

209762

**ARKANSAS-OKLAHOMA RAILROAD, INC.
LAW DEPARTMENT
P.O. BOX 185
MORTON, ILLINOIS 61550**

December 26, 2003

Vernon A. Williams,
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

RE: City of Lincoln Petition for Declaratory Order
FD No. 34425

Dear Secretary Williams:

Enclosed, for filing, as part of the Comments of Arkansas-Oklahoma Railroad, Inc., Pioneer Railcorp, Minnesota Commercial Railway Co., and the Small Railroad Business Owners of America, are copies of the Verified Statements of B. David Donoley and John W. Gohmann. Please file same.

Please call me if you have any questions.

Sincerely yours,



Daniel A. LaKemper
Vice President - Law.

Enclosures.

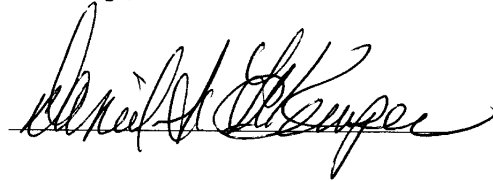


CERTIFICATE OF SERVICE

I hereby certify that copies of the Verified Statements of B. David Donoley and John W. Gohmann were served by United States Mail, first class, postage fully pre-paid, this 26th. Day of December, 2003 upon:

Charles H. Montange
426 N.W. 162nd. St.
Seattle, WA 98177

Thomas McFarland
208 S. LaSalle St., Suite 1890
Chicago, Illinois 61604

A handwritten signature in black ink, appearing to read "Daniel H. Kuper", is written over a horizontal line.

209762



BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

FINANCE DOCKET NO. 34425

CITY OF LINCOLN
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF JOHN W. GOHMANN

Filed: December 29, 2003

Attachment to Comments of:
Minnesota Commercial Railway Co.
Pioneer Railcorp
Arkansas-Oklahoma Railroad, Inc.
Small Railroad Business Owners of America

BEFORE THE UNITED STATES SURFACE TRANSPORTATION BOARD

Verified Statement of John W. Gohmann

In the matter of: Requested condemnation of a portion of a railroad right of way for
Trail Usage.

My name is John W. Gohmann. I am President and founder of Minnesota Commercial Railway Company in the metro Twin Cities area of Minnesota, and, also, President and One of the founders of the Small Railroad Business Owners of America – a two year old Association made up of some 43 small railroads with approximately 1000 employees Located all throughout America.

I am filing this Statement because the thought of a municipality to have the legal right to Arbitrarily condemn a portion of a 50 or 100 foot right of way where active rail service is Conducted for purposes of building a trail, whether biking, hiking or snowmobiling, Gives me grave concern. In fact, based on my almost 39 continuous years working within The railroad industry (see my resume, attached), I have never heard of such a concept. A rail right of way is comprised of not only the track, but, the adjacent portions of the Right of way and to my knowledge, decisions of the ICC dating back to its early days have always so found, for many good reasons.

OPERATING CONCERNS

A 50 to 100 foot right of way protects the rail operations thereon from perils which other-

Wise would interface with the public. A train going as slow as 10 mph, if it derails, can Easily go out 20 to 30 feet from the edge of ties, depending upon length of car, contents And track -- train dynamics. Many center beam and general purpose lumber cars are 75 To 89 feet long; new high capacity tank cars used to carry lpg, fertilizers, ammonia, and Other hazardous material are 75 feet in length or longer. A right of way 50 ' wide in Some cases, and based on my experience, will not even contain these derailed at 10mph - A 100 foot wide right of way (about 40 some feet from centerline of track) will contain These cars if derailed. Secondly is access to the derailment itself without having to Use others' property. Third is the use of the right of way for potential transloading, Or, building another track at some point in time. Smaller railroads, in particular, are Very market aggressive and for example, at Minnesota Commercial, we have located Over ten (10) sites along our 120 route miles for trucks to come alongside and transload, And, it is happening as you read this at many of these sites on a recurring basis. These Sites were NOT even in existence on the lines when operated by the Class I carriers, but to smaller, market aggressive carriers trying to rebuild business, a vital link in connect- ing many business who do not have rail sidings with lower cost more energy efficient Rail transportation and thus highly in the overall public interest.

The next problem with just allowing a municipality or trail group to condemn a slice Of the right of way is potential grade crossing construction and existing crossing Liability, whether the trails are bike, snowmobile, or hiking in nature. Their very Presence creates an uninvited guest situation placing people on or near railroad Rights of way. Not only have stray snowmobile operators, for example, had Accidents involving trains, but, the case law on who is liable is very mixed in all

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Of the states.

Potential Legal Liability

We asked our outside, independent legal counsel to quickly provide us with some case Law and facts on the issue, and, that is appended to this testimony. As a review of it will Disclose, juries have found railroads negligent and awarded HUGE settlements to Those injured or killed in snowmobile accidents on railroad right of ways. What is to Stop the users of such trails located on railroad rights of way from straying from the Trail and trying to run down the railroad track. In fact, in Minnesota, and, even on our Rail line, we find snowmobile tracks in the center of the rights of way at many Locations in the winter. While our operations are generally at 10 mph and we can MOST OFTEN stop a train, even at that speed, it can be a close call, and, a train at At 25mph clip who comes upon a trespasser on the track around a curve or a hidden Area cannot get stopped many times. While railroads post signs and barricades at Many properties saying no trespassing and no snowmobiling, the facts are the public Ignores them. Railroads have even been found liable and had large verdicts against Them in such cases, as a review of the attached cases and others will show.

