Schlichter Bogard & Denton

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

Welcome to Volume 1, Issue III 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 hazardous safety conditions and whistleblower retaliation.

We hope you enjoy the third 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

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Our new and improved mobile application is now available on iPhone and Android mobile devices. Search 'UseLaws' in the App Store or Google Play to download the app today.

Access the latest news, sample injury report forms, and critical information about railroad workers' rights, contact our office, and more—all from the UseLaws mobile application!

Beer with Fish and Chips, and a Side of Hazardous Safety Conditions

by Nelson Wolff, Senior Partner

A. The Beer

Picture this.

You work at one of the largest railroad carriers in the country. You begin and end your workday at the same time every day. You have never been required to work overtime or after hours. Your work is exemplary. However, in recent months, you have unexpectedly had to take off several days due to an ongoing family crisis. Other than these unavoidable missed days of work, you have not allowed your private troubles to interfere with your job.

One day, after work, you decide that you have earned a night out at a bar. Before you know it, you arrive and are having a great time with your friends. Suddenly, you receive a phone call. It's your supervisor, demanding that you come back to work immediately due to an emergency. You glance at the multiple (now-empty) glasses of beer that you have already consumed and find yourself in an uncomfortable position. You believe that if you show up to work intoxicated, you pose a danger to yourself or others at the railroad. So, you tell your supervisor the truth: You have been drinking while off duty, and you do not feel as though you can safely come back to work. You apologize. Your supervisor pushes back, and you state: "I am reporting a hazardous safety condition. I cannot come to work intoxicated. I'm sorry."

And the next day, you are fired.

The reason: Excessive absences, culminating in the absence on the night you went to the bar.
The question: Could you report this to OSHA, as a violation of the Federal Rail Safety Act ("FRSA")? Put another way: Were you discriminated/retaliated against for a "protected activity"—in this case, reporting the "hazardous safety condition" that was your intoxicated off-duty state?

The answer: Yes. You may have a claim.

If this scenario sounds vaguely familiar, it is because the U.S. Department of Labor's Administrative Review Board (the "ARB") tackled a strikingly similar question on June 4th, 2020, in a case called *Cieslicki v. Soo Line Railroad Co.* After Mr. Cieslicki was terminated "in retaliation for telling his employer that he could not report to work because he drank two glasses of wine with dinner," he reported the termination to OSHA, which dismissed his claim. He next requested a hearing with the Office of Administrative Law Judges (OALJ) who also tossed aside his claim. Undeterred, he brought the matter before the ARB, who ruled in his favor, and essentially expanded the meaning of a "hazardous safety condition." The ARB stated that the FRSA's key language ("hazardous safety or security condition") is "broad and general" and is not "limited to work-related conditions." Indeed, the ARB held that the language "is broad enough to include impaired railroad workers who present a danger of death or serious injury if they were to work without reporting those hazardous conditions, or refusing to work because of their impaired condition."

At the end of the day, the ARB stated that "the Department of Labor's primary purpose, as regards the whistleblower protection provisions of FRSA, is safety," and that this goal applies equally regardless of whether the "hazardous condition" relates to faulty equipment or the diminished capacity of a worker who runs perfectly-functioning equipment. The ARB recognized the dangerous power of "human error," and wanted to avoid an "absurd" scenario in which a railroader has to suddenly choose between pretending to be sober while showing up for work to avoid punishment, and being honest with their employer resulting in getting themselves fired.

That said, the ARB provided one important caveat: "If an employer decides to discipline an employee because the employee voluntarily chose to become impaired at a time when the employee knew that he should not be impaired (because he was on call, or because it is illegal), then the employer is not prohibited by the FRSA from taking disciplinary action."

In other words, if you were still "on the clock" or "on-call" when you went to the bar and became intoxicated, then your FRSA claim could be in jeopardy.

B. Fish and Chips

Alright, let's change the facts, slightly.

