Schlichter Bogard & Denton

IN THIS ISSUE

Volume 2, Issue II of SB&D's Railroad Injury Newsletter

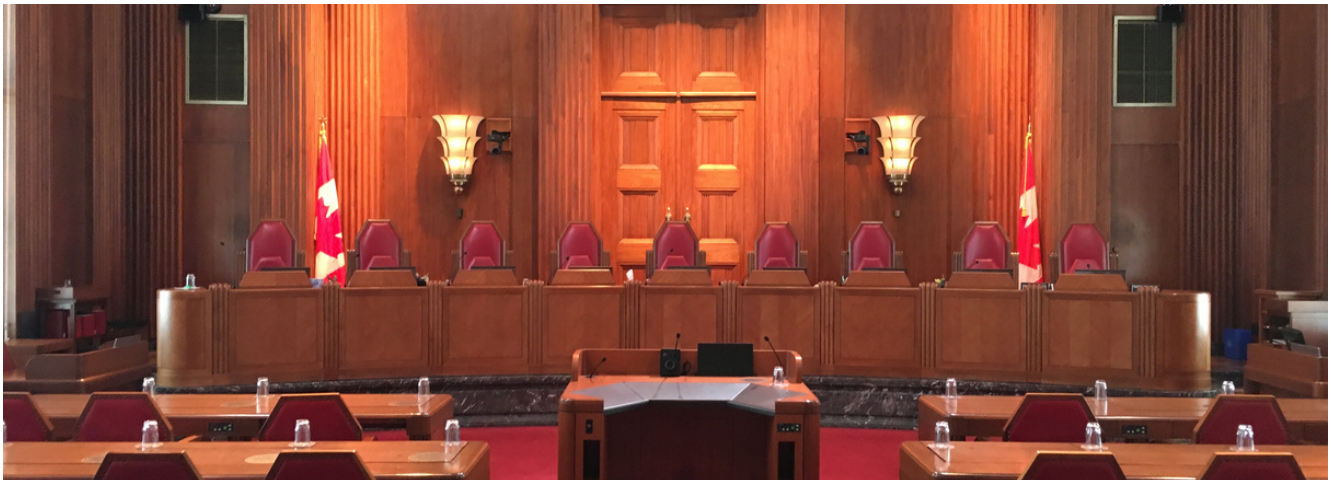
Welcome to Volume II, Issue II of Schlichter Bogard & Denton's Railroad Injury newsletter exclusively covering railroad-related topics.

This quarter, our nationally-recognized attorneys provide an update on the Ledure Supreme Court Case (see Volume II Issue I for more details), and address important questions surrounding railroad workers' rights pertaining to attendance policies and strikes.

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



U.S. SUPREME COURT UPDATE: FELA CASE INVOLVING LOCOMOTIVE SAFETY IS DECIDED (SORT OF)

by Nelson Wolff, Senior Partner

On April 28, 2022, the Supreme Court issued its decision in the case of LeDure vs. Union Pacific Railroad Co. where Schlichter Bogard & Denton represented a locomotive engineer who sustained career-ending injuries when he slipped on an engine's oily passageway. The decision was a 4-4 tie vote that effectively fails to establish guidance in other cases.

The incident occurred in Salem, Illinois, during a nighttime crew change on a train that was temporarily stopped during its journey from Chicago to Dexter, Missouri. LeDure, a veteran train service employee, was walking from the head end of the train to power off the second and third locomotives, pursuant to UP's fuel conservation policy. After crossing over to the third unit, he slipped and fell, striking his head, shoulders, and lower back on the steel walkway. Following a post-injury inspection, a UP mechanical crew identified oil on the locomotive passageways as the cause of the slip.

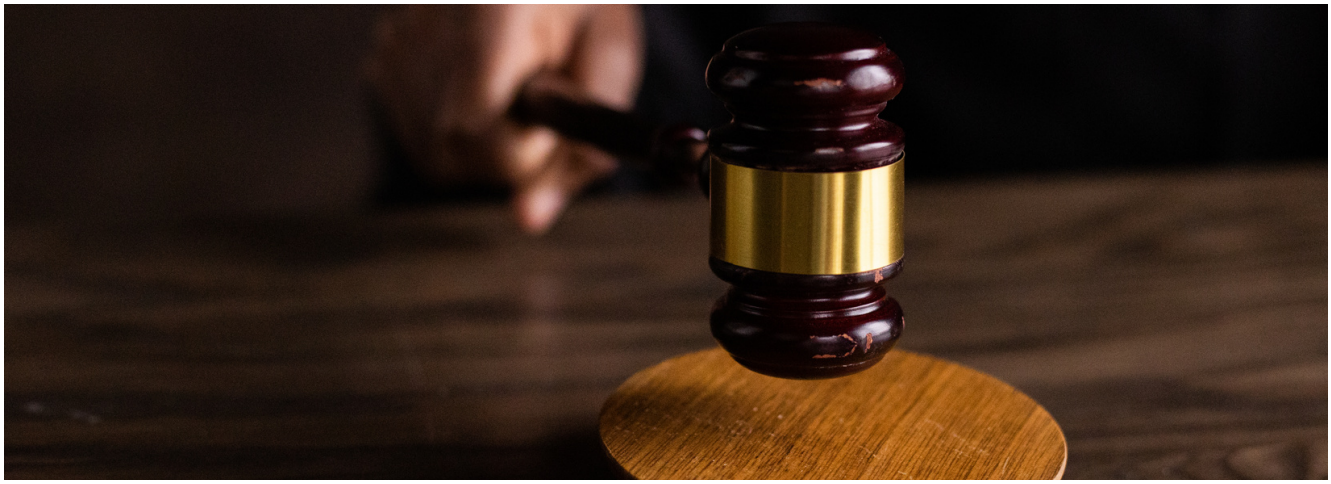
Ledure filed a lawsuit in the United States District Court for the Southern District of Illinois, asserting negligence and the violation of an FRA regulation requiring locomotive passageways to be free of oil and other slipping hazards. The court refused to allow a jury trial. Instead, it granted summary judgment to UP, finding that it could not have known that oil was on the walkway or when/how it got there. The court also held that the safety regulation did not apply because the locomotive was not "in use" at the time of the incident—a requirement for the regulation to apply. It reasoned that preparing a locomotive for operation, to be hauled "dead," was not "in use" because it was not imminently ready for departure since a few cars needed to be switched out of the train. The court of appeals in Chicago affirmed that decision. Schlichter Bogard & Denton sought discretionary review in the Supreme Court, which only accepts 1% of all requests for review. After receiving support from the FRA arguing that the locomotive was in use, the Supreme Court accepted review—a major victory itself! Written arguments were submitted on behalf of LeDure by Schlichter Bogard & Denton, the FRA, and a group of unions (BLET and SMART-UTU) as well as the Academy of Rail Labor Attorneys (ARLA). The case was opposed by UP, the U.S. Chamber of Commerce, and the Association of American Railroads (AAR).

During the March 28 oral argument in Washington, D.C., justices questioned the limits of the Locomotive Inspection Act (LIA). This law was modeled after the Safety Appliance Act and was previously known as the Boiler Inspection Act. FRA's regulations were enacted pursuant to LIA. Previous court decisions interpreting the phrase "in use" characterized it broadly to mean any use of on rail equipment until it reaches a place of repair. Yet, the Court questioned the outer limits of "use" to determine whether a locomotive in storage in a railyard or on a sidetrack would be "in use," or whether the locomotive had to be running (as opposed to powered off), and whether it must be part of a fully assembled train ready for imminent departure. Several justices seemed inclined to narrowly interpret the law, despite prior decisions requiring a broad reading to promote safety and provide a compensation remedy for injured rail workers. Many conservative justices, appointed by Republican presidents, appeared more sympathetic to railroad interests and inclined to limit worker protections.

On April 28, the Court issued a decision announcing a 4-4 tie vote. What that means is that the decision of the 7th Circuit Court of Appeals stands, but the case does not bind other courts. In essence, the Supreme Court was evenly divided on how to decide the issue. Usually, there are nine justices which decide cases so that tie votes cannot happen. However, here, one of the justices did not take part in the decision because she (Amy Coney Barret) was part of the panel that issued the ruling in the 7th Circuit.

In accepting this case, the Supreme Court acknowledged that it presented an important issue on which the lower courts were divided. Given the lack of binding value from today's decision, confusion and uncertainty remain on track. The decision also derails an opportunity to improve safety for thousands of concerned railroad workers throughout North America. In this case, a long-time employee suffered career ending injuries due to equipment Union Pacific acknowledged was unsafe, yet he was deprived of his right to a jury trial to assess fair compensation. His case highlights the perverse incentives for railroads to sacrifice safety via cost cutting moves intended to boost profits, such as reducing mechanical support personnel.

This case also serves as a reminder that who we elect as President and to Congress directly affects who is appointed to the Supreme Court and ultimately decides issues that can have a profound effect on railroad worker's legal rights. Regardless, now more than ever, it is important to seek prompt legal advice from Schlichter Bogard & Denton. This is the fifth time in recent years that Schlichter Bogard & Denton has presented a case to the Supreme Court as we continue our fight on behalf of workers.



Railroad Attendance Policies – What Are Your Rights?

by Scott Gershenson, Counsel

It is hard to imagine a more significant development in day-to-day operations for railroad workers than the enactment of new attendance policies among Class I railroads. These policies appear to increase the working demands of railroaders while also restricting their ability to engage in a normal family life outside of work. Depending on the circumstances, you may have legal rights that could protect you if the railroad attempts to improperly enforce their attendance policies.

One of the recent attendance policy changes came at BNSF through its new "Hi-Viz" program. Although BNSF has stated publicly that this new Hi-Viz policy would "provide more predictability for [its] train crews while also providing more reliable crew availability," the policy has created a more demanding and, in many circumstances, less safe working environment for railroad workers. Hi-Viz operates through a points system whereby employees are required to be on call on a near-constant basis. Employees are allotted a certain number of attendance "points," and taking off work typically costs them many of these allotted points. Employees can only earn points back by being available for work within a short period of time for 14 straight days. This means that, at least under the terms in the attendance policy, employees are not permitted to take a family trip, enjoy a night out with their spouse, or visit the doctor – without violating the attendance policy. If an employee burns through his or her attendance points, he or she is provided smaller, additional allotments. Once those additional allotments are exhausted, the policy calls for the employee to be terminated.

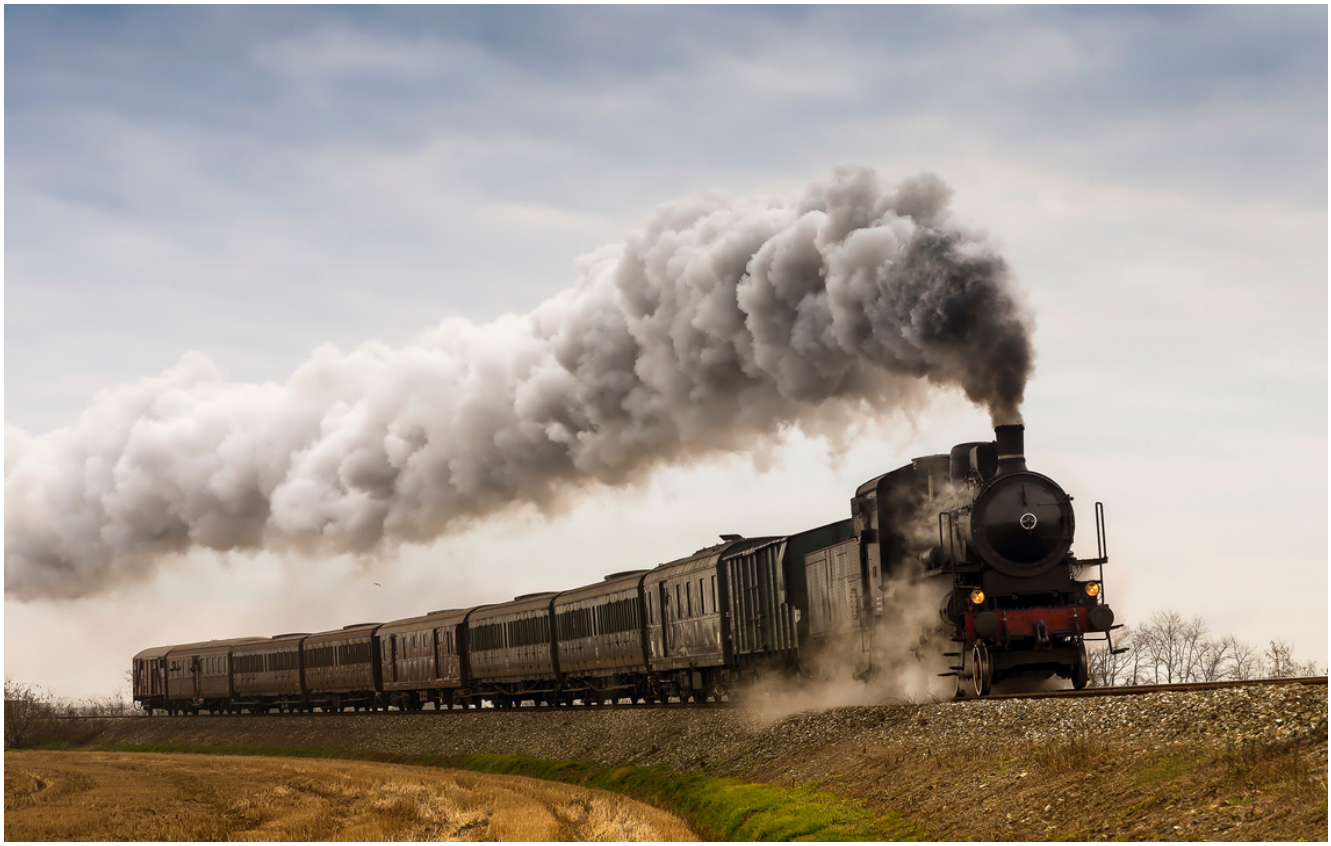
As one might expect, this policy has only added stress to the lives of railroad workers, who already operate in demanding and safety-sensitive environments. As a result, railroaders should be aware of their legal rights and how those rights might offer them protection. Unfortunately, there have already been circumstances where employees show up to work exhausted due to constantly being on-call and have fallen asleep while operating heavy trains. This scheduling practice by railroads has led to derailments and severe injuries to employees, exposing railroad workers and the public to danger. The Federal Rail Safety Act (FRSA) protects railroaders from retaliation when they refuse to work in an imminently hazardous safety environment. An employee refusing to work because he or she is ill or too fatigued to work could, depending on the circumstances, qualify as a legitimate refusal to work in a hazardous environment and therefore, could be considered a protected activity under the FRSA. Of course, illness and fatigue must be supported by a qualified physician.

Separately, the FRSA also prohibits the railroad from denying or interfering with the medical treatment of an employee who was injured on-duty, and also prohibits the railroad from disciplining an employee for requesting medical treatment or following his or her doctor's treatment plan. An employee who was injured at work could therefore be protected from attendance violations when visiting a doctor for treatment of an on-duty injury, but supporting documentation should be supplied to the railroad.

The Family Medical Leave Act (FMLA) may also offer protection to employees seeking intermittent or long-term leave due to a medical condition or family illness. Again, an employee interested in pursuing FMLA leave must satisfy the requirements under that law to qualify for that protection. More information about qualifying for FMLA can be found by visiting the U.S. Department of Labor website (**https://www.dol.gov/agencies/whd/fmla**) or by contacting your human resources department.

Finally, the Federal Employers' Liability Act (FELA) could offer protection to employees injured due to the acts of a fatigued worker, who suffered from said fatigue by relying on the railroad's on-call scheduling system. After all, FELA requires that railroads provide its employees with reasonably safe equipment, safe working conditions, and safe methods for work. An attendance policy that causes an employee to be too tired to work resulting in an injury, could amount to a failure by the railroad to provide a safe working environment for its injured employees.

The protection offered by these laws depends on the unique facts of every case. If you have any questions about railroad employee protections and how they may affect you, please contact our team to discuss further.



The Railway Labor Act and Railroad Workers' Right to Strike

by Jon Jones, Associate

In January 2022, the BLET and SMART-TD, which represent nearly 17,000 railroad workers, began organizing a massive railway strike in response to the new and egregious BNSF attendance policy described in our previous article. Workers overwhelmingly voted to initiate the strike, which was set to begin on February 1.

But the strike never happened. This was not because BNSF agreed to change its policy, or because workers backed away from the fight. Rather, on January 25, U.S. District Judge, Mark Pittman, granted BNSF's request for a temporary restraining order, blocking the strike because it would cause "substantial, immediate and irreparable harm" to the company and "exacerbate our current supply-chain crisis—harming the public at large[...]." On February 22, Judge Pittman granted BNSF's further request for an injunction. The Feb. 22 order also banned workers from engaging in "work stoppages, picketing, slowdowns, sickouts or other self-help." In short, the strike was over before it began.

What gave the federal court authority to stop railroad workers from striking? The answer is the Railway Labor Act (RLA) of 1926, 45 U.S.C. §§ 151-188.

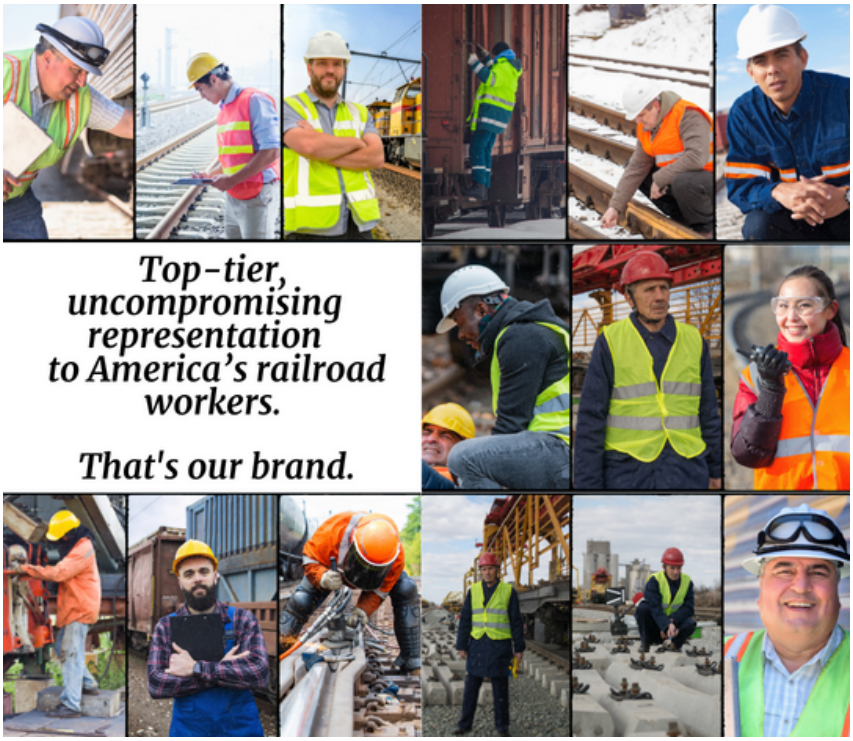
The stated purposes of the RLA are to avoid interruption of interstate commerce, protect employees' right to join labor organizations and bargain collectively, and provide "prompt" settlement of disputes that arise between railroads and their employees. While the RLA offers several benefits, it also restrains workers' right to engage in self-help activities, like striking, to address labor disputes.

Under the RLA, labor disputes are classified as either "major" or "minor" disputes. "Major" disputes are those where the parties wish to add a new term or change the existing terms of a collective bargaining agreement. "Minor" disputes are those concerning the meaning or proper application of terms to which the parties have already agreed. If a railroad's action is "arguably justified" under the existing terms of an agreement, then any dispute over that action is deemed "minor." There is often disagreement over whether a labor dispute is "major" or "minor."

This distinction is important, because striking over a minor dispute is strictly prohibited and can be stopped by the courts. Even for major disputes, striking is prohibited unless the parties first exhaust the RLA's negotiation and mediation procedure. Courts have described this procedure as "a mandatory and virtually endless process of negotiation, mediation, voluntary arbitration, and conciliation." In other words, even though the RLA ensures the parties negotiate over major disputes, the process can drag on for a long time. While that process drags on, workers cannot strike.

In the case of BNSF's new attendance policy, Judge Pittman found that changing the policy without the unions' consent was a "minor" dispute. The proposed strike, he decided, would therefore violate the RLA. He found that BNSF's unilateral policy change was "arguably justified" under the terms of the existing agreement, because the new policy "arguably" did not violate any terms of the existing agreement and because BNSF had historically changed the attendance policy on its own, without negotiating. Even if the dispute had been a "major" one, however, the RLA would prohibit striking until the parties had exhausted the mandatory and lengthy negotiation process. If you are interested in learning more, you can read Judge Pittman's entire opinion and order at:
https://ble-t.org/wp-content/uploads/2022/02/059_Order_Granting_BNSF_PI.pdf.

Although the RLA may restrict railroad workers' right to strike, other laws may still offer certain protections if you are forced to work through hazardous or unfair work conditions. It is important that you understand your rights. If you have any questions about railroad employee protections and how they may affect you, please contact our team. *



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.