

RAIL RIGHTS

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INTRODUCTION

The contents of this manual are not intended to be legal advice. Rather, the contents are intended to provide a general analysis of the most often discussed laws of the rail industry. The material contained herein is not inclusive of all of the laws of the rail industry.

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I. RAILWAY LABOR ACT

I. RAILWAY LABOR ACT - OVERVIEW

The Railway Labor Act governs Labor/Management Relations in the Rail Industry. The Railway Labor Act is a federal law that was enacted in 1926. It is the oldest continuous federal collective bargaining legislation in the nation's history. The Railway Labor Act also governs labor/management relations in the airline industry.

The Railway Labor Act has five major functions:

1. To prevent the interruption of rail service by precluding strikes;
2. To allow the employees to organize their own union;
3. To allow the formation and independence of labor organizations without interference from management;
4. To assist in settlement of disputes arising in regard to rates of pay and working conditions;
5. To assist in settlement of any disputes or grievances that arise as a result of an interpretation or application of an existing labor agreement.

A. History of the Railway Labor Act

By 1850 the railroads in this country had become a dominant force and were having an immediate and dramatic effect on commerce. The railroads were recognized as an appropriate and necessary object of federal legislation in the public interest, particularly in light of the millions of acres of land that had been granted to the railroads. The necessity to legislate labor-management relations really began by 1865 as railroad employees sought to organize and exercise their latent strengths by engaging in a series of prolonged and

costly strikes.¹ To deal with these strikes, Congress enacted the first in a series of legislative attempts to promote the peaceful settlement of controversies. Several laws were passed beginning with the Arbitration Act of 1888. The underlying theme of each of these attempts to legislate rail labor management was culminated with the Railway Labor Act of 1926 was to prevent the disruption of interstate commerce by a labor strike.

The early attempts to legislate labor-management relations were wholly unsuccessful. The Arbitration Act of 1888 provided for voluntarily arbitration between the parties and for the creation of investigatory boards when strikes arose. The United States President appointed these boards, however, the Boards had no authority to enforce any of its recommendations. The arbitration provisions were rarely used and the investigatory powers were invoked only one time in connection with the Pullman strike of 1894.

In 1898, Congress supplanted the Arbitration Act with the Erdman Act. This Act strengthened the voluntary provisions of the Arbitration Act, introduced federal mediation and conciliation to further peaceful settlement efforts and prohibited employer discrimination based on union affiliation. However, the Supreme Court later invalidated the anti-discrimination provisions of the Act.²

¹The Brotherhood of Locomotive Engineers formed in 1863; The Brotherhood of Railroad Conductors formed 1868; The Brotherhood of Locomotive Firemen and Enginemen formed 1873; and the Brotherhood of Railroad Trainmen formed in 1883.

²*Adair v. U.S.*, 208 U.S. 161 (1908).

The Newlands Act of 1913, which established a permanent three-member board of mediation but retained the voluntary arbitration provisions of the prior acts, replaced the Erdman Act. Three years later, the Newlands Act met its end when the unions demanded an eight-hour day. A strike over this issue was imminent and the unions rejected the arbitration provisions of the Act, which only emphasized its ineffectiveness. A strike was prevented only by the passage of the Adamson Act of 1916, which established an eight-hour day for railroad employees.

During World War I the railroads were operated and controlled by the United States federal government. A General Order of the Director of Railroads served to protect from retaliation railroad workers who sought to form and join labor organizations. A peaceful labor front and the flourishing of collective bargaining between labor and management marked the war years. During this period, disputes regarding interpretations of these agreements were required to be settled in arbitration by "Boards of Adjustments." Strikes were outlawed by this mandatory settlement procedure.

After the railroads were returned to private operation, Congress revised the ineffective Newlands Act and created the Transportation Act of 1920. The Act's principal provision was to provide for a Railway Labor Board of three members, a carrier member, an employee member and a public member. The Board was to investigate disputes and then publicly publish its investigation and recommendations in the hope that public opinion would sway the parties to accept the Board's recommendations. This provision was a total failure. During this post-war period, the railroads made a concentrated effort to establish and control company labor organizations and employees were urged to join.

The failure of the Transportation Act led to the enactment of the Railway Labor Act of 1926. ***The purpose of the Act was to avoid strikes by employees and lockouts by employers by establishing a long, methodical process for negotiation and mediation of new agreements and for binding arbitration of disputes over existing agreements.***

Section 2 Third, of the Act explicitly gave the employees the right to designate representatives without the interference, influence, or coercion of management.³

Since 1926, the Act has been revised on five occasions, 1934, 1936, 1951, and 1966. These amendments added the following revisions:

- Section 2, Third: “Representatives...shall be designated without interference, influence, or coercion by either party over the designation of representatives.”
- Section 2, Fourth granted the employees: “The right to organize and bargain collectively through representatives of their own choosing.”

³This provision was challenged by the railroads and decided by the United States Supreme Court in 1930. The Court ruled that the Act was a valid exercise of the federal commerce power and that the right of labor to organize without employer impediment could be constitutionally protected. *Texas & New Orleans Railroad v. Brotherhood of Railroad Clerks*, 281 U.S. 548 (1930).

- Section 2, Fifth set forth: “No carrier...shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization.”
- Section 2, Seventh, restricted the carrier as follows: “No carrier...shall change the rates of pay, rules or working conditions of its employees as a class as embodied in agreements except in the manner prescribed in...Section 6 of this Act.”
- Section 2, Ninth, is the current provision in the Act, which provides for the certification of representatives by the National Mediation Board, independent of management interference.
- A major change by the 1934 Amendments was the creation of the National Railroad Adjustment Board and the reconstitution of the Board of Mediation as the National Mediation Board. The NRAB was established as a final and binding arbitration panel, which either party could invoke to resolve disputes over the application, or interpretation of existing labor agreements. The Mediation Board was empowered to conduct and

certify representation elections and to mediate disputes regarding the consummation of new agreements.⁴

- The Act provided for four divisions of the NRAB. Each division is composed of a group of members to deal with separate crafts of employees within the railroad. The First Division handles the operating crafts, the Second Division handles shop crafts, the Third Division handles maintenance of way, and the Fourth Division handles clerical disputes.
- Finally, Section 2, Eleventh, of the 1951 Amendment allowed rail and airline employees to bargain for certain union security measures including union shop agreements and the “checkoff” of union dues. In essence, this allowed the employees to make agreements with the carriers, which required mandatory union membership. The employer could also be required to deduct union dues from the employee=s paycheck and to remit those dues to the union.

