

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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Scott Kowalewski  
Plaintiff,

Case Type: Personal Injury - FELA  
Court File No.: 27-CV-17-145

v.

**ORDER AND MEMORANDUM**

BNSF Railway Company, a  
Delaware corporation,  
Defendant.

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The above-entitled matter came before the Honorable Amy Dawson, Judge of District Court, on December 19, 2017, upon Plaintiff Scott Kowalewski's Motion for Sanctions. Paula Jossart, Esq., and Joseph Saylor, Esq., appeared on behalf of the Plaintiff, Scott Kowalewski. Patrick Sweeney, Esq., and Daniel Haws, Esq., appeared on behalf of the Defendant, BNSF Railway Company.

Additionally, the above-entitled matter came before the Honorable Amy Dawson, Judge of District Court, on January 9, 2018, and January 10, 2018, upon Defendant BSNF Railway Company's Motion to Exclude Expert Testimony. Paula Jossart, Esq., and Joseph Saylor, Esq., appeared on behalf of the Plaintiff, Scott Kowalewski. Patrick Sweeney, Esq., and Daniel Haws, Esq., appeared on behalf of the Defendant, BNSF Railway Company.

Based upon all of the files, records, and proceedings herein, the Court being duly advised,

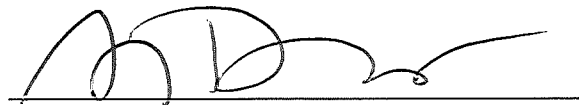
**IT IS HEREBY ORDERED THAT:**

1. Plaintiff's Motion for Sanctions is hereby **GRANTED**.

- a. Defendant's liability and causation defenses are stricken, and judgment is entered in favor of Plaintiff on liability and causation.
  - b. BNSF is ordered to pay costs and attorney's fees incurred by Plaintiff as a result of its misconduct, in an amount to be proven.
  - c. The parties are instructed to supply the Court with a list of all outstanding motions in limine and objections to evidence which, in their view, are relevant to the issue of damages, by 3:00 p.m. Thursday, February 8, 2018.
  - d. Any new motion in limine necessitated as a result of this Order must be filed by Thursday, February 8, 2018.
2. Defendant's Motion to Exclude Expert Testimony is **DENIED**.
  3. The jury trial scheduled to begin on February 12, 2018 shall go forward solely on the issue of damages.
  4. Defendant BNSF and its attorney, Patrick Sweeney, are ordered to appear on February 23, 2018 at 10:30 a.m. and show cause why they should not be held in contempt of Court.
  5. A hearing on the imposition of additional financial sanctions sufficient to deter future misconduct shall also be held on February 23, 2018 at 10:30 a.m.
  6. The Court shall consider evidence concerning the amount of costs and attorney's fees incurred by Plaintiff as a result of BNSF's misconduct at the hearing on February 23, 2018 at 10:30 a.m.
  7. BNSF is ordered to pay the fees of Special Master Gary Larson.
  8. The parties are invited to submit any relevant briefs, affidavits, and evidence concerning issues to be heard at the February 23, 2018 hearing no later than February 21, 2018.
  9. The attached Memorandum is incorporated into this Order.

Dated: February 5, 2018

**BY THE COURT:**



Amy Dawson  
Judge of District Court

## MEMORANDUM

### **I. Introduction**

Plaintiff Scott Kowalewski (“Plaintiff,” or “Kowalewski”) has filed this action against Defendant BNSF Railway Company (“BNSF”), alleging that he suffered severe respiratory and neurological injuries following exposure to hazardous chemicals in the course and scope of his employment as a switchman. Kowalewski brings suit alleging negligence under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, as well as violations of the Federal Safety Appliance Act (“FSAA”), 49 U.S.C. § 20302, *et seq.* and federal safety regulations.

Currently pending before the Court is Kowalewski’s Motion for Sanctions. The facts of this case are familiar to the parties, and are discussed at length in the Court’s January 11, 2018 Order and Memorandum Denying BNSF’s Motion for Summary Judgment. They will not be repeated at length here, except as they are relevant to Kowalewski’s Motion for Sanctions.

### **II. Summary of Facts**

While working in BNSF’s Northtown yard on January 19, 2014, Kowalewski and his co-worker Michael Gehrz (“Gehrz”) noticed what a “rotten egg smell” that quickly became “a very pungent, overwhelming sweet” smell. Immediately after noticing this smell, Kowalewski began to cough profusely and experienced difficulty speaking and breathing. In addition to a burning sensation in his lungs, nose, air passage, and eyes, Kowalewski experienced headaches, dizziness, and tremors throughout his body. This pain worsened as Kowalewski’s exposure continued, to the point where he required assistance entering and exiting the utility vehicle that

transported him and Gehrz from the scene. BNSF attributed Kowalewski's chemical exposure to two cars on Track 17, one of which was an empty sulfur dioxide car later discovered to have not been on Track 17 until 3:15 p.m., rather than the 11 hydrocarbon cars shown on video being humped at a high rate of speed on Track 14 less than 40 feet away from where Kowalewski was working. These 11 cars were carrying "casing head gasoline," a known inhalation hazard comprised of various hydrocarbons including benzene, hydrogen sulfide, and toluene.

BNSF misled Kowalewski by representing that he was exposed to sulfur dioxide, and Kowalewski was subsequently treated for sulfur dioxide exposure at Hennepin County Medical Center ("HCMC"). BNSF failed to inform Kowalewski or his treating physicians at HCMC of the possibility that he may have been exposed to hydrocarbons released from the 11 cars being humped on Track 14 at excessive speeds. Kowalewski has presented evidence that it is important for treating physicians to know what chemicals an employee may have been exposed to so that appropriate treatment can be rendered, and that if his treating physicians had known that he had been exposed to hydrocarbons, they would have provided him with different treatment that may have remediated the effects of his exposure.

Kowalewski underwent regular physicals which indicate that he was a healthy individual prior to his exposure on January 19, 2014. Following his exposure, however, Kowalewski suffered a severe degenerative neurological injury that his experts opine was caused by exposure to hydrocarbons. He has been diagnosed with reactive airways disease syndrome (RADS), vocal cord dysfunction, Posttraumatic Stress Disorder, and Parkinsonism. Kowalewski's expert presented evidence that exposure to chemicals found in well head casing gasoline can cause

central nervous system injuries, including Parkinsonism. Pl.'s Resp. to BNSF's Mot. to Exclude Experts, 42-44.

### **III. BNSF's Misconduct In the Course of Its Investigation and During Litigation**

Allegations of BNSF's misconduct in this case are both plentiful and well-documented. Kowalewski contends that BNSF engaged in misconduct "within minutes" of his exposure at the Northtown yard in Fridley, Minnesota ("Northtown"), on January 19, 2014, and that BNSF's misconduct has "pervaded all proceedings since." Pl.'s Mot. for Sanctions, 1. He argues that sanctions against BNSF are necessary "in order to avoid the extreme prejudice caused by its abuses in this case." *Id.* Kowalewski draws the Court's attention to a number of "discovery and evidentiary abuses" attributable BNSF, including: failure "to inspect and preserve" the 11 hydrocarbon cars that were humped on Track 14 on the date of his exposure; refusal to comply with the Court's September 13, 2017 Order Granting Plaintiff's Motion to Compel production of the 11 hydrocarbon cars for inspection at the Northtown yard; failure to preserve "shipping papers and documents concerning the exact contents of the 11 hydrocarbon cars;" failure to "preserve or produce video and audio of the scene/exposure;" failure to obey the Court's October 13, 2017 Order Granting Plaintiff's Motion to Compel by "not producing the BNSF Claims Manual in place on the day of the accident;" and, "other discovery abuses" such as "dumping volumes of documents on plaintiff after the discovery deadlines and again the day before expert disclosures," and concealing the identity of a crucial witness until after BNSF had paid the witness a confidential settlement. *Id.* at 1-2.

On February 2, 2018, Plaintiff's counsel filed a supplemental memorandum with the Court concerning "newly uncovered documentation" relevant to Kowalewski's Motion for Sanctions and in response to BNSF's Motion to Exclude Expert Testimony. Pl.'s Suppl. Mem. Supp. Sanctions and in Resp. to BNSF's Mot. to Exclude Experts, 1. This documentation, attached to Kowalewski's supplemental memorandum, was "derived from government data" and illustrates that BNSF had previously reported at least seven "unintentional releases" of the same product carried in the 11 hydrocarbon cars involved in Kowalewski's exposure. *Id.* These seven releases occurred in the same time frame as Kowalewski's exposure, originated from the same generator of the product (Occidental Energy), came from the same location (Levelland, Texas), and list BNSF as the rail carrier. *Id.* Two of these incidents occurred in the Northtown yard in October 2013, approximately three months before Kowalewski's exposure. *Id.* Contrary to BNSF's representations throughout the present case, five of these incidents "specifically identify the 'Technical/Trade Name' of the product as 'Natural Gas Condensate,'" which is a synonym for "casing head gasoline." *Id.* Kowalewski's supplemental memorandum notes that both BNSF and its experts deny that the product in the 11 hydrocarbon cars on the day of Kowalewski's exposure was natural gas condensate, or casing head gasoline. *Id.* at 2.

