

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE**

Timothy J. Wallender,)	
)	
Plaintiff,)	Case No. 2:13-cv-02603-JTF-dkv
)	
v.)	Judge John T. Fowlkes, Jr.
)	
Canadian National Railway Co.,)	
Illinois Central Railroad, Wisconsin)	
Central, Andrew Martin, and Keith)	
Creel,)	
)	
Defendants.)	
)	

DEFENDANT KEITH CREEL’S ANSWER AND AFFIRMATIVE DEFENSES

NOW INTO COURT, through undersigned counsel, comes Defendant Keith Creel (“Creel”), and respectfully answers the Complaint of Plaintiff, Timothy J. Wallender (“Plaintiff” or “Wallender”), as follows:

FIRST DEFENSE

The Complaint fails to state a claim against Creel upon which relief can be granted.

SECOND DEFENSE

In response to the separately numbered sections and paragraphs of the Complaint, Creel states as follows:

1. In response to paragraph 1 of the Complaint, Creel admits that the U.S. District Court has federal question jurisdiction over this case but denies that the Court has jurisdiction over all Defendants.

2. Creel admits that Canadian National Railway Company (“Canadian National Railway”) is a publicly held corporation, that it operates as a railroad in Canada, and that it indirectly owns railroads in some states in the United States. Creel denies each and every remaining allegation in paragraph 2 of the Complaint.

3. Creel admits the allegations contained in paragraph 3 of the Complaint.

4. Creel states that paragraph 4 of the Complaint calls for conclusions of law to which no response is required and denies each and every allegation in paragraph 4 that is inconsistent with the law.

5. In response to paragraph 5 of the Complaint, Creel admits that Illinois Central Railroad Company (“Illinois Central”) and Wisconsin Central Ltd. (“Wisconsin Central”) are indirect, wholly-owned subsidiaries of Canadian National Railway.

6. Creel admits that the financial statements of Illinois Central and Wisconsin Central are consolidated with those of Canadian National Railway. Creel denies that it is appropriate to refer to Canadian National Railway, Illinois Central, and Wisconsin Central collectively as “Canadian National” in the Complaint and denies each and every remaining allegation in paragraph 6 of the Complaint.

7. Creel admits that Wisconsin Central and Illinois Central each separately employed Wallender for periods of time and denies each and every remaining allegation in paragraph 7 of the Complaint.

8. Creel admits that Illinois Central owns and operates Harrison Yard in Memphis, Tennessee and denies each and every remaining allegation in paragraph 8 of the Complaint.

9. Creel admits that Wallender worked for Illinois Central as a trainmaster at Harrison Yard for a period of time and that Illinois Central Trainmasters have some supervisory duties in certain railroad yards. Creel denies each and every remaining allegation in paragraph 9.

10. Creel admits that Andrew Martin (“Martin”) has been a General Superintendent for Illinois Central at the Harrison Yard and supervised Wallender for a period of time. Creel denies each and every remaining allegation in paragraph 10 of the Complaint.

11. Creel admits that: Harrison Yard is a switching facility that has several sets of tracks and switches; Harrison Yard is topographically configured as a bowl; when trains arrive at Harrison Yard with railcars that have different destinations, the railcars, at times, have to be uncoupled, sorted by destination, and assembled into new configurations for departure; as part of this process, cars are, at times, uncoupled and shoved by locomotive over the hump; gravity propels the rolling cars down tracks into the bowl; and switches that control access to the different sets of tracks are aligned to send the cars that have the same destination into the same set of tracks, so the cars can be coupled. Creel denies each and every remaining allegation in paragraph 11 that is inconsistent with the above.

12. Creel admits that the length of time that railcars spend in a terminal is one of a number of factors in assessing the efficiency of a railroad and that, under the proper definition, this is referred to as “dwell time.” Creel denies each and every remaining allegation in paragraph 12 of the Complaint.

