

**United States District Court for the
Western District of Tennessee**

Timothy J. Wallender,

Plaintiff,

vs.

Case No.: 2:13-cv-02603-JTF-dkv

**Canadian National Railway Co.,
Illinois Central Railroad,
Wisconsin Central, Andrew Martin,
and Keith Creel,**

Defendants.

First Amended Whistleblower Complaint Pursuant to 18 U.S.C. § 1514A

Timothy J. Wallender, by his attorneys, James L. Farina, Steven P. Garmisa, William J. McMahon, Eugene A. Laurenzi and Lesley Cook submits the following as his First Amended Whistleblower Complaint against Canadian National Railway Co., Illinois Central Railroad, Wisconsin Central, Andrew Martin, and Keith Creel pursuant to 18 U.S.C. § 1514A:

1. The U.S. District Court has federal question jurisdiction over this case pursuant to 28 U.S.C. 1331, 18 U.S.C. 1514A, and 29 C.F.R., 180.114(a), because Wallender initially filed his whistleblower complaint with the Secretary of Labor on January 3, 2013, and the Secretary did not issue a final decision within 180 days of the filing of that administrative complaint.

2. Canadian National Railway Co. (CNRC or CN) is a publicly held corporation that owns and operates railroads in North America.

3. CNRC's shares are traded on the New York Stock Exchange.

4. CNRC is subject to U.S. securities laws and regulations.

5. CNRC's wholly-owned subsidiaries include Illinois Central Railroad and Wisconsin Central.

6. CNRC consolidates the financial statements of Illinois Central Railroad and Wisconsin Central with CNRC's financial statements. In this Complaint, CNRC, Illinois Central Railroad, and Wisconsin Central are collectively referred to as "Canadian National."

7. For approximately 20 years, Timothy J. Wallender (Wallender) worked for Wisconsin Central, Illinois Central Railroad, and/or CNRC.

8. Canadian National owns and operates a terminal in Memphis, Tennessee, that is known as Harrison Yard.

9. Trainmasters supervise railroad yards, and Wallender worked for Canadian National as a trainmaster at Harrison Yard.

10. Wallender's boss at Harrison Yard was Andrew Martin (Martin), the General Superintendent of the Memphis facility.

11. Harrison Yard is a switching facility that contains numerous sets of tracks and switches. It is topographically configured as a giant bowl. The rim of the bowl is referred to as the hump. When trains arrive at Harrison Yard with railcars that have different destinations, the railcars have to be uncoupled, sorted by destination, and assembled into new trains for departure. As part of this process, the cars of a newly-arrived train are 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 all the cars that have the same destination into the same set of tracks, so the cars can be coupled together into a new train.

12. An important statistic for determining the efficiency of a railroad is the length of time that railcars spend in a terminal before sent out in a newly assembled train. This statistic is called "dwell time," "terminal dwell," or "terminal dwell time."

13. In its 2011 annual report to shareholders, Canadian National declared that it is “relentless” in its efforts to reduce dwell time. *Exhibit A*. “For many years,” according to a statement in this annual report from CN’s president and CEO, Claude Mongeau, “CN’s relentless pursuit of efficiency has been the Company’s hallmark.” *Id.* And as part of this annual report, Mongeau stated, “Our relentless focus on execution supports all our activities.... We work hard to run more efficient trains, reduce dwell time at our terminals, and improve overall network velocity.” *Id.*

14. Statistics about a railroad’s dwell time are material to shareholders and prospective shareholders when deciding whether to buy, hold, or sell the railroad’s shares.

