

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL HALL, and ELIJAH UBER
a/k/a Elijah Hall, and their marital
community; and AMIE GARRAND and
CAROL GARRAND and their marital
community,

Plaintiffs,

vs.

BNSF RAILWAY CO., a Delaware
corporation,

Defendant.

No. 2:13-cv-02160

FIRST AMENDED
INDIVIDUAL AND
COLLECTIVE
COMPLAINT FOR
NONPAYMENT OF WAGES
UNDER EQUAL PAY ACT,
STATE AND FEDERAL
DISCRIMINATION CLAIMS AND
ERISA BENEFITS AND
DECLARATORY JUDGMENT
CLAIMS

COME NOW the plaintiffs and through counsel allege as follows:

INTRODUCTION

1. This is a claim under the federal Equal Pay Act 29 USC §206(d)(1), §216 and related sections, for sex based discrimination by defendant BNSF Railway Co. (BNSF), which refuses and fails to pay for the spousal health care costs of its employee, locomotive engineer/plaintiff Michael Hall, who is married to Elijah Uber (also known as Elijah Hall) who is also male. The failure to pay is based on sex because BNSF does pay for spousal health needs for employees, and locomotive engineers, if the employee is a *female* married to a male spouse,

1 but does not pay for Elijah's health needs because Michael Hall is male -- and not female --
2 married to a male (Elijah). The denial of the same benefit to employee Michael Hall because he
3 is *male* and not female is discrimination in pay or benefits based on sex that is per se illegal.
4 Similarly, BNSF denies spousal health care coverage to its employee conductor Amie Garrand
5 solely because she is a female married to a female (Carol Garrand) and not a male married to a
6 female. BNSF commonly pays the benefit to employees who are males, who are married to
7 female spouses. The denial of the spousal health care benefits to Amie Garrand because she is
8 *female* and not male is discrimination in pay and benefits based on sex, and this discrimination is
9 illegal under the Equal Pay Act. This is also a complaint for declaratory relief, and for benefits
10 and/or compensatory and punitive damages, penalties, fees, and costs, as applicable, under the
11 Washington State Law Against Discrimination (WLAD), for discrimination based on sex, and
12 sexual orientation; under Title VII of the federal anti-discrimination laws, for discrimination
13 based on sex; and under ERISA for ERISA benefits, declaratory relief, and fees and costs.

15 2. BNSF's stated policy and reason for not paying the benefits is "marriage is
16 between one man and one woman" -- but BNSF does not get to judge what marriage is. That the
17 denial of equal pay is based on this BNSF policy only shows BNSF is discriminating based on
18 the sex of the employee.

20 3. The Halls and the Garrands sue to compel BNSF to provide Michael Hall and
21 Amie Garrand the spousal health care benefit and also to compel BNSF to provide this benefit to
22 all other employees similarly situated, i.e., BNSF engineers, conductors or other employees who
23 were married in other states with legal same sex marriage and who have been denied the benefit
24 based on the sex of the BNSF employee. The plaintiffs here also seek all damages and liquidated
25
26

1 damages allowed under the statute, fees and costs, and injunctive relief to prevent future similar
2 violations of the Equal Pay Act. .

3 4. On information and belief, there are numerous or hundreds of other BNSF
4 employees or engineers or conductors in legal same sex marriages who are similarly situated and
5 who are being denied spousal health care benefits based on the sex of the employee in the states
6 where BNSF operates that have legal same sex marriage (Washington, Minnesota, Iowa, Illinois
7 and California, Illinois, and New Mexico) (or who had legal marriages in any state or
8 jurisdictions with same sex marriage and who work anywhere for BNSF).
9

10 **PARTIES, JURISDICTION, VENUE**

11 5. Plaintiff incorporates and re-alleges herein all other allegations of this complaint.

12 6. This case arises under 29 USC §206 and 216 and related sections and federal
13 question jurisdiction is present in this Court under 28 USC § 1331.

14 7. Michael Hall and Elijah Uber (also known as Elijah Hall and referred to herein as
15 Elijah Hall) are males residing in Pierce County, Washington who legally married in Washington
16 State on January 21, 2013. Amie Garrand and Carol Garrand are females who are residents of
17 Clark County, Washington who were legally married in Washington State on February 17, 2013.
18 Michael Hall and Amie Garrand are BNSF employees.
19

20 8. BNSF is a Delaware corporation doing business in Washington State and in
21 Seattle city limits and in this judicial District and is subject to personal jurisdiction here.
22 BNSF's principal place of business in Washington State is in Seattle in King County where it has
23 offices. A BNSF supervisor told Michael Hall his fight for the benefits would be long and
24 bumpy (i.e., BNSF would deny the benefit) from the BNSF terminal where Hall works in Seattle
25 in King County, Washington.
26

1 9. Venue is proper in the Western District of Washington under 28 USC § 1391
2 because plaintiffs reside in this district, a substantial part of the events or omissions giving rise to
3 the claim occurred in this district where BNSF management offices exist, and BNSF resides in
4 this judicial district since it does business here and has its principal place of business in the State
5 here, and has contacts here sufficient to subject it to personal jurisdiction if this district were a
6 separate State; and because this is the district with which BNSF has the most significant contacts
7 in this State, and its principal place of business, having its NW Division headquarters in Seattle,
8 in King County Washington. The Seattle court is also proper under the local rules because all
9 defendants reside here and have their principal place of business here and or a substantial part of
10 the events or omissions giving rise to the claim occurred here, including the Seattle terminal
11 supervisor's call to Hall denying the benefit and promising a long and bumpy fight to get it.
12

13 **KEY FACTS REGARDING THE HALLS**

14 10. Plaintiffs incorporate and re-allege herein all other allegations of this complaint.

15 11. BNSF is one of the larger railroads in the United States, moving goods by train on
16 a railway that comprises 32,000 miles of track in 28 States on which freight cars, locomotives
17 and trains are sent throughout the railway system from one location to another nationwide.
18

19 12. The entire BNSF railway constitutes one enterprise under the Equal Pay Act.

20 13. BNSF has some 13 divisions which are groupings of employees; the freight and
21 cars and trains go from division to division, but not the employees.