The basics are still the same, including the fact that you work the exact same hours every day, and you've missed some work because of a family crisis. You still perform exemplary work and decide to go to a bar after work to celebrate your efforts. Before you know it, you're having a great time with friends again. This time, instead of drinking, you decide to order fish and chips for dinner. Unfortunately, something is wrong with the way that the fish was prepared, and you wind up getting sick to your stomach. Later, when your supervisor calls you and demands that you come into work immediately for an emergency shift, you are still in the bathroom, feeling terrible.

You believe that if you show up to work in this state, you pose a danger to yourself or others at the railroad. So, you tell your supervisor the truth: You have food poisoning, and you do not feel as though you can safely come to work. You apologize. Your supervisor pushes back, and you state: "I am reporting a hazardous safety condition. I cannot come to work ill. I'm sorry."

And the next day, you are fired.

Same reason: Excessive absences, culminating in the absence on the night you went to the bar.

Could you report this incident to OSHA, as a violation of the FRSA? Were you discriminated/retaliated against for a "protected activity"—in this case, reporting the "hazardous safety condition" that was your illness?

The answer to both questions: Again, yes. You may have a claim.

As it turns out, the ARB also tackled a strikingly similar question on March 31st, 2021, in a case called *Nicholas Ingrodi v. CSX Transportation Inc.* In that instance, Mr. Ingrodi was fired after a series of absences, culminating in his calling out of work due to food poisoning. During his hearing, his girlfriend testified that Mr. Ingrodi was incapable of driving himself to the hospital, "so I don't think [he could] come in and operate a train or have anybody else's, you know, life in his hands."

The ARB took the opportunity to extend their decision from Mr. Cieslicki's intoxication scenario. It held that "an employee impaired by an illness can create a hazardous safety or security condition under FRSA. Depending on the circumstances of the particular case, a worker impaired by illness, like a worker impaired by alcohol or like a faulty or unsafe piece of equipment or line of track, could present a danger or threat of serious harm or injury to the worker, to his or her colleagues, and to the public." The ARB went on to say that "to hold otherwise could implicitly incentivize impaired employees to work despite the risk of causing great harm or injury to themselves or those around them, for fear of discipline." The ARB concluded that "reporting, or refusing to work because of, a personal, non-work related illness may constitute protected activity under Section 20109(b)(1) of the FRSA."

Another caveat: Mr. Ingrodi's food poisoning claims were suspicious, so the court sent the case back down to the OALJ to retry his claim. The important takeaway is that the railroad could still have a defense if there is reason to believe that you are faking your illness in order to avoid work.

C. The Bottom Line: "Hazardous Safety Conditions"

The ARB has effectively extended the FRSA's definition of "Hazardous Safety Conditions" beyond workplace hazards. It now can include the non-work-related condition of employees, including sickness, legal intoxication, and other such personal impairment. And the boundaries appear to only be stretching further.

In short: Reporting any of these personal impairment conditions likely cannot be used to discipline a railroad worker under the FRSA.

However, in order to preserve a claim under the FRSA, we want to call your attention to a few important tips.

Tips

1. If you are calling out of work due to an illness or impairment, it is generally a good idea to remember to tell your employer that your present state renders you unable to safely perform the duties of your job. Remember that you must still "report a hazardous safety condition," even if that "hazardous safety condition" is you. If you merely call out sick, you might not have sufficiently "reported a hazardous safety condition."
2. It is generally a good idea to record, gather, present, and/or keep all evidence of your illness or impairment that will support your claim (e.g. doctor's notes, medical bills, etc).
3. Any discipline that you receive is likely only contestable if your impairment was not illegal, "on-the-clock" or "on-call" (related to drinking alcohol), fake, or in violation of any other Federal Railroad Administration regulations.

As always, if you believe you may have a claim, we urge you to contact our experienced, dedicated Railroad Injury attorneys as soon as possible to help you analyze your claim and potentially file a complaint.