In many cases, public entities can claim sovereign immunity insofar as their liability Is concerned, and the "deep pockets" concept of liability, prevalent in many States, Then passes 100% of the liability onto the railroad. Verdicts the size of those that Occurred on some larger carriers can devastate a smaller railroad with revenues of Less than or say up to 20 million a year in revenue – and thin margins to start. It Could cause bankruptcy, or, if not that, can cause already high general liability

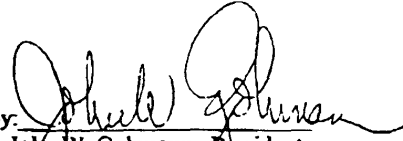
Insurance, which for most shortlines, even small, is close to at least a six figure per Year and in many cases, as high as half a million a year in premiums, to go up Substantially. All small railroads are experience rated, and, there just a few Insurance companies remaining at this time who write general railroad liability Insurance. In the past two years, since 9/11, the industry has taken increase in Its general liability insurance premiums of between 20 and 50%. Added risk like adjacent Trails will cause a clear additional exposure potential to the railroad and raise Rates even further – for even indemnification clauses granted by trail authorities – Most of whom have little capital themselves, can be found meaningless by Courts.

This is just not an open and shut case as apparently the trail afficianados would like To believe – there are serious impairments created by such trails on or near railroad Tracks. Most large railroads have a stern no snowmobiling on railroad right of way Policies as a result – but even where signage and warnings and barricades exist, Today's legal system still finds exposure to railroads.

For these reasons, we ask the Commission continue to follow the long precedent of Finding that used railroad right of way, regardless of width or size, remains non-Condemnable property.

I hereby verify that the above is a true and accurate statement to the best of my
Knowledge and experience.

By:



John W. Gohmann, President
Minnesota Commercial Railway
Small Railroad Business Owners
Of America

December 18, 2003

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(Cite as: 474 N.W.2d 4)

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Court of Appeals of Minnesota.

Sandra Hattenberger NOLAND, Appellant,
v.
SOO LINE RAILROAD COMPANY, Respondent.

No. C6-91-158.

July 30, 1991.
Review Denied Sept. 13, 1991.

Snowmobiler injured in fall from railroad trestle sued railroad. Summary judgment for railroad was granted in the District Court, Carlton County, Dennis J. Seitz, J., and snowmobiler appealed. The Court of Appeals, Foley, J., held that there were issues of fact, precluding summary judgment, as to whether trestle was so concealed that railroad had reason to believe that trespassers would not discover it and whether snowmobiler who, as result of darkness and blowing snow allegedly did not know that she was on trestle, knew of the risk involved in snowmobiling in the area containing the trestle.

Reversed and remanded.

West Headnotes

[1] Negligence ⇨1088
272k1088 Most Cited Cases
(Formerly 272k48)

Trespasser is not required to show that landowner had actual knowledge that artificial condition was dangerous, to satisfy the requirement for liability to known trespassers that landowner knew condition was likely to cause death or serious bodily harm, but need only show that landowner realized or should have realized the potential danger, and it is not necessary to prove that landowner anticipated the exact nature of the particular accident that occurred.

[2] Railroads ⇨362(1)
320k362(1) Most Cited Cases

For purposes of test of landowner liability under duty of care to known trespassers, railroad which knew that trestle was used by trespassers should

have known that trestle was at least potentially dangerous.

[3] Judgment ⇨181(33)
228k181(33) Most Cited Cases

In action against railroad arising when a snowmobiler fell off trestle when, as result of darkness and blowing snow, she allegedly did not know that she was on trestle near snowmobile trail, there were issues of fact precluding summary judgment for railroad as to whether trestle was so concealed that railroad had reason to believe that trespassers would not discover it and whether snowmobiler knew of risks involved in snowmobiling in area containing the trestle.

*4 Syllabus by the Court

1. A landowner has reason to know that a railroad trestle used by known trespassers is dangerous to trespassers.

2. Summary judgment is not appropriate where there are fact issues whether a railroad owed a duty to a trespasser and whether that railroad failed to exercise reasonable care to warn.

Thomas M. Skare, Newby, Lingren, Newby & Carlson, Ltd., Cloquet, for appellant.

Patrick J. Nugent, Minneapolis, for respondent.

Considered and decided by CRIPPEN, P.J., and FOLEY, and DAVIES, JJ.

OPINION

FOLEY, Judge.

The trial court granted summary judgment to respondent Soo Line Railroad Company in a negligence action brought by appellant Sandra Hattenberger Noland, *5 who was injured when she drove her snowmobile off respondent's railroad trestle. We reverse and remand.

FACTS

Appellant was injured when she drove her snowmobile over the side of a railroad trestle owned by respondent. According to appellant's

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affidavit and answers to respondent's interrogatories, she was snowmobiling with others on a snowmobile trail after dark on December 26, 1987. Appellant claims she had never been on the trail before. Darkness, blowing snow, and snow kicked up by the other snowmobiles made visibility poor.

Appellant was following another snowmobile on a trail running parallel to the Soo Line tracks. The first snowmobile left the trail and drove onto a trestle to cross a creek. Appellant followed. Appellant claims she did not realize she was on a railroad trestle and thought she was still on the established snowmobile trail because there was packed snow and snowmobile tracks on the trestle. The trestle was not barricaded and contained neither warnings nor "no trespassing" signs.

The first snowmobile stopped on the trestle. When appellant swerved off the trail to pull alongside it, she drove off the edge of the trestle to the frozen creek below and was injured.

Appellant brought this action alleging respondent was negligent in failing to warn of hidden or known dangers, maintain its property and warn trespassers about dangerous conditions on its property. The trial court granted respondent's motion for summary judgment. It concluded respondent owed no duty of care to appellant because she could not show respondent knew the trestle was dangerous to trespassers or had reason to believe that trespassers would not discover it.

ISSUES

1. Did the trial court err in concluding respondent did not know the trestle was likely to cause death or serious bodily harm to trespassers?
2. Did the trial court err in concluding appellant could not show respondent had reason to believe trespassers would not discover the trestle?

ANALYSIS

When reviewing an appeal from a summary judgment, we determine whether there are genuine issues of material fact for trial on the merits and whether the trial court erred in applying the law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn.1989). This court's duty in reviewing a

summary judgment motion is set forth in *Sauter v. Sauter*, 244 Minn. 482, 70 N.W.2d 351 (1955):

A motion for a summary judgment may be granted pursuant to Rule 56.03 only if, after taking the view of the evidence most favorable to the nonmoving party, the movant has clearly sustained his burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. It is essential to bear in mind that the moving party has the burden of proof and that the nonmoving party has the benefit of that view of evidence most favorable to him. The salutary purpose and useful function of summary judgment proceedings as a means of securing the just, speedy, and inexpensive determination of the action * * * is well recognized, but resort to summary judgment was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists. In other words a summary judgment is proper where there is no issue to be tried but is wholly erroneous where there is a genuine issue to try.

