

# **RAILROAD WORKERS**

## **KNOW YOUR RIGHTS!**

**A GUIDE TO  
ON THE JOB INJURIES  
AND WHISTLEBLOWER'S PROTECTION**

**COLLEY SHROYER  
ABRAHAM**

**536 SOUTH HIGH STREET  
COLUMBUS, OHIO 43215  
1-937-564-0598**



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## **PREFACE**

This booklet is not legal advice. Legal advice can, and should, come only from a lawyer. What is written here cannot possible tell you what the law is as applied to the facts of a particular case.

The purpose of this booklet is to inform railroad employees of their legal rights concerning on-the-job injuries, whistleblower protections, and other key issues.

Unfortunately, all too few railroad employees are aware of their rights under these laws, enacted solely for their benefit. Each year thousands of railroad workers are injured or killed. In many instances, injured railroad workers or their survivors are left to fend for themselves. All too often, the railroad companies, through claims agents, by waivers, and other methods succeed in dodging their just and lawful responsibility.

Railroad employees work long hours in hazardous conditions to provide for their families. We are here to help ensure that you are treated with respect and your lawsuit is handled with experience and competence in the event that you are injured while working. This booklet outlines your rights and the steps you should take to protect those rights.

## **ABOUT OUR LAW FIRM**

The attorneys at Colley Shroyer and Abraham are trial attorneys dedicated to advocating the rights of injured railroad workers who were hurt by the railroad's negligence. We are skilled and experienced in all aspects of the Federal Employers' Liability Act (F.E.L.A.). The attorneys at CSA have advocated and earned large settlements and verdicts in the millions from many of the largest railroads including, but not limited to: National Railroad Passenger Corporation (Amtrak), Norfolk Southern Railway, CSX, and Consolidated Rail (Conrail).

The attorneys at CSA are also committed to prosecuting whistleblower violations. We understand the retaliatory culture that railroad employees face when reporting injuries or engaging in other protected activities. We are dedicated to standing by employees who exercise their federally protected rights.

All of our attorneys and staff are passionate about insuring that our clients receive the highest quality legal advice and services. In providing the best possible representation, we strongly believe in educating our clients about the legal process. That education starts at the initial client meeting and continues throughout the representation, making for a successful lawyer-client relationship.

Our railroad law attorneys are dedicated to every client and every case. You can trust that we will remain attentive to your needs, working diligently and efficiently to deliver the best possible outcome.

# **FEDERAL EMPLOYERS LIABILITY** **ACT (F.E.L.A.)**

The Federal Employers Liability Act (F.E.L.A.) was enacted by Congress in 1908 to provide benefits for railroad workers who sustain injuries in the scope of their employment. Unlike state workers compensation laws, which provide benefits on a no-fault basis, the F.E.L.A. is based on the principals of fault. **To recover damages in this type of claim, the injured worker must establish that the railroad caused or in some way contributed to the injury.** Unlike a workers comp law, if the railroad is not responsible for the employee's injury, the employee will not receive any compensation for his or her injury.

This booklet will give you answers to some of the questions that arise most often when a railroad employee becomes injured.

## **What requirements must be established for an F.E.L.A. lawsuit?**

There are three basic requirements that an injured railroad worker must establish to recover damages under the F.E.L.A.

- (1) The accident must have occurred in the course and scope of the worker's employment with the railroad. The F.E.L.A. does not require that the accident happen on railroad property, as long as the injury occurs in the furtherance of the worker's employment.
- (2) The railroad must be engaged in interstate commerce between two or more states. As a result of several court decisions on this issue, almost all of the duties of railroad workers are interpreted as being in furtherance of interstate commerce, thus satisfying this requirement.
- (3) The railroad must have caused or in some way contributed to the injuries sustained by the worker.

