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No. 07-40058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN AG,

Petitioners

Original Proceeding from the United States District Court
for the Eastern District of Texas, Marshall Division

AMICI CURIAE BRIEF OF UNION PACIFIC RAILROAD COMPANY AND BNSF RAILWAY COMPANY IN SUPPORT OF PETITIONERS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Union Pacific Railroad Company
   Amicus Curiae

2. Union Pacific Corporation
   Corporate Parent of Amicus Curiae
   Union Pacific Railroad Company

3. BNSF Railway Company
   Amicus Curiae

4. Burlington Northern Santa Fe Corporation
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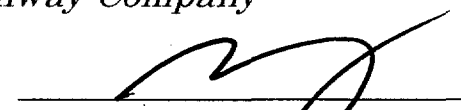

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other Authorities

INTEREST OF *AMICI CURIAE*

Union Pacific is the largest railroad in the United States, covering twenty-three states across two-thirds of the country. It has over 30,000 miles of railroad and employees over 50,000 people. BNSF is the second largest railroad in the United States, operating in twenty-eight states. It has over 32,000 miles of railroad and employees over 40,000 people. Together, Union Pacific and BNSF (collectively, the "Railroads") are by far the largest railroads that operate in the Fifth Circuit.

Union Pacific is a defendant in eight cases in the United States District Court for the Eastern District of Texas, Lufkin Division, involving twenty-nine plaintiffs. BNSF is a defendant in four cases in the Lufkin Division involving seven plaintiffs. These are cases brought by the Railroads' current and former employees under the Federal Employers' Liability Act ("FELA")[1] alleging various musculoskeletal injuries, including carpal-tunnel syndrome. The vast majority of these plaintiffs have never worked in Texas, and their claims have no relationship to the

[1] 45 U.S.C. § 51 *et seq.*

Eastern District of Texas. Nonetheless, they sued in the Lufkin Division.

The Railroads each had § 1404(a) venue-transfer motions granted based on the panel opinion in this case.[2] The district court stayed both transfers after the panel opinion was vacated, however.[3] So, the Railroads' transfers depend on the *en banc* Court's ruling in this case. The Railroads have an interest in this case because this Court's decision will determine whether they will have to defend these cases hundreds—if not thousands—of miles away from where the injuries occurred in a court with no connection to the cases.

The Railroads are filing this *amici* brief to provide real-world examples of how plaintiffs' lawyers are strategically using the broad venue statutes to concentrate cases in courts with no connection to the underlying facts. The Railroads believe that

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[2] *York v. Union Pacific R.R. Co.*, No. 07-CV-169 (E.D. Tex. Feb. 13, 2008) (Doc. No. 42) (App. A); *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex. Feb. 20, 2008) (Doc. No. 29) (App. B).

[3] *York v. Union Pacific R.R. Co.*, No. 07-CV-169 (E.D. Tex. Mar. 5, 2008) (Doc. No. 44) (App. C); *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex. Mar. 5, 2008) (Doc. No. 32) (App. D).

their experiences show the need for § 1404(a) convenience transfers as a counterweight to the broad venue statutes.

All of the parties have consented to the Railroads filing this *amici* brief.[4]

[4] FED. R. APP. P. 29(a).

ARGUMENT

Congress has established broad corporate-venue provisions, so a case against a large corporation can often be filed anywhere in the country. As a counterweight to those broad provisions, Congress has provided § 1404(a), which says that district courts should transfer cases that—although filed in technically proper venues—are filed in inconvenient places.

An overly cramped view of § 1404(a) convenience transfers will throw the system out of balance and result in cases being litigated and tried in places with no relationship to the underlying facts. This Court should recognize § 1404(a)'s important role in maintaining balance in venue law and hold that district courts should transfer cases that are filed in districts with no connection to the underlying facts.

I. Congress has established broad corporate-venue provisions.

Under the general-venue statute, a lawsuit can be brought in a judicial district where any defendant resides, if all of the

defendants reside in the same state.[5] While that sounds relatively narrow, it is actually quite broad when the defendant is a large corporation. That is because a corporate defendant resides in any judicial district in which it is subject to personal jurisdiction.[6] Professors Wright and Miller have said that this provision "has the effect of nearly eliminating venue restrictions in suits against corporations."[7]

McDonald's has restaurants in every judicial district in the country, so it is subject to personal jurisdiction—and, therefore, resides—in every judicial district. So, a slip-and-fall case at a McDonald's in Anchorage, Alaska, could properly be filed over 5,000 miles away in Key West, Florida.

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[5] 28 U.S.C. § 1391(a)-(b).

[6] 28 U.S.C. § 1391(c) ("For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.").

[7] 14D CHARLES ALAN, WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3802 (3d ed. 2007).

The specific-venue statutes are also broad. FELA, which allows railroad workers to sue for work-related injuries, is a good example of that. Under FELA, a case can be brought in any judicial district where the railroad does business.[8] So, the Railroads' workers can sue them in any of the over twenty states where they operate—no matter where the workers were injured.

II. Forum shopping is part of our adversarial system.

This Court has recognized that forum shopping is part of our adversarial system.[9] So, given the breadth of the corporate-venue statute, it is not surprising that plaintiffs' lawyers use it strategically. When deciding where to sue a corporation that does business throughout the country, plaintiffs' lawyers will decide which of the 94 judicial districts is most favorable to their clients. They will consider whether the juries are generous and whether the judge is likely to rule in their favor.[10]

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[8] 45 U.S.C. § 56 (A FELA case "may be brought in a district court of the United States . . . in which the defendant shall be doing business at the time of commencing such action.").

