

STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT COURT

FILED
2012 FEB 16 AM 10:56

2012 FEB 16 AM 10:56

**ANDREW ASHLEY, SR., JIMMY
BOWMAN, JACK GILMORE
& HOSKIE YONNIE,**

Plaintiffs,

vs.

NO. *D-1113-CV-2012-66-7*

**THE BNSF RAILWAY COMPANY,
individually and as successor in interest to
the Atchison, Topeka & Santa Fe Railway
Company**

Defendant.

COMPLAINT

NOW COMES PLAINTIFFS, ANDREW ASHLEY, SR., JIMMY BOWMAN, JACK GILMORE, and HOSKIE YONNIE, by and through their attorneys, and for their complaint against the Defendant, BNSF Railway Company state:

1. Plaintiff, Andrew Ashley, Sr. is a resident of Houck, Arizona, Jimmy Bowman is a resident of Window Rock, Arizona, Jack Gilmoare is a resident of St. Michaels, Arizona, and Hoskie Yonnie is a resident of Ya-Ta-Hey, New Mexico.

2. That at all times mentioned herein, and for some time prior thereto and thereafter, the Defendant, BNSF RAILWAY COMPANY, was engaged in the business of interstate commerce in and throughout the several states of the United States as a common carrier by railroad; and for the purposes thereof, operated its business, maintained offices and placed its agents, servants and employees throughout McKinley County, New Mexico. Service of process may be had upon Defendant, BNSF RAILWAY COMPANY, by serving Leslie L. Keener, 106 North First Street, Belen, NM 87002.

JURISDICTION AND VENUE

3. That during the course of Plaintiffs' employment, the railroad Defendant was engaged in interstate commerce as a common carrier by rail, and all or part of the duties of Plaintiffs were in furtherance of and did closely, directly and substantially affect interstate commerce; wherefore the rights and liabilities of the parties were and are governed by the Federal Employers' Liability Act, 45 U.S.C., Section 51 *et seq.*, which Act grants this Court jurisdiction over this action. Venue is proper in this county as Plaintiffs were injuriously exposed to toxic materials in this county on a regular basis, as hereinafter alleged, which exposures contributed and combined to cause the injuries of which they complain.

4. That beginning in 1968 Plaintiff Andrew Ashley, Sr. while engaged in the performance of his duties in furtherance of interstate commerce was required by the Defendant to work with and in the vicinity of toxic substances including asbestos, silica and quartz containing ballast rock, gravel and other hard rock aggregate materials, sand, coal dust, and other minerals and dust-containing products used on the Defendant's railroad lines and track bed, lines and facilities, including those in the State of New Mexico and McKinley County.

5. That beginning in 1969 Plaintiff Jimmy Bowman while engaged in the performance of his duties in furtherance of interstate commerce was required by the Defendant to work with and in the vicinity of toxic substances including asbestos, silica and quartz containing ballast rock, gravel and other hard rock aggregate materials, sand, coal dust, and other minerals and dust-containing products used on the Defendant's railroad lines and track bed, lines and facilities, including those in the State of New Mexico and McKinley County.

6. That beginning in 1943 Plaintiff Jack Gilmore while engaged in the performance of his duties in furtherance of interstate commerce was required by the Defendant to work with

and in the vicinity of toxic substances including asbestos, silica and quartz containing ballast rock, gravel and other hard rock aggregate materials, sand, coal dust, and other minerals and dust-containing products used on the Defendant's railroad lines and track bed, lines and facilities, including those in the state of New Mexico and McKinley County.

7. That beginning in 1947 Plaintiff Hoskie Yonnie while engaged in the performance of his duties in furtherance of interstate commerce was required by the Defendant to work with and in the vicinity of toxic substances including asbestos, silica and quartz containing ballast rock, gravel and other hard rock aggregate materials, sand, coal dust, and other minerals and dust-containing products used on the Defendant's railroad lines and track bed, lines and facilities, including those in the state of New Mexico and McKinley County.