## **What types of injuries are covered by F.E.L.A.?**

Basically, all injuries sustained in the course of employment are covered by the Federal Employer's Liability Act. There are four basic types of injuries covered by the F.E.L.A.:

- (1) Sudden and traumatic injuries such as broken bones, back strains, pulled muscles and tendons, lacerations and other types of “traditional injuries.”
- (2) Repetitive stress injuries that develop gradually and are not traceable to a specific date of accident. Examples of these types of injuries include carpal tunnel syndrome, tendinitis, and hearing loss.
- (3) Aggravation of pre-existing conditions. For a worker to be entitled to damages, they must either injure a part of the body never previously injured or aggravate a part of the body previously injured. When a worker’s accident aggravates or accelerates a pre-existing physical condition or injury, it is considered a “new injury” under F.E.L.A.
- (4) Occupational Diseases are covered by the Federal Employer’s Liability Act when it can be established that they developed as a result of some negligence on the part of the railroad. Examples of occupational diseases include lung cancer, skin diseased and asbestos related diseases.

### **What type of damages are recoverable in F.E.L.A. cases?**

Typically, there are four types of damages recoverable:

- (1) Past and future last earnings;
- (2) Past and future disability;
- (3) Past and future medical and hospital expenses;
- (4) Past and future pain and mental suffering.

### **Does F.E.L.A require the injured worker to prove the railroad caused the accident?**

Yes, **F.E.L.A. is a fault-based system. Contrary to state Workers' Compensation acts, which are no-fault statutes, evidence of fault on the part of the railroad is required to establish the injured worker's right of recovery.** The test for determining the railroad's negligence is whether the railroad's action or inactions played any part, even the slightest, in causing the worker's injury or death.

### **Does F.E.L.A. impose specific duties on the railroads?**

Yes, the Federal Employer's Liability Act has broadly imposed a duty upon the railroad to provide a safe place to work. This includes the duty to: provide adequate manpower, provide adequate tools and

equipment, properly maintain its tools and equipment, make adequate inspections of off premises work areas, create and enforce work safety rules.

**Are injured workers barred from recovery under F.E.L.A. if they were partly responsible for the accident?**

No, When it is established that the railroad was negligent in causing injury to a worker, the railroad cannot use as a defense the fact that the injured worker was partly responsible for causing the accident. However, the negligence of the injured worker is taken into account when determining the amount of monetary damages that the worker is entitled to receive in a F.E.L.A case. For example, if the railroad was negligent in causing an injury which is worth \$50,000 and it is determined that the injured worker was 10% comparatively negligent in contributing to the cause of the injury, the monetary damages would be reduced by 10% or \$5,000. The railroad, in this example, would be liable to pay the injured worker \$45,000.

**Is there any time limitation for the filing of a F.E.L.A. lawsuit?**

Yes, a **Federal Employer's Liability Act case must be filed in court within three (3) years of the date of accident.** In the case of repetitive stress injuries and occupational diseases, the three (3) year statute of limitations begins to run when the injured worker knew, or reasonably should know, that they may have a work-related injury. **If a suit is not filed within the statute of limitations, whatever rights an injured worker has will be lost permanently.**

**Do I have to notify the railroad after being injured on the job?**

Yes, you must give prompt notice to the railroad after sustaining a work-related injury. It is advisable to complete a written accident report form, keeping a copy for your records. Your statement should be short and brief. It will be used by the company to limit your claim. **IMPORTANT NOTE: It is extremely advisable that an injured employee contact their union representative and an experienced F.E.L.A. attorney BEFORE giving a statement.**

**Can I receive treatment for my injuries from a doctor of my own choosing?**

Yes, injured workers have the right to be treated by doctors of their

own choosing. Even though frequently, the railroad will attempt to "direct" or even "force" injured workers to be treated by company doctors or clinics.

**Am I required to provide a claims agent with a written or recorded statement?**

No, You are not required to provide a claims agent with a recorded or written statement under the Federal Employers Liability Act. It is important to remember that statements are not taken for the benefit of the injured worker. The purpose of the statement taken by a claims agent is to minimize the amount of money that the railroad has to pay the injured worker. **It is, therefore, critical that BEFORE you give any type of statement to a claims agent you contact your local union representative and a qualified F.E.L.A. attorney.** The railroad claims agent may tell the injured employee he must give a statement, or that it is for his benefit. No one must make or sign a statement. It is not understandable how it could help anyone but the railroad. **Remember, when dealing with the railroad claims agent, that they are long experienced in this work, and you are not. They are paid by the railroad, and their interest is for the railroad.**