⁴The Supreme Court gave the 1934 amendments the vitality lacking in all of its predecessors by permitting judicial enforcement of the duty to make and maintain agreements concerning rates of pay, rules, and working conditions. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937).

The 1966 provisions provided for the establishment of Special Board of Adjustments, commonly referred to as Public Law Boards. These Boards were established to provide final and binding arbitration for disputes arising over the interpretation and application of the existing agreements basically in the same manner as provided for by the National Railway Adjustment Board. By 1966, the NRAB had become so backlogged with disputes that Congress created an additional forum to resolve what the courts now call “minor disputes.”⁵ These Boards are generally locally established and, by agreement, they consist of three members: an employee member, carrier member, and chairman and/or neutral member. The chairman and/or neutral member is either agreed to by the parties or appointed by the National Mediation Board if the parties cannot agree on a chairman. The chairman=s salary and expenses are paid for by the National Mediation Board.

B. Major v. Minor Disputes

The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, 565 (1930). Under the Act, the Courts have classified disputes as either “major or minor.” The United States Supreme Court has described major disputes as those: “Over the formation of collective agreements or efforts to secure them. They arise where there is no

⁵The courts have defined minor disputes as those that arise over the interpretation or application of existing agreements. A minor dispute is one that must be resolved through arbitration without judicial involvement and/or without a work stoppage.

agreement or where it is sought to change the terms of one.” *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). A major dispute results when there is a disagreement in the bargaining process for a new contract. Typically this only occurs when the collective bargaining process breaks down regarding “National Negotiations.”

According to the United States Supreme Court, a minor dispute is one in which no effort is made to bring about a formal change in terms or create a new agreement but rather the dispute relates either to the meaning or application of an existing agreement. *Id.* at 723. Thus, a minor dispute is a controversy over the meaning of an existing collective bargaining agreement in a particular fact situation. *Brotherhood of Railway Trainmen v. New York Central RR.*, 246 F.2d 114 (6th Cir. 1957); cert. denied, 355 U.S. 877.

C. Handling Major Disputes

The Act provides a detailed framework to facilitate voluntary settlement of major disputes. The party desiring to affect a change of rates of pays, rules, or working conditions, must give advance written notice pursuant to Section 6 of the Railway Labor Act. Next, the parties must confer (Section 2 Second) and, if conference fails to resolve the dispute, either or both parties may invoke the services of the National Mediation Board, which may also proffer its services sua sponte if it finds a labor emergency exists.

If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, only if both parties, i.e., the railroad and the union, consent. If arbitration is rejected and the dispute threatens to substantially interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the mediation board shall notify the

President. The President may then create an emergency board to investigate and report on the dispute. While the dispute is working its way through these stages neither party may unilaterally alter the status quo. (Section 2 Seventh, 5 First, 6, 10.) The parties shall establish such board and for thirty days after such board has made its report to the President, no change, except by agreement, to the controversy in the conditions out of which the dispute arose. Only after all of these procedures have been complied with, is the union free to strike.

Of course, over the years, when the Union has struck, particularly over a national wage and rules movement, the United States Congress has enacted legislation adopting for the employees the recommendations of the National Mediation Board.

The drafters of the Act were bitterly opposed to compulsory arbitration of major disputes. The railroad and union representatives who drafted the Railway Labor Act chose to leave the settlement of major disputes entirely to the process of non-compulsory adjustment. *Elgin v. Burley*, at 724. The Act imposes upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help (strike) while the Act=s remedies are exhausted. The drafters of the Act purposely crafted the Act whereby: “The procedures of the Act purposely long and drawn out, based on the hope that reason and practical consideration will provide in time an agreement that resolves the dispute.” *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966).

D. Handling Minor Disputes - Time Claims

1. A minor dispute is basically a time claim. Whenever the Agreement is violated, the Railway Labor Act, and consequently the Labor Agreement requires that a time claim must be filed and processed in order to resolve the violation. Time claims must be timely filed as prescribed in the Agreement or it is barred. For example, if the Agreement states that a claim must be filed within sixty (60) days of the violation, and the violation occurs on April 1, the claim must be on file with the company by May 30. The company then has an obligation to pay or decline the claim within the same period of time. If declined, the claim must be appealed, and if not resolved on the property, it must be arbitrated.

2. A claim must be resolved by Arbitration, not the Courts. If a dispute is minor and the parties are unable to resolve it through negotiation or prescribed grievance procedures, the National Railway Adjustment Board then has **primary and exclusive jurisdiction** under Section 3 of the Railway Labor Act, (45 U.S.C. ' 153) to interpret the agreement of the parties and to make an appropriate award. *Order of Rail Conductors v. Pitney*, 326 U.S. 561 (1945). The United States Supreme Court has repeatedly held that Section 3 of the Railway Labor Act is a mandatory, exclusive and comprehensive system for resolving minor disputes. *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30. The Supreme Court has held that a court may not take jurisdiction over a railroad employees= grievance because:

“If a carrier or a union could chose a court instead of a board, the other party would be deprived of the privilege conferred by the Railway Labor Act which provides that after negotiations have failed either party may refer the dispute to the appropriate division of the Adjustment Board.”

Order of Conductors v. Southern Rail R. Co., 339 U.S. 255. The arbitration provisions provided by the Railway Labor Act for the settlement of minor disputes is the **complete** and **final means** for **settling minor disputes**. *Union Pacific Rail R. Co. v. Price*, 360 U.S. 601.