Prior to Kowalewski's filing of this Supplemental Memorandum, BNSF failed to produce any information or documentation related to the seven related release incidents. *Id.* at 3. Such materials would include "documentation of the product involved, MSDS and shipping papers related to the events, recommendations for preventing future problems, waybills, and BNSF's own incident reports." *Id.* at 4. Rather than producing such materials, BNSF has "steadfastly

denied” that it has any documentation of the product in the 11 hydrocarbon cars outside of its “reconstituted” waybills. *Id.* This withheld evidence is relevant to the question of the foreseeability of Kowalewski’s injuries on January 19, 2014, as well BNSF’s failure to follow any remedial recommendations. BNSF’s failure to produce these materials constitutes a deliberate violation of the Court’s earlier orders directing it to produce information concerning the product that was in the 11 hydrocarbon cars as well as events involving the venting or leaking of hazardous materials. *Id.* at 2.

Kowalewski argues that he is “severely prejudiced in his ability to present evidence and fully informed experts at trial” as a result of BNSF’s misconduct in the immediate aftermath of his January 19, 2014 exposure as well as its misconduct throughout the course of litigation. Pl.’s Mot. for Sanctions, 42. In particular, he underscores BNSF’s failure to inspect the 11 hydrocarbon cars on Track 14 for evidence of venting following his exposure, noting that two of these 11 cars were ultimately destroyed and that at least one of these now-destroyed cars had to be repaired within three months of his exposure after it was found to be leaking as a result of a faulty safety valve. *Id.* at 23, n.32, 24. Kowalewski proposes a range of sanctions under this Court’s discretion and inherent power as well as Minnesota Rule of Civil Procedure 37, that he asserts “are needed to offset this prejudice,” including: striking BNSF’s liability and causation defenses; allowing the case to proceed to trial only on the issue of damages; ordering BNSF “to pay costs and attorney fees incurred because of its evidentiary and discovery misconduct;” holding a separate hearing to impose upon BNSF “an additional financial sanction sufficient to deter future misconduct;” ordering that BNSF pay the fees of Special Master Gary Larson

appointed pursuant this Court's Order dated December 1, 2017; and, ordering that BNSF pay "any and all other sanctions available," including "findings of contempt, fees to the Court, or additional Rule 11 hearing." *Id.* at 42-43.

In response to Kowalewski's Motion for Sanctions, BNSF asserts that it conducted "an objectively reasonable investigation" following Kowalewski's chemical exposure. Def.'s Mem. of Law in Opp'n to Pl's Mot. for Sanctions, 1. It argues that Kowalewski asks the Court for "the most severe sanctions available," but that "there has been no conduct justifying sanctions" in either its initial investigation or its "claimed dilatory conduct . . . related to discovery." *Id.* at 1-2. BNSD also argues that although "it was unable to comply with the Court's inspection order" with respect to the 11 hydrocarbon cars, its offer to pay the costs incurred by Kowalewski's liability expert Patrick Reilly ("Reilly") in inspecting the surviving 9 cars in their disparate locations "eliminated any potential prejudice." *Id.* at 32-33, 38. Further, BNSF argues that it did not engage in spoliation of evidence with respect to these 11 cars because its "first notice that Kowalewski claimed injury relating to those cars came nearly 3.5 years" after his exposure. *Id.* at 38. It asserts that both parties "are equally situated with respect to evidence regarding the 11 cars." *Id.* Finally, BNSF argues that it "did not fail to comply with any other discovery orders," and that "there is no good-faith basis to assert a claim of sanctions" against it. *Id.*

**A. BNSF failed to adequately inspect the 11 hydrocarbon cars on the date of the accident, and has failed to produce these 11 cars for inspection upon order of the court.**

BNSF attempted to obscure the true source of the chemical release by focusing on cars other than the 11 hydrocarbon cars on Track 14. Pl.'s Mem. in Opp'n to Def's. Mot. for Summ.



J., 9. BNSF engaged in misdirection following Kowalewski's exposure by conducting a "sham investigation" of two unrelated cars on Track 17 while failing to fully inspect the 11 hydrocarbon cars on Track 14, and that it is now attempting to use the results of this investigation as "proof" that no hydrocarbon exposure occurred. Pl.'s Mot. for Sanctions, 26. BNSF knew within hours of the exposure that the 11 hydrocarbon cars on Track 14 were involved and yet BNSF released the cars from the yard on January 21-22, 2014, rather than retaining or preserving the cars for a full inspection. Pl.'s Mem. in Opp'n to Def's Mot. for Summ. J., 10. BNSF, however, has consistently denied awareness of any involvement of the 11 hydrocarbon cars throughout this litigation, and indeed, since Kowalewski's initial exposure. *Id.*

BNSF attempted to obscure the likely source of Kowalewski's exposure beginning with its initial response. For instance, in the wake of the exposure BNSF directed the local hazmat team to an empty sulfur dioxide car on Track 17, one of the two unrelated cars that ultimately was found not to have caused the chemical exposure. *Id.* at 13. Northtown Trainmaster Joseph Pisano ("Pisano") eventually admitted in deposition testimony that this sulfur dioxide car was not actually present on Track 17 until approximately 3:15 p.m., over five hours after Kowalewski's reported chemical exposure. *Id.* at 13 (citing Jossart Aff. Ex. 22, Dep. of Pisano, 41-43; Jossart Aff. Ex. 23, Car Inquiry for PROX 28932).

BNSF's immediate efforts to conceal the potential involvement of the 11 hydrocarbon cars extended to the information that it provided to Kowalewski and his treating physicians. *Id.* at 4. In coordination with its investigation of the two unrelated sulfur dioxide cars, BNSF informed Kowalewski and his doctors at the Hennepin County Medical Center that he "was, at

most, exposed to sulfur dioxide.” *Id.* at 27. Additionally, although Kowalewski requested Material Safety Data Sheets (“MSDS”) for all chemicals that he was potentially exposed to from BNSF’s industrial hygiene department, BNSF directed his request to a claims representative with “no medical or hazmat background.” *Id.* at 27. BNSF eventually provided Kowalewski with the MSDS for sulfur dioxide “after many months,” despite having previously ruled out the possibility of sulfur dioxide exposure. *Id.* at 27-28 (citing Jossart Aff., Ex. 26, Email from Stoddart to Kowalewski dated October 31, 2016). BNSF’s course of action is at odds with testimony of BNSF’s Medical Director Dr. Laura Gillis, who stated that “it is important for treating physicians to know what chemicals an employee may have been exposed to so that appropriate treatment can be rendered. *Id.* at 6 (citing Jossart Aff. Ex. 13, Dep. of Dr. Gillis, 43-44). As a result of BNSF’s response, Kowalewski was deprived of an accurate diagnosis and appropriate treatment for potential exposure to hydrocarbons in the immediate aftermath of his exposure, during which time he had displayed clear signs of neurological distress and was in clear need of emergency care. *Id.* at 27-28. If Kowalewski’s treating physicians had known that he had been exposed to hydrocarbons, they would have provided him with different treatment that may have remediated his injury. *Id.* at 28.

Correspondence between Northtown Terminal Superintendent John Wright (“Wright”) and Federal Railroad Administration (“FRA”) Hazardous Materials Specialist Alan Budleski (“Budleski”) dated January 20, 2014 further establishes the scope of BNSF’s efforts to obscure the source of the exposure. *Id.* at 11-12 (citing Jossart Aff. Ex. 20, Email correspondence dated 1/20/14 between Alan Budleski and John Wright; Jossart Aff. Ex. 19, Dep. of Wright, 84-88).