22 14. The NW Division includes the part of the railway in Northern California, Oregon,
23 Idaho, Washington, Idaho and Montana.

24 15. Michael Hall and Amie Garrand are employed in the NW Division.
25
26

1 16. BNSF manages the employees in the NW Division out of its offices at 2454
2 Occidental Avenue South in Seattle, plus other management offices at 1000 Second Avenue suite
3 3700, Seattle, and terminal yards in Seattle, including the one where the supervisor called
4 Michael Hall, and BNSF has its principal place of business in the State of Washington in Seattle,
5 in King County Washington.

6 17. BNSF manages the entire railway train operation from Forth Worth, Texas.
7 Employees are managed out of the divisions.

8 18. Michael Hall was employed by BNSF starting in November 2010 and by 2013 he
9 was working as a locomotive engineer; he chose to work for BNSF in part due to its stated
10 antidiscrimination policy which bars discrimination based on sex and sexual orientation and
11 other things.
12

13 19. In 2013 Michael Hall worked in the Interbay Yard in Seattle and other BNSF
14 locations in Seattle, and also drove mile long trains on three-day runs, from Auburn over
15 Stampede Pass and through the Yakima Canyon to Pasco; the next day along the Columbia River
16 to Vancouver, Washington; and the next day north to Auburn or Seattle.
17

18 20. Typically Michael Hall's trains included empties or grain or coal cars, or Z trains
19 which are high priority container double stack trains carrying semi-trailers with freight, like Fed
20 Ex or UPS freight, grain or coal; much of this freight arrived or was destined for the Port of
21 Seattle terminals in Seattle.

22 21. In 2013, and other recent years, BNSF has had married employees who were
23 opposite sex married; and, increasingly, some who were same-sex legally married as same=sex
24 marriage has become legal in certain states and jurisdictions.
25
26

1 22. BNSF pays spousal health coverage throughout its enterprise where a male
2 employee is married to a female spouse and where a female employee is married to a male
3 spouse.

4 23. Starting in early 2013, Michael Hall repeatedly requested that BNSF cover
5 Elijah's health care costs.

6 24. Michael Hall has provided documentation of marriage required by BNSF or its
7 authorized agent for health care benefits, United Healthcare.

8 25. BNSF has failed and refused to cover the health care costs of Michael Hall's legal
9 spouse, Elijah Hall.

10 26. This failure to pay is based solely on the fact Michael is male.

11 27. If Michael Hall were female, married to a male, BNSF would pay him the spousal
12 health coverage benefits as it does to all employees who are female married to male spouses, or
13 males married to female spouses.

14 28. BNSF pays in its enterprise many female employees the health care benefits
15 concerning their male spouses, including many locomotive engineers who are female.

16 29. BNSF has directly and through its apparent and authorized agent United
17 Healthcare stated its reason for not covering Elijah is it has a "policy" that "marriage is one man,
18 one woman"; although Michael Hall and Elijah Hall have explained many times this definition of
19 marriage is not the law in Washington state, and Elijah is the spouse and husband of Michael
20 Hall, factually, and legally.

21 30. The one man/one woman definition of spouse used by BNSF to limit its liability
22 to cover spousal health benefits amounts to a BNSF policy to discriminate against Michael Hall
23
24
25
26

1 simply because he is male; under this policy, if he were a female married to Elijah, the benefit
2 would be paid.

3 31. Early in 2013 Michael Hall provided certified copies of his marriage certificate
4 and other documentation to United Healthcare who explained to him he did not qualify for
5 spousal benefits because BNSF Railway says that marriage is between one man and one woman.

6 32. United Healthcare was possessed of actual and apparent authority to deal with
7 Michael Hall and other employees, for BNSF, on such coverage issues and to speak for BNSF as
8 to the reasons for denying coverage.
9

10 33. BNSF had directed Michael Hall and other employees to look to United
11 Healthcare for coverage questions, and payment of the benefits.

12 34. United Healthcare repeated to Michael or Elijah that BNSF policy is marriage is
13 one man and one woman, i.e., it was BNSF policy that required the servicer United Healthcare to
14 deny coverage to Michael Hall for his spouse Elijah.

15 35. In June 2013, a federal law called "Defense of Marriage Act" was struck down by
16 the US Supreme Court in *United States v. Windsor*, 570 U.S. __ (2013).
17

18 36. Michael and Elijah again sought the benefit; United Healthcare told Michael Hall
19 that BNSF tells them marriage is between one man and one woman; another employee of United
20 Healthcare told Michael Hall that he worked for the BNSF Railway, and cannot do anything
21 unless told by BNSF Railway to do so; Michael Hall then spoke to a supervisor at United
22 Healthcare called Christy but she never called back despite promising to do so.

23 37. In a later call United Healthcare referred the Halls to the BNSF law department.

24 38. They called the law department in Fort Worth, Texas, in June 2013.
25
26

1 39. On June 26, 2013 the law department promised Elijah Hall they would look into it
2 and call back but it failed to do so. Elijah called the law department on June 27, 2013 and spoke
3 to a law department employee named Tina who cut off his explanation and request to be covered,
4 saying “we do it on our own time.” Elijah Hall told her coverage was legally required and she is
5 not above the law. Tina referred Elijah Hall to another female employee (name unknown), who
6 immediately said Hall had the “wrong number” when he mentioned same sex marriage. He
7 called back and got “Cathy” who put him off claiming she would take his number and call back.
8 No one called him back.

9 40. Elijah Hall called United Healthcare again, whose representative refused to give
10 her name, and who said marriage is between one man and one woman. Elijah Hall explained
11 that same sex legal marriage is valid and made him the legal spouse so coverage should be
12 provided. He asked where in the health care plan does it state marriage is one man, one woman.

13 41. The representative falsely said the plan so provides, but in fact the plan booklet
14 states any husband or wife is covered without limiting this to opposite-sex marriage. Copies of
15 relevant pages of the plan are attached hereto as **Exhibit A**.

16 42. The representative became rude and said that BNSF had sent them a memo after
17 the Supreme Court ruling overturning DOMA, and then said, “let me read it to you.” She began
18 reading a BNSF letter to United Healthcare directing United Healthcare to deny all spousal
19 benefits for all same sex marriages in all areas where BNSF operates and has employees.