The Railway Labor Act provides one major exception to the final and binding provisions of the arbitration procedure as follows: "Awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." 45 U.S.C. § 153 First (M). Thus, when a discharged employee is reinstated with pay for time lost, the computation of the discharge of the employee's time lost is an issue wholly separable from the merits of the wrongful discharge issue.

If the carrier does not comply with the award, or with the employee's or union's interpretation of it, the Act authorizes the employee to bring an action in federal district court to enforce the award. The lawsuit proceeds in all respects as any other civil case but the findings and order of the Adjustment Board are to be recorded as *prima facie* evidence of the facts stated in the complaint. The employee is excused from the cost of suit, and in addition is awarded attorneys fees if he or she prevails. According to the Supreme Court the total effect of these detailed provisions is to provide a carefully designed procedure for reviewing monetary awards, one, which will achieve the reviewing function without any significant expense to the employee or his union. *Washington Terminal Co. v. Boswell*, 124 F.2d 235 aff'd 319 U.S. 732. Thus, it is critical for every railroad employee to understand that virtually any and every dispute that he or she may have with the railroad must be submitted to arbitration pursuant to the Railway Labor Act. This means that any time a rail employee believes his contract has been violated, his

seniority has been tampered with, or generally, that the railroad has done anything to him he believes is unfair, a claim must be timely filed and handled pursuant to the collective bargaining agreement and the Railway Labor Act. Failure to do so will forever bar that particular claim or grievance from being resolved.

3. Decisions of the arbitrators are final and binding. The arbitrator=s decision is final. There is no further appeal. It is also binding upon the parties, so neither may choose to ignore it. However, the courts have held that in rare instances, a decision can be set aside:

- a. For failure of the Board to comply with the Railway Labor Act;
- b. For failure of the order to conform or confine itself with matters within the scope of the Board=s jurisdiction; or
- c. For fraud or corruption.

However, the courts have construed these provisions extremely narrow. For example, in the case of *Richmond, Fredericksburg & Potomac RR. v. Trans. Communications Int=l. Union*, 973 F. 2d 276 (4th Cir. 1992), the court held that it could inquire only: “whether the arbitrators did the job they were told to do - not whether they did it well, or correctly, or reasonably, but simply whether they did it.” A court may not overrule an arbitrator=s decision simply because it believes its own interpretation of the contract would be to better one. *W. R. Grace & Co. v. Local Union 759, Int=l. Union of United Rubber Workers*, 461 U.S. 757, 765 (1983). It may reverse an arbitral decision as an excess of a board=s jurisdiction only where the arbitration board=s order: “does not draw its essence from the Collective Bargaining Agreement.” *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). As long as the arbitrator is even arguably construing or applying the

contract the arbitrator's award must not be disturbed. *Norfolk & Western Railway Co. v. Transportation Communication International Union*, 17 F. 3d 696, (4th Cir. 1993).

Thus, it is very clear that a decision of the arbitrator is final and binding and for all practical purposes the courts will not overturn the arbitrator's decision. Furthermore, it is very probable that even if the court overturned the arbitrator's decision the claimant would not necessarily win the case but simply be required to re-arbitrate the case before a different arbitrator.

Pursuant to the mandatory exclusive remedy provisions of the Act, the only person authorized by law to make a railroad honor the agreements is an arbitrator vested with the authority to decide pursuant to the Railway Labor Act. The only way for an employee to get his grievance before the arbitrator is to file a time claim. Thus, if an employee has any type of dispute with the carrier a time claim should be immediately filed.

E. Exceptions to the Exclusive Remedy Provisions of the Railway Labor Act

The Railway Labor Act does not preempt state and federal causes of action when an employee believes he has been discriminated against on the basis of his or her race, sex, religion, national origin, age or disability. Thus, if an employee believes that discipline or discharge is predicated on, for example, age (over 40), then that person could sue the railroad for age discrimination. The exclusive remedy provisions of the Railway Labor Act would not preempt such a lawsuit. Some states have whistle blower statutes, which forbid an employer from discriminating against an employee for reporting a violation of state or federal law to a federal body. (Texas does not have a whistle blower law for rail workers). In such cases an employee who is discharged for blowing the whistle may pursue a lawsuit

in state court, which would not be preempted by the Railway Labor Act. *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994).

Rail workers who intend to file a discrimination lawsuit must first file a timely complaint with the Equal Employment Opportunity Commission. Federal law requires a complaint be made with the EEOC within 300 days of the discriminatory act. Failure to do so precludes a lawsuit against the railroad for the alleged discriminatory act. Many states (including Texas) have laws, which prevent discrimination by an employer against its employees. In order to file a state law discrimination claim the employee must file a complaint with the prescribed state discriminatory agency within the time allotted by state law or the claim is forever barred in state court. For example, in Texas, an employee who wishes to file a state age discrimination claim must file a complaint with the Texas Commission on Human Rights within 180 days of the discriminatory act.

After a claim is filed with the EEOC and/or the state agency, a right to sue letter is normally thereafter issued to an employee. Once issued, the employee has 90 days under federal law and usually a shorter time frame under state law (60 days in Texas) to file the actual lawsuit. Again, failure to comply with the strict deadlines will forever bar the claim.

An employee who believes he or she has been discriminated against by the railroad should contact legal counsel without delay in order to protect their rights. Discrimination cases are often very complicated and early advice is critical to a successful conclusion.

F. Interfering with Union Organizing

Sections 2, Third and 2, Fourth of the Railway Labor Act give employees the right to organize and bargain collectively through representatives of their own choosing without interference by the carrier. These sections have been interpreted by the courts to provide employees with a private right of action (lawsuit) against a railroad when the employee is wrongfully discharged for participating in union organizing campaigns. *Cort v. Ash*, 422 U.S. 66 (1975). There also appears to be a private right of action for a claim of wrongful discharge for an employee who engaged in concerted activity to improve conditions of employment. *Davin v. Delta Airlines, Inc.*, 678 F.2d 567 (5th Cir. 1982). In the *Davin* case, an employee was discharged for opposing coercive policies outside of union organizing. The affected individual or their certified bargaining representative must bring such suits, as an uncertified union does not have standing to bring such a lawsuit. In such suits, the courts have authority to issue back pay awards and injunctive relief where appropriate. 470 F Supp. 1356 (W. D. Tenn. 1979), aff=d, 654 F. 2d 452

(6th Cir. 1981). Such lawsuits must be brought within six months of the discharge. *Del Costello v. IBT*, 462 U.S. 151 (1983).