8. That during the course of Plaintiffs' employment with the Defendant railroad, they were employed as Laborers and Machine Operators on Defendant's railroad tracks, bridges, roadbed, roadway equipment and facilities and in other various roles and assignments where they were required and caused to work with, and in the vicinity of, toxic substances as previously alleged. These exposures caused the Plaintiffs to contract significant and permanent injury to their persons, to-wit: occupational lung disease resulting in pulmonary fibrosis which was, in all Plaintiffs, diagnosed and discovered less than three years prior to the commencement of this civil action and within the time frame required by 45 U.S.C. §56.

9. That at all times relevant, the Plaintiffs were unaware of the dangerous propensities of such toxic dusts and materials they were required to work with and around and were unaware of the development of their latent abnormal medical conditions.

CAUSE OF ACTION

10. Plaintiffs reallege Paragraphs 1-9 as if restated here verbatim.
11. That the railroad Defendant, by and through its duly authorized agents, servants and employees, was then and there guilty of one or more of the following negligent acts or omissions in violation of the Federal Employers' Liability Act:
 - (a) in failing to provide the Plaintiffs with a reasonably safe place within which to work; a workplace free of toxic and fibrogenic dust;
 - (b) in failing to furnish the Plaintiffs with safe and suitable tools and equipment, including adequate protective masks and/or protective inhalation devices;
 - (c) in failing to warn the Plaintiffs of the true nature and hazardous effects of the asbestos, sand, silica / silicate containing rock, gravel and related materials, coal dust, and other toxic fibers;
 - (d) in exposing the Plaintiffs to unsafe concentrations of asbestos, sand, silica /silicate containing rock, gravel and related materials, coal dust, and other toxic fibers;
 - (e) in failing to design, specify, purchase and operate its self propelled track machinery in a safe and reasonable manner so as to prevent the plaintiffs from operating such equipment in polluted, dusty and unhealthy conditions.
 - (f) in failing to provide the Plaintiffs with safe and proper ventilation systems in its self propelled track equipment, including Ballast Regulators, Track Brooms and Tampers;
 - (g) in failing to provide instructions or a method for the safe manipulation and handling of asbestos, sand, silica / silicate containing rock, gravel and related materials, coal dust, and other toxic fibers;

- (h) in failing to provide adequate, if any, instructions in the use or removal of asbestos, silica and silicate containing ballast rock, gravel or other hard rock aggregate material, sand, coal dust, workplace dust, and other toxic insulation products so as to avoid the creation and inhalation of dust;**
- (i) in failing to test asbestos, silica and silicate containing ballast rock, gravel or other hard rock aggregate material, sand, coal dust, workplace dust, and other toxic insulation products for its toxic content prior to requiring employees to work with the same;**
- (j) in formulating and using a method of handling asbestos and all asbestos –related material, silica and all silicate-related materials, and other toxic dusts exposing the Plaintiffs to high concentrations of fibrogenic dust;**
- (k) in allowing unsafe practices to become the standard practice;**
- (l) in failing to exercise reasonable care in publishing and enforcing a safety plan and method for the safe removal, handling and installation of asbestos - containing products and insulation on railway machinery and equipment and sand gravel and rock on the right of way of the railroad;**
- (m) in failing to exercise reasonable care in publishing and enforcing a safety plan and method for the safe handling and installation of sand gravel and rock on the right of way of the railroad;**
- (n) in failing to inquire of the suppliers of asbestos, ballast rock and gravel, and all other toxic insulation products , or to test the contents of these precuts to determine if workers would foreseeably be exposed to unsafe levels of fibrogenic dusts while manipulation or working around them;**

- (o) in requiring employees to work with an ultra-hazardous product;
- (p) in failing to exercise adequate, if any, care for the health and safety of employees, including the Plaintiffs;
- (q) in failing to periodically test and examine the Plaintiffs to determine if they were subject to any ill effects of their exposure to asbestos, sand ballast, rock, gravel or other hazardous substances;
- (r) in allowing excessive fumes, dusts, and fibers to remain in the work area;
- (s) in failing to provide any or adequate warning to the Plaintiffs of the exposure to the uncontrolled quantities of the hazardous materials they worked with and around.