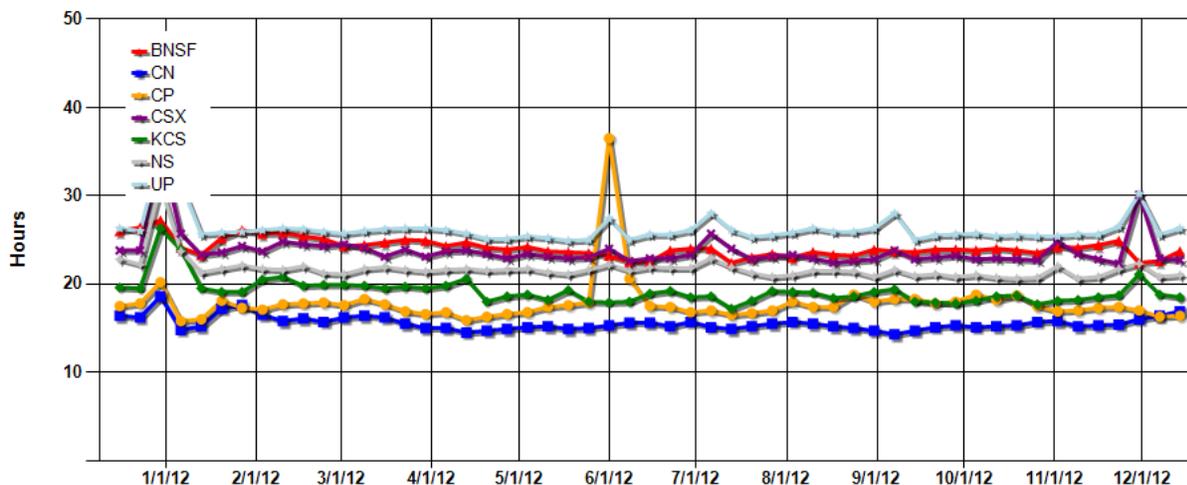
15. Statistics about Canadian National’s dwell time are material to shareholders and prospective shareholders in deciding whether to buy, hold, or sell the railroad’s shares.

16. In March 2012, a securities analyst reported that Canadian National claimed that it “expects to maintain high railroading (velocity, reliability, and asset utilization) standards and remain ahead of its peers, in terms of train speed and dwell time.” *Exhibit B*.

17. In October 2012, a securities analyst reported that Canadian National claimed that it “has a 20% 25% advantage relative to its peers, in terms of train speed and dwell time.” *Exhibit C (Brokerage Research Digest at pg. 5)*.

18. Dwell time is such an important statistic in the railroad industry that seven major railroads in North America provide weekly updates on their dwell times to Railroad Performance Measures, an organization that posts this data online at www.railroadpm.org.

19. According to a graph that is available through the Railroad Performance Measures website, CN’s dwell time for 2012 is substantially lower than the dwell time of its major competitors.



<http://www.railroadpm.org/Graphs/Terminal%20Dwell%20Graph.aspx> [visited December 23, 2012].

20. Terminal dwell statistics for nine of Canadian National's yards—including Harrison Yard—are reported separately and in the aggregate as part of weekly reports that Railroad Performance Measures posts on its website.

21. Canadian National's supposedly favorable statistics on terminal dwell at Harrison Yard are based on persistent and pervasive fraud.

22. As part of Canadian National's policy of relentlessly pressuring employees to produce favorable dwell-time statistics, Martin—the General Superintendent at Harrison Yard—ordered Canadian National employees to engage in a series of schemes that fraudulently manipulated this important measure of railroad efficiency. The schemes that Martin ordered at Harrison Yard include—but are not limited to—the following:

(a) Martin ordered Canadian National employees to change the computer program on Canadian National's computers to automatically show that trains departed 30 minutes earlier than they actually left Harrison Yard. For example, in an email dated February 28, 2011, a Canadian National employee reported that, based on a "discussion with Andy Martin," one of the scanners that was used to verify when trains departed from Harrison Yard "needs to have a Thirty (30) Minute adjustment for departures out of Memphis. This would mean departure for north bound trains would be 30 'prior' to scanner time." *Exhibit D*. By using this scheme, Canadian National was able to create records that falsely showed lower than actual dwell time for Harrison Yard.

(b) The "clock" used in calculating a railcar's dwell time is reset to zero if the car is moved to certain tracks in and about Harrison Yard. And Martin ordered Canadian National employees to create false records for movement of cars at Harrison Yard, so that the dwell-time clock for the cars would be fraudulently reset to zero. By using this scheme, Canadian National was able to create records that falsely showed lower than actual dwell time for Harrison Yard.

(c) Martin ordered Canadian National employees to falsely list trains as having departed from Harrison Yard even though the trains had not left the yard. The computer code for showing that a train had departed from Harrison Yard is "WOC," and the procedure of making a false entry in the computer to show that a train had departed when it was still located in Harrison Yard was referred to as "walking" [as in "WOC-ing"] the train out of the yard. As an example of Martin's instructions to engage in this scheme, on February 8, 2012, Martin sent an email to Wallender saying: "If a train is moving north

we can walk him out.” *Exhibit E*. By using this scheme, Canadian National was able to create records that falsely showed lower than actual dwell time for Harrison Yard.

