

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

PHILIP CUSTARD, DONAL HANSEN
& STEVE HEGENER

Plaintiffs,

v.

BNSF RAILWAY, individually and
As successor in interest to the
BURLINGTON NORTHERN
RAILROAD and the CHICAGO
BURLINGTON and QUINCY
RAILROAD

Defendant.

CASE NO.

012-2581

F

COMPLAINT AND DEMAND
FOR JURY TRIAL

LANCASTER COUNTY
2012 JUN 29 AM 11 07
CLERK OF THE
DISTRICT COURT

COME NOW Plaintiffs, by and through their attorney, and for their cause of action against the Defendant state:

1. That at all times relevant, Plaintiff Philip Custard is a resident of Omaha, Nebraska, and Plaintiffs Donal Hansen and Steve Hegener are residents of Lincoln, Nebraska (hereinafter "Plaintiffs" refers to Philip Custard, Donal Hansen and Steve Hegener, unless indicated otherwise).

2. That at all times mentioned herein, and for some time prior thereto and thereafter, the Defendant, BNSF RAILWAY COMPANY, a corporation, individually and as successor in interest to the Burlington Northern Railroad and the Chicago Burlington and Quincy Railroad (hereinafter "BNSF" or "Railroad Defendant"), was engaged in the business of interstate commerce in and throughout the several states of The United States, as a common carrier by railroad; and for the purposes thereof did operate its business, maintain offices and place its agents, servants and employees throughout the

[Handwritten signature]



001160248D02

State of Nebraska at the time of the events as hereinafter described. Service of process may be had upon Defendant, BNSF RAILWAY COMPANY, by serving CT Corporation, 1024 K Street, Lincoln, NE 68508.

3. That during the course of Plaintiffs' employment, the Railroad Defendant was engaged in interstate commerce as a common carrier by rail, and all or part of the duties of Plaintiffs were in furtherance of and did closely, directly and substantially affect interstate commerce; wherefore the rights and liabilities of the parties were and are governed by the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, which Act grants this Court jurisdiction over this action.

4. That beginning in 1950, and throughout his employment as a carman with the Railroad Defendant, Plaintiff PHILIP CUSTARD was engaged in the performance of his duties in furtherance of interstate commerce and was required to work with and around asbestos-containing products in and around Defendants various railroad equipment, shops and facilities, including those located in and around Omaha and Lincoln, Nebraska.

5. That beginning in 1952, and throughout his employment as a carman with the Railroad Defendant, Plaintiff DONAL HANSEN was engaged in the performance of his duties in furtherance of interstate commerce and was required to work with and around asbestos-containing products in and around Defendants various railroad equipment, shops and facilities, including those located in and around Lincoln, Nebraska.

6. That beginning in 1969, and throughout his employment as a carman with the Railroad Defendant, Plaintiff STEVE HEGENER was engaged in the performance of

his duties in furtherance of interstate commerce and was required to work with and around asbestos-containing products in and around Defendants various railroad equipment, shops and facilities, including those located in and around Lincoln, Nebraska.

7. That during the course of Plaintiffs' employment with the Railroad Defendant, Plaintiffs were engaged in the course of employment at the Defendant's facilities in and around the Railroad Defendant's Omaha and Lincoln, Nebraska shops and facilities, and elsewhere as carmen and in other various roles and assignments where they were required and caused to work with, and in the vicinity of toxic substances including asbestos and asbestos-containing products and materials. Plaintiffs' exposure to asbestos and other toxic substances is herein alleged for the specific period of time commencing with the onset of Plaintiffs' railroad work through December 31, 1979. Such exposures caused the Plaintiffs to suffer severe and permanent injury to their persons, to-wit: asbestos-related lung disease which was, in all, diagnosed and discovered less than three years prior to the commencement of this civil action and within the time frame required by 45 U.S.C. §56.

8. That at all times relevant, Plaintiffs were unaware of the dangerous propensities of the asbestos and asbestos-containing products that Plaintiffs were required to work with and around, and were furthermore totally unaware of the cause of their latent abnormal medical conditions until said conditions were discovered less than three years prior to the commencement date of this civil action.

9. Joinder of the Plaintiffs' claims is proper under Neb. Rev. Stat. § 25-311 in that Plaintiffs seek monetary damages as the result of continuous and systematic

railroad work procedures, practices and occurrences which led to their cumulative exposures to asbestos in a common work environment. Plaintiffs raise common questions of law and fact which will arise and predominate in this action, and which should be adjudicated collectively to avoid a multiplicity of substantially identical suits.

Venue

10. At all relevant times, Plaintiffs were required to work with and around asbestos-containing products in and around Defendant's various railroad equipment, shops and facilities, including those located in and around Lincoln, Lancaster County, Nebraska and thus venue is proper.

