# Schlichter Bogard & Denton

IN THIS ISSUE



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

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

This quarter, our nationally-recognized attorneys address important questions related to why it matters whether your locomotive is "in use" when you suffer an on-duty injury, what laws protect railroad workers, and the pros and cons of jury trials.

We hope you enjoy this 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


# Why It Matters to You Whether Your Locomotive is "In Use" When You Suffer an On-Duty Injury

## *The Supreme Court Will Decide the Issue Later This Year

Imagine that a freight train travels on the mainline from Point A to Point B and stops in a rail yard for a crew change and to switch a few railcars before transport continues. The railroad procedures require that you power off two of the three locomotives at the head end of the train to save fuel. While on a sidetrack in the yard, you walk through the cabs of the first two locomotives and attempt to cross over to the third before placing a tag and turning it off. But, before you get there, you slip and fall, at nighttime, on what you discover was an oil slick. It is later determined that this locomotive had not been inspected during the three days leading up to this incident. You require multiple surgeries and cannot return to work. You think it is a slam dunk of a case only to have a judge dismiss it because he determines that the locomotive was not "in use" at the time of the incident and that the oil may have accumulated while the train was in transit.

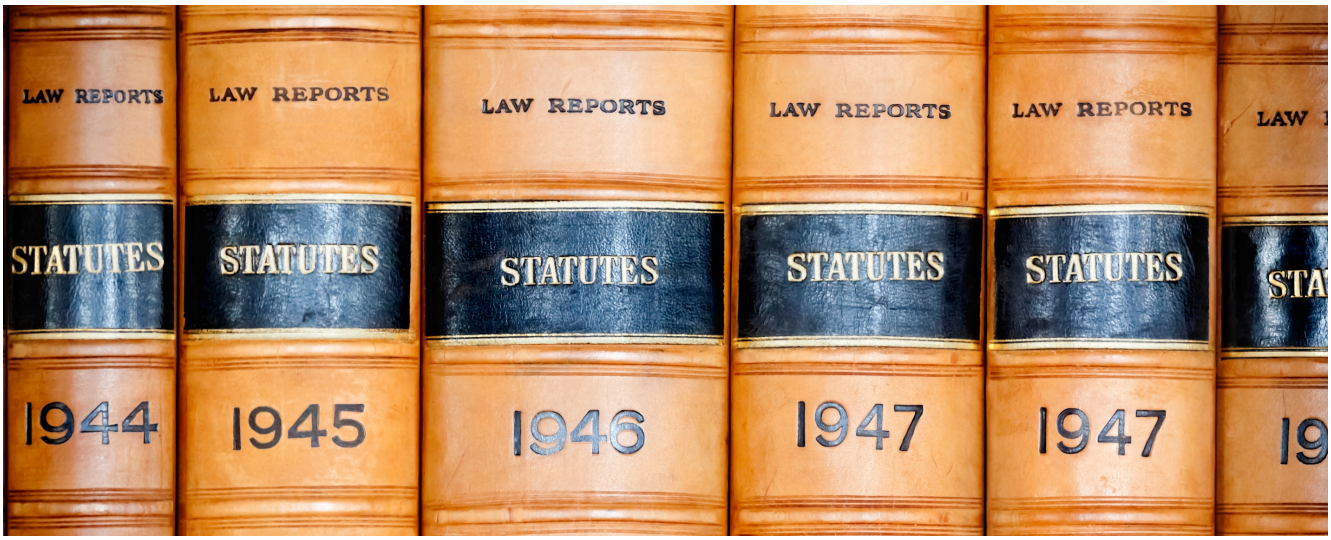
This is exactly the situation in which Bradley LeDure found himself when he made a claim against Union Pacific for on-duty injuries he suffered in 2016. We filed a lawsuit, claiming that Union Pacific violated federal law when it failed both to keep its locomotive free of slipping hazards and to properly inspect the locomotive. The railroad argued a technicality: because the locomotive was not "in use" at that time, the safety regulation did not apply. Surprisingly, the court accepted this argument and dismissed the case. We have been fighting ever since to correct this wrong decision.

