

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**UNION PACIFIC RAILROAD COMPANY, )  
a Delaware Corporation, )**

**Plaintiff, )**

**vs. )**

**PROGRESS RAIL SERVICES )  
CORPORATION, )  
an Alabama Corporation, )**

**Defendant. )**

**8:00CV36**

**JURY  
INSTRUCTIONS**

## **JURY INSTRUCTION NO. 1**

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning and during the trial are not repeated here.

## **JURY INSTRUCTION NO. 2**

Members of the jury, now that you have heard all of the evidence, it is my duty to instruct you in the law.

1. Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be. During this trial I have asked questions of a witness. Do not assume that I hold any opinion on the matters to which my questions related.

2. It is my duty to tell you what the law is. It is your duty to decide what the facts are and to apply the law to those facts.

In determining what the facts are you must rely solely upon the evidence in this trial and the general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact.

3. You must apply the law in these instructions, even if you believe that the law is or should be different.

No one of these instructions contains all of the law applicable to this case. You must consider each instruction in light of all of the others.

The law demands of you a just verdict. You must not indulge in any speculation, guess, or conjecture. You must not allow sympathy or prejudice to influence your verdict.

4. The attorneys have a duty to represent their clients. In arguing their client's case, attorneys may draw legitimate deductions and inferences from the evidence.

The attorneys have a duty to make all objections they deem proper. Do not be influenced by any objection.

### **JURY INSTRUCTION NO. 3**

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;
2. Documents and other things received as exhibits;
3. Any facts that have been stipulated--that is, formally agreed to by the parties;

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;
2. Objections to questions;
3. Any testimony I told you to disregard; and
4. Anything you may have seen or heard about this case outside the courtroom or have overheard from one of the bench conferences between the lawyers and myself.

#### **JURY INSTRUCTION NO. 4**

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

## **JURY INSTRUCTION NO. 5**

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight, that is, a preponderance, of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you must resolve that issue against the party who has the burden of proving it. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

## **JURY INSTRUCTION NO. 6**

This case should be considered and decided by you as an action between parties of equal standing in the community, of equal worth, and holding the same or similar stations in life. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

A corporation can act only through its employees or agents. A corporation is bound by the knowledge possessed by its employees and agents. It is also bound by such acts or omissions of its employees as are within the scope of their employment and by such acts or omissions of its agents as are within the scope of their authority as agents.

### **JURY INSTRUCTION NO. 7**

During the trial, testimony was presented to you by deposition. Such testimony is under oath and is entitled to the same fair and impartial consideration you give other testimony.



## **JURY INSTRUCTION NO. 8 (page 1 of 3)**

### **STIPULATED FACTS**

The parties have agreed the following may be accepted as established facts for the purpose of this case only:

1. Plaintiff Union Pacific Railroad Corporation (hereinafter "Union Pacific") is a corporation incorporated under the laws of the state of Delaware with its principal place of business in Omaha, Nebraska.

2. Defendant Progress Rail Services Corporation (hereinafter "Progress Rail") is a corporation incorporated under the laws of the state of Alabama with its principal place of business in Alabama.

3. On or about January 27, 1998, Union Pacific and Progress Rail entered into a Purchase and Removal Agreement, Contract Audit Number 70427, for a rail removal project near Bridgeport, Kansas.

4. The Purchase and Removal Agreement, Contract Audit Number 70427 (the "Agreement"), provided in part that Progress Rail was to:

" . . . provid[e] necessary labor, supplies and equipment to remove rail and load onto rail train, remove and stockpile ties and otm from the abandoned Hoisington Subdivision between Hope, KS (MP459.20) and Bridgeport, KS (MP491.20)."

5. The Agreement provided in part that Progress Rail:  
[would] indemnify and hold harmless Union Pacific and all of its affiliates, officers, agents and employees against and from any and all liability, loss, damages, claims, etc., of whatsoever nature, including court costs and attorneys fees, arising from or growing out of any injury to or death of persons, including Union Pacific's employees.

The Agreement also provided in part:

The right to indemnity shall accrue when such injury, death, loss or damage occurs from any cause and is associated in whole or in part with the work performed under this agreement,

## **JURY INSTRUCTION NO. 8 (page 2 of 3)**

breach of the agreement or the failure to observe the health and safety provisions of the agreement or any activity or omission arising out of performance or nonperformance of this agreement. However, the Contractor shall not indemnify the Railroad when the loss is caused by the negligence of the Railroad, excepting that Progress Rail would not indemnify Union Pacific when any said loss is caused by the negligence of Union Pacific.

6. On February 7, 1998, at the rail removal job site, Ronald D. Grimmatt (hereinafter "Grimmett") was employed by Union Pacific as a brakeman on a rail train for Union Pacific.