Id. at 484-85, 70 N.W.2d at 353 (emphasis in original) (footnotes omitted).

1. The parties concede that appellant was a known trespasser injured by an artificial condition on respondent's property. To determine whether a landowner owes a duty of care to a known trespasser injured by an artificial condition, Minnesota has adopted Restatement (Second) of Torts § 335 (1965). See *Hanson v. Bailey*, 249 Minn. 495, 499-500, 83 N.W.2d 252, 257 (1957); *Walters v. Buckbee Mears Co.*, 354 N.W.2d 848, 850 (Minn.App.1984). Restatement (Second) of Torts § 335 states:

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if

(a) the condition

(i) is one which the possessor has created or maintains and

(ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and

(iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and

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(b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

The Minnesota jury instruction for liability of landowners to known trespassers is modeled on the Second Restatement. Jury Instruction Guide 326 provides:

If * * * a possessor of land knows or from facts known has reason to know that trespassers regularly use certain portions of the premises and if the possessor (creates) (maintains) an artificial condition on the premises which the possessor knows is likely to cause death or serious bodily harm, and which is such that the possessor has reason to believe that trespassers would not discover it, then the possessor has a duty to use reasonable care to warn a trespasser of the danger or risk involved, unless the trespasser is already aware, or from facts the trespasser knew should have been aware, of the condition of the premises and the risk involved.

4 Minnesota Practice, CIV. JIG III 326 (1986).

[1] A plaintiff is not required to show a landowner had actual knowledge that an artificial condition was dangerous to satisfy the requirement that the landowner knew the condition was likely to cause death or serious bodily harm. A plaintiff need only show that the landowner realized or should have realized the potential danger. Restatement (Second) of Torts § 335, comment d (1965). Likewise, it is not necessary to prove the landowner anticipated the exact nature of the particular accident that occurred. See *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 915 (Minn.1983) (defendant held liable for negligence even if he could not have anticipated the particular injury that did happen).

[2] Here, the trestle was suspended above a creek. Respondent knew the trestle was used by trespassers. Respondent should have known the trestle was at least potentially dangerous.

Respondent argues, based on *Olmscheid v. Paterson*, 440 N.W.2d 124 (Minn.App.1989) *per. rev. denied* (Minn. July 12, 1989), a railroad has no affirmative duty to make safe a railroad trestle. In *Olmscheid*, however, this court held a railroad had no affirmative duty to make safe a railroad trestle that created a visual obstruction at a traffic

intersection. *Id.* at 129-30.

Olmscheid differs from the instant case in at least one important aspect. In *Olmscheid*, the court observed the municipality was "the body charged with maintaining traffic control" in the trestle's location. *Id.* at 129. Thus, the railroad was only required to make changes suggested by the municipality. *Id.* In essence, the railroad owed no duty of care to motorists; that duty was charged to the municipality.

Here, if a duty of care exists, it rests solely with the railroad. A public body is not charged with ensuring safe traffic flow in the railroad trestle location.

2. Under the Restatement, appellant must show the trestle was so concealed respondent had reason to believe trespassers would not discover it. A landowner may assume a trespasser will "be on the alert to observe the conditions which exist on the land." Restatement (Second) of Torts § 335, comment f (1965). The landowner

is not entitled to assume that the trespassers will discover conditions which are unusual to the land of the character upon which the trespasser intrudes * * * 7 if the conditions are not readily observable by the attention which the trespasser should pay to his surroundings.

Id. However, if a trespasser is aware or should be aware of the artificial condition, the landowner owes no duty to the trespasser. *Watters*, 354 N.W.2d at 851.

[3] Here, there is no evidence appellant was aware she was on a railroad right-of-way. Moreover, appellant claimed she had not snowmobiled in the area before and was not aware she was on a trestle at the time of the accident.

Although there is no evidence appellant was aware she was on a trestle or on a railroad right-of-way, summary judgment would nevertheless be appropriate if appellant produced no evidence the trestle was concealed so that an alert trespasser would not readily observe it. See Section 335, comment f. Appellant claimed the trestle was covered with snow. She also claimed visibility was reduced by darkness and blowing snow. These conditions may have obscured the trestle enough to make it difficult for even an attentive snowmobiler

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(Cite as: 72 Ohio St.3d 307, 649 N.E.2d 1219)

▷

Supreme Court of Ohio.

SHARP, Admr., et al., Appellants and
Cross-Appellees,
v.

NORFOLK & WESTERN RAILWAY COMPANY
et al., Appellees and Cross-Appellants.

No. 94-428.

Submitted April 18, 1995.

Decided June 14, 1995.

Estate and administrator of mentally handicapped, minor snowmobile operator brought wrongful death action against railroad after operator was killed in collision with flatbed car that was stopped at unit crossing. The Court of Common Pleas, Erie County, granted railroad's motion for judgment notwithstanding the verdict, and appeal was taken. The Court of Appeals affirmed, and record was certified. The Supreme Court reversed and remanded, 36 Ohio St.3d 172, 522 N.E.2d 528. On remand, the Court of Common Pleas, Erie County, entered judgment in favor of estate and administrator and railroad appealed. The Court of Appeals affirmed, and appeal was taken. The Supreme Court held that: (1) whether operator violated assured clear distance statute and whether his parents were negligent in failing to supervise him were questions for jury, and (2) verdict awarded was not excessive.

Affirmed.

Wright, J., dissented and filed statement.

West Headnotes

[1] Railroads ◊350(18)
320k350(18) Most Cited Cases
(Formerly 285k13(2))

Whether snowmobile operator violated assured clear distance statute by failing to stop within assured clear distance of railroad crossing while operating a snowmobile at night and whether operator's parents were negligent for failing to supervise him were fact questions to jury in

wrongful death action arising when operator collided with flatbed car that was stopped on unit crossing. R.C. § 4511.21(A).