[9] *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1261 (5th Cir. 1983).

[10] *Id.* at 1261-62 ("a court may be selected because its docket moves rapidly, its discovery procedures are liberal, its jurors are generous, the rules of law applied are more favorable, or the judge who presides in that forum is thought more likely to rule in the litigant's favor").

Plaintiffs' lawyers should represent their clients zealously. But, while plaintiffs' lawyers have an interest in placing their cases in districts that they consider unusually favorable, Congress and the courts do not share that interest.[11]

Congress has provided the courts with a tool to make sure that the plaintiffs' lawyer's natural desire to seek the most favorable forum is not unchecked. That tool is the § 1404(a) convenience transfer.

III. Section 1404(a) convenience transfers are a necessary counterweight to the broad corporate-venue provisions.

The role of § 1404(a) convenience transfers as a counterweight to the broad venue statute is seen by examining the history of corporate venue.

Since 1887, the general-venue statute has allowed plaintiffs to sue defendants in the districts where they resided.[12] For years,

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[11] *See, e.g., Iragorri v. United Tech. Corp.*, 274 F.3d 65, 71-73 (2d Cir. 2001) (*en banc*) (granting less deference to the plaintiff's choice of forum in *forum non conveniens* cases when it appears "motivated by forum-shopping reasons"); 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3848 (3d ed. 2007) ("some courts give less weight to a plaintiff's forum choice if that party appears to be forum shopping").

[12] Judicial Code, Act of March 3, 1887, 24 Stat. 552, § 51 as corrected by Act of August 13, 1888, 25 Stat. 433 (formerly codified at 28 U.S.C. § 112(a)) ("no

a corporation was a resident—for venue purposes—only of the state where it was incorporated, and it could be sued only in the district within that state where it had its principal office and transacted its general corporate business.[13] The Supreme Court expanded that in 1939 when it held that, by designating an agent for service of process in a state where it was not incorporated, a corporation consented to be sued in federal court in that state.[14]

Congress expanded corporate venue in 1948. Under the 1948 law, a corporation could be sued in any judicial district where it was "doing business."[15] There were problems interpreting

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civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant"); 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3802 (3d ed. 2007).

[13] *Galveston, H. & S.A. Ry. Co. v. Gonzales*, 151 U.S. 496, 504 (1894) ("if the corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done"); 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3811 (3d ed. 2007).

[14] *Neirbo Co. v. Bethlehem Shipbuilding Co.*, 308 U.S. 165, 175 (1939); 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3811 (3d ed. 2007).

[15] 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3811 (3d ed. 2007) (quoting 1948 version

the scope of that provision, and Congress passed the current statute to clarify the issue.[16] Now, a corporate defendant resides—and can be sued—in any judicial district in which it is subject to personal jurisdiction.[17]

Congress included § 1404(a) convenience transfers in the same bill that expanded corporate venue.[18] Before 1948, federal courts could not transfer cases from one division to another. If a case was filed in a district that—while technically proper under the venue rules—was inconvenient, the district court could only dismiss under *forum non conveniens*.[19] Congress changed that in 1948 when it passed § 1404(a), which gave federal courts the power to transfer cases to more convenient districts instead of

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of 28 U.S.C. 1391(c)) ("A corporation may be sued in any judicial district in which it is . . . doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.").

[16] 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3811.1 (3d ed. 2007); Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, § 1013(a), 102 Stat. 4462 (1988) (amending 28 U.S.C. § 1391(c)).

[17] 28 U.S.C. § 1391(c).

[18] *See Ex parte Collett*, 337 U.S. 55, 62-71 (1949) (explaining legislative history of § 1404(a)).

[19] Note, *Forum Non Conveniens, a New Federal Doctrine*, 56 YALE L.J. 1234, 1249 (1947) (discussing lack of convenience transfer under federal law and endorsing passage of then pending bill that included current § 1404(a)).

dismissing them. While Congress based § 1404(a) on *forum non conveniens* law, it gave federal courts broader power to transfer cases than they had to dismiss them.[20]

Congress, therefore, did two things in these 1948 amendments. Congress greatly increased corporate venue so that a corporation could be sued in any district where it did business. But, Congress tempered the effect of that broad venue provision by allowing federal courts to transfer cases that were filed in inconvenient forums. So, the § 1404(a) convenience transfer acts as a counterweight to the broad corporate-venue provision.

IV. The Railroads' experiences show the need for § 1404(a) convenience transfers.

Plaintiffs' lawyers are taking advantage of FELA's broad venue provision to sue the Railroads in districts with no relationship to the cases' underlying facts. This is seen in the FELA lawsuits filed in the Lufkin Division. The vast majority of the plaintiffs in these cases are not from—and never worked in—Texas, let alone in the Eastern District of Texas. The only

[20] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 264-65 (1981); *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

relationship between their claimed injuries and the Eastern District is that their lawyers filed their cases there. Union Pacific's *York* case and BNSF's *Teuton* case are representative examples.

A. Union Pacific's experience.

Willis York has worked for Union Pacific for over thirty years. He worked the first two decades in Pocatello, Idaho, and for the last eight years in North Platte, Nebraska.[21] All of the doctors who treated York work in Nebraska, with most of them working within two miles of the North Platte federal courthouse.[22] Even though he has never worked in Texas—and did not claim that his injury related to Texas in any way—he sued Union Pacific in the Lufkin Division.[23]

Union Pacific filed a § 1404(a) motion seeking to transfer the case to the District of Nebraska.[24] York did not argue that his

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[21] *York v. Union Pacific R.R. Co.*, No. 07-CV-169 (E.D. Tex. Jan. 15, 2008) (Doc. No. 22).