**After being injured on the railroad, do I need to hire an attorney?**

Absolutely! You need to hire an attorney who is experienced in handling F.E.L.A. cases. It is extremely important that an injured worker contact a knowledgeable F.E.L.A. attorney before they give a statement to railroad management. Immediately after being injured, you are involved in an adversarial legal system. The railroad has in place a team of claims agents, investigators, attorneys and doctors whose primary responsibility is to minimize the amount of monetary damages paid to the injured worker. **Having legal guidance on your side is the best way to protect your job.**

# WHAT TO DO IF YOU ARE INJURED

To the extent you are able, there are several things that you should do right away if you become injured at work:

- (1) Immediately request that you be taken to the nearest emergency room. During this time do not give any statements to your supervisor other than you have been injured and need emergency medical attention. **Do not let a railroad manager pressure you into giving a statement before you get medical attention.**
- (2) Request a trusted co-worker to immediately inspect the equipment, thing, or area that cause or contributed to your injury and make written notes of the inspection. If at all possible **have pictures taken of the equipment, thing or area that caused or contributed to your injury. Also, have pictures taken of your injuries.**
- (3) Once at the emergency room do not talk to or communicate with railroad management or claims agent.
- (4) Contact your union representative.
- (5) **Contact an experience F.E.L.A. attorney for advice.** During this time, you can obtain advice on how to complete an accident report and statement.
- (6) After you have obtained medical attention and received advice from your union representative and attorney, contact your manager so that you can complete an accident report.
- (7) When completing an injury report do not let any representative of the railroad pressure you or put words in your mouth.
- (8) Apply for Sickness Benefits. Contact the Railroad Retirement Board and request the forms that need to be signed by your doctor.
- (9) Keep records of out-of-pocket expenses incurred as the result of an injury, dates and times of medical treatment, names of witnesses, loss of earnings, details of ongoing disability, details of pain and suffering.

# HOW TO PROPERLY COMPLETE AN INJURY REPORT

When a railroad employee is injured, he or she is required under most working rules to make out a report of the injury. **The first step to properly completing an injury report is to contact a F.E.L.A. attorney prior to meeting with railroad managers. Remember that you should never complete an injury report or give any statement until after you have received medical attention.**

A railroad employee is usually required to provide a written statement in the injury report. A statement is a handwritten story of the facts leading up to and the cause of the accident, intended to show whether or not the railroad is liable to the injured employee. **IMPORTANT NOTE: Going to the emergency room to receive medical attention puts distance between you and railroad management giving you an opportunity to contact legal advice.**

Railroad employees need to be aware of “liability” questions in the injury report. It is extremely important that these questions are answered correctly. A railroad worker’s right to recover often depends on the failure of the railroad to supply a safe place to work, safe equipment, and safety procedures. Do not hesitate to blame the accident on the railroad’s faulty equipment, poor maintenance, ect. if that caused the injury. The following are four examples of liability questions commonly asked in injury reports:

(1) Question: Did you have a safe place to work?

Answer: NO

(2) Question: Was the equipment defective

Answer: YES

(3) Question: Was anyone negligent?

Answer: Yes, The Railroad

(4) Question: Who is responsible for your injury? And to what extent?

Answer: The Railroad to the fullest extent.

If you do not know how to answer one of these questions, state “to be determined.” Do not let the railroad manager pressure you into answering these questions favorably for the railroad. Railroad managers have a long tradition of making the injury report a very uncomfortable situation for railroad employees. By the time you are filling out an injury report and writing a statement you should have already contacted legal advice to help guide you during this process.

## **FEDERAL RAILROAD SAFETY ACT** **(WHISTLE BLOWERS LAW)**

In 2007, the Federal Railroad Safety Act (F.R.S.A.) was amended to increase protections for railroad employee whistleblowers. The whistleblower statute provides protection for railroad employees who engage in protected activities and who are then later retaliated against by their employer. A protected activity triggers the protections provided by the F.R.S.A., thus if that employee who engaged in the protected activity is retaliated against the F.R.S.A. provides a legal remedy.

The following will give you answers to some of the most common questions concerning the Federal Railroad Safety Act Whistleblower Statute.

