IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, **Plaintiff,** **vs.** **PROGRESS RAIL SERVICES CORPORATION,** **Defendant.**	**8:10CV38** **JURY INSTRUCTIONS**

INSTRUCTION NO. 1

Members of the jury, the instructions I gave at the beginning of the trial and during the trial are still in effect. Now I am going to give you some additional instructions.

You have to follow all of my instructions – the ones I gave you earlier, as well as those I give you now. Do not single out some instructions and ignore others, because they are all important. This is true even though I am not going to repeat some of the instructions I gave you at the beginning of the trial.

You will have copies of the instructions I am about to give you now in the jury room. However, this does not mean some instructions are more important than others. Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.

INSTRUCTION NO. 2

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 some questions of witnesses. Do not try to guess my opinion about any issues in the case based on the questions I asked.

INSTRUCTION NO. 3

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.

You may consider a witness's intelligence; the opportunity the witness had to see or hear the things testified about; a witness's memory, knowledge, education, and experience; any reasons a witness might have for testifying a certain way; how a witness acted while testifying; whether a witness said something different at another time; whether a witness's testimony sounded reasonable; and whether or to what extent a witness's testimony is consistent with other evidence you believe.

In deciding whether to believe a witness, remember that people sometimes hear or see things differently and sometimes forget things. You will have to decide whether a contradiction is an innocent misrecollection, or a lapse of memory, or an intentional falsehood; that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 4

You will have to decide whether certain facts have been proved by the greater weight of the evidence. A fact has been proved by the greater weight of the evidence, if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable.

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

INSTRUCTION NO. 5

When I use the word "evidence," I mean the testimony of witnesses; documents and other things I received as exhibits; facts that I tell you the parties have agreed are true; and any other facts that I tell you to accept as true.

Some things are not evidence. I will tell you now what is not evidence:

1. Lawyers' statements, arguments, questions, and comments are not evidence.

2. Documents or other things that might be in court or talked about, but that I did not receive as exhibits, are not evidence.

3. Objections are not evidence. Lawyers have a right – and sometimes a duty – to object when they believe something should not be a part of the trial. Do not be influenced one way or the other by objections. If I sustained a lawyer's objection to a question or an exhibit, that means the law does not allow you to consider that information. If that happened, you must ignore the question or the exhibit, and you must not try to guess what the information might have been.

4. Testimony and exhibits that I struck from the record, or told you to disregard, are not evidence, and you must not consider them.

5. Anything you saw or heard about this case outside the courtroom is not evidence, and you must not consider it.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You should not be concerned with those terms, because the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 6

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.

INSTRUCTION NO. 7

DEWITT, IOWA, DERAILMENT

This claim is brought by the Plaintiff, Union Pacific Railroad Company (referred to in these instructions and the accompanying verdict forms as "Union Pacific"), and involves the derailment of a Union Pacific train (referred to in these instructions as the "DeWitt Train") which took place on July 14, 2007, near DeWitt, Iowa (referred to in these instructions and the accompanying Verdict Form 1 as the "DeWitt, Iowa, Derailment"). Union Pacific alleges that the DeWitt Train derailed due to the failure of an axle on a railcar (referred to in these instructions as the "DeWitt Railcar"). Union Pacific claims that the Defendant, Progress Rail Services Corporation (referred to in these instructions and the accompanying verdict forms as "Progress Rail") was negligent in connection with the DeWitt, Iowa, Derailment by failing to remove corrosion pitting from the fillet area of the DeWitt Railcar axle, and allowing the axle back into service.

Union Pacific also alleges that Progress Rail's alleged negligence was the direct and proximate cause of the DeWitt, Iowa, Derailment.

Progress Rail denies that it was negligent or that any act or omission by Progress Rail was a direct and proximate cause of the damages Union Pacific has alleged.

I. UNION PACIFIC'S BURDEN OF PROOF

Before Union Pacific can recover against Progress Rail for the DeWitt, Iowa, Derailment, Union Pacific must prove, by the greater weight of the evidence, each and all of the following:

1. That Progress Rail was negligent in violating the Code of Federal Regulations promulgated by the Federal Railway Administration, or violating the standard of care set forth in the Association of American Railroads (referred to in these instructions as the "AAR") G-II Manual by:

a. Failing to properly inspect and evaluate the fillet of the axle on the DeWitt Railcar for corrosion pits before mounting the roller bearing;

b. Failing to properly remove corrosion pits from the fillet of the axle to avoid fatigue cracking and failure of the axle; and/or

c. Failing to apply the proper amount of rust preventative to the fillet.

2. That this negligence was a proximate cause of the DeWitt, Iowa, Derailment;

3. That the DeWitt, Iowa, Derailment was a proximate cause of some damage to Union Pacific; and

4. The nature and extent of that damage.

If Union Pacific has *not* met this burden of proof, then your verdict must be for Progress Rail with respect to the DeWitt, Iowa, Derailment.