7. On February 7, 1998, at the rail removal site, Grimmatt was assigned by Union Pacific to assist Progress Rail in Progress Rail's duties under the Agreement in removing and loading rail onto a rail train and stockpiling ties from the rail removal site.

8. On February 7, 1998, Grimmatt was injured at the rail removal job site in the form of fractures to both bones in his lower left leg.

9. As a result of Grimmatt's on-the-job injury, Grimmatt made a claim against Union Pacific for his personal injuries.

10. On March 10, 1998, via correspondence, Union Pacific informed Progress Rail of an injury to Grimmatt.

11. Grimmatt was released to return to work from his injuries on October 1, 1998.

12. Via correspondence on February 1, 1999, Union Pacific asked Progress Rail to become involved in the negotiation of the settlement of the Grimmatt claim.

13. On February 17, 1999, Progress Rail denied it was legally obligated for any amounts paid to Grimmatt.

14. On March 19, 1999, Union Pacific informed Progress Rail that Union Pacific had settled Grimmatt's claim in the amount of \$115,000.00 and Union Pacific requested that Progress Rail reimburse Union Pacific for the full amount of the settlement of

**JURY INSTRUCTION NO. 8 (page 3 of 3)**

\$115,000 and the medical costs paid by Union Pacific of \$2,572.12 for a total of \$117,572.12.

15. On April 7, 1999, Progress Rail informed Union Pacific that Progress Rail was not legally liable to Union Pacific for the Grimmatt matter.

## **JURY INSTRUCTION NO. 9 (page 1 of 4)**

### **STATEMENT OF THE CASE**

#### **I. PLAINTIFF'S CLAIMS**

##### **A. ISSUES**

This case involves Union Pacific's action against Progress Rail for contractual indemnification in order to recover those monies paid to Ronald Grimmert as a result of injuries sustained by Mr. Grimmert on February 7, 1998, while Mr. Grimmert was working as an employee of Union Pacific. Union Pacific alleges that, on January 27, 1998, it entered into a contract with Progress Rail for the removal of certain rail in the area of Hoisington, KS. Mr. Grimmert was injured on the job site when a piece of partially removed rail line bowed out and hit Mr. Grimmert's leg. Union Pacific claims that as a result of the negligence of Progress Rail, Mr. Grimmert was injured and Union Pacific was required to pay Mr. Grimmert for those injuries under the Federal Employers' Liability Act. Union Pacific paid Mr. Grimmert a settlement in the amount of \$115,000.00. Union Pacific seeks to recover \$117,572.12 it paid to Mr. Grimmert in other expenses for settlement of Mr. Grimmert's claim because of the injuries Mr. Grimmert sustained on February 7, 1998.

Union Pacific alleges the contract requires Progress Rail to reimburse or indemnify Union Pacific for those monies paid to Grimmert because Progress Rail's negligence caused Grimmert's injuries. The court has found Progress Rail must indemnify Union Pacific only for Progress Rail's negligence. Union Pacific alleges Progress Rail was negligent in one of more or the following ways:

1. In directing Grimmert to stand in an unsafe area; or
2. In failing to use safety chains during the removal of the rail.

Union Pacific further alleges the settlement paid to Grimmert was caused by the negligence of Progress Rail. Union Pacific requested Progress Rail participate in the Grimmert settlement and Progress Rail did not. As a result, Union Pacific alleges Progress Rail breached the contract between the parties in not paying Union Pacific for that portion of the injuries caused by Progress Rail. Union Pacific claims Progress Rail breached the contract by not indemnifying Union Pacific, and seeks a judgment against Progress Rail for these damages.

## **JURY INSTRUCTION NO. 9 (page 2 of 4)**

Progress Rail admits it contracted with Union Pacific to remove the rail. Progress Rail denies that it was negligent and further denies it breached the contract. Instead, Progress Rail alleges the injuries to Grimmiett were caused by the negligence of Union Pacific. Finally, Progress Rail claims the settlement amount of \$117,572.12 is excessive, not fair, not reasonable, and not necessary for the injuries suffered by Grimmiett.

### **B. BURDEN OF PROOF**

Before Union Pacific can recover against the defendant on its claim for contractual indemnification, Union Pacific must prove, by the greater weight of the evidence, each and all of the following:

1. Progress Rail was negligent in one or more of the ways claimed by Union Pacific;
2. This negligence on the part of Progress Rail was a proximate cause of some injury to Mr. Grimmiett;
3. The \$117,572.12 paid by Union Pacific by reason of Mr. Grimmiett's injuries was fair, reasonable and made in good faith for the injuries he sustained on February 7, 1998; and
4. Progress Rail's failure to reimburse Union Pacific for that portion of the injuries caused by Progress Rail was a breach of the contract between the parties in the amount of the negligence of Progress Rail that proximately caused Grimmiett's injuries.

### **C. EFFECT OF FINDINGS**

If Union Pacific has not met its burden of proof, then your verdict must be for Progress Rail and you shall complete verdict form number 1.