Indeed, most courts addressing the question have adopted the expansive view that a locomotive is "in use" as long as it is not located in a place of maintenance or repair, such as a roundhouse. For example, one court found that a railcar was "in use" when it was idling in a railyard, even if the train was not fully assembled.

Another found that that a locomotive was “in use” even though it had been uncoupled from railcars and sat motionless in the switching yard, since it was scheduled to be used when additional railcars arrived. Yet another court found that a locomotive or railcar is ”in use” almost any time it is not stopped for repair.

However, a few other courts have taken a restrictive view of when a locomotive is “in use.” One court determined that a locomotive was not “in use” until the train’s inspection had been completed. Another found that a locomotive was not “in use” unless it was actually moving. We argued that these decisions were inapplicable because the facts were different in important ways from the facts of LeDure’s case, but the court disregarded those objections and dismissed the case nonetheless.

In situations like these, where we believe a court has wrongly decided an issue of law, we have the right to appeal the decision to a higher court and to correct the lower court’s error. After this court refused to reverse the decision, we faced extremely poor odds in getting the highest court—the United States Supreme Court—to accept the case for review. That court only accepts about 1% of all cases presented to it. But, we thought it was worth the fight, not just for Brad LeDure, but for thousands of other train workers throughout the country on Class I and shortline railroads whose rights will be affected by this case. So, we filed a petition for the Supreme Court to accept the case. In response, the Court asked the U.S. government to weigh in with the views of the FRA and the Department of Labor. This is also uncommon. Fortunately, the U.S. government filed a brief supporting our position and the Court decided to accept the case—a remarkable achievement alone, given the long odds. The BLET and SMART-UTU also filed briefs in support of LeDure. It is expected that the railroads will join together in opposition. The case is now scheduled for oral argument on March 28, 2022. Fortunately, Schlichter Bogard & Denton have a track record of success in the Supreme Court, having won their last two cases there, including this past January, in another case on behalf of workers. This unique fight in the highest court is another example of how we fight hard to represent working Americans against big businesses. Stay tuned for more news in the near future.




# "What Laws Protect Railroad Workers?"

Many railroaders who suffer on-duty injuries or are the subject of unfair retaliation may be unsure of their legal rights. Fortunately, railroad employees are afforded significant rights under both federal and state law.

A. FELA

The Federal Employers' Liability Act (FELA) protects railroad workers by holding employers accountable for injuries caused by an unsafe workplace or equipment. If that is proven, then the injured worker can recover money damages for lost wages, pain and suffering, disability, and disfigurement, if applicable. A FELA case can be filed in state or federal court. These lawsuits must typically be filed within three years of a traumatic injury incident. If the injury is from cumulative trauma, it can be more complicated to identify when the injury first occurred and must be filed.

To prove a working condition was unsafe or defective, evidence can show what a reasonable railroad would have provided under the circumstances. For example, if a worker trips over debris on the walkways next to the railroad tracks, evidence can show that a safe railroad would regularly inspect the track and remove debris. Testimony from coworkers about similar problems in the past or safety meeting records that document prior complaints can prove the railroad had notice of problems but ignored them. On the other hand, a railroad can try to prove the worker was also at fault or contributorily negligent by saying that a careful lookout was not made. These disputes are typically resolved by a jury at trial. If the jury decides that both sides are equally responsible or 50/50 at fault, then the injured worker's damages can be cut in half.

However, railroads are governed by federal and state safety regulations. The Federal Railroad Administration (FRA) has enacted many regulations that require safe components on locomotives, railcars, and tracks. For example, ladders and grab irons on equipment must be secure, hand brakes must operate efficiently, and pin-lifters must work to uncouple equipment without the need for going between them. If the railroad violates any of those regulations, then contributory negligence by the injured worker cannot be used to reduce the railroad's liability for all damages.