13. Creel states that Canadian National Railway’s 2011 annual report to shareholders speaks for itself. Further answering, Creel denies that the Complaint, as served, includes “Exhibit A” and states that he is therefore without information or belief sufficient to admit the allegations about Exhibit A. Consequently, Creel denies each and every remaining allegation in paragraph 13 of the Complaint.

14. Creel denies the allegations contained in paragraph 14 of the Complaint.

15. Creel denies the allegations contained in paragraph 15 of the Complaint.

16. Creel states that there is no “Exhibit B” to the Complaint, as served, and that he is therefore without knowledge or information to admit to the allegations therein. Consequently, Creel denies each and every remaining allegation in paragraph 16 of the Complaint.

17. Creel states that there is no “Exhibit C” to the Complaint, as served, and that he is therefore without knowledge or information to admit to the allegations therein. Consequently, Creel denies each and every remaining allegation in paragraph 17 of the Complaint.

18. Creel admits that Railroad Performance Measures posts data about dwell time provided by some railroads at www.railroadpm.org on about a weekly basis. Creel denies each and every remaining allegation in paragraph 18 of the Complaint.

19. To the extent that any of the allegations in paragraph 19 of the Complaint pertain to or require a response from Creel, Creel states that the www.railroadpm.org website does not currently show numbers for 1/1/12 through 12/1/12. Creel denies each and every remaining allegation in paragraph 19.

20. To the extent that any of the allegations in paragraph 20 of the Complaint pertain to or require a response from Creel, Creel states that the www.railroadpm.org website speaks for itself and denies each and every remaining allegation in paragraph 20.

21. Creel denies each and every allegation in paragraph 21 of the Complaint.

22. To the extent the allegations in paragraph 22 of the Complaint pertain to or require a response from Creel, Creel states that there is no “Exhibit D” or “Exhibit E” to the Complaint, as served, and that he therefore does not have sufficient information to form a belief as to the truth of the allegations regarding those exhibits and consequently denies the same. Creel denies each and every remaining allegation in paragraph 22 and each of its subparts.

23. To the extent the allegations in paragraph 23 of the Complaint pertain to or require a response from Creel, Creel states that there is no “Exhibit F” or “Exhibit G” to the Complaint, as served, that therefore he does not have sufficient information to form a belief about the truth of the allegations regarding “Exhibit F” or “Exhibit G,” and he consequently denies each and every allegation regarding the same. Creel denies each and every remaining allegation in paragraph 23.

24. To the extent the allegations in paragraph 24 of the Complaint pertain to or require a response from Creel, Creel admits that he was the Chief Operating Officer and

an Executive Vice President of Canadian National Railway and Illinois Central for a period of time and denies each and every remaining allegation in paragraph 24.

25. Creel states that there is no “Exhibit H” to the Complaint, as served, that he does not have sufficient information to form a belief as to the truth of the allegations regarding “Exhibit H,” and consequently denies the same; admits that his compensation for 2011 included salary of \$558,842, restricted stock of \$872,583, stock options of \$676,706, and non-equity incentive plan compensation of \$713,947. Creel denies each and every remaining allegation in paragraph 25.

26. To the extent the allegations in paragraph 26 of the Complaint pertain to or require a response from Creel, Creel denies the allegations in paragraph 26.

27. To the extent the allegations in paragraph 27 of the Complaint pertain to or require a response from Creel, Creel denies the allegations in paragraph 27.

28. To the extent the allegations in paragraph 28 of the Complaint pertain to or require a response from Creel, Creel admits, upon information and belief, that Illinois Central continues to employ Martin and denies the remaining allegations contained in paragraph 28.

29. To the extent the allegations in paragraph 29 of the Complaint pertain to or require a response from Creel, Creel denies the allegations contained in paragraph 29.

30. To the extent the allegations in paragraph 30 of the Complaint pertain to or require a response from Creel, Creel admits that Wallender was disciplined by Illinois Central, denies that Wallender has accurately and completely represented his secret recording, and denies any and all remaining allegations contained in paragraph 30.