[22] *Id.*

[23] *Id.*

[24] *Id*; *see Ex Parte Collett*, 337 U.S. at 62-64 (§1404(a) applies in FELA cases just like in cases governed by the regular venue statute).

case had any relationship to Texas.[25] Instead, York opposed the transfer based on his right to sue Union Pacific anywhere it did business.[26]

Based on the panel opinion in this case, the district court transferred York's case.[27] But, the district court has stayed the transfer pending this Court's *en banc* decision.[28]

B. BNSF's experience.

In the *Teuton v. BNSF Railway Company* case, the same plaintiffs' lawyers involved in *York* sued BNSF in the Lufkin Division.[29] Two of the four plaintiffs had worked their entire careers outside of Texas, and neither of the two Texas plaintiffs had ever worked in the Eastern District. BNSF filed a motion to sever the cases and transfer each plaintiff to his home division

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[25] *York v. Union Pacific R.R. Co.*, No. 07-CV-169 (E.D. Tex. Jan. 25, 2008) (Doc. No. 37).

[26] *Id.*

[27] *York v. Union Pacific R.R. Co.*, No. 07-CV-169 (E.D. Tex. Feb. 13, 2008) (Doc. No. 42) (App. A).

[28] *York v. Union Pacific R.R. Co.*, No. 07-CV-169 (E.D. Tex. Mar. 5, 2008) (Doc. No. 44) (App. C).

[29] *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex.).

under § 1404(a).[30] Like in *York*, the plaintiffs did not argue that their cases had any relationship to the Eastern District.[31] Instead, like in *York*, they opposed the transfer based on their right to sue BNSF anywhere it did business.[32]

Based on the panel opinion in this case, the district court transferred the *Teuton* case.[33] But, the district court has stayed the transfer pending this Court's *en banc* decision.[34]

C. The Railroads' experiences show the danger from narrowly interpreting § 1404(a).

If § 1404(a) is interpreted too narrowly, then the Railroads will have to defend these cases far from where they arose. Witnesses will have to travel hundreds or thousands of miles to testify, and citizens of a community with no interest in the cases will have to serve as jurors. That throws the venue system out of balance.

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[30] *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex. Jan. 30, 2008) (Doc. No. 23).

[31] *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex. Feb. 8, 2008) (Doc. No. 27).

[32] *Id.*

[33] *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex. Feb. 20, 2008) (Doc. No. 29) (App. B).

[34] *Teuton v. BNSF Ry. Co.*, No. 07-CV-214 (E.D. Tex. Mar. 5, 2008) (Doc. No. 32) (App. D).

To achieve balance, the broad venue statute needs a robust convenience-transfer counterweight. Regardless which specific formulation this Court adopts, it should make certain that § 1404(a) convenience transfers are a proper counterbalance so that cases will not be tried in districts with no connection to the underlying facts.

CONCLUSION

The broad corporate-venue provision allows plaintiffs to sue corporate defendants in virtually any judicial district in the country. Because forum shopping is part of our adversarial system, plaintiffs' lawyers will file cases in the district they perceive most favorable—even if it has no connection to the lawsuit.

Congress included § 1404(a) convenience transfers to counterbalance the broad corporate-venue provision and resulting forum shopping. An unnecessarily cramped interpretation of § 1404(a) will throw the venue system out of balance. This Court should ensure that § 1404(a) convenience transfers are a proper

counterbalance so that cases will not be tried in districts with no connection to the underlying facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d)(1)(B), I hereby certify that a true and correct copy of Appellants' brief, in both paper (2 copies) and electronic form (1 copy), were served upon the following by certified mail, postage prepaid to them on March 24, 2008:

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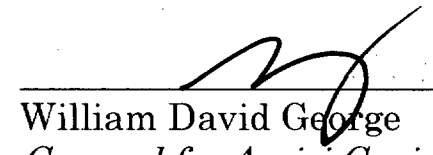
Pursuant to Federal Rule of Appellate Procedure 25(d)(2), I certify that a true and correct copy of the same has been forwarded to the Clerk of the Fifth Circuit Court of Appeals by Federal Express on March 24, 2008, for delivery on March 25, 2008.



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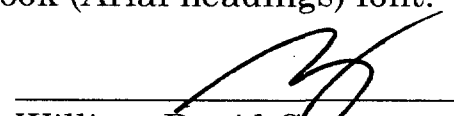
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 2,782 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2002 in 14 point (12 point in footnotes) Century Schoolbook (Arial headings) font.



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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

WILLIS ALLEN YORK	§	
Vs.	§	CIVIL ACTION NO. 9:07CV169
UNION PACIFIC RAILROAD COMPANY	§	

ORDER

Plaintiff Willis Allen York filed the above-styled lawsuit on July 30, 2007, in the Eastern District of Texas, Lufkin Division. The matter was referred to the undersigned to conduct pretrial proceedings in accordance with 28 U.S.C. § 636. On January 15, 2008, Defendant filed a Motion to Transfer Venue (document #32). A response was filed by Plaintiff on January 25, 2008, followed by a reply by Defendant on January 30, 2008 and a sur-reply filed by Plaintiff on February 1, 2008. For the reasons assigned below, the undersigned finds that the motion should be granted.