Although Wright initially told Budleski that “[a]ll indications reflect a false alarm in this situation,” Budleski responded incredulously by writing “FALSE ALARM? Two employees taken to the hospital? What information do you have that could be released? Please forward me the names and contact information of the two individuals.” *Id.* (citing Jossart Aff. Ex. 20, Email correspondence dated 1/20/14 between Alan Budleski and John Wright). Budleski also inquired whether “an overview of the potential cars that might have leaked in the immediate area” was conducted. *Id.* BNSF subsequently told the FRA that it had completed its investigation of the two unrelated cars on Track 17, that an “air monitor test was completed with a zero reading” and that “no leaks were found,” and that the employees involved in the exposure had been released from the hospital. *Id.* at 12, 29-30. Rather than retaining, testing, and preserving the remaining cars in the area for further inspection after learning that the two unrelated cars were not the source of the exposure, BNSF ended its investigation, sent its testing team home, and told the FRA that no employees had been harmed. *Id.* at 14, 30. It bears repeating that one of the two cars BNSF took the trouble to inspect was not even present at the injury scene until more than five hours afterwards.

In the course of BNSF’s investigation, it failed to solicit input from exposed employees about any odors they noticed, any symptoms they experienced, or any visual evidence they may have seen. *Id.* at 7-8. Additionally, BNSF’s air monitoring tests were deficient, as they failed to consider the testing’s proximity to potential sources and wind direction. *Id.* at 7-8. Both Kowalewski and his fellow exposed railyard employee, Michael Gehrz (“Gehrz”), displayed “classic symptoms of being exposed to hydrocarbons” which were confirmed by BNSF

management and coworkers and consistent with MSDS showing the dangers of hydrocarbon exposure. *Id.* at 13 (citing Jossart Aff. Ex. 21, MSDS sheets for well head casing oil).

Despite BNSF's contention that it was "initially unaware" of the 11 hydrocarbon cars' involvement, available video evidence demonstrates that the cars were the only objects in motion at the time of Kowalewski's exposure and that the cars were coupling at the exact location of the exposure at the exact time the exposure occurred. *Id.* at 5, 13. Kowalewski notes that the hydrocarbon cars' involvement was apparent because of the exposure's sudden onset, which "could only come from venting of tank cars—which occurs suddenly," rather than a slow leak from a car or other source that had been sitting undisturbed in the area. *Id.* at 3-4. Emergency venting of pressurized loads in rail cars carrying hydrocarbons is a concern in shipping, and that cars coupling together at speeds greater than the maximum mandated limit of four miles per hour are subject to venting because the collision's force creates more pressure in the tanks. *Id.* at 12-13 (citing Jossart Aff. Ex. 7, Dep. of Brady, 14-15; Jossart Aff. Ex. 8, AAR Field Guide to Tank Cars). Evidence in the record shows that the 11 hydrocarbon cars were coupling in excess of four miles per hour, and that the BNSF had previously received complaints from Northtown yard employees related to venting of tank cars due to overspeed coupling. *Id.* at 5-6 (citing Jossart Aff., Ex. 12, Dep. of Hooper 38-39).

Additionally, counsel for Kowalewski has presented evidence that BNSF had previously reported at least seven previous unintentional releases of the same product carried in the 11 hydrocarbon cars on January 19, 2014. Pl.'s Suppl. Mem. Supp. Sanctions and in Resp. to BNSF's Mot. to Exclude Experts, 1. . These seven releases occurred in the same time frame as

Kowalewski's exposure, originated from the same generator of the product (Occidental Energy), came from the same location (Levelland, Texas), and list BNSF as the rail carrier. *Id.* Two of these incidents occurred in the Northtown yard in October 2013, approximately three months before Kowalewski's exposure. *Id.* These previous instances of venting hydrocarbons in the Northtown yard had made BNSF aware of the potential for hydrocarbon cars to engage in venting and release of product, and that such release was foreseeable.

On February 2, 2018, Plaintiff's counsel filed a supplemental memorandum with the Court concerning "newly uncovered documentation" relevant to Kowalewski's Motion for Sanctions and in response to BNSF's Motion to Exclude Expert Testimony. Pl.'s Suppl. Mem. Supp. Sanctions and in Resp. to BNSF's Mot. to Exclude Experts, 1. This documentation, attached to Kowalewski's supplemental memorandum, was "derived from government data" and illustrates that BNSF had previously reported at least seven "unintentional releases" of the same product carried in the 11 hydrocarbon cars involved in Kowalewski's exposure. *Id.* These seven releases occurred in the same time frame as Kowalewski's exposure, originated from the same generator of the product (Occidental Energy), came from the same location (Levelland, Texas), and list BNSF as the rail carrier. *Id.* Two of these incidents occurred in the Northtown yard in October 2013, approximately three months before Kowalewski's exposure. *Id.* Contrary to BNSF's representations throughout the present case, five of these incidents "specifically identify the 'Technical/Trade Name' of the product as 'Natural Gas Condensate,'" which is a synonym for "casing head gasoline." *Id.* Kowalewski's supplemental memorandum notes that both BNSF

and its experts deny that the product in the 11 hydrocarbon cars on the day of Kowalewski's exposure was natural gas condensate, or casing head gasoline. *Id.* at 2.

Prior to Kowalewski's filing of this Supplemental Memorandum, BNSF failed to produce any information or documentation related to the seven related release incidents. *Id.* at 3. Such materials would include "documentation of the product involved, MSDS and shipping papers related to the events, recommendations for preventing future problems, waybills, and BNSF's own incident reports." *Id.* at 4. Rather than producing such materials, BNSF has "steadfastly denied" that it has any documentation of the product in the 11 hydrocarbon cars outside of its "reconstituted" waybills. *Id.* This withheld evidence is relevant to the question of the foreseeability of Kowalewski's injuries on January 19, 2014, as well BNSF's failure to follow any remedial recommendations. BNSF's failure to produce these materials constitutes a deliberate violation of the Court's earlier orders directing it to produce information concerning the product that was in the 11 hydrocarbon cars as well as events involving the venting or leaking of hazardous materials. *Id.* at 2.

Patrick Brady ("Brady"), BNSF's general director of hazardous materials, testified that BNSF should "have precision in the knowledge of materials that are specifically in [a] car" during an emergency response. Pl.'s Mot. for Sanctions at 6 (citing *Jossart Aff.*, Ex. 7, Dep. of Brady, 51). Brady confirmed that when an "unintentional release of hazardous materials occurs," as in the present case, "there is always an issue that 'should have been prevented,'" and that if the cars at an employee's precise location "are not the source of exposure (as it was determined here)," BNSF should then turn to examining "cars adjacent and in close proximity to the

workers' location, and even extend beyond BNSF's property line." *Id.* at 5 (citing Jossart Aff., Ex. 7, Dep. of Brady, 61, 84). Brady further confirmed that in the event of a hazardous material release, BNSF should "go to great lengths" to "identify what that odor could have come from," and explained that when a release occurs that it is important to "look at all cars in general, both hazmat and non-hazmat cars." *Id.* at 7 (citing Jossart Aff., Ex. 7, Dep. of Brady, 61-62, 69, 73). Additionally, Brady testified that a "meaningful inspection" of the 11 hydrocarbon cars on Track 14 "would necessarily include an examination of the pressure release valves" and the area on each car around these valves. *Id.* at 11 (citing Jossart Aff., Ex. 7, Dep. of Brady, 65).

BNSF General Foreman Lawrence Doremus ("Doremus"), BNSF's hazardous material designee who served as investigator on the date of the accident, testified that it is critical to "scan the whole area" and to "inspect all rail cars in the area" to identify "any signs of a leak on anything coming from anywhere." *Id.* at 8 (citing Jossart Aff., Ex. 15, Dep. of Doremus, 30, 31, 34, 35, 53). Despite this testimony, and despite acknowledging and identifying the cars as a possible source of the exposure by climbing on top of one of the hydrocarbon cars while looking for the exposure source upon his arrival at the Northtown yard, Doremus did not inspect any of the hydrocarbon cars. *Id.* Northtown Terminal Superintendent John Wright testified that "there is no evidence that BNSF ever inspected any of the 11 hydrocarbon cars to determine whether the release valves were properly calibrated or for signs of venting." *Id.* at 11 (citing Jossart Aff., Ex. 19, Dep. of Wright, 77).

BNSF's own internal protocol required it "to retain, inspect, document, and preserve the hydrocarbon cars, their shipping papers, and audio and video." Pl.'s Mot. for Sanctions, 10.