G. Conclusion

Railroad men and women often feel helpless because they perceive themselves as having no recourse to stop the carrier from doing whatever they want.” The general rule in the rail industry is to: “comply now and grieve later.” However, the Railway Labor Act does provide for the adjustment of all claims and grievances at little or no cost to the employee and there is finality to arbitrator’s decisions. Thus, the employee receives a final and binding answer to his dispute and, if successful, is spared the expense and effort of a time consuming court appeal.

Some argue that the process is too long, and it is true that there are cases that drag on for years. However, most cases that are arbitrated are resolved within eighteen months of their initial filing. This is not unreasonable, in light of

the time it takes to pursue a lawsuit to a conclusion, which is usually much longer.

Most rail workers fail to take advantage of the law because they fail to file time claims when they are mishandled by the carrier; thus, the carrier, in fact, “does what it wants to.” Failure to timely file a time claim deprives rail workers of the exclusive remedy provisions of the Railway Labor Act. On balance the Railway Labor Act is a very good law, but it is one that is not understood by most rail workers.

H. **Questions and Answers About the Railway Labor Act**

1. **Who negotiates my labor agreements?**

The highest designated officer of the Railroad and the highest designated officer of the union. At the local level, it is the General Chairman and the head of Labor Relations.

2. **Who determines whom the highest designated officers of the Railroad and the unions are?**

Railroad management selects an individual as its highest designated officer. The Union elects its highest designated officer, pursuant to the Constitution.

3. **Who is the highest designated officer for my union?**

The highest designated officer of the Union is the General Chairperson. According most rail union Constitutions, the General Chairperson has the authority to negotiate labor agreements. However, before going into effect, the labor agreement typically must be ratified by a majority vote of the affected local chairpersons and in some instances by a majority vote of the membership.

4. **What are national negotiations?**

National negotiation is a generic phrase, which refers to negotiations that occur between the union Presidents and/or his designated representative and the National Carriers Conference Committee (NCCC). The NCCC is made up of representatives from the major Carriers.

5. **What types of agreements are negotiated nationally?**

National negotiations began in the late 1950's as a solution to selected issues that were affecting all major railroads. For example, the elimination of the fireman's

craft was an issue that was negotiated nationally. Today national negotiations deal with a variety of including wages, health, insurance, and most working rules.

6. Do I get to vote on a national agreement?

Yes. Typically, pursuant to the union Constitution national agreements must be ratified by a majority vote of each craft involved in the national negotiations. If one craft fails to ratify the agreement, the entire agreement fails.

7. What should I do if I have a dispute with the Railroad?

File a time claim.

8. What are some examples of time claims and how should they be worded?

There are no magic words that must be placed in a time claim in order to make the claim valid. An employee does not need to cite a particular agreement, article or section in order to establish a valid time claim. However, the employee should state on the claim the facts of the claim and simply what is being claimed.

For example, a claim for a 50-mile runaround could read as follows:

Claim of Conductor Smith for a 50-mile runaround February 1, 1998 because Conductor Jones ran me around. I was first out on the Conductor=s Extra Board and stood to be called for train 241 to operate from San Antonio to Hearne at 4:00 A.M. on February 1, 1998. However, the crew dispatcher erred and called Conductor Jones, who was second out, to operate in my place. I was not called to work as a conductor on Train 241. Therefore, I am entitled to a 50-mile runaround.

The wording of the claim explains who is involved, what happened, where it happened, when it happened, and what the claim is actually for. The information that

is provided on the claim is critical to the local chairman, as well as the railroad, in order to find the records to substantiate the claim.

9. If the Railroad does not allow an arbitrary, how should the claim be filed?

If the railroad does not allow an arbitrary allowance, such as held away from home terminal pay, the claim could read as follows:

Claim of Conductor Smith for eight hours held away from home terminal pay at Hearne, Texas on February 5, 1998. I arrived at Hearne, Texas away from home terminal on train 242 with Engineer Jones at 3:30 P.M. on February 4, 1998. I put off duty at 4:00 P.M. at Hearne on February 4, 1998. My held away from home terminal pay commenced 16 hours later at 8:00 A.M. February 5, 1998. I was not called on duty again until 6:00 P.M. February 5, 1998 for train 45 to operate from Hearne to San Antonio. Therefore, I am entitled to eight hours held away from home terminal pay.

Again, the claim describes who is involved, where it happened, when it happened, what the claim is for, and why the claim is being made.

If an employee's listing on the seniority roster is improper (out of order) then the following wording would be appropriate for such a claim:

Claim of Engineer Jones for all lost earnings beginning January 1, 1998 account improperly listed on the Engineer's seniority roster. I have a seniority date of February 10, 1980. Engineer Smith has a seniority date of February 15, 1981. The January 1998 Engineer's Seniority roster improperly lists Engineer Smith ahead of me on the roster. Therefore, I am claiming all lost earnings that I may incur account my seniority being improperly impaired and I am requesting that the seniority roster be corrected to properly reflect that I should be listed ahead of Engineer Smith on the Engineer's seniority roster.

This claim describes who is involved, the nature of the claim and why the claim is

being made.

10. What should I do if I am not sure if I have a claim?

Contact your union representative. Your local chairman or your general chairman will be happy to attempt to answer your question as to whether or not you have a valid claim. However, if you are unable to contact your union representative, or if your union representative does not know if the claim is valid, then in order to protect your rights you must file a time claim. Remember that a time claim is the only way an employee can protect a contractual right. If a time claim is not timely filed (normally within 60 days of the agreement violation) the claim is forever barred.