Background

This lawsuit was filed seeking relief pursuant to the Federal Employers' Liability Act ("FELA"). Plaintiff states in the complaint that he was injured in the course and scope of his employment with Union Pacific Railroad Company ("Union Pacific"). He alleges that he has suffered disorders of his musculoskeletal and/or nervous systems, including injuries to his knee, as a result of cumulative and repetitive trauma during the course of his employment. Plaintiff asserts

that his injuries resulted from Union Pacific's negligence.

Union Pacific filed a Motion to Transfer Venue. Union Pacific argues that a transfer to the District of Nebraska is appropriate in this case. Union Pacific submits that this case has no factual connection to the Eastern District of Texas, in that Plaintiff has never lived in Texas, worked in Texas or received any medical treatment in Texas. Plaintiff worked in Pocatello, Idaho until 2000, when he transferred to North Platte, Nebraska. Union Pacific asserts that the District of Nebraska is a more convenient forum for this case than the Eastern District of Texas and seeks a transfer pursuant to 28 U.S.C. § 1404(a).

Plaintiff filed a response on January 25, 2008. Plaintiff submits that a transfer would cause delay because the case is currently scheduled for trial on or about April 7, 2008. Plaintiff submits that his choice of forum is a substantial right because this is a FELA case. Plaintiff argues that Union Pacific has not shown good cause for a transfer in this case. Plaintiff asserts that the interests of justice would not be furthered by a transfer because a transfer would cause delay.

In its reply, Union Pacific asserts that Plaintiff's choice of forum, the possibility of delay and the location of counsel are not § 1404(a) factors. Union Pacific further disputes Plaintiff's interpretation of the effect of FELA's venue provision on a motion seeking to transfer pursuant to § 1404(a). Plaintiff's sur-reply asserts that the most recent Fifth Circuit case concerning § 1404(a) transfers is distinguishable from this case because it did not involve a FELA claim. Plaintiff argues that Plaintiff's choice of forum is to be given deference and that delay, location of counsel and political or economic influence are still factors to be considered.

Discussion and Analysis

Defendant seeks a transfer of this case to the District of Nebraska pursuant to 28 U.S.C. §

1404(a), which allows the Court, in its discretion, to transfer a case to any other district where it might have been brought. The purpose of § 1404(a) is to prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense. *Id.* at 616. The decision whether to transfer a case is within the sound discretion of the district court. *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir.1966). The amount of deference sought by Plaintiff for his choice of forum would render § 1404 inapplicable in a FELA case. Contrary to Plaintiff's assertions, parties may seek a § 1404(a) transfer in a FELA case. Indeed, "Congress cited a FELA case as an example of the need for such a provision, and courts have consistently held that § 1404(a) applies to all actions, not just those listed in the general venue provisions." *Robertson v. Kiamichi Railroad Co., L.L.C.*, 42 F.Supp.2d 651, 654 (E.D.Tex.1999).

The first issue for consideration when deciding whether a transfer is appropriate is, "whether the judicial district to which transfer is sought qualifies under the applicable venue statutes as a judicial district where the civil action 'might have been brought.'" *In re Horseshoe Entertainment*, 337 F.3d 429, 433 (5th Cir.), *cert. denied*, 540 U.S. 1049, 124 S.Ct. 826 (2003). A lawsuit "might have been brought" in a district and division where the jurisdictional and venue requirements are satisfied. *Van Dusen v. Barrack*, 376 U.S. 612, 621-22, 84 S.Ct. 805, 810-11 (1964).

Plaintiff asserts a claim pursuant to the FELA. Pursuant to 45 U.S.C. § 56, a FELA lawsuit, "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." Plaintiff argues at length in his response that venue is proper in the Eastern District of Texas and that Congress intended to allow plaintiffs to file FELA lawsuits anywhere the railroad does business. The parties do not dispute, however, that jurisdiction

and venue would be permitted, in accordance with 45 U.S.C. § 56, in this district and the District of Nebraska.

Next, the burden is placed on the movant to show why the forum should be changed. *Time, Inc. v. Manning*, 366 F.2d at 698. The Fifth Circuit recently clarified that the proper standard is whether the movant has shown good cause for a transfer. *In re Volkswagen*, 506 F.3d 376, 380 (5th Cir.2007) (rejecting requirement for the movant to show that the balance of convenience and justice substantially weighs in favor of transfer). Although a plaintiff's choice of forum has typically been considered by courts as one of the private interest factors when analyzing a motion for § 1404(a) transfer, the deference given to a plaintiff's choice of forum establishes the burden that the movant must meet when seeking a § 1404(a) transfer. *Id.* at 381. In other words, because of the deference afforded a plaintiff's choice of forum, a movant must show that a transfer is for the convenience of the parties and witnesses and that it is in the interest of justice. *Id.*

There are essentially two categories of factors to be considered: factors relating to the convenience of parties and witnesses, referred to as private interest factors, and factors relating to the public interest in the fair and efficient administration of justice. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843 (1947); *Walter Fuller Aircraft Sales v. The Rep. Of the Philippines*, 965 F.2d 1375, 1389 (5th Cir.1992). The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *In re Volkswagen*, 506 F.3d at 380 (citing *In re Volkswagen AG*, 371 F.3d. 201, 203 (5th Cir.2004). The location of counsel is irrelevant to a decision on transfer of venue and is improper for consideration. *In re Horseshoe Entertainment*, 337

F.3d at 434. Factors to consider concerning the public interest include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law. *Id.*

Convenience Factors

Location of Sources of Proof

The first factor is the accessibility and location of sources of proof. Typically, the location of documents and business records is given little weight, unless the documents are "so voluminous that their transport is a major undertaking." *Dupre*, 810 F.Supp. at 827. In this case, no records are located in the Eastern District of Texas. Plaintiff alleges that he was injured during his employment and none of his employment or medical care took place in the Eastern District of Texas. Union Pacific states that documents relating to Plaintiff's employment are located in Omaha, Nebraska and Plaintiff's medical records are located in his doctor's offices in North Platte, Nebraska and Kearney, Nebraska. None of the sources of proof are located in the Eastern District of Texas; rather they are all located in the District of Nebraska. This factor weighs in favor of a transfer because none of the sources of proof are located in this district.