Section 1.2.3 of BNSF's General Code of Operating Rules ("GCOR"), "Equipment Inspection," states that "all tools, machinery, and other equipment involved, including the accident site, must be inspected by the foreman, another person in charge of the work, or other competent inspectors" when an accident "results in personal injury or death." *Id.* at 10 (citing Jossart Aff., Ex. 18, Excerpts of GCOR). Section 1.2.3 of BNSF's GCOR further requires that such equipment be "marked for identification and placed in the custody of the responsible manager or employee until the claims department is contacted and determines disposition." *Id.* Additionally, Section 1.2.4 of BNSF's GCOR, "Mechanical Inspection," requires inspection of "engines, cars, or other equipment involved in an accident that results in personal injury or death" before the equipment leaves the accident site. *Id.* Section 1.2.4 of BNSF's GCOR further requires that such equipment must then be further inspected by a mechanical department employee at the first terminal, who must "promptly report inspection results to the proper manager." *Id.*

BNSF failed to comply with its GCOR with respect to the 11 hydrocarbon cars on Track 14. *Id.* at 11. BNSF did not provide post-incident reports of inspection of any of the hydrocarbon cars, did not mark any of these cars for identification or place them in the custody of a manager, and did not thoroughly inspect these cars or their release valves either before they left the Northtown yard or at the next terminal. *Id.* BNSF's insistence that it "inspected" the 11 cars is misleading, because such inspections evidently consisted of "walking past or looking under" the cars or testing their brakes, which would not produce evidence of a venting tank car. *Id.* at 6, n.3.

Following BNSF's decision to allow the 11 hydrocarbon cars to leave the yard without thoroughly inspecting or testing them for evidence of venting, two of the 11 cars were destroyed.



*Id.* at 24. Documents produced by BNSF late in the course of litigation indicate that less than three months after the exposure, “at least one” of the two cars that were ultimately destroyed was “leaking and had a faulty safety valve” that had to be repaired. *Id.* at 23, n.32. Pursuant to the Secretary of Transportation’s Hazardous Materials Regulations (“HMR”) governing “nonconforming or leaking packages,” codified at 49 C.F.R. § 174.50, such leaking cars may be moved “only as required for safety” and must be repaired before they are allowed to be moved to be scrapped. *Id.* This missing or destroyed evidence is critical to proving Kowalewski’s case, and BNSF’s conduct has resulted in an irreparable loss of evidence that has severely prejudiced his ability to prove his case. *Id.* at 24.

The Court finds that in addition to engaging in misdirection, BNSF also engaged in spoliation of evidence because it failed to inspect and preserve critical evidence at the scene of the accident despite being required to do so by its own GCOR. *Id.* at 5. BNSF’s own protocols clearly triggered an investigation and preservation of the 11 hydrocarbon cars under the circumstances of this case. *Id.* at 9 (citing Jossart Aff., Ex. 6). BNSF’s decision to allow the hydrocarbon cars to leave the Northtown yard without properly inspecting them allowed the only physical evidence of chemical venting to leave its yard and be lost forever. *Id.* at 6. A thorough inspection of the 11 hydrocarbon cars was critical, because the “primary physical evidence left behind” following a tank car’s emergency pressure relief venting “is liquid or condensation of the chemical in the dome on top of the tank car.” *Id.* at 6. BNSF conducted such an inspection of the two unrelated cars on Track 17, but not the 11 hydrocarbon cars. *Id.* at 6. The Court finds that BNSF’s conduct in allowing the hydrocarbon cars to leave the yard was purposeful because “it

was abundantly clear to BNSF the hydrocarbon cars needed to be inspected and preserved,” that their deliberate actions resulted in spoliation of evidence that is highly prejudicial to Kowalewski’s ability to prove his case. *Id.* at 6-8 (citing Jossart Aff. Ex. 7, Dep. of Brady, 51, 69, 70, 73; Jossart Aff. Ex. 15, Dep. of Doremus, 30, 31, 34, 35, 53).

Kowalewski argues that BNSF’s behavior in “ensuring that [he] could not inspect” the cars by “hurr[ying] the hydrocarbon cars out of the yard and scatter[ing] them to the four winds,” rather than “testing and preserving what it knew was critical evidence,” is “the very definition of spoliation.” *Id.* at 11. Kowalewski has presented evidence that rather than thoroughly inspecting the 11 hydrocarbon cars, BNSF actively “attempted to obscure the source of the exposure” by directing attention away the hydrocarbon cars during its investigation and subsequently sending the cars out of the yard following the exposure without inspecting or testing them. *Id.* at 6, 12. Kowalewski has also presented evidence that BNSF effectively “directed both its local hazmat team and the Fridley Fire Department away from the hydrocarbon cars,” thereby directing others to “benign, non-evidence to obscure the truth” rather than conducting an open investigation. *Id.* at 12.

On September 11, 2017, the Court heard Kowalewski’s motion to compel the production of the 11 hydrocarbon cars at the Northtown yard for inspection. At this hearing, the Court took into consideration representations made by BNSF’s former counsel Brian Stofferahn (“Stofferahn”) at a June 30, 2017 hearing on one of BNSF’s motions to compel. Jossart Aff., Ex. 30, June 30, 2017 Transcript, 54-55). The Court noted that although Kowalewski’s counsel had hoped to conduct an inspection of the cars at the Northtown yard on July 11, 2017, Stofferahn

objected on the 30th day after being served with notice and said that the inspection could not be arranged by July 11, 2017. *Id.* The Court asked whether BNSF could have the 11 cars ready for inspection on July 19, 2017, and Mr. Stofferahn indicated that he believed it could. *Id.* Mr. Stofferahn represented that he had made arrangements to have two of the 11 cars available on July 19, 2017, and that he was working to arrange production of the remaining cars for inspection. *Id.* Stofferahn further indicated that if Kowalewski's expert wasn't available to inspect the cars on August 19, 2017, BNSF was willing to cooperate with Kowalewski's counsel on setting up possible future inspection dates. *Id.* Despite Mr. Stofferahn's representations, none of the 11 hydrocarbon cars were produced for inspection. Instead, Mr. Stofferahn no longer appeared on the record, and Mr. Sweeney represented at the Court's September 11, 2017 hearing on Plaintiff's Third Motion to Compel that BNSF could not produce any of the 11 hydrocarbon cars because it did not "possess them, have custody of them or control them."

Upon consideration of this previous hearing testimony and BNSF's subsequent refusal to produce the 11 cars, the Court made findings on the record and issued an Order Granting Plaintiff's Motion to Compel on September 13, 2017. *Jossart Aff., Ex. 32, Sept. 11, 2017 Transcript, 31.* The Court ordered production of the 11 hydrocarbon cars for inspection at the Northtown yard during the week of September 24, 2017 through September 29, 2017. BNSF failed to mention either to the Court or Kowalewski's counsel at any point prior to these hearings that two of the tank cars had already been destroyed and inspection would be impossible. Records produced after issuance of the Court's order granting Plaintiff's motion to compel inspection and the passing of the discovery deadline show that at least one of these two cars "was

being scrapped and leaking its cargo,” less than three months after the January 19, 2014 exposure. *Id.* at 33.

Rather than comply with the Court’s Order, BNSF sought a writ of prohibition from the Minnesota Court of Appeals and simultaneously brought a motion in this Court to stay enforcement of the Order pending its appeal. This Court issued an Order on September 18, 2017 denying BNSF’s Motion to Stay. The Minnesota Court of Appeals issued an Order on September 20, 2017 in which it denied BNSF’s petition for prohibition and further denied its motion to stay as moot. The Minnesota Court of Appeals found that:

[t]he record, “including statements of counsel to the court and documents indicating that petitioner exercised control over specific railcars during the relevant period, supports the district court’s findings on ability to comply, control, and impossibility, and those findings are not clearly erroneous. Petitioner has not identified any legal standard or criteria that the district court failed to apply or provided legal authority establishing that granting a motion to compel under the circumstances presented here constitutes an abuse of discretion.

*In re BNSF Ry. Co., Petitioner*, No.A17-1435, 2 (Minn. Ct. App. Sept. 20, 2017). BNSF appealed to the Minnesota Supreme Court for review of the Court of Appeals’ September 20, 2017 Order. The Minnesota Supreme Court issued an order on September 25, 2017, in which it denied BNSF’s petition for further review, and denied as moot BNSF’s motion to stay the district court’s September 11, 2017 Order. *In re BNSF Ry. Co., Petitioner*, No.A17-1435 (Minn. Sept. 20, 2017). In the face of these appellate court orders, BNSF has failed to produce any of the remaining 9 hydrocarbon for inspection at the Northtown yard as ordered. Pl.’s Mot. for Sanctions, 31. BNSF has made clear that it will not comply with the Court’s Order, writing that it

will not “produce what it does not own,” and that “no finding by the Court to the contrary can change that.” Jossart Aff., Ex. 29, Sweeney letter dated November 7, 2017.