Has Your Employer Impermissibly Punished or Retaliated Against You? | What To Do If You Think You May Be a Whistleblower

by Jerry Schlichter, Managing Partner

In the first issue of our Railroad Injury Newsletter, we introduced you to the Federal Rail Safety Act ("FRSA"), which works to protect railroad workers from retaliatory or discriminatory action in response to performing various "protected activities," including but not limited to: reporting a hazardous safety condition, reporting work-related injuries, refusing to perform dangerous work, following a treating doctor's order to remain off of work following an injury, or even speaking with attorneys and/or filing an on-duty injury claim. We also provided information regarding how to enforce your rights under the FSRA. In this article, we will respond to frequently asked questions related to this topic.

I believe that I have been retaliated against by my employer for engaging in a protected activity. In other words, I believe I may be a whistleblower. What should I do?

Act immediately. Time is of the essence at this juncture, so we encourage you not to wait. A railroad worker who believes that he/she/they have been retaliated against for engaging in a protected activity should file a complaint with the Occupational Safety & Health Administration ("OSHA") no later than 180 days after the railroad worker knew or should have known about the adverse action taken by the railroad. Further, such adverse action must have been taken based in whole or in part on the protected activity. We urge you to find an experienced railroad injury attorney as soon as possible to help you analyze your claim and potentially file a complaint. Our nationally recognized Railroad Injury lawyers are, as always, ready to assist you. The location of your local OSHA office can be found at **www.osha.gov**.

I thought that the situation might get better on its own, but it has only become worse. Now, it has been 181 days. What can I do?

Unfortunately, if you did not file a complaint within 180 days after you knew or should have known about the adverse action taken by the railroad, your claim will be barred. That is why it is so important that you act as quickly as possible.

Even though I have missed the 180-day window to file a complaint after my disciplinary trial/hearing, my formal discipline was only just imposed last week. Does that change anything?

Yes! If there are multiple adverse actions involved, the 180-day window restarts after each individual adverse action. OSHA considers the first notice of a disciplinary charge to be an adverse action initiating the window. A disciplinary trial and the imposition of formal discipline will open their own 180-day windows. That said, we encourage you to file a complaint as early as possible, to capture all subsequent disciplinary actions.

I filed my complaint with OSHA. What happens now?

OSHA will appoint an investigator who will look into your claim. They may seek a formal written response from the railroad, interview you or your coworkers, and request documents from you and/or the railroad to support your claim. This is all part of a normal investigation, so do not feel intimidated. Eventually, OSHA will issue a Finding, either against you (dismissing your claim) or the railroad.

How long will that take? It's been a year and half since I filed my complaint with OSHA, and I have heard nothing.

We recommend you contact an experienced railroad injury attorney immediately. If OSHA does not issue a final decision within 210 days of you filing your complaint, you now have the option to file a lawsuit in federal district court for a jury trial on all the issues, including the amount of punitive damages.

OSHA issued a Finding, and it's against the railroad! What happens now?

The railroad has 30 days to either comply with the finding or file an Objection.

OSHA issued a finding against me! I want to file an Objection. Can I do that? If so, what happens next?

Yes! Once you file an Objection, the case will proceed to a hearing before a federal administrative law judge ("ALJ").

What if the ALJ also rules against me?

It's not over yet! You can appeal from an ALJ decision directly to the federal Administrative Rule Board (ARB) in Washington DC. After that, you can continue the appeals process to the United States Circuit Court of Appeals and then to the US Supreme Court (if a petition for a writ of certiorari is granted). We note that the railroad can also follow the same appeal path if they object to any ruling against them along the way.

Conclusion

In conclusion, if you believe that you may have been retaliated against for engaging in activities protected by the FRSA Whistleblower law, we strongly encourage you to contact our nationally-recognized Railroad Injury lawyers as soon as possible. Our team can help you analyze the unique facts of your case and provide specific legal advice. *

** The information contained in this newsletter is provided for informational purposes only and does not constitute legal advice. Reading this newsletter and information contained herein does not constitute formation of an attorney-client relationship. Every potential case must be assessed in accordance with its unique facts and circumstances. If you believe you may have a legal claim, please request a free, confidential case evaluation with our team today.*

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.