Availability of Compulsory Process

Courts should consider the availability and convenience of witnesses and parties, including the availability of compulsory process. Courts commonly consider the availability, convenience and cost of witnesses as one of the most important considerations. *Gardipee v. Petroleum Helicopters, Inc.*, 49 F.Supp.2d 925, 928 (E.D.Tex.1999) (citing *Dupre v. Spanier Marine Corp.*, 810 F.Supp. 823, 825 (S.D.Tex.1993)); *TV-3, Inc.*, 28 F.Supp.2d at 411 (citing *Fletcher v. Southern Pacific Trans. Co.*,

648 F.Supp. 1400, 1401-02 (E.D.Tex.1989)); *Reed*, 995 F.Supp. at 714; *Gundle Lining Construction Corp.*, 844 F.Supp. at 1166.

When considering the convenience of witnesses, the Court must be concerned with the convenience of only "key" witnesses. *Gardipee*, 49 F.Supp. at 929. None of the witnesses identified by either party are located within the Eastern District of Texas. Any witness unwilling to appear at trial would be outside of the 100-mile subpoena radius if the trial is in Lufkin, Texas. Union Pacific asserts that the testimony of Plaintiff's treating physicians will have particular importance in this case because Plaintiff is alleging an injury that accumulated over thirty years of employment. Union Pacific argues that the treating physicians should be compelled to testify in person in this case at trial, rather than by deposition, because medical testimony will be key in this case and their live testimony will be necessary to balance the testimony of retained expert witnesses. Union Pacific submitted declarations from three of Plaintiff's four treating physicians stating that they will not voluntarily attend trial in Lufkin, Texas because it is inconvenient. This factor weighs in favor of a transfer.

Cost of Attendance for Willing Witnesses

The third factor concerns the cost of attendance for willing witnesses. It is axiomatic that it is more convenient for witnesses to attend trial close to home. "Additional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which fact witnesses must be away from their regular employment." *In re Volkswagen AG*, 371 F.3d at 205. For a trial in the Eastern District of Texas, all witnesses will be required to travel. It appears that the majority of potential witnesses are located within the District of Nebraska. With none of the witnesses located in this district, the convenience of the witnesses and parties overall favors a transfer.

Public Interest Factors

As previously stated, the public interest factors include issues such as relative court congestion, community nexus to the lawsuit resulting in a local interest in adjudicating the dispute, the familiarity of the forum with the law that will govern the case and the desire to avoid any conflict of law issues.

In this case, the District of Nebraska has a superior interest in adjudicating this dispute. A portion of Plaintiff employment, including his most recent employment, occurred in the District of Nebraska and the Plaintiff is a resident of the District of Nebraska. The Eastern District of Texas, on the other hand, has no connection to the facts giving rise to this lawsuit. Plaintiff has not lived or worked here and did not acquire his injury here. There are no conflict of laws issues in this case because this lawsuit is brought under federal law. There has been no showing that the District of Nebraska's docket is so congested, as compared with the Eastern District of Texas, Lufkin Division, that it would be burdensome to transfer this case there. Indeed, although Plaintiff submits that this case is set for trial on April 7, 2008, Plaintiff does not have a firm trial setting and it is unlikely that this case would proceed to trial at that time. Due to the number of FELA lawsuits filed in the Lufkin Division within the past year, there are currently 5 FELA lawsuits wherein the parties have been instructed to "be ready for trial" in early April 2008. Those five lawsuits include FELA claims by fourteen plaintiffs. Obviously, that many claims cannot be tried at the same time. In addition, Judge Heartfield undoubtedly has other, non-FELA cases set for his April docket

Balancing all of these various factors, the Court is of the opinion that Defendant has satisfied its burden of showing good cause for a transfer. The Eastern District of Texas is not a convenient forum for this case. While it is understood that there may be some delay in this case because of the

transfer, there has been no showing that the delay will be so significant as to outweigh the good cause shown for a transfer. The lawsuit should be transferred to the District of Nebraska. It is accordingly

ORDERED that the Defendant's Motion to Transfer Venue (document #32) is **GRANTED** and the case is hereby **TRANSFERRED** to the District of Nebraska pursuant to 28 U.S.C. § 1404(a).

So **ORDERED** and **SIGNED** this **13** day of **February, 2008.**

JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

LARRY M. TEUTON, ET AL.	§	
Vs.	§	CIVIL ACTION NO. 9:07CV214
BNSF RAILWAY COMPANY	§	

ORDER

Plaintiffs Larry M. Teuton, Robert E. Lutrick, Charles R. Mitchell and Wayne K. Boles filed the above-styled lawsuit on September 11, 2007, in the Eastern District of Texas, Lufkin Division. The matter was referred to the undersigned to conduct pretrial proceedings in accordance with 28 U.S.C. § 636. On January 17, 2008, Defendant filed a Motion to Sever (document #16). Defendant subsequently filed an Amended Motion to Transfer Venue (document #23) on January 30, 2008. For the reasons assigned below, the undersigned finds that the motions should be granted.

