at 650 West where the accident occurred. *See* defendant's Memorandum in Support, Exhibit C.

43. The Court finds that, despite plaintiff's reference to the voluntary statements of witnesses who said nothing about having heard the train's bells or whistle, plaintiff did not submit any affidavits to that effect in accordance with the requirements of Rule 4-501 of the Utah Code of Judicial Administration. Furthermore, there is no evidence to indicate that those witnesses were in a position to hear the bells and whistles if they had in fact been sounded. Conversely, defendant submitted the affidavit of the train's engineer, Ryan Puffer, who stated that he checked the train prior to leaving Milford to verify that the brakes, whistle, and headlights worked properly. Mr. Puffer also stated that he sounded the train's

bells and whistles for over 1/4 of a mile prior to reaching the crossing at 5950 South, and continued to sound the whistle beyond that crossing because he knew there was another crossing (the 650 West crossing) shortly beyond the 5950 South crossing. Finally, Mr. Puffer stated that he was sounding the whistle continuously as he watched the truck and horse trailer cross the tracks just ahead of plaintiff's automobile.

44. The Court finds the affidavit evidence presented is uncontradicted and that defendant did appropriately sound the train's bells and whistle as warning.

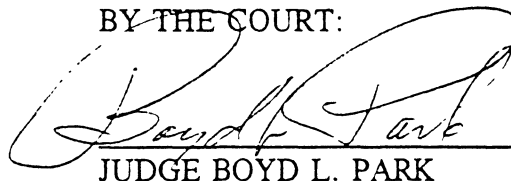
Conclusion

45. The Court concludes (a) that the speed of defendant's train was not a proximate cause of the accident; (b) that defendant was not responsible for any conditions which may have been present at the time of the accident and creating a "more than ordinarily hazardous" crossing; and (c) that defendant did sound the train's bells and whistle as it approached the crossing. Therefore, the Court finds no genuine issues of material fact remain as to defendant's liability to plaintiff. Accordingly, the Court grants defendant's Motion For Summary Judgment.

Counsel for defendant is to prepare, within 15 days of the date hereof, an order consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated at Provo, Utah this 15th day of May, 1995.

BY THE COURT:



JUDGE BOYD L. PARK

cc: J. Clare Williams
Allen Young

D

J. CLARE WILLIAMS, #3490
MORRIS O HAGGERTY, #5283
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101-1151

MAR 9 1995

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

ALECIA JENSEN,)	
)	
Plaintiffs,	)	DEFENDANT'S REPLY MEMORANDUM
	)	IN SUPPORT OF MOTION
vs.	)	FOR SUMMARY JUDGMENT
)	
UNION PACIFIC RAILROAD)	
COMPANY,	)	Civil No. 940400280
)	
Defendant.	)	Judge Boyd L. Park
_____)	

Defendant, Union Pacific Railroad Company ("Union Pacific"), submits the following Reply Memorandum in Support of its Motion for Summary Judgment.

- I. THERE IS NO GENUINE FACTUAL OR LEGAL DISPUTE REGARDING TRAIN SPEED.
 - 1. Plaintiff's Expert Witness Affidavits Are Incompetent, Conclusory And Legally Insufficient Regarding What The Event Recorder Shows The Speed To Be.

Plaintiff cannot raise a "genuine issue . . . [of] . . . material fact" regarding train speed by means of affidavits from incompetent expert witnesses making unsupported conclusory statements.

The only evidence of train speed on which plaintiff is relying is defendant's locomotive event recorder printout which, according to the Affidavit of George E. Ohlsson (Exhibit F to defendant's initial brief), shows an appropriate speed of 49-51 m.p.h. The

Affidavits of J. Bruce Reading and Dennis Andrews do not raise any genuine issue concerning whether the train was traveling at an excessive speed because Reading and Andrews are not qualified to testify regarding what speed the event recorder printout shows. Rule 56(e) requires that opposing affidavits "shall show affirmatively that the affiant is competent to testify to the matters stated therein." As set forth in the Ohlsson Affidavit, Ohlsson has special knowledge, experience and training which qualify him to interpret event recorder printouts and determine whether they show excessive speed. Reading and Andrews set forth no such qualifications.

Reading is an attorney and former UDOT civil engineer and Andrews is a former police officer and an accident reconstructionist. They know about intersections and collisions, not railroad trains, train handling and locomotive event recorders. They profess no expertise in these unique and specialized areas of knowledge. Reading merely states that he reads the printout to show that the train "was traveling in excess of 50 m.p.h." (§ 12). Andrews states little more, advising that he has "studied" the printout and has "ascertained" and "determined" that the train's speed was "in excess of 50 m.p.h." (§ 7) and "was 51.5 m.p.h." (§ 8). Without some explanation of their familiarity with and understanding of locomotive event recorders and train handling, Reading and Andrews are incompetent to testify regarding interpretation of the event recorder printout and whether the train was traveling at an excessive speed. Furthermore, their testimony in this regard is

unsupported and conclusionary. Accordingly, their affidavits are insufficient and should be disregarded on this issue. Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979); Gaw v. State, 798 P.2d 1130 (Utah Ct. App. 1990); Northern v. Blackham, 669 P.2d 857 (Utah 1983).

2. 49 CFR § 217 Does Not Authorize Timetables To Change The Federal Speed Limits Set In 49 CFR § 213.9.

Rule 704, Utah Rules of Evidence, was not intended to allow a witness, expert or not, to give legal conclusions. Davidson v. Prince, 813 P.2d 1225 (Utah Ct. App.) cert. denied, 826 P.2d 651 (Utah 1991). Bruce Reading's assertion at ¶¶ 7-9 of his affidavit, to the effect that the federal speed limits set in 49 CFR § 213.9 are "clarified and restricted" by 49 CFR § 217, is a legal conclusion and should be disregarded.

Section 217 does not require speed limit changes be filed with the Federal Railroad Administration ("FRA"). It requires only the filing of railroad operating rules and timetables which may or may not contain speed limits.¹ Section 217 makes no reference to train speed limits and says nothing about timetable speeds modifying the federal limits imposed by § 213.9. Neither does § 213.9 say anything about the maximum speed limits set forth therein being subject to modification by railroad timetables. As explained in CSX Transportation, Inc. v. Easterwood, 113 S. Ct. 732; 123 L. Ed.2d 387 (1993), it is § 213.9 which sets the "ceiling" or "maximum" speed,

¹Although timetables contain system wide speed limits, speed limits can also be set and adjusted by Superintendents' orders which are not contained in the timetable.

not timetables. Implicit in such holding is the understanding that while a railroad may not exceed such limit, it may by internal fiat voluntarily operate its trains at any slower speed deemed appropriate. It would seem nonsensical to blame a railroad for operating at a fraction over a self-imposed timetable speed limit when it could have increased that limit at any time by substantially more than the fractional amount without making any reference to the timetable or filing the change with the FRA.

Timetable filings under § 217 have no effect on the maximum speeds at which a railroad may operate its trains under § 213.9. The Code of Federal Regulations does not authorize it and plaintiff can cite no case law that supports such an argument. The only authority on point is Easterwood which specifically holds that § 213.9 "covers the subject matter" regarding train speed limits. 123 L.Ed.2d at 403. The Court should not rule otherwise.

3. The Train Was Traveling Within The Timetable Speed Limit.

49 CFR § 229.117 (copy attached as Exhibit K) requires every locomotive operating in excess of 20 m.p.h. to be equipped with a "speed indicator" (event recorder) accurate within ± 3 m.p.h. at speeds of 10-30 m.p.h., and accurate within ± 5 m.p.h. at speeds above 30 m.p.h. These federal accuracy standards recognize the inherent variables in locomotive speed gauges and event recorders referred to in the Ohlsson Affidavit, and preempt any argument of excessive speed as long as the speed was within the variable allowed. Accordingly, here any speed shown on the event recorder printout up to and including 55 m.p.h. is an allowable variable

under to 49 CFR § 229.117. Therefore, not only was the train traveling within the federal speed limit, but it was also traveling within the timetable limit as that limit must be interpreted by factoring in the 5 m.p.h. variable allowed by § 229.117. To rule otherwise would be to assume that the event recorder was precisely accurate when in fact the actual speed may have been well below 50 m.p.h.

II. PLAINTIFF HAS NOT RAISED A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER DEFENDANT COMPLIED WITH UCA § 56-1-14.

1. Plaintiff's Affidavit Is Inconsistent With Her Previous Testimony.

Plaintiff's statement in her affidavit that she "did not hear the train blow its whistle or sound its horn anytime prior to the collision" is inconsistent with her Answer to Interrogatory No. 26. In response to the question of how the accident happened, plaintiff answered simply:

I remember nothing of the accident and very little, if anything, of what happened prior to the accident.

Plaintiff's Answer to Interrogatory No. 26, copy attached as Exhibit M. Since a party may not rely on a subsequent affidavit that contradicts prior sworn testimony in order to create an issue of fact, plaintiff's affidavit testimony that she did not hear the whistle should be disregarded. Webster v. Sill, 675 P.2d 1170 (Utah 1983); Gaw v. State, 798 P.2d 1130 (Utah Ct. App. 1990).

2. Plaintiff's Statement In Her Affidavit That She Did Not Hear The Whistle Is Not Probative Evidence.

Plaintiff does not testify in her affidavit that the whistle was not sounded--only that she did not hear it. Such a statement is considered "negative" testimony and, without more, is not sufficiently probative to raise an issue of fact regarding whether the whistle was blown, in the face of the positive testimony set forth in the affidavit of Engineer Ryan Puffer (Exhibit D to defendant's initial brief). In order for plaintiff's testimony to rise to the level of positive testimony sufficient to raise a question of fact, she must additionally testify that not only was she in a physical position to hear the whistle, but also that she was paying sufficient attention that she would have heard the whistle had it been sounded. Hudson v. Union Pacific RR, 233 P.2d 357 (Utah 1951); Seabold v. Union Pacific RR, 239 P.2d 175 (Utah 1951); Bebout v. Norfolk & Western Rwy. Co., 982 F.2d 1178 (7th Cir. 1993). Plaintiff has not laid this kind of foundation in her affidavit. In view of her earlier testimony that she remembers little if anything of the events leading up to the accident and her failure to deny involvement in the "wish game" she was playing with Bruce Brinkmeier, she cannot do so now. The fact that she did not hear any whistle even though others did, including independent witnesses, is supportive of the fact that plaintiff was not paying attention.

3. Bruce Brinkmeier's Statement Is Not Probative Evidence.

For the same reasons set forth in paragraph II.2. above, Bruce Brinkmeier's negative statement that he did not hear the whistle

does not raise an issue of fact concerning whether the whistle was blown. As stated at p. 15 of his statement (attached as Exhibit 4 to plaintiff's Memorandum in Opposition):

CR--(Claim Representative) Did you hear any trains coming?

I--(Interviewee) Nope, I didn't hear the train or a horn.

CR--You weren't paying attention for any train horns, do you know or?

I--Oh, I'm sure I was subconsciously, but not paying attention.

CR--Right.

I--But the people, the witnesses at the auction, said that he was blowing his horn from a ways back.

CR--Right.

I--But I never heard anything.

Not only does Brinkmeier admit that he never heard the whistle, but he also admits that he was not listening or paying attention. Thus, he impliedly admits that the whistle could have been sounded--he just didn't hear it. His statement is negative testimony and cannot be changed into positive testimony since he cannot meet the second portion of the two-pronged foundational test of paying sufficient attention.

In any event, Brinkmeier's statement is not in affidavit form and is not, therefore, competent to raise an issue of fact in the face of Engineer Puffer's Affidavit testimony that the whistle was

sounded. It is clear that when a motion for summary judgment is filed and supported by Affidavit, the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by Rule 56(e). This plaintiff has not done. Brinkmeier's statement that he did not hear the whistle should be disregarded. D & L Supply v. Saurini, 775 P.2d 420 (Utah 1989).

4. The Statements Of Gerald and Whitney Hill Are Not Probative Evidence That Defendant Did Not Comply With The Whistle Statute.

The Hills make no reference to the whistle one way or the other--the subject simply was not addressed. A failure to make mention that the whistle was sounded does not provide a basis for arguing that it was not. If it did, by the same reasoning defendant could argue that a failure to mention that the whistle was not sounded gives rise to the implication that it was. For obvious reasons, including their not being in affidavit form, these statements are not evidence on the issue of whether the whistle was blown for the statutory distance or at all. The statements should be disregarded on this issue.

Defendant also notes that in mentioning the Hills' failure to say that the whistle was sounded, plaintiff selectively overlooks the statement from eyewitness Johnny Starks, which was also attached to the Sheriff's Report, that: "I heard the train honking".

5. There Is No Material Variation Between Defendant's Statement Of Facts And Its Answers To Interrogatories.

U.C.A. §56-1-14 does not require a particular "sequence" of whistle sounds--only that the whistle or the bell be operated

"continuously" from one-quarter (1/4) mile away on up to the crossing. The continuous requirement could mean one constant blast for the entire distance without any interruption--or it could mean intermittent blasts of one length or another "continuously" for the required distance. Statutorily, it does not matter which way the engineer chooses to do it as long as he does it for the requisite distance. Accordingly, it is irrelevant whether defendant's Answer to Interrogatory No. 10 dated July 22, 1994, specified that the whistle was sounded intermittently in a certain sequence of sounds and that its Statement of Facts, based upon Engineer Puffer's later Affidavit, specified that the whistle and bell were being operated "continuously" for the required distance. In this regard, plaintiff fails to mention that at the same time that Engineer Puffer provided his Affidavit, defendant filed Supplemental Answers to Interrogatories dated February 3, 1995, which conformed its earlier Answer to Interrogatory No. 10 to Engineer Puffer's testimony in his Affidavit. (Defendant's Answer to Interrogatory No. 10 and Supplemental Answer to Interrogatory No. 10 are attached hereto collectively as Exhibit L). Accordingly, there is no inconsistency or variation in defendant's facts regarding the sounding of the whistle.

6. The Event Recorder Printout Is Not Evidence That The Whistle Was Not Sounded.

As explained in the attached Supplemental Affidavit of George E. Ohlsson (attached as Exhibit N), the event recorder printout fails to show that the whistle was being sounded because the design

of the recording device used on the locomotive is of the older type which does not have a channel for recording a whistle. The event recorder installed on the locomotive uses an 8 track cassette which does not have a channel for hookup to record whether or not the whistle was sounded. Accordingly, the reason why the event recorder printout does not show a whistle is not that the whistle was not being sounded. It was because the recorder was not designed or installed on the locomotive to do so. The event recorder printout is irrelevant on the issue of whether the whistle was sounded.

7. Defendant's Operation Of The Bell Alone Satisfies The Requirements Of U.C.A. § 56-1-14.

As previously mentioned, U.C.A. § 56-1-14 allows either the whistle or the bell to be operated for the statutory distance. Engineer Puffer's affidavit testimony is that he operated both warning devices for the requisite distance. Plaintiff has not produced any probative evidence or made any argument to the effect that defendant did not operate the bell. Accordingly, the Court may find that defendant met the statutory requirements imposed by § 56-1-14 by sounding the bell regardless of whether the whistle was also blown.

III. THE CONDITION OF THE CROSSING AT THE TIME OF THE ACCIDENT DID NOT IMPOSE ADDITIONAL DUTIES OF CARE ON UNION PACIFIC.

1. Other Than As To Speed Plaintiff Does Not Complain That Defendant Was Negligent Because Of The Extrahazardous Nature Of The Crossing.

Paragraph 9 of plaintiff's Complaint contains her specific allegations of negligence which include only (1) excessive train speed; (2) excessive train speed through a more than ordinarily

hazardous crossing; and (3) failure to blow the whistle in accordance with U.C.A. § 56-1-14. Plaintiff's only allegation with reference to an extrahazardous crossing was made in support of her argument that the speed of defendant's train was excessive. Defendant addressed that contention in ¶ II, pp. 9-11 of its initial brief. Plaintiff's Complaint does not state that the alleged extrahazardous nature of the crossing imposed any additional duties upon defendant with reference to either the crossing or its train operations.

2. There Is No Probative Evidence That The Crossing Was More Than Ordinarily Hazardous.

Apparently plaintiff's only basis for arguing a more than ordinarily hazardous crossing is her allegation that the auction held at the Utah Livestock Auction premises located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which plaintiff's automobile approached, brought additional traffic congestion and noise to the area sufficient to obstruct the view of the approaching train and obscure or muffle the warning sounds of the train's approach. Plaintiff, however, does not present even a scintilla of probative evidence to the effect that either such obstructions were present or that they made the crossing more than ordinarily hazardous.

While plaintiff now testifies by affidavit that "I noticed that there were a lot of trucks and trailers which obstructed our view of the tracks in all directions", in earlier answers to interrogatories plaintiff specifically testified that she did not remember

whether the view at the crossing was obstructed. Defendant's Interrogatories Nos. 25 and 26 and plaintiff's Answers thereto (Copies attached as Exhibit M) are as follows:

25. Describe in detail any and all obstructions to your vision of the train's approach and railroad crossing where the accident occurred at the time of the accident.

Answer: I do not recall if the view was obstructed.

26. State in detail your version of how the accident occurred.

Answer: I remember nothing of the accident and very little, if anything, of what happened prior to the accident.

As explained above under paragraph II.1. above, for purposes of defeating a motion for summary judgment plaintiff is not allowed to change previously sworn testimony in order to create an issue of fact. Plaintiff's affidavit testimony that the train's approach was obstructed should be disregarded.

There is no probative evidence regarding obstruction to view and no evidence whatsoever, either in affidavit form or otherwise, that the auction noise obscured the sound of the warning devices on the train. Accordingly, in the face of the photographs attached to defendant's initial brief, which speak for themselves, plaintiff's bare allegation that the crossing was more than ordinarily hazardous does not create an issue of fact for jury consideration, and the Court should so rule as a matter of law. Duncan v. Union Pacific R. Co., 790 P.2d 595 (Utah Ct. App. 1990), afield., 842 P.2d 832 (Utah 1992).

3. The Law Imposes No Additional Duty On Defendant Because Of The Nature Of The Crossing.

Plaintiff misstates the duty of care Utah law imposes on railroads where crossings are or may be determined to be more than ordinarily hazardous. Initially, a railroad cannot be held liable for crossing conditions unless the crossing is more than ordinarily hazardous. Duncan v. Union Pacific R. Co., 842 P.2d 832, 833 (Utah 1990). Where a crossing is or may be deemed to be extrahazardous, a railroad's duty of care is limited to those unsafe conditions which it created or over which it has responsibility. Thus, obstructions to view or sound caused or created by the railroad or located on railroad right of way or property would be the railroad's responsibility to abate. Gleave v. Denver & Rio Grande Western R.R., 749 P.2d 660 (Utah Ct. App. 1988); Duncan, supra. However, adjacent property owners have responsibility to remove vegetation or other obstructions on their property which constitute a "traffic hazard," (UCA § 41-6-19); and UDOT has been delegated the responsibility for regulating the safe travel of motorists on roads and highways, including those which pass over and across railroad tracks. UCA § 54-4-14 et seq.; Duncan, supra.

It is not enough for plaintiff to simply allege that the crossing was more than ordinarily hazardous. Plaintiff must also allege and prove the specific duty of care that was breached by the Railroad, such as the "wild vegetation" the Railroad allowed to grow on its right of way and which obstructed the motorist's view in the Gleave case, supra.

Here plaintiff makes a bare allegation of an extrahazardous crossing but fails to allege how defendant was negligent with respect to such condition. Under Duncan, defendant had no duty to signalize the crossing. Under Easterwood, defendant had no duty to reduce its speed (even though it did) below the federal limit (see defendant's initial brief, pp. 9-11). And obviously, defendant was not responsible for any problems that may have been caused by the livestock action which was located entirely off the right of way. As stated in Duncan:

Plaintiff has failed to "demonstrate, or even suggest what more Union Pacific could [legally] have done to make this crossing safer, short of installing automatic warning lights and gates, which admittedly was not its responsibility.

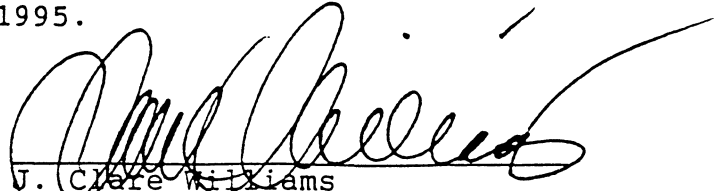
842 P.2d at 833-34. The Court should rule as a matter of law not only that the crossing was not more than ordinarily hazardous, but also that defendant breached no duty of care owed to the plaintiff.

CONCLUSION

As a matter of law the federally set speed limit for the trackage where the crossing is located was 60 m.p.h. and there is no factual dispute that defendant's train was traveling substantially under that limit. There is no probative evidence that the train whistle and bell were not sounded as prescribed by the statute. There is no probative evidence that the crossing was more than ordinarily hazardous or even assuming that it was, that defendant breached any duty of care owed to the plaintiff with respect to such alleged condition. Defendant submits that the

undisputed probative facts and the law show that the accident was not caused by any negligence on defendant's part, and that the Court should grant defendant's Motion.

DATED this 8th day of March, 1995.



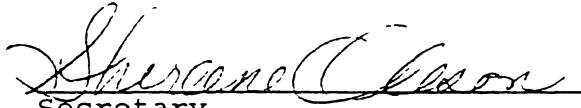
J. Clare Williams
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 1995, a copy of the foregoing was served in the manner indicated below upon the following:

Allen K. Young, Esq.
Young & Kester
101 East 200 South
Springville, Utah 84663

<u>X</u>	U.S. Mail
_____	Hand Delivered
_____	Overnight
_____	Facsimile
_____	No Service


Secretary

§ 229.113

49 CFR Ch. II (10-1-94 Edition)

water. The fill test valve may not discharge steam or hot water into the steam generator compartment.

§ 229.113 Warning notice.

Whenever any steam generator has been shut down because of defects, a distinctive warning notice giving reasons for the shut-down shall be conspicuously attached near the steam generator starting controls until the necessary repairs have been made. The locomotive in which the steam generator displaying a warning notice is located may continue in service until the next periodic inspection.

CABS AND CAB EQUIPMENT

§ 229.115 Slip/slide alarms.

(a) Except for MU locomotives, each locomotive used in road service shall be equipped with a device that provides an audible or visual alarm in the cab of either slipping or sliding wheels on powered axles under power. When two or more locomotives are coupled in multiple or remote control, the wheel slip/slide alarm of each locomotive shall be shown in the cab of the controlling locomotive.

(b) Except as provided in § 229.9, an equipped locomotive may not be dispatched in road service, or continue in road service following a daily inspection, unless the wheel slip/slide protective device of whatever type—

(1) Is functioning for each powered axle under power; and

(2) Would function on each powered axle if it were under power.

(c) Effective January 1, 1981, all new locomotives capable of being used in road service shall be equipped with a device that detects wheel slip/slide for each powered axle when it is under power. The device shall produce an audible or visual alarm in the cab.

§ 229.117 Speed indicators.