The Court finds that BNSF and its counsel have made multiple inconsistent statements and misrepresentations with regard to the availability of the 11 hydrocarbon cars humping on Track 14 at the time of Kowalewski’s exposure, and they have continually misled the Court regarding the existence and location of these cars and their ability to produce them for inspection. The Court finds that BNSF has engaged in misconduct through willful refusal to comply with this Court’s September 11, 2017 Order compelling production the 11 hydrocarbon cars for inspection in the Northtown yard, which was affirmed by the Minnesota Court of Appeals and the Minnesota Supreme Court. The Court further finds that BNSF’s misconduct in failing to produce the 11 hydrocarbon cars has substantially prejudiced Kowalewski’s ability to prove his case.

**B. BNSF has failed to produce court-ordered audio relevant to the exposure, the investigation, and Kowalewski’s injuries.**

BNSF only produced audio recordings from Northtown yard through 11:52 a.m. on January 19, 2014, approximately two hours after his exposure, “despite claims personnel requesting more and its claims manual requiring preservation.” Pl.’s Mot. for Sanctions, 4. As a result of BNSF’s failure to produce any additional audio, there exists no audio recordings to shed light on the entirety of BNSF’s supposed investigation of the exposure source. *Id.* Kowalewski draws the Court’s attention to “the last recording on the ‘YR’ audio,” a radio call either to or from BNSF General Foreman Lawrence Doremus (“Doremus”), who was BNSF’s hazardous material designee and served as investigator on the date of the accident. *Id.* Kowalewski notes

that no audio can be heard beyond this radio call “despite video showing Doremus and the fire department looking at and climbing on top of one of the hydrocarbon cars, while talking on a radio.” *Id.* (citing Jossart Aff. Ex. 2, Yard Video, East Tower 7 and 8 of 11). BNSF’s own protocols required preservation of audio from all sources, but BNSF either failed to preserve or failed to produce the audio. *Id.* at 9 (citing Jossart Aff., Ex. 6, BNSF Claims Manual).

Kowalewski brought a motion to compel the production of full, unedited audio of the Northtown yard recorded by BNSF on January 19, 2014. He argued that he had only received limited portions of audio that were selected by BNSF’s claims department, and that the audio that BNSF produced did not contain a specific conversation that he remembered having. The Court made findings on the record on September 11, 2017, and subsequently issued an Order Granting Plaintiff’s Motion to Compel production of the native audio recordings of radio communications in the Northtown yard from 9:00 a.m. to 5:00 p.m. on the date of the accident. Following this order, BNSF failed to produce audio recordings of the Northtown yard after 11:52 a.m., which would have included “Doremus talking on the radio with other BNSF officials while standing on top of one of the hydrocarbon cars and during investigation” of the two unrelated cars. *Id.* at 15.

BNSF’s claims manual requires that audio from all sources should be preserved. Jossart Aff., Ex. 6, Claims Manual Portions. Portions of BNSF’s claims manual related to preservation of audio recordings mandate that “[f]ield and yard audio associated to a . . . major incident is secured by the EP team and uploaded to LDFS as part of the investigation.” *Id.* at Ex. 6.

Evidence shows that Nate McLaughlin (“McLaughlin”), a BNSF General Claims Agent, sent out

an e-mail at 1:12 p.m. on the date of the exposure requesting audio and video from “MN Pullout Channel 2082” for “4 hours before and 4 hours after” the exposure. Jossart Aff., Ex. 5.

The Court finds that BNSF has engaged in spoliation of evidence either by destroying or intentionally failing to secure field and yard audio associated with Kowalewski’s chemical exposure on January 19, 2014 that caused him immediate and readily apparent neurological injury. This audio was requested by Kowalewski’s counsel through discovery and the Court ordered its full production on the record at the September 11, 2017 hearing on Kowalewski’s motion. The Court further finds that evidence produced by Kowalewski, as well as BNSF’s status as an experienced litigant and its own internal protocols, establish that BNSF cannot credibly argue that it did not know it was required to preserve audio related to the January 19, 2014 exposure and ultimately produce such evidence. The Court further finds that BNSF’s misconduct in failing to produce the yard audio of its investigation has substantially prejudiced Kowalewski’s ability to prove his case.

**C. BNSF’s failure to produce court-ordered video relevant to the exposure, investigation, and Kowalewski’s injuries.**

Kowalewski has produced evidence that BNSF destroyed video of certain channels, its investigation, and car movements. Pl.’s Mot. for Sanctions, 9. This behavior contravenes directives contained in BNSF’s claims manual, which requires that “video footage from all cameras that could potentially capture an incident area” be secured “regardless of whether the area was captured.” *Id.* (citing Ex. 6). BNSF’s Claims Manual also requires that if “longer than four minutes of video is needed, the evidence preservation team should be notified.” *Id.* In this case, BNSF knew it needed more than four minutes of video, and indeed, initially obtained more.

*Id.* Kowalewski has submitted evidence that BNSF’s own protocols required retention, inspection, documentation, and preservation of video from all cameras that could potentially capture an incident area, but BNSF failed to retain and preserve highly relevant video and has failed to produce video of certain channels, its investigation, and car movements. *Id.*

Kowalewski draws the Court’s attention to BNSF’s failure to produce “video of the investigation of the two unrelated cars” on Track 17, as well as “video of the car movements in the yard after 11:50 a.m.,” including “video of the car that BNSF inspected that records show was not in the yard until 3:15 p.m., four hours after the exposure.” *Id.* at 15. Additionally, Kowalewski highlights the absence of “video of Kowalewski in the yard and yard office, which would show Kowalewski’s physical state and his movements.” *Id.* at 16. Kowalewski argues that BNSF cannot credibly say that it was unaware that it should retain all video because it “retained other videos that were clearly not related to the exposure” and because its claims manual clearly outlines retention requirements. *Id.*

As part of its July 28, 2017 Order Granting Plaintiff’s Motion to Compel, the Court ordered that BNSF produce “the unedited version of the BNSF Northtown Yard Terminal Surveillance videos,” including videos taken in the Northtown yard, the employee break room, and the employee parking lot. The Court ordered that such videos be produced “in their entirety and in their native format.” It has now become apparent that BNSF failed to preserve or produce video of its investigation of the two unrelated cars on Track 17, video of car movements, video of the actions of BNSF and its investigators in the Northtown yard after 11:50 a.m. on January 19, 2014, and video of Kowalewski in the yard or yard office that would have shown his physical



state and his movements. *Id.* at 15-16. Additionally, BNSF failed to preserve and produce video from the employee parking lot and break room following Kowalewski's exposure. *Id.* at 22. Such video which would have demonstrated the immediate effects of the chemical exposure on Kowalewski's physical state and movements and enabled a visual comparison with video footage from earlier in the day of Kowalewski's condition prior to the exposure, which BNSF also failed to preserve and produce. Despite BNSF's assertions that it did not preserve parking lot video because of a lack of relevant connection with Kowalewski's exposure in the yard, BNSF did, however, retain and produce other videos unrelated to Kowalewski's exposure, including video of the car shop. *Id.* at 16. Additionally, Northtown Trainmaster Joseph Pisano ("Pisano") testified that there was a functioning camera in the break room on January 19, 2014. This sworn testimony directly contradicts representations made to this Court by BNSF and its counsel at the December 19, 2017 hearing on Plaintiff's Motion for Sanctions that there was no camera in the break room.

The Court finds that BNSF has engaged in misconduct, specifically, spoliation of evidence, by either destroying or deliberately failing to produce video evidence related to Kowalewski's exposure that it was ordered to produce in the Court's July 28, 2017 Order Granting Plaintiff's Motion to Compel. The Court further finds that evidence produced by Kowalewski, as well as BNSF's status as an experienced litigant and its own internal protocols, establish that BNSF cannot credibly argue that it did not know it was required to preserve this video evidence related to the January 19, 2014 exposure. The Court further finds that BNSF's misconduct in failing to produce video of the investigation of the two unrelated cars, video of the

car movements in the yard after 11:50 a.m., video of the car that BNSF inspected that records show was not in the yard until 3:15 p.m., and video of Kowalewski in the yard and yard office, has substantially prejudiced Kowalewski's ability to prove his case.