Background

This lawsuit was filed seeking relief pursuant to the Federal Employers' Liability Act ("FELA"). Plaintiffs are current and former employees of BNSF Railway Company ("BNSF"). They allege that they have suffered disorders of their musculoskeletal and/or nervous systems as a result of cumulative and repetitive exposure to ergonomic risk factors during the course of their employment with BNSF. Plaintiffs assert that his injuries resulted from BNSF's negligence.

BNSF filed a Motion to Sever. BNSF asserts that the claims of each plaintiff should be separated out into independent cases. BNSF submits that the claims do not arise out of the same transaction or occurrence, settlement of the claims or judicial economy would be facilitated by severance, prejudice would be avoided if severance were granted, different witnesses and documentary proof are required for the separate claims and there are different issues of fact. BNSF explains that Plaintiffs all worked out of different locations and have not all performed the same job duties. BNSF argues that it will be prejudiced if the claims are not severed.

Plaintiffs filed a response on January 28, 2008. Plaintiffs assert that severance is premature because the parties are still conducting discovery. Plaintiffs additionally argue that a severance is not warranted because their claims involve interrelated claims that share attributes. Plaintiffs submit that their claims do arise out of the same transaction or occurrence because they are all seeking to recover for injuries allegedly sustained as the result of continuous exposure to various ergonomic risk factors to their hands, wrists, arms, legs, neck and back due to the equipment, methods and conditions they were exposed to in performing their work for BNSF. Plaintiffs assert that they were all employed in the transportation department during a similar time period and that their types of injuries share similarities. Plaintiffs argue that there are common questions of law and fact because they are all seeking relief pursuant to the FELA for injuries allegedly resulting from continuous exposure to various ergonomic risk factors. According to Plaintiffs, a severance will result in multiple trials and additional time and expense in discovery.

In a reply filed on February 1, 2008, BNSF submits that a recent expert report from Plaintiffs' expert witness notes that the injuries of each plaintiff varies. BNSF reiterates that Plaintiffs worked at different locations and there has been no showing that they operated the same tools or performed

the same job tasks.

BNSF additionally filed an Amended Motion to Transfer Venue. BNSF argues that, if the claims are severed, they should be transferred as follows: Teuton's claims transferred to the Northern District of Texas, Amarillo Division; Lutrick's claims transferred to the District of New Mexico; Mitchell's claims transferred to the Western District of Texas, Waco Division; and Boles's claims transferred to the District of Kansas. BNSF submits that these claims have no factual connection to the Eastern District of Texas, in that Plaintiffs have never lived in the Eastern District of Texas, worked in the Eastern District of Texas or received any medical treatment in the Eastern District of Texas. BNSF submits that Teuton lives in Amarillo, Texas and has worked his entire career with BNSF in that general area; Lutrick lives in Portales, New Mexico and has worked his entire career with BNSF in that general area; Mitchell lives in Temple, Texas and has worked his entire career with BNSF in that general area; and that Boles lives in Kansas City, Missouri and has worked most of his career with BNSF in the Kansas, Missouri and Oklahoma general area. BNSF identifies potential witnesses for each plaintiff, including retained experts located in Houston, Texas, Ft. Worth, Texas and Pelham, Massachussetts, co-workers residing in the same area as each plaintiff, treating physicians located in the same area as each plaintiff, and BNSF employees located in Ft. Worth, Texas. BNSF asserts that the identified districts are a more convenient forum for each Plaintiff's claims than the Eastern District of Texas and BNSF seeks a transfer pursuant to 28 U.S.C. § 1404(a).

Plaintiffs filed a response on February 8, 2008. Plaintiffs submit that a transfer would cause delay because the case is currently scheduled for trial on or about June 2, 2008. Plaintiffs assert that their choice of forum is a substantial right because this is a FELA case. According to Plaintiffs,

FELA cases are to be treated differently than other cases when considering a motion to transfer venue. Plaintiffs argue that BNSF has not shown good cause for a transfer in this case and that the interests of justice would not be furthered by a transfer because a transfer would cause delay.

In its reply, BNSF asserts that Plaintiff's choice of forum is only a factor to be considered and, balanced with the fact that none of the injuries occurred in the Eastern District and none of the witnesses or sources of proof are located in the Eastern District, Plaintiffs' choice of forum should be given less weight.

Discussion and Analysis

First, Defendant seeks to sever the claims of each plaintiff. Pursuant to Fed.R.Civ.P. 20(a), plaintiffs may join together if:

> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.

Claims may also be severed. Fed.R.Civ.P. 21. The trial court has broad discretion to order a severance. *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir.1994).