20 43. Elijah Hall asked her name and she refused to give it, and though Hall got to talk
21 to a supervisor named Vanessa, she did not resolve the issue.

22 44. Michael Hall also called BNSF HR who refused to do anything.
23
24
25
26

1 45. One BNSF HR representative on June 27, 2013 stated that BNSF was above the
2 law, because they did not have to follow the federal laws.

3 46. On July 8, 2013 at 10:24 AM, Elijah Hall sent an e-mail concerning the request to
4 be covered to BNSF upper management including Chairman/CEO Matthew K. Rose; President
5 and COO Carl Ice; Executive Vice President, Law and Secretary, Roger Nober; Kristen Smith;
6 Vice President and Chief Human Resources Officer Riz Chand; Vice President and General
7 Counsel Charles Shewmake; and Vice President and General Counsel, Regulatory Richard
8 Weicher. A true and correct copy of this e mail is attached as **Exhibit B** hereto.
9

10 47. Elijah Hall in this email protested the “ILLEGAL actions of BNSF Railway and
11 their refusal to provide LEGAL spousal benefits” to legally married same sex couples. He
12 stated, “BNSF Railway AND United Healthcare have discriminated us. . . .Their health guide
13 DOES NOT state that spouse is 1 man 1 woman, or someone of the opposite sex. . . .couples in
14 state[s] that recognize same-sex marriage will now be able to receive the same benefits as
15 heterosexual couples**Large businesses that operate in multiple states will have to keep**
16 **track of who lives under what jurisdiction.**”
17

18 48. Elijah Hall also said “I have dealt with enough pain and suffering, headaches, etc.
19 from their discrimination” and again requested coverage noting the legal marriage.

20 49. Elijah Hall had in fact had headaches and much pain and suffering due to the
21 discrimination, as did Michael Hall.

22 50. No one got back to Elijah Hall in response to the July 8 email to top BNSF
23 managers.
24
25
26

1 51. Elijah Hall called United Healthcare July 8, 2013 and spoke to Cynthia Gray, who
2 said she could not talk because she was “busy.” When he explained that United had denied
3 coverage three times Gray hung up on him.

4 52. In July 2013, Elijah Hall asked Debbie Trabold of United Healthcare to provide
5 him with a copy of the letter in which BNSF told United Healthcare to deny spousal benefits to
6 same sex couples, but she refused to do so.

7 53. On July 10, 2013 both Michael and Elijah Hall called Pat Pitsch of BNSF
8 Railway HR and discussed their legal marriage, request for benefits and BNSF’s denial thereof.
9 In response, she said there was “nothing” BNSF could do and stated that BNSF law department
10 had said BNSF did not have to provide the coverage for same sex spouses.
11

12 54. She also said no change would be made until 2014, then changed that to 2015,
13 and did not resolve the issue.

14 55. On July 10, 2013 at 12:52 p.m., Elijah Hall again e mailed CEO Rose and the
15 other BNSF managers he contacted on July 8th, stating “SHAME SHAME SHAME on you,
16 BNSF Railway for allowing this discrimination and ILLEGAL actions to go on this long. For a
17 company that prides themselves for being a company built around diversity, and having a
18 diversity department, YOU SURE DO DISCRIMINATE!”
19

20 56. The e mail also stated “I spoke with Pat Pritsch, Director of BNSF Medical
21 Benefits, BNSF Railway, and she more or less stated that BNSF Railway was indeed above the
22 law.” A true and correct copy of this e mail is attached hereto as **Exhibit C**.

23 57. BNSF is not above the law.

24 58. On July 10, 2013 at 12:16 p.m. Michael called Marie Olson, Director of
25 Administration of Transportation for BNSF’s NW Division, and she called back at 2:16 p.m.
26

1 from her personal cell phone at 406-390-0633; Michael discussed the issue, that he was being
2 discriminated against in the denial of coverage, and since Olson she was on the diversity council,
3 he wanted her to help him not be discriminated against. She said she would look into the issue.

4 59. On July 10, 2013, in the evening, a BNSF supervisor named Benjamin Marx, the
5 terminal manager in Seattle, Washington, called Michael Hall at his home while he was off duty,
6 which was highly unusual and Marx was not someone Michael dealt with normally.

7 60. Marx demanded to know if Michael Hall was making all these calls to everyone;
8 Hall told him he was worried he be fired; Marx using a threatening tone told Michael Hall that he
9 was “brave” to “take on” BNSF and that it was going to be a “long and bumpy battle.” Michael
10 and Elijah Hall felt intimidated by this threatening call but continued to seek coverage.
11

12 61. On July 15, 2013 at 12:00 p.m. Michael Hall called Marie Olson’s personal cell
13 and left a message; he got no call back, and called again on July 16, 2013 at 6:24 p.m. and left
14 her another message.

15 62. On July 17, 2013 at 5:01 p.m. Marie Olson called Michael Hall from her personal
16 cell, saying she had been too busy to get back to him; Michael Hall explained he was legally
17 married and his Elijah should be covered and that BNSF was refusing to cover this benefit
18 because it is a same sex marriage and they had been told the denial is because BNSF policy is
19 marriage is one man one woman; Michael Hall asked her as a member of diversity council in a
20 company with a nondiscrimination policy to solve the problem; and Olson said she was calling
21 after work, on her personal cell, “I’ve been advised not to talk to you because it could cost me
22 my job and my livelihood of working here”; and she said nothing could be done by the diversity
23 council.
24
25
26

1 63. In July 2013 after being requested, United Healthcare sent Michael Hall a written
2 denial letter with a benefit booklet and pointed to the definition of eligible dependents in the
3 booklet.

4 64. As shown in Exhibit A, the booklet relied on by United Healthcare stated that a
5 “wife” or “husband” is covered and does exclude spouses in a legal same-sex marriage.

6 65. The BNSF policy to limit coverage to opposite sex marriages violates the plan’s
7 plain meaning: Elijah is Michael’s husband, and should be covered under the plan.

8 66. Michael Hall has appealed the denial of coverage to United Healthcare with
9 repeated pleas to end the discrimination and denial of coverage, but it and BNSF have failed to
10 properly respond, and have refused and failed to provide the coverage.