12. That as a direct and natural result, in whole or in part, of one or more of the foregoing negligent acts or omissions on the part of the railroad Defendant, the Plaintiffs suffered exposure to toxic substances including asbestos, silica and silicate containing ballast rock, gravel or other hard rock aggregate material, sand, coal dust, and other toxic insulation products, which caused them to sustain injury to their respective bodies and respiratory systems, which will likely result in further impairment in the future, and which cannot be effectively cured by conservative medical procedures or medications.

13. That, as a result, Plaintiffs' enjoyment of life, enjoyment of retirement and earning capacity have been greatly impaired and shortened; and further, that Plaintiffs' expected life span is greatly shortened. The Plaintiffs further allege that as a result of their health problems, they have been and will in the future be forced to incur medical expenses by way of

doctor, hospital and drug bills expended in an effort to diagnose and monitor their permanent, progressive pulmonary illnesses and potential future complications resulting therefrom.


14. That Plaintiffs were strong and able-bodied men and were gainfully employed prior to the manifestation of their illnesses. As a result of these illnesses, they have suffered damages by way of lost earning capacity, fear of future cancer and/or progressive pulmonary fibrotic lung disease, and by way of their diminished ability to render services, society, affection, counseling and support to their households and families.

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

PLAINTIFFS DEMANDS A TRIAL BY JURY.

DATED this ____ day of _____, 2012.

Respectfully submitted,

BY: 
Michael Sanchez, Esq.
Cindy Mercer, Esq.
LAW OFFICES OF MICHAEL SANCHEZ
P.O. Box 1297
Los Lunas, NM 87031
P: 505.865.0688 F: 505.865.4079

COUNSEL FOR PLAINTIFFS
And

JOHN D. ROVEN
HECTOR L. SANDOVAL
ROVEN – KAPLAN, L.L.P.
2190 North Loop West, Suite 410
Houston, Texas 77018
P: 713.465.8522 F: 713.465.3685

CO – COUNSEL FOR PLAINTIFFS

STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT

ANDREW ASHLEY, SR., JIMMY BOWMAN,
JACK GILMORE, & HOSKIE YONNIE, Plaintiffs

v.

No. *D-1113-CV-2012-66-7*

BNSF RAILWAY COMPANY, individually and
as successor in interest to the Atchison,
Topeka & Santa Fe Railway Company, Defendant.

**SUMMONS
THE STATE OF NEW MEXICO**

TO: BNSF RAILWAY COMPANY, Defendant
ADDRESS: LESLIE L. KEENER, Agent for BNSF Railway Co.
106 N. FIRST STREET
BELEN, NM 87002

You are required to serve upon the Law Offices of Michael S. Sanchez, P.C. and Roven-Kaplan, L.L.P. (name of plaintiff or plaintiff's attorney) an answer or motion in response to the complaint which is attached to this summons within thirty (30) days after service of this summons upon you, exclusive of the day of service, and file your answer or motion with the court as provided in Rule 1-005 NMRA.

If you fail to file a timely answer or motion, default judgment may be entered against you for the relief demanded in the complaint.

Attorney or attorneys for plaintiff:

MICHAEL S. SANCHEZ, ESQ. and
CINDY M. MERCER, ESQ
MICHAEL S. SANCHEZ, P.C.
P.O. BOX 1297
LOS LUNAS, NM 87031
(505) 865-0688

JOHN D. ROVEN
HECTOR L. SANDOVAL
ROVEN-KAPLAN, L.L.P.
2190 North Loop West, Suite 410
Houston, Texas 77018
(713)465-8522

WITNESS the Honorable Robert A. Aragon, District Judge of the
Eleventh judicial district court of the State of New Mexico, and the seal of the district court
of McKinley County, this 16 day of Feb, 2012.

Francisca P. Polanco
Clerk of court

By Michelle Sanchez
Deputy

RETURN¹