On the other hand, if Union Pacific *has* met this burden of proof, then you must consider Progress Rail's affirmative defense of comparative negligence, below.

II. COMPARATIVE NEGLIGENCE

In defense to Union Pacific's claim for the DeWitt, Iowa, Derailment, Progress Rail claims that Union Pacific itself was negligent. Union Pacific denies these allegations.

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

1. That Union Pacific was negligent in one or more of the following ways:
    a. In failing to inspect or repair the equipment, as required by the Code of Federal Regulations;
    b. In allowing the axle on the DeWitt Railcar and wheel set to continue in service;
    c. Through its participation on the AAR, agreeing to the standards for the inspection and reconditioning of railcar axles, as set forth in the G-II Manual;
    d. In failing to prohibit the use of Class F (6 1/2 x 12) axles on unit coal car trains;
    e. In failing to require its customers to use Class K (6 1/2 x 9) axles on unit coal car trains;
    f. In failing to restrict trains on Union Pacific track to only Class K (6 1/2 x 9) axles on unit coal car trains;
    g. In failing to place age limitations on axles used on unit coal car trains;
    h. In failing to place mileage limitations on axles used on unit coal car trains;

i. In failing to track the mileage of individual axles and eliminating them from service after they have reached an excessive number of miles; and

2. That this negligence on the part of Union Pacific was a proximate cause of its own damages.

III. EFFECT OF FINDINGS

If Union Pacific *has* met its burden of proof and Progress Rail *has not* met its burden of proof, then your verdict with regard to the DeWitt, Iowa, Derailment must be for Union Pacific.

If both Union Pacific and Progress Rail have met their burdens of proof, then you must compare the negligence of each with that of the other.

1. If upon comparison you decide that Union Pacific's negligence was equal to or greater than the negligence of Progress Rail, then your verdict must be for Progress Rail with regard to the DeWitt, Iowa, Derailment.

2. If, however, upon comparison, you decide that Union Pacific's negligence was less than half of the negligence of Progress Rail, then your verdict must be for Union Pacific with regard to the DeWitt, Iowa, Derailment. To compute the amount of that verdict you shall determine the amount of Union Pacific's damage in accordance with Instruction No. 12. You must then decide what percentage of the total negligence was attributable to Union Pacific. The total damages to Union Pacific will be diminished proportionately by that same percent, resulting in a verdict for the balance only.

INSTRUCTION NO. 8

MARTIN BAY, NEBRASKA, DERAILMENT

This claim involves the derailment of a Union Pacific train (referred to in these instructions as the "Martin Bay Train") which took place on January 14, 2010, near Martin Bay, Nebraska (referred to in these instructions and the accompanying Verdict Form 2 as the "Martin Bay, Nebraska, Derailment"). Union Pacific alleges that the Martin Bay Train derailed due to the failure of an axle on a railcar (referred to in these instructions as the "Martin Bay Railcar"). Union Pacific claims that Progress Rail was negligent in connection with the Martin Bay, Nebraska, Derailment by failing to remove corrosion pitting from the fillet area of the Martin Bay Railcar axle, and allowing the axle back into service.

Union Pacific also alleges that Progress Rail's alleged negligence was the direct and proximate cause of the Martin Bay, Nebraska, Derailment.

Progress Rail denies that it was negligent or that any act or omission by Progress Rail was a direct and proximate cause of the damages Union Pacific has alleged.

I. UNION PACIFIC'S BURDEN OF PROOF

Before Union Pacific can recover against Progress Rail for the Martin Bay, Nebraska, Derailment, Union Pacific must prove, by the greater weight of the evidence, each and all of the following:

1. That Progress Rail was negligent in violating the Code of Federal Regulations promulgated by the Federal Railway Administration, or violating the standard of care set forth in the AAR G-II Manual by:

a. Failing to properly inspect and evaluate the fillet of the axle on the Martin Bay Railcar for corrosion pits before mounting the roller bearing;

b. Failing to properly remove corrosion pits from the fillet of the axle to avoid fatigue cracking and failure of the axle; and/or

c. Failing to apply the proper amount of rust preventative to the fillet.

2. That this negligence was a proximate cause of the Martin Bay, Nebraska, Derailment;

3. That the Martin Bay, Nebraska, Derailment was a proximate cause of some damage to Union Pacific; and

4. The nature and extent of that damage.

If Union Pacific has *not* met this burden of proof, then your verdict must be for Progress Rail with respect to the Martin Bay, Nebraska, Derailment.

On the other hand, if Union Pacific *has* met this burden of proof, then you must consider Progress Rail's affirmative defense of comparative negligence.