11. What is the proper wording for a wrongful termination claim?

Again, there are no magic words for such a claim. However, if Conductor Smith is fired for missing a call a proper claim should include the following:

Claim of Conductor Smith for all time lost, all seniority rights unimpaired, all fringe benefits unimpaired and all other rights unimpaired account improperly terminated on February 20, 1998 account allegedly missing a call for service on January 15, 1998.

12. How much time do I have to file a time claim?

A time claim must be filed promptly according to your labor agreement. Most labor agreements are patterned after the 1948 National Time Limit Agreement that requires a claim be filed within 60 days of the violation.

Thus, if the violation occurred on October 1, 1998, a time claim must be in the railroad's possession no later than November 29, 1998. Furthermore, the employee must be able to prove that the claim was timely filed within the prescribed 60-day time limit.

For example, if the agreement was violated on October 1, 1998, and a claim is

filed in the time box on November 29, 1998, but the clerk does not stamp it as received until November 30, 1998, the railroad will certainly argue that the claim is barred because it was not filed within 60 days of the violation. In such circumstances, an employee should have someone from the railroad sign and acknowledge that the claim was filed on November 29, 1998 or have a co-worker witness that the time claim was timely filed on November 29, 1998.

13. What is likely to happen with my claim?

The railroad will undoubtedly deny your time claim.

14. After my time claim is disallowed, what should I do?

You should promptly submit the claim to your Local Chairman for handling with the railroad.

15. How much time do I have to get my claim and declination to the Local Chairman?

Most labor agreements require that the Local Chairman make a written appeal of your time claim within 60 days of the declination. That means that the Local Chairman must have the claim written up to the Superintendent within 60 days of the declination. Therefore, if the declination is dated March 1, 1998, the Local Chairman must have the claim on file with the Superintendent no later than April 29, 1998.

16. What happens next?

The Superintendent can either pay the claim or deny the claim. If the claim is paid then obviously you get your money. If the claim is denied, the Local Chairman must advise the Superintendent in writing that he does not accept the decision as final and must send the claim to the General Chairman who is required to make a written appeal to the labor relations department of the railroad. If the Labor Relations

Department denies the claim, the General Chairman is required to have a conference on the property with the highest designated officer of labor relations to at least discuss the claim. If the claim is not resolved at the conference, a General Chairman may then list the claim for arbitration.

17. What is arbitration?

Arbitration is a procedure whereby a neutral person, much like a judge in a court of law, makes a final and binding decision, which resolves the time claim.

18. Where do arbitrators come from?

Arbitrators are actually employed by the National Mediation Board, which is an agency of the federal government. There are approximately 300 arbitrators. Most arbitrators are lawyers and most have some level of expertise in labor/management relations.

19. Are all arbitrators knowledgeable of the rail industry?

Not always. One does not have to have experience in the rail industry to be a rail arbitrator. Some have very little knowledge of the rail industry. However, most have quite a bit of knowledge regarding labor/management relations. For example, most arbitrate other disputes such as postal worker disputes and other types of labor/management disputes as well as rail labor/management disputes.

20. What happens at arbitration?

The union general chairperson and the railroad labor relation's officer prepare a written brief to outline their respective positions to the arbitrator. Then, an oral hearing is conducted where both sides are allowed to explain their respective

positions to the arbitrator. After receiving the written brief and attending the oral hearing the arbitrator renders a decision.

21. How long does it take the arbitrator to make a decision?

That's basically up to the arbitrator. Quite often, the board agreement requires the arbitrator to render a decision within 60 days of the oral hearing. However, there is very little enforcement power available to the union or the railroad to make the arbitrator render a decision if the arbitrator fails to do so within the prescribed time.

22. If I don't like the arbitrator's decision, can I sue?

Yes, someone who is unhappy with the arbitrator's decision may bring a lawsuit in federal district court. However, the chances of success are slim. The courts have interpreted the Railway Labor Act to allow arbitrators broad authority and in fact the courts have construed a review of a rail arbitrator's decision as the narrowest review in law. Thus, unless the disgruntled person can prove that there was fraud or corruption on the part of the arbitrator, the union, or the company, or that somehow the arbitrator exceeded the scope of his authority, it is virtually impossible to overturn an award of the arbitrator. Furthermore, if the arbitrator's award were overturned, in all probability the party would simply win the right to re-arbitrate the same issue.

23. If the railroad fires me because I violate an operating rule, may I sue the railroad for wrongful termination?

No. Generally, the assessment of discipline or termination is considered a minor dispute. The proper procedure is to file a time claim to have the discipline removed, which if is unresolved on the property, will result in binding arbitration. Remember

the courts have consistently held that arbitration is the exclusive remedy for rail workers who have been wrongfully discharged.

24. If the railroad refuses to pay my claim, may I sue the railroad?

No. The claim is governed exclusively by the Railway Labor Act, which means an employee's **only recourse** is to file a time claim and to pursue the claim to arbitration.

25. If I believe that the railroad has disciplined or discharged me on the basis of my race, sex, national origin, age, religion, or on the basis of a disability, may I sue the railroad?

Yes. You may sue the railroad on the basis that you were discriminated against due to your race, sex, national origin, age, religion, or on the basis of a disability.

26. May I file a lawsuit in addition to pursuing my claim pursuant to the Railway Labor Act if I have been discriminated against?

Yes. If you believe your discipline or termination is discriminatory in nature on the basis of race, sex, national origin, age, religion, or on the basis of a disability, you may file a discrimination lawsuit in addition to pursuing your claim for reinstatement or removal of discipline pursuant to the Railway Labor Act. Of course, if you intend to do that, you should seek advice immediately from your legal counsel.

27. If I believe my agreement has been violated, would it be a good idea to write my Congressman and/or the railroad superintendent to complain?

You might get a nice response, but this does nothing to protect your rights.