11 67. To this date BNSF has not responded to the July 8th and July 10th e mails sent to
12 CEO Rose or other upper management, unless the threatening call made by Marx is a response.

13 68. Elijah Hall has the human immunodeficiency virus, a slowly replicating retrovirus
14 that may cause acquired immunodeficiency syndrome.

15 69. On information and belief, defendant BNSF and United Healthcare know this.

16 70. Elijah Hall’s monthly medication costs are about \$2,400.

17 71. BNSF’s gender based discrimination is forcing the Halls to lose benefits worth
18 \$2,400 a month. Their economic damages grow monthly and are estimated at some \$24,000 to
19 date.

20 72. The gender based discrimination also causes the Halls emotional distress which
21 could adversely affect Elijah Hall’s medical condition which also causes great emotional distress
22 for the legally married couple.

23
24
25 **KEY FACTS REGARDING THE GARRANDS**

1 73. Amie Garrand has been employed at BNSF for about 12.5 years. She has been
2 an engineer and is currently a conductor. She is in the NW Division which is operated out of
3 Seattle in King County.

4 74. Amie Garrand has several times requested that BNSF or United Healthcare cover
5 the health care costs of her spouse, Carol Garrand, including costs the couple incurred relating to
6 birth of a son by Carol after the marriage in 2013. BNSF has failed and refused to cover the
7 spousal health care costs, including through communications from United Healthcare, citing its
8 policy that marriage is one man one woman.
9

10 75. This is discrimination based on Amie's sex as BNSF provides spousal health care
11 coverage to male conductors or employees who are married to females and here is not providing
12 the spousal benefit to Amie Garrand because she is female and not male.

13 76. Amie Garrand called the BNSF Hotline, Legal Department and HR on June 26
14 and 28, 2013, seeking coverage for her spouse Carol and protesting the discriminatory refusal to
15 cover her spouse and got no positive response.
16

17 77. On June 28, 2013, Garrand spoke with BNSF Human Resources representative
18 Ray Scott, who said they know about the issue and their lawyers were looking into it. This did
19 not resolve anything.

20 78. On July 9, 2013 at 2:22 p.m. she called United Healthcare and again asked to add
21 her wife Carol to the health plan and the representative told her no, because BNSF does not
22 recognize same-sex marriage.

23 79. On July 18, 2013 Amie Garrand called an employee named Katrina with BNSF
24 who would not recognize her wife Carol or provide the coverage.
25
26

1 80. On July 19, 2013 at 3:30 p.m. Amie Garrand called an employee named Monica
2 at United Healthcare, who denied the coverage saying the benefit book states same sex marriage
3 does not qualify as a dependent.

4 81. This was untrue; the benefit book or plan states “Your wife” is covered and does
5 not state “wife” excludes a same-sex wife.

6 82. Monica then said BNSF won’t let United Healthcare add Carol Garrand so Amie
7 Garrand then talked with Felicia in the resolution department, who said she would send a denial
8 of benefits letter.

9 83. On July 29, 2013 at 11:50 am Amie Garrand called BNSF Human Resources and
10 spoke with Bob Apetz, who said BNSF would not cover a same-sex-married wife; Apetz was
11 hostile and rude.
12

13 83. Amie Garrand asked for his supervisor and left a message for supervisor Pat
14 Pitsch who called Garrand July 31, 2013 at 2:25 p.m., saying BNSF would not provide the
15 coverage and would not even consider coverage until 2015; Garrand told her this was blatant
16 discrimination, and that the policy to not cover spouses was illegal; Pitsch said BNSF could do
17 nothing.
18

19 84. In July 2013 Amie Garrand asked her own terminal superintendent, Chris
20 Delargey, to look into the issue and one month later he said he had no information for her; she
21 protested the discrimination saying it would be “easier for me to get a sex change operation” than
22 it would be for her to get the spousal benefit for her legal wife under the BNSF policy of not
23 recognizing same sex marriage.
24
25
26

1 85. On August 29, 2013 Amie Garrand called United Healthcare to put her spouse
2 Carol on the insurance, and they again refused saying BNSF does not recognize same-sex
3 marriage spouses, as dependents.

4 86. On September 23, 2013 at 2:57 p.m. Amie Garrand called United Healthcare,
5 citing new Department of Labor guidelines covered same-sex marriages and saying hers should
6 be regarded just like any other marriage; the representative again refused to add the spouse.

7 87. On September 23, 2013 at 3:58 p.m. Amie Garrand called Pat Pitsch with BNSF
8 Human Resources and left a message regarding the new DOL guidelines noting recognition of
9 legal same-sex marriages. Pitsch called back on September 24, 2013 at 7:22 a.m. and left a
10 message saying those rules did not apply to BNSF.
11

12 88. On September 29, 2013 at 11:43 a.m. Amie Garrand called United Healthcare to
13 add her new infant son to coverage and her wife, Carol. They added the infant son but refused to
14 cover Carol saying again BNSF only recognizes marriage as one man one woman.

15 89. On September 30, 2013 Amie Garrand called United Healthcare seeking to add
16 the spouse and again was refused. On November 4, 2013, she called again, asking to add the
17 spouse, and was again refused. On November 21, 2013 at 4:55 p.m. Garrand again called United
18 Healthcare and spoke with an employee named Monica who said she remembered the last time
19 Garrand spoke with her. Garrand asked to add the wife and Monica said “no,” nothing had
20 changed, and she was not allowed to add the spouse because it is a same-sex marriage.
21

22 90. The letter United Healthcare sent to Amie Garrand quoted the benefits plan but
23 the portion quoted stated that the booklet’s page 16 describing “eligible dependents” includes
24 “Your wife or husband.” This language includes Amie’s wife, Carol. There was no language in
25 the benefits booklet excluding same sex wives or husbands.
26

1 91. BNSF is denying coverage for Carol Garrand because Amie Garrand is female; if
2 Amie were male, BNSF would provide the coverage -- as it does to many thousands of male
3 employees with female spouses.

