

[EDITOR'S NOTE: An excerpt of trial testimony of a Norfolk Southern vocational expert in an injury case.]

Michael 1 The following is the Testimony of
2 Maher and Mr. . 's Closing Argument taken in
3 the trial held on the 26th day of August 1999
4 before the Honorable Robert P. Doherty, Jr.,
5 Judge of the Circuit Court for the City of
6 Roanoke, sitting at Roanoke, Virginia:
7
8 T. MICHAEL MAHER,
9
10 was called as a witness and after having first been
duly 11 sworn to tell the truth, the whole truth, and nothing
but 12 the truth, was examined and testified as follows:
13

14 DIRECT EXAMINATION

15
16 BY MR. HAGIE:
17 Q Would you please tell the Jury who you
18 are.
19 A My name is Thomas Michael Maher,
20 M-a-h-e-r.
21 Q What do you do, sir?
22 A I am a manager with Norfolk Southern
23 Corporation in the vocational rehabilitation program.
24 Q Would you tell the Jury a little bit

about

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Mr. Maher - Direct

1 your educational background?
2 A I have a bachelor's degree in
counseling 3 and rehabilitation services and an associate in
science 4 and nursing degree and a law degree.
5 Q When you say an associate in nursing,
are 6 you a nurse?
7 A I am licensed in Virginia, yes, sir, I
am. 8 Q What types of jobs have you held with
the 9 railroad since you have been working with them?
I 10 A I started out as a brakeman, and then
district 11 was a claim agent and a senior claim agent and a
12 claim agent, and now I am manager in the disability

13 support system.
14 Q How long have you been in that
position,
15 sir?
16 A The present position, for
approximately
17 one year.
18 Q What are your job duties as manager of
the
19 rehabilitation program?
20 A Essentially we try to return -- we
help
21 injured employees return to their jobs.
22 Q Can you describe the program for the
Jury,
23 please?
24 A Yes, sir. Our program, which is
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Mr. Maher - Direct

1 essentially called the rehabilitation program,
consists
2 of two components, and the first component is called
3 medical management, and what that consists of is when
an
4 employee gets injured we will hire an occupationally
5 trained registered nurse that acts like a case manager
6 and more or less works with the employee and the
doctor
7 in making sure that the medical treatment is provided
in
8 a timely and efficient manner with the goal of trying
to
9 facilitate the employee to return to his job.
10 The second component is the actual
11 rehabilitation component, and what that consists of is
if
12 at some point in time it is determined by the
employee's
13 treating doctor that the employee cannot return to
their
14 former job, then we try to find jobs within the
railroad
15 primarily within their own department, alternate
16 positions if you will, with the primary goal of
returning
17 them back to the railroad.
18 If that is not possible due to medical
19 restrictions, then we will look -- we will hire
outside
20 vocational specialists who will work with that
employee

21 who will help them find a job outside the railroad.
22 Q You mentioned if you try to return an
23 individual within the area they were working within
24 railroad and if they can't do that, you would hire a

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Mr. Maher - Direct

1 vocational expert to help them outside.
2 Is there anything in between there
3 you might look across the railroad at other areas in
4 railroad?
5 A Well, yes. As I said, we will look
6 within their own department and if there is nothing
7 available or due to medical restrictions they can't
8 perform those duties, then we will look in other
9 departments, and if that is the case then we will --
10 sometimes when that happens there are certain job
11 requirements that perhaps the employee can't
12 that time, so we will pay for training, vocational
13 training, education, whatever it takes to help the
14 employee to meet at least the minimum requirements for
15 alternate job in another department.
16 Q How do you determine whether or not an
17 individual has the necessary skills or needs
18 go into another area on the railroad or another
19 department?
20 A Well, our personnel department will
21 personnel evaluation, they will conduct a personnel
22 evaluation, and there are various general aptitude
23 tests that determine aptitudes and abilities.
24 Q What does an individual have to do to