### **What must an employee prove to establish a F.R.S.A lawsuit?**

A railroad employee must prove four elements by a preponderance of the evidence:

- (1) He or she engaged in a protected activity under the F.R.S.A.
- (2) The railroad was aware the employee engaged in the protected activity.
- (3) The railroad subjected the employee to some form of adverse action.
- (4) The employee’s protected activity was a “contributing factor” to

the adverse action.

### **What are some examples of protected whistleblower activities?**

Some common protected activities are:

- Employee Reporting a Work-Related Injury
- Employee Becoming Injured at Work
- Employee Requesting Medical Treatment or First-Aid
- Employee Following Medical Orders When Medical Condition Occurred or Manifested at Work
- Employee Reporting a Safety Concern
- Employee Reporting a Security Concern
- Employee Refusing to Work Under Unsafe Conditions
- Employee Filing a Whistleblower Complaint
- Employee Refusing to Violate Safety Regulations
- Employee Participating in an Inspection
- Employee Participating in a Co-Worker's Investigation.

### **What are some examples of adverse actions?**

Some common adverse actions are:

- Charging an Employee with a Rules Violation
- Firing or Laying off an Employee
- Blacklisting an Employee
- Demoting an Employee
- Denying Overtime or a Promotion
- Disciplining
- Denying Benefits
- Failure to Hire or Rehire
- Intimidation
- Reducing Pay or Hours
- Merely Threatening an Adverse Against an Employee Engaged in Protected Activities (even issuing a charge letter that is later rescinded is an adverse action)

**For better clarification of a whistleblower lawsuit, what are some examples of adverse actions applied to protected activities?**

- Disciplining Employee for Injury that Resulted from Defective Equipment
- Disciplining Employees for “Late Reporting” of Injuries: An employee must report an on-the-job injury when the employee reasonably knows that he or she is injured. This sometimes means that an employee does not know that he or she is injured until a later time. The important thing to remember is that as soon as you know that you are injured you must immediately report that injury.
- Disciplining Employees for “Falsifying” an Injury
- Discouraging employees from filing injury reports or raising safety concerns
- Targeting for closer scrutiny employees who report injuries or raise safety concerns
- Disciplining employees who report injuries without disciplining the managers who contributed to the circumstances that made the injury possible
- Disciplining Employee Based on Injury Investigation Information
- Using Vague Safety Rules to Discipline Injured Workers: If the Railroad’s safety rules are written in such a manner that anyone who is injured and reports it will have violated at least a part of a rule then that rule is a violation of the FRSA. These Rules in effect punish an employee for being injured. The Railroad cannot argue that an employee is being disciplined for being injured as opposed to reporting the injury, because that is a distinction without a difference. An example of this type of rule would be “failure to take the safest course” or “failure to be aware of your surroundings.”
- Disciplining the Employee for Injury that Resulted from Common Practice: Here is a classic example of how the FRSA is correcting rail management’s reflexive "blame the injured worker" mentality. The Railroad failed to provide the proper tool to do the task in question. So the worker used whatever was at hand to complete the task, just as many other workers had done with management’s blessing and without being

disciplined. But this time the worker was injured. So, instead of disciplining the managers who failed to provide the proper tool, the Railroad disciplined the worker for using "an improper tool."

- Interfering with Medical Treatment of an injury that occurred or manifested on-the-job
- Disciplining an employee for following a physician treatment plan concerning an injury that occurred or manifested on-the-job
- Disciplining an employee for requesting medical or first-aid treatment
- Forcing an employee to work against medical advice
- Accompanying Injured Worker in Medical Exam Room

### **What is a Contributing factor?**

A contributing factor is a factor which, alone or in connection with other factors, affected in any way the railroad's adverse action. **A protected activity is a contributing factor if the railroad's adverse action was based in whole or in part on the protected activity.** The employee need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. A railroad manager can have a valid reason for taking disciplinary action against an employee and still be in violation of the F.R.S.A., as long as the employee shows that the adverse action was in any part based on his protected activity.

### **Which employees are covered under the protections of the F.R.S.A Whistleblower Statute?**

The Federal Railroad Safety Act protects employees of railroad carriers and their contractors and subcontractors who report a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security.

### **How long do I have to file a whistleblower's complaint?**

**Whistleblower complaints must be filed within 180 days after the alleged adverse action occurred.** That means that an employee has 180 days from the time of the railroad's retaliatory act.