4 92. At times BNSF or United Healthcare told Garrand that a collective bargaining
5 agreement forces them to deny coverage for Carol Garrand. This was not true factually or
6 legally. The benefits plan said "Your wife or husband" is an eligible dependent and in any event
7 excluding same-sex spouses is illegal pay discrimination based on the sex of the employee.
8 Union contracts are not a legal way to excuse or justify discrimination.
9

10 **SUPPLEMENTAL FACTS AFTER DEC. 3, 2013 AND OTHER KEY FACTS**

11 92.1 Following the filing of this complaint in federal court on December 3, 2013,
12 BNSF sent or caused to be sent the Halls and on information and belief, all employees, a
13 document dated and sent December 23, 2013. The document stated as follows: "Effective
14 January 1, 2014 the Plans that are listed below will provide dependent coverage to covered
15 railroad employees' same-sex spouses. This is not a benefit that is required by law or under the
16 collective bargaining agreements currently in effect, but the Plan Administrators, listed below,
17 have determined to voluntarily provide this benefit in light of recent changes in the law that
18 allow married same-sex couples to access the same Federal tax benefits provided to married
19 opposite-sex couples." The latter stated the change applied to the Railroad Employees National
20 Health and Welfare Plan, a plan covering the plaintiffs, herein, with the administrator thereof
21 being the Joint Plan committee.
22

23 92.2 At the same time the Halls received a health coverage card listing Elijah T. Hall
24 as a covered dependent and since January 1, Eli Hall's health care coverage has been provided
25 by the plan. The Garrands received similar treatment.
26

1 92.3 Also on December 23, 2013, United Health Care sent the Halls a letter responding
2 to one of his several appeal letters regarding adding “your husband to your medical insurance
3 policy.” The letter went on to state that United had considered all the supporting information
4 received, but “UnitedHealthcare has no jurisdiction over who can be added to your policy. We
5 provide administrative and claim payment services only. All issues related to who may or not
6 [sic] be added to your policy are made entirely by your employer. [This referred to BNSF.] We
7 apologize if our previous responses were inadequate and/or incorrect. An actual appeal with the
8 Central Escalation Unit [of United] cannot be conducted on a member who is not on your policy.
9 The issue regarding adding your husband to your policy can only be handled by your employer.
10 Our records indicate that as of January 1, 2014, your husband Elijah Hall is a covered dependent
11 on your plan. Please accept our sincere apology for your frustration as we worked to resolve
12 your issue.” The letter went on to note that “Coverage is subject to the exclusions, limitations
13 and other terms of your Summary Plan Description” and “You have the right to file civil action
14 under section 502(a) of ERISA after you have exhausted all of your appeal rights.” In effect, this
15 letter amounted to denial of appeal avenues at United, for the Halls and Garrands.
16

17 92.4 On information and belief, the United Healthcare letter quoted above accurately
18 stated that the employer, BNSF, was in charge of making the decision regarding whether or not a
19 same sex spouse including Eli Hall or Carol Garrand was to be covered under the terms of the
20 plan; and as a result, on information and belief, BNSF is acting as the plan administrator or
21 fiduciary and has denied coverage to plaintiffs.
22

23 92.5 Besides changing the practice to cover Eli starting January 1, 2014, BNSF also
24 changed its practice to cover Carol Garrand and on information and belief, other same sex
25 couples; but BNSF still has not covered them for the period up to January 1, 2014, and has on
26

1 information and belief told the plan to not cover the same sex spouses' health care costs for prior
2 to January 2014. Although the same sex couples are being covered in a de facto sense, at
3 present, this comes with the statement that this is not a legal requirement and this practice can
4 change at BNSF's whim and leaves plaintiffs insecure and without a solid benefit as a matter of
5 right. BNSF and its agent United Health Care could revoke what they claim to provide now as a
6 matter of grace, but not right; this renders the benefit insecure and constitutes ongoing
7 discrimination and denial of equal pay based on sex and sexual orientation and causes plaintiffs
8 to have distress and uncertainty. Benefits provided as a matter of grace are not secure and may
9 perhaps be withdrawn just when a large health care cost is incurred.
10

11 92.6 There remains a failure and refusal to pay the spousal benefit to plaintiffs the
12 Halls and Garrands for medical costs occurring up to January 1, 2014 and ongoing and future
13 denial of paying the benefit in a secure fashion as a matter of obligation, not grace.

14 92.7 On information and belief, despite the de facto change in practice, BNSF is still
15 taking the legal position the spousal benefit need not be provided legally and there is an ongoing
16 present controversy between the plaintiffs and others similarly situated, and BNSF, concerning
17 whether this benefit is legally required.
18

19 92.8 On or about July 18, 2013, the Halls had complained to the Washington State
20 Human Rights Commission about denial of the spousal benefit regarding Eli's health care costs;
21 and this triggered an Equal Employment Opportunity complaint or case to be opened as well.

22 92.9 On February 26, 2014, the EEOC issued its right to sue letter to the Halls,
23 providing them a 90 day window in which to sue BNSF under Title VII and their claim under the
24 federal anti-discrimination laws became ripe and actionable. By suing under Title VII in this
25 first amended complaint, the Halls' Title VII claim is ripe and timely.
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CAUSES OF ACTION

FIRST CAUSE OF ACTION: FEDERAL EQUAL PAY ACT CLAIMS

93. Plaintiffs incorporate and re-allege herein all other allegations of this complaint.

94. The denial of equal pay in the form of spousal health care benefits which BNSF was not paying or causing to be paid to Michael Hall respecting his husband Elijah based on Michael's sex violates the Equal Pay Act, 29 USC §206(d)(1). The denial of equal pay in the form of spousal health care benefits which BNSF was not paying or causing to be paid to Amie Garrand regarding her wife Carol based on Amie's sex violates the Equal Pay Act, 29 USC §206(d)(1).

95. BNSF is an employer within the meaning of the Act, with employees within the meaning of the Act, including engineers or conductors such as Hall and Garrand. It has female engineers and conductors married to males for whom BNSF provides the benefit and male engineers and conductors married to females to whom BNSF provides the benefit.

96. BNSF was and is an establishment directly engaged in interstate or foreign commerce or production of goods including handling goods and has and has had employees such as Hall and Garrand directly engaged in interstate and foreign commerce and handling or production of goods moving in interstate or foreign commerce.