The only way for an employee to protect his rights pursuant to the Railway Labor Act for an agreement violation is to file a time claim. An agreement violation means anything from the Railroad's failure to call you for the proper assignment, the crew caller's failure to properly mark you up, an instruction from management to perform

work outside the scope of your agreement, failure to pay the proper basic day or arbitrary, and/or a wrongful assessment of discipline and/or termination. When any of these instances occur, in order to protect his or her rights the employee must timely file a time claim.

However, once a time claim is filed, it may be a good idea to write your Congressman, call the superintendent's office, call the timekeeper and/or write letters to the railroad in order to quickly resolve the matter. If the matter is resolved prior to arbitration, the claim can be withdrawn.

28. What is a formal investigation?

A formal investigation is a process that is required by the labor agreement. It is a procedure the Railroad must conduct prior to assessing an individual any type of discipline. Technically, the Railroad must show good cause before it may discipline or terminate an employee.

29. What is good cause dismissal?

Good cause simply means the railroad must prove that the employee violated some rule or rules before it may discipline or terminate an employee. This is different from the general non-railroad work environment where an employee is generally considered to be an "at will" employee. Pursuant to the labor agreements, the railroad must at least have an investigation, and it must be required to show good cause to warrant the discipline or termination.

However, the railroad is not the final word on whether or not good cause exists.

Remember that the arbitrator has the final word to determine whether or not there

was good cause and whether or not the railroad proved good cause before the discipline would be allowed to stand.

30. If I receive formal notice of an investigation, what should I do?

Contact your local chairperson. You and your local chairman must prepare a defense.

31. If I am charged for a rule violation and instructed to attend a formal investigation, should I expect to be disciplined or terminated?

Yes! The railroad does not charge an employee unless it intends to discipline or terminate the employee. Thus, you should expect that the railroad will assess some type of discipline.

32. If I am charged because I have been injured at work, what should I do?

You should contact your union representative and legal counsel immediately.

Remember what an employee says during an investigation may be used later in a court of law, against the employee. Often, the railroad will hold an investigation for an injured employee simply to obtain un-counseled testimony from the charged employee and other involved employees. Thus, the charged employee should expect to be asked very incriminating questions. The only solution is to be prepared, which means discussing the matter with your union representative and legal counsel well in advance of the investigation. Your representative should write the railroad and ask that relevant documents regarding the injury be produced for review well in advance of the investigation. For example, if the injury occurred because the employee slipped in oil on an engine running board, the representative should write the railroad and request that it produce the following:

1. The claim agent=s file including all photographs and statements taken by the claim agent regarding the accident;
2. Inspection reports made by mechanical forces after the accident;
3. Inspection reports made of the locomotive prior to the accident;
4. Repairs and maintenance reports made of the locomotive after the incident;
5. Accident reports completed by co-workers and other employees involved who witnessed the accident;
6. The Superintendent’s file regarding the accident;
7. The Trainmaster or other investigating officer’s file regarding the accident;
8. The charged employee’s medical records that are in possession of the railroad;
9. The charged employee’s personnel file.

The local chairman may request other documents relevant to the charges. Of course, the railroad does not have to produce such documents, but if the railroad fails to produce the documents, then an arbitrator may hold that the investigation was not conducted in a fair and impartial manner, because it failed to produce the requested relevant documents. Arbitrators have consistently held that the investigation must be held in a fair and impartial manner, which means that both sides should be on an equal playing field. If the railroad has documents regarding the accident or injury, then certainly the charged employee should have access to those documents prior to his testimony.

One recent arbitration award strongly upheld this principal as follows:

“The deliberate withholding of requested documents and information until the hearing that is relevant to the matter at issue, may, in certain circumstances, provide sufficient

grounds for exclusion...Such discovery should be permitted where the Carrier's tapes, transcripts and other documents that are germane and of critical importance to the charged employee...To arbitrarily withhold documentary and other written evidence until the investigation is held ... is palpably unreasonable."

Award 2, PLB 6365, Charles F. Fishbach, (2001)

Personal injury investigations are the most treacherous of all investigations. In order to be successful, they require an enormous amount of pre-investigation preparation and it is imperative for the charged employee to seek the advice of legal counsel prior to attending such an investigation.

33. If the railroad assesses discipline after the investigation, what should I do?

File a time claim. Have your case handled by the Union up through, and including, arbitration. It does no good to go through an investigation, if the discipline assessed is not appealed.

34. May I waive my formal investigation?

Yes. You have the right to waive the formal investigation. You may decide that it is in your best interest to simply make a plea bargain arrangement with the company whereby you agree to a preset amount of discipline for an agreement to waive the investigation. There is certainly nothing wrong with agreeing to an agreed amount of discipline in return for a waiver of the investigation. Remember, just because you think you are right and have been wrong by the railroad, does not mean you will win at arbitration.

35. If I agree to waive the investigation, may I still appeal to an arbitrator?

No. Generally, if an employee consents to discipline, the employee waives the right to appeal. In essence, a waiver of the investigation means the employee admits to the rule violations. However, in very rare, limited circumstances, an employee who waives an investigation without agreeing to a preset amount of discipline may, nevertheless, appeal the discipline (but not the fact that he was guilty) on the basis that the discipline assessed was harsh and excessive.

36. Am I entitled to representation at the investigation?

Yes. You're entitled to representation as provided for by your labor agreement. Most labor agreements provide for representation by your **local chairperson** or another employee on your seniority district.

37. Am I entitled to have a lawyer represent me at the investigation?

No. The courts have held that an employee is not entitled to be represented by anyone other than those persons set forth in the labor agreement.

38. Am I entitled by law to have my union representative present during an investigatory interview?

No. The **law** does not provide this right for railroad workers. For example, if a rail worker is confronted by a supervisor and is threatened to be removed from service for an alleged violation of rule G, the employee does not have the lawful right to wait until his union representative is present before talking to the supervisor. Employees covered by the National Labor Relations Act do have that right as mandated by the United States Supreme Court. This right is often referred to as a "Weingarten Right" as the Supreme Court case that decided this issue involved a Weingarten employee. Remember that some **rail labor**

agreements do specifically provide for the right to have your union representative present before being interrogated by management, so be sure and know what rights you have pursuant to the controlling labor agreement.