[2] Appeal and Error ◊1062.1
30k1062.1 Most Cited Cases

Any error in allowing estate of deceased snowmobile operator to present claim for punitive damages was harmless in wrongful death action, where no punitive damages were awarded. Rules Civ.Proc., Rule 61.

[3] Appeal and Error ◊1195(1)
30k1195(1) Most Cited Cases

Doctrine of law of the case did not preclude award of punitive damages in wrongful death action brought by snowmobile operator's estate against railroad, where Supreme Court, in its order remanding case for new trial, did not limit issues or claims to be retried.

[4] Death ◊103(4)
117k103(4) Most Cited Cases

Evidence that railroad acted with actual malice by allowing flatbed car to block unit crossing created jury issue with regard to claim for punitive damages by snowmobile operator's estate.

[5] Appeal and Error ◊1064.1(10)
30k1064.1(10) Most Cited Cases

[5] Trial ◊238
388k238 Most Cited Cases

[5] Trial ◊242
388k242 Most Cited Cases

Trial court must give jury instructions which are correct and complete statement of the law; adequate jury instruction which, in effect, misleads the jury, constitutes reversible error.

[6] Appeal and Error ◊977(1)
30k977(1) Most Cited Cases

Trial court's decision on motion for new trial will be disturbed only upon showing that such decision was unreasonable, unconscionable or arbitrary. Rules Civ.Proc., Rule 59.

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[7] Evidence ⇐532
157k532 Most Cited Cases

Admission of testimony of grief expert in wrongful death action was not abuse of discretion.

[8] Death ⇐99(5)
117k99(5) Most Cited Cases

Award of \$1 million to parents of snowmobile operator who died in collision with flatbed train car that was stopped at unlit crossing was not excessive.

[9] Railroads ⇐348(8)
320k348(8) Most Cited Cases
(Formerly 285k13(2))

Evidence in wrongful death action was sufficient to establish that negligence of snowmobile operator in allegedly violating the assured clear distance statute and of his parents in allegedly failing to adequately supervise him were not proximate cause of fatal collision between snowmobile and flatbed train car that was stopped at unlit crossing. R.C. § 4511.21(A).

[10] Interest ⇐39(3)
219k39(3) Most Cited Cases

Postjudgment interest following retrial of wrongful death action ran from time of verdict in second trial, rather than from time of verdict in first trial, where jury's determination as to parties' respective liability had been reversed on appeal.

**1220 *307 Murray & Murray Co., L.P.A., W. Patrick Murray and Steven Bechtel, Sandusky, for appellants and cross-appellees.

Robison, Curphey & O'Connell, Jack Zouhary and Jean Ann S. Sieler, Toledo, for appellees and cross-appellants.

The judgment is affirmed for the reasons stated by the court of appeals in its opinion filed on January 3, 1994, which we adopt and attach as an appendix to this entry.

MOYER, C.J., and DOUGLAS, PORTER, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.

WRIGHT, J., dissents.

JAMES M. PORTER, J., of the Eighth Appellate District, sitting for RESNICK, J.

*308 APPENDIX

GLASSER, Presiding Judge.

This is an appeal from a judgment of the Erie County Court of Common Pleas. This case involves a wrongful death action brought by appellants/cross-appellees Fred S. Sharp, administrator of the estate of Joseph A. Meyer, and Meyer's parents (collectively referred to as "Sharp"), against appellee/cross-appellant Norfolk & Western Railway Company ("Norfolk"). Norfolk is appealing the judgment awarded against it in the amount of \$1,003,959.80. Sharp is appealing the denial of his request for attorney fees and interest. For the reasons discussed below, we affirm the decision of the trial court.

The facts of this case are as follows. On the evening of February 12, 1982, a train owned and operated by Norfolk was stopped, blocking a road crossing on Thompson Township Road 136. The railroad car blocking the unlit crossing, as well as the adjacent railroad cars, were all flatbed cars.

On that same evening, Joseph Meyer was operating a snowmobile. At approximately 9:30 p.m., the snowmobile struck the stopped flatbed car and Meyer was killed.

Subsequently, Sharp brought a wrongful death action against Norfolk alleging that the railroad was negligent in failing to warn Meyer of the stopped flatbed car at the crossing. Norfolk answered alleging that Meyer was contributorily negligent. The case proceeded to trial before a jury. At the conclusion of the evidence, the trial court granted a partial directed verdict in favor of Norfolk, holding that Meyer was negligent *per se* for violating the assured-clear-distance-ahead statute, R.C. 4511.21(A), and for violating the snowmobile operation statute, R.C. 4519.41(B). The issues of Norfolk's negligence and the apportionment of negligence between the parties were submitted to the jury.

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The jury, in its verdict, did find that both Norfolk and Meyer were negligent. The **1221 jury found that Norfolk was fifty-five percent negligent and Meyer was forty-five percent negligent. Based on the jury verdict, the trial court awarded damages of \$733,150 to Meyer's parents and \$3,080 to the administrator of Meyer's estate.

Subsequently, Norfolk filed a motion for judgment notwithstanding the verdict. The trial court granted judgment notwithstanding the verdict, relieving Norfolk of any liability on the ground that Meyer's negligence was greater than Norfolk's negligence as a matter of law.

Sharp appealed the trial court's grant of judgment notwithstanding the verdict to this court, which affirmed the trial court's decision. Sharp then appealed to the Supreme Court of Ohio. The Supreme Court reversed our decision in *Sharp v. Norfolk & W. Ry. Co.* (1988), 36 Ohio St.3d 172, 522 N.E.2d 528. The Supreme *309 Court held that the trial court erred in granting both the partial directed verdict and judgment notwithstanding the verdict. *Id.* at 176, 522 N.E.2d at 532. The Supreme Court specifically held that the issues of whether Meyer was negligent for failing to maintain an assured clear distance and whether Meyer's negligence exceeded that of Norfolk were jury questions. The Supreme Court further held as follows:

"Plaintiffs have requested that this court, if it were to hold in their favor, merely reinstate the jury's verdict in lieu of directing a new trial. While this writer finds merit in such a request, it is the consensus of this court to decline this invitation and, therefore, we remand the case for a new trial." *Id.*

The case then proceeded to a second trial. At the conclusion of Sharp's case-in-chief, and again at the conclusion of all of the evidence, Norfolk moved for a directed verdict determining that Meyer was negligent and that his negligence exceeded that of Norfolk. The trial court denied both motions.

