

United States District Court  
Southern District of Texas

**ENTERED**

April 26, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

KLAY ABBOTT

§

V.

§

§

CIVIL ACTION NO. G-13-353

§

BNSF RAILWAY COMPANY

§

**OPINION AND ORDER**

Before the Court is “BNSF Railway Company’s Opposed Motion to Compel Plaintiff (Klay Abbott) to Designate all Testimony and Exhibits from Trial” as the transcript for his appeal. Abbott argues that the trial witnesses’ testimony and the exhibits are not necessary to address his claim that the Court failed to submit instructions and a verdict form for a claim of retaliation for following his doctor’s treatment plan for Abbott’s on the job injury.

As the Court recalls, it refused such submissions, in part, because no such claim was pleaded in Abbott’s complaint which read, in pertinent part, “Defendant has violated the retaliatory provisions of 49 U.S.C. section 20109 by filing disciplinary charges then terminating Plaintiff **in retaliation for reporting an on the job injury.**” (emphasis added). Consequently, if Abbott intends to show or argue that the claim was tried by express or implied consent, pursuant to Rule 15(b)(2), the transcript of the trial testimony and the exhibits will be required to determine if sufficient evidence was presented to justify submission of the claim to the jury. See, Burull v. First National Bank of Minneapolis,

817 F.2d 56, 57-58 (8<sup>th</sup> Cir. 1987) (citing, McDonough Marine Service, Inc. v. M/V ROYAL STREET, 608 F.2d 203, 204 (5<sup>th</sup> Cir. 1979).

The Court is aware of Abbott's poor financial condition and the impediment this ruling creates to his appeal, but it is Abbott's burden to provide an adequate transcript and financial hardship will not excuse him from doing so. Richardson v. Henry, 902 F.2d 414, 416 (5<sup>th</sup> Cir. 1990).

This Court agrees with BNSF that the transcripts are necessary and it is, therefore, **ORDERED** that BNSF's Motion to Compel (Instrument no. 126) is **GRANTED**.

**DONE** at Galveston, Texas, this 26th day of April, 2016.

  
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John R. Froeschner  
United States Magistrate Judge