(a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a speed indicator which is—

(1) Accurate within ± 3 miles per hour of actual speed at speeds of 10 to 30 miles per hour and accurate within ± 5

miles per hour at speeds above 30 miles per hour; and

(2) Clearly readable from the engineer's normal position under all light conditions.

(b) Each speed indicator required shall be tested as soon as possible after departure by means of speed test sections or equivalent procedures.

§ 229.119 Cabs, floors, and passageways.

(a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.

(b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, Safety Glazing Standards, 49 CFR part 223, 44 FR 77348, Dec. 31, 1979.)

(c) Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

(d) The cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 50 degrees Fahrenheit 6 inches above the center of each seat in the cab.

(e) Similar locomotives with open end platforms coupled in multiple control and used in road service shall have a means of safe passage between them; no passageway is required through the nose of car body locomotives. There shall be a continuous barrier across the full width of the end of a locomotive or a continuous barrier between locomotives.

(f) Containers shall be provided for carrying fusees and torpedoes. A single container may be used if it has a partition to separate fusees from torpedoes. Torpedoes shall be kept in a closed metal container.

§ 229.121 Locomotive cab noise.

(a) After August 31, 1980, the permissible exposure to a continuous noise in a locomotive cab shall not exceed an eight-hour time-weighted average of 90dB(A), with a doubling rate of 5dB(A) as indicated in the table. Continuous noise is any sound with a rise time of

E

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--ooo0ooo--

ALICIA JENSEN,	:	PLAINTIFF'S MEMORANDUM
	:	IN OPPOSITION TO DEFENDANT'S
Plaintiff,	:	MOTION FOR SUMMARY JUDGMENT
	:	
v.	:	
	:	
UNION PACIFIC RAILROAD, INC.,	:	Civil No. 940400280
	:	
Defendant.	:	Judge: Boyd L. Park

--ooo0ooo--

COMES NOW the plaintiff, by and through counsel, Allen K. Young of Young & Kester, and hereby responds to Defendant's Motion for Summary Judgment.

I.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S
"UNDISPUTED FACTS"**

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Deny. Each Saturday morning, there is a livestock auction at the intersection of 650 West 5950 South, Spanish Fork, Utah. Vehicles park all around and obstruct the view in all directions. Shortly after the accident, the investigating officer

requested that "No Parking" signs be posted in the area of the tracks. See the report of the investigating officer, C. J. Witney, attached as exhibit A to the Defendant's Memorandum in support of its Motion for Summary Judgment. The photographs attached to the Affidavit of Claims Adjustor Lawrence Curley were clearly not taken on a Saturday morning during the busy auction.

7. The plaintiff has no knowledge sufficient at this time to deny the allegations in Paragraph 7 and therefore admits the same at this time.

8. The plaintiff has no knowledge upon which to deny the allegations of Paragraph 8 at this time, and therefore admits the same.

9. Deny. The Federally mandated speed limit for the area in question is 50 miles per hour. See the Affidavits of J. Bruce Reading and Dennis Andrews, attached hereto as Exhibits 1 and 2. At the time of the collision, the train was traveling at a speed in excess of 50 miles per hour, and had been averaging 51.5 miles per hour for the three minutes immediately prior to the collision. See the Affidavit of Dennis Andrews, attached hereto as Exhibit 2.

10. Deny. The train was traveling at a speed in excess of 50 miles per hour as the train approached the intersection and had been for more than three minutes. Had the train been traveling at no more than the 50 mile per hour speed limit, the collision would never have occurred. See the Affidavit of Dennis Andrews, attached hereto as Exhibit 2.

11. Admit.

12. Deny. The plaintiff Alicia Jensen has no recollection of seeing the train or its lights prior to the collision. See the Affidavit of Alicia Jensen, attached hereto as Exhibit 3.

13. Deny. The plaintiff, Alicia Jensen, did not hear a train whistle prior to the collision. See the Affidavit of Alicia Jensen, attached hereto as Exhibit 3. Bruce Brinkmeier did not hear the train whistle prior to the collision. See the recorded statement of Bruce Brinkmier, taken by Lawrence Curley, Union Pacific Claims Representative,

attached hereto as Exhibit 4. The Pulse Electronics chart taken from the train shows no evidence of the train whistle blowing before the intersection. See the Pulse Electronics chart attached to the Affidavit of J. Bruce Reading as Exhibit E. In Answers to Interrogatories and in Affidavits, the defendant has made inconsistent statements with regard to the train's whistle blowing prior to the collision. See Answers to Interrogatories and the Affidavit of Puffer.

14. Deny. See response to Paragraph 13.

15. Deny. See response to Paragraphs 12 and 13.

16. The plaintiff has no facts to dispute Mr. Puffer's statement about his observations at this time, and therefore admits the same.

17. The plaintiff has no facts to dispute Mr. Puffer's statement about his observations at this time, and therefore admits the same.

18. Generally admit.

19. Generally admit. However, Alicia Jensen has no recollection of doing so just prior to the collision. See the Affidavit of Alicia Jensen, attached hereto as Exhibit 3.

20. Admit that they never saw or heard the train prior to impact. Deny the remainder of the Allegation.

21. Deny for lack of knowledge and failure of defendant to cite location of citation in record.

22. Admit the first four sentences. Deny allegation that Puffer did everything within his power to warn, since both occupants of the vehicle deny seeing lights or hearing the horn.

23. Admit.

II.

PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS

1. The maximum speed limit for trains in the area of the collision, according to the Union Pacific Timetable in force on the date of the collision was 50 Miles per hour. See the Affidavit of J. Bruce Reading, attached hereto as Exhibit 1, and the Union Pacific Timetable attached to Mr. Reading's Affidavit as Exhibit C. See also the Affidavit of Dennis Andrews, attached hereto as Exhibit 2.

2. 50 miles per hour is the Federally enforceable speed, and speeds in excess of 50 violate Federal law. See the Affidavit of J. Bruce Reading, attached hereto as Exhibit 1.

3. Just prior to the collision, the train was traveling at a speed in excess of 50 miles per hour. See the Affidavit of J. Bruce Reading and the Pulse Electronics speed tape attached thereto as Exhibit E. See also the Affidavit of Dennis Andrews.

4. Had the defendant's train traveled at 50 miles per hour or less for the three minutes immediately prior to the collision, the train would have been at least 392.25 feet southwest of the intersection, and would have been at least 5.35 seconds from the crossing, thereby avoiding a collision with the vehicle in which the plaintiff was a passenger. See the Affidavit of Dennis Andrews, attached hereto as Exhibit 2.

5. The Pulse Electronics, Inc. graph taken from the train at the scene does not reflect that a horn was sounded prior to the collision. See the Pulse Electronic, Inc. chart attached to the Affidavit of J. Bruce Reading as Exhibit E.

III.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Summary Judgment Should Not Be Granted Because Material Facts Are In Dispute.

When a Motion for Summary Judgment is submitted, the moving party must establish that there are no material facts in dispute and that the moving party is entitled to judgment as a matter of law. Atkinson v. IHC Hospitals, Inc., 798 P. 2d 733 (Utah 1990). The plaintiff has disputed relevant facts that the defendant has set forth as uncontroverted. The plaintiff and Bruce Brinkmeier both deny hearing any warning bells or whistles prior to the collision. The Pulse speed graph which has a line for the horn and whistle does not show that a whistle was blown prior to the collision. The railroad has made inconsistent statements in its Answers to Interrogatories and its Affidavits about the nature and manner of warnings. All of these facts are material to a finder of fact. The undisputed Affidavits of plaintiff's experts show that the train was speeding at the time of the collision and had been for at least three minutes prior to the collision. Had the train not been speeding, the accident would not have occurred, according to expert Dennis Andrews. If material facts are in dispute, summary judgment is inappropriate and should not be granted by the trial court. Therefore, on the factual basis alone, summary judgment in favor of the defendant should be denied. Nevertheless, the following argument establishes the reasons defendant is not entitled to summary judgment as a matter of law.

B. Union Pacific Can Be Held Liable For The Injuries To Plaintiff Because The Train Was Traveling In Excess Of The Authorized Speed Limit.

The defendant lays most of its eggs in the basket of CSX Transportation, Inc. V. Easterwood, 113 S. Ct. 732; 123 L. Ed. 2d 387. In that case, the plaintiffs made claims under state common law negligence issues and claims that the defendants exceeded reasonable speeds. The facts in the case were undisputed that the Federal Railway Administration had set a maximum authorized speed on the section of track in question at 60 miles per hour and the train which struck the plaintiffs' vehicle was going significantly slower. The Supreme Court, in a 7-2 opinion, ruled that the "speed limits must be read as not only establishing a ceiling, but also precluding additional State regulation of the sort which respondent seeks to impose on petitioner." 123 L. Ed. 2d at 403. The logic of the Supreme Court in the Easterwood case is that the Court did not want states or municipalities to interfere with Federal law, the Federal Railway administration, or interstate commerce.

The facts in this case are very different. In this case, the defendant Union Pacific Railroad Co., pursuant to 49 C. F. R. 217, has filed with the Federal Railway Administration its Timetable evidencing that the maximum authorized speed at the intersection of this collision is 50 miles per hour. See page 77 of the Union Pacific Railroad System Timetable No. 9, attached hereto as Exhibit C of the Affidavit of J. Bruce Reading. The rules, regulations and Timetables filed with the Federal Railway Administration are enforceable against the defendant, and train speeds in excess of those Timetables violate Federal law. See the Affidavit of Bruce Reading, attached hereto as Exhibit 1, and Exhibits A through E attached to his Affidavit.

The undisputed fact is that the defendant's train was traveling in excess of 50 miles per hour immediately prior to the collision and had averaged, for three miles immediately prior to the collision, a speed of 51.5 miles per hour. See the Affidavit of J. Bruce Reading attached as Exhibit 1 hereto. See also the Affidavit of Dennis Andrews, attached hereto as Exhibit 2.

The plaintiff in this case does not attempt to impose upon the defendant Union Pacific Railroad Co. a State speed regulation which is more stringent than its Federal counterpart. Rather, the plaintiff claims that the defendant's train was exceeding its own maximum authorized Timetable speed (thereby violating Federal law) and in so doing was negligent. Plaintiff submits that this negligence was a cause in fact of the collision which so horribly injured the plaintiff.

The Supreme Court, in its decision in Easterwood, is careful to conclude that most state law claims are not pre-empted by Federal statute. The issue of speed was pre-empted because there was no allegation in the pleadings (in fact the parties agreed that the train was traveling 40-45 miles per hour in a 60 mile per hour zone) that the train exceeded the maximum authorized speed. It would be illogical to argue that the Federal Government intended to pre-empt claims based on negligence where the train exceeds the maximum authorized Federal speed; in other words to allow the defendant to operate its trains unlawfully and negligently, and then hide behind Federal pre-emption.

C. Compliance With Requirements of U.C. A. § 56-1-14 Is An Issue of Genuine Material Fact.

Whether Union Pacific fulfilled its duty to conduct the proper procedure required by Utah law is a disputed issue of genuine material fact. Utah Code Annotated § 56-1-14 requires:

Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than eighty rods from any city or town street or public grade crossing until such city or town street or public highway grade crossing shall be crossed except in towns and in terminal points, the sounding of the locomotive whistle or siren at

least one-fourth of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid. . . U.C.A § 56-1-14 (Emphasis added).

Neither the plaintiff, nor the driver of the vehicle, Bruce Brinkmeier ever heard the train sound its horns or whistles. Train horns and whistles are historically very loud. The failure of the plaintiff or her driver to hear them certainly creates an issue of fact about whether the engineer ever, or in what manner, sounded the horns or bells.

In the statements of witnesses Gerald and Whitney Hill, and Ryan Puffer, the engineer, there is no mention of the train's horn blowing or bell sounding as is required by law. See Exhibit A to Defendant's Motion for Summary Judgment, the Utah County Sheriff's Department Report, Voluntary Statements. Gerald and Whitney Hill were occupants of the automobile which proceeded across the grade crossing immediately before the defendant's train struck plaintiff's car as it started across the grade crossing. The plaintiff submits that the Hills' statements are not only proof that the whistle was not blown, but also of the "more than ordinarily dangerous" nature of the grade crossing, which is specifically addressed in Section D of this response.

Furthermore, the defendant's Statement of Fact varies from its Answers to Plaintiff's First Set of Interrogatories. In its answer to plaintiff's Interrogatory asking, "How many times, and at what intervals, was the whistle of the defendant's train activated in the minute prior to the collision with the vehicle in which the plaintiff was a passenger?" the defendant answered, "continuously from approximately one quarter mile prior to the crossing in a two long, one short, one long repeat sequence." Yet according to Number 15 of Defendant's Memorandum of Points and Authorities, "Puffer turned the bell on when he started sounding the whistle for the 5950 South crossing. He never turned the bell off until after the accident. Puffer operated the whistle and bell continuously from more than one quarter mile away up to the point of accident." The first account of the whistle blowing mentions a pattern or "sequence"; however, the second record does not mention any such

pattern. It merely states that the bell and whistle were operated "continuously" (Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, page 5).

The Pulse Electronics graph attached to the Affidavit of J. Bruce Reading as Exhibit E, and taken from the train by the Utah County Sheriff at the time of the collision, indicates that no whistles or bells were sounded by the train. It is a question of material fact as to whether or not the recorder was working properly, or if the train did not in fact sound any whistles or bells, and is a question for a finder of fact, to be determined by a jury, from evidence and testimony at trial.

The plaintiff, Alicia Jensen, did not hear the train sound its whistle or bells. See the Affidavit of Alicia Jensen, attached hereto as Exhibit 3. See also, the taped statement of Bruce Brinkmeier, the driver of the Jensen vehicle, taken by Lawrence Curley, Union Pacific Claims Representative, wherein Mr. Brinkmeier stated that he did not hear the train blow its whistle. See Exhibit 4, at page 10. Whether Alicia Jensen and Bruce Brinkmeier did not hear the train's whistle or bells because they were not blown, or because the sound was muffled by the sounds of the auction, is a question of material fact.

In sum, the issue of whether Union Pacific actually operated its bell and whistle, as is required by law, is a genuine issue of material fact.

D. Plaintiff Is Claiming That Grade Crossing is More than Ordinarily Dangerous, Which Is An Issue For Trial.

Plaintiff's Complaint avers that the crossing was "more than ordinarily hazardous" (Plaintiff's Complaint, Paragraph 7). Under the holding in English v. Southern Pacific Co., 13 Utah 407, 45 P.47 (1986), a crossing that is "more than ordinarily hazardous" adds an additional duty of care to the railroad. The English standard was recently applied in Gleave v. Denver & Rio Grande Western Railroad Company, 749 P. 2d 660 (1988), for injuries caused in a grade crossing accident. In Gleave, the Court held that the plaintiff

could not argue any defect which was the responsibility of UDOT, meaning any permanent warning devices. However, if the plaintiff had proven that the crossing was "more than ordinarily dangerous", it was a matter for the jury to determine whether or not the railroad was at fault. The Gleave jury found Rio Grande at fault because trees blocked the view of the train; the jury's verdict was upheld by the Utah Supreme Court.

Recently, in Duncan v. Union Pacific Railroad, 842 P. 2d 832 (1992), a car containing a driver and three passengers was struck by a train on Droubay Road in Tooele County. The Duncan Court upheld precedent established in English v. Southern Pacific Co., 13 Utah 407, 45 P. 47 (1896), that railroad companies are not responsible for crossing conditions unless the crossing is "more than ordinarily hazardous." Id at 833. The Utah Supreme Court, in Duncan, held that the crossing was not more than ordinarily hazardous as 'plaintiffs could not demonstrate, or even suggest, what more Union Pacific could have done to make this crossing safer, short of installing automatic warning lights and signs and gates, which admittedly was not its responsibility." Id, at 833. However, in Duncan, the plaintiff's claim centered around the warning devices issue, to which the Utah Court of Appeals held that "the plaintiffs could not prove or claim that there were any other reasons for the train company's negligence." So reading English in the light of Duncan, a plaintiff must aver that the rail crossing was extra hazardous for reasons other than warning devices, which the plaintiff has done, arguing that the auction barn accompanied by the busy nature of a livestock auction, including trucks and trailers parked near the crossing, creates all of the elements of a more than ordinarily dangerous crossing (plaintiff's Complaint, Paragraph 7). In Duncan, the Court stated the criteria for a "more than ordinarily dangerous crossing":

a crossing might be found to be more than ordinarily hazardous if it was in a thickly populated portion of a city; if the view of the tracks was obstructed because of the railroad itself or because of the natural objects; if the crossing was frequented by heavy traffic so that approaching trains could not be heard; or if, for any reason devices employed at the crossing were rendered inadequate to warn the public of the danger of an approaching train. . . Duncan v. Union Pacific Railroad, 842 P. 2d 832 at 834 (1992) [emphasis added].

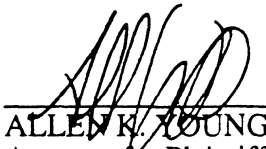
This line of argument is directly in conflict with Defendant's Motion for Summary Judgment (Defendant's Motion for Summary Judgment, Section 2, p. 9). Union Pacific "denies that the crossing was more than ordinarily dangerous", yet plaintiff claims the auction barn as well as the traffic which accompanies a livestock auction complies with the criteria established in English and upheld in Duncan. The grade crossing which was the scene of the accident is as busy during an auction as any suburban city street; furthermore, the noise and commotion resulting from a livestock auction created noise and commotion so that a driver might not hear the train's whistle or bell when properly operated. Defendant's photographs, taken on the sixth of February, the Sunday following the accident, do not capture the full story of the grade crossing on an auction day.

IV.

CONCLUSION

Summary Judgment is not appropriate where legitimate issues of fact exist. There are clearly issues of fact about the negligent operation of the train in excess of Federally protected speeds. Issues about warning and the extraordinarily hazardous nature of the crossing as well preclude Summary Judgment in this case. The Court should deny this Motion and let a jury decide these very important issues of fact, in addition to the damages that the plaintiff has suffered.

DATED this 2 day of March, 1995.

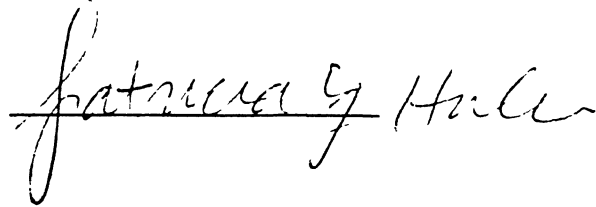


ALLEN K. YOUNG
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, this 2nd day of March, 1995, to the following:

J. Clare Williams, Esq.
Morris O. Haggerty, Esq.
406 West 100 South
Salt Lake City, Utah 84101-1151

A handwritten signature in cursive script, appearing to read "Morris O. Haggerty". The signature is written in black ink and is positioned to the right of the printed recipient address.

PART 217—RAILROAD OPERATING RULES**Subpart A—General**

- Sec.
 217.1 Purpose.
 217.3 Application.
 217.5 Penalty.
 217.7 Filing of operating rules.
 217.9 Program of operational tests and inspections; recordkeeping.
 217.11 Program of instruction on operating rules.
 217.13 Annual report.
 217.15 Information collection.
 APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES

AUTHORITY: 45 U.S.C. 431, 437 and 438, as amended; Pub. L. No. 100-342; and 49 CFR 1.49(m).

SOURCE: 39 FR 41176, Nov. 25, 1974, unless otherwise noted.

Subpart A—General**§ 217.1 Purpose.**

Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.

§ 217.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

40 FR 2690, Jan. 15, 1975, as amended at 54 FR 33229, Aug. 14, 1989]

§ 217.5 Penalty.

Any person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad)

part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

[53 FR 28599, July 28, 1988, as amended at 53 FR 52927, Dec. 29, 1988]

§ 217.7 Filing of operating rules.

(a) Before February 1, 1975, each railroad that is in operation on January 1, 1975, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on January 1, 1975. Each railroad that commences operation after January 1, 1975, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable instructions before it commences operations.

(b) Each amendment to a railroad's code of operating rules, each new timetable, and each new timetable special instruction which is issued after January 1, 1975, shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

§ 217.9 Program of operational tests and inspections; recordkeeping.

(a) Each railroad to which this part applies shall periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetables special instructions in accordance with a program filed with the Federal Railroad Administrator.

(b) Before March 1, 1975, or 30 days before commencing operations, whichever is later, each railroad to which this part applies shall file with the Federal Railroad Administrator, Washington, DC 20590, three copies of a program for periodic conduct of the oper-

by paragraph (a) of this section. The program shall—

(1) Provide for operational testing and inspection under the various operating conditions on the railroad;

(2) Describe each type of operational test and inspection adopted, including the means and procedures used to carry it out;

(3) State the purpose of each type of operational test and inspection;

(4) State, according to operating divisions where applicable, the frequency with which each type of operational test and inspection is conducted;

(5) Begin within 30 days after it is filed with the Federal Railroad Administrator; and

(6) Include a schedule for making the program fully operative within 210 days after it begins.

(c) Each amendment to a railroad's program for periodic conduct of operational tests and inspections required under paragraph (a) of this section shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

(d) *Records.* Each railroad shall keep a record of the date and place of each operational test and inspection performed in accordance with its program. Each record must provide a brief description of the operational test or inspection, including the characteristics of the operation tested or inspected, and the results thereof. Records must be retained for one year and made available to representatives of the Federal Railroad Administration for inspection and copying during regular business hours.

§217.11 Program of instruction on operating rules.

(a) To ensure that each railroad employee whose activities are governed by the railroad's operating rules understands those rules, each railroad to which this part applies shall periodically instruct that employee on the meaning and application of the railroad's operating rules in accordance with a program filed with the Federal Railroad Administrator.

(b) Before March 1, 1975 or 30 days before commencing operations, whichever is later, each railroad shall file with the Federal Railroad Adminis-

trator, Washington, DC 20590, three copies of a program for the periodic instruction of its employees as required by paragraph (a) of this section. This program shall—

(1) Describe the means and procedures used for instruction of the various classes of affected employees;

(2) State the frequency of instruction and the basis for determining that frequency;

(3) Include a schedule for completing the initial instruction of employees who are already employed when the program begins;

(4) Begin within 30 days after it is filed with the Federal Railroad Administrator;

(5) Provide for initial instruction of each employee hired after the program begins.

(c) Each amendment to a railroad's program for the periodic instruction of its employees required under paragraph (a) of this section shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

§217.13 Annual report.

Before March 1 of each year, each railroad to which this part applies, except for a railroad with fewer than 400,000 total manhours, shall file with the Federal Railroad Administrator, Washington, DC 20590, a written report of the following with respect to its previous year's activities.

(a) The total number of train miles which were operated over its track.

(b) A summary of the number, type, and result of each operational test and inspection, stated according to operating divisions where applicable, that was conducted as required by §217.9.

(c) The number of operational tests and inspections conducted as required by §217.9 per 10,000 train miles.

(d) The number, type and result of each test and inspection related to enforcement of part 219 of this subchapter and the railroad's rule on alcohol and drug use ("Rule G"). This information shall be reported on Form FRA 6180.77, shall be provided separately for employees covered by the Hours of Service Act and other employees subject to the railroad's code of operating rules and operational testing program, and shall include the following:

(1) Total number of observations of individual employees (including observations for which breath, blood or urine tests were included and observations after accidents/incidents and rule violations) and total number of employees charged with violation of Rule G or a similar rule.