Regardless, an injured railroad worker must show that the unsafe workplace or equipment caused or contributed to cause his or her injuries. However, the standard under the FELA is relaxed compared to ordinary personal injury cases. A railroader must only prove that the employer's negligence played any part, even the slightest, in creating the railroad employee's injuries.

Even if the worker suffered pre-existing injuries or medical conditions to the same body part injured on-duty, the employee must only show that the on-duty incident played any part in aggravating the prior problem and required additional medical treatment and time off work.

Even if a worker is unable to return to his or her job on the railroad as a result of the injury incident, the worker has a duty to "mitigate" damages. Railroad workers have a responsibility to look for work within their physical limitations in order to be productive members of society, even if it means that they cannot return to their normal railroad job on a temporary or permanent basis. For example, if a conductor is injured on duty and is unable to lift or carry more than 50 pounds permanently, he or she must attempt to find work that falls within those restrictions. Otherwise, a jury will learn that the worker was able to perform some level of work, but chose not to do so, which could hurt the case. There are exceptions however, such as significant disabilities, that may make returning to work in some capacity impractical.

### B. Whistleblower and Anti-Discrimination Laws

The Federal Rail Safety Act (FRSA) protects workers from "adverse actions" such as termination in response to engaging in protected activity, such as reporting a safety hazard or on-duty injury. But, such a claim must be filed with the Occupational Safety and Health Administration (OSHA) within 180 days of the incident; otherwise, it will be barred.

Employees are protected from discrimination taken by an employer on account of the workers' race, gender, age, religion, or disability. If any of those factors can be shown to result in different treatment between workers and damage results, then a legal claim can be filed with the Equal Employment Opportunity Commission (EEOC) and/or corresponding state human rights agency. Much like the OSHA claims, these claims are also time-sensitive, so it is critical to make sure that claims are filed punctually.

Damages for whistleblower and discrimination claims can include wage loss, emotional distress, and attorney fees and litigation costs. That means, if you win, then the railroad may also have to pay your lawyer! In some cases, punitive damages can also be obtained.

The railroad can raise defenses to these claims, such as asserting that there were legitimate reasons for taking adverse employment actions which were not related to protected activity or status. Employees have a duty to mitigate or minimize their damages by finding alternative work, even if the railroad terminated them. In that case, the measure of wage loss is the difference between what could have been earned on the railroad and at the new job.

If you have any questions about railroad employee protections and how they may affect you, please contact our team to discuss further.

# "A Jury of Your Peers?" – The Pros and Cons of Jury Trials

So far in this edition of the Railroad Injury Newsletter, we have discussed the various laws that have been designed to protect your rights as a Railroad employee. In our previous newsletter (Volume I, Issue IV) we provided you with a quick and easy roadmap through the litigation process. The final stage of that litigation process deserves a closer look.

The jury trial lies at the heart of the American legal system. It is a right provided by the U.S. Constitution. It utilizes members of the community where each case is filed to serve as judges of the facts during a trial. So, what are the benefits and challenges of a jury trial? As discussed below, you will see that many of the benefits of a jury trial also present potential challenges—a true double-edged sword. However, careful planning, thorough preparation, and a polished trial strategy and presentation can help minimize the potential downside while maximizing the potential benefits. This is where your choice of attorney comes into play, which is perhaps the most important decision in getting the best outcome at trial. The alternative to a jury trial is a "bench" trial, which is a trial before a single judge.

Benefits of a Jury Trial:

*Jurors are your peers.* A jury is meant to consist of your "peers," or a cross-section of individuals from the community. This means that corporations cannot be on a jury. Instead, a jury is selected randomly from people in your community. Some will be blue-collar workers, others white-collar executives, unemployed people, stay-at-home spouses, and students. In fact, almost any adult can be required to report for jury service, including individuals with disabilities that can be accommodated, such as with amplifying headphones for those hard of hearing. Although there is no guarantee that a jury will side with a person over a railroad corporation, the shared human element between an injured worker and a jury is often compelling.