31. To the extent the allegations in paragraph 31 of the Complaint pertain to or require a response from Creel, Creel admits that Wallender forwarded a secret recording he made and some emails to a Human Resources employee of Illinois Central and denies any and all remaining allegations contained in paragraph 31.

32. Creel denies the allegations in paragraph 32 of the Complaint.

33. To the extent the allegations in paragraph 33 of the Complaint pertain to or require a response from Creel, Creel states that “Exhibit I” is not attached to the Complaint, that he therefore does not have sufficient information to form a belief as to the truth of the allegations regarding “Exhibit I,” and that he consequently denies the same. Creel denies each and every remaining allegation in paragraph 33.

34. To the extent the allegations in paragraph 34 of the Complaint pertain to or require a response from Creel, Creel denies the allegations in paragraph 34.

35. Creel denies the allegations in paragraph 35 of the Complaint.

36. To the extent the allegations in paragraph 36 of the Complaint pertain to or require a response from Creel, Creel admits, upon information and belief, that Illinois Central did not terminate Martin’s employment, and denies each and every remaining allegation in paragraph 36.

37. Creel denies the allegations in paragraph 37 of the Complaint.

38. To the extent the allegations in paragraph 38 of the Complaint pertain to or require a response from Creel, Creel denies the allegations in paragraph 38.

39. To the extent that the allegations in paragraph 39 of the Complaint pertain to or require a response from Creel, Creel denies the allegations in paragraph 39.

40. To the extent the allegations in paragraph 40 of the Complaint pertain to or require a response from Creel, Creel states that he is serious and sincere about ethics, denies that he engaged in fraud, and denies each and every remaining allegation in paragraph 40.

41. Upon information and belief, Creel admits that Illinois Central continues to employ Martin and, to the extent that the remaining allegations pertain to or require a response from Creel, denies that he engaged in fraud and denies each and every remaining allegation in paragraph 41 of the Complaint.

42. Creel admits that Illinois Central discharged Wallender on September 30, 2012 and that the ultimate infraction that led to his discharge was that he listed a train as having arrived in the Harrison Yard when it had not arrived in the Harrison Yard. To the extent that any remaining allegations in paragraph 42 pertain to or require a response from Creel, he denies each and every remaining allegation in paragraph 42 of the Complaint.

43. Creel denies the allegations contained in paragraph 43 of the Complaint.

44. To the extent the allegations in paragraph 44 of the Complaint pertain to or require a response from Creel, Creel denies each and every allegation in paragraph 44.

45. Upon information and belief, Creel admits that Martin continues to work for Illinois Central, denies that he engaged in fraud, and denies each and every remaining allegation in paragraph 45 of the Complaint.

46. Creel denies the allegations in paragraph 46 of the Complaint.

47. Creel states that the statute speaks for itself and is incomplete as set for in paragraph 47 of the Complaint. Creel further states that paragraph 47 otherwise requires no response and denies any allegations that are inconsistent with the law.

48. To the extent that the allegations in paragraph 48 of the Complaint pertain to Creel, Creel denies the allegations. Creel further states that paragraph 48 calls for a conclusion of law and requires no response. Creel denies any allegations that are inconsistent with the law

49. Creel denies the allegations in paragraph 49 of the Complaint.

50. Creel denies the allegations in paragraph 50 of the Complaint.

51. Creel denies the allegations in paragraph 51 of the Complaint.

52. Creel denies the allegations in paragraph 52 of the Complaint.

53. Creel denies the allegations in paragraph 53 of the Complaint.

54. Creel denies that Plaintiff is entitled to any of the damages or other relief set forth in the unnumbered paragraphs of the Complaint.

THIRD DEFENSE¹

Insofar as Plaintiff seeks to recover relief (a) for alleged incidents occurring prior to the applicable limitations period for the filing of an administrative charge of retaliation and (b) for alleged incidents not listed in OSHA Case No. 4-1760-13-029, Plaintiff may not recover any relief for such incidents of alleged retaliation.