(2) Number of breath tests conducted under the authority of §219.301 of this title and number of such tests that were positive; number of breath tests conducted under railroad authority for specific cause and not relying on §219.301 and number that were positive.

(3) Number of urine tests conducted under the authority of §219.301 of this title and number of such tests that were positive; number of urine tests conducted under railroad authority for specific cause and not relying on §219.301 and number that were positive. For positive tests indicate number for alcohol and for each of the following controlled substance drug groups: marijuana, cocaine, phencyclidine, opiates, amphetamines, and other controlled substances.

(4) Number of employees who refused to cooperate in testing under §219.301; number of employees who refused to cooperate in testing under railroad authority for specific cause and not relying on §219.301.

(5) Number of blood tests demanded by employees in connection with such observations and results by substance (alcohol, controlled substance drug group) (separated as to blood tests demanded under subpart D of this part and blood tests conducted under railroad authority).

(6) Number and results of random drug tests conducted under the authority of §219.601 of this chapter. For positive tests indicate the number for each controlled substance by drug group, and the following information: number and type of disciplinary actions taken, number of employees referred for evaluation, number of employees evaluated as not requiring formal treatment, number of employees evaluated as requiring outpatient treatment, number of employees evaluated as requiring inpatient treatment, number of employees failing to complete abatement or rehabilitation, number of employees who completed abatement or rehabili-

tation determined after investigation to have been involved in subsequent alcohol/drug disciplinary offenses, and number of follow-up tests and results by drug group (including refusals). Also indicate number of refusals to cooperate in random and follow-up testing.

(7) Number of test results reported by the laboratory as positive that are declared negative by the Medical Review Officer due to scientific insufficiency, as provided in 49 CFR 40.33.

[39 FR 41176, Nov. 25, 1974, as amended at 50 FR 7919, Feb. 27, 1985; 50 FR 31578, Aug. 2, 1985; 53 FR 47131, Nov. 21, 1988; 54 FR 53279, Dec. 27, 1989; 55 FR 22794, June 4, 1990]

§217.15 Information collection.

(a) The information collection requirements in this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Public Law 96-511, and have been assigned OMB control number 2130-0035.

(b) The information collection requirements are found in the following sections:

- (1) Section 217.7.
- (2) Section 217.9.
- (3) Section 217.11.
- (4) Section 217.13.

[50 FR 7919, Feb. 27, 1985]

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES¹

Section	Violation	Willful violation
217.7 Filing of operating rules:		
(a) _____	\$2,500	\$5,000
(b) _____	2,500	5,000
217.9 Program of operational tests and inspections and recordkeeping:		
(a) _____	5,000	7,500
(b) and (c) _____	2,500	5,000
(d) _____	1,000	2,000
217.11 Program of instruction on operating rules:		
(a) _____	5,000	7,500
(b) _____	2,500	5,000
(c) _____	2,500	5,000
217.13 Annual report:		
(a) and (c) _____	1,000	2,000
(b) and (d) _____	2,500	5,000

¹ A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[53 FR 52927, Dec. 29, 1988]

(5) The consistency of the conditions of the proposed disqualification with disqualification orders issued against other employees for the same or similar violations;

(6) Whether the respondent was on notice of any safety regulations that were violated or whether the respondent had been warned about the conduct in question;

(7) The respondent's past record of committing violations of safety regulations, including previous FRA warnings issued, disqualifications imposed, civil penalties assessed, railroad disciplinary actions, and criminal convictions therefor;

(8) The civil penalty scheduled for the violation of the safety regulation in question;

(9) Mitigating circumstances surrounding the violation, such as the existence of an emergency situation endangering persons or property and the need for the respondent to take immediate action; and

(10) Such other factors as may be warranted in the public interest.

§ 209.331 Enforcement of disqualification order.

(a) A railroad that employs or formerly employed an individual serving under a disqualification order shall inform prospective or actual employers of the terms and conditions of the order upon receiving notice that the disqualified employee is being considered for employment with or is employed by another railroad to perform any of the safety-sensitive functions described in § 209.303.

(b) A railroad that is considering hiring an individual to perform the safety-sensitive functions described in § 209.303 shall ascertain from the individual's previous employer, if such employer was a railroad, whether the individual is subject to a disqualification order.

(c) An individual subject to a disqualification order shall inform his or her employer of the order and provide a copy thereof within 5 days after receipt of the order. Such an individual shall likewise inform any prospective employer who is considering hiring the individual to perform any of the safety-sensitive functions described in § 209.303

within 5 days after receipt of the order or upon application for the position, whichever first occurs.

§ 209.333 Prohibitions.

(a) An individual subject to a disqualification order shall not work for any railroad in any manner inconsistent with the order.

(b) A railroad shall not employ any individual subject to a disqualification order in any manner inconsistent with the order.

§ 209.335 Penalties.

(a) Any individual who violates § 209.331(c) or § 209.333(a) may be permanently disqualified from performing the safety-sensitive functions described in § 209.303. Any individual who willfully violates § 209.331(c) or § 209.333(a) may also be assessed a civil penalty of at least \$1,000 and not more than \$5,000 per violation.

(b) Any railroad that violates § 209.331(a) or (b) or § 209.333(b) may be assessed a civil penalty of at least \$5,000 and not more than \$10,000 per violation.

(c) Each day a violation continues shall constitute a separate offense.

§ 209.337 Information collection.

The information collection requirements in § 209.331 of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130-0529.

[56 FR 66791, Dec. 26, 1991]

APPENDIX A TO PART 209—STATEMENT OF AGENCY POLICY CONCERNING ENFORCEMENT OF THE FEDERAL RAILROAD SAFETY LAWS

The Federal Railroad Administration ("FRA") enforces the federal railroad safety statutes under delegation from the Secretary of Transportation. See 49 CFR 1.49 (c), (d), (f), (g), and (m). Those statutes include the Federal Railroad Safety Act of 1970 ("Safety Act"), 45 U.S.C. 421 *et seq.*, and a group of statutes enacted prior to 1970 referred to collectively herein as the "older safety statutes": The Safety Appliance Acts, 45 U.S.C. 1-16; the Locomotive Inspection Act, 45 U.S.C. 22-34; the Accident Reports Act, 45 U.S.C. 38-43; the Hours of Service Act, 45 U.S.C. 61-64b; and the Signal Inspection Act,

OGDEN SUBDIVISION — GREEN RIVER & UTAH DIVISIONS

PROVO SUBDIVISION — UTAH DIVISION

Radio Display — 2020		Station Nos	Sidings Feet	Maximum Speed McCammon to Ogden (Except as below)	MPH	
SOUTH STATIONS	NORTH				Page	Ft.
	CP G192 McCAMMON CP G111 T 64 CP G110 GREEN RIVER DIVISION	IY038	e6624 w6368	Between Mile Posts — 110.8 and 111.2 107.3 and 107.8 102.3 and 102.7 99.4 and 99.7 92.3 and 93.9 90.1 and 90.4 85.6 and 87.5 82.7 and 83.0 66.0 and 67.2 64.1 and 64.5 53.5 and 53.9 51.1 and 51.4 47.2 and 49.4 46.2 and 47.2 44.6 and 46.2 43.9 and 44.6 42.0 and 43.9 38.1 and 42.0 37.8 and 38.1 23.1 and 23.5 20.9 and 21.1 19.1 and 20.9 10.3 and 14.0 1.9 and 3.0 0.8 and 1.9 0.0 and 0.8	79	60
	UTAH DIVISION	UN105	6046	90.1 and 90.4 85.6 and 87.5 82.7 and 83.0 66.0 and 67.2 64.1 and 64.5 53.5 and 53.9 51.1 and 51.4 47.2 and 49.4 46.2 and 47.2 44.6 and 46.2 43.9 and 44.6 42.0 and 43.9 38.1 and 42.0 37.8 and 38.1 23.1 and 23.5 20.9 and 21.1 19.1 and 20.9 10.3 and 14.0 1.9 and 3.0 0.8 and 1.9 0.0 and 0.8		
	ARIMO 98 DOWNEY 106 SWAN LAKE 56 COULAM 74 DAYTON 60 WESTON 88 TRENTON 80 CACHE JCT 46 WHEELON 83 DEWEY 53 HONEYVILLE 93 BRIGHAM CITY 65 WILLARD 51 LITTLE MOUNTAIN JCT T 05 HOT SPRINGS 73 SP JCT 17 OGDEN	UN095 UN085 UN078 UN071 UN065 UN057 UN049 UN045 UN036 UN030 UN021 UN014	5991 6005 6007 6011 6103 6098 8619 6010 6044 5984 Yd. 6027	66.0 and 67.2 64.1 and 64.5 53.5 and 53.9 51.1 and 51.4 47.2 and 49.4 46.2 and 47.2 44.6 and 46.2 43.9 and 44.6 42.0 and 43.9 38.1 and 42.0 37.8 and 38.1 23.1 and 23.5 20.9 and 21.1 19.1 and 20.9 10.3 and 14.0 1.9 and 3.0 0.8 and 1.9 0.0 and 0.8		
	1114 loc. MP 111.4 = MP 191.6			Ogden Terminal Limits Cecil Jct. Through crossover 15 15		

Radio Display — 4242		Station Nos	Sidings Feet	Maximum Speed Between Mile Posts — P748.9 and P665.7 (Except as below)	MPH	
WEST CP No	EAST				Page	Ft.
	NORTH YARD 07 GRANT TOWER 36 DRGW 96 SANDY 29.1 GENEVA 06 C758 LAKOTA JCT 52 C753 PROVO C749 15.7 C738 PAYSON C735 14.1 C723 STARR C721 21.9 C710 NEPHI HOLD SIGNAL C702 SHARP C700 4.6 C696 JUAB C695 15.3 C681 PARLEY C680 15.0 C669 LEVINGTON 31 C666 LYNDYL 135.1	LP042 LP072 LP076 LP092 LP107 LP128 LP133 LP148 UZ147	5072 5975 Yd. 6102 6085 13 436 6082 6242 6930	Between 1st South & 9th South Sta. Between Mile Posts — Midvale Spur at Atwood P798.7 and P757.3 P757.3 and P753.4 P753.4 and P752.8 Geneva Steel Plant Xings P752.8 and P748.9 P733.5 and P732.6 P711.8 and P710.0 P694.4 and P692.6 P692.6 and P691.8 Parley Siding P686.2 and P676.4 P676.4 and P674.8 P667.2 and P666.3 P666.3 and P665.8 Yard Limits P800.1 and P748.9		

In addition trains operate over DRGW between Grant Tower and Lakota Jct., MP P757.2.
 Train Defect Detector @MP P743.7 @MP P727.8 @MP P709.0 @MP P690.2 (Eastward trains must immediately reduce to restricted speed until head end of train is at MP P694 before stopping to inspect train) @MP P671.0

At Provo — Normal position all switches on West leg of Wye is for West leg of Wye. Normal position at East end of Pipe Plant lead for DRGW Connection
 Murray — Units must not move over under track hopper on Gibbons and Reed Spur
 Provo — No units are permitted to operate on Pipe Plant Highline beyond sign at underpass

Cedar City Branch Lund to Cedar City 32.5 Miles Westward TWC in effect. Yard limits in effect MP 0.0 to MP 1.0 Main track derail at MP 31.8 Max Speed 40 MPH (Except as below) Radio Display 4242

MP	Sta. No.	Business Tracks	MP	Sta. No.
0.0 and 0.3			29.7 and 32.4	
23.0 and 29.7			20	
Business Tracks Lund T	01 CX272	Business Tracks Iron Springs T	20.3	CI321
Western Elec	16.1	Cedar City	31.8	CI333
American Azide	16.5			

Iron Mt. Branch Iron Springs to Iron Mt. 14.7 Miles Westward TWC in effect. Yard limits are in effect MP 0.0 to MP 1.2. Retaining valves must be used on all cars on all trains from Iron Mt. or Comstock to Iron Springs. Air brakes must be used on all cars handled on all trackage. Locomotives or tipple cabooses must not operate under the old tupples located over tracks Nos. 732 and 733 at Comstock. Locomotives are not allowed on the scale South of the tupples on track 733. Max. Speed 25 MPH (Except as below) Radio Display 4242.

MP	Sta. No.	Business Tracks	MP	Sta. No.
0.0 and 1.2			10.1 and 14.5	
Business Tracks Iron Springs T	00 CI321	Business Tracks Iron Mt.	14.4	CI415
Comstock T	10.9 CI411			

Special Instruction Item 20 for AMTK schedules thruward AMTK Trains at Ogden must receive Track Warrants for the Ogden, Nampa and divisions at Salt Lake City using the Subdiv. The Ogden Subdiv. Track Warrant will track Bulletins for the Pocatello Subdiv. when necessary
 in effect MP 109.8 to MP 1.0

Mountains Branch Little Mountain Jct to Little Mountain 14.4 miles TWC in effect. its in effect MP 12.0 to MP 14.4 Maximum Speed 40 MPH (except as below)

MP	Sta. No.	Business Tracks	MP	Sta. No.
15		3.5 and 3.7	25	
20		14.2 and 14.3 (End LP operations)	15	
Track main			MP 14.3	UL314

Branch Malad to Brigham City 52.1 miles southward TWC in effect. Yard limits are in effect MP 0.0 to MP 4.0 Maximum Speed 40 MPH (except as below) Radio Display 2020

MP	Sta. No.	Business Tracks	MP	Sta. No.
3.4		29.3 and 29.9	30	
5.5		32.0 and 51.1	30	
12.1		51.1 and 52.1	10	
27.9				
Trucks				
T 51.5	UD952	Ford	11.5	UD912
31.0	UD931	Comne	5.5	UD906
17.8	UD918	Brigham City	T 0.0	UN021
19.7	UD920			

Valley Branch Preston to Cache Jct. 51.1 Miles Southward. TWC in effect. Max. MPH (Except as below) Radio display 2020

MP	Sta. No.	Business Tracks	MP	Sta. No.
19		50.2 and 51.1	10	
10				
Trucks				
50.8	UC251	Holt	20.2	UC220
43.6	UC244	Hyrum	17.6	UC218
41.5	UC242	Wellsville(E)	13.8	UC214
31.5	UC232	Cache Jct. T	0.2	UN049
24.1	UC224			



UNION PACIFIC RAILROAD CO.

SYSTEM

TIMETABLE

No. 9

Effective 0001 Sunday,
OCTOBER 25, 1992

CENTRAL TIME EAST OF NORTH PLATTE, NE.,
HORACE, KS., OAKLEY, KS., EL PASO, TX.,
AND ON PLAINVILLE BRANCH

MOUNTAIN TIME WEST OF NORTH PLATTE, NE.,
HORACE, KS., OAKLEY, KS., AND EL PASO, TX.
TO SMELTER, UT., LAS VEGAS, NV., AND
LA GRANDE, OR.

PACIFIC TIME WEST OF SMELTER, UT.,
LAS VEGAS, NV., AND LA GRANDE, OR.

FOR THE GUIDANCE AND USE OF
EMPLOYEES AFFECTED.

A. L. SHOENER, Executive Vice President — Operation.
M. F. KELLY, Vice President — Field Operations.
E. S. HAWLEY, Vice President — Transportation Services.
S. J. McLAUGHLIN, Vice President — Engineering Services.
H. WAGENSEIL, Vice President — Supply & Maintenance
Operations.

EXHIBIT C

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--ooo0ooo--

ALICIA JENSEN,	:	AFFIDAVIT OF
	:	J. BRUCE READING, P.E.
Plaintiff,	:	
v.	:	
UNION PACIFIC RAILROAD, INC.,	:	Civil No.: 940400280
Defendant.	:	Judge: Boyd L. Park

--ooo0ooo--

STATE OF UTAH)
):ss.
COUNTY OF UTAH)

11503-344-3357

J. Bruce Reading, P.E., being first duly sworn on oath and based on his knowledge, information and belief, deposes and says:

1. I received a degree in Civil Engineering from the University of Utah in 1969. I received a Juris Doctorate degree from the University of Utah, and am a practicing attorney in the State of Utah. I am a registered professional Engineer for the State of Utah. I have been employed by the Utah Department of Transportation. While employed, I was a principal engineer on the development of the Utah Railroad Grade Crossing Index and prioritization list. I have qualified as an expert in the Federal and State Courts of Utah with regard to Railroad grade crossings. In that regard, I have become familiar with the Union

Pacific Timetable and Operating Rules and the Code of Federal Regulations as it deals with the Railroad.

2. I have been retained by the law firm of Young & Kester to look at the records, charts and files of the above entitled matter, and based on my experience and education, render opinions thereon.

3. In particular, I have studied the Investigating Officer's Report, witness statements, and the Union Pacific System Operating Rules and Timetable in effect for the area of the accident, at 5950 South 650 West, and 49 C.F.R. Sections 209, 217 and 240.

4. By Federal law, each Railroad is required to file a copy of its Operating Rules and Timetables with the Federal Railway Administration. See the Federal Railroad Administration 49 C.F.R., § 217 attached hereto as Exhibit A.

5. In addition, each year, the Railroad must file an Annual Report with regard to its Operating Rules. See 49 C.F.R. § 217.13.

6. The Federal Railway Administration enforces the Federal Railroad safety statutes and the Operating Rules and Timetables under delegation from the Secretary of Transportation. See 49 C.F.R. § 209.A attached hereto as Exhibit B.

7. The speed limits mandated in the Union Pacific Railroad Co. Operating Rules and Timetables thus become the Federally mandated guidelines and maximum speed limits for the Railroad, and are enforceable by the Federal Railway Administration.

8. 49 C.F.R. § 213.9, with all of its exceptions, is therefore clarified and restricted by the Operating Rules and Timetable.

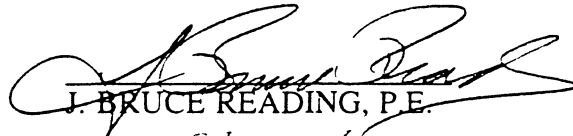
9. The maximum speed for freight trains on the Provo Subdivision of the Union Pacific Railroad as identified on page 77 of Union Pacific Railroad Co. Timetable No. 9 is 50 miles per hour. See page 77 of the Operating Rules and Timetable, attached hereto as Exhibit C.

10. The maximum speed for all trains, therefore, at the intersection of 5950 South 650 West Spanish Fork, Utah, is 50 miles per hour, according to the Union Pacific Railroad Co. Timetable No. 9.

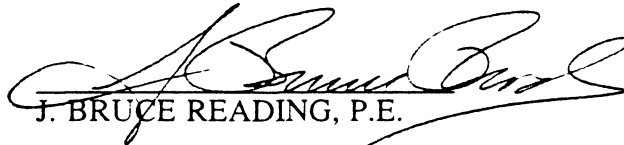
11. If the Railroad or its employees violate the Operating Rules, they are subject to civil penalties as set forth in 49 C.F.R. § 240. See C.F.R. § 240 attached hereto as Exhibit D.

12. By observation of the Event Recorder Graph, attached hereto as Exhibit E, and reading Defendant's Supplemental Answer to Plaintiff's Interrogatory No. 2, the train, immediately prior to impact, was traveling in excess of 50 m.p.h., a speed in excess of its maximum authorized speed, and therefore in violation of the Federal law.

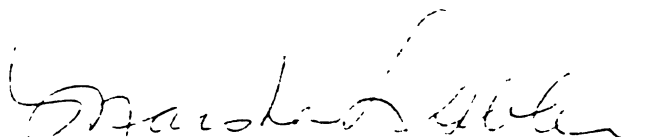
DATED this 1 day of March, 1995.


J. BRUCE READING, P.E.

On this 15th day of March, 1995, personally appeared before me, J. Bruce Reading, P.E., who being first duly sworn, states that he is the person who executed the foregoing instrument, that he has read the same and knows the contents thereof, that the matters stated therein are true of his own knowledge, except such matters as stated to be upon information and belief, and as to those matters, he believes them to be true.

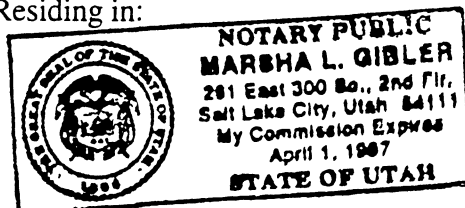

J. BRUCE READING, P.E.

SUBSCRIBED AND SWORN to before me, this 15th day of March, 1995.


NOTARY PUBLIC

My Commission Expires:

Residing in:



ALLEN K. YOUNG (A3583)
YOUNG & KESTER
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--00000000--

ALICIA JENSEN, : ANSWERS TO
INTERROGATORIES

Plaintiff, :

v. :

UNION PACIFIC RAILROAD, INC., : Civil No.: 940400280

Defendants. : Judge: Boyd L. Park

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COMES NOW the plaintiff, by and through counsel. Allen K. Young, and hereby answers Defendant's First Set of Interrogatories as follows:

1. State the names and addresses of all persons of whom you are aware who witnessed the accident referred to in your Complaint.

ANSWER: Bruce Brinkmeier, the Union Pacific engineer, and Gerald Hill.

2. State the names and addresses of any and all persons of whom you are aware having knowledge of any relevant facts regarding the accident referred to in your Complaint, other than those referred to in Interrogatory No. 1.

ANSWER: None.

- (b) The nature of the offenses for which you were arrested and the charges that were filed against you; and
- (c) The ultimate disposition of each of the offenses with which you was (sic) charged.

ANSWER: No.

22. Have you ever been a party to any civil litigation either as a plaintiff or a defendant? If the answer is yes, please state specifically and in detail the following:

- (a) The title of each case you or you (sic) have been involved in;
- (b) The civil number of each such case and the name of the court in which it was filed;
- (c) The date when each such case was filed;
- (d) The nature of each of the claims and counterclaims in each such case; and
- (e) The ultimate disposition of each of the claims and counterclaims of each of such cases.

ANSWER: No.

23. State whether or not you were experiencing any difficulty in operating the vehicle at the time of the accident and, if so, state in detail the nature of the difficulty experienced.

ANSWER: No problems with the vehicle.

24. State the name of your spouse, including birth date, and the names and ages of your children, if any.

ANSWER: Single/not married.

25. Describe in detail any and all obstructions to the (sic) your vision of the train's approach and railroad crossing where the accident occurred at the time of the accident.

ANSWER: I do not recall if the view was obstructed.†

26. State in detail your version of how the accident occurred.

ANSWER: I remember nothing of the accident and very little, if anything, of what happened prior to the accident.

27. State whether at the time of the accident you were on any particular errand or mission for someone and, if so, specify the particular errand or mission you was (sic) on and the name and address of the person for which you was (sic) acting.

ANSWER: We were not on an errand.

28. State whether or not you filed an accident report with the State of Utah concerning this accident.

ANSWER: An accident report was filed.

29. State the exact speed of your vehicle immediately preceding the accident at the following distances away from the point of impact:

- (a) One-half mile;
- (b) One-quarter mile;
- (c) 1,000 feet;
- (d) 500 feet;
- (e) 250 feet;
- (f) 100 feet;
- (g) 50 feet;
- (h) 25 feet; and
- (i) The point of impact.

