

NO. 07-08-0043-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL B

JUNE 18, 2008

BNSF RAILROAD COMPANY F/K/A THE BURLINGTON
NORTHERN AND SANTA FE RAILROAD COMPANY, APPELLANT

v.

HOMER "GENE" HEATH, APPELLEE

FROM THE 47TH DISTRICT COURT OF POTTER COUNTY;

NO. 91,285-A; HONORABLE HAL MINER, JUDGE

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

ON BNSF'S MOTION TO REMAND FOR NEW TRIAL

The above captioned matter was tried to a jury in Potter County, Texas. At the conclusion of the trial, the trial court entered a judgment for appellee, Homer "Gene" Heath, and overruled a motion for judgment notwithstanding the verdict and new trial filed by appellant, BNSF Railroad Company. BNSF subsequently perfected its appeal and requested the preparation of the reporter's record. The request for preparation of the reporter's record included all pretrial matters, trial testimony, and post trial matters. Upon receiving the request for the reporter's record, it was discovered that the proceedings for

the first day of trial, May 21, 2007, had been lost due to the electronic disks having become corrupted. Efforts at retrieving the data have proven unsuccessful. The loss of the first day's proceedings is through no fault of BNSF. No other sources for recording of the trial proceedings that day are available. The parties have been unable to reach an agreement as to the exact content of the reporter's record for the day in question. Accordingly, BNSF's motion to remand for new trial is granted, the judgment of the trial court is reversed, and this case is remanded for a new trial. TEX. R. APP. P. 34.6(f).

Per Curiam