

Daily Journal

FEBRUARY 17, 2016

TOP VERDICTS OF 2015

The Largest and most significant verdicts and appellate reversals handed down in California in 2015

TOP DEFENSE RESULTS

Jensen v. BNSF Railway Company

case INFO

Wrongful termination

Northern District

U.S. District Judge Haywood S. Gilliam Jr.

Defense attorneys:

Yukevich | Cavanaugh,
James J. Yukevich, Cristina M. Ciminelli,
Steven S. Vahidi, Noushan Nouredдини

Plaintiffs' attorneys:

Hildebrand McLeod & Nelson, Anthony
S. Petru, Paula A. Rasmussen; Law
Offices of Charles C. Goetsch LLC,
Charles C. Goetsch



FROM LEFT, JAMES J. YUKEVICH, NOUSHAN NOUREDDINI, CRISTINA M. CIMINELLI,
AND STEVEN S. VAHIDI

In the first Federal Railway Safety Act whistleblower case in the nation to be tried to a defense verdict, a railroad worker sued BNSF Railway Co. for about \$4 million on wrongful discharge claims.

The worker suffered a wrist injury on the job in 2003, returned to duty in 2009 and was fired after he became chronically absent. In his subsequent lawsuit, the worker asserted he was “whistleblowing” about illegal employment practices.

The defense challenge was to overcome the plaintiff’s allegation that his doctor’s treatment plan required him to miss between three and eight days a month for the rest of his career in addition to any vacation days, paid personal leave days and scheduled rest days. *Jensen v. BNSF Railway Co.*, 13-

CV05955 (N.D. Cal., filed Dec. 26, 2013).

BNSF’s lead defense lawyer, James J. Yukevich of Yukevich | Cavanaugh, said the case pivoted on a 2007 amendment to the safety act that forbids railroad carriers from disciplining an employee for following orders of a treating physician.

“The plaintiffs’ bar has been exploiting this poorly-worded statute to force railroads to give unlimited sick leave or be sued,” Yukevich said.

He and colleagues successfully argued to a Northern District jury, which reached a verdict in November, that a doctor ordering rest days for a worker’s entire career was not

“treatment” under the statute.

The defense also showed that the doctor had colluded with plaintiff’s counsel to create the alleged plan for the sole purpose of winning the lawsuit.

“Had plaintiff prevailed, it would have functionally conferred indefinite sick leave on all railroad employees who can obtain a doctor’s note,” Yukevich said. “The verdict sends a message that not all absences are protected under the FRSA, and that employees must still comply with their employer’s attendance policy.”

— John Roemer