The jury returned a verdict finding that Norfolk was the sole proximate cause of Meyer's death and awarded Meyer's parents \$1,000,000 in damages and awarded Meyer's estate \$3,959.80 in damages. The jury did not award any punitive damages.

Subsequently, Norfolk moved for judgment notwithstanding the verdict and a new trial, which the trial court denied. In addition, Sharp moved for attorney fees, prejudgment interest and interest from the date of the first jury verdict, which the trial court also denied.

It is from this judgment that Norfolk raises the following six cross-assignments of error:

"A. The trial court erred in failing to direct a verdict because the negligence of Meyer and his parents had to be at least a contributing cause of his accident as a matter of law.

"B. Willful/wanton misconduct and actual malice should not have been considered by the jury.

"C. Meyer and his parents were more than 50% at fault as a matter of law.

"D. The jury instructions were woefully lacking and did not provide guidance to the jury.

"E. The verdict was excessive and/or the result of passion and prejudice.

"F. The verdict was against the manifest weight of the evidence."

It is also from this judgment that Sharp raises the following four assignments of error:

*310 "First Assignment of Error

"The trial court erred by requiring plaintiffs to relitigate the issue of damages on retrial when there was no prejudicial error on the issue of damages during the first trial.

"Second Assignment of Error

"Plaintiffs are entitled to post-judgment interest from August 13, 1985, the date of the first jury award.

"Third Assignment of Error

"The trial court erred by denying plaintiffs' motion for attorney fees when the jury made a specific finding that the railway acted with actual malice which proximately caused the accident.

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"Fourth Assignment of Error

****1222** [1] "The trial court erred in overruling plaintiffs-appellants' motion for prejudgment interest."

Norfolk's cross-assignments of error will be addressed first. As its first cross-assignment of error, Norfolk argues that the trial court erred in failing to grant its motion for a directed verdict as to Meyer's negligence. Specifically, Norfolk argues that Meyer was negligent as a matter of law for failing to stop within an assured clear distance in violation of R.C. 4511.21(A) [FN1] and that such negligence was the proximate cause of the accident. Norfolk also argues that Meyer's parents were negligent for failing to supervise him.

FN1. R.C. 4511.21(A) provides, in part, as follows:

"[N]o person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

Civ.R. 50(A)(4) provides that a directed verdict shall be granted as follows:

"When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

Further, in its decision remanding this case for a new trial, the Supreme Court held that: "[C]ommon sense dictates that discernibility of an object on a highway will most likely be an issue for the jury to resolve when an accident occurs during the nighttime hours." *Sharp, supra*, at 176, 522 N.E.2d at 531. The Supreme Court held that "the trial court erred in refusing to submit the question of reasonable discernibility to the jury * * *." *Id.* at 176, 522 N.E.2d at 532. Specifically, the Supreme

Court held that "where conflicting evidence is introduced *311 with respect to the assured-clear-distance-ahead provision (R.C. 4511.21[A]), the issue of whether an object is reasonably discernible on a highway during nighttime hours is usually a question of fact for a jury to determine." *Id.* at 175, 522 N.E.2d at 531.

During the second trial following the remand by the Supreme Court, several witnesses testified that the discernibility of the train was less than fifty feet, a distance which would not have permitted Meyer to avoid colliding with the train. Norfolk did present evidence that the discernibility of the train was one hundred feet, which would have allowed Meyer to avoid the collision. However, on a motion for a directed verdict, the court does not weigh the evidence or determine the credibility of the witnesses. Given the conflicting evidence, we can only conclude that reasonable minds could disagree as to whether Meyer violated the assured-clear-distance-ahead statute. Therefore, the trial court did not err in refusing to grant a directed verdict as to whether Meyer was negligent and whether such negligence proximately caused the accident. It follows that the issue of Meyer's parents' negligence in failing to supervise their son also was a question of fact for the jury. Accordingly, the first cross-assignment of error is found not well taken.

As its second cross-assignment of error, Norfolk argues that the trial court erred in allowing Sharp to present his claim for punitive damages, on the ground that Norfolk acted with actual malice. Specifically, Norfolk argues that Sharp was prohibited from seeking punitive damages under the doctrine of law of the case. Alternatively, Norfolk argues that the trial court erred in failing to grant a directed verdict as to Sharp's claim for punitive damages.

[2][3][4] This court would initially note that, in fact, no punitive damages were awarded to Sharp, and therefore, any error was harmless. See Civ.R. 61. Second, the Supreme Court in its order remanding the case for a new trial did not limit the issues or claims to be retried. *Sharp, supra*, at 176, 522 N.E.2d at 532. Therefore, the doctrine of law of the case is inapplicable. Third, there was evidence presented from which a reasonable jury could conclude that Norfolk acted with ****1223**

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actual malice, i.e., "a conscious disregard for the rights and safety of others under circumstances where there [is] a great probability for substantial harm." *Brown v. Consol. Rail Corp.* (Oct. 11, 1991), Erie App. No. E-90-35, unreported, 1991 WL 253917. Therefore, we hold that the trial court did not err in allowing the issue of punitive damages to be tried, nor did the trial court err in failing to direct a verdict as to the issue of punitive damages. Accordingly, the second cross-assignment of error is found not well taken.

As a third cross-assignment of error, Norfolk argues that the trial court erred in failing to grant a directed verdict in its favor on the ground that Meyer and his parents were more than fifty percent negligent as a matter of law.