*Jurors tend to have more empathy.* Juries tend to be more compassionate and empathetic than, for example, a judge who has been trained to follow the law over his/her emotions. When presenting a case before a jury, an effective trial presentation will help jurors understand the full extent of what an injured worker and their family have gone through. An emotionally-driven presentation can help juries relate to the injured worker and tilt the scales in weighing the facts of the case. Even so, juries are instructed that they cannot make decisions based on sympathy alone. An effective presentation at trial can remind the jury that their decisions will have an important impact on human lives. It is natural for a jury to put themselves in the shoes of the injured worker, which can lead to more generous judgments against railroads.

*Jury trials are moderated by a judge but decided by the jury.* Judges determine what law applies in a case, but juries decide the facts which are in dispute. For example, before a jury trial begins, judges often examine evidence and decide whether it should be kept from the jury based on a legal standard of relevance. By contrast, in a bench trial, the judge decides the law and the facts—which is a lot of power for one person! Additionally, a jury only has one case to decide, whereas judges are responsible for a large docket of other cases which demand their attention. With a jury, there can be a lot of discussion and compromise when making decisions. In some states, like Missouri, you only need 9 out of 12 jurors to reach a decision. It is the job of the judge to help ensure that the jury follows the law. During a trial and at the end, the judge will "instruct" or tell the jury what the law is. For example, the judge will tell the jury that the injured worker has the burden to prove his or her case, and that means determining "which side is more probably correct" on certain issues. During a trial, the lawyer will need to speak to both the judge and the jury at various times and have sufficient skill to be persuasive in making the case.

Challenges of a Trial by Jury:

*Juries can be unpredictable.* Unlike judges, juries can be more confused by the law and evidence and may make mistakes despite doing their best. This can lead to unpredictable results for both sides. Although this risk is always present, effective trial lawyers can reduce the risk by making their points directly, clearly, and with strong evidence. Lawyers are trained to "KISS" their cases, which means "Keep It Simple Stupid!" Thus, the smart lawyer avoids making a simple issue more complicated than it needs to be.

*Juries can be biased.* Although jurors usually try to do the right thing, sometimes bias can seep into their decision-making process. A juror's feelings, past experiences, personal values, and other factors can affect how they view the evidence. This can have damaging effects for both parties in a trial. This is one reason it is critical to hire an attorney with lots of jury trial experience, who has a good personality and communicates well. And the courts have a process for attorneys to identify potential bias before the trial begins. During the jury selection process, potential jurors can be questioned by both sides' lawyers and the judge.

If it becomes clear that a person cannot be fair for any reason, that person can be stricken. Thus, while we try to strike anyone who is pro-railroad, it is also true that the railroad lawyers will try to strike anyone who is obviously against the railroad. This is intended to ensure a fair trial for both sides by individuals who have agreed to keep an open mind.

J*ury trials can take longer than a trial by judge.* It can take a year or more to finally have your day in front of a jury. And a jury trial can last longer than a bench trial once it gets started. Jury trials are also difficult to coordinate, in that they involve many witnesses, boxes of evidence, and travel arrangements. On the other hand, a trial judge is responsible for dozens of cases at a time and may not have the time to make decisions any quicker than a jury. Typically, a capable lawyer can push a case to trial even when the defendant tries to stall and, at trial, can streamline the evidence. Moreover, a good lawyer will spend many months preparing for trial to help get the best result.

In short, jury trials are an excellent way to tell your story and have regular people—a jury of your peers—decide the outcome. This is a great opportunity, but not without risk. An experienced trial attorney is going to help you navigate the litigation process, up to and including putting on the most compelling case at a jury trial. It is important that you employ an attorney with whom you not only feel confident and comfortable, but also one who is experienced and will zealously fight on your behalf. To that end, we strongly encourage you to contact our nationally-recognized Railroad Injury lawyers who will tirelessly advocate for you. *



# Questions?

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