(d) Railcars that have been tagged as defective are excluded from the daily report of cars that are in Harrison Yard. This daily report, which lists the time cars arrived in the yard, is used to calculate dwell time. And Martin ordered Canadian National employees to (a) report non-defective cars as defective shortly before this daily report was issued and (b) remove those cars from the list of defective equipment shortly after the daily report was released. By using this scheme, Canadian National was able to create records that falsely showed lower than actual dwell time for Hunter Yard.

(e) Even when he was on vacation, Martin insisted on receiving emails with drafts of the daily report on railcars in Harrison Yard. Then, having reviewed the draft report, Martin would send emailed instructions on what schemes he wanted employees to use to fraudulently manipulate dwell-time statistics for Harrison Yard.

23. Martin also ordered Canadian National employees to not report derailments and collisions—even though derailments and collisions are supposed to be reported to the Federal Railroad Administration. For example, on March 14, 2011, Wallender forwarded a video to Martin showing a “cornering” [an incident when a railcar is hit by another car in a switching yard because it had not moved all the way off an intersecting set of tracks]. And rather than report the accident as required, Martin’s cover-up response was a terse email to Wallender that said: “No incident.” *Exhibit F*. Also, on April 30, 2012, Wallender informed Martin that there had been a derailment in Harrison Yard. And Martin’s cover-up response was: “No big issue. Even if we record it that’s fine. Just won’t call it in. I will handle.” *Exhibit G*.

24. Keith Creel (Creel) was the chief operating officer and executive vice president of Canadian National when the misconduct set forth above occurred.

25. For 2011, Creel's compensation from Canadian National included salary of \$558,842; a restricted stock award of \$872,583; stock option awards of \$676,706; non-equity incentive plan compensation of \$713,947. Also, as of 2011, Creel had unexercised options for 43,240 shares of Canadian National shares. *Exhibit H*. Thus, a significant part of Creel's compensation depended on his ability to inflate the price of Canadian National's shares.

26. Martin told employees at Harrison Yard that he had a green light and carte blanche from Creel to implement his schemes for using false records to show lower than actual dwell time at Harrison Yard.

27. Twice in 2012, employees of Canadian National's Human Resources Department (HR employees) investigated Martin's fraudulent practices at Harrison Yard. And Wallender alleges, on information and belief, that (a) the HR employees uncovered and documented Martin's fraudulent practices; (b) Martin's dishonest schemes were reported to Creel; (c) Canadian National and Creel were obligated to disclose Martin's persistent and pervasive fraud at Harrison Yard to shareholders, the public, the Securities and Exchange Commission (S.E.C.) and the Federal Railroad Administration (F.R.A.).

28. At the end of the first investigation by HR employees, Canadian National did not fire Martin. And Canadian National's decision to retain Martin as the General Superintendent of Harrison Yard proves that Canadian National is not serious or sincere about being ethical. Additionally, Wallender alleges, on information and belief, that Creel protected Martin from being fired so his share-based compensation would not be impaired. Wallender also alleges, on

information and belief, that Canadian National violated its obligation to disclose the persistent and pervasive fraud at Harrison Yard to shareholders, the public, the S.E.C., and the F.R.A.

29. After the HR employees finished their first investigation of Martin's misconduct, and after Canadian National decided to retain Martin as General Superintendent of Harrison Yard, Martin—who claimed he had a green light and carte blanche from Creel—returned to his prior practice of ordering Canadian National employees to use fraudulent schemes to falsely reduce the statistics for dwell time at Harrison Yard.

30. At one point after the first investigation of Martin by HR employees, Wallender was disciplined for following Martin's orders. But Wallender recorded a conversation in which Martin told Wallender that (a) Wallender was being suspended for two days; (b) the suspension would be scheduled for days that Wallender was already scheduled to be off duty; (c) Martin was going to "forget" to tell the personnel department that Wallender had been suspended; and (d) Wallender should not try to be so "perfect" in obeying Martin's orders about dwell time.

31. Wallender forwarded that recording to an HR employee—along with emails and other documents that showed Martin's continuing misconduct.

32. Wallender blew the whistle on Martin's misconduct because he believes Canadian National was engaged in criminal conduct by defrauding and misleading shareholders, the public, and federal regulators about material facts.

