

**Case Name:** Richard P. Flaa v Burlington Northern Santa Fe Railway Co.

**Date Decided:** May 6th, 2003

**Originally Filed in:** ()

**Decided by:** (State)

**Court:** U.S.D.C. - E.D. Washington

**Judge:** Magistrate Judge Imbrogno

**Citation:**

**Background:**

The Plaintiff, Richard P. Flaa, brought forth a Motion to Compel Defendant, Burlington Northern Santa Fe Railway Co. ("BNSF") to produce three documents. The first document was a copy of each and every Employee Injury/Illness Supervisor's Report. BNSF failed to produce pages nine and eleven of Flaa's report, which detailed the equipment, acts, and conditions contributing to the injury, the root cause of the injury, and the recommended corrective actions. BNSF argued those pages were never completed and did not exist. Next, Flaa wanted the BNSF Report of Inspection prepared in response to Flaa's April 2, 2000, on-the-job injury. BNSF stated that the request was "overly broad and unduly burdensome." BNSF further countered that the form was never completed and therefore did not exist. Flaa next contended that BNSF failed to produce the "Self-Critical" Analysis. BNSF argued that pursuant to 49 U.S.C. Â§ 20903 and 49 C.F.R. Â§ 225.7, no part of any report filed under the latter may be used in an action for damages. BNSF asserted the privilege of common law attached by virtue of statutory law. Flaa objected, stating that the self-critical analysis document was published by BNSF, rather than prescribed by the FRA and BNSF waived any objections by failing to object within thirty days.

**Issue:**

The Court must decide whether (1) the Motion to Compel on each of the three documents will be granted; and whether (2) the privilege of common law attaches by virtue of statutory law.

**Overall Issues Discussed or Touched Upon in this Case:**

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**Held:**

The Supervisor's Report was the first document requested by Flaa. The Court accepted BNSF's representation that the documents did not exist. Thus, the motion to compel was denied as moot. Similarly, the Court accepted BNSF's representation that the Inspection Form was never completed and did not exist. Therefore, Flaa's motion to compel was denied as moot. For the self-critical analysis document, the Court held that BNSF's argument must fail. When applied, the self-critical analysis privilege concerns situations involving "an intrusion into the self-evaluative analysis of an institution that would have an adverse effect on the

evaluative process, with a net detriment to a cognizable public interest." Thus, because production of such documents can hamper candid self-evaluation geared towards preventing future accidents, the doctrine evolved to protect subjective or conclusory materials. In tort cases, *Dowling v American Hawaii Cruises* (971 F.2d 423) is the standard for determining the applicability and extent of the privilege. Pursuant to *Dowling*, a self-critical analysis privilege may attach if: (1) the information sought resulted from a critical self-analysis undertaken by a party seeking protection; (2) the public has a strong interest in protecting flow of this information; (3) information is of the type whose flow would be curtailed if discovery was allowed; and (4) the document was prepared with the expectation it would be and has been kept confidential. Here, BNSF produced the BNSF Railway Alternative Form instead of FRA Form F6180.98. BNSF asserted that the information used to prepare their form was derived, in some part, from the self-critical analysis prepared after the accident. This Court held there was no evidence the self-critical analysis remained confidential, which was necessary to give BNSF the privilege found in *Dowling*. Thus, the common law privilege did not apply to the self-critical analysis material in light of the fact BNSF disclosed the Alternative form, which would have otherwise been privileged, and BNSF's failure to assert privilege within the time allotted. The Court next discussed BNSF's alleged statutory privilege. BNSF contended the privilege existed by virtue of federal statutory law, 49 U.S.C. Â§ 20903, 49 U.S.C. Â§ 20901(a), and 49 C.F.R. Â§ 225.7. This Court held that no self-critical analysis privilege existed based on statutory provisions. First, no case law was given by BNSF in support of their contention. Second, the form at issue was not one mandated by the FRA, and was therefore not protected by federal statutes. Thus, Flaa's Motion to Compel for the self-critical analysis was granted. BNSF must produce this document within five business days.

**Comments:**

The gist of this case was the Court's consideration and rejection of BNSF's objections based on the common law privilege, as well as 49 U.S.C. Â§ 20903 and 49 C.F.R. Â§ 225.1. Steve Gordon <http://www.gordon-elias.com>