97. BNSF, Hall and Garrand and other engineers at BNSF directly use instrumentalities of interstate commerce and were engaged directly in interstate commerce, i.e., driving or moving trains across parts the national BNSF railway in Washington State, containing goods or trains or cars sent from or to various States or nations, in a flow of interstate and international commerce.

1 98. BNSF employed Hall and also female engineers or conductors or
2 employees in an establishment in jobs requiring substantially equal skill, effort and
3 responsibility and performed under similar working conditions, surroundings and
4 hazards. BNSF employed Garrand and also male engineers and conductors or employees
5 in an establishment in jobs requiring substantially equal skill, effort and responsibility
6 and performed under similar working conditions, surroundings and hazards.

7 99. The establishment is the entire 28-State BNSF railway (or, alternatively is
8 the NW Division or subdivisions or yards where Michael Hall or Amie Garrand work).
9

10 100. In said establishment(s), BNSF discriminated between plaintiff Michael
11 Hall, a male, and other employees who were female, who performed equal work on jobs
12 requiring equal skill, effort and responsibility and which are performed under similar
13 working conditions, by paying said females married to males spousal health benefits
14 while not paying males married to males the same benefit, including Hall. In said
15 establishment(s), BNSF discriminated between plaintiff Amie Garrand, a female, and
16 other employees who were male, who performed equal work on jobs requiring equal
17 skill, effort and responsibility and which are performed under similar working
18 conditions, by paying said males married to females spousal health benefits while not
19 paying females married to females the same benefit, including Amie Garrand. The
20 ongoing denial that they are entitled as a matter of right to the benefit is also ongoing
21 denial of equal pay in that the benefit is not secure.
22

23 101. Nationwide BNSF has thousands of engineers or conductors. The NW
24 Division has some 800 engineers and the Auburn Triangle route has some 35 engineers
25 and 35 conductors or 70 trainmen. In each part of the Railway, there are female
26

1 employees who are married to males, and who receive spousal health coverage; and male
2 employees married to females who receive spousal health coverage; while BNSF denies
3 the same benefit to males married to males, like the Halls, or females married to females,
4 like the Garrands.

5 102. This discrimination in pay rates or benefits was pursuant to BNSF policy and
6 direction; was repeatedly ratified by BNSF, including its law and HR departments; and was not
7 justified by any seniority or merit system, or system which measures earnings by quantity or
8 quality of production; or a differential based on any other factor other than sex. The letters dated
9 Dec. 23, 2013 from BNSF and United Health care confirm and state correctly that BNSF itself
10 decided to make the discrimination based on sex complained of herein. The policy of “marriage
11 is one man one woman” is not a distinction based on seniority or merit systems, or a system
12 which measures earnings by quantity or quality of production; and is a differential based on the
13 sex of the employee vis-a-vis his or her spouse.
14

15 103. BNSF policy would be to pay the benefit to Michael Hall if he were female, not
16 male; and it would be to pay the benefit to Amie Garrand if she were male and not female. The
17 discrimination was and is based on sex.
18

19 104. Said discrimination and unequal pay caused and proximately caused plaintiffs to
20 suffer legal damages including economic loss, and emotional distress and pain and suffering.
21 The economic loss of the Halls is estimated at \$2,400 per month or some \$24,000 to the end of
22 2013; the economic loss to the Garrands is estimated as the cost of the birth of Carol and Amie’s
23 son, estimated as thousands of dollars to the end of 2013. Amounts will be proven at trial.
24

25 105. The benefits not paid to plaintiffs are “wages” under the Equal Pay Act and 29
26 CFR § 1620.10 and 1620.11.

1 106. The discrimination by BNSF complained of herein violates the Equal Pay Act
2 §206(d)(1), §215(a)(1) and (2) and §216(b). The ongoing refusal to recognize the benefit as
3 legally required constitutes and ongoing threat of violation of the EPA.

4 107. The discrimination by BNSF complained of herein violates 29 CFR § 1620.11(b)
5 providing “It is unlawful for an employer to discriminate between men and women performing
6 equal work with regard to fringe benefits”; and subsection (d), providing that “It is unlawful for
7 an employer to make available benefits for the spouses or families of employees of one gender
8 where the same benefits are not made available for the spouses or families of opposite gender
9 employees.”

10 108. BNSF is liable to Hall and Garrand in the amount of the unpaid benefits, plus “an
11 additional equal amount as liquidated damages,” and reasonable attorneys’ fees, and costs of the
12 action, under 29 USC § 216(b). Plaintiffs also are entitled to a declaratory judgment under the
13 EPA that providing the same sex spousal health care benefit is required under that law such that
14 its position taken in the Dec. 23, 2013 letter is incorrect legally; this will make the benefit secure
15 and make it a real benefit, not something given as a matter of grace, or changeable policy by
16 BNSF.

17 109. BNSF is also liable to the same extent to other employees in its establishment
18 who are similarly situated and suffer similar discrimination and who consent to be plaintiffs in
19 this action. This includes similarly situated engineers or conductors, or other employees of
20 BNSF, who were married legally in same sex marriages who are denied the benefit based on the
21 one man one woman policy.

22 110. On information and belief, this group may include hundreds or thousands of
23 same-sex-married BNSF employees who are being denied equal pay for equal work via the
24
25
26

1 denial of the spousal health care benefits based on the sex of the BNSF employee vis-à-vis the
2 sex of his or her legally married spouse.

3 111. The suit under the Equal Pay Act is ripe now and plaintiffs sued under that Act
4 because those claims were ripe last December. Although the Dec. 23, 2013 letter stopped certain
5 damages from accruing going forward as of January 1, 2014 it did not remedy or pay plaintiffs
6 for the past discrimination occurring in 2013, and the position the benefits are not legally
7 required constitutes an ongoing present controversy between the parties as to whether the benefit
8 is legally required under the Equal Pay Act and further amounts to a threat of denial of the
9 benefits at BNSF's discretion which is unequal pay itself and continuing discrimination.
10

11 **SECOND CAUSE OF ACTION:**

12 **DISPARATE TREATMENT UNDER TITLE VII**

13 112. Plaintiffs incorporate and re-allege herein all other allegations of this complaint.