If Union Pacific has met its burden of proof, then you must consider Progress Rail's affirmative defense that Mr. Grimmiett's injuries were caused by the negligence of Union Pacific.

## **JURY INSTRUCTION NO. 9 (page 3 of 4)**

### **II. DEFENDANT'S DEFENSES**

#### **A. ISSUES**

In defense to Union Pacific's claim, Progress Rail claims it is not responsible to indemnify Union Pacific because Union Pacific itself, by and through its employees, was negligent in one or more of the following ways:

1. In causing and/or directing Mr. Grimmertt to be located in a position of danger or otherwise unsafe area;
2. In failing to warn Mr. Grimmertt not be located in a position of danger or otherwise unsafe area.
3. In operating the rail train and/or related rail train equipment in a manner which caused the rail to bow out and strike Grimmertt; and
4. In failing to follow instructions and/or warnings from Progress Rail by allowing Grimmertt to be located in a position of danger or otherwise unsafe area.

Union Pacific denies it was negligent.

#### **B. BURDEN OF PROOF**

In connection with its claim that Union Pacific was negligent, the burden is on the defendant to prove by the greater weight of the evidence both of the following:

1. The plaintiff was negligent in one or more of the ways claimed by the defendant; and
2. This negligence on the part of the plaintiff was a proximate cause of some injury to Grimmertt; and
3. This negligence on the part of the plaintiff was a proximate cause of the damage claimed by Union Pacific.

#### **C. EFFECT OF FINDINGS**

If the plaintiff has met its burden of proof and the defendant has not met its burden of proof, then your verdict must be for the plaintiff and you shall complete verdict form number 2.

**JURY INSTRUCTION NO. 9 (page 4 of 4)**

If both the plaintiff and the defendant have met their respective burdens of proof, then you must compare the negligence of each with that of the other and you shall do so by completing verdict form number 3. In doing so, you should understand that the amount awarded to the plaintiff will be reduced in direct proportion to the amount of negligence of the plaintiff.

### **JURY INSTRUCTION NO. 10**

Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.



### **JURY INSTRUCTION NO. 11**

A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would have not occurred.

## **JURY INSTRUCTION NO. 12**

To evaluate whether Union Pacific has met its burden of proof that the settlement amount paid to Grimmiett was reasonable and made in good faith, you must evaluate the reasonableness of the settlement by comparing the nature of the injury and the damages incurred to the size of the settlement. You must also review the good faith of Union Pacific by evaluating the probability that it would have been held liable for Grimmiett's injuries.

To show the settlement was reasonable, Union Pacific need only prove its potential liability and the settlement amount was reasonably related to Mr. Grimmiett's injuries.

The amount you find as the reasonable amount for the settlement will be the amount you enter on verdict form number 2.

### **JURY INSTRUCTION NO. 13**

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

## **JURY INSTRUCTION NO. 14**

A verdict reached during the first six hours of your deliberation must be agreed to by all of you, that is, it must be unanimous. After six hours of deliberation, you may reach a verdict agreed to by ten of you.

### **JURY INSTRUCTION NO. 15**

The law forbids you to return a verdict determined by chance. You may not, for instance, agree in advance that each juror will state an amount to be awarded in damages, that all of those amounts will be added together, that the total will be divided by the number of jurors, and that the result will be returned as the jury's verdict. A verdict determined by chance is invalid.

## **JURY INSTRUCTION NO. 16 (Page 1 of 2)**

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the courtroom deputy signed by one or more jurors. Or, you may reach my chambers directly by lifting the receiver of the telephone in the jury room. The caller should clearly identify himself or herself as a member of the jury so that my staff will react accordingly. I will respond to your question as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

If you do not agree on a verdict by 5:00 o'clock p.m., you may separate and return for deliberation at 9:00 o'clock a.m. on the next business day, i.e. Thursday, May 8, 2003. You may deliberate after 5:00 o'clock p.m., but if so, please advise the courtroom deputy of your intention to do so. You may also separate for meals during the course of your deliberations, but if you do separate for meals please contact the courtroom deputy to advise her of your intention to separate and when you expect to return to the jury room to

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reconvene your deliberations. If you do separate, then during that time, you are not allowed to discuss this case with anyone, even another juror.

Fourth, your verdict must be based solely on the evidence and law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

Finally, the verdict forms are simply the written notice of the decision that you reach in this case. You will take these forms to the jury room, complete them pursuant to the instructions on the forms, and advise the courtroom deputy when you are ready to deliver your verdict.

Three verdict forms have been furnished to you. You are to complete only the one form that reflects your verdict. You must return all of the verdict forms at the completion of your deliberations.

Submitted at 3:25 o'clock p.m.

DATED this 7th day of May, 2003.

BY THE COURT:

s/Thomas D. Thalken  
THOMAS D. THALKEN  
United States Magistrate Judge