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Mr. Maher - Direct

1 into this program?
2 A Just call me. All employees are
aware of

3 this program. There have been mass mailings, three
mass
4 mailings since 1993, the last one was early this year,
5 but all you have to do is just call me.
6 Q Are there actual descriptions then
that
7 are available to the employees?
8 A Yes. The mass mailings consisted of
-- it
9 was called a summary plan of the accelerated
10 rehabilitation program that broadly describes what the
11 program consists of.
12 Q Are the employees required to
participate
13 in this program?
14 A No. This is entirely voluntary and if
15 they so choose to participate initially and change
their
16 mind for whatever reason, all they have to do is
just let
17 us know and they are no longer in the program. It is
18 their choice.
19 Q The registered nurse that you talked
about
20 under the medical management program, is that
someone who
21 is employed by the railroad?
22 A No. These are occupationally trained
23 registered nurses that are employees of various
companies
24 that are in that type of business. We use seven,
eight,

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Mr. Maher - Direct

1 nine national companies and several smaller regional
2 companies throughout our system, and one of the main
3 criteria that we look for is that these are
experienced,
4 very professional, trained registered nurses that have
5 worked in occupational areas.
6 Q When you talked about the vocational
7 counselor that you would provide, is that something
that
8 the employee would have to pay for?
9 A No, there is no cost whatsoever to the
10 employee for this program. Even if we are unable to
find
11 a job within the employee's department and say they
have
12 to have a personnel evaluation, we would even pay
their

have
training
and
example of
that
heavy
to
for
and

13 expenses, reimburse them for their expenses, if they
14 to travel to have the personnel evaluation performed.
is Q You mentioned a little bit about
16 and evaluating people for other jobs on the railroad
17 other departments. Could you give the Jury an
18 what you were talking about?
19 A well, probably the most used part of
20 is, for example, someone whose normal job involves
21 labor and their medical restrictions don't allow them
22 go back to that job, but they would medically qualify
23 say a clerical position and they can't type.
24 Well, we will pay for a typing class

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10

Mr. Maher - Direct

most
reimbursed
paper
maybe
a
and
duties.
day

1 they sign up. Usually a community college is the
2 obvious choice, and you take a typing class and as long
3 as you get a grade of C or better then you are
4 the cost of that typing class, and you just submit your
5 grade transcript and receipts and I sign a slip of
6 and a check is cut to them and they receive full
7 reimbursement.
8 Q I am not certain I understand what you
9 mean when you talk about clerical positions, and
10 you can explain to the Jury. Is that something like
11 secretary?
12 A I guess for lack of better comparison,
13 yes, it is secretarial positions. They do typing, data
14 input on computers, they track billing for rail cars,
15 I was never a clerk so I don't know all the duties.
16 Q I guess my question runs into the
17 Is it somebody that just sits at a desk and types all
18 long?
19 A Some do, yes.

require 20 Q Are there other jobs that don't
21 that much typing?
22 A Well, there is not all that -- there
is 23 not consistent typing eight hours a day in a clerical
24 position. There are multiple duties they have to
do.

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Mr. Maher - Direct

1 They can get up and change their positions, move,
filing, 2 answer the phone.
3 Q Is there a requirement in terms of
number 4 of words to type in order for an individual to qualify
5 for that job?
6 A Yes, the minimum requirement for a
7 clerical position is 35 words per minute. That is
why we 8 would offer to pay for the typing class, if the
employee 9 can at least meet that minimum requirement.
10 Q Now, is Mr. Jernigan eligible for this
11 program?
12 A Absolutely.
13 Q Has there been any attempt to offer
this 14 program specifically to Mr. Jernigan?
15 A Yes.
16 Q Let me show you a letter and ask you if
17 you can identify this, sir?
18 A Yes.
19 Q Can you tell the Jury what that letter
is? 20 A This is the initial letter that was
sent 21 to Mr. Jernigan advising him of the program and
offering 22 the services of the program to him.
23 Q Who was that letter signed by?
24 A It was signed by Carolyn Wilson who
was my

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Mr. Maher - Direct

1 predecessor. I took Carolyn's place.
2 Q Is this a letter that is kept, a
copy of