33. Canadian National has an unwritten policy of retaliating against whistleblowers. Attached as *Exhibit I*, for example, is a communication about a "safety blitz" in which Canadian National supervisors were notified that the "main focus of attention" of the safety inspection would be "Focus, Flagged and less than 2 years employees." "Focus" and "flagged" employees are targeted for special attention as retaliation for having reported accidents or engaged in other

whistleblower activities. By relentlessly focusing their attention on employees who are targeted for retaliation, Canadian National's supervisors are likely to find excuses for firing or otherwise disciplining workers who report accidents or otherwise engage in whistleblower activities.

34. Canadian National uses this unwritten policy of retaliation to discourage employees from reporting accidents and otherwise engaging in whistleblower activities. By intimidating employees into not reporting accidents, Canadian National reduces its financial exposure to personal injury lawsuits under the Federal Employers' Liability Act. And by intimidating employees into not reporting Martin's persistent and pervasive fraud at Harrison Yard, Canadian National, and Creel have benefitted from inflated prices for Canadian National's shares.

35. As a trainmaster, Wallender was aware of Canadian National's unwritten policy of retaliating against whistleblowers. And Wallender knew he faced retaliation for reporting Martin's continuing misconduct to HR employees. But Wallender was sick and tired of being relentlessly pressured to participate in the misconduct that Martin orchestrated at Harrison Yard with the connivance of Creel.

36. Despite the fact that Wallender forwarded to the Human Resources Department an audio recording, emails, and other documents showing that Martin had resumed his misconduct at Harrison Yard—and despite the fact that the Human Resources Department purported to conduct a second investigation of Martin's misconduct—Canadian National still failed to fire Martin.

37. On information and belief, Wallender alleges that Martin was not fired after the second investigation, and was retained as General Superintendent of Harrison Yard, because Creel—who benefited from Martin's misconduct because it boosted the price of Canadian

National's shares—protected Martin and continued to approve of Martin's persistent pattern of wrongdoing in fraudulently manipulating important business statistics.

38. Canadian National notified Martin that (a) Wallender recorded a conversation with Martin; (b) Wallender kept copies of documents showing Martin's fraudulent conduct; and (c) Wallender forwarded this evidence to the Human Resources Department. As a result, Martin and Canadian National—and Wallender alleges, on information and belief, Creel—targeted Wallender for retaliation pursuant to Canadian National's unwritten policy of retaliating against whistleblowers.

39. Canadian National and Martin—and Wallender alleges, on information and belief, Creel—wanted to retaliate against Wallender so that no other Canadian National employees would (a) record conversations in which Canadian National executives made damaging admissions, (b) gather evidence of misconduct by Canadian National executives, and (c) blow the whistle on fraudulent conduct by Canadian National executives concerning dwell time and other material business statistics.

40. If Canadian National and Creel were serious and sincere about being ethical after the second investigation of Martin's misconduct, they would have fired Martin and reported the widespread fraud at Harrison Yard to shareholders, the public, the S.E.C., and the F.R.A.

41. At the end of the second investigation of Martin by the Human Resources Department, Canadian National again failed to fire Martin. And Wallender alleges, on information and belief, that Canadian National and Creel did not disclose the widespread fraud at Harrison Yard to shareholders, the public, the S.E.C., and the F.R.A.

42. After the second investigation, Wallender continued to face relentless pressure from Canadian National and Martin to participate in schemes to manipulate dwell-time statistics. For

example, it was a common practice at Harrison Yard—pursuant to Martin’s instructions—to list a train as having arrived before it was physically present in the yard. Nevertheless, pursuant to Canadian National’s unwritten policy of targeting whistleblowers for heightened attention and retaliation, Canadian National fired Wallender on September 30, 2012, based on charges that he listed a train as having arrived before it was physically present in Harrison Yard.

43. On the same date, Wallender was told by CN that this was a complete termination and he was terminated from employment as a locomotive engineer on the Wisconsin Central.

44. Because Wallender’s locomotive engineer position on the Wisconsin Central was terminated at the same time as his CN trainmaster position in Memphis, Wallender alleges, on information and belief, that the defendants colluded and conspired to target him for retaliation under Canadian National’s unwritten anti-whistleblower policy because he blew the whistle on the persistent and pervasive misconduct of Martin and Canadian National.

45. Wallender knew at the time of his termination that the same the persistent and pervasive misconduct of Martin and Canadian National were happening on the Wisconsin Central.

46. Because Wallender knew of the persistent and pervasive misconduct of Canadian National on the Wisconsin Central, including its practice of engaging in the same fraudulent schemes and improper train reporting he blew the whistle on in Memphis, the defendants colluded and conspired to target him for retaliation.