ANSWER: I do not recall. I was not driving.

30. What was the posted speed limit for your vehicle as it crossed over the railroad crossing intersection?

ANSWER: I don't know. I was not driving.

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--0000000--

ALICIA JENSEN, : AFFIDAVIT OF ROBERT HITSON
Plaintiff, :
v. :
UNION PACIFIC RAILROAD, INC., : Civil No.: 940400280
Defendant. : Judge: Boyd L. Park

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STATE OF UTAH)
)ss.
COUNTY OF UTAH)

ROBERT HITSON, being first duly sworn on oath and based upon his knowledge, education, experience, information and belief, deposes and says:

1. I was born on September 8, 1928, and graduated from Rogue River High School in 1946.
2. I was a Locomotive Fireman from November, 1948 through April, 1957 on the Portland Division, Shasta Division and Salt Lake Division.
3. I was a Locomotive Engineer from April, 1957 through August, 1979 on the Portland Division and Los Angeles Division.
4. I was Road Foreman of Engines from August, 1979 to November, 1986 on the San Joaquin Division and the Los Angeles Division.

5. I have been self employed as a consultant and expert witness on Railroad operations and locomotive and train handling from December, 1986 to the present.

6. I have additional specialized education in General Code of Operating Rules, Railway Engineers Annual Certification, Train Handling Principles and Practices, Locomotive Maintenance Practices, Design and Operation of Pulse Company Locomotive Event Recorders, Principles and Operation of Diesel Electric Locomotives, Principles and Operation of Doppler Radar, Accident Prevention and Safety, and Accident Investigation.

7. I have been retained by the law firm of Young & Kester. Based upon my education, experience in Railroading and the material furnished to me with regard to the above entitled matter, when a class is placed on a section of track (such as Class 1, 2, 3, 4) that establishes a maximum allowable speed subject to a number of exceptions, such as signal spacing, track quality, angle of curve, inside rail height, etc. In other words, the class of track establishes the minimum standard set by the Federal Railway Administration. When other speeds are set by the Railroad in their Timetables, trains must not operate in excess of those Timetable speeds.

8. Mr. Dick Clairmont, an officer of the F.R.A., has informed me that the F.R.A. will not interfere with the Railroad's rules were so long as the Timetable speed does not exceed the F.R.A. minimum standards. Mr. Clairmont also informed me that the F.R.A. would ensure that the Railroad enforces its own rule or rules. Mr. Clairmont can be reached in Billings, Montana, 406-657-6642.

9. I have personal knowledge and experience of operating a train when an engineer and fireman were dismissed from service for six months for operating a train two and one half M.P.H. over the ^{Authorized R.E.W.} ~~Timetable~~ speed. The Brotherhood of Locomotive Engineers appealed the decision to the Federal Labor Board. The Board's decision was in favor of the Railroad, and the discipline stood.

10. When a speed is placed on a track by the Railroad, as long as that speed is not in excess of F.R.A. minimum standards, the F.R. A. insists that the Railroad enforce that speed.

DATED this 10 day of March, 1995.

Robert Hitson
ROBERT HITSON

On this 10th day of March, 1995, personally appeared before me, Robert Hitson, who being first duly sworn, states that he is the person who executed the foregoing instrument, that he has read the same and knows the contents thereof, that the matters stated therein are true of his own knowledge, except such matters as stated to be upon information and belief, and as to those matters, he believes them to be true.

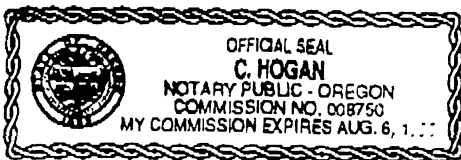
Robert Hitson
ROBERT HITSON

SUBSCRIBED AND SWORN to before me, this 10 day of March, 1995.

[Signature]
NOTARY PUBLIC

My Commission Expires: 8-6-95

Residing in: Eugene, OR



F

J. CLARE WILLIAMS, #3490
MORRIS O HAGGERTY, #5283
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101-1151

1995

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

ALECIA JENSEN,)	
)	
Plaintiffs,	)	MOTION FOR SUMMARY
	)	JUDGMENT
vs.)	
)	
UNION PACIFIC RAILROAD,)	
INC.,	)	Civil No. 940400280
)	
Defendant.	)	Judge Boyd L. Park
_____)	

Defendant, Union Pacific Railroad Company, moves the Court for an order of summary judgment with respect to the following claims of negligence as set forth in paragraph 9 of plaintiff's Complaint:

1. Defendant's train was "traveling in excess of the authorized speed limit."
2. Defendant failed "to reduce the speed of its train through the more than ordinarily hazardous crossing."
3. Defendant failed "to comply with Section 56-1-14, Utah Code Annotated, by failing to blow train whistles in the manner required therein."

The motion is being made for the reason that defendant believes there is no genuine issue as to any material fact that defendant was

J. CLARE WILLIAMS, #3490
MORRIS O HAGGERTY, #5283
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101-1151

FEB 7 1995

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

ALECIA JENSEN,)	
)	
Plaintiffs,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
vs.	)	MOTION FOR SUMMARY JUDGMENT
)	
UNION PACIFIC RAILROAD)	
COMPANY,	)	Civil No. 940400280
)	
Defendant.	)	Judge Boyd L. Park
_____)	

Defendant, Union Pacific Railroad Company ("Union Pacific"), submits the following Memorandum of Points and Authorities in Support of its Motion for Summary Judgment.

UNDISPUTED MATERIAL FACTS

1. Alecia Jensen, age 17, was seriously injured when the automobile in which she was riding as a passenger drove in front of and was struck by a Union Pacific train. (Utah County Sheriff's Case File for the accident (21 pp.), collectively attached as Exhibit A).

2. The accident occurred at approximately 12:10 p.m. on February 5, 1994, at a public railroad crossing of Union Pacific's Provo Subdivision mainline trackage located near 650 West and 5950 South in Spanish Fork. (Sheriff's File, Exhibit A).

3. The car, a 1982 Honda Civic, had been purchased and was owned by Danny Jensen, Alecia Jensen's father, for Alecia Jensen's personal use. (Plaintiff's Answers to Interrogatories, No. 14).

The car was being driven at the time of the accident by Jensen's boyfriend, Bruce Brinkmeier, age 17. (Sheriff's File, Exhibit A; Plaintiff's Answers to Interrogatories, No. 52).

4. Brinkmeier was not licensed to drive an automobile, and received a citation for same. (Sheriff's File, Exhibit A).

5. The train was traveling from Milford to Provo in a southwest to northeast direction. The trackage at this location is relatively straight and flat. The road (650 West) travels in a north/south direction and the car was traveling southbound. The road is straight and flat for hundreds of feet before reaching the crossing. The trackage and road intersect at a greater than 90° angle with reference to the directions of approach of the train and car. (Sheriff's File, Exhibit A; Lawrence Curley Affidavit with appended diagram and photographs, attached as Exhibit B; Olympus Aerial Surveys Aerial Photograph of the crossing, attached as Exhibit C).

6. The crossing is located in a rural farming area and is surrounded by open fields on the approach side. A Utah Livestock Auction building and animal pens are located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which Jensen's automobile approached. The northwest quadrant, which is the view quadrant for the approaching train and car, is an open field. (Curley Affidavit, Exhibit B; Aerial Photograph, Exhibit C).

7. 650 West is an asphalted road and the railroad crossing was planked and asphalted. An advance stop sign warning sign was

posted along side 650 West at approximately 572 feet north of the crossing. An advance railroad crossing warning sign was posted along side the road at approximately 332 feet north of the crossing. An advance railroad crossing warning sign was painted on the road surface at approximately 281 feet north of the crossing. Another railroad crossing warning sign, somewhat faded but still observable, was painted on the road surface at approximately 175 feet north of the crossing. Stop signs and railroad crossing "crossbuck" signs were located on both sides of the crossing. The stop and crossbuck signs on the north side were located approximately 17 and 9 1/2 feet, respectively, away from the tracks. White stop sign stop lines were painted on the roadway surface on both sides of the crossing approximately 22 feet away from the tracks. All of these signs, with the possible exception of the second painted road sign, were in excellent condition and easily visible to motorists approaching the crossing in a southbound direction. (Curley Affidavit, Exhibit B).

8. The train was an empty coal train with three locomotives and 46 trailing empty coal cars. The train weighed 1424 tons and was 2622 feet in length. The locomotives were painted yellow and ranged in height from 15 1/2 feet to a little over 16 feet. The total length of the three locomotives which were coupled back to back was approximately 200 feet. (Curley Affidavit, Exhibit B; Affidavit of Engineer Ryan Puffer, attached as Exhibit D).

9. The federally set speed limit for the trackage in question was 60 m.p.h. for freight trains and 80 m.p.h. for passenger trains.

Union Pacific had voluntarily imposed a 50 m.p.h. speed limit for freight trains. (Affidavit of William E. Van Trump, attached as Exhibit E; Puffer Affidavit, Exhibit D).

10. Ryan Puffer was the engineer of the train and was controlling the train's movements from the cab of the leading locomotive. He was operating the train at approximately 50 m.p.h. as the train approached the crossing and at the time he placed the train into emergency braking just before the accident. He monitored the train speed by means of a speedometer in the cab of the leading locomotive. (Puffer Affidavit, Exhibit D; Affidavit of George E. Ohlsson, attached as Exhibit F).

11. One of the locomotives (No. 3799) was equipped with a Pulse Electronics "Speed Recorder" device which electronically recorded the train's speed on tape. The tape shows the train to be traveling between 49 and 51 m.p.h. for at least the last three miles before braking was initiated. (Ohlsson Affidavit, Exhibit F).

12. The leading locomotive (No. 9390) was equipped with two headlights which were operating on high beam as the train approached the crossing. (Puffer Affidavit, Exhibit D); Curley Affidavit, Exhibit B).

13. Engineer Puffer was sounding the locomotive whistle and bell as the train approached the crossing. He began sounding the whistle and bell approximately 1/4 mile away from the 5950 South crossing and continued to sound them from the 5950 South crossing on up to the point of the accident at 650 West. The distance between the 5950 South and 650 West crossings is approximately 1,100

feet (Puffer Affidavit, Exhibit D; Sheriff's File, Exhibit A; Curley Affidavit, Exhibit B).

14. At about the time the train passed over the 5950 South crossing, Puffer noticed a truck pulling a horse trailer begin to drive over the tracks in a southbound direction. Puffer focused his attention on the truck/horse trailer to make certain that it would get out of the way. Puffer was sounding the whistle and bell as he watched the truck/horse trailer drive over the crossing. (Puffer Affidavit, Exhibit D; Sheriff's File, Exhibit A).

15. The whistle and bell were operating properly and the whistle was a particularly loud whistle. The locomotive bell was also ringing. Puffer turned the bell on when he started sounding the whistle for the 5950 South crossing. He never turned the bell off until after the accident. Puffer operated the whistle and bell continuously from more than 1/4 mile away up to the point of the accident. (Puffer Affidavit, Exhibit D; Sheriff's File, Exhibit A).

16. Shortly after seeing the truck/horse trailer clear the crossing, Puffer noticed the Jensen car rolling towards the crossing. The car was following a few seconds behind the truck/horse trailer and moving past the stop sign. Puffer had the impression that the car never fully stopped for the stop sign. The car rolled onto the track directly in front of the train (Puffer Affidavit, Exhibit D; Sheriff's File, Exhibit A).

17. The train was a few hundred feet from the crossing when Puffer first saw the Jensen car approaching the crossing. Puffer

placed the train into emergency braking immediately upon seeing the car. (Puffer Affidavit, Exhibit D).

18. Brinkmeier and Jensen had come from Brinkmeier's home in Salt Lake City, with Brinkmeier driving, to the place of the accident. The purpose of the drive was to visit Brinkmeier's foster parents who lived in the area and to see where Brinkmeier used to work just north of the crossing. (Plaintiff's Answers to Interrogatories, Nos. 15 and 35).

19. Brinkmeier and Jensen played a "wish" game upon arrival at the crossing. They did so by lifting their feet up off the floor of the car and touching something metallic with their fingers while at the same time making a wish and crossing the tracks.

20. Brinkmeier and Jensen never saw or heard the train at anytime before impact. They were discussing and playing the game and looking in a forward and/or upward direction to try and find a metal screw to touch as the car was at or near the stop sign. They did not look or listen for train traffic because of being preoccupied with playing the game. (Sheriff's File, Exhibit A).

21. In addition to not having a driver's license, Brinkmeier was also cited for "Failure to Stop at Stop Sign." (Sheriff's File, Exhibit A).

22. Emergency braking is the quickest way to stop a train, but because the car was so close, it was not possible to slow the train before impact. It took the train approximately 1,400 feet to stop after emergency braking was initiated. The brakes operated normally and the stop was a good one under the circumstances. It was not

possible for Puffer to stop the train any quicker. Puffer did everything within his power to warn of the train's approach and to stop the train after perceiving that the car may not stop. (Puffer Affidavit, Exhibit D; Curley Affidavit, Exhibit B).

23. The left side of the snowplow of the leading locomotive struck the right front portion of the Jensen car, throwing it in a northeasterly direction. Both occupants were ejected from the car and thrown in the same northeasterly direction. Neither occupant was wearing a seat belt. (Sheriff's File, Exhibit A; Curley Affidavit, Exhibit B; Puffer Affidavit, Exhibit D).

POINTS AND AUTHORITIES

1. Union Pacific Was Not Negligent "In Traveling In Excess Of The Authorize Speed Limit."

The "authorized speed limit" for the trackage in question was set by the Federal Railroad Administration (FRA) at 60 m.p.h. for freight trains and 80 m.p.h. for passenger trains, and such limit preempts plaintiff's claim of excessive speed. 49 C.F.R. § 213.9(a) (copy attached as Exhibit G). The U. S. Supreme Court case of CSX Transportation, Inc. v. Easterwood, 113 S.Ct. 732; 123 L.Ed.2d 387 (1993) (copy attached as Exhibit H), is directly in point. In that case the plaintiff sued for the death of her husband caused in a railroad crossing accident, alleging the same common law negligence claims made here, of a crossing that was unsafe and excessive train speed. The railroad argued, inter alia, that plaintiff's claim of excessive train speed was preempted under 49 C.F.R. § 213.9(a), and

the Supreme Court agreed. In rendering its decision, the Supreme Court clarified the extent to which federal railroad safety laws and regulations preempt state laws concerning train movements. The Court held that federal regulations implemented pursuant to 45 U.S.C.A. § 434 (Federal Rail Safety Act of 1970), may preempt any state law, rule, etc., including "legal duties imposed on railroads by the common law," 123 L.Ed.2d at 396; and that the plaintiff's common law negligence allegation of excessive train speed was preempted by the maximum speed limits established by the FRA. The court stated:

On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on petitioner.

123 L.Ed.2d at 402 (emphasis added).

In the present case it is undisputed that the train was operating within the federally set track speed limit of 60 m.p.h. The fact that the Union Pacific had set a lower "timetable" speed limit than that specified by the FRA is irrelevant since any claim based upon a violation of the railroad set limit would be but a variation of plaintiff's common law negligence claim of excessive or unreasonable speed. Bowman v. Norfolk Southern Ry. Co., 832 F. Supp. 1014, 1017 (D.S.C. 1993) (copy attached as Exhibit I). Such

a claim should be treated no differently than any other similar excess speed claim since the FRA speed limits "cover the subject matter" of such claims, even those based on state statutes or local ordinances. Id.; Landrum v. Norfolk Southern Corp., 836 F. Supp. 373, 375 (S.D. Miss 1993). Accordingly, since the issue of speed limits has been specifically preempted by federal law and the train was operating within the federal limit, the jury would not be entitled to second guess the FRA by considering the question of whether the speed of the train was reasonable. Therefore, the train's speed, whether it be 49, 50 or 51 m.p.h., cannot provide a basis for arguing common law negligence. Easterwood is directly in point on this issue.

2. Union Pacific Did Not "Fail To Reduce The Speed Of Its Train Through The More Than Ordinarily Hazardous Crossing".

Assuming, arguendo, but not agreeing that the crossing was more than ordinarily hazardous¹, such a scenario does not impose a duty upon Union Pacific to reduce the train's speed below the federally mandated limit. As in this case, the plaintiff in Easterwood also alleged, in addition to excessive train speed, unsafe crossing conditions requiring additional warning devices. Nevertheless, in

¹Union Pacific denies that the crossing was more than ordinarily hazardous. The photographs attached to the Curley Affidavit clearly show otherwise and the crossing does not meet the criteria needed to support such a finding as set forth in Duncan v. Union Pacific R. Co., 842 P.2d 832, 834 (Utah 1992) (copy attached as Exhibit J). However, the issue is irrelevant since, as explained below, the Easterwood train speed preemption rule applies even through unsafe conditions may have existed at the crossing.

spite of the fact the Court found that plaintiff may have a viable claim for an unsafe crossing,² the Court still held that the railroad had no duty to reduce the train's speed below the federal limit, and dismissed that portion of plaintiff's Complaint. The Court specifically ruled that:

§ 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings.

123 L. Ed.2d at 403 (Emphasis added).

The rationale for the ruling is found in the court's explanations that "the limits were adopted only after the hazards posed by track conditions were taken into account," and that "the limits in § 213.9(a) were set with [crossing] safety concerns already in mind . . . ", 123 L.Ed.2d at 402, 403, and in the fact that train speeds usually play a less significant role (than the actions of drivers) in causing crossing accidents. As set forth in the footnote at page 403:

(Nearly all grade crossing accidents can be said to be attributable to some degree of "driver error." Thus, any effective program for improving [crossing] safety should be oriented around the driver and his needs in approaching, traversing, and leaving the crossing site as safely and efficiently as possible); . . . (the most influential predictors of train-vehicle accidents at rail-highway crossings are type of warning devices in-

²The plaintiff is not claiming here that Union Pacific is liable for the alleged unsafe crossing conditions or for failing to install automatic train warning devices at the crossing, such as flashing lights and gates. Under the Duncan case, supra, and the statutory scheme set forth at U.C.A. § 54-4-14, et seq., the State of Utah (UDOT) has exclusive responsibility to determine the need for and install such devices.

stalled, highway traffic volumes, and train volumes. Less influential, but sometimes significant [is] maximum train speed . . .)

123 L.Ed.2d at 403 (emphasis added).

In any event, as explained above, the undisputed evidence is that Union Pacific did, in fact, reduce the speed of its train some 10 m.p.h. below the federal limit at which the train could have been lawfully operated. Accordingly, plaintiff's allegation in this respect is not only without legal support but is also factually incorrect.

3. Union Pacific Complied With Requirements of U.C.A. § 56-1-14.

Utah Code Annotated § 56-1-14 governs the operation of locomotive whistle and bell devices at public railroad crossings. It provides as follows:

Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than 80 rods from any city or town street or public highway grade crossing until such city or town street or public highway grade crossing shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least 1/4 of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid; . . .

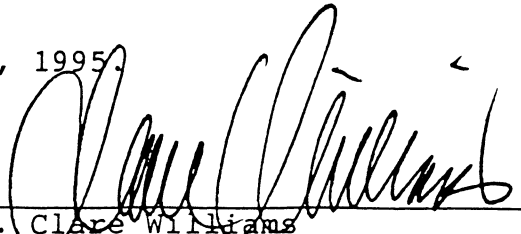
Unless the crossing is located in a town or at a terminal point, the statute does not require the operation of both the bell and the whistle simultaneously. Where the grade crossing is in a rural area such as the one in question, the requirement is in the alternative--either the bell or the whistle must be operated beginning "at least" 1320 feet away from the crossing.

In this case, the evidence is that Engineer Puffer sounded both the bell and the whistle beginning at a point well in excess of 1320 feet away from the crossing. Puffer's testimony is that he began sounding the whistle and the bell at approximately 1/4 mile away from the crossing at 5950, South and then continued operating the bell and whistle from 5950 South for another approximately 1100 feet to the crossing at 650 West where the accident happened. Other witnesses in the vicinity support such testimony. There is no probative evidence to the contrary. Accordingly, Union Pacific clearly complied with the statutory requirements of sounding either the whistle or the bell for a minimum of 1320 feet before the crossing.

CONCLUSION

Based upon the foregoing, Union Pacific submits that its Motion for Summary Judgment should be granted on the grounds that there are no genuine issues of material fact which should keep the Court from ruling as a matter of law that the train was not traveling in excess of the authorized speed limit; that Union Pacific was not negligent in failing to reduce the speed of the train over the crossing; and that the locomotive's signaling devices were operated in accordance with statutory requirements.

DATED this 6th day of February, 1995.



J. CLARE WILLIAMS
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1995, a copy of the foregoing was served in the manner indicated below upon the following:

Allen K. Young, Esq.
Young & Kester
101 East 200 South
Springville, Utah 84663

X U.S. Mail
_____ Hand Delivered
_____ Overnight
_____ Facsimile
_____ No Service



Secretary

EXHIBIT A



Utah County Sheriff

MISDEMEANOR FACT SHEET

SCA _____ ACA _____ DATE April 6, 1994
 APPROVED _____ PR YES () NO () INCIDENT NO. 94-150235
 DEFENDANT NO. 1 OF 1

DEFENDANT

NAME Bruce Brinkmeier ALIAS _____
 ADDRESS 1950 East 100 South; Salt Lake City
 DOB 9-16-76 SEX Male RACE White

OFFENSE

COUNT 1 No Drivers License CLASS _____
 STATUTE 41-2-104 DATE OF OFFENSE 2-5-94

COUNT 2 Failure to Stop at Stop Sign CLASS _____
 STATUTE _____ DATE OF OFFENSE 2-5-94

ALCOHOL TEST RESULTS - BREATH _____ REFUSAL _____ BLOOD _____

TYPE OF VEHICLE _____

INCIDENT LOCATION 5950 South 650 West

ARRESTING DEPUTY C.J. Witney

AGENCY/ADDRESS UCSO: 75 South 200 East, Suite 201; Provo

COURT Utah County Justice Precinct WARRANT _____ IN CUSTODY _____

SUMMONS

WITNESSES

NAME	ADDRESS	PHONE
1. <u>Deputy C.J. Witney</u> <u>Sgt. Jens Horn</u>	<u>UCSO</u>	<u>370-8887</u>
2. <u>Deputy Robert Eyre</u>	<u>"</u>	<u>"</u>
3. <u>Robert L. Crow</u>	<u>P.O. Box 53; Minersville</u>	<u>386-2318</u>
4. <u>Ryan Puffer</u>	<u>P.O. Box 822; Beaver</u>	<u>438-5460</u>
5. <u>Johnny Starks</u>	<u>3701 S. 8235 W.; Magna</u>	<u>250-7039</u>
6. _____	_____	_____

Handwritten marks and signatures at top left.

Handwritten mark 'A' at top right.