3 this is kept in your files?
4 A Yes, sir.
5 Q It is a letter that was generated
in the
6 normal course of operations with the railroad?
7 A Yes.
8 Q And that was sent directly to Mr.
9 Jernigan?
10 A Yes, sir.
11 Q Did it describe the program as being
12 offered to Mr. Jernigan?
13 A Yes, sir.
14 Q Did it tell him --
is MR. .: Object to leading.
16 THE COURT: Sustained.
17
18 13Y MR. HAGIE:
19 Q what did it tell him in terms of
what he
20 needed to do to get involved in that program?
21 A It says that "I look forward to
hearing
22 from you and hope you will take advantage of the
23 program. Please feel free to call me in Roanoke," at
the
24 telephone number.

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Mr. Maher - Direct

1 Q Do you know if Ms. Wilson received a
reply
2 to that letter?
3 A Yes, she did.
4 Q Was that reply from Mr. Jernigan?
5 A No, sir.
6 Q Who was that reply from?
7 A It was from Mr. ..
8 Q What was the date of that initial
letter
9 that went out to Mr. Jernigan?
10 A December 18, 1997.
11 Q Had Mr. Jernigan been operated on by
that
12 time?
13 A I don't believe he had.
14 Q Do you know the date of Mr. Jernigan's
is injury?
16 A I know it was in 197, November. I
don't
17 recall the exact date.

18 Q Would your department have contacted
him
19 within a month of the time that he was initially
injured?
20 A Well, the way -- how he would have
been
21 contacted would have been the claim agent who was
22 assigned to the injured employee's case immediately
23 offers medical management services and then if it
appears
24 that a longer treatment is going to be involved then
my

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Mr. Maher - Direct

1 department gets involved and will offer further
services.
2 Q Does this number up at the top here give
3 you any indication?
4 MR. .: Object to the leading.
5 THE COURT: Sustained.
6
7 BY MR. HAGIE:
8 Q Let me ask you to look at the number up
9 there and ask you what that number indicates if you
10 know.
11 A Well, it is the date of the letter and
12 then the date of the injury.
13 Q What is the date of the injury?
14 A November 20, 1997.
15 Q How long after that injury would that
16 first letter have gone out then?
17 A Well, less than a month.
18 Q After that initial reply that was
received
19 from Mr. . was another letter then sent?
20 THE COURT: Let me stop. Would you give
21 the first letter -- is that something you plan
to
22 have marked for identification?
23 MR. HAGIE: I would like to have that
24 marked for identification.

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is

Mr. Maher - Direct

1 THE COURT: Let's give the first one
to

2 the clerk and mark that Defendant's Exhibit
3 Number 14.
4 MR. HAGIE: This would be for
5 identification purposes only at this point.
6 THE COURT: Yes. I don't want to get
too
7 many exhibits out there and not have them
8 numbered.
9
10 (Defendant's Exhibit Number 14 was
11 marked and entered into the
deposition.)
12
13 BY MR. HAGIE:
14 Q When was the next correspondence, Mr.
15 Maher?
16 A The next one from Ms. Wilson was
January
17 13, 1998.
18 Q what was offered at that point?
19 A Well, the services, full services of
the
20 program, and also she provided a copy of the summary
plan
21 description that I mentioned earlier that very broadly
22 outlines the program.
23 Q Do you know if there was any response
to
24 that letter, sir?

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Mr. Maher - Direct

1 A No, I don't.
2 Q When was the next document?
3 THE COURT: Do you plan to offer that
next
4 letter into evidence? And if so, let's get
it
5 marked for identification.
6 MR. HAGIE: No, Your Honor, that is not
7 one we are going to offer.
8 THE WITNESS: April 14, 1998.
9
10 BY MR. HAGIE:
11 Q What was the gist of that
correspondence?
12 A Offering the program, medical
management
13 and essentially the program to Mr. Jernigan.
14 Q Was there any response to that letter,
15 sir?
16 A No.

