Schlichter Bogard & Denton

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Volume 1, Issue I of SB&D's Railroad Injury Newsletter

Welcome to Volume 1, Issue I of Schlichter Bogard & Denton's newsletter exclusively covering railroad-related topics.

This quarter, attorneys from our nationally-recognized Railroad Injury team tackle important questions related to the Federal Rail Safety Act, negligence, and statute of limitations.

We hope you enjoy the first issue of the SB&D Railroad Injury Newsletter. As always, we are here to answer any questions you may have: 800-USE-LAWS | railroad@uselaws.com

Sincerely,

Jerry Schlichter & Nelson Wolff

Schlichter Bogard & Denton Again Named a *US News* National Tier I Railroad Law Firm

Schlichter Bogard & Denton was again named a U.S. News National Tier 1 Railroad Law Firm in 2021. We are one of a very small number of firms representing injured railroad workers to consistently receive the highest national ranking by U.S. News.

Per U.S. News, "[a]chieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise" and reflects "the highest level of respect a firm can earn among other leading lawyers and clients from the same communities and practice areas."

Our Railroad Injury attorneys and team members are bound by a common goal: providing high-quality legal representation that outperforms client expectations and achieves impactful results. We are honored to have our efforts recognized by our peers and clients.

What is the Federal Railroad Safety Act?

by Jon Jones

It is common for workers to fear retaliation from their employer when they report work-related injuries or safety concerns; refuse to perform dangerous work; follow a treating doctor's order to remain off work after an injury; or even after speaking with attorneys and/or filing an on-duty injury claim. In fact, sometimes, employers do attempt to retaliate or intimidate against employees who engage in these activities. However, this type of retaliation against railroad workers is prohibited by a federal law called the Federal Railroad Safety Act (the "FRSA" or Whistleblower law). When a railroad breaks this law, an employee is entitled to file a legal claim and recover compensatory and punitive damages. This article explains the basics of the Whistleblower law, railroad workers' rights, and how those rights are enforced.

Federal Whistleblower Protections

A federal statute enacted under Title 49 of the United States Code is a law enacted by Congress as section 20109. It protects railroad workers who engage in specific safety-related activities. Specifically, it provides that a railroad "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" for engaging in these protected activities. The statute also prohibits a wide range of retaliatory conduct not specifically listed, such as intimidation or threats, reduction of hours, denial of overtime or promotion, or failure to hire or rehire.

What Is a Protected Activity?

Under the Whistleblower law, protected activities generally relate to railroad worker safety, following railroad safety laws and regulations, getting medical treatment, or participating in legal and investigatory processes. Some examples include:

- Notifying the railroad of your own or a coworker's work-related injury or illness;
- Reporting a railroad about legitimate safety or security concerns;
- Refusing to violate any federal law, rule, or regulation relating to railroad safety or security;
- Refusing to perform work that presents an imminent danger of serious injury or death where there is no reasonable alternative;
- Seeking medical treatment (like insisting on going to an emergency room instead of a corporate health clinic selected by the railroad) and following the orders and treatment plan of your doctor (like remaining off work);
- Providing information about fraud, waste, or abuse of government funds connected to rail safety or security; or
- Filing a complaint, causing a proceeding to be brought, cooperating with an investigation, or testifying in a proceeding under federal laws and regulations relating to railroad safety.

Enforcing Rights Under the FRSA

A railroad worker who believes he/she has been retaliated against for engaging in a protected activity may file a complaint with OSHA (Occupational Safety & Health Administration) no later than 180 days after the railroad worker knew or should have known about the adverse action taken by the railroad. If no complaint is filed within 180 days, the claim will be barred. The complaint and resulting investigation are handled by OSHA's Office of Whistleblower Protection. The location of your local OSHA office can be found at here.

If OSHA does not issue a final decision within 210 days of filing the complaint, the railroad worker then has the option to file a lawsuit in federal court.

Because of the short 180-day window to file the initial OSHA complaint, if you believe you were or may have been retaliated against for engaging in a protected activity, it is important to contact an experienced attorney as soon as possible to get advice.

What Must a Worker Prove?

To win a Whistleblower claim, a worker must prove the following probably happened:

1. The worker engaged in a protected activity;
2. The railroad was aware the worker had engaged in that activity;
3. The railroad took unfavorable or adverse action against the worker (i.e. discharge, demotion, suspension, reprimand, etc.); and
4. The worker's protected activity was a "contributing factor" to the railroad's decision to take the adverse action (i.e. the protected activity, alone or in combination with other factors, affected the railroad's decision).

If each of these elements is established, the railroad will be found liable unless it proves by clear and convincing evidence that it would have taken the same adverse action against the worker even if the worker had never engaged in a protected activity. "Clear and convincing" is a much higher standard of proof, however, than "preponderance of the evidence" and requires the railroad to prove its defense to a "reasonable certainty."

What Remedies Are Available if you prove your claim?

The list of possible remedies for a worker that proves a case includes the following:

- Removal of adverse disciplinary action from the employment record;
- Reinstatement to old job with all seniority and benefits intact;
- Payment of back wages with interest for the period spent not working due to the retaliation;
- Damages for emotional distress;
- Punitive damages, in certain circumstances, up to $250,000; and
- Reasonable attorney's fees and costs.

Conclusion

If you believe you were or may have been retaliated against for engaging in activities protected by the Whistleblower law, it is important to contact an experienced attorney as soon as possible who can analyze the facts of your case and provide specific legal advice.

