

Recreating Visual Aspects of a Crossing Collision

Most authorities on investigation and discovery still preach the cardinal rule that you must "go to the scene" in order to be adequately prepared to represent a client. This doctrine has, on many occasions, led me to the scene of a grade crossing in an effort to better understand my client's case in a situation involving a railroad grade crossing accident. Unfortunately, the visit to a railroad grade crossing accident is complicated by many factors. Frequently, the client is unable to relate their story to you because of disabling injuries or death. The re-creation of your client's perspective requires an approach similar to that of constructing a jigsaw puzzle without the guidance of an overall picture of the final product. Further complicating the issue is the fact that there are very few people who have survived grade crossing accidents and been able to explain their experience to the rest of the public. In fact, Union Pacific Railroad distributed calendars in 1996 which read as follows "EVER MEET ANYBODY WHO'S BEEN HIT BY A TRAIN? DIDN'T THINK SO!". Occasionally you may find witnesses who have had near-miss experiences at the crossing you are investigating. However, those near-miss experiences may or may not be under similar circumstances and may or may not be appropriate to assist you in preparing your case for trial. The challenge facing a trial attorney in a railroad grade crossing case is to allow the jury to understand the conflict between these two modes of transportation, a conflict which so often proves to be fatal. There will seldom, if ever, be jurors who have experienced near-misses, accidents at grade crossings, or have even ridden on a train.

It is important to produce a visual picture to provide these jurors an accurate glimpse of the circumstances surrounding your grade crossing accident. I always try to get the court's approval for a scene visit by the jury. The scene visit by a jury will allow orientation of the jurors to all of the subtle circumstances which should have been clarified by testimony before the scene inspection occurs. Those subtle circumstances may include the angle of the crossing, the existence of visual obstructions, the existence of visual clutter, the condition of the road surface, the condition of the track surface, the condition of the grade crossing surface, and all of those other conditions which an experienced railroad grade crossing litigator knows to affect liability issues. However, a scene visit can never achieve the effect of placing a jury in the identical circumstances that the parties experienced

at the time of the railroad grade crossing accident. To re-create those circumstances, it is necessary to include a train and a motor vehicle in the equation. The inclusion of these variables may indeed give the opportunity for a more accurate re-creation of the conditions that existed at the time of the accident, but they also provide the potential for so much uncertainty that such a re-creation would be virtually impossible to accomplish as the jury watches. The use of technology to accurately record those events and present them to a jury as a trial exhibit becomes paramount. This paper involves the use of current technology and traditional concepts of discovery to create such an exhibit.

The first time I considered the possibility of compelling the production of a train, it was more a fanciful thought than a serious belief that the task could be accomplished. The initial research concerning discovery of such equipment revealed nothing that prevented me from such an endeavor. Many attorneys, including myself, had obtained court orders to produce locomotives for inspections. However, those inspections had never included the ability to ride on a moving train. Typically, the inspection involved a supervised visual and photographic inspection of a stationary locomotive at the local rail yard. In order to conduct the re-creation of a grade crossing accident, it became necessary to obtain inspection rights along with the right to operate the train across your specific grade crossing at predetermined speeds and under specified conditions. This request did not initially appear to me as one likely to be accorded serious consideration. My first informal discovery request for such a re-creation was met with a tongue in cheek agreement to produce the train for a fee somewhere around \$100,000. I knew the figure was exaggerated, but didn't want to argue "a few bucks" at that level. When faced with the potential financial obstacle, I shelved the idea for some period of time. While working on another case, I obtained the equipment lease agreement from a locomotive and train equipment lessor. Much to my surprise, the lease contained a locomotive cost of \$100 per day. Armed with this information, I resumed my attempt to force production of a locomotive for my re-creation. Attached hereto is a copy of the first order requiring production of a train under conditions necessary to film a re-creation. This order has served as a guide in subsequent cases. Also attached as an appendix to this paper is the billing for \$1,297.48 received from the railroad for the use of the train. It should be noted that \$261.47 of the bill was for

payment of wages of a railroad investigator who did not need to be at the scene. This expense could have been contested, but I felt that the contest would be more costly than the potential savings.

The federal rules of civil procedure provide a conduit for compelling the production of a train necessary for filming a re-creation. The following federal rules must be considered:

Rule 26 (b)(1) reads as follows:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Rule 34 provides in pertinent part:

"Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requester's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phone records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

The Advisory committee notes to the 1970 Amendment of Rule 34 contemplate exactly the type of scenario a plaintiff would need for filming an accident re-creation. Those notes state:

"Rule 34 is revised to accomplish the following major changes in the existing rule: ... (3) to include testing and sampling as well as inspecting or photographing tangible things."

"The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing."

I have cited the above federal rules because the discovery codes in most states, including all of those in which I have compelled production of the train, are patterned after the Federal Rules of Civil Procedure. In Oklahoma, we were challenged by a "Writ of Prohibition" filed in the Supreme Court for the State of Oklahoma. The Union Pacific Railroad was not willing to comply with the District Court's order compelling our re-creation. However, the Oklahoma Supreme Court denied the writ and our re-creation proceeded as requested. The citation for the denial of that writ is Missouri Pacific Railroad Company, a Delaware Corporation, d/b/a Union Pacific Railroad Company et al v. The District Court of the State of Oklahoma, Twenty-Sixth Judicial District, Canadian County and the Honorable Edward C. Cunningham, District Judge, Case No. 87240. Once you have overcome the sometimes difficult hurdle of obtaining a train, the work on a re-creation begins. The balance of this paper contains an overview of that task by Steve Irwin, my Reconstruction Engineer and Mark Johnson, the President of Visual Law. Without the efforts of those individuals, the creation of a high-quality exhibit showing our re-creation would have been impossible.