COUNT I – FELA / NEGLIGENCE

11. Plaintiffs re-allege Paragraphs 1-10 as if restated herein verbatim.

12. That the Railroad Defendant, by and through its duly authorized agents, servants and employees, was then and there guilty of one or more of the following negligent acts or omissions in violation of the Federal Employers' Liability Act:

- (a) in failing to provide Plaintiffs with a reasonably safe place within which to work;
- (b) in failing to furnish Plaintiffs with safe and suitable tools and equipment including adequate protective masks and/or protective inhalation devices;
- (c) in failing to warn Plaintiffs of the true nature and hazardous effects of the asbestos-related and other hazardous materials;
- (d) in failing to operate the repair facility in a safe and reasonable manner;

- (e) in failing to provide instructions or a method for the safe use of asbestos;
- (f) in failing to provide adequate, if any, instructions in the use or removal of old asbestos products;
- (g) in failing to test asbestos-containing products prior to requiring employees to work with the same, to determine their ultra-hazardous nature;
- (h) in formulating and using a method of handling asbestos and asbestos-related materials exposing Plaintiffs to high concentrations of asbestos fibers;
- (i) in failing to provide Plaintiffs with safe and proper ventilation systems in the locomotive repair facility;
- (j) in allowing unsafe practices to become the standard practice;
- (k) in failing to exercise reasonable care in publishing and enforcing a safety plan and method of handling and installing said asbestos and asbestos insulation materials and other asbestos-containing products;
- (l) in failing to inquire of the suppliers of asbestos-containing products, the hazardous nature of asbestos;
- (m) in requiring employees to work with an ultra-hazardous product;
- (n) in failing to exercise adequate, if any, care for the health and safety of employees, including the Plaintiffs;

- (o) in failing to periodically test and examine Plaintiffs to determine if they were subject to any ill effects of their exposure to asbestos-related products and other hazardous substances;
- (p) in failing to periodically inspect its locomotives, boilers, cars and their appurtenances in order to ascertain any contamination by asbestos fibers;
- (q) in allowing excessive fumes, dusts, gases and mists to exist and remain in the work area;
- (r) in failing to provide any or adequate warning to the Plaintiffs of the exposure to the carcinogen asbestos at any time, including up to the time of filing.

13. That as a direct and proximate result, in whole or in part, of one or more of the foregoing negligent acts or omissions on the part of the Railroad Defendant, Plaintiffs suffered exposure to toxic substances including asbestos and asbestos-containing materials which caused Plaintiffs to sustain severe injury to their bodies and respiratory systems, resulting in Plaintiffs' progressive impairment and disability and which caused Plaintiffs to develop occupational lung disease, which cannot be effectively cured by conservative medical procedures or medications.

14. That, as a result, Plaintiffs have suffered pain, extreme nervousness and mental anguish and verily believe that their injuries and disabilities are permanent in nature and that Plaintiffs will be forced to suffer the same for the remainder of their lives; that their enjoyment of life, enjoyment of retirement, and retirement earning capacities have been greatly reduced; and further, that their expected life spans have been

shortened. Plaintiffs further allege that as a result of their health problems, Plaintiffs have been forced to incur medical expenses by way of doctor, hospital and drug bills and verily believe that they will be forced to incur additional expenses in the future in an effort to treat their conditions.

15. That Plaintiffs were strong and able-bodied men at the time of the manifestation of their illness and as a result of their illnesses, Plaintiffs have suffered damages by way of lost wages and earning capacity and diminished ability to render services, society, affection, counseling and support to their households and families.

WHEREFORE, Plaintiffs demand judgment against the Defendant, for money damages for the injuries suffered as herein alleged, in an amount to be determined by the trier of fact; together with applicable interest, costs and all other relief permitted by law.

REUQUEST FOR JURY TRIAL

COME NOW Plaintiffs, and respectfully request a jury trial in this action.

Dated: June 29, 2012

PHILIP CUSTARD, DONAL HANSEN,
STEVE HEGENER
PLAINTIFFS

By: 

Christopher R. Miller, #24599
Mark P. Grell, #22607
MILLER GRELL LAW GROUP, PC, LLO
201 N 8th Street, Ste. 202
Lincoln, NE 68508
(402)261-4736
(402)261-4982 FAX
chris@millergrell.com
mark@millergrell.com

JOHN D. ROVEN (Of Counsel)
ROVEN-KAPLAN, LLP
Texas Bar No. 17327900
2190 North Loop West, Suite 410
Houston, Texas 77018
(713) 465-8522
(713) 465-3658 (FAX)
jroven@rovenlaw.com