What Role Does Negligence Play in FELA Claims?

by Scott Gershenson

Some railroad workers, medical and billing professionals and even some attorneys think that any employee who is injured at work is covered by a state's workers' compensation laws. This can lead to much confusion. In fact, all railroad workers, with very limited exceptions, are NOT covered by workers' compensation. Instead, they are covered by the Federal Employers Liability Act (or "FELA"). The biggest difference in these two laws is that in order to recover any compensation, a railroad worker must prove that his/her injury was caused by the negligence of the employer-railroad. If there is no negligence, there is no right to recover any money

.The FELA is the exclusive remedy for injured railroad workers. Importantly, the FELA requires the injured employee to prove that the railroad was somehow negligent in causing the employee's injury – that, for instance, the railroad failed to provide reasonably safe working conditions, equipment, or methods of work, and that that failure caused or contributed to cause the employee's injuries. Common examples of unsafe workplaces include oil or debris that creates a slip or trip hazard. Common examples of unsafe equipment include defective locomotives, railcars or track switches and handbrakes which malfunction.

Although the injured railroad employee must establish that the railroad was negligent in causing his or her injuries, the evidence required at trial is much less than an ordinary negligence claim such as a claim arising from a motor vehicle injury or a slip-and-fall at a retail store. Rather, under the FELA, the injured employee must only show that the railroad's negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

However, in an attempt to reduce damages available to the employee, the railroad will often try to demonstrate that the employee was "contributorily negligent," meaning that the employee's actions (or inactions) caused or contributed to cause the incident. Importantly, though, even if a railroad employee is partially at fault in causing the injury incident, that does not completely bar the employee's right to recover, but merely reduces the recovery proportion to the fault attributed to the employee. [1]

Proof of FELA negligence against the railroad can come from a variety of different sources, including company records and testimony from witnesses. For example, if a railroad employee is injured after tripping on debris, evidence that another employee complained to his manager about that condition one week earlier would show that the railroad was aware of that same condition and failed to take any action to address the safety hazard, contributing to cause the employee's injury.

Experienced FELA attorneys, such as those at Schlichter Bogard & Denton know what documents to obtain from the railroad, even if it means getting a court order to force the railroad to turn them over. It is also our role as advocates for railroad workers to investigate injury incidents by interviewing key witnesses and determining whether others had been injured by the same defective workplace condition or equipment. These pieces of evidence are the building blocks for which FELA attorneys help "make their case" that the railroad was negligent in causing an employee's injuries. If one is successful in demonstrating that the railroad committed negligence, then the employee is entitled to money damages arising from that injury, which are broader than those limited funds provided under a state's workers' compensation program. Railroads often attempt to hide or destroy evidence that shows their negligence. This requires aggressive representation and getting a judge to order the railroad to turn over damaging evidence. Accordingly, the likelihood of a successful injury compensation claim depends a lot on having an experienced lawyer that is prepared to fight to prove that an on-duty injury was caused by railroad negligence.

[1] A railroad employee can also demonstrate that the railroad was negligent under the FELA if the railroad violated a specific state or federal rail safety statute. If the violation of that statute is shown to have caused or contributed to cause the employee's injury, then the railroad is not permitted to argue that the employee's negligence contributed in any way to the injury incident.

What is a Statute of Limitations?

If you are injured while working for the railroad, you have a limited amount of time to resolve your injury claim. This time limit is known as a "statute of limitations." If you do not file a lawsuit or settle your claim before the statute of limitations expires, your claim will be forever barred and you will be unable to recover any compensation. Accordingly, it is extremely important that you know what statute of limitations applies so that you can make sure any claim is filed before the deadline runs.

If you are injured while working for a railroad, your personal injury claim against your employer will be governed by the Federal Employers' Liability Act ("FELA") and you will have three years from the date of your injury to file a lawsuit. In many instances, it is easy to determine when an injury occurred. If you trip and fall at work and break your ankle, you will have three years from the date of that incident to file a lawsuit against your employer unless it is fully settled before that date. In other situations, it is less clear. For example, if you develop carpal tunnel syndrome as a result of doing repetitive, forceful, heaving, and/or awkward work over time, determining when that injury occurred is more complicated. Is it when you first noticed symptoms? Is it when you first associated those symptoms with your job duties? Is it when a doctor first diagnoses you with carpal tunnel? Or is it another date entirely? There is no single answer to the question because it depends on the unique facts of every individual case. Courts generally find that the statute of limitations begins to run when you know that you have an injury and that the injury may have been caused by work activities. You may have a duty to ask your doctor if work caused or contributed to your condition. Even if it is partly related to work and non-work activities, you may still have a claim worth pursuing. Accordingly, if you believe you have sustained an on-duty injury at work, it is important to contact an attorney as soon as possible to evaluate your claim and help you understand when a lawsuit will need to be on file.

You should also be aware that claims against persons or entities other than your railroad employer may have different statutes of limitations. For example, if you are injured in a crossing collision, you may also have a claim against the company employing the driver of the truck that caused the collision. That claim is not governed by the FELA and may have a shorter or longer statute of limitations, depending on where the incident occurred. Some states have a limitations period of only 1-year! Similarly, if you are injured while working for the railroad on property owned by another industry, you may have a claim to file against the owner of the property where you were injured, in addition to the railroad. The claim against the industry is not covered by the FELA and may have a shorter or longer statute of limitations.

Accordingly, if you believe someone other than the railroad is partly responsible for an injury you sustain, it is very important to contact an attorney as soon as possible to evaluate your claim and help you understand when a lawsuit will need to be on file.

Questions?

As always, our team of nationally recognized Railroad Injury attorneys are available to answer any questions you have. Contact our office at railroad@uselaws.com or 800-USE-LAWS.