In this case, Plaintiffs assert that their claims arise out of the same transaction or occurrence because they are all seeking to recover for injuries allegedly sustained as the result of continuous exposure to various ergonomic risk factors to their hands, wrists, arms, legs, neck and back due to the equipment, methods and conditions they were exposed to in performing their work for BNSF. Plaintiffs have not identified the "ergonomic risk factors" each plaintiff was exposed to or the job tasks that allegedly resulted in their injuries. Plaintiffs assert that severance is premature because discovery is on-going, but Plaintiffs are

in the best position to know what equipment they worked with, what job tasks they performed and what injuries they have suffered. Although Plaintiffs are all seeking relief pursuant to the FELA, they do not provide enough facts to support their assertion that their claims arise out of the same transaction or occurrence. It is not enough to rely on non-specific, conclusory allegations that they have all been exposed to "various ergonomic risk factors" and sustained injuries due to "equipment, methods and conditions." Those statements do not provide enough information for the undersigned to determine that the claims should remain joined. Plaintiffs worked at different locations and there is no indication that they performed the same job tasks or used the same equipment. With these facts, it is not at all clear that judicial economy would be served by keeping the claims together. For these reasons, the Motion to Sever should be granted.

Second, Defendant seeks a transfer of each plaintiff's case pursuant to 28 U.S.C. § 1404(a), which allows the Court, in its discretion, to transfer a case to any other district where it might have been brought. The purpose of § 1404(a) is to prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense. *Id.* at 616. The decision whether to transfer a case is within the sound discretion of the district court. *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir.1966). The amount of deference sought by Plaintiff for his choice of forum would render § 1404 inapplicable in a FELA case. Contrary to Plaintiff's assertions, parties may seek a § 1404(a) transfer in a FELA case. Indeed, "Congress cited a FELA case as an example of the need for such a provision, and courts have consistently held that § 1404(a) applies to all actions, not just those listed in the general venue provisions." *Robertson v. Kiamichi*

Railroad Co., L.L.C., 42 F.Supp.2d 651, 654 (E.D.Tex.1999).

The first issue for consideration when deciding whether a transfer is appropriate is, "whether the judicial district to which transfer is sought qualifies under the applicable venue statutes as a judicial district where the civil action 'might have been brought.'" *In re Horseshoe Entertainment*, 337 F.3d 429, 433 (5th Cir.), *cert. denied*, 540 U.S. 1049, 124 S.Ct. 826 (2003). A lawsuit "might have been brought" in a district and division where the jurisdictional and venue requirements are satisfied. *Van Dusen v. Barrack*, 376 U.S. 612, 621-22, 84 S.Ct. 805, 810-11 (1964).

Plaintiffs assert claims pursuant to the FELA. Pursuant to 45 U.S.C. § 56, a FELA lawsuit, "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." Plaintiffs argue that venue is proper in the Eastern District of Texas and that Congress intended to allow plaintiffs to file FELA lawsuits anywhere the railroad does business. The parties do not dispute, however, that jurisdiction and venue would be permitted, in accordance with 45 U.S.C. § 56, in this district and the districts to which BNSF seeks transfers.

Next, the burden is placed on the movant to show why the forum should be changed. *Time, Inc. v. Manning*, 366 F.2d at 698. The Fifth Circuit recently clarified that the proper standard is whether the movant has shown good cause for a transfer. *In re Volkswagen*, 506 F.3d 376, 380 (5th Cir.2007) (rejecting requirement for the movant to show that the balance of convenience and justice substantially weighs in favor of transfer). Although a plaintiff's choice of forum has typically been considered by courts as one of the private interest factors

when analyzing a motion for § 1404(a) transfer, the deference given to a plaintiff's choice of forum establishes the burden that the movant must meet when seeking a § 1404(a) transfer. *Id.* at 381. In other words, because of the deference afforded a plaintiff's choice of forum, a movant must show that a transfer is for the convenience of the parties and witnesses and that it is in the interest of justice. *Id.*

There are essentially two categories of factors to be considered: factors relating to the convenience of parties and witnesses, referred to as private interest factors, and factors relating to the public interest in the fair and efficient administration of justice. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843 (1947); *Walter Fuller Aircraft Sales v. The Rep. Of the Philippines*, 965 F.2d 1375, 1389 (5th Cir.1992). The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *In re Volkswagen*, 506 F.3d at 380 (citing *In re Volkswagen AG*, 371 F.3d. 201, 203 (5th Cir.2004). The location of counsel is irrelevant to a decision on transfer of venue and is improper for consideration. *In re Horseshoe Entertainment*, 337 F.3d at 434. Factors to consider concerning the public interest include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law. *Id.*

Convenience Factors

Location of Sources of Proof

The first factor is the accessibility and location of sources of proof. Typically, the location of documents and business records is given little weight, unless the documents are "so voluminous that their transport is a major undertaking." *Dupre*, 810 F.Supp. at 827. In this case, however, no records are located in the Eastern District of Texas. Plaintiffs allege that they were injured during their employment and none of their employment or medical care took place in the Eastern District of Texas. None of the sources of proof are located in the Eastern District of Texas. This factor weighs in favor of a transfer because none of the sources of proof are located in this district.

Availability of Compulsory Process

Courts should consider the availability and convenience of witnesses and parties, including the availability of compulsory process. Courts commonly consider the availability, convenience and cost of witnesses as one of the most important considerations. *Gardipee v. Petroleum Helicopters, Inc.*, 49 F.Supp.2d 925, 928 (E.D.Tex.1999) (citing *Dupre v. Spanier Marine Corp.*, 810 F.Supp. 823, 825 (S.D.Tex.1993)); *TV-3, Inc.*, 28 F.Supp.2d at 411 (citing *Fletcher v. Southern Pacific Trans. Co.*, 648 F.Supp. 1400, 1401-02 (E.D.Tex.1989)); *Reed*, 995 F.Supp. at 714; *Gundle Lining Construction Corp.*, 844 F.Supp. at 1166.