*312 Under the first cross-assignment of error, we held that the evidence presented at trial created a jury question as to Meyer's and Meyer's parents' negligence. Therefore, the trial court properly denied Norfolk's motion for a directed verdict as to the percentage of such negligence. Accordingly, the third cross-assignment of error is found not well taken.

As a fourth cross-assignment of error, Norfolk argues generally that the trial court gave improper jury instructions. In particular, Norfolk argues that the jury instruction as to proximate cause was inadequate in that it failed to inform the jury of dual causation, i.e., that more than one proximate cause of Meyer's death was possible.

[5] A trial court must give jury instructions which are a correct and complete statement of the law. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 19 OBR 8, 10, 482 N.E.2d 583, 585. An inadequate jury instruction which, in effect, misleads the jury, constitutes reversible error. *Id.*

The jury instruction as to proximate cause was not as articulate and comprehensive on the issue of proximate cause as one might desire. However, this court in reviewing the instructions as a whole, as well as the jury's response to the interrogatories, cannot find prejudicial error. Accordingly, the fourth cross-assignment of error is found not well taken.

As its fifth cross-assignment of error, Norfolk

argues that the amount of the jury verdict was the result of passion and prejudice, and therefore, the trial court erred in failing to grant its motion for a new trial. Specifically, Norfolk argues that (1) improper evidence of malice was admitted, (2) improper testimony by a grief expert was admitted, and (3) the jury verdict was excessive.

[6] It is well-settled law that the decision on a motion for a new trial pursuant to Civ.R. 59 is within the discretion of the trial court. The trial court's decision will be disturbed only upon a showing that such decision was unreasonable, unconscionable or arbitrary. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142.

[7][8] As we discussed under the first assignment of error, the admission of evidence as to Norfolk's malice of willfulness to support the claim for punitive damages was proper. Further, we do not find that the trial court's decision to admit the testimony of a grief expert constitutes an abuse of discretion. Finally, we do not find that the amount of the verdict was so excessive that it could only be the result of passion and prejudice. Therefore, we hold that the trial court did not abuse its discretion in denying Norfolk's motion for a new trial. Accordingly, the fifth cross-assignment of error is found not well taken.

As its sixth cross-assignment of error, Norfolk argues that the verdict was against the manifest weight of the evidence. Specifically, Norfolk argues that the *313 jury's finding that Meyer's negligence and that of his parents were not a proximate cause of the accident was against the manifest weight of the evidence. Norfolk also argues that the amount of the award was against the manifest weight of the evidence.

It is well-settled law that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." **1224 C.E. *Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus.

[9] In the present case, there was evidence that Meyer did not violate the assured-clear-distance-ahead statute. Further, the

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remoteness of the other alleged acts of negligence concerning the unsupervised operation of a snowmobile by Meyer supported the jury's finding that such negligence was not the proximate cause of the accident. Finally, as we discussed under the fifth cross-assignment of error, the amount of the jury award was supported by the evidence at trial. Therefore, we hold that the verdict was not against the manifest weight of the evidence. Accordingly, the sixth cross-assignment of error is found not well taken.

As his first assignment of error, Sharp argues that the issue of damages should not have been retried after the case was remanded by the Supreme Court of Ohio. As discussed under Norfolk's second cross-assignment of error, the Supreme Court did not limit the scope of the second trial following its reversal of the first verdict. Therefore, the trial court did not err in retrying the issue of damages. Accordingly, the first assignment of error is found not well taken.

[10] As his second assignment of error, Sharp argues that the post-judgment interest should run from the time of the first jury verdict. Sharp relies on *Vlock v. Stowe-Woodward Co.* (1989), 59 Ohio App.3d 3, 569 N.E.2d 1070, in support of this assignment of error.

In *Vlock*, this court reinstated the original jury verdict, which we found had been erroneously reduced by the trial court. We further held that the post-judgment interest accumulated from the date of the original jury verdict.

However, we find that *Vlock* has no application to the case at hand. In the present case, the jury's determination as to the parties' respective liability was reversed on appeal. No damage award then existed to be reinstated by an appellate court. There was no judgment establishing either party's liability until the jury returned its verdict at the conclusion of the second trial. Therefore, we find the trial court did not err in refusing to award post-judgment interest from the date of the first jury verdict. Accordingly, the second assignment of error is found not well taken.

*314 As his third assignment of error, Sharp argues that the trial court erred in denying his request for attorney fees.

It is well-settled law that where there is no statutory provision for attorney fees, "the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith." *State ex rel. Kabatek v. Stackhouse* (1983), 6 Ohio St.3d 55, 55-56, 6 OBR 73, 74, 451 N.E.2d 248, 249, quoting *State ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363, 369, 21 O.O.3d 228, 232, 423 N.E.2d 1099, 1103, or has acted "vexatiously, wantonly, obdurately, or for oppressive reasons." *Sorin v. Warrensville Hts. School Dist. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 181, 75 O.O.2d 224, 226, 347 N.E.2d 527, 530.

We find no evidence that Norfolk engaged in bad faith conduct or acted vexatiously, wantonly, obdurately, or for oppressive reasons. Therefore, the trial court properly denied Sharp's request for attorney fees. Accordingly, the third assignment of error is found not well taken.

Judgment affirmed.

HANDWORK and ABOOD, JJ., concur.

WRIGHT, Justice, dissenting.

I respectfully dissent because I would reverse the judgment of the court of appeals and order a new trial.