¹ Creel avers that he has the burden of proof only on defenses expressly identified as affirmative defenses in Rule 8(c) of the Federal Rules of Civil Procedure or other applicable law.

FOURTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by his failure to comply with the jurisdictional, procedural, and administrative prerequisites for filing this action.

FIFTH DEFENSE

To the extent Plaintiff has failed to exhaust his administrative remedies, his claims for relief are barred.

SIXTH DEFENSE

Creel was not and is not an employer.

SEVENTH DEFENSE

Creel is not subject to personal jurisdiction in Tennessee.

EIGHTH DEFENSE

To the extent Plaintiff has failed to institute this action within the time required under the applicable statute of limitations, his claims for relief are barred.

NINTH DEFENSE

The employment decisions about which Plaintiff complains were based on reasonable factors and not retaliatory animus. Creel, at all times relevant to this action, has acted in good faith toward Plaintiff and acted in compliance with all applicable laws. Any action taken by Creel was reasonably necessary for the normal operation of its business and was based on legitimate business reasons and not retaliatory animus.

TENTH DEFENSE

Plaintiff's claims fail because any alleged action or failure to act on the part of Creel was not the proximate cause of any injuries to Plaintiff.

ELEVENTH DEFENSE

Plaintiff's claims fail because any alleged protected conduct did not contribute to any adverse action against him.

TWELFTH DEFENSE

Plaintiff's claims fail because Creel would have taken the same action even without the protected activity.

THIRTEENTH DEFENSE

Plaintiff's claims are barred in whole or in part because Plaintiff failed, or refused and/or neglected, to mitigate or avoid any damages or injuries he claims to have suffered.

FOURTEENTH DEFENSE

Plaintiff's Complaint fails to state facts sufficient to state a claim that would support an award of actual, compensatory, liquidated, punitive, or other damages against Creel.

FIFTEENTH DEFENSE

Plaintiff's claims for compensatory and punitive damages are limited by the applicable limitations on such damages.

SIXTEENTH DEFENSE

Plaintiff's request for injunctive relief fails to state a claim and should be dismissed because there is no risk of irreparable injury or harm. Plaintiff has an adequate remedy at law.

SEVENTEENTH DEFENSE

Plaintiff's Complaint and each cause of action fail to state valid claims for attorneys' fees.

EIGHTEENTH DEFENSE

To the extent that Plaintiff has suffered any damages, such damages were caused by and are the responsibility of persons, parties, or entities other than Creel.

NINETEENTH DEFENSE

Plaintiff's claims are barred in whole or in part by the equitable defenses of laches, waiver, ratification, estoppel, and/or unclean hands.

TWENTIETH DEFENSE

Creel alleges, on information and belief, that any recovery by Plaintiff, or alternatively, portions of any recovery, are barred by the doctrine of after-acquired evidence.

TWENTY-FIRST DEFENSE

Pending the conclusion of further discovery and investigation, Creel respectfully reserves the right to add such further or supplemental defenses as may be warranted by the information developed through discovery.

WHEREFORE, Defendant Keith Creel respectfully requests the Court deny the relief sought in Plaintiff's Complaint and grant judgment:

1. Dismissing Plaintiff's Complaint with prejudice;
2. Awarding Creel attorneys' fees, costs, and disbursements, as appropriate;

and

3. Directing such other relief to Creel as the Court deems just and equitable.

Respectfully submitted,

s/ Joseph D. Weiner

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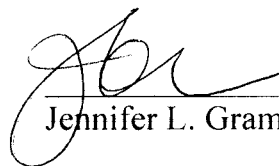
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Attorneys for Defendant Keith Creel

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2013, I electronically filed the foregoing Defendant Keith Creel's Answer and Affirmative Defenses with the Clerk of the Court for the United States District Court for the Western District of Tennessee by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JL Gramse', is written over a horizontal line.

Jennifer L. Gramse