Don't Get "Railroaded" When Conducting a Site Inspection

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Site inspections are usually mandatory in railroad cases. Almost without exception, it requires going onto the property of the railroad in order to inspect the area or the equipment involved in the incident. While all of us agree and expect to follow the operational and safety instructions necessitated by the inspection (and wearing the appropriate personal protective equipment), the railroad has become insistent on the Plaintiff's attorneys, his experts, and the Plaintiff himself signing a "release and indemnification agreement" (Release) absolving the railroad of any liability whatsoever regardless of any injury arising from the inspection. Plaintiff's lawyers must fight this request and refuse to sign away their rights (and the rights of their experts) as a condition for entry onto the railroad's property.

Almost every jurisdiction, including the Federal Courts, has a civil rule of procedure entitled "Capital Fee Production of Documents and Things and Entry Upon Lad for Inspection and Other Purposes"(or similar language). These rules generally state, in part, that any party may serve on any other party a request to permit entry upon designated land or other property in the possession or control of the party upon whom the request

was served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any other designated object or operation thereon, within the scope of legitimate provisions governing discovery.

The rules of civil procedure give the Plaintiff the "right" to conduct the inspection unfettered by additional requirements (such as signing a Release) which are not contained in the rules of civil procedure. The railroad's requirement in signing the Release, in essence, is an attempt to deny the Plaintiff and his counsel discovery authorized by the Civil Practice Act. Usually, this Release waives any and all rights that the Plaintiff, his counsel, or experts may have in the event they are injured during the inspection – regardless of whether the railroad was totally at fault in causing the injury. This requirement places an undue burden on Plaintiff's ability to prepare his case. The Plaintiff's request is not unlike the situation where the Court would allow jurors to "view" the scene of the incident and equipment in order to gain a better understanding if the case. In such a situation, it is beyond reason that the Defendant could expect the Court, as well as the jurors, to sign such a Release.

Usually, after requesting a site inspection, the Defendant railroad never raises a "formal" objection to the request. Routinely, the defense lawyer will respond with a letter enclosing a Release agreement stating that it must be signed before the inspection can take place. It is important to respond to the letter refusing to sign the Release and stating that Plaintiff's counsel will wear the appropriate personal protective equipment and comply with instructions from railroad management. Plaintiff and his counsel have a

lawful purpose in conducting the inspection and therefore should not waive their rights to gain entry. An argument can be made that Plaintiff and his counsel are "invitees" as opposed to licensees or trespassers.

Signing a Release as a condition precedent to a site inspection also violates 45 U.S.C.A. § 55 which states:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void…"

Plaintiff's counsel should argue that the railroad's request is in violation of this statute in that it hinders Plaintiff's preparation of the case, which would tend to exempt the railroad from liability. Plaintiff has a right to thoroughly investigate the claim even if it requires going on the Defendant's property.

Never let the railroad force the Plaintiff or Plaintiff's counsel to "assume the risk" of injury associated with a site inspection. Such tactics should be opposed by filing a Motion to Compel the site inspection without having to sign a Release. The several times that this writer has filed Motions to Compel to prevent this tactic have been received favorably by the Court. The Defendant railroad has no legal basis for requiring the Release. The railroad sometimes argues that 45 U.S.C.A. § 55 is only applicable to employees and not Plaintiff's counsel. However, this argument is disingenuous since

Plaintiff's counsel is acting as an agent of the Plaintiff in preparing this case for trial. The railroad's argument is a distinction without a difference.

Don't allow defense counsel to virtually eliminate reality by suggesting that the equipment be examined at some other location (such as defense counsel's office). There are times when location is not important; however, sometimes the location of the equipment is essential to understanding how a particular incident occurred. If that location happens to be on the property of the railroad, then that factor could be essential in understanding the mechanism of injury.

In conclusion, don't get "railroaded" by the defense attorney in giving up your rights for something your client is entitled to under the law. Most judges will understand that you are only doing your job as an officer of the Court and should be accorded a reasonably safe place in which to conduct the inspection.