UTAH COUNTY SHERIFF
OFFENSE REPORT

PRINTED: 02/14

CLASSIFICATION: 50PI
SUB CLASS:

INCID NO: 0150235

ADDRESS OF OCCUR: 5906 S 650 W CITY: 01 RM/APT:
DIST: S BEAT: 12 GRID: 0900 SHIFT: 2

DATE REPORTED: 02/05/94 TIME REPORTED: 1210
DATE OCCURED: 02/05/94 TIME OCCURED: 1210

DAMAGED PROP AMT: STOLEN PROP AMT: PREMISE:

COMPL/BUSN: DOB: SEX: RACE:
ADDR: CTY: ST: ZIP:

REPORTING DEPUTY: WITNEY, CARLA INITIAL INVESTG UNIT: PATROL

COMMENTS: CAR TRAIN ACCIDENT. GO DOWN BY LONGVIEW FIBRE AND MEET CLYDE ARGYLE

INCIDENT NAMES

CRAW, ROBERT L PASS DOB: 02/07/55 SEX: M RACE: W
ADDR: PO 53 CTY: MINERSVILLE ST: UT ZIP:
ID NO: MISC ID: RES PHONE: 8013862318
BUSN/SCHOOL: UNION PACIFIC CONDUCTOR BUSN PHONE:

PUFFER, RYAN PASS DOB: 03/26/70 SEX: M RACE: W
ADDR: PO 822 CTY: BEAVER ST: UT ZIP:
ID NO: MISC ID: RES PHONE: 8014385460
BUSN/SCHOOL: UNION PACIFIC ENGINEER BUSN PHONE:

STARKS, JOHNNY WITN DOB: 10/31/77 SEX: M RACE: W
ADDR: 3701 S 8235 W CTY: MAGNA ST: UT ZIP:
ID NO: MISC ID: RES PHONE: 8012507039
BUSN/SCHOOL: BUSN PHONE:

HILL, GERALD WITN DOB: 01/02/44 SEX: M RACE: W
ADDR: 5851 S DEPOT RD CTY: SPANISH FORK ST: UT ZIP: 84601
ID NO: MISC ID: RES PHONE: 8017986547
BUSN/SCHOOL: BUSN PHONE:

FEB 15 1994 *Handwritten date and initials.*

copy of entire case report to Allen Lumsden

copy of train tape to Mike Petro, Atty. as

copy of accid. form to UPRP

copy to Dan Jensen 2-15-94

WHITNEY, HILL WITN DOB: 12/18/73 SEX: M RACE: W INCID NO: 0150235-
ADDR: 5851 SO DEPOT RD CTY: SPANISH FORK ST: UT ZIP:
ID NO: MISC ID: RES PHONE: 798-6547
BUSN/SCHOOL: BUSN PHONE:

UNION, PACIFIC RAILROAD BUSN DOB: SEX: RACE: INCID NO: 0150235-
ADDR: 1000 SOUTH 400 EAST CTY: PROVO ST: UT ZIP:
ID NO: MISC ID: RES PHONE:
BUSN/SCHOOL: BUSN PHONE: 373-1780

JENSEN, ALECIA PASS DOB: SEX: F RACE: W INCID NO: 0150235-
ADDR: 3948 W ZODIAC DR CTY: SALT LAKE CITY ST: UT ZIP:
ID NO: MISC ID: RES PHONE:
BUSN/SCHOOL: BUSN PHONE:

BRINKMEIER, BRUCE DRIV DOB: 09/16/76 SEX: M RACE: W INCID NO: 0150235-
ADDR: 1950 EAST 100 SOUTH CTY: SALT LAKE CITY ST: UT ZIP:
ID NO: MISC ID: SSN529278513 RES PHONE: 485-4567
BUSN/SCHOOL: BUSN PHONE:

PROPERTY

RECOVERED STATUS: SAFEKEEP BIN/TAG NO: EVIDENCE FILE INCID NO: 0150235-0
TYPE ARTICLE: FILM/PHOTO BRAND: 35MM MODEL: PRINTS
SERIAL NO: OWNER APPLIED NO:
DATE REPORTED: 02/05/94 PROPERTY VALUE:
RECOVERED/RECEIVED: 02/14/94 RECOVERED VALUE:
COMMENTS: PHOTOS OF CAR-TRAIN CRASH

RECOVERED STATUS: SAFEKEEP BIN/TAG NO: EVIDENCE FILE INCID NO: 0150235-0
TYPE ARTICLE: FILM/PHOTO BRAND: 35MM MODEL: SLIDES
SERIAL NO: OWNER APPLIED NO:
DATE REPORTED: 02/05/94 PROPERTY VALUE:
RECOVERED/RECEIVED: 02/14/94 RECOVERED VALUE:
COMMENTS: PHOTOS OF CAR-TRAIN ACCIDENT

OFFENSE NARRATIVE

INCID NO: 0150235

SUMMARY;

THIS IS A REPORT OF A TRAFFIC ACCIDENT INVOLVING A MOTOR VEHICLE AND A UNION PACIFIC TRAIN.

DATE AND LOCATION;

THIS ACCIDENT OCCURRED ON FEBRUARY 5TH 1994 AT SATURDAY AT APROX 1210 HRS. THE LOCATION OF THE ACCIDENT WAS ON 5950 SOUTH 650 WEST, WHERE IT INTERSECTS WITH THE RAIL ROAD TRACKS.

CONTACT;

WE WERE CONTACTED BY DISPATCH AND SENT TO THE SCENE OF THE ACCIDENT. SPANISH FORK POLICE HAD ARRIVED AT THE SCENE. SPANISH FORK AMBULANCE WAS RESPONDING TO THE ACCIDENT ALSO. SPANISH FORK POLICE WAS FIRST ON SCENE. BRUCE BRINKMEIER WAS IDENTIFIED AS THE DRIVER OF THE VEHICLE.

ACTIONS;

DEPUTY ROBERT EYER AND SGT JENS HORN WERE RESPONDING TO THE SCENE ALSO. SGT HORN MADE CONTACT WITH THE ENGINEER AND THE CONDUCTOR OF THE TRAIN. DEPUTY EYER WORKED ON THE DIAGRAM AND MEASUREMENTS. DEPUTY EYER CALLED FOR A FORENSIC NURSE TO DRAW BLOOD AT THE HOSPITAL.

THE SCENE WAS MARKED FOR EVIDENCE. PHOTOS WERE TAKEN OF THE ACCIDENT SCENE. A DIAGRAM WAS DRAWN AND MEASUREMENTS TAKEN.

TRAIN EMPLOYEES RESPONDED FOR THEIR INVESTIGATION. THE TRAIN ENGINEER AND CONDUCTOR WERE TESTED FOR ALCOHOL WITH A PORTABLE INTOXIMETER AND RELEASED. ARRANGEMENTS WERE MADE TO RECOVER A COPY OF THE TRAIN COMPUTER SPEED TAPE.

ELEMENTS;

THE UNION PACIFIC TRAIN WAS EAST BOUND ON THE TRACKS AT ABOUT 48 MPH. THE DRIVER OF THE HONDA WAS SOUTH BOUND ON 650 WEST. THE HONDA WAS MOVING AT APPROXIMATELY 5 MPH WHEN IT DROVE UP TO THE TRACKS. DRIVER AND PASSENGER DIDN'T SEE THE TRAIN.

THE HONDA WAS STRUCK IN THE FRONT ENGINE COMPARTMENT, THE RIGHT QUARTER PANEL, AND THE PASSENGER COMPARTMENT. THE HONDA WAS FORCED OVER TO THE SOUTH EAST SIDE OF THE TRACKS. BOTH THE DRIVER AND THE PASSENGER WERE EJECTED. THE DRIVER WAS FOUND JUST WEST OF WHERE THE VEHICLE CAME TO REST. THE PASSENGER WAS FOUND EAST OF THE VEHICLE.

INJURIES;

BRUCE BRINKMEYER HAD SEVERAL LACERATIONS AND SCRAPES ALL OVER HIS BODY.

ALECIA JENSEN, WHEN THE OFFICER HAD CAME OVER TO CHECK HER, WAS TOLD THAT SHE WASN'T BREATHING AND HER CHIN WAS ON HER CHEST. OFFICER SNOW HAD GONE OVER AND RE-ESTABLISHED AN AIR WAY. SHE STARTED TO BREATH ON HER OWN. ALECIA WAS REPORTED TO HAVE HAD C-5 AND C-6 DISLOCATED AND ONE POSSIBLE FRACTURE ALSO IN THE NECK. ALECIA WAS TAKEN TO THE ICU UNIT IN CRITICAL CONDITION.

WITNESS SUMMARY;

THERE WERE THREE WITNESSES IN ADDITION TO THE EDITION TO THE CONDUCTOR AND ENGINEER.

WITNESSES STATED THAT THE VEHICLE SLOWED DOWN BUT DIDN'T STOP BEFORE ENTERING THE TRAIN TRACK AREA. THEY STATED THAT HE DIDN'T LOOK EITHER WAY BEFORE ENTERING THE TRACK AREA. WITNESSES STATED THAT WHEN THE VEHICLE HAD ENTERED THE TRACK AREA, THEY WERN'T SURE IF HE HAD STOPPED OR MOVING VERY SLOW. WITNESSES ALSO STATED THAT THEY CLEARLY HEARD THE TRAIN AIR HORN BLOWING JUST PRYOR TO THE IMPACT.

WITNESSES STATE THAT WHEN THE TRAIN HAD IMPACTED WITH THE HONDA, THEY CLEARLY SAW THE DRIVER AND PASSENGER EJECTED FROM THE VEHICLE. JOHNNY STARKS THEN RAN TO THE AUCTION AND CALLED 911 FOR AN AMBULANCE. OTHER WITNESSES HAD STARTED TO RENDER AID TO THE VICTIMS TILL THE AMBULANCE ARRIVED.

EXTRA PATROL;

I WOULD LIKE TO HAVE AN EXTRA PATROL IN THIS AREA. I HAD BEEN ADVISED BY SEVERAL OF THE PEOPLE IN THE AREA THAT IT IS A FREQUENT OCCURANCE THAT THE DRIVERS FAIL TO STOP AT THE STOP SIGN.

OTHER ACTIONS TAKEN;

I REQUESTED NO PARKING SIGNS BE POSTED IN THE AREA OF THE TRACKS. THESE WILL BE PUT UP AND REGUARLY PATROLED.

CASE MANAGEMENT

INCID NO: 0150235
REPORTING DEPUTY: WITNEY, CARLA INITIAL REPORTING UNIT: PATROL
FOLLOWUP INVESTIGATOR: FOLLOWUP INVESTG UNIT:

CASE STATUS/DISPO: OPEN PATROL STATUS/DISPO DATE: 02/05/94

END OF REPORT

WHITE - Provider
CANARY - EMS Office
PINK - Hospital

UTAH EMS INCIDENT REPORT

Bureau of Emergency Medical Services, Utah Department of Health

No **5108**

Service Number: 25092		District Code		Unit/Permit Number: 250903		Incident Number: 15023		Incident Date: 12-22-11	
Incident Street Location: 5700 So 600 West				City: Spanish Fork		State: Ut		Zip Code: 84600	
Dispatch Date: 12-24-11		Incident Reported Time: 12:12		Dispatch Notified Time: 12:18		Dispatched Time: 12:18		Enroute Time: 12:18	
Left Scene Time: 12:46		Arrived Destination Time: 12:53		Back In Service Time		PM/EMT Number: 75126		PM/EMT Number: 74133	
Response / Transport		Bodily Fluids Exposure		CPR Information		Safety Equipment Usage		Alcohol/Drug Usage	
To Scene: <input checked="" type="checkbox"/> Lights / Siren <input type="checkbox"/> Silent Run From Scene: <input checked="" type="checkbox"/> Lights / Siren <input type="checkbox"/> Silent Run		Exposure: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Types: Blood		Was CPR Initiated prior to EMS Arrival? <input type="checkbox"/> Yes <input type="checkbox"/> No By Whom? <input type="checkbox"/> Citizen <input type="checkbox"/> 1st Responder		Safety equipment usage? (Seat belt, helmet, etc.) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Types:		Suspicion of alcohol/drug use? <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:	
								Odometer Readings: Beginning: 30109 At Scene: 30112 Ending: 30120 Billable Miles: 17	

Patient Last Name: Brinkmeier First: Bruce M.I.			Responsible Party: Vickie Brinkmeier Telephone Number: 485-4567		
Street Address: 1950 East 100 So			Street Address: 1950 East 100 So. SCL UT 84106		
City: S.L.C. State: Ut. Zip Code: 84106		City: S.L.C. State: Ut. Zip Code: 84106			
Telephone Number: 485-4567 Social Security Number: 529-27-8513 Race Code: L		Primary Insurance Number		Group Insurance Number	
Sex: M Date of Birth: 09-16-1976 Age: 17		Medicare Number		Medicaid Number	
Chief Complaint: Multiple Trauma			Current Medications: _____		
Past Medical History: _____			Allergies: _____		

Narrative: **17 yo male - hit by train thrown from vehicle. Multiple injuries - Buckle wound, C-collar - head secured to board, vitals taken, O2 cannula. IV. LR Full open**

CRAMS Score Components	GLASGOW COMA Scale	Vitals	Time	Pulse	Blood Pressure	Respiration	Temperature
Circulation <input checked="" type="checkbox"/> 2 Blood Pressure ≥ 100 <input type="checkbox"/> 1 Blood Pressure ≥ 85 < 100 <input type="checkbox"/> 0 Blood Pressure < 85 Capillary Refill <input checked="" type="checkbox"/> 2 Normal <input type="checkbox"/> 1 Delayed <input type="checkbox"/> 0 Absent Enter Least Value of the Above Boxes Checked: 2	Eye Open <input checked="" type="checkbox"/> 4 Spontaneously <input type="checkbox"/> 3 To Speech <input type="checkbox"/> 2 To Pain <input type="checkbox"/> 1 None Verbal Response <input checked="" type="checkbox"/> 5 Oriented <input type="checkbox"/> 4 Confused <input type="checkbox"/> 3 Inappropriate <input type="checkbox"/> 2 Incomprehensible <input type="checkbox"/> 1 None	Initial: 76		129/70	20		
Respiration <input checked="" type="checkbox"/> 2 Rate < 35 <input type="checkbox"/> 1 Rate ≥ 35 <input type="checkbox"/> 0 Rate = 0 Respiratory Effort <input checked="" type="checkbox"/> 2 Normal <input type="checkbox"/> 1 Labored or Shallow <input type="checkbox"/> 0 Absent Enter Least Value of the Above Boxes Checked: 2	Motor Response <input checked="" type="checkbox"/> 6 Obeys Commands <input type="checkbox"/> 5 Localizes Pain <input type="checkbox"/> 4 Withdraws <input type="checkbox"/> 3 Flexes to Pain <input type="checkbox"/> 2 Extends to Pain <input type="checkbox"/> 1 Flaccid	Repeat: _____					
Abdomen/Thorax <input checked="" type="checkbox"/> 2 Abd. / Thor. Non-Tender <input type="checkbox"/> 1 Abd. / Thor. Tender <input type="checkbox"/> 0 Abd. Rigid or Penetrating Injury Enter Value Box Checked: 2	GLASGOW TOTAL : 15 Enter Injury / Illness Codes (Most to Least Significant) 029 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/>	Repeat: _____					
Motor <input checked="" type="checkbox"/> 2 Normal, Obeys Command <input type="checkbox"/> 1 Responds Only to Pain, No Posturing <input type="checkbox"/> 0 Postures or No Response Enter Value Box Checked: 2	Enter Treatment Codes (Most to Least Significant) 120 2 200 3 350	Repeat: _____					
Speech <input checked="" type="checkbox"/> 2 Normal Oriented <input type="checkbox"/> 1 Confused or Inappropriate <input type="checkbox"/> 0 No Speech or Unintelligible Sounds Enter Value Box Checked: 2		Repeat: _____					
Medical Control Contact <input type="checkbox"/> At Scene <input type="checkbox"/> In Transit <input type="checkbox"/> Standing Order							
Medical Control Physician: Zanotti				Destination/Transferred To: SPRINGS			
Medical Control Nurse: Wooten				Disposition: SPRINGS			
This is to certify that I am refusing treatment / transport. I have been informed of the risks involved, and hereby release the ambulance service, its attendants, and its affiliates, from all responsibility which may result from this action.							

VOLUNTARY STATEMENT
NOT UNDER ARREST

Name: GERALD Hill
Address: 5851 SO. DEPOT Rd. (SPRINK)

Date: Feb. 5 - 1994
Time: _____

D.O.B. 1-2-44

I, GERALD Hill, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make know to _____. I volunteer the following information of my own free will.

While traveling south across tracks I noticed a train coming eastward. I hurried and crossed tracks. I noticed another car (the one which was hit) coming behind me. At this time I stopped another out. which was traveling north, because I felt they were going to pull across tracks. The car which was hit appeared to pull up to tracks (and I am not completely sure, come to nearly a complete stop. At this time the engine hit the front end of car throwing both the car and the wall driver down the tracks. The other passenger (female) ~~was thrown~~ was thrown farther (east) down the tracks out of the car.

The above statement is true and correct to the best of my knowledge.
Gerald Hill
Signature)

(Witness)



Utah County Sheriff

VOLUNTARY STATEMENT

CASE NO. PAGE OF

Name Johnny Starks

Date 2/5/94

Address 3701 s. 8235 w. Magna, Ut, 84044

Time 12:40

250-7039

DOB 10/31/77

I, Johnny Starks, do give this statement to _____ of the Utah County Sheriff's Department, of my own free will. I understand that I have the right to remain silent, that anything I say can be used against me in a court of law, that I have the right to talk to an attorney, and to have him present while I make this statement, that if I cannot afford an attorney one will be appointed for me if I so desire. I understand that I have the right to stop answering questions at any time. Fully understanding the above rights, I make the following statement.

I seen a grey car approaching southbound going fairly slow and I heard the train honking but I kept my eyes on the car he appeared to be stopped until the train got their then I seen the car go bounding off the train and into the brush. I never seen the people because I was on the other side of the train but I seen plastic flying over the train so I ran inside and told them to call an ambulance.

The above statement is true and correct to the best of my knowledge.

Johnny Starks



Utah County Sheriff

VOLUNTARY STATEMENT

Name Robert L CRAW

Address _____

CASE NO. _____ PAGE _____ OF _____

Date 2-5-94 150235

Time 1240

DOB 2/7-94

I, Robert L CRAW, do give this statement to _____ of the Utah County Sheriff's Department, of my own free will. I understand that I have the right to remain silent, that anything I say can be used against me in a court of law, that I have the right to talk to an attorney, and to have him present while I make this statement, that if I cannot afford an attorney one will be appointed for me if I so desire. I understand that I have the right to stop answering questions at any time. Fully understanding the above rights, I make the following statement.

At 1210 At Spanish Fork Crossing at (auction)
TRAIN CDSRS-03 Moving Eastbound-
I SAW a grey Car at Crossing IN foul of
tracks people in Car seemed unaware of
Approaching train whistle was being sounded and
bell was ringing Engineer Placed train IN
emergency- we then Struck the Car

The above statement is true and correct to the best of my knowledge.

Robert L CRAW
(Signature)



Utah County Sheriff

94 150235

VOLUNTARY STATEMENT

CASE NO.

PAGE 1 OF 1

Name RYAN Puffer

Date 02/05

Address P.O. Box 822

Time 1335

Beaver UT, 84713 438-5460

DOB 3-26-70

I, Ryan Puffer, do give this statement to Sgt. Horn of the Utah County Sheriff's Department, of my own free will. I understand that I have the right to remain silent, that anything I say can be used against me in a court of law, that I have the right to talk to an attorney, and to have him present while I make this statement, that if I cannot afford an attorney one will be appointed for me if I so desire. I understand that I have the right to stop answering questions at any time. Fully understanding the above rights, I make the following statement.

I was heading ~~west~~ east on the train we were approaching the crossing and a truck with a horse trailer went in front of us, and a small car driving west to east followed the horse trailer not stopping or looking down the tracks and we hit the front of the car on the passenger side.

The above statement is true and correct to the best of my knowledge.

Ryan Puffer
(Signature)

[Signature]



Utah County Sheriff

VOLUNTARY STATEMENT

CASE NO. PAGE OF

Name Whitney Hill Date 2-5-93
 Address 5851 So Pyant Rd Time 12:40 P.M.
Spanish Fork, Utah Phone # 798-6547 DOB 12-18-73

I, _____, do give this statement to _____ of the Utah County Sheriff's Department, of my own free will. I understand that I have the right to remain silent, that anything I say can be used against me in a court of law, that I have the right to talk to an attorney, and to have him present while I make this statement, that if I cannot afford an attorney one will be appointed for me if I so desire. I understand that I have the right to stop answering questions at any time. Fully understanding the above rights, I make the following statement.

I was heading south and had crossed the tracks, I looked behind and saw a grey car rolling toward the tracks, I jumped out of my truck and saw the train hit the front end of the car throwing both passengers, After the train stopped I was the first one there to the victims and found the man talking and half conscious, and the woman was unconscious barely breathing from what I could tell.

12:00 P.M. Happened

The above statement is true and correct to the best of my knowledge.

Whitney Hill
(Signature)

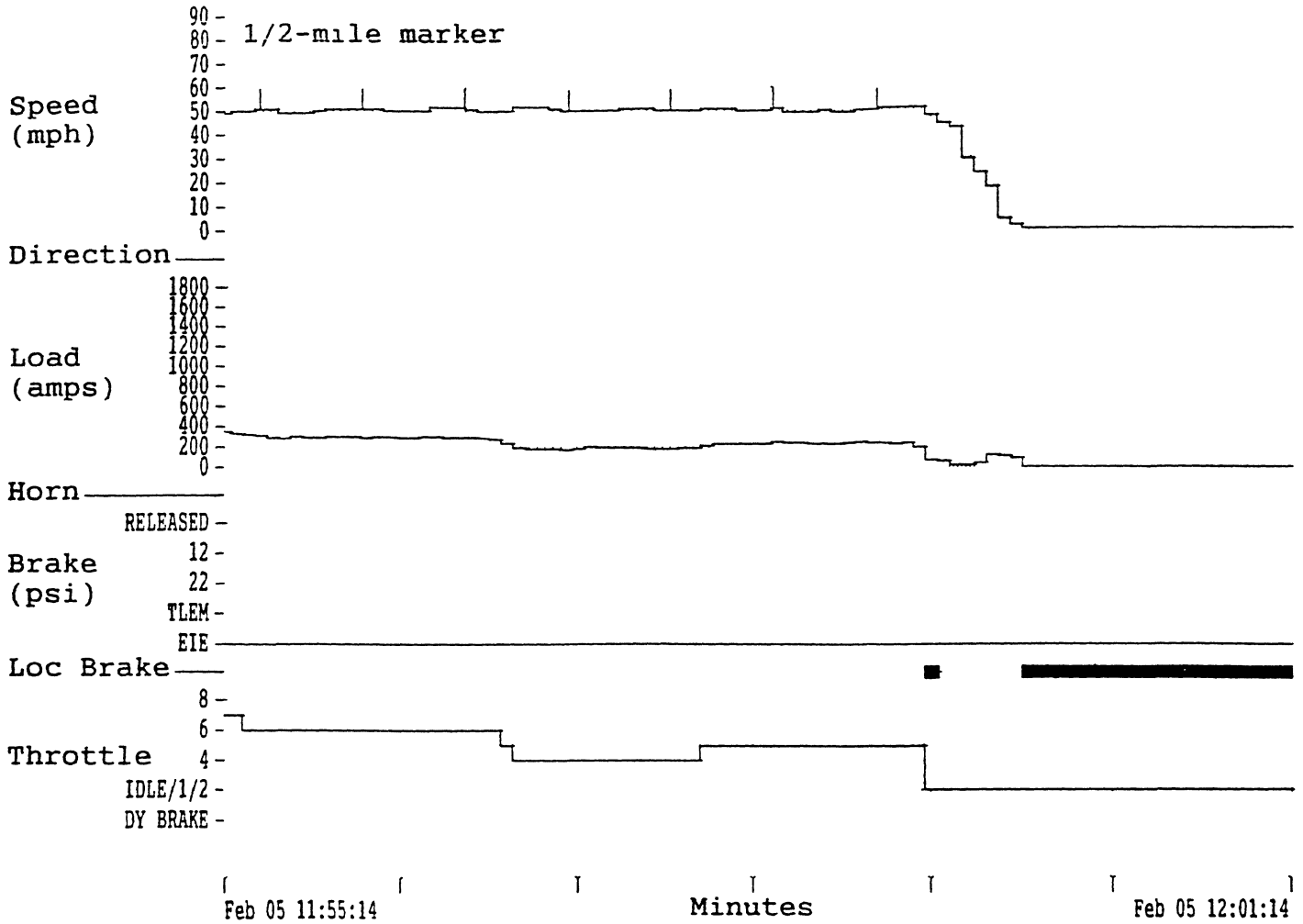
Whitney Hill
(Witness)

PULSE Electronics, Inc.