II. COMPARATIVE NEGLIGENCE

In defense to the Union Pacific's claim for the Martin Bay, Nebraska, Derailment, Progress Rail claims that Union Pacific itself was negligent. Union Pacific denies Progress Rail's allegations of contributory negligence.

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

1. That Union Pacific was negligent in one or more of the following ways:

a. In failing to inspect or repair the equipment, as required by the Code of Federal Regulations;

b. In allowing the axle on the Martin Bay Railcar and wheel set to continue in service;

c. Through its participation on the AAR, agreeing to the standards for the inspection and reconditioning of railcar axles, as set forth in the G-II Manual;

d. In failing to prohibit the use of Class F (6 1/2 x 12) axles on unit coal car trains;

e. In failing to require its customers to use Class K (6 1/2 x 9) axles on unit coal car trains;

f. In failing to restrict trains on Union Pacific track to only Class K (6 1/2 x 9) axles on unit coal car trains;

g. In failing to place age limitations on axles used on unit coal car trains;

h. In failing to place mileage limitations on axles used on unit coal car trains;

i. In failing to track the mileage of individual axles and eliminating them from service after they have reached an excessive number of miles; and

2. That this negligence on the part of Union Pacific was a proximate cause of its own damages.

III. EFFECT OF FINDINGS

If Union Pacific *has* met its burden of proof and Progress Rail *has not* met its burden of proof, then your verdict with regard to the Martin Bay, Nebraska, Derailment must be for Union Pacific.

If both Union Pacific and Progress Rail have met their burdens of proof, then you must compare the negligence of each with that of the other.

1. If upon comparison you decide that Union Pacific's negligence was equal to or greater than the negligence of Progress Rail, then your verdict must be for Progress Rail with regard to the Martin Bay, Nebraska, Derailment.

2. If, however, upon comparison, you decide that Union Pacific's negligence was less than half of the negligence of Progress Rail, then your verdict must be for Union Pacific with regard to the Martin Bay, Nebraska, Derailment. To compute the amount of that verdict you shall determine the amount of Union Pacific's damage in accordance with Instruction No. 12. You must then decide what percentage of the total negligence was attributable to Union Pacific. The total damages to Union Pacific will be diminished proportionately by that same percent, resulting in a verdict for the balance only.

INSTRUCTION NO. 9

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.

INSTRUCTION NO. 10

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

INSTRUCTION NO. 11

It is claimed that 49 C.F.R. § 215.105 and the standards set forth in the AAR G-II Manual were violated. If you find that they were, that does not necessarily prove negligence. The violation of a regulation is evidence that you may consider in deciding whether or not there was any negligence.

INSTRUCTION NO. 12

If you return a verdict for Union Pacific, then you must decide the amount of money which will reasonably and fairly compensate Union Pacific for any of the following elements of damage sustained, which you find were proximately caused by the fault of the defendant.

First, the cost of restoration reasonably incurred for any necessary repairs to any property that was damaged;

Second, the cost reasonably incurred for any necessary replacement of property that was damaged; and

Third, incidental costs for the disruption, delay, or inconvenience reasonably incurred during any necessary repair to or replacement of any damaged property.

Whether any of these elements of damage has been proved by the evidence, and the extent of such damage, is for you to determine. Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damage by way of punishment or through sympathy. Also keep in mind that it is the duty of any injured party to use reasonable diligence and reasonable means, under the circumstances, to take advantage of any reasonable opportunity to reduce or minimize loss or damage. Accordingly, you should reduce the amount of Union Pacific's total damages by the amount Union Pacific received for salvage value of damaged property.

INSTRUCTION NO. 13

There are rules you must follow when you go to the jury room to deliberate and return with your verdicts.

First, you will select a 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 this without going against what you believe to be the truth, because all jurors have to agree on the verdicts.

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

Do not be afraid to change your mind if the discussion persuades you that you should. But, do not come to a decision just because other jurors think it is right, or just to reach a verdict. Remember you are not for or against any party. You are judges – judges of the facts. Your only job is to study the evidence and decide what is true.

Third, if you need to communicate with me during your deliberations, you may send note to me signed by one or more of you. You may contact Ms. Frahm or call my chambers at tel. 661-7323 to inform a member of my staff that you have a note for me. I will respond as soon as possible either in writing or here in court. While you are deliberating, do not tell anyone - including me - how many jurors are voting for any side.

Fourth, your verdicts have to be based only on the evidence and on the law that I have given to you in my instructions. Nothing I have said or done was meant to suggest what I think your verdicts should be. The verdicts are entirely up to you.

Finally, the verdict forms are the written notices of the decisions that you reach in this case. You will take these forms to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in the forms, sign and date them, and advise Ms. Frahm or call my chambers at 661-7323, and tell whoever answers the telephone that you have a verdict and are ready to return to the courtroom.