## **What types of legal remedies are available in F.R.S.A lawsuits?**

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue a preliminary order requiring the appropriate relief to make you whole. Ordered relief may include:

- **Payment of “Back Pay” With Interest Including Railroad Retirement Board Allocation:** When an employee proves that they were wrongly suspended or fired in violation of the Federal Railroad Safety Act they are entitled to the wages that they would have earned had not they been retaliated against.
- **Payment of Punitive Damages of up to \$250,000:** Punitive damages are designed to "send a message" to a defendant railroad by punishing them for a pattern of whistleblowers violations and to deter its repetition. This new F.R.S.A. Whistleblower law allows juries to impose punitive damages that will discourage the railroad from continuing its course of retaliatory conduct. When an employee reports a F.E.L.A. on-the-job injury, and the railroad reacts by filing bogus disciplinary charges against the employee. The management culture encourages such knee jerk disciplinary retaliation against employees who report injuries. The F.R.S.A. is designed to change that culture by enforcing the free and unfettered reporting of injuries and punitive damages are the hammer that will force such a cultural change.
- **Preliminary Reinstatement with Same Seniority and Benefits:** The F.R.S.A. gives OSHA the power to order the "preliminary reinstatement" of an employee with full back pay. The reinstatement goes into immediate effect even if the railroad objects to OSHA's findings. And even if the railroad ultimately overturns OSHA's award, the railroad can never recover the reinstatement wages it paid.
- **Emotional Distress Damages:** Emotional Distress damages are intended to compensate employees for the consequential stresses that result from an unlawful retaliation against protected activities or exposing the employee to the stresses of Outrageous Conduct. Examples of evidence establishing emotional distress include testimony confirming sleeplessness,

anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown. Also testimony noting the physical manifestations of severe emotional harm is sufficient, such as ulcers, gastrointestinal disorders, headaches, or panic attacks.

- **Injunctive Relief:** Such relief could include: an order requiring a railroad to expunge certain records from an employee's personnel file, or post a notice regarding the resolution of the employee's whistleblower complaint to remedy the employee's reputational harm.
- **Disqualifying Managers:** In addition to naming the railroad as a defendant in a F.R.S.A. whistleblower complaint, employees have the power to name managers or supervisors as individual defendants as well. And there are good reasons for doing so. When a manager is singled out as illegally retaliating against workers it raises the unsettling potential for that manager to be held personally liable for economic damages, thus making him and other railroad managers think twice before retaliating again.

When OSHA, a judge, or a federal jury finds that a manager illegally retaliated against a worker in violation of the FRSA, it automatically creates an official record that can be used as a basis for the Federal Rail Administration to disqualify that manager from working in the railroad industry.

- **Make Whole Remedies:** Make Whole Remedies are ordered to put the injured party in the financial position that they would have been had they not been unlawfully retaliated against for engaging in protected activities. Make whole remedies include: late mortgage payment fees, bankruptcy attorney fees, moving expenses, Damages for ruining credit, ordering a promotion with retroactive seniority date, etc.
- **Attorney Fees and Cost:** If a railroad worker wins his FRSA complaint, the railroad has to pay all his attorney fees. But if a FRSA complaint fails, the railroad cannot recover any attorney fees or costs against the worker. FRSA bars any attorney fee awards to railroads. If a railroad worker wins his F.R.S.A. compliant, the railroad also has to pay litigation cost including expert witness fees.

**MICHAEL T. RAPIER**  
**Rail Labor Injury Attorney**  
**1-937-564-0598**



Michael T. Rapier, Esquire graduated Magna Cum Laude from Capital Law School and is admitted to the Ohio Bar. In 2007 Michael began working as a legal investigator and now brings that experience to his work as an attorney. Michael grew up in Ohio and has been around the railroad his entire life. Michael's Great Grandfather, Grandfather, Father, and Brother have all worked on the railroad. His father has served as a representative in the Union for over twenty-five years. Michael grew up attending Union meetings with his father and also had the opportunity to walk the picket line when necessary to support workers' rights. Michael's unique upbringing and personal experiences make him a valuable asset to railroaders.