14 113. This action under Title VII is allowed under 42 USC §2000e-5(f)(1) allowing a
15 civil action to remedy an unlawful practice in employment under Title VII within 90 days after
16 notice by the EEOC of the right to sue and plaintiff Michael Hall seeks declaratory and
17 injunctive relief, backpay of the benefit and compensatory damages under this section. The Title
18 VII claim is timely under the 90 day window. Jurisdiction and venue are appropriate in this
19 Court under 42 USC §2000-e-5(f)(3), providing jurisdiction to hear Title VII civil actions in each
20 United State district court, and because this is the judicial district in the State in which the
21 unlawful employer practice occurred. BNSF has over 14 employees each work day in 20 or
22 more weeks in the current year or preceding year prior to the unlawful acts described herein, and
23 is an employer under 42 USC §2000e-2b. BNSF also has had more than 500 employees in each
24 of the work days in 20 or more weeks in the current or preceding year under 42 USC §1981a.
25
26

1
2 114. 42 U.S.C. § 2000e et seq., provides that “[i]t shall be an unlawful employment
3 practice ... to discriminate against any individual with respect to his compensation, terms,
4 conditions, or privileges of employment because of ... sex[.]” BNSF’s denial of spousal health
5 care benefits to the same sex married persons it employs including Michael Hall violates the
6 above mentioned section because the spousal health benefit is part of compensation and is a
7 material part of the terms and conditions of employment; and the denial of the benefit is because
8 of Michael Hall’s sex. Michael Hall is a male properly performing his job, who experienced
9 adverse employment action in the denial of the spousal health benefit, due to his sex, where
10 similarly situated females were treated more favorably by getting the benefit. If Michael Hall
11 were female, the benefit would be provided; BNSF provides it to female employees who are
12 married to males but denied it to Hall who is married to a male. BNSF is using a forbidden
13 criterion, sex, to deny a material benefit to Michael Hall as a matter of policy. The denial here is
14 also violative of Title VII because it is based on gender nonconforming conduct. BNSF had the
15 specific intent to discriminate based on sex under its declared facially discriminatory policy --
16 marriage is between one man and one woman. BNSF’s discrimination was also malicious,
17 reckless or oppressive.
18
19

20 115. While BNSF ordered that the benefit be provided starting January 1, 2014 this
21 effort to mitigate its damages for its violation of Title VII did not remedy the discrimination
22 occurring prior to that date. The ongoing position that the benefit is not legally required also
23 constitutes continued and ongoing discrimination based on sex. A benefit that is not legally
24 required is not the same as a benefit that is legally required.
25

26 116. The discrimination caused Hall to proximately suffer damages.

1 117. The statement on Dec. 23, 2013 that the benefit is not legally required creates an
2 ongoing present controversy between Hall and BNSF about whether Title VII allows denial of
3 this benefit based on sex.

4 118. Plaintiff Michael Hall is entitled to compensatory and punitive damages, fees and
5 costs for the violation of 42 USC §2000e et seq. and also to a declaration under Title VII that
6 BNSF is legally required to provide the benefit. Under this section plaintiff Hall seeks all
7 compensatory and punitive damages available including front pay, emotional distress and other
8 damages, to the maximum extent allowed in this section. Plaintiffs allege that the unlawful
9 practices engaged in by BNSF were engaged in intentionally, and with malice or with reckless
10 indifference to the federally protected rights within the meaning of 42 USC §1981a(b). Plaintiff
11 Hall also seeks fees and costs under 42 USC §2000e-5(k).
12

13 **THIRD CAUSE OF ACTION:**

14 **DISPARATE TREATMENT DISCRIMINATION UNDER WLAD**

15
16 119. Plaintiffs incorporate and re-allege herein all other allegations of this complaint.

17 120. RCW 49.60.030(1) recognizes the “right to be free from discrimination because
18 of” sex and or sexual orientation and this right includes (a) “the right to obtain and hold
19 employment without discrimination.” Subsection (2) of this section provides a civil remedy for
20 violations of this right including an order to “enjoin further violations, or to recover the actual
21 damages sustained by the person, or both, together with the cost of suit including reasonable
22 attorneys’ fees or any other appropriate remedy authorized by this chapter or the United States
23 Civil Rights Act of 1964 as amended.” RCW 49.60.180(3) further specifies that it is an unfair
24 practice for any employer “[t]o discriminate against any person in compensation or in other
25
26

1 terms or conditions of employment because of age, sex, marital status, sexual orientation, race,”
2 and other protected statuses. This law applies to BNSF as it is an employer under the WLAD.

3 121. BNSF denied Michael Hall and Amie Garrand the spousal health care benefit for
4 the period ending January 1, 2014. This violated the foregoing sections of the WLAD. The
5 denial was based on sex, and also on sexual orientation. The benefit would have been provided
6 to Michael Hall but for his sex. The benefit would have been provided to Amie Garrand but for
7 her sex. In each case others similarly situated of the opposite sex were paid the benefit. Michael
8 Hall is a gay man and Amie Garrand is a lesbian woman and the spousal benefits were also
9 denied to each due to their sexual orientation; BNSF stated, “marriage is one man, one woman.”
10 If each were of the opposite gender they would not have been denied the benefit; if each were
11 heterosexual and not homosexual, they would not have been denied the benefit.

12 In respect to each plaintiff employed by BNSF there was disparate treatment based on sex, and
13 sexual orientation. As of January 1, 2014, the position that the benefit is not legally required
14 constitutes ongoing discrimination based on sex, and sexual orientation.

15 122. Said discrimination is disparate treatment based on sex, and sexual orientation
16 under the WLAD and caused and proximately caused and is causing damage to Michael Hall and
17 Amie Garrand. The ongoing claim that the disparate treatment is legally permissible constitutes
18 ongoing discrimination which causes damages to plaintiffs. proximately This also creates a
19 present controversy of importance between plaintiffs and BNSF. Plaintiffs Michael Hall and
20 Amie Garrand are entitled to recover compensatory and punitive damages, fees and costs under
21 the WLAD, and to a declaratory judgment that BNSF must pay the benefit, legally and not as a
22 matter of grace, and its past and present and ongoing position that the benefit legally need not be
23 paid, violates the WLAD and the civil right to be free of discrimination based on sex, and sexual
24 orientation.