Detailed Analysis Plot (c
Time bas

Location: SPANISH FORK
Remarks: CRSDS-04 02/05/94

Scan ID: 43-1-0018



2-17-94
TAPE EVAL THIS
Sgt. E. Johnson
MOP SCC UT

Michael O. Leavitt
Governor



STATE OF UTAH
DEPARTMENT OF HEALTH
DIVISION OF LABORATORY SERVICES
PUBLIC SAFETY TOXICOLOGY SECTION

46 North Medical Drive • Salt Lake City, Utah 84113 • (801) 584-8400 • FAX 584-8486

TOXICOLOGY REPORT

Agency:	UTAH COUNTY S. O.	Laboratory No.	L94-0211
Suspect(s):	BRINKMEIER, BRUCE	Your Agency Case No.	150235
Officer:	CARLA WHITNEY		

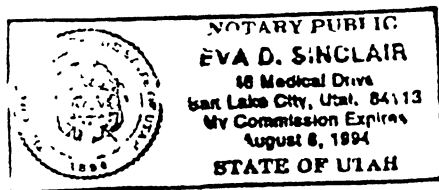
LABORATORY FINDINGS:

Blood Alcohol: Negative

Analyzed by Bruce Beck *...Bruce Beck.....*

No Drugs Were Identified in the Blood

Analyzed by Barbara Jepson *...Barbara R. Jepson.....*



Sworn and Subscribed to before me this 25 day of February 19 94

Eva D. Sinclair

Notary Public

- Final Report
- Amended Report
- Supplemental Report
- Additional Results to Follow



Incident No. 150235

ACCIDENT INVESTIGATORS FILE

Date FEB 5 94 Time 1210 Day Of Week SAT Highway 650 W

Investigating Officer WITNEY Badge # A102

Assisting Officer EMRE & HORN Badge # A013-014

<u>Drivers Involved (Name/Address)</u>	<u>Vehicle #</u>
<u>BRUCE BRINKMEIER</u>	<u>1</u>

ACCIDENT CHECK LIST

DIAGRAM AND MEASUREMENTS

- Skidmarks
- Couge Marks
- Debris
- Location of Bodies
- Probable Point of Impact
- Distance Traveled After Impact
- Vehicle's Final Position at Rest
- Width of Highway
- Width of Traffic Lanes

PHOTOGRAPHS

- Approach Path of Each Vehicle
- Any View Obstructions
- Skidmarks
- Couge Marks
- Debris
- Damage Sustained by Each Vehicle
- Vehicle's Final Position
- Probable Point of Impact
- Position of Bodies
- Obvious Vehicle Defects
- Interior of Vehicle
- 4 Sides of Each Vehicle

WRITTEN WITNESS STATEMENTS

- Drivers
- Bystanders
- Passengers
- Other Motorists

MISCELLANEOUS

- Blood Alcohol on all Drivers and Pedestrians Within Two Hours
- Gather any Other Physical Evidence (Especially in Hit and Run Cases)
- Examination of Lights (Headlights, Brake Lights, Turn Signals, Etc.)
- Examination of Brakes, Speedometer, Tires, Etc.
- Check Traffic Signal for Proper Operation and Timing in all Directions
- Make Detailed Notes Regarding Observations: Who did what during the investigation.
- Notification of Next of Kin
- Notification of Staff Duty Officer
- Notification of News Media

VEHICLE DAMAGE

1 VEHICLE

Make HONDA

License # 527 GAM

Color GRN

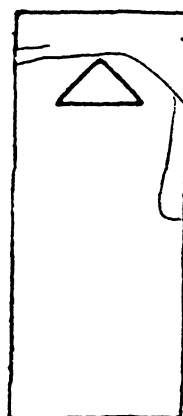
Condition: Brakes /

Tires /

Glass /

Lights /

Mech. /



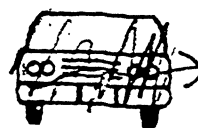
TOP



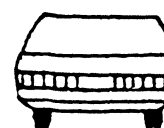
RIGHT



LEFT



FRONT



REAR

2 VEHICLE

Make _____

License # _____

Color _____

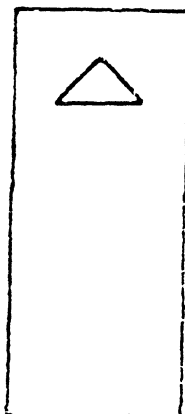
Condition: Brakes _____

Tires _____

Glass _____

Lights _____

Mech. _____



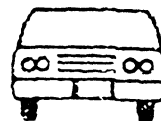
TOP



RIGHT



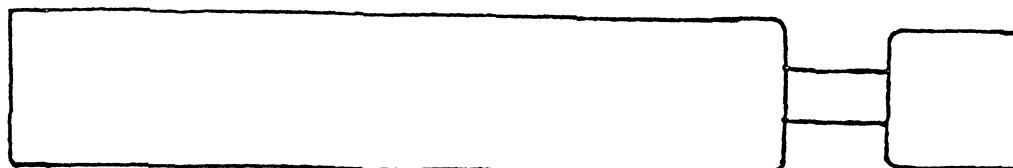
LEFT



FRONT



REAR



STATE OF UTAH INVESTIGATING OFFICER'S REPORT OF TRAFFIC ACCIDENT

DATE: MONTH 2 DAY 5 YEAR 94
 DAY OF WEEK: M T W T F S S
 MILITARY TIME: 1210
 CASE NUMBER: 150235

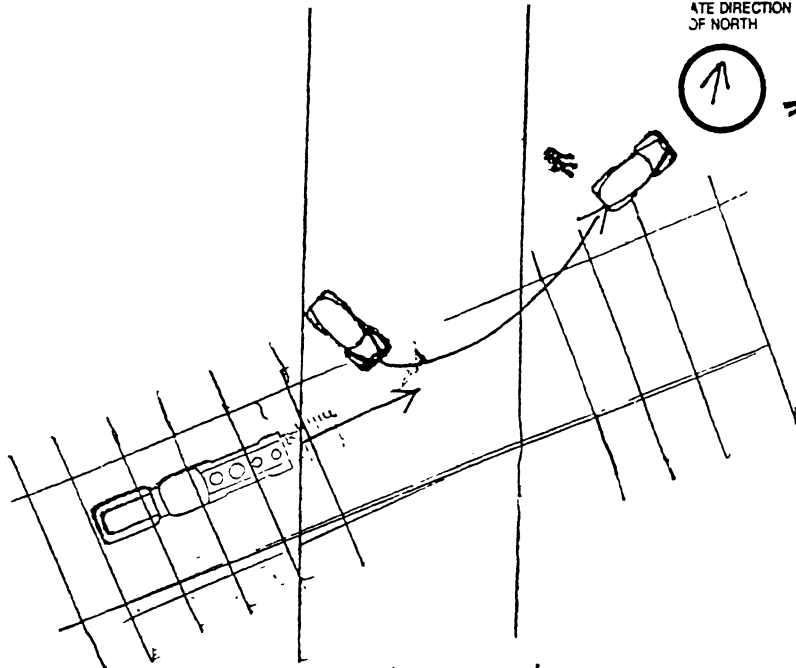
PLACE WHERE ACCIDENT OCCURRED COUNTY: Utah CITY OR TOWN: 49
 Accident was outside city limits indicate distance from city limits or nearest town: 1/2 MILES NORTH SOUTH EAST WEST OF Spanish Fork CITY OR TOWN

ROAD ON WHICH ACCIDENT OCCURRED: 5950 So 650 W INTERSECTION TYPE: 2
 1 AT ITS INTERSECTION WITH _____
 2 IF NOT AT INTERSECTION: 100 FEET NORTH SOUTH EAST WEST OF Deport RD NEAREST INTERSECTION STREET HOUSE NO LANDMARK
 TENTH OF A MILE _____ OF MILE POST _____ BE SURE TO COMPLETE IF ROAD HAS MILE POST

VEHICLE #1: YEAR 82 MAKE Honda MODEL Civic BODY STYLE / TYPE CODE 01 VEHICLE COLOR GRAY REG WEIGHT _____ DESC OF CARGO _____ COMMERCIAL VEHICLE (Reg 12,000 lbs or more) INTERSTATE INTRASTATE
 VEHICLE IDENTIFICATION NUMBER: 1H4ST343005027342 DISPOSITION OF VEHICLE: 1 NO OF AXLES (INCLUDING ALL TRAILERS): 2 DIR OF TRAVEL: South
 INSURANCE APPEARS VALID: YES NO LICENSE PLATE INFO: 94 YEAR: 5 MONTH: Ut STATE: 5276AM NUMBER: _____ PARTS DAMAGED: 0 COST OF REPAIR: 2500
 INSURANCE COMPANY: STATE FARM EFFECTIVE DATE: U EXPIRATION DATE: U POLICY NUMBER: 7196178F2344B
 AGENCY THAT SOLD POLICY: Phil Kotter ADDRESS: 643 E 400 S Salt Lake
 OWNER / OPERATOR: FIRST Danny INITIAL _____ LAST Jensen STREET, CITY, STATE, ZIP, PHONE NO: 3948 Zodiac Dr Salt Lake
 DRIVER: FIRST Breece INITIAL _____ LAST Brinkmeier STREET, CITY, STATE, ZIP, PHONE NO: 1950 E 3000 S Salt Lake 485458
 DRIVER'S LICENSE: STATE Ut NUMBER None DATE OF BIRTH: MONTH 9 DAY 16 YEAR 76 AGE 17 SEX M SAFE EQUIP. 348803 INJURY: THROUGH WHAT AREA EJECTED? Passenger Door
 DRIVER'S EDUCATION: 1 PUBLIC 2 COM'L 3 NONE 4 UNKN YEARS DRIVE EXP: 0 LICENSE CLASS: X RESTRICTIONS: X

VEHICLE #2: YEAR 91 MAKE Union Pacific MODEL LOCOMOTIVE BODY STYLE / TYPE CODE _____ VEHICLE COLOR _____ REG WEIGHT _____ DESC OF CARGO _____ COMMERCIAL VEHICLE (Reg 12,000 lbs or more) INTERSTATE INTRASTATE
 VEHICLE IDENTIFICATION NUMBER: CRSD504- DISPOSITION OF VEHICLE: owner Ret NO OF AXLES (INCLUDING ALL TRAILERS): _____ DIR OF TRAVEL: East
 INSURANCE APPEARS VALID: YES NO LICENSE PLATE INFO: 9390 YEAR: _____ MONTH: _____ STATE: _____ NUMBER: _____ PARTS DAMAGED: 1 COST OF REPAIR: 500.00
 INSURANCE COMPANY: _____ EFFECTIVE DATE: _____ EXPIRATION DATE: _____ POLICY NUMBER: _____
 AGENCY THAT SOLD POLICY: _____ ADDRESS: _____
 OWNER / OPERATOR: FIRST Union Pacific Rail Road INITIAL _____ LAST _____ STREET, CITY, STATE, ZIP, PHONE NO: 406 W 1000 S Salt Lake City
 DRIVER: FIRST Robert INITIAL _____ LAST Cray STREET, CITY, STATE, ZIP, PHONE NO: PO Box 53 Minersville ut
 DRIVER'S LICENSE: STATE _____ NUMBER N/A DATE OF BIRTH: MONTH 2 DAY 7 YEAR 55 AGE 39 SEX M SAFE EQUIP. 41XX01 INJURY: THROUGH WHAT AREA EJECTED? _____
 DRIVER'S EDUCATION: 1 PUBLIC 2 COM'L 3 NONE 4 UNKN YEARS DRIVE EXP: X LICENSE CLASS: X RESTRICTIONS: X

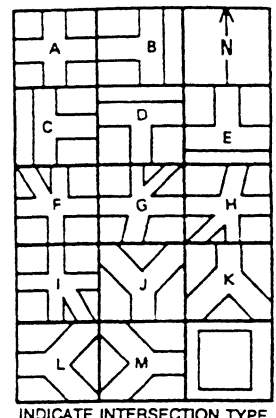
NAME	ADDRESS	DATE OF BIRTH	AGE	SEX	INJURY TYPE	CAUSE	AREA
1 | 13 | Alecia Jensen	3948 W Zodiac Dr	5/18/76	18	F	3	4	8303 Passenger Door
2 | 11 | Ryan Poffler	PO Box 829 Beaver UT	4/23/74	23	M	4	1	X X 0 1



DATE DIRECTION OF NORTH



	VEHICLE 1	2
ESTIMATED TRAVEL SPEED	5	48
ESTIMATED IMPACT SPEED	5	48
POSTED SPEED	40	40
ADVISORY SPEED		48



DESCRIBE WHAT HAPPENED (Refer to Vehicle by Number)

veh 1 was south bound on 650 west. Veh 1 didn't yield at the stop sign and pulled up onto the tracks. Veh 2 (train) struck vehicle 1 in the front and passenger side of vehicle.

If Hazardous Materials were involved list the placard number from off the commercial vehicle:

DAMAGE TO PROPERTY OTHER THAN VEHICLES

Union Pacific 9390 stop & guard rail, 50000 ESTIMATE

Name and address of owner of object struck

Union Pacific Salt Lake City

WITNESSES

Robert Crow Address P.O. 53 Minersville UT Phone 396-2318
 Ryan Puffer Address P.O. 822 Beaver UT Phone 438-5460

FIRST AID ADMINISTERED BY

EMS REPORT NO 6100/6025

INJURED TAKEN BY

2

- 1 - Ambulance, Private
- 2 - Ambulance, Police
- 3 - Paramedics
- 4 - Private Vehicle
- 5 - Other

TIME Amb Called 1212 Arrived 1221

INJURED TAKEN TO Mt View Hospital Payson

OFFENSE ACTIVITY

2 5 94 Date Notified of Accident

1212 Time Notified of Accident

1220 Arrived at Scene

EMS REPORT NO

[Empty box]

Deputy Wilkey, E-1, Hon

SOURCE OF INFORMATION (Officer at scene, No 1 Driver contacted station, etc)

PHOTO(S) TAKEN

1

- 1 - Yes
- 2 - No

2

NUMBER OF ROLLS

Investigation of accident Completed at

1520

of 1

the same day

the

day following

Charge

Charge Pending waiting for screening by Court Attorney
 Wilkey A102 UC 50 Jones 2-6-94

OFFICER'S RANK AND NAME BADGE NO PATROL DIVISION DEPARTMENT SUPERVISORS APPROVAL DATE OF REPORT

TIME	MONTH	DAY	YEAR	DAY OF WEEK	1	2	3	4	5	6	7	MILITARY TIME	CASE NUMBER
	2	5	94		M	T	W	T	F	S	1210			150235

PLACE WHERE ACCIDENT OCCURRED: COUNTY UTAH 49 CITY OR TOWN _____

Accident was outside city limits indicate distance from city limits or nearest town 1/2 MILES NORTH S E W of Spanish Fork CITY OR TOWN

ROAD ON WHICH ACCIDENT OCCURRED: 5950 SO 650W RAMP NO. _____

GIVE NAME OF STREET OR HIGHWAY NUMBER INTERSECTION TYPE _____

1. AT ITS INTERSECTION WITH _____

2. IF NOT AT INTERSECTION 100 NORTH FEET S E W of Deport RD NEAREST INTERSECTION, STREET, HOUSE NO. LANDMARK BE SURE TO COMPLETE IF ROAD HAS MILE POST

TENTH OF A MILE OF MILE POST _____

VEHICLE #	YEAR	MAKE	MODEL	BODY STYLE/TYPE CODE	VEHICLE COLOR	G.V.W.R.	DESC. OF CARGO CODE	COMMERCIAL VEHICLE (Reg 12,000 lbs. or more)
								INTERSTATE <input type="checkbox"/> INTRASTATE <input type="checkbox"/>

VEHICLE IDENTIFICATION NUMBER	DISPOSITION OF VEHICLE CODE	NO. OF AXLES (INCLUDING ALL TRAILERS)	DIR OF TRAVEL

US DOT	LICENSE PLATE INFO	YEAR	MONTH	STATE	NUMBER	PARTS DAMAGED	3 2 5 9 U 1 7 T \$	COST OF REPAIR

OWNER	FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP, PHONE NO.	PHONE ()

OPERATOR	FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP, PHONE NO.	PHONE ()

DRIVER'S LICENSE	STATE	NUMBER	DATE OF BIRTH	MONTH	DAY	YEAR	AGE	SEX	SAFETY EQUIP TYPE	INJURY	EXTR CAUTION	EJECTION	THROUGH WHAT AREA EJECTED?

DRIVER'S EDUCATION	1. PUBLIC	3. NONE	2. COM'L	4. UNKN	YEARS DRIVE EXP.	LICENSE CLASS	ENDORSEMENT	RESTRICTIONS
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER

INSURANCE APPEARS VALID	AGENCY THAT SOLD POLICY	ADDRESS	PHONE ()
YES <input type="checkbox"/> NO <input type="checkbox"/>			

VEHICLE #	YEAR	MAKE	MODEL	BODY STYLE/TYPE CODE	VEHICLE COLOR	G.V.W.R.	DESC. OF CARGO CODE	COMMERCIAL VEHICLE (Reg 12,000 lbs. or more)
								INTERSTATE <input type="checkbox"/> INTRASTATE <input type="checkbox"/>

VEHICLE IDENTIFICATION NUMBER	DISPOSITION OF VEHICLE CODE	NO. OF AXLES (INCLUDING ALL TRAILERS)	DIR OF TRAVEL

US DOT	LICENSE PLATE INFO	YEAR	MONTH	STATE	NUMBER	PARTS DAMAGED	3 2 5 9 U 1 7 T \$	COST OF REPAIR

OWNER	FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP, PHONE NO.	PHONE ()

OPERATOR	FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP, PHONE NO.	PHONE ()

DRIVER'S LICENSE	STATE	NUMBER	DATE OF BIRTH	MONTH	DAY	YEAR	AGE	SEX	SAFETY EQUIP TYPE	INJURY	EXTR CAUTION	EJECTION	THROUGH WHAT AREA EJECTED?

DRIVER'S EDUCATION	1. PUBLIC	3. NONE	2. COM'L	4. UNKN	YEARS DRIVE EXP.	LICENSE CLASS	ENDORSEMENT	RESTRICTIONS
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER

INSURANCE APPEARS VALID	AGENCY THAT SOLD POLICY	ADDRESS	PHONE ()
YES <input type="checkbox"/> NO <input type="checkbox"/>			

1. PEDESTRIAN	2. BICYCLIST	DATE OF BIRTH	AGE	SEX	INJURY

NAME	ADDRESS	TYPE	CAUSE	AREA

SE NUMBER 100 - 0

Reason For No Diagram _____

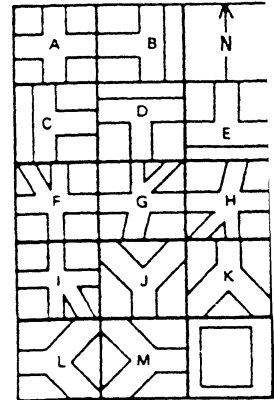
- 1 Officer not at scene
- 2 Vehicles moved
- 3 Other _____

INDICATE DIRECTION OF NORTH



VEHICLE NO _____ NO _____

ESTIMATED TRAVEL SPEED	
ESTIMATED IMPACT SPEED	
POSTED SPEED	
ADVISORY SPEED	



INDICATE INTERSECTION TYPE

DESCRIBE WHAT HAPPENED
(Refer to Vehicle by Number)

If Hazardous Materials were involved list the placard number from off the commercial vehicle

DAMAGE TO PROPERTY OTHER THAN VEHICLES _____ \$ _____ ESTIMATE

Name and address of owner of object struck _____

WITNESSES

Name _____ Address _____ Phone _____

Name _____ Address _____ Phone _____

FIRST AID ADMINISTERED BY 1 - Policeman 2 - Fireman 3 - Ambulance Personnel 4 - Paramedics 5 - Doctor 6 - Private Individual 7 - Hospital 8 - Helicopter Personnel 9 - None Administered 0 - Unknown	EMS REPORT NO _____	INJURED TAKEN BY 1- Ambulance, Private 2- Ambulance Fire 3- Paramedics 4- Private Vehicle 5- Helicopter 6- Other	TIME Amb Called _____ Arrived _____
	EMS REPORT NO _____		INJURED TAKEN TO _____

POLICE ACTIVITY Date Notified of Accident _____ Month Day Year Time Notified of Accident _____ (USE MILITARY TIME) Arrived at Scene _____	Investigation of accident Completed at _____ of _____ the same day <input type="checkbox"/> the _____ day following	Source of Information Officer at scene _____ Driver No _____ Contacted s't at on _____ Other _____	PHOTO(S) TAKEN YES <input type="checkbox"/> NO <input type="checkbox"/> VIDEO TAKEN YES <input type="checkbox"/> NO <input type="checkbox"/> FIELD DIAGRAM YES <input type="checkbox"/> NO <input type="checkbox"/>
---	---	--	--

Officer Name Bruce Brinkmeyer Charge NO DRIVERS LICENSE

Officer Name _____ Charge _____

Inspection Yes _____ No _____ If Yes Report Number _____

Other action taken Utah Co Sheriff

UNIT Deputy C. Whitney A102 UCSO Jew 4-3-94

OFFICER'S RANK AND NAME	ID NO	PATROL DIVISION	DEPARTMENT	SUPERVISORS APPROVAL	DATE OF REPORT
-------------------------	-------	-----------------	------------	----------------------	----------------

State Law requires that report be forwarded to Dept. of Public Safety within 10 days following

EXHIBIT B

4. I took the photographs of 650 West and the crossing on February 6, 1994, the day following the accident. The weather was the same on this date as it was on the previous day when the accident happened. These photographs show 650 West as it approaches the crossing from the north, including the roadway signs and what a driver could see approaching the crossing from this direction. These photographs are attached to "Photo Sheets" which are appended to my Affidavit as follow:

- a. The first Photo Sheet contains three panorama photographs taken from 600 feet, 500 feet, and 450 feet respectively north of the crossing. The photographs show the advance stop sign and railroad crossing warning signs posted along side the road and painted on the surface of the road. The locations of these signs are described in the attached diagram referred to below. The photographs also show the open field in the northwest quadrant of the crossing across which the motorists could have looked to see the approaching train. The stop and crossbuck signs located at the crossing can also be seen.
- b. Photo Sheet No. 2 contains three panorama photographs taken from 400 feet, 350 feet, and 300 feet north of the crossing. These photographs show essentially the same things as described in paragraph 4.a. above except closer to the crossing.