**D. BNSF failed to preserve and produce shipping papers, waybills, and material safety data sheets concerning the product carried by the 11 hydrocarbon cars, and has responded to court-ordered discovery by producing "reconstituted" waybills.**

BNSF failed to properly maintain shipping papers, Waybills, and Material Safety Data Sheets ("MSDS") affiliated with the 11 hydrocarbon cars pursuant to the requirements of its claims manual and emergency preparedness plan. *Id.* at 9. BNSF's claims manual requires that MSDS be preserved, and states that these documents "are readily available to the claims department and are 'designed to provide you with detailed information of the chemical you are using.'" *Id.* (citing Jossart Aff., Ex. 6, Claims Manual Portions). Pursuant to its Emergency Preparedness Plan for Northtown yard, BNSF was also required to obtain the waybills "for all cars that could be the source of an exposure, including adjacent cars and all placarded cars" in the "general area" of the exposure in order to assist with identifying information about the source and contents of an exposure. *Id.* (citing Jossart Aff. Ex. 16, Northtown Preparedness Plan). BNSF's Emergency Preparedness Plan further required it to: retrieve "shipping and car information from BNSF's computer system and from the Emergency Response Guidebook;" review "train movement documentation to determine potential sources of the exposure;" obtain and review the MSDS in order to obtain information about the chemicals implicated in the exposure; and, isolate the cars and shipment and contact the shipper. *Id.* Such shipping papers contain detailed information about the contents of the cars. *Id.* at 23.

BNSF ultimately “destroyed the shipping papers for the cars,” rather than preserving them. *Id.* at 14. BNSF admits that it must “procure the shipping papers when hydrocarbons are potentially involved in an exposure,” both for “cars it suspects were involved” in the exposure as well as adjacent cars. *Id.* (citing Jossart Aff., Ex. 7, Dep. of Brady, 87-88). Additionally, BNSF admits that it is required by federal law to retain the shipping papers for at least one year, but asserts that “the shipping papers were destroyed” despite federal preservation laws and BNSF’s own protocol. *Id.* at 15. (citing Jossart Aff., Ex. 7, Dep. of Brady, 87).

On July 28, 2017, the Court issued its Order Granting Plaintiff’s Motion to Compel. Through this order, the Court ordered production of “copies of any Material Safety Data Sheets or Safety Data Sheets for hydrocarbon,” “copies of any Material Safety Data Sheets or Safety Data Sheets for any hazardous materials that went through or were in BNSF’s Northtown Yard,” and “copies of any inspection reports from shippers, inspection reports created by BNSF, shipping papers, and waybills that relate to the 11 hydrocarbon cars at issue in this case from January 19, 2013 to January 19, 2014.

BNSF has subsequently attempted to “reconstitute” waybills that it previously destroyed. Pl.’s Reply Memo in Supp. of Mot. for Sanctions, 3. These waybills “identify hydrocarbons and specific components being shipped,” but BNSF has produced three sets of such “reconstituted” waybills which “differ significantly from each other,” and are not actual business documents but rather documents that BNSF prepared for this litigation. *Id.* (citing Jossart Aff., Exs. 38-40). The discrepancies in BNSF’s waybills were borne out during deposition of Brandon Woodward (“Woodward”), a late-disclosed witness who worked as controller for North Star Gas (“NSG”),

the company for which BNSF was shipping the hydrocarbon cars on the date of Kowalewski's exposure. *Id.* at 2. NSG works as an intermediary by taking product from Occidental Petroleum a short distance by truck before placing it in rail cars and shipped by BNSF. *Id.* During his deposition, Woodward offered "almost exclusively leading testimony," based on BNSF's "reconstituted" waybills, but was surprised by discrepancies between the waybills and BNSF's bill of lading, a document that identified the January 19, 2014 cargo in the 11 hydrocarbon cars as "casing head gasoline." *Id.* at 3. Woodward admitted that he did not expect waybills to change or to be different from a bill of lading, and that he "was unsure" if BNSF's "reconstituted" waybills could be trusted. *Id.* at 4.

Following substantial effort from the outset of the present case, Kowalewski's counsel has learned that the 11 hydrocarbon cars on Track 14 contained "casing head gasoline." "Casing head gasoline" is comprised of hydrocarbons that are known inhalation hazards, including xylene, hydrogen sulfide, and toluene. Kowalewski was able to obtain this information after waybills and MSDS "were initially suppressed by BNSF," and only following multiple motions to compel. *Id.* at 15, n.10. BNSF has failed to produce "leases, contracts, communications, or any additional documents from either NSG or Occidental," instead producing or "reconstituting" documents it finds useful or finding witnesses to sign affidavits after the close of discover. Pl.'s Reply Memo in Supp. of Mot. for Sanctions, 5. Kowalewski also draws attention to evidence he received on Monday, December 4, 2017 in the form of correspondence from Woodward to Patrick Sweeney ("Sweeney"), counsel for Defendant, that caused him to suspect that BNSF was attempting to mislabel chemicals in order to circumvent federal regulations and hump the cars at

higher speeds. *Id.* at 15 (citing Jossart Aff., Ex. 24, Memorandum from Woodward to Sweeney dated Nov. 27, 2017).

The Court finds that BNSF has engaged in misconduct by destroying or deliberately failing to preserve and produce waybills, shipping papers, and MSDS associated with the 11 hydrocarbon cars on Track 14. The Court further finds that evidence produced by Kowalewski, as well as BNSF's status as an experienced litigant and its own internal protocols, establish that BNSF cannot credibly argue that it did not know it was required to preserve this evidence related to the January 19, 2014 exposure. As a result of BNSF's failure to preserve waybills, shipping papers, and MSDS, Kowalewski and his experts have been deprived of important details that BNSF was required to preserve. The Court further finds that BNSF's misconduct in failing to produce this evidence, and engaging in spoliation of this evidence, has substantially prejudiced Kowalewski's ability to prove his case.

**E. BNSF has committed a number of additional litigation and discovery abuses.**

Kowalewski also draws the Court's attention to what he characterizes as BNSF's "strategic litigation tactics" of "spoliating evidence and abusing discovery." *Id.* at 16. Beyond refusing to produce the remaining nine hydrocarbon cars for inspection, BNSF has hidden behind objections that forced Kowalewski to file multiple motions to compel discovery for clearly relevant documents. *Id.* at 35. This evidence has included "unaltered video, complaints of venting cars in BNSF's yards, complaints of overspeed coupling, documents showing the movements of the hydrocarbon cars," information related to the retarders, and many other pieces of clearly relevant information. *Id.* at 29, 35. Additionally, Kowalewski has produced evidence

that there were numerous, previous examples of hydrocarbon leaks that BNSF reported to the federal government, including two that took place in the Northtown yard, but that BNSF failed to produce evidence of these incidents in the course of discovery in the present case. Pl.'s Suppl. Mem. Supp. Sanctions and in Resp. to BNSF's Mot. to Exclude Experts, 1.

Kowalewski asserts that "BNSF has engaged in its typical practice of producing voluminous documents after the close of discovery," and has produced "over 4,100 pages of documents" since the close of discovery. Pl.'s Mot. for Sanctions, 36. He further asserts that "over 3,000 pages" of these documents were produced one day before expert reports were due, rendering the production meaningless for use in expert reports as well as the deposition testimony of important witnesses. *Id.*

Kowalewski also asserts that BNSF "engaged in the practice of not producing documents critical to the questioning of specific witnesses until after their depositions were concluded," and that BNSF also waited to disclose witnesses until after the close of discovery. *Id.*; Pl.'s Reply Memo in Supp. of Mot. for Sanctions, 6. He asserts that BNSF attempted to "drastically change the testimony of two witnesses long after their depositions concluded" by submitting errata sheets for witnesses "well outside the timeframe for submitting an errata sheet" and "shortly before expert disclosures." Pl.'s Mot. for Sanctions, 37. He further asserts that BNSF submitted a supplemental affidavit from crew member Paul Schmacher ("Schumacher") in which Schumacher contravened his earlier deposition testimony that he "saw a toxic cloud" when first watching the video "during the timeframe of the exposure when he returned to" the Northtown yard office. *Id.*

Kowalewski also presented evidence that BNSF suppressed the identity of a critical witness during the pendency of the present litigation. Kowalewski was unable to take the deposition of William Hentges (“Hentges”), the hump tower operator responsible for sending the 11 hydrocarbon cars down Track 14, until September 15, 2017. *Id.* at 28. Hentges was a crucial witness who should have been identified in BNSF’s initial disclosures, and he admitted in deposition testimony that he was not conducting hump tower operations pursuant to the rule that the 11 hydrocarbon cars could not couple at a speed greater than four miles per hour. *Id.* Over the course of Hentges’ deposition, Kowalewski’s counsel came to learn that Hentges had reached a confidential settlement with BNSF on a FELA claim related to an accident caused by overspeed cars. *Id.* BNSF had initially identified a different employee as the hump tower operator on the date of the exposure, and disclosed Hentges only after reaching a confidential settlement with him. *Id.*

The Court granted Kowalewski’s third motion to compel discovery on October 13, 2017 which ordered BNSF to reveal this settlement amount. Kowalewski learned that Hentges received “\$160,000 for his minor claim, an exorbitant amount, just before having him testify in this matter.” *Id.* at 28-29. Kowalewski notes that BNSF has previously been sanctioned for paying witnesses “as a ‘reward’ for” favorable post-trial testimony, and that Hentges “is the only witness to state that he observed Kowalewski with pre-existing issues,” which is now part of BNSF’s defense. *Id.* at 29.