17 Q Did you get a response --
18 A Not from Mr. Jernigan, anyway.
19 Q Did you get a response from someone
else?
20 A Mr. ..
21 Q What was that date?
22 A April 17, 1998.
23 Q Was there a response to that one, sir?
24 A Yes, April 22, 1998.

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Mr. Maher - Direct

1 Q Again, who was that from?
2 A Ms. Wilson.
3 Q Was anything different offered at that
4 point?
5 A Essentially the entire program, but
6 vocational rehabilitation was specifically mentioned.
7 Q Would that have been sent then after Mr.
8 Jernigan's operation?
9 A Yes.
10 Q Had you taken over the program by that
11 time, sir?
12 A No. I took Ms. Wilson's place in I
think
13 it was June. I am not ...
14 Q Was the next letter that was sent out
one
15 that was sent out over your signature?
16 A Yes, July 20, 1998.
17 Q What did you contact Mr. Jernigan for at
18 that time?
19 A well, since I was new in the position I
20 wanted everybody to know that Ms. Wilson was no longer
21 handling those responsibilities and I had taken over
her
22 position and just kind of introduce myself, and to
offer
23 the services again and to let them know that if they
24 needed anything or wanted to take advantage of the

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18

Mr. Maher - Direct

1 program to contact me.
2 Q what was the date of that letter?
3 A July 20, 1998.
4 MR. HAGIE: I would like to have that

5 letter marked for identification.
6 THE COURT: Mark that one Defendant's
7 Exhibit Number 15.

8
9 (Defendant's Exhibit Number 15 was
10 marked and entered into the
deposition.)

11
12 BY MR. HAGIE:
13 Q Did you get any response from that?
14 A No, sir.
15 Q Did you continue to contact Mr.

Jernigan?
16 A Yes, sir. I status cases approximately
17 every 90 days and I will just send out a little letter
18 reminding people that I am here if you need any help,
19 have any questions, any concerns or problems. It just
20 apparently came up again for a status on October 21,
21 1998 .

22 Q What did you offer in that letter?
23 A Well, you know, the program again and
that
24 if at that time the doctor determined that Mr.

Jernigan

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19

Mr. Maher - Direct

1 cannot return to his former job or to any other job,
then
2 I would offer to hire an outside vocational counselor
to
3 help him find a job outside the railroad.

4 Q What date was that?
5 A That is October 21, 1998.
6 MR. RAGIE: We would move to have that
7 letter marked for identification.
8 THE COURT: All right. That will be
9 marked Defendant's Exhibit 16.

10
11 (Defendant's Exhibit Number 16 was
12 marked and entered into the
deposition.)

13
14 BY MR. HAGIE:
15 Q What was the next step in this saga,
Mr.
16 Maher?

17 A Well, I got no response so on January
20,
18 which would have been approximately 90 days, I sent
19 another letter to Mr. Jernigan -- and, of course, we
send

it 20 all letters certified which shows that they received
21 -- offering the program again and that we would make
22 reasonable accommodations to help him return to work.
23 Q You say that was on January 20th?
24 A Yes, of 1999.

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20

Mr. Maher - Direct

1 Q Did you have any response to that, sir?
2 A No, sir.
3 Q What did you then do?
4 A Well, I wrote again on April 7th of
1999 5 once again offering the services of the program and
the 6 services of an outside vocational counselor to work
with 7 Mr. Jernigan.
medical 8 Q Now, were you being provided with
9 records in regard to Mr. Jernigan?
10 A No, sir.
11 Q Were you ever informed as to whether or
12 not he had reached maximum medical improvement?
13 A No, sir.
14 Q What happened next in terms of your
15 correspondence with him?
16 A Well, in trying to help people go back
to 17 work I generally do, I guess for lack of a better
word, 18 surveys of available jobs over the whole system, so I
had 19 talked with the road foreman of engines here in
Roanoke, 20 Mr. Bob Brown, and he informed me there were three
available, 21 locomotive trainee positions that were still
22 that were available here in Roanoke for the Roanoke
23 terminal for the remainder of this year.
24 So, I sent a letter to Mr. Jernigan

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[Remainder of deposition omitted].