- c. Photo Sheet No. 3 contains three panorama photographs taken from 250 feet, 200 feet, and 150 feet north of the crossing. These photographs show the same as Photo Sheets 1 and 2 except closer to the crossing. In addition, you can see a second advance railroad crossing warning sign painted on the roadway surface.
- d. Photo Sheet No. 4 contains three panorama photographs taken from 100 feet, 50 feet, and 25 feet from the crossing. The photographs show the view the motorists would have had to the right down the tracks when in close proximity to the crossing. The first and second panorama photographs also show the white stop sign stop line painted on the roadway surface. The third panorama photograph shows the motorist's view to the right down the tracks from this stop line.
- e. Photo Sheet No. 5 contains three panorama photographs. The first panorama photograph shows the view the engineer would have had approximately 72 feet from the crossing. The second is taken from the trackage northeast of the crossing looking down the tracks in the direction from which the train came. This photograph shows another view of the open field in the northwest quadrant of the crossing. The second panorama photograph is taken

from the south side of the crossing on the westerly edge of 650 West. It shows this same field in the northwest quadrant of the crossing, the trackage in the direction from which the train approached, and 650 West going north from the crossing.

- f. Photo Sheet No. 6 contains seven photographs of the locomotives involved in the accident. The photographs show the locomotives in the exact order where they were positioned at the head end of the train at the time the accident happened. Locomotive No. 9390 was the leading locomotive. The second unit was Locomotive No. 2492. The third engine in the consist was Locomotive No. 3799.
- g. Photo Sheet No. 7 contains five photographs which show the damage to the lead locomotive caused by the accident. The top two photographs show the place on the leading locomotive where the Jensen car was struck. The photographs indicate that the left front portion of the snowplow on Locomotive No. 9390 made contact with the Jensen automobile.
- h. Photo Sheet No. 8 contains six photographs of the damaged Jensen automobile. These photographs were taken on the same day of the accident at approximately 4:30 p.m. The photographs show that the Jensen vehicle was first struck by the train in the right front portion of the car.

All of the above-mentioned photographs were taken by me personally and show accurately what I saw with my eyes through the camera's viewfinder at the time I was taking the photographs. In my opinion the photographs are accurate depictions of the scenes and objects portrayed and seen in the photographs.

5. In addition to taking the above-mentioned photographs I also prepared a rough, hand drawn diagram of the accident scene. I made this diagram on February 7, 1994, based upon notes that I took when I visited the accident scene on February 5, 1994, after the accident occurred. A copy of this diagram is attached hereto. It contains the following information:

- a. The approach angle for the crossing is greater than 90°, meaning that a motorist southbound on 650 West should not have to look as far to the right to see a train approaching from that direction as would be required at a 90° angled crossing.
- b. There is another public railroad crossing situated approximately 1100 feet southwest of the 650 West crossing. This crossing is located at 5950 South.
- c. The Utah Livestock Auction building and animal pens are located on the south side of the tracks between 5950 South and 650 West.
- d. There is an open field located in the northwest quadrant of the crossing. This is the area through which a southbound motorist on 650 West would have to look to be able to see a train coming from the

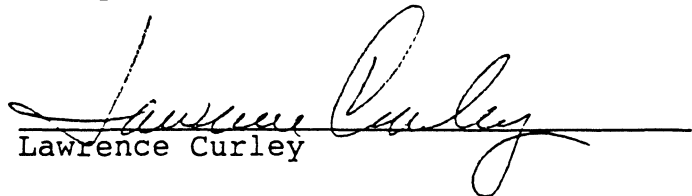
southwest to the northeast, which is the direction of travel for the train in question. There is no obstruction in this field to block the view of an oncoming train.

- e. The tracks are straight and flat as they travel towards the crossing from the southwest. 650 West is also straight and flat as it travels towards the crossing from the north.
- f. A number of traffic regulatory signs are located on 650 West as it approaches the crossing from the north. These are the signs shown in the attached photographs. An advance stop sign warning sign was located along the west side of 650 West at approximately 572 feet north of the crossing. An advance railroad crossing warning sign was posted along side the road at approximately 332 feet north of the crossing. An advance railroad crossing warning sign was painted on the roadway at approximately 281 feet north of the crossing. This appeared to be a newly painted sign. Another advance railroad crossing warning sign, somewhat faded but still observeable, was painted on the roadway at approximately 175 feet north of the crossing. Stop signs and railroad crossbuck warning signs were located on both sides of the crossing and could be clearly seen for hundreds of feet north of the crossing. The stop

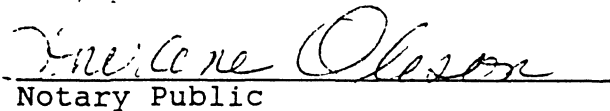
sign and railroad crossbuck sign on the north side of the tracks were located 17 feet and 9 1/2 feet, respectively, from the tracks. A white stop sign stop line was painted on the roadway 22 feet north of the tracks.

- g. The front end of the leading engine unit came to a stop approximately 1399 feet north of the crossing.

DATED this 1st day of February, 1995.


Lawrence Curley

Subscribed and sworn to before me this 1st day of February, 1995.


Notary Public



BRUCE CONRAD BRINKMEIER

CR I'm Lawrence Curley, Union Pacific Claims Representative. The following is a recorded interview with Bruce Brinkmeier, which is taking place at Salt Lake City, Utah on February 8, 1994, at approximately 11:39 a.m., regarding a accident involving Bruce Brinkmeier at Spanish Fork, Utah on February 5th, 1994. Bruce, do you understand that this interview is being recorded?

I Yeah.

CR OK. Is this being done with your permission?

I Yes.

CR OK. And is this being done voluntarily?

I Yes.

CR OK. Bruce, could you please state your full name and spell your last name?

I Uh, Bruce Conrad Brinkmeier, B-R-I-N-K-M-E-I-E-R.

CR OK, and what is your address?

I 1950 East 3000 South, Salt Lake.

CR And your zip code?

I 84106.

CR And what's your phone number?

I 485-4568

CR OK. Also uh, here at the interview is uh, Monica Morrison. Monica could you please state your full name?

MM Monica Ann Morrison.

EXHIBIT 4

CR And could you spell your last name please?

MM M-O-R-R-I-S-O-N.

CR OK, and you're a friend of uh, Bruce?

MM Yeah, I'm his best friend's girl friend.

CR OK. And you reside at the same place, too?

MM Yeah.

CR OK. Bruce, how old are you right now?

I Seventeen.

CR And your birthdate?

I 9-16-76.

CR 9-16? And are you on any medication right now?

I ~~Lorazab.~~ - JADOLONE BB

CR And did you take any today by chance?

I Not since last night.

CR Uh, would you be able to answer the questions uh, without any problems?

I Yes.

CR Bruce, what is, what's your mother's name?

I Vicki Brinkmeier, V-I-C-K-I.

CR And where does she live at?

I 848 North 600 West, Apartment A, Provo, Utah.

CR And do you have her phone number?

I 374-1529.

CR And are you working right now?

I No.

CR OK, and uh, are you a student, or ...

I Yeah, I'm a student.

CR And where are you a student at?

I Central High.

CR And what grade are you in?

I Senior.

CR Do you plan on graduating this summer or this spring?

I Oh probably this August.

CR And how long have you lived here?

I Six months.

CR About six months. And who do you live with?

I I live with myself, Monica and Joshua Wilkerson.

CR Cursen?

I Wilkerson

CR Wilkerson. And prior to the six months, where did you live at?

I I lived at a foster home in Spanish Fork. Joe and Chris Kelly.

CR And how long did you live there?

I Four months this time.

CR And how about before that?

I Before them I lived with my mom for a period of time but we didn't get along so I moved out.

CR Bruce, on the day of the accident, uh, what date was that, do you remember?

I It was uh, February 5, '94.

CR And what time was that?

I Uh, approximately 12:30.

CR Can you basically tell me uh, what you did, uh, when you started driving with uh, there was another passenger in the car, Alicia Jensen? Alicia Jensen. Can you tell me basically what your day consisted of?

I Well, we were going down to visit my foster parents, and when I was going to school, I used to work with horses that were out in a pasture on that road, and I drove by and showed her where that was and what I was doing and stuff, and I started going on this road and there's a, a big truck with a camper in the back of the bed, it was in front of us and he pulls up to the stop sign in front of the tracks and the truck went and I pulled up and stopped and then it just hit.

CR Do you remember what road you were on?

I No, I don't know the exact address.

CR And uh ...

I It was the lower auction at Spanish Fork on Saturday afternoon.

CR You had uh, worked there or with a school there, or what was that?

I Well I went, I was going to the Parkview School previously and I was on the work crew and I helped out the horses almost every day. We had horses out in that pasture about a half mile up the road.

CR To the south? Is that where you were headed? South? You were traveling ...

I Oh, I was traveling from Springville to Spanish on the back road, actually Palmyra.

CR Palmyra to Spanish Fork?

I Yeah.

CR And uh, whose vehicle was that?

I It was Alicia's.

CR Is she your girlfriend, or friend, or ...

I Girlfriend.

CR And at what point did you start driving her vehicle?

I When we left here.

CR Did you leave here in Salt Lake, or did you leave from her house, or ...

I Yes. NO BB

CR Did she pick you up at this address then, or ...?

I Yeah, she drove over here and picked me up.

CR And you started driving from here then, is that correct?

I Yeah.

CR Bruce, do you have a driver's license?

I I don't.

CR Did you ever get one, or ...?

I Oh, I passed the course, but my mom wouldn't sign for it, so I couldn't get one until I'm 18.

CR Is that a high school course?

I Sure.

CR And had you been driving prior to that before?

I Oh yeah. I drive all over the place.

CR What age were you when you started driving?

I The first time I drove, 14.

CR And you've been driving ever since?

I Umhum.

CR OK, and uh, what kind of car was you guys ...

I It was a Honda Civic.

CR And what year was it, do you remember?

I an '84? I Think BB

CR Was it a 4-door?

I Yeah.

CR What color was it?

I Gray.

CR And was it a stick shift or an automatic?

I Automatic.

CR Have you driven that car before then?

I Umhum. I drove that car around ^{for A} ~~last~~ month. *(B)*

CR OK, and about what time do you think you left from here?

I We left here around ~~9:30~~ 9:00 *(M)*

CR Was there any other occupants in the vehicle besides yourself and Alicia?

I ~~Um~~ uh. *no* *(M)*

CR And where was she sitting at in the car?

I Front passenger seat.

CR So did you take I-15 Southbound, then to ...

I Yeah, we took I-15 Southbound down to Provo, stopped off at my mom's house. We went on the freeway and visited my foster mom for a minute, my foster dad was there, so we went up and visited a couple of other friends, went and got something to eat, and then went back down to Provo to see another friend, but they weren't home, then I decided to show her where the horses were, so we took the back road.

CR Have you been on that road before, Bruce?

I Many times. I used to ride my bike on that road five times a week because I fed the horses down there.

CR Is that when you were staying with your foster family?

I Yeah.

CR In Spanish Fork? And are you aware of the uh, railroad crossing at that location?

I Umhum.

CR In what direction were you traveling and was it southbound at that time?

I Uh, yeah. I think it was southbound. Spanish Fork is south.

CR Right. And those previous times you went on the crossing, have you ever seen trains go through that area?

I I've seen one train on those tracks, the whole time I've drove across.

CR And uh, y'know, as you were driving towards the uh, railroad crossing, did you notice the uh, the signs, there's a couple of signs on the side of the road, do you remember seeing them?

I I remember seeing the stop sign.

CR The one right at the crossing?

I Yeah.

CR Or, how about before that? Did you notice any signs before that?

I Uh uh, I wasn't paying attention until I got near the tracks.

CR And when you came on that road, there's a curve right before you go on that stretch ... what's the speed limit through that area, do you know?

I Uh, 25 or 30.

CR Twenty-five or thirty?

I I'd say it's 30.

CR OK. And how fast were you going when you came out of that curve?

I I was going real slow because I was behind a truck, I don't know, like that speed, but it was approximately 30.

CR Were you behind that truck all the way then, or ...?

I No, I came up on it.

CR And when did you catch up with the truck, or was it, where was it at at the time?

I Well, if I remember right, I stopped right behind it at the stop sign.

CR And uh, when you stopped at the stop sign, did that truck go across the crossing?

I Umhum.

CR And where did it pull to, do you know?

I It pulled into the auction.

CR Was it on the east, or west side when it pulled into the auction? In other words, the auction there on the ...

I The auction was on my right.

CR Right, then there's ...

I West.

CR Right, and then there's a parking lot on the east side. That would be your left side.

I ^{NO}~~Yeah~~, there's a field over there, there's just that ⁴⁶ narrow road, you can park on both sides of the road and then they have a parking lot that you can park in.

CR OK. Say this is the road, uh ...

I Let's see ... the auction house itself is about right here, and then there's like the pens and stuff that go like that, and then there's parking here, and you can park here, and then ... these are the train tracks?

CR Right, uh huh.

I OK, there's about, there's a dirt road and sometime diesels will park right in here along the tracks, and the entrance is right here, and I think he pulled in there ...

CR OK, were you watching him, or did ...

I I really wasn't paying attention to him.

CR Uh huh. And when you stopped at the stop sign, what did you do then?

I Ummm, well Alicia like jokes, like if you touch a screw and lift your feet over train tracks you get a wish, and she goes, *Oh cool! Train tracks, touch a screw.* And all I remember doing is looking up and seeing this screw up above the windshield and then that was it.

CR "Touch a screw" ... I don't get it, is this ...

I If you touch, touch a screw and lift your feet up ...

CR In the car?

I Yeah, touch a ... it's just a little thing she's done all her life, I guess.

CR OK, so you ...

I Superstitious stuff.

CR OK, you touch a screw and then you lift your feet up?

I Yeah. And then you're supposed to get a wish.

CR As you're on the train tracks or ...?

I Well, if you have your feet ^{up} and touching ^{up} a screw as you go across the train tracks, you'll get a wish.

CR OK, so that's what you were doing?

I Well, I was contemplating trying it, but then I said *Well, I guess I can't do that and push the gas to keep us going*, but I looked up at the screw for a second, and I guess my foot slipped off the brake. That could be the only thing I think could have happened.

CR What screw was it, was it on the rear view mirror, or ...?

I It was close to the rear view mirror.

CR OK. Did you look down the tracks or anything when you stopped at the stop sign?

I I hadn't yet.

CR Were you guys talking at that time, Bruce, when you were talking about the, the wish?

I Umm, yeah, we were talking, but I was looking forward.

CR And uh, was there a speed limit on that, speed limit sign on that road that you were traveling on? Do you remember?

I Uh, yeah, I think it's 40? Until you get to the turn.

CR OK, and uh, how about the uh, the weather conditions? What was it like that day?

I Sunny, clear, it was a nice day.

CR OK. Were the pavements uh, dry?

I Yeah, it was dry.

CR So, Bruce, when you stopped at the stop sign, is that when you guys started talking about it or ... when did, when did you start looking for the screw, right when you were ...?

I When I stopped, she said *Oh, a train track*, and I looked up.

CR At the stop, you stopped at the stop sign, then you ...

I Yeah, behind the tracks, I thought ... I may not have done, I may have been on them, I'm really not sure.

CR OK.

I I stopped, came to a complete stop.

CR OK, and you don't remember if you were stopped on the tracks at that time, or if you stopped at the stop sign?

I I don't know. I'm pretty sure it was behind the stop sign, but I'm not sure.

CR OK, and then, then you briefly looked for the screw and you let your foot off the brake, you rolled, may have rolled onto the tracks.

I I didn't notice any movement.

CR And uh, what else did ... Alicia, is that what it is? Did she say anything to you besides that conversation about looking for the screw or ...?

I Not that I, not there.

CR OK. Did you have uh, your radio on in the car?

I Yeah but it wasn't very loud at all.

CR About how high ... midway, or low or high or ...?

I It was fairly low.

CR Was that the uh, tape deck, or was that the radio?

I It was the radio.

CR Do you remember what station it was by chance?

I It was KBER. I don't know the name of the song.

CR And how about your heater? Did you have your heater on at that time?

I Nope. No heater, but the windows were up.

CR The windows were up?

I Windows were up, but there was no heater or air conditioning on.

CR As far as the vehicle that you were driving, was there anything wrong with the car or anything like that?

I No. Except that it accelerated really slow.

CR From prior ... why's that?

I Well, just because it's that gutless, it's a gutless vehicle.

CR Is it a 4-cylinder by chance, or ...?

I I think so. It's really a gutless car, and it's ~~the~~
slowest of the line. *BB*

CR As you were traveling down the road, approaching the
railroad crossing, say when you came out of that curve,
you were aware of the railroad tracks down there?

I Yup.

CR Did you ever notice any trains coming or anything or ...?

I Nope.

CR Did you hear any trains coming?

I Nope, I didn't hear the train or a horn.

CR You weren't paying attention for any train horns, do you
know or ...?

I Oh, I'm sure I was ^{sub} ~~un~~consciously, but not paying
attention. *BB*

CR Right.

I But the people, the witnesses at the auction said that he
was blowing his horn from a ways back.

CR Right.

I But I never heard anything.

CR Bruce, as far as uh, this may be a hard question for you
to answer but, was there any consumption of any drugs or
alcohol?

I No just Root Beer (indecipherable). *BB*

CR OK. And when was the first time you noticed the train, or did you ever even notice a train there?

I I've seen them go by occasionally when I was at the auction.

CR OK. How about at the time of the accident? Were you aware that a train was there?

I I was not.

CR OK, and you don't wear glasses or anything do you?

I I do. But I broke them.

CR Were you wearing eyeglasses at the time?

I No. I broke them like a week before.

CR OK. What kind of vision do you have, Bruce?

I ^{AB} ↑ ~~I~~ stigmatism.

CR OK. Near sightedness, far sightedness?

I I can't see things real far, but I can't see things real close, either.

CR OK. Do you know if it's like 20/40 or 20/60, or do you have a rough idea?

I I have NO Id. g. AB (indecipherable).

CR And how about your hearing? Is that pretty good?

I My hearing's perfect, ~~it's OK.~~ AB

CR OK. What happened after the, when did you notice that you got hit by a train, or were you even aware of that?

I Umm, I wasn't ... I kinda, see we were stopped, then all of a sudden the car started vibrating really bad, and I was, y'know, going through my mind like, *what the heck is this*, and then it hit me that we were getting hit by a train, and then it stopped and I was laying in the ditch or whatever and was having trouble breathing because I had the wind knocked out of me.

CR OK. Did you look up and see the train or anything, or was it ... you just felt the vibration?

I I didn't even hear a train when I was lying on the ground.

CR When it was going by?

I Yeah, I didn't hear anything. I tried to open my eyes, but I couldn't move my head, and all I could see was the black rocks, that rock ...

CR The ballast?

I Yeah.

CR Do you know about how long you were maybe sitting on that track, or rolled onto the track when you were looking for the screw and had your foot off the brake?

I I'd say it was about 2 or 3 seconds.

CR OK. Were there any cars alongside that road?

I Oh, yeah, it was packed, it was full.

CR Was that in the auction parking lot or ...?

I No, that was right here on the side of the road, both sides.

CR On the other side of the tracks?

I Yeah, they were over here on the other side of the tracks, they parked up and down this road. Their parking lot is pretty small, it gets filled quickly.

CR So on the east and west side on the south side of the crossing is where all the cars were parked at?

I Umhum.

CR OK. How about on the road that you came from? Was there any, any cars?

I ~~That's a good question.~~ NO there were NONE *BB*

CR OK. And uh, did you receive a citation or anything?

I I didn't. Well, I mean, that I haven't as of now.

CR OK.

I They're looking into it.

CR And uh, where were you treated at for your injuries?

I Mountain View Hospital, in Payson.

CR And what kind of injuries did you get, Bruce?

I Uh, severe lacerations all over my body, bruised bones, head trauma.

CR Did you have stitches?

I I do.

CR Where are those stitches at?

I I have one on the right side of my, on my right cheek, on the right side of my forehead, I have some behind my right ear, I have some holding my right ear on. I got uh, two different sets of stitches on my right arm, one on my wrist and one up by the elbow, and I've got some stitches on the left side of my back.

CR Left wrist and left elbow, was that?

I Right.

CR Right, OK. And uh, when were you released from the hospital?

I On Sunday afternoon, around 1.

CR Did you remember seeing any other cars out there, too, that were maybe stopped on the other side of the crossing?

I _____ (indecipherable) parked the truck, there were no cars around.

CR OK. Did you know that there was an auction going on at that time?

I Yeah, I saw people walking down ... uh, yeah, I know there's an auction goes on every Saturday there.

CR OK. And do you remember which way you came out of the, the vehicle? How you fell out or ...?

I Don't know.

CR OK. Were you wearing seat belts by chance?

I Nope. Which is probably a good thing.

CR Why's that?

I Uh, well a friend went down and saw the car and he said it was pretty much turned inside out.

CR Right. And the transmission was in drive, right, at that time when you were stopped?

I Yes.

CR Do you think when you let your foot off the brake, the car rolled? I think I asked you that before. Do you remember that, or ...

I Ummm, ~~it~~ it probably did because when you, unless you're on a hill, which we weren't, the car does roll slowly forward.

CR OK.

I And I'm pretty sure that's what happened, but I didn't, I didn't uh, recognize the movement.

CR OK. Bruce, I don't have any other questions to ask you, uh, I just want to ask if this is a true and complete account of what you recall?

I Yeah.

CR On the day of the accident. OK, and you understand that
this interview was recorded?

I Yeah.

CR And this interview was done voluntarily?

I Yes.

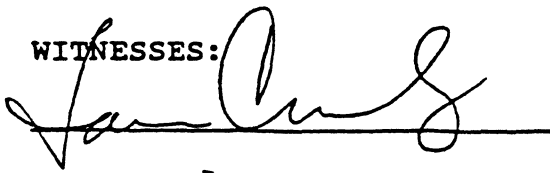
CR OK. And uh, Bruce, with your permission, I'd like to
turn the tape recorder off at this time.