When considering the convenience of witnesses, the Court must be concerned with the convenience of only "key" witnesses. *Gardipee*, 49 F.Supp. at 929. None of the identified witnesses are located within the Eastern District of Texas. Any witness unwilling to appear at trial would be outside of the 100-mile subpoena radius if the trial is in Lufkin, Texas. This

factor weighs in favor of a transfer.

Cost of Attendance for Willing Witnesses

The third factor concerns the cost of attendance for willing witnesses. It is axiomatic that it is more convenient for witnesses to attend trial close to home. "Additional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which fact witnesses must be away from their regular employment." *In re Volkswagen AG*, 371 F.3d at 205. For a trial in the Eastern District of Texas, all witnesses will be required to travel. With none of the witnesses located in this district, the overall convenience of the witnesses favors a transfer.

Public Interest Factors

As previously stated, the public interest factors include issues such as relative court congestion, community nexus to the lawsuit resulting in a local interest in adjudicating the dispute, the familiarity of the forum with the law that will govern the case and the desire to avoid any conflict of law issues.

In this case, the districts identified by BNSF have a superior interest in adjudicating each plaintiff's dispute because these districts are where each plaintiff resides and worked or currently works. The Eastern District of Texas, on the other hand, has no connection to the facts giving rise to this lawsuit. Plaintiffs have not lived or worked here and did not acquire their injuries here. There are no conflict of laws issues in this case because this lawsuit is brought under federal law. There has been no showing that the dockets of the identified districts are so congested, as compared with the Eastern District of Texas, Lufkin Division,

that it would be burdensome to transfer the claims.

Balancing all of these various factors, the Court is of the opinion that Defendant has satisfied its burden of showing good cause for a transfer. The Eastern District of Texas is not a convenient forum for this case. While it is understood that there may be some delay caused by a transfer, there has been no showing that the delay will be so significant as to outweigh the good cause shown for a transfer. It is accordingly

ORDERED that Defendant's Motion to Sever (document #16) is **GRANTED**. Plaintiffs' claims are **SEVERED**. It is further

ORDERED that Defendant's Motion to Transfer Venue (document #23) is **GRANTED.** The claims of Larry M. Teuton are hereby **TRANSFERRED** to the Northern District of Texas, Amarillo Division; the claims of Robert E. Lutrick are **TRANSFERRED** to the District of New Mexico; the claims of Charles R. Mitchell are **TRANSFERRED** to the Western District of Texas, Waco Division; and the claims of Wayne K. Boles are **TRANSFERRED** to the District of Kansas pursuant to 28 U.S.C. § 1404(a).

So **ORDERED** and **SIGNED** this **20** day of **February, 2008.**

JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

WILLIS ALLEN YORK	§	
Vs.	§	CIVIL ACTION NO. 9:07CV169
UNION PACIFIC RAILROAD COMPANY	§	

ORDER

Plaintiff Willis Allen York filed the above-styled lawsuit on July 30, 2007, in the Eastern District of Texas, Lufkin Division. The matter was referred to the undersigned to conduct pretrial proceedings in accordance with 28 U.S.C. § 636.

On February 13, 2008, the undersigned issued an Order granting Defendant's Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a). The following day, the Fifth Circuit granted a petition for rehearing en banc regarding the decision of *In re Volkswagen*, 506 F.3d 376 (5th Cir. 2007), vacated its previous opinion and judgment and stayed the mandate. *See In re Volkswagen*, No. 07-40058 (5th Cir. Feb. 14, 2008) (order granting petition). The undersigned relies heavily on the *Volkswagen* decision in the Order granting a transfer. As a result, the case should be stayed pending the en banc decision of the Fifth Circuit in *Volkswagen*. The Clerk's office has not yet transferred this case because a Motion for Reconsideration was filed on February 22, 2008. In light of the foregoing, it is hereby

ORDERED that the above-styled case, including the Order to Transfer, is **STAYED**, pending the en banc decision of the Fifth Circuit in the matter of *In Re Volkswagen*.

So **ORDERED** and **SIGNED** this **25** day of **February, 2008.**

JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

LARRY M. TEUTON, ET AL.	§	
Vs.	§	CIVIL ACTION NO. 9:07CV214
BNSF RAILWAY COMPANY	§	

ORDER

Plaintiffs filed the above-styled lawsuit on September 11, 2007, in the Eastern District of Texas, Lufkin Division. The matter was referred to the undersigned to conduct pretrial proceedings in accordance with 28 U.S.C. § 636.

On February 20, 2008, the undersigned issued an Order granting Defendant's Motion to Sever and to Transfer Venue Pursuant to 28 U.S.C. § 1404(a). On February 14, 2008, the Fifth Circuit granted a petition for rehearing en banc regarding the decision of *In re Volkswagen*, 506 F.3d 376 (5th Cir. 2007), vacated its previous opinion and judgment and stayed the mandate. *See In re Volkswagen*, No. 07-40058 (5th Cir. Feb. 14, 2008) (order granting petition). The undersigned relies heavily on the *Volkswagen* decision in the Order granting a transfer. As a result, the case should be stayed pending the en banc decision of the Fifth Circuit in *Volkswagen*. The Clerk's office has not yet transferred this case because a Motion for Reconsideration was filed on February 29, 2008. In light of the foregoing, it is hereby

ORDERED that the above-styled case, including the Order to Transfer, is **STAYED**, pending the en banc decision of the Fifth Circuit in the matter of *In Re Volkswagen*.

So **ORDERED** and **SIGNED** this **5** day of **March, 2008.**

JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE