



# Schlichter Bogard & Denton



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

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

This quarter, our nationally-recognized attorneys address important questions surrounding railroad strict liability and FRA Whistleblower protections.

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](tel:800-USE-LAWS) | [railroad@uselaws.com](mailto:railroad@uselaws.com)

Sincerely,



Jerry Schlichter & Nelson Wolff



## **Railroad Safety Regulations Protect You - When Violated, Railroads Can Be Held Strictly Liable For Harm**

*by Scott Gershenson, Counsel*

The Federal Employers' Liability Act (FELA) protects railroad workers by holding employers responsible for injuries caused by unsafe working conditions, practice, and equipment. When proven, the injured railroad worker should be compensated for lost wages, disability, disfigurement, and pain and suffering. However, the injured worker has the burden to prove that the company was negligent; that is, that the railroad failed to act as a reasonable person would. That includes proving that the railroad knew something was unsafe, and yet failed to take action to fix it. This is ultimately a fact question for the jury to decide. Just because a worker is injured on the job does not mean that the workplace was unsafe. For example, if a railroader falls while walking on ballast, then that railroader must prove that there was something unsafe that the railroad knew about but did not fix. Even then, the railroad's responsibility can be reduced if a jury finds that the worker was also negligent. So, if the jury finds that the worker was 50% at fault, his damages would be cut in half.

However, railroads are also 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, regulations require that railcar ladders be securely fastened. If the railroad violates that regulation, and an insecure ladder contributes to cause an employee's injury, then the railroad is absolutely at fault (or "strictly liable"), and fault by the worker cannot be used to reduce the railroad's liability.

State governments have also enacted some safety regulations for the benefit of railroad employees. In the case of *Christopher Cole v. The Kansas City Southern Ry. Co.*, the jury found that the railroad violated an Illinois safety regulation that required eight feet of clearance between signposts and the tracks. Chris was severely injured when he tried to get on moving equipment and was struck by a sign that the railroad allowed to be posted too close to the track. Chris was knocked off the train and his legs were run over and amputated. As a result of our investigation, we were able to prove that regulation was violated. Remarkably, even then, the railroad denied that its illegal sign caused the incident—that it was just a coincidence the sign was at the exact location where Chris was knocked off the train. So, we still had to prove that the sign caused the fall -- not just that he had slipped and fallen before he got to the sign. The jury believed our evidence and returned a verdict for Chris. Because we proved a violation of that regulation, the judge disregarded the jury's finding that Chris was 29% at fault in causing the incident and he was awarded the full \$12 million verdict.

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





## Understanding the FRA's Whistleblower Protections in Three Scenarios

*by Matt Strauser, Associate*

In prior issues of our Railroad Injury Newsletter, we discussed the Federal Railroad Safety Act (FRSA) and answered frequently asked questions about the FRSA. Its whistleblower provisions prohibit railroads from retaliating or discriminating against railroad workers for engaging in protected activities, including reporting a hazardous safety condition, reporting work-related injuries, refusing to perform dangerous work, and following a treating doctor's order to remain off work after an injury. In this article, we provide a few scenarios that could give rise to a potential whistleblower claim under the FRSA.

### Scenario #1

You are working as a track inspector tasked with identifying defects. Your manager, misinterpreting the relevant FRA regulations, demands that you handle track defects in a way contrary to FRA requirements so that the railroad can continue to operate trains in the manager's territory without speed restrictions. You do not want to violate the FRA's safety rules, but you also do not want to risk termination. So, you report, in good faith, the hazardous safety condition, and provide your supervisor information showing that his instructions would violate federal law. Despite that, your manager insists that you follow his misguided orders. You refuse to do so and report the manager's conduct to the FRA. Later, you refuse to help this same manager with a task you believe was aimed at covering up another defect. Ultimately, the railroad fires you for this action.

You have engaged in protected activity under the FRSA that could give rise to a whistleblower claim because, under the FRSA, you have the right to (1) report, in good faith, hazardous safety conditions; (2) provide your supervisor with information about a violation of federal law or regulations; (3) refuse to violate or help violate a federal railroad safety law, rule, or regulation; and (4) report violations of federal law or regulations to the FRA. Thus, you have engaged in many types of protected activity and would likely have a claim.\*

### Scenario #2

You sustain an injury on the job that requires you to seek emergency medical care. The ER doctors release you from the hospital, instruct you to follow up with your primary care physician, and provide you a note that says you must stay off work for three days. You report all of this to your manager. Nevertheless, your manager counts the missed days of work against you, which puts you in violation of the railroad's attendance policy. The railroad then disciplines you.

You have engaged in protected activity under the FRSA that could give rise to a whistleblower claim because the FRSA prohibits a railroad from discriminating against you for (1) notifying the railroad of a work-related injury or illness or (2) following the orders or treatment plan of your doctor. You have, therefore, engaged in protected activity and would likely have a claim.\*\*

### Scenario #3

You are working as an engineer and your federal hours of service limit will expire before you get to your destination. You report this to your manager and ask for a relief crew. Your manager refuses, forcing you to violate your hours-of-service limit. When tying up, you accurately report your hours of service. You also notify the FRA of the violation and cooperate in the FRA's investigation of the violation. The railroad disciplines you as a result.

Here again, you may have a claim under the FRSA's whistleblower provisions because you have engaged in protected activity by (1) notifying your manager that you were about to violate your hours-of-service limit; (2) accurately reporting your hours of service; (3) reporting the hours-of-service violation; and (4) cooperating with the FRA's investigation. Because the railroad disciplined you for this protected activity, you would likely have a claim.\*\*\*

If you think the railroad discriminated or retaliated against you for engaging in protected activity under the FRSA's whistleblower provisions, we strongly encourage you to contact our nationally-recognized railroad injury lawyers as soon as possible. Our team can help you analyze the facts of your case and provide specific legal advice.

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\*This scenario is loosely based off *Fresquez v. BNSF Ry. Co.*, 52 F.4th 1280 (10th Cir. 2022).

\*\* This scenario is very loosely based on *Williams v. Ill. Cent. R.R.*, No. 3:16cv838, 2018 U.S. Dist. LEXIS 18106 (S.D. Miss. Feb. 5, 2018).

\*\*\* Source: Investigator's Desk Aid to the Federal Railroad Safety Act (FRSA) Whistleblower Protection Provision, OSHA, <https://www.osha.gov/sites/default/files/FRSA-Desk-Aid-FINAL-12-20-2019.pdf>

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We hope that you found this newsletter informative and helpful. As always, if you have any questions, please contact our team.\*

*\*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](mailto:railroad@uselaws.com) or 800-USE-LAWS.**