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Snowmobile certification, registration & accident statistics 1967-present

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Year	Students certified	students certified	Registered snowmobiles	Snow season	Fatalities	Injuries	Property damage	Total accidents	Fatalities 100,00
1967			18737						
1968			23235						
1969		538	60627	68-69	14			14	23.09
1970	18654	19192	112896	69-70	11			11	9.74
1971	30346	49538	165389	70-71	15			15	9.07
1972	29788	79326	217881	71-72	32			32	14.69
1973	21571	100897	270374	72-73	28			28	10.36
1974	15863	116760	275778	73-74	23	182		205	8.34
1975	16345	133105	287559	74-75	26	250		276	9.04
1976	13325	146430	292488	75-76	13			13	4.44
1977	9221	155651	277562	76-77	8	292		300	2.88
1978	10784	166435	267579	77-78	16	231		247	5.98
1979	9083	175518	262920	78-79	20			20	7.61
1980	6022	181540	269669	79-80	22	136		158	8.16
1981	3880	185420	227001	80-81	5			5	2.20
1982	5281	190701	219924	81-82	2			2	0.91
1983	3490	194191	207284	82-83	13	70		83	6.27
1984	3363	197554	202663	83-84	3	119		122	1.48
1985	3723	201277	181062	84-85	7	112		119	3.87
1986	3130	204407	180782	85-86	5	121		126	2.77
1987	2172	206579	169911	86-87	1	72		73	0.59
1988	3862	210441	176765	87-88	17	261		278	9.62

1989	4070	214511	184134	88-89	9	313		322	4.89
1990	3721	218232	190579	89-90	14	246		260	7.35
1991	5581	223813	191715	90-91	11	354		365	5.74
1992	5613	229426	192642	91-92	15	325	61	401	7.79
1993	8834	238260	206278	92-93	23	420	126	569	11.15
1994	10265	248525	217708	93-94	22	431	94	547	10.11
1995	9535	258060	233433	94-95	19	417	87	523	8.14
1996	11745	269805	254510	95-96	26	581	126	733	10.22
1997	11370	281175	274913	96-97	32	615	175	822	11.64
1998	12677	293852	277650	97-98	19	274	56	349	6.84
1999	13320	307172	280696	98-99	17	336	72	425	6.06
2000	17377	324549	277290	99-00	11	241	67	319	3.92
2001	14747	339296	297623	00-01	28	510	155	693	9.98
2002	14093	353389	285675	01-02	17	203	39	259	6.06

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November 26, 2003

SNOWMOBILE FATALITIES 2002-2003 SEASON

Number of snowmobile fatalities	10
Number of injuries reported	146
Number of machines damaged	34
Total number of accidents reported	179

70% of the fatalities involved alcohol

23.2% of operators involved in injury or property damage accidents used alcohol

12/14/2002, 10:33 p.m. - St. Louis County - Ely.

22 year old male operating a snowmobile was thrown from the snowmobile. The snowmobile was traveling Shagawa Lake at a high rate of speed. The snowmobile struck a rock by the shoreline, the right ski hit a hole and the snowmobile stopped. The operator was thrown from the machine and struck a rock with his head. The operator was not wearing a helmet. The operator died four days later from injuries sustained in the accident. Snowmobile safety certificate - yes. Alcohol involved - BAC - .156.

1/4/2003, 12:00 a.m. - St. Louis County - Kabetogama.

27 year old male operating a snowmobile was thrown from the snowmobile. The snowmobile was traveling on Lake Kabetogama when it struck an island. The operator was thrown 118 feet through the trees. Snowmobile safety certificate - no. Alcohol involved - BAC - .265.

1/17/2003, 6:49 p.m. - Lake County - Silver Bay.

50 year old male operating a snowmobile struck a trail groomer. The snowmobile was traveling on a plowed resort road, hard packed with snow. The rear of the snowmobile slid to the left and struck a small power pole. The snowmobile continued to rotate and rolled over. The rear of the snowmobile struck a parked trail groomer, ejecting the operator. The operator struck the groomer face first, the helmet came off prior to striking the groomer. Snowmobile safety certificate - no. Alcohol involved - BAC - .33.

1/18/2003, 1:45 p.m. - Cook County - Grand Marais.

16 year old male operating a snowmobile struck a pickup truck. The snowmobile was traveling partially on a roadway. The snowmobile attempted to negotiate a curve in the road when the machine partially turned sideways. The operator was ejected from the machine and thrown underneath an oncoming pickup. The operator was trapped underneath the vehicle's frame and axle. Snowmobile safety certificate - yes. Alcohol involved - no.

2002-2003 Snowmobile Fatality Summary (continued)

2/1/2003, unknown - Crow Wing County - Nisswa.

18 year old male operating a snowmobile in a field struck a tree. The operator was reported missing on 2/1/03, and was found the next day. Snowmobile safety certificate - yes. Alcohol involved - BAC - .074.

2/9/2003, 11:41 a.m. - Sherburne County - Orrock Township.

27 year old male operating a snowmobile struck a gate. The snowmobile was traveling with three other snowmobiles along a roadway. The snowmobiles were attempting to access a state trail. The fourth snowmobile had obstructed vision due to blowing snow and did not see a "road closed" gate in time to stop. The snowmobile struck the gatepost and the operator was thrown into the steel gate. Snowmobile safety certificate - no. Alcohol involved - not taken.

2/16/2003, 3:36 p.m. - Watonwan County - St. James.

9 year old male operating a snowmobile struck a road embankment. The snowmobile was traveling in a field, perpendicular to a county road. The snowmobile came down over a hill and the ski of the snowmobile hit the road embankment. The snowmobile flipped over and the operator was thrown from the machine. The operator and the snowmobile landed on the opposite side of the road embankment. The operator had not driven a snowmobile before. Snowmobile safety certificate - no. Alcohol involved - no.

2/26/2003, 9:29 p.m. - Lake County - Isabella.

40 year old male operating a snowmobile struck a tree. The snowmobile was traveling on a marked trail. The snowmobile left the trail on a curve, the ski sank into a small hole, and pulled the snowmobile into a tree. The operator was dead at the scene. Snowmobile safety certificate - no. Alcohol involved - BAC - .177.

3/9/2003, 10:18 p.m. - Anoka County - Oak Grove.

40 year old male was thrown from the snowmobile he was operating. The snowmobile was traveling on Lake George when it struck a 307 pound rock near the boat launch at a high rate of speed. The impact launched the rock 29 feet in the air, and it rolled 10 additional feet after it landed. The snowmobile and the operator were thrown over a rock walkway. The operator died on impact. Snowmobile safety certificate - no. Alcohol involved - BAC - .189.

3/10/2003, 2:03 a.m. - Martin County - Fairmont.