47. Overt acts in furtherance of this conspiracy by the defendants occurred in Memphis when the defendants retaliated against Wallender by terminating his employment with Canadian National, Illinois Central, and Wisconsin Central, as part of their conspiracy to get rid of

Wallender for blowing the whistle on the persistent and pervasive misconduct of defendants that was occurring in Memphis and Wisconsin, as well as elsewhere on the CN railroad system.

48. Wallender alleges, on information and belief, that the practice of ordering Canadian National employees to engage in fraudulent schemes, including schemes to produce lower than actual dwell-time statistics and engaging in other improper train reporting practices, continues on the Wisconsin Central and elsewhere in the CN system.

49. Pleading in the alternative as to Wisconsin Central's role, Wallender alleges that Wisconsin Central acted as a de facto division or alter ego of Canadian National in retaliating against Wallender in Memphis for blowing the whistle on Canadian National's misconduct in Tennessee.

50. Because Wallender was targeted for retaliation under Canadian National's unwritten anti-whistleblower policy, a contributing factor in the decision to fire Wallender was that he blew the whistle on the persistent and pervasive misconduct of Martin and Canadian National.

51. Wallender alleges, on information and belief, that Martin has continued to order Canadian National employees to engage in fraudulent schemes, including schemes to produce lower than actual dwell-time statistics for Harrison Yard.

52. Wallender alleges, on information and belief, that following the date he was fired, Canadian National still has not (a) fired Martin and (b) disclosed the widespread fraud about dwell times and other important statistics to shareholders, the public, the S.E.C., and the F.R.A.

53. Wallender alleges, on information and belief, that Creel—whose compensation substantially depends on a high price for Canadian National's shares—protected Martin from discipline, gave a green light for Martin's misconduct, and gave Martin carte blanche to continue the misconduct that protected and increased the value of his stock options.

54. Pursuant to 18 U.S.C.A. § 1514A(a) [“Whistleblower protection for employees of publicly traded companies”]:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

“(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

* * *

“(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)[.]

55. Canadian National is a “company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934.” 18 U.S.C.A. § 1514A(a).

56. Canadian National and Martin—and Wallender alleges, on information and belief, Creel—discharged Wallender, and discriminated against Wallender in the terms and conditions of his employment, because of lawful acts by Wallender in providing information to, and assisting in an investigation by, persons with supervisory authority over Wallender regarding conduct that Wallender reasonably believed constituted mail, wire, and securities fraud (in violation of 18 U.S.C. §§ 1341, 1343, and 1348), violations of S.E.C. rules or regulations, and violations of Federal laws relating to fraud against shareholders.

57. If Canadian National and Creel contend they supposedly would have fired Wallender

in any event, that defense would be baseless—because the the defendants have repeatedly proved they are not genuinely sincere or serious about being ethical. For example, Canadian National and Creel proved they are not genuinely sincere or serious about corporate ethics because they (a) failed to fire Martin; (b) protected Martin; (c) gave Martin a green light and carte blanche to continue his fraud; (d) failed to disclose the persistent and widespread fraud at Harrison Yard to shareholders, the public, and federal regulators; and (e) only fired Wallender, the whistleblower who disclosed Martin’s misconduct.

58. Based on the facts and circumstances set forth above, there is a compelling inference that Canadian National, with the approval, participation and/or connivance of Andrew Martin and Keith Creel, violated 18 U.S.C.A. § 1514A(a) by firing Wallender for blowing the whistle on serious fraud at Harrison Yard.

59. By firing Wallender, Canadian National sent a message to other employees that they should keep quiet about the fraudulent conduct that permitted Canadian National to inflate the value of its shares, to the benefit of Creel.

60. Wallender has suffered severe economic and psychological loss as a result of Respondents’ violation of 18 U.S.C.A. § 1514A(a).

WHEREFORE, PREMISES CONSIDERED, Plaintiff Timothy J. Wallender sues the Defendants herein for a just and fair and equitable amount to be determined by TRIAL BY JURY after hearing the facts and issues of this case. Based on these facts, Wallender seeks the following relief:

(A) Reinstate Wallender with the same seniority status he would have had but—for the retaliatory termination of his employment;

- (B) Give Wallender back pay with interest;
- (C) Compensate Wallender for his general and special damages; and
- (D) Reimburse Wallender for litigation costs, expert witness fees, and reasonable attorney fees.
- (E) For all such other general relief justified by the facts under the law or in equity.

Respectfully submitted,

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