39. How long does the arbitration process take?

The process normally takes about eighteen (18) months from the time the claim is initially filed until the arbitrator renders a decision.

II. THE RAIL SAFETY ACT

II THE RAIL SAFETY ACT

At the time of its passage in 1970, the Rail Safety Act was the "most comprehensive" rail safety legislation ever enacted by Congress. As with all safety legislation, the Act should be broadly construed to effectuate the congressional purpose. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13, 63 L. Ed. 2d 154, 100 S. Ct. 883 (1980).

Specifically, § 20109 (a) of the FRSA was meant to protect railroad employees who are harassed, discriminated against, or discharged by their employers for reporting safety violations. Such "retaliatory actions by employers [were] not to be tolerated in the work place." *Id.* at 3832. Railroad employees would no longer "be forced to choose between their lives and their livelihoods." *Id.* The purpose of the Act is to reduce injuries to persons and damage to property caused by railroad accidents. *See* 45 U.S.C. § 20109. Section 20109(a) furthers these goals by protecting railroad employees who report safety violations. In short, it was Congress' intent to protect all railroad employees who report safety violations.

Section 20109(a) specifically provides:

(a) Filing complaints and testifying. A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has--

(1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part et seq. or, as applicable to railroad safety, chapter 51 or 57 of this title et seq.; or

(2) testified or will testify in that proceeding.

These provisions apply to complaints made to railroad managers and/or to those persons directly responsible for enforcement, such as inspectors for the Federal Railroad Administration.

Rayner v. CSX, 873 F. 2d 60 (4th Cir. 1989). 49 USC 20101 encompasses all of the safety

regulations promulgated by the Federal Railroad Administration codified as 49 CFR 200 *et seq.*

The enforcement provisions of the act are as follows:

Dispute resolution. A dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act. In a proceeding by the National Railroad Adjustment Board, a division or delegate of the Board, or another board of adjustment established under section 3 to resolve the dispute, grievance, or claim, the proceeding shall be expedited and the dispute, grievance, or claim shall be resolved not later than 180 days after it is filed. If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than \$ 20,000.

Thus, an employee who files a complaint or has proceedings brought to enforce a railroad safety regulation is not to be discharged or in any way discriminated against by the railroad. Therefore, if an employee contacts the Federal Railroad Administration to complain about the enforcement of a safety regulation, such as a defective locomotive, the railroad is prohibited from discharging or discriminating *in any way* against that employee because of the report.

Should the railroad violate the law, the employee has a right to file a time claim, pursuant to the Railway Labor Act, and have that claim adjudicated by a railroad arbitrator. Further, the law provides that such claims must: (1) be resolved no later than 180 days after filing, and (2) the arbitrator may award the employee reasonable damages, including punitive damages, of not more than \$20,000.00. 49 U.S.C. '20109(c).

The Act also allows for the investigation and surveillance of safety regulations by state agencies. Thus, the Federal Railroad Administration or a state agency, such as the Texas Railroad Commission, may participate in the investigation, surveillance and enforcement of safety regulations. The Rail Safety Act also provides the authority for the

promulgation of regulations regarding certification of engineers, and alcohol and drug testing.

Section 20109(b) is also the only law that allows an employee to refuse to work because of hazardous conditions as follows:

(b) Refusing to work because of hazardous conditions.

(1) A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if--

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that--

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger through regular statutory means; and

(C) the employee, where possible, has notified the carrier of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately.

(2) This subsection does not apply to security personnel employed by a carrier to protect individuals and property transported by railroad.

This means a rail employee may refuse to perform work when confronted by a serious hazardous condition. However, there are many caveats to the law. For example, the refusal must be made in good faith. Good faith is a vague term that is subject to various interpretations, as is "a reasonable individual would conclude that the condition presents eminent danger of death or serious injury." Thus, care must be taken before relying on the law to refuse to work because of hazardous conditions. However, if the employee were instructed to switch leaking LPG tank cars, refusal to perform the work would probably be protected by ' 20109.

Remember, the accepted rule in the railroad industry is that an employee must comply now and grieve later. Generally, an employee is insubordinate any time he or

she refuses a direct order from their supervisor. Railway Labor Act arbitrators have consistently held that the railroad industry is quasi-military in nature and subordinate employees are required to comply with the instructions of superiors, unless to do so would endanger life, limb or property. PLB 2498, Award 16, Arthur T. Van Wart (1980). Thus, the only time an employee can refuse a direct order from a supervisor with impunity is when the instructions are clearly unsafe which places the employee=s safety in extreme peril as set forth in ' 20109(b). Furthermore, if an employee feels the direct order does seriously endanger life, limb, or property and refuses the direct order **he must be able to prove his contention**, in order to justify the refusal. PLB 600, Award 60, Preston J. Moore (1975).

By way of example, arbitrators have held that the following acts constitute insubordination:

- § Laying off against orders at the away from home terminal; PLB 1613, Award 248, John Criswell (1976).
- § Refusing to perform work prohibited by the scheduled labor agreement, i.e., sanding engines, aligning switches, working shorthanded, handling EOT devices. PLB 1503, Award 25, Murray Rohman (1977).
- § Refusing to work shorthanded. PLB 1692, Award 1, Nicholas Zumas (1977).
- § Refusing conductor=s orders to walk and inspect train. PLB 1312, Award 217, Arthur T. Van Wart (1977).
- § Refusing to accept a switch list thirty-five minutes before ending duty. PLB 1842, Award 16, Louis Yagoda (1977).
- § Refusal to Amake out@ accident report after substantial evidence of personal injury. PLB 1908, Award 2, Preston J. Moore (1978).
- § Refusal to report for a physical examination. PLB 2076, Award 1, Arthur T. Van Wart (1978).

§ Refusal to report to work in forty-five instead of the normal one and one-half hour call time. PLB 912, Award 461, Preston J. Moore (1979).

