

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JUSTIN R. BELISLE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 08-2087-JWL
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	

ORDER

This case comes before the court on the motion of the plaintiff, Justin R. Belisle, to compel the defendant, BNSF Railway Company, to produce documents responsive to two discovery requests (**doc. 44**). Defendant has filed a response (doc. 46), and plaintiff has replied (doc. 47). At issue in the instant motion are injury reports which defendant was withholding from production on the grounds they are privileged by statute, i.e., 49 U.S.C. § 20903 and 23 U.S.C. § 490. On September 9, 2008, the court entered an order (doc. 50) finding that upon the current state of the record, the court was unable to confidently determine whether the injury reports defendant is withholding fall within the scope of either of the above-referenced statutes. The court ordered defendant to produce copies of all the reports for an in camera inspection. Defendant has provided two reports. Upon review, the court makes the following findings.

As to the report titled "FRA FORM F6180.98 (ALTERNATE), the court notes that the bottom of each page contains the following statement:

This report is part of the reporting railroad's accident report pursuant to the accident statute and, as such shall not "be admitted as evidence or used for any purpose in any suit or action or damages growing out of any matter mentioned in said report . . ." 49 U.S.C. 20903.

However, the report, on page 2, also includes the following statement:

IT IS THE POLICY OF THE BNSF THAT EACH EMPLOYEE WILL BE PROVIDED THE OPPORTUNITY TO REVIEW AND/OR OBTAIN COPY OF ALTERNATE FRA FORM F6180.98 UPON REQUEST.

The court finds the language of plaintiff's request for production Nos. 5 and 6 is broad enough to encompass the above-referenced report. Therefore, consistent with the above-stated policy of BNSF, this report is discoverable and should be produced to plaintiff promptly upon receipt of this order.

As to the report titled "SHORT FORM FOR REPORTING STRESS/TRAUMA DUE TO HIGHWAY-GRADE CROSSING AND TRESPASSER ACCIDENTS OR OTHER CRITICAL INCIDENTS," the court finds this report does fall within the scope of 49 U.S.C. § 20903 and 23 U.S.C. § 490 and, therefore, is not discoverable.

In consideration of the foregoing,

IT IS HEREBY ORDERED that plaintiff's motion to compel is granted in part and denied in part (**doc. 44**).

Dated this 12th day of September, 2008, at Kansas City, Kansas.

s/James P. O'Hara

James P. O'Hara
U.S. Magistrate Judge