Finally, Kowalewski draws the Court’s attention to BNSF’s failure to produce for *in camera* review the BNSF Claims Manual, or Law Department Guide, that was in effect at the

time of his exposure on January 19, 2014. *Id.* at 38. The Court ordered production of this document for *in camera* review in response to Kowalewski's third motion to compel discovery on October 13, 2017. Following its *in camera* review of this document, the Court learned that BNSF had produced a version of this document that was revised after the incident, and BNSF refused to comply with Kowalewski's subsequent requests to produce a copy of the document that was in effect at the time of his exposure in 2014. *Id.* BNSF ultimately produced what it purported to be a 2013 version of this document shortly prior to the deposition of the claims agent in charge at the time of the accident, which was substantially different from the 2017 version it had produced earlier. *Id.* at 38-39.

The Court finds that BNSF has engaged in a pattern of misconduct throughout this case characterized by late production of documents and witnesses, production of inaccurate or inconsistent documents, and by the outright failure to produce relevant evidence. The Court finds that BNSF's behavior constitutes a deliberate effort to frustrate Kowalewski's ability to bring his claim, and that this behavior constitutes misconduct. Kowalewski and his experts have been prejudiced by this behavior, as it has significantly inhibited their ability to establish issues of liability and causation in a trial before a jury.

#### **IV. Analysis**

##### **Rule**

Minnesota courts “are vested with considerable inherent judicial authority necessary to their vital function—the disposition of individual cases to deliver remedies for wrongs and justice



freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.” *Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 783 (Minn. Ct. App. 2010) (quoting *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118-19 (Minn. 1995)). “The task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the trial court.” *Id.* (quoting *Patton*, 538 N.W.2d at 119). Determining whether to impose sanctions and if a sufficient factual basis exists to support such a decision are questions of fact for the Court, and are subject to an abuse of discretion standard. *Dillon v. Nissan Motor, Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993).

In the absence of any “specific exclusion of attorney fees from possible sanctions,” and “given the ‘broad authority’ of the district court to determine what sanction to impose,” courts have the inherent power to impose monetary sanctions. *Id.* Sanctions imposed by a district court may also include dismissal of all or part of a claim if a party “willfully and persistently fails to comply with a discovery order without justification or excuse.” *Frontier Ins. v. Frontline Proc. Corp.*, 788 N.W.2d 917, 922 (Minn. Ct. App. 2010) (citing Minn. R. Civ. P. 37.02(b)(3); *Breza v. Schmitz* 248 N.W.2d 921, 922 (1976)). When a party “has willfully and without justification or excuse refused to comply with discovery orders” that party has ““forfeited [the] right to a trial of [the] case on the merits.”” *Id.* (quoting *Breza*, 248 N.W.2d at 922).

The law imposes an “obligation to preserve evidence” on all parties, which “begins when a party knows or should have known that the evidence is relevant to future or current litigation.” *E\*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588 (D. Minn. 2005) (citing *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004)). The ““destruction or significant

alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonable foreseeable litigation” is known as spoliation. *Id.* at 587 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). In sanctioning parties for spoliation of evidence, as well as broader abuses by litigants, Minnesota courts give consideration to a number of factors, including:

- (1) the degree of prejudice suffered by the non-offending party;
- (2) the degree of fault or willfulness of the party who altered or destroyed the evidence;
- (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future;
- (4) whether any evidence has been irreparably lost;
- (5) the policy of favoring adjudication of a case on its merits; and
- (6) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney.

*Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 783 (2010) (citing *Patton v. Newmar Corp.*, 520 N.W.2d 4 (Minn. App. 1994)). Minnesota courts determine prejudice by “considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice.” Parties liable for document destruction “have been assessed their opponents’ fees and costs for investigating, researching, preparing, and arguing evidentiary motions and motions for sanctions.” *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550 (D. Minn. 1989).

Appellate courts examine the following factors in determining whether a district court has abused its discretion in imposing sanctions for discovery abuse:

- (1) whether the court set a date certain by which compliance was required;
- (2) whether the court gave a warning of potential sanctions for non-compliance;
- (3) whether the failure to cooperate with discovery was an isolated event or part of a pattern;
- (4) whether the failure to comply was willful or without justification; and
- (5) whether the moving party has demonstrated prejudice.

*Frontier Ins. Co.*, 788 N.W.2d at 923 (citing *Breza*, 248 N.W.2d at 922; *Beal v. Reinertson*, 215 N.W.2d 57, 58 (1974); *Jadwin v. City of Dayton*, 379 N.W.2d 194, 197 (Minn. App. 1985); *Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn. App. 1985); *Williams v. Grand Lodge of Freemasonry AF & AM*, 355 N.W.2d 477, 480 (Minn. App. 1984)).

### **Analysis**

The Court finds that the extent of BNSF's misconduct in this case is vast, and spans from the outset of its initial sham investigation into the exposure on January 19, 2014 through the course of litigation. One of the most egregious examples is BNSF's deliberate misrepresentation that Kowalewski was exposed to sulfur dioxide. This misrepresentation prevented Kowalewski from receiving appropriate medical treatment that might have remediated his injury. Another egregious example is the willful refusal of BNSF to produce any of the 11 hydrocarbon cars for inspection despite this Court's order. BNSF's misconduct is varied, comprising behavior ranging from failure to adequately follow its own internal protocols for preservation of relevant evidence to failing to produce relevant evidence and witnesses in willful contravention of court orders compelling discovery.

Even more troubling to the Court is that BNSF's behavior in the present case is clearly part of a pattern and practice of behavior that extends nationwide.

For instance, the Montana Supreme Court endorsed the possibility of entering a judgment of default to address spoliation of evidence committed by BNSF in the case of *Spotted Horse v. BNSF Railroad Company*. *Spotted Horse v. BNSF R.R. Co.*, 350 P.3d 52 (Mont. 2015). In *Spotted Horse*, an injured BNSF machinist filed suit alleging negligence under FELA claiming

that he suffered a disabling injury after his co-worker “inadvertently lowered a locomotive engine compartment hatch on his head.” *Id.* at 53. In bringing his claim, the Plaintiff in *Spotted Horse* requested a copy of video footage of the area where his injury occurred, but was told that the videos did not exist because the digital recording system automatically overwrote old video footage. *Id.* at 54. BNSF’s general foreman eventually admitted that he had utilized these video recordings for investigations of workers for rule violations and in connection with injuries, was aware that the video footage would overwrite recordings after a certain period of time, and could have requested video footage of the area. *Id.* The Plaintiff moved for default judgment against BNSF on the issues of liability, causation, and contributory negligence based on the alleged spoliation of video footage and discovery abuses. *Id.* at 55.

Although the district court in *Spotted Horse*, in its discretion, opted not to grant default judgment, the Montana Supreme Court acknowledged that courts are equipped to grant default judgment when the circumstances justify such relief. *Id.* at 56. The Montana Supreme Court wrote that although “the issue before us relates to the spoliation of video footage before the initiation of the formal discovery process,” the rationale for imposing sanctions on a party for discovery abuse applies with equal force. *Id.* The Montana Supreme Court recognized BNSF’s status as “a sophisticated and recurrent party to litigation,” and wrote that BSNF is aware of its obligation to preserve evidence. *Id.* The Montana Supreme Court further noted that BNSF has “in the past been subject to complaints from litigants concerning spoliation of evidence, and . . . has previously been admonished in court for concealing or disposing of evidence.” *Id.* at 56-57. Although the Montana Supreme Court declined to hold that the district court’s refusal to grant

the plaintiff's request for default judgment was an abuse of discretion, it held that the district court "abused its discretion when it declined to impose a meaningful sanction on the railroad" for its destruction of evidence. *Id.* at 59.