43 year old male was thrown from the snowmobile he was operating. The operator was traveling across Temperance Lake with a second snowmobile. The second operator lost sight of the first operator's taillight and went to see what happened. The first snowmobile went up an embankment and the snowmobile went airborne. The snowmobile landed nose first and the operator was thrown from the machine. Snowmobile safety certificate - no. Alcohol involved - BAC .11



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Snowmobiling along train tracks unsafe for sled railroad workers

Canadian Pacific Railway receives complaints every winter of snowmobilers riding on the right of way, the railroad property on both sides of the track. Railroad police who handle these complaints want to warn snowmobilers who do this that they are putting themselves at risk of injury or even death. Some of these complaints come from the Rosemount and Farmington areas south of the Twin Cities.

A few years ago, a snowmobiler got his sled stuck on CPR tracks in Farmington while a train was approaching. The rider managed to free his sled with only seconds to spare. Imagine how helpless the train crew felt as they witnessed this near-tragedy, knowing that the law of physics wouldn't allow them to stop a train traveling 45 mph in time.

Elsewhere, snowmobile riders have been struck and killed crossing tracks because they couldn't hear the train whistle over the roar of their sled's engine. Or didn't see the train just around a bend or didn't look the other way down a parallel second track once a train passed by on the first track.

In Rosemount, CPR maintenance-of-way employees complain about their safety when snowmobile riders speed past them on railroad property. Snowmobilers along railroad tracks also risk striking objects buried under snow, such as long portions of rail and other track equipment or even material dumped by the public. "I also see areas along our tracks where the snowmobile riders have to lift their sleds over the tracks because they box themselves in between tracks," CPR Investigator Bob Reardon said. "I could go on and on about how some, not all, snowmobile riders are trespassing on railway property and are putting themselves at risk."

Railroads generally own the land that extends about 50 feet on each side straight out from the center of the track. In some places, the right of way is wider or narrower than 100 feet, but it's generally 100 feet. The right of way is unsafe for snowmobiling or any other kind of traffic. What's more, as private property, it's illegal to trespass on it. "But the railroad's biggest concern, as yours, is that no one gets injured or killed while snowmobiling," Reardon said.

Here are some statistics:

When a train crushes a snowmobile, it is equivalent to the force with which a car crushes a pop can.

A typical train weighs the same as 4,000 automobiles combined.

In 2001 in the United States, 423 people - including five in Minnesota - were killed while trespassing on railroad right of way and property. An

additional 345 trespassers were injured, including five in Minnesota.

Trains can take up to a mile and a half to stop. By the time a train crew sees a snowmobiler stuck on the track ahead, it may already be too late to stop.

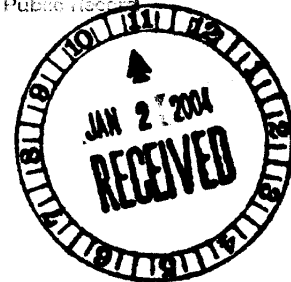
MnUSA - Minnesota United Snowmobilers Association
7040 Lakeland Avenue N., Suite 212, Brooklyn Park, MN 55428

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

FINANCE DOCKET NO. 34425

**CITY OF LINCOLN
PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF B. DAVID DONOLEY

My name is B. David Donoley. I am the President and CEO of Arkansas-Oklahoma Railroad, Inc., a class III rail carrier operating in the State of Oklahoma. I have over 25 years experience with track maintenance, and associated work, dating back to employment with the Chicago, Rock Island & Pacific Railroad in the 1970's. It is my opinion that any forced sharing of railroad right of way with a trail would adversely affect railroad operations, and imperil the safety thereof.

Specifically, the railroad needs control of its entire right of way for numerous reasons. One of the reasons is access, which includes clean up and restoration after accident/derailments, normal maintenance, trans-loading, inspections, and so forth. It is frequently necessary to access tracks with trucks, bulldozers, and other off-rail equipment because tracks are occupied; tracks are in need of repair or maintenance, off-rail customers need to unload products, or specialized equipment is needed for various work. While it is fairly obvious that derailments often extend well beyond the tracks, and re-railing equipment needs as much right of way as it can get, normal maintenance requires the entire right of way, as well. When railroads replace ties, the equipment must use the right of way to extract old ties and insert new, and must also use the right of way for

storage of the materials to be installed, as well as the materials which have been removed and are awaiting disposal. Mixing normal maintenance operations, let alone the extraordinary demands of a derailment, with a parallel trail that exists on railroad right of way, without any voluntary contractual arrangements for such things as temporary closure, etc., is unsafe, unwise, and places an unreasonable burden on the railroad.

The right of way is also utilized for signal and communications lines, which must be available for the railroad.

Drainage and brush control is another very important issue for railroad maintenance. Proper drainage is critical to preventing washouts, track deterioration, and similar problems. Brush control is also important to maintenance, as it allows tracks to dry, and, more importantly, preserves sight distances both for the train crew, and motorists at highway crossings. We use Jordan Spreaders, brush cutting equipment, and other equipment that must be able to freely extend well beyond the edge of the ties.

The right of way is also available for future industrial development, future traffic needs, and the like. The railroad must have the flexibility to construct new track, sidings, run-arounds, and so forth, or its operations are clearly being significantly impeded, and its customers may not be properly served.

Finally, it is my opinion, based upon my extensive experience in the railroad business, that municipal governments are particularly ill-equipped and ill-suited to make judgments as to what the operating needs of a railroad are. Some municipalities have no active customers, and thus no interest whatsoever in preserving rail service. Decisions impacting the rail system, and shippers all over the country, cannot be left to such entities. That is one of the many reasons

railroad regulation has been delegated to the Surface Transportation Board, which, as a professional agency, is charged with implementing the National Transportation Policy.

It is therefore my opinion that the City of Lincoln's proposal to allow municipalities to utilize state condemnation law to force shared right of way use would be dangerous for public safety, detrimental to the national rail system, and, in general, be bad public policy. I strongly urge the Board to find that the Interstate Commerce Commission Termination Act preempted such actions.

VERIFICATION

I, B. David Donoley, verify under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to file this Verified Statement.

Dated: December 26, 2003