25
26 **FIFTH CAUSE OF ACTION: ERISA CLAIMS**

1 123. Plaintiffs incorporate and re-allege herein all other allegations of this complaint.

2 124. The Employee Retirement Income Security Act 29, USC § 1132(a)(1) and (3)
3 provides that a participant or beneficiary of a employee benefit plan may sue “to recover benefits
4 due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to
5 clarify his rights to future benefits under the terms of the plan” or to obtain an order or judgment
6 to enjoin any act or practice which violates any provision of ERISA or the plan or other
7 appropriate equitable relief to redress such violations or enforce provisions of ERISA or terms of
8 the plan.
9

10 125. The 2013 denial of the spousal health benefit to plan participant Michael Hall and
11 beneficiary Elijah Hall and to plan participant Amie Garrand and beneficiary Carol Garrand
12 violated the terms of the plan which provided that the benefit was to be paid to the employee’s
13 “wife or husband.” This violates ERISA. The denial of benefits was deliberate, intentional and
14 malicious and constitutes an abuse of discretion or was an arbitrary and capricious denial of
15 rights under the plan. The ongoing position that the benefit need not legally be paid constitutes
16 an ongoing violation of the plan and ERISA.

17 126. The plan is a separate legal entity, see 29 USC 132(d)(1), but on information and
18 belief BNSF caused the denial of benefits and violation of the terms of the plan and/or is acting
19 as the administrator or fiduciary operating the plan responsible for such denials. BNSF may be
20 sued directly in its individual capacity with a money judgment to be entered against it rather than
21 the plan, under 29 USC §1132(d)(2).

22 127. Jurisdiction and venue are proper in this Court. 29 USC 1132(e)(1) provides the
23 district courts of the United States with exclusive jurisdiction of civil actions under ERISA by a
24 plan participant or beneficiary. 20 USC § 1132(e)(2) provides such actions may be brought in
25 the “district where the plan is administered, where the breach took place, or where a defendant
26

1 resides or may be found, and process may be served in any other district where a defendant
2 resides or may be found.” On information and belief, the Western District of Washington is a
3 district where the breach took place, or where BNSF resides or may be found.

4 128. The Halls appealed the denial of ERISA benefits repeatedly to United. The
5 December 23, 2013 letters from United amounted to a final denial of any internal appeals the
6 Halls had. In the United letter, they were told no appeal in fact ever could have been made to
7 United or the plan as the matter was in the hands of BNSF. The Halls have exhausted any
8 remedies or BNSF has acted to make them pointless. Amie Garrand is a participant and Carol
9 Garrand is a beneficiary. The Garrands received the same letter the Halls received from BNSF.
10 The Garrands are in the same position as the Halls; they were told by United they would not get
11 the benefit, and now they received the same letters in December 2013 the Halls got. Any appeal
12 to the plan by them is futile or pointless as the matter is in hands of BNSF which has made its
13 general decision about these benefits, and United is indicating it will not hear any appeal. The
14 Garrands have exhausted any remedies or are excused from doing so.

15 130. Plaintiffs were proximately damaged by the denial of benefits in violation of the
16 plan. While BNSF is paying the benefits going forward post January 1, 2014, this does not
17 remedy the past denial of benefits. Also, the BNSF position that they are not legally required
18 creates an ongoing threat of denial of benefits which is a present denial of the certainty of the
19 benefit being paid in the future which violates the plan. It also creates dispute between plaintiffs
20 and BNSF concerning the plan as to which a declaration of rights is appropriate.

21 131. Plaintiffs are entitled under ERISA to an order awarding them the unpaid benefits
22 they should have been paid for 2013 health care costs; award of costs and attorneys fees for this
23 action; and an order declaring that under the plan the spousal health benefit is legally required
24 under the plan to same sex couples legally married, and enjoining BNSF to not deny the benefit
25
26

1 in the future, to cease the legal position the benefit is not required and to cease directing the plan
2 in this regard or cease interfering in the plan's provision of such benefits.

3
4
5
6 **PRAYER FOR RELIEF**

7 NOW, THEREFORE, plaintiffs pray for the following relief:

8 1. For a judgment in an amount for actual and liquidated damages, to be proven at
9 the time of trial; plus costs, attorneys' fees, pre and post judgment interest, and any punitive
10 damages as allowed by law;

11 2. For a judgment and order enjoining defendant from continuing the
12 discrimination and denial of plan benefits complained of herein, and decreeing BNSF shall pay
13 the benefit sought herein to any legal wife or any legal husband, regardless of the sex of the
14 BNSF employee or his or her sexual orientation or status as same sex married; and BNSF shall
15 direct and cause the plan to pay said benefits as a matter of right, and cease interfering with
16 payment of said benefits, and
17

18 3. For such other relief as the Court may deem equitable and proper.
19

20 DATED this 26th day of March 2014.

21 CLEVELAND STOCKMEYER PLLC

22 By: ___/s/ Cleveland Stockmeyer _____
23 Cleveland Stockmeyer WSBA # 21636
24 8056 Sunnyside Ave. N
25 Seattle, WA 98103
26 (206) 419-4385
Email: cleve@clevelandstockmeyer.com
Attorney for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BADGLEY MULLINS TURNER PLLC
By: s/ Duncan C. Turner
Duncan C. Turner, WSBA # 20597

4750 Columbia Center
701 Fifth Avenue
Seattle, Washington, 98104
Telephone: (206) 621-6566
Email: duncanturner@badgleyturner.com

Attorney for Plaintiffs

DECLARATION OF SERVICE

LISALOU GOGAL states and declares under penalty of perjury as follows:

I hereby certify that on this day, I served the foregoing on the defendant, by mailing to its registered agents for service of process by depositing same in the US mail, postage prepaid, addressed to:

CT Corporation
505 Union Ave. SE Suite 120
Olympia, WA 98501

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 26 day of March, 2014, at Seattle, King County, Washington.

 /s/ LisaLou Gogal
LisaLou Gogal