As another example, as recently as August 2017 a district court imposed sanctions on BNSF for failing to produce critical evidence. In *Paul v. BNSF Railway Co.*, the District Court of Lancaster County, Nebraska entered judgment for a plaintiff on the issue of liability under the Locomotive Inspection Act ("LIA") and precluded BNSF from offering any evidence that its locomotive was not defective. *Paul v. BNSF Railway Co.*, No. 14-1505, 5 (Neb. 3rd Jud. Dist. Sept. 14, 2017). The Plaintiff in *Paul*, a BNSF engineer, had brought suit pursuant to the Federal Employers' Liability Act ("FELA") and the LIA, alleging that he "suffered permanent and career ending injuries to his back" as a result of a locomotive's defective seat and footrest that caused "an inordinate amount of stress on his lower back" during a lengthy train ride. *Id.* at 1. BNSF categorically denied that the seat or footrest were defective. *Id.* The Lancaster County District Court found that it was undisputed that the seat and footrest "were removed from the locomotive and altered prior to inspection by Plaintiff's expert witness." *Id.* at 4. The court also found that BNSF had willfully concealed relevant audio recordings as well as a written statement from a co-worker who accompanied Plaintiff that was written immediately after the trip and described Plaintiff's numerous attempts to report the defective seat. *Id.* at 3-4. The *Paul* court wrote that there was "no reasonable justification or excuse" for BNSF's failure to disclose either the audio recordings or the written document," and that BNSF had violated "not only the discovery rules, but the spirit of discovery." *Id.* at 4. Exercising its inherent authority, the *Paul* court entered

judgment for Plaintiff on the issue of liability and allowed the case to proceed to trial on the issue of causation and damages. *Id.* at 5.

These cases concern orders from district courts in a different states and are instructive because they concern the same sort of misconduct by the same party – BNSF – as is present in the matter before the Court. The Court concurs with the Montana Supreme Court’s characterization of BNSF in *Spotted Horse* as “a sophisticated and recurrent party to litigation” aware of its obligation to preserve evidence and previously subject to complaints from litigants regarding spoliation. *Spotted Horse*, 350 P.3d at 56-57. In *Paul*, as in the present case, BNSF has attempted to use missing evidence as a basis to strike plaintiff’s expert based on a lack of evidentiary foundation. *Paul*, No. 14-1505, at 4. In ordering sanctions under Nebraska Court Rule of Civil Discovery § 6-337, the Lancaster County District Court found that such sanctions are designed “to prevent a party who has failed to comply with discovery from profiting by such party’s misconduct . . . .” The *Paul* court wrote that this sanctions provision authorizes a trial court “to make such orders as are just, including, but not limited to, preventing the party from raising issues or defenses, preventing the party from introducing designated matters in evidence, striking pleadings, dismissing the action, or rendering a default judgment.” *Id.* at 5 (citing *Brizendine v. Brudnay*, Nos. A-12-619, A-12-620, 2013 Neb. App. LEXIS \*47 (Mar. 26, 2013)).

As outlined above in Section II, *supra*, the present cause involves not only spoliation of evidence, but other abuses as well, including misrepresentations to Plaintiff and this Court about the availability of evidence, discovery abuses, witness abuses, and a persistent pattern of obstruction. BNSF has engaged in a pattern of misconduct that included: (1) the loss, destruction,

and/or fabrication (or “reconstitution”) of evidence, including the suspected railcars as well as audio and video of the Northtown yard; (2) the failure of BNSF to follow its own policies for accident investigation and evidence preservation; (3) the obstruction of and interference with Kowalewski’s investigation of the January 19, 2014 exposure through failure to produce available relevant evidence; (4) knowingly advancing lies, misleading facts, and/or misrepresentations by BNSF employees and agents in depositions and sworn affidavits; and (5) willfully refusing to comply with this Court’s orders compelling discovery. This Court finds that this misconduct was perpetrated in bad faith, and that it was willful and without excuse.

BNSF’s misconduct resulted in Kowalewski having to file multiple motions to compel discovery and incur attendant expenses that could have been avoided. BNSF’s misconduct has placed Kowalewski at a tremendous disadvantage, forcing him to expend substantial time and resources in an attempt to adequately prosecute his case. Instead of focusing on relevant case theories and evidence, Kowalewski’s counsel was forced to spend the pendency of the present litigation continually focused on unearthing BSNF’s abuses and hiring experts to speculate on what the missing or destroyed evidence might have established. As a result of BNSF’s failure to fully produce audio, video, the 11 hydrocarbon cars, and the original waybills, Kowalewski has been left with the impossible task at trial of attempting to accurately recreate that which has been irretrievably lost. BNSF has also attempted to use its own abuses to its advantage by filing a motion for summary judgment on Kowalewski’s Federal Safety Appliance Act (“FSAA”) and federal safety regulation violation claims, arguing that Kowalewski cannot name a statutory violation or prove that this type of injury was reasonably foreseeable. This argument was only

possible as a result of BNSF's spoliation and destruction of evidence, including BNSF's failure to conduct a proper inspection of the 11 hydrocarbon cars or produce them for inspection.

It is difficult to construct a remedy that would alleviate the prejudice that has already been suffered by Kowalewski. The 11 hydrocarbon cars, as well as the audio and video footage of the Northtown yard, break room, and parking lot are so central to this litigation that their preservation and timely disclosure would have dramatically changed the course of this lawsuit and would likely have saved substantial time and expense. The Court finds that BNSF's willful misconduct has tremendously prejudiced Kowalewski's ability to prove his claims on the issues of liability and causation, and therefore judgment in the favor of Kowalewski on liability and causation is warranted as a sanction.

After a consideration of the factors considered by Minnesota courts in sanctioning spoliation, as articulated in *Frazier v. Burlington Northern Santa Fe Corporation*, 788 N.W.2d 770, the Court finds that all factors support sanctions in the present case. The degree of prejudice suffered by Kowalewski as a result of BNSF's conduct throughout the present case is substantial, and severely inhibits his ability to fully present liability and causation claims to a jury. The willfulness of BNSF's behavior is underscored by its status as an experienced litigant and its own internal protocols requiring inspection and preservation of requested evidence in the present case. The Court finds that a finding of judgment in favor of Kowalewski on liability and causation is appropriate, and that the imposition of this sanction, when weighed against the level of fault attributable to BNSF for its continued misconduct and abuses throughout this case, does not result in the sort of "substantial unfairness" requiring a lesser sanction. In fact, the Court has



considered lesser sanctions and finds that no lesser sanction would suffice. The Court further finds that BNSF's misconduct has resulted in irreparable loss of evidence and prevented an adjudication of the case on its merits. Finally, the Court notes that BNSF's misconduct in the present case began moments following Kowalewski's exposure, and that its abuses are not solely attributable to the conduct of its attorneys.

Accordingly, it is hereby ordered that Plaintiff's motion for sanctions is granted.

Judgment is entered for Plaintiff on the issues of liability and causation on Kowalewski's claims; specifically the Court finds as a matter of law that the railroad was negligent in allowing the 11 hydrocarbon cars to engage in overspeed coupling in the Northtown yard and failing to inspect the 11 cars' release valves to ensure proper calibration and avoid unnecessary pressure relief venting. The Court also finds as a matter of law that as a result of BNSF's negligence, Plaintiff was exposed to hydrocarbons which caused his immediate, degenerative neurological injury and that this type of injury was reasonably foreseeable. BNSF is precluded from offering any evidence that it was not negligent and/or that the pressure release valves on the 11 hydrocarbon cars were not defective. BNSF is also precluded from offering any evidence that Plaintiff was exposed to something other than well head casing oil. The case will proceed to trial on the issue of damages only. Plaintiff's request for reasonable expenses, including attorney fees, caused by Defendant's failure to comply with discovery rules, will be addressed at a hearing outside the presence of the jury, and after the trial on damages is completed. Plaintiff's request for additional monetary sanctions to deter future similar conduct is granted and the amount of such monetary sanctions shall be determined after a hearing on the matter.

## **V. Conclusion**

The court grants Kowalewski's motion for sanctions. Judgment is hereby entered for Kowalewski on the issues of liability and causation on his claims. The case will proceed to trial solely on the issue of damages. Additionally, the Court grants Kowalewski's request for reasonable expenses, including attorney's fees, incurred as a result of BNSF's failure to comply with discovery rules. The Court denies also BNSF's motion to exclude expert testimony, finding that Defendants' arguments are reliant upon its own misconduct. Further, a hearing will be held on February 23, 2018 at 10:30 a.m. on the imposition of additional financial sanctions sufficient to deter future misconduct. The Court shall consider evidence concerning the amount of costs and attorney's fees incurred by Plaintiff as a result of BNSF's misconduct at this hearing. BNSF is further ordered to pay the fees of Special Master Gary Larson. Finally, Defendant BNSF and its attorney, Patrick Sweeney, are ordered to appear on February 23, 2018 at 10:30 a.m. and show cause why they should not be held in contempt of Court.

AD