I OK.

CR OK, thanks.

I have read the foregoing and believe it to be a true and
correct copy of the statement I have given and includes any
and all of the changes I have made.

WITNESSES:


Monica Morrison

x Bruce Brinkmeier
(Signature)
Bruce Brinkmeier
(PRINT Name)

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--ooo0ooo--

ALICIA JENSEN, : REQUEST FOR HEARING
Plaintiff, :
v. :
UNION PACIFIC RAILROAD, INC., : Civil No. 940400280
Defendant. : Judge: Boyd L. Park

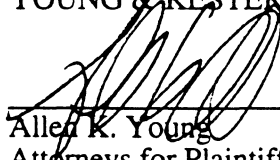
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Plaintiff Alicia Jensen, by and through counsel, Allen K. Young of Young & Kester, hereby requests a Hearing on Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, pursuant to Rule 4501 (3) of the Utah Code of Judicial Administration.

DATED this 2 of mar, 1995.

YOUNG & KESTER

By:


Allen K. Young
Attorneys for Plaintiff

the owner and the assignee. After the Administrator grants a petition, he may hold the track owner or the assignee or both responsible for compliance with this part and subject to penalties under § 213.15.

(e) A common carrier by railroad which is directed by the Interstate Commerce Commission to provide service over the track of another railroad under 49 U.S.C. 11125 is considered the owner of that track for the purposes of the application of this part during the period the directed service order remains in effect.

[47 FR 39402, Sept. 7, 1982]

§ 213.7 Designation of qualified persons to supervise certain renewals and inspect track.

(a) Each track owner to which this part applies shall designate qualified persons to supervise restorations and renewals of track under traffic conditions. Each person designated must have—

(1) At least—

(i) One year of supervisory experience in railroad track maintenance; or

(ii) A combination of supervisory experience in track maintenance and training from a course in track maintenance or from a college level educational program related to track maintenance;

(2) Demonstrated to the owner that he—

(i) Knows and understands the requirements of this part;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(3) Written authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements in this part.

(b) Each track owner to which this part applies shall designate qualified persons to inspect track for defects. Each person designated must have—

(1) At least—

(i) One year of experience in railroad track inspection; or

(ii) A combination of experience in track inspection and training from a course in track inspection or from a

college level educational program related to track inspection;

(2) Demonstrated to the owner that he—

(i) Knows and understands the requirements of this part;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(3) Written authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements of this part, pending review by a qualified person designated under paragraph (a) of this section.

(c) With respect to designations under paragraphs (a) and (b) of this section, each track owner must maintain written records of—

(1) Each designation in effect;

(2) The basis for each designation; and

(3) Track inspections made by each designated qualified person as required by § 213.241.

These records must be kept available for inspection or copying by the Federal Railroad Administrator during regular business hours.

[36 FR 20336, Oct. 20, 1971, as amended at 38 FR 875, Jan. 5, 1973]

§ 213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraphs (b) and (c) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137 (b) and (c), the following maximum allowable operating speeds apply:

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it

does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under §213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

(c) Maximum operating speed may not exceed 110 m.p.h. without prior approval of the Federal Railroad Administrator. Petitions for approval must be filed in the manner and contain the information required by §211.11 of this chapter. Each petition must provide sufficient information concerning the performance characteristics of the track, signaling, grade crossing protection, trespasser control where appropriate, and equipment involved and also concerning maintenance and inspection practices and procedures to be followed, to establish that the proposed speed can be sustained in safety.

[36 FR 20336, Oct. 20, 1971, as amended at 38 FR 875, Jan. 5, 1973; 38 FR 23405, Aug. 30, 1973; 47 FR 39402, Sept. 7, 1982; 48 FR 35883, Aug. 8, 1983]

§ 213.11 Restoration or renewal of track under traffic conditions.

If during a period of restoration or renewal, track is under traffic conditions and does not meet all of the requirements prescribed in this part, the work on the track must be under the continuous supervision of a person designated under §213.7(a) who has at least one year of supervisory experience in railroad track maintenance. The term "continuous supervision" as used in this section means the physical presence of that person at a job site. However, since the work may be performed over a large area, it is not necessary that each phase of the work be done under the visual supervision of that person.

[47 FR 39402, Sept. 7, 1982]

§213.13 Measuring track not under load.

When unloaded track is measured to determine compliance with requirements of this part, the amount of rail movement, if any, that occurs while the track is loaded must be added to the measurement of the unloaded track.

[38 FR 875, Jan. 5, 1973]

§213.15 Civil penalty.

Any person (including a railroad, any manager, supervisor, official, or other employee or agent of a railroad, any owner of track on which a railroad operates, or any person held by the Federal Railroad Administrator to be responsible under §213.5(d)) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix B to this part for a statement of agency civil penalty policy.

[36 FR 20336, Oct. 20, 1971, as amended at 53 FR 28598, July 28, 1988; 53 FR 52924, Dec. 29, 1988]

§213.17 Exemptions.

(a) Any owner of track to which this part applies may petition the Federal Railroad Administrator for exemption from any or all requirements prescribed in this part.

(b) Each petition for exemption under this section must be filed in the manner and contain the information required by §§211.7 and 211.9 of this chapter.

(c) If the Administrator finds that an exemption is in the public interest and is consistent with railroad safety, he may grant the exemption subject to any conditions he deems necessary. Notice of each exemption granted is published in the FEDERAL REGISTER to-

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--ooo0ooo--

ALICIA JENSEN, : AFFIDAVIT OF ALICIA JENSEN
Plaintiff, :
v. :
UNION PACIFIC RAILROAD, INC., : Civil No.: 940400280
Defendant. : Judge: Boyd L. Park

--ooo0ooo--

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

ALICIA JENSEN, being first duly sworn on oath and based on her knowledge,
information and belief, deposes and says:

1. I am the plaintiff in the above entitled action.
2. On the day of the accident, I was a passenger in my own car. Bruce Brinkmeier was driving.
3. As we approached the intersection of 5950 South 650 West, Spanish Fork, Utah, I noticed that there were a lot of trucks and trailers which obstructed our view of the tracks in all directions.
4. I have since learned that each Saturday, there is a stock auction at the intersection of 5950 South 650 West, Spanish Fork, Utah, which causes great traffic congestion at the intersection.

3

5. Ever since I was a child, when I have been in a vehicle approaching a railroad track, I have raised my feet off the ground and touched a screw and made a wish, as we crossed the tracks. Bruce Brinkmeier and I have done this a number of times together.

6. I have no independent recollection of raising my feet, touching a screw, or making a wish at this intersection, but I may have.

7. I did not ever see the train prior to the collision.

8. I did not hear the train blow its whistle or sound its horn anytime prior to the collision.

DATED this 1 day of March, 1995.

Alicia Jensen
ALICIA JENSEN

On this 1 day of March, 1995, personally appeared before me, Alicia Jensen, who being first duly sworn, states that she is the person who executed the foregoing instrument, that she has read the same and knows the contents thereof, that the matters stated therein are true of her own knowledge, except such matters as stated to be upon information and belief, and as to those matters, she believes them to be true.

Alicia Jensen
ALICIA JENSEN

SUBSCRIBED AND SWORN to before me, this 2 day of March, 1995.

My Commission Expires: 8 14 97

Carrie Elmer
NOTARY PUBLIC
STATE OF UTAH
MY COMMISSION EXPIRES AUG 14 1997
REGISTERED IN MAPLETON UT 84461

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ALLEN K. YOUNG (A3583)
YOUNG & KESTER
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--ooo0ooo--

ALECIA JENSEN, : COMPLAINT AND
Plaintiff, : JURY DEMAND
v. :

UNION PACIFIC RAILROAD, INC., : Civil No.:
Defendants. : Judge:

--ooo0ooo--

Plaintiff complains of defendant and for causes of action alleges as follows:

1. Plaintiff is a resident of Salt Lake County, State of Utah.
2. Defendant Union Pacific Railroad is a Utah corporation authorized to do business in the State of Utah, and in Utah County, Utah, and in connection with such business maintains a crossing, a right of way and line of tracks in Utah County, over which crossing, tracks and right of way Defendant operates its trains.
3. The accident which is the subject of the present action occurred in Utah County, State of Utah, and therefore jurisdiction and venue are properly vested in this Court.
4. The amount in controversy in this action, exclusive of interest and costs, exceeds the sum or value of \$100,000.00.
5. On or about February 5, 1994, at approximately 12:10 p.m., Alecia Jensen was a passenger in a vehicle being driven by Bruce Brinkmeier which was traveling in a

southerly direction on 650 West, approaching the railroad crossing at approximately 5950 South, in Utah County, State of Utah.

6. As the automobile in which Alecia Jensen was a passenger was crossing the tracks at the above mentioned location, the vehicle was struck by an eastbound train owned and operated by the defendant, Union Pacific Railroad, and Alecia Jensen was severely and permanently injured as a direct and proximate result of this collision.

7. At all times relevant hereto, the subject railroad crossing was more than ordinarily hazardous because of, but not limited to, the following factors:

- a. Traffic congestion and other distractions caused by a nearby livestock auction;
- b. The curve and angle of the tracks as they approach 5950 South creates sight distance difficulties;
- c. Obstructing vehicles and sound of a nearby livestock auction muffle the whistle, bell and other warning noises of an approaching train;

8. At or about the time of the collision, the defendant's train had been traveling in excess of the authorized speed limit for several miles, which excessive speed was a direct cause of the collision and resultant injuries to Alecia Jensen.

9. Defendant, Union Pacific Railroad, breached its duty of care and was negligent in the following respects:

- a. Traveling in excess of the authorized speed;
- b. Failing to reduce the speed of its trains through the more than ordinarily hazardous crossing;
- c. Failing to comply with § 56-1-4, Utah Code Annotated, by failing to blow train whistles in the manner required therein;
- d. Such other acts of negligence as will be proven at trial.


10. *The foregoing acts of negligence were a direct and proximate cause of the collision between said defendant's train and the vehicle in which Alecia Jensen was a passenger, resulting in severe and permanent injuries to Alecia Jensen.*

11. The medical bills for Alecia Jensen have far exceeded \$10,000, and are continuing at this time.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

1. For special damages in such sum as is proven at trial;
2. For an award of general damages for such sums as are proven at trial;
4. For interest on special damages;
5. For costs of this action, and such other and further relief as the court deems just and proper.

DATED this 16 day of May, 1994.




ALLEN K. YOUNG
Attorney for Plaintiff

DEMAND FOR TRIAL BY JURY

Plaintiff demand that all of the issues in the above counts be tried by jury.

DATED this 16 day of May, 1994.



ALLEN K. YOUNG
Attorney for Plaintiff

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--00000000--

ALECIA JENSEN,

Plaintiff,

v.

UNION PACIFIC RAILROAD, INC.,

Defendants.

:

:

:

:

:

SUMMONS

Civil No.:

Judge:

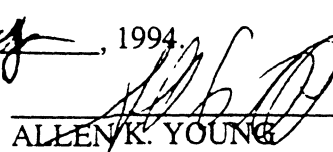
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TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to file an answer in writing to the attached Complaint with the Clerk of the above-entitled Court, and to serve upon or mail to plaintiff's attorney a copy of said answer at the address shown above within 30 days after service of this Summons upon you.

If you fail to do so, judgment by default will be taken against you for the relief demanded in said Complaint which has been filed with the Clerk of the Court, a copy of which is hereto annexed and herewith served upon you.

DATED this 16 day of May, 1994.

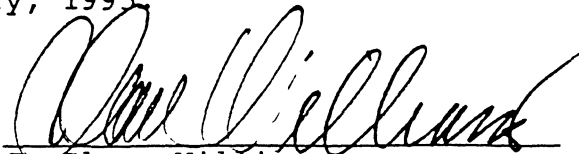


ALLEN K. YOUNG
Attorney for Plaintiffs

not negligent as alleged and that defendant is entitled to judgment as a matter of law.

The motion is being made pursuant to Rule 56 of the Utah Rules of Civil Procedure, and is based upon the supporting Memorandum of Points and Authorities with attached exhibits, together with the pleadings on file herein.

DATED this 10th day of February, 1995.




J. Clare Williams
Attorneys for Defendant Union
Pacific Railroad

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 1995, a copy of the foregoing was served in the manner indicated below upon the following:

Allen K. Young, Esq.
Young & Kester
101 East 200 South
Springville, Utah 84663

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	No Service



Secretary

ALLEN K. YOUNG (A3583)
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
Springville, Utah 84663
Telephone: (801) 489-3294

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

--ooo0ooo--

ALICIA JENSEN, : AFFIDAVIT OF DENNIS ANDREWS
Plaintiff, :
v. :
UNION PACIFIC RAILROAD, INC., : Civil No.: 940400280
Defendant. : Judge: Boyd L. Park

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STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

DENNIS ANDREWS, being first duly sworn on oath and based on his knowledge, information and belief, deposes and says:

1. I am an accident reconstructionist.
2. I have investigated over 600 accidents in the past fourteen years.
3. I have been qualified as an accident reconstruction expert in the Federal and State Courts in Utah for twelve years.
4. I have investigated the accident scene at the intersection of 650 West in Spanish Fork, Utah.
5. I have studied the Utah County Sheriffiff's accident report, Answers to Interrogatories from the Defendant Union Pacific Railroad, and the Union Pacific Timetable

Dennis Andrews

2

Number 9, which indicates that the maximum allowable speed in the area of the intersection is 50 miles per hour.

6. In particular, I have studied the speed record device from Locomotive 3799.

7. From the speed graph I was able to ascertain that prior to the collision, the train was traveling in excess of 50 miles per hour.

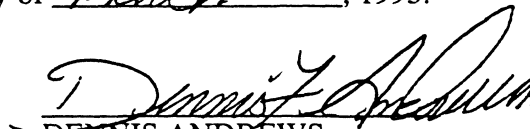
8. I have studied the speed record device for a distance of three minutes immediately prior to the collision, and have determined that the average speed of the train for three minutes prior to the collision was 51.5 miles per hour.

9. I have assumed in my accident reconstruction that the Jensen vehicle, which was driven by Bruce Brinkmeier, was going to cross the intersection at 650 West at the instant in time that it did, regardless of an approaching train.

10. From my study, I have determined that if the Union Pacific train would have been traveling at the maximum allowable speed for the three minutes prior to the accident, the train would have been 392.25 feet southwest of the intersection at the point in time that Mr. Brinkmeier crossed the tracks. The engine would have been 5.35 seconds from the crossing, and no collision would have occurred.

11. I have determined, therefore, that the excessive speed of the train was a cause in fact of the collision.

DATED this 1 day of March, 1995.

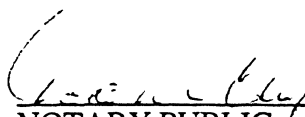
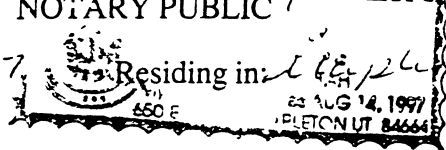

DENNIS ANDREWS

On this 1 day of March, 1995, personally appeared before me, Dennis Andrews, who being first duly sworn, states that he is the person who executed the foregoing instrument, that he has read the same and knows the contents thereof, that the matters stated therein are true of his own knowledge, except such matters

as stated to be upon information and belief, and as to those matters, he believes them to be true.

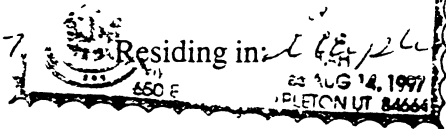

DENNIS ANDREWS

SUBSCRIBED AND SWORN to before me, this 2 day of
March, 1995.


NOTARY PUBLIC


My Commission Expires: 8-14-97

Residing in: 1621 1/2 N. 1100 E.



APPENDIX A TO PART 240—SCHEDULE OF CIVIL PENALTIES¹—Continued

Section	Violation	Willful violation
(b) Program that fails to address a subject	2,500	5,000
240 103—Failure to:		
(a) follow Appendix B	1,000	2,000
(d) to resubmit, when directed by FRA	1,000	2,000
240 105—Failure to have adequate procedure for selection of supervisors	2,500	5,000
240 107—Classes of Service		
(a) Failure to designate classes of service	2,000	4,000
240 109—Limitations on considering prior conduct records		
(a) Failure to have procedure for determining eligibility	2,500	5,000
(e) Considering excluded data	2,000	4,000
(f,g) Failure to provide timely review opportunity	2,000	4,000
240.111—Furnishing Motor Vehicle Records		
(a) Failure to action required to make information available	1,000	2,000
(b) Failure to request:		
(1) local record	1,000	2,000
(2) NCR record	1,000	2,000
(f) Failure to request additional record	1,000	2,000
(e) Failure to notify of absence of license	750	1,500
(h) Failure to submit request in timely manner	750	1,500
240 113—Furnishing prior employment information		
(a) Failure to take action required to make information available	1,000	2,000
(b) Failure to request record	1,000	2,000
240.115—Criteria for considering prior motor vehicle conduct		
(b) Considering excluded data	2,000	4,000
(c) Failure to		
(1) consider data	5,000	7,500
(3,4) properly act in response to data	2,500	5,000
240.117—Consideration of operational rules compliance records		
(a) Failure to have program and procedures	5,000	10,000
(b-d) Failure to have adequate program or procedure	2,500	5,000
240 119—Consideration of substance abuse rules compliance records		
(a) Failure to have program and procedures	5,000	10,000
(b-e) Failure to have adequate program or procedure	2,500	5,000
240.121—Failure to have adequate procedure for determining acuity	2,500	5,000
240 123—Failure to have		
(a) adequate procedures for continuing education	2,500	5,000
(b) adequate procedures for training new engineers	2,500	5,000
240.125—Failure to have		
(a) adequate procedures for testing knowledge	2,500	5,000
(d) adequate procedures for documenting testing	2,500	5,000
240 127—Failure to have		
(a) adequate procedures for evaluating skill performance	2,500	5,000
(c) adequate procedures for documenting skills testing	2,500	5,000
240.129—Failure to have		
(a-b) adequate procedures for monitoring performance	2,500	5,000
Support C—Implementation of the Process		
240.201—Schedule for Implementation		
(a) Failure to select supervisors by specified date	1,000	2,000
(b) Failure to identify grandfathered engineers	2,000	4,000
(c) Failure to issue certificate to engineer	1,000	2,000
(d) Allowing uncertified person to operate	5,000	10,000
(e-g) Certifying without complying with subpart C	2,500	5,000
(h-i) Failure to issue certificate to engineer	1,000	2,000
(j) Allowing person to continue to operate after 12/31/92 without testing or evaluation	2,500	5,000
240.203 (a) Designating a person as a supervisor without determining that		
(1) person knows and understands this part;	2,500	5,000
(2) person can test and evaluate engineers;	5,000	7,500
(3) person has experience to prescribe remedies	2,500	5,000
(b) Certifying a person without determining that		
(1) person meets the eligibility criteria;	5,000	7,500
(2) person meets the medical criteria;	2,500	5,000
(3) person has demonstrated knowledge	2,500	5,000
(4) person has demonstrated skills	2,500	5,000
(c) Certifying a person without determining that		
(1) person has completed training program	2,500	5,000
(2) person meets the eligibility criteria	2,500	5,000
(3) time has elapsed	2,500	5,000
240 205—Procedures for determining eligibility based on prior safety conduct		
(a) Selecting person lacking eligibility	5,000	7,500
(d) Failure to have basis for taking action	2,500	5,000
240 207—Ineligibility based on medical condition		
(a) Selecting person lacking proper acuity	2,000	4,000

APPENDIX A TO PART 240—SCHEDULE OF CIVIL PENALTIES¹—Continued

Section	Violation	Willful violation
(b) Failure to have basis for finding of proper acuity	1,000	2,000
(c) Acuity examinations performed by unauthorized person	1,000	2,000
(d) Failure to note need for device to achieve acuity	1,000	2,000
(e) Failure to use device needed for proper acuity	1,000	2,000
240.209—Demonstrating knowledge		
(b) Failure to properly determine knowledge	2,500	5,000
(c) Improper test procedure	2,000	4,000
(d) Failure to document test results	1,000	2,000
(e) Allowing person to operate despite test failure	2,500	5,000
240.211—Demonstrating skills		
(b) Failure to properly determine knowledge	2,500	5,000
(c) Improper test procedure	2,000	4,000
(d) Failure to document test results	1,000	2,000
(e) Allowing person to operate despite test failure	2,500	5,000
240.213—Completion of approved training program		
(a) Failure to properly determine	2,500	5,000
(b) Failure to document successful program completion	2,000	4,000
240.215—Supporting information		
(a, f-h) Failure to have a record	1,000	2,000
(b) Failure to have complete record	500	1,000
(i) Falsification of record	(-)	10,000
240.217—Time limits for making determinations		
(a, c) Exceeding time limit	2,000	4,000
240.219—Denial of certification		
(a) Failure to notify or provide opportunity for comment	2,000	4,000
(c) Failure to notify, provide data, or untimely notification	2,000	4,000
240.221—Identification of persons		
(a-b) Failure to have record	2,000	4,000
(c) Failure to update record	2,000	4,000
(b) Failure to issue certificate	1,000	2,000
(e-f) Failure to make record available	1,000	2,000
240.223—Certificate criteria		
(a) Improper certificate	500	1,000
(b) Failure to designate those with signatory authority	500	1,000
(d) Falsification of certificate	(-)	10,000
240.225—Railroad Relying on Determination of Another		
(a) Reliance on expired certification	2,500	5,000
(b) Reliance on wrong class of service	2,500	5,000
(c) Failure to familiarize person with new operational territory	2,000	4,000
(d) Failure to determine knowledge	2,000	4,000
240.227—Railroad Relying on Requirements of a Different Country		
(a) Joint operator reliance		
(1) on person not employed	1,000	2,000
(2) on person who fails to meet Canadian requirements	1,000	2,000
(b) Canadian railroad reliance		
(1) on person not employed	1,000	2,000
(2) on person who fails to meet Canadian requirements	1,000	2,000
240.229—Railroad Controlling Joint Operation Territory		
(a) Allowing uncertified person to operate	2,000	4,000
(b) Certifying without making determinations or relying on another railroad	2,500	5,000
(c) Certifying without determining:		
(1) certification status	2,500	5,000
(2) knowledge	2,500	5,000
(3) skills	2,500	5,000
(4) familiarity with physical characteristics	2,000	4,000
(d) Failure to provide qualified person	2,000	4,000
Subpart D—Program Administration		
240.301—Failure to have system for certificate replacement	2,000	4,000
240.303—Monitoring operations		
(a) Failure to have program	5,000	10,000
(b) Failure to observe each person annually	1,000	2,000
(c) Failure to test each person annually	1,000	2,000
(d) Failure to test property	1,000	2,000
240.305—Certified engineer conduct		
(a) Failure of engineer to		
(1) properly control speed	2,500	5,000
(2) stop at signal	2,500	5,000
(3) obey rules for track occupancy authority	2,500	5,000
(b) Failure of engineer to		
(1) carry certificate	1,000	2,000
(2) display certificate when requested	1,000	2,000