§ Refusal to attend rules classes. PLB 2003, Award 5, David H. Brown (1979).

In essence, '20109(b) merely codifies what arbitrators have consistently held to be the rule of the railroad industry for many years, that is an employee can refuse a direct order with impunity only if the instructions are clearly unsafe which places the employee=s safety at extreme peril. Insubordination is one of the most serious charges in the rail industry and employees must be cognizant of their very narrow right of refusal.

Rail employees should be aware of the thousands of regulations promulgated by the Federal Railroad Administration, which are contained in 49 C.F.R. parts 200-399 dealing with the rail industry. There are literally thousands of regulations that the FRA has imposed on the railroads to make the work place safe. The regulations deal with everything from trackside drainage to locomotive safety conditions. A complete text of 49 C.F.R. 200-399 can be obtained at any government bookstore and is available on the Internet.

49 C.F.R. 214.33 requires the railroads to keep ditches and drain pipes under or immediately adjacent to the roadbed free of obstruction to accommodate expected water flow. Thus, low switches which often are covered in water or muddy walkways or standing water in ditches breeding mosquitoes and snakes would come under the jurisdiction of the FRA for correction pursuant to '213.33. 49 C.F.R. 213.37 deals with the vegetation on railroad property. It states in pertinent part:

Vegetation on railroad property which is on or immediately adjacent to the roadbed must be controlled so that it does not - (c) interfere with railroad employees performing normal track side duties.

Thus, weeds growing on railroad property immediately adjacent to the roadbed that interferes with a trainman performing his normal duties such as coupling tracks, inspecting trains, etc. would be an area that the FRA has jurisdiction of to take corrective measures pursuant to ' 213.37.

49 C.F.R. ' 219.119 deals with cab floors and passageways of locomotives. These standards are of critical importance to every operating employee as a large portion of the work of every trainman or engineman is now spent in a locomotive cab. Section 229.119(a) provides: "Cab seats should be securely mounted and braced. Cab doors should be properly equipped with a secure and operable latching device." Thus, if a seat is missing a mounting pin or is not properly braced or if the cab doors on the locomotive will not shut properly, or if the failure of the doors to shut allows excessive amounts of cold air to enter the cab, the FRA would have jurisdiction over these matters for correction.

Section 229.119(c) provides in pertinent part:

Floors of cabs, passage ways and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

Thus, cab floors and walkways are to be kept free from sump oil, crater grease, empty water bottles, leakage from air conditioners, paper towels, flag sticks, fusees, or any other obstruction which could cause an employee to slip or trip. Again the FRA has jurisdiction to correct these problems pursuant to ' 229.119(c).

Section 229.119(d) provides in pertinent part:

The cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 50E Fahrenheit six inches above the center of each seat in the cab.

Thus, an engine that has battery gases coming into the cab of the locomotive or diesel exhaust coming into the cab of the locomotive would probably be in violation of ' 229.119(d) and the FRA would have jurisdiction to make corrections. An engine that does not have a heater which maintains a temperature of at least 50E Fahrenheit six inches above the cab would also be an area where the FRA would have jurisdiction to make corrections.

These are but a few of the thousands of examples of safety regulations that are applicable to the rail industry. Each rail worker should familiarize himself with the all the safety regulations imposed by the FRA and when the railroad is not in compliance each employee should report non-complying acts with the Federal Railroad Administration for correction. The Rail Safety Act recognizes that proper enforcement of the law requires the assistance of each rail worker. Accordingly, the law provides protection against retaliation by the railroad for those employees who report non-compliance to the proper authority.

Finally, the Rail Safety Act ' 20109(e) prohibits the disclosure of the identity of the complaining party:

(e) Disclosure of identity.

(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part [49 USCS §§ 20101 et seq.] or, as applicable to railroad safety, chapter 51 or 57 of this title [49 USCS §§ 5101 et seq. or 5701 et seq.] or a regulation prescribed or order issued under any of those provisions.

(2) The Secretary shall disclose to the Attorney General the name of an employee described in paragraph (1) of this subsection if the matter is referred to the Attorney General for enforcement.

Thus, the Federal Railroad Administration should not disclose the name of the complaining party unless the complaining party consents to such disclosure.

QUESTIONS AND ANSWERS

Q. If I think a manager has told me to violate an FRA regulation, what are my options?

A. The best way to correct the problem is to notify the FRA. The FRA is responsible to enforce the regulations. It is the only agency with the authority to insure compliance. You can also complain to the railroad. You should contact your local chairman and/or legislative representative and make a written complaint as well.

Q. If I am told to violate a safety regulation, do I have the right to refuse?

A. Generally no! The only time you can lawfully refuse a direct order from a manager is if that order confronts you with a hazardous condition and:

1. Your refusal is made in good faith and there is no reasonable alternative.
2. A reasonable individual in the circumstance then confronting the employee would conclude:
 - a. The hazardous condition presents imminent danger of death or serious injury;
 - b. The urgency of the situation does not allow sufficient time to eliminate the danger through normal statutory means.
3. You have notified the company of the hazardous condition and your intention not to perform further work until the condition is corrected immediately.

If one declines to perform work and relies on this provision for protection from insubordination charges, it will be up to the arbitrator to determine if all the provisions of the law actually provide protection, based on the facts of the case.

Q. If I make a complaint regarding the enforcement of a safety law, do I have any protection from discharge or discrimination?

A. Yes! The law specifically provides protection for an employee who makes a complaint regarding the enforcement any of the safety provisions of the Rail Safety Act. If you have reported a violation of the act, either to a manager of the railroad, or to a governmental agency and later you are disciplined or in "in any way discriminated against" you have the protection of the law.

Q. If the railroad charges me and fires me for a minor rule infraction, but I think it is because I made a complaint regarding the enforcement of the Rail Safety Act, do I have the right to file a lawsuit?

A. NO! The Rail Safety Act specifically provides for arbitration of this type of dispute. Thus, if one is disciplined, discharged, or in any way discriminated against as a result of making a complaint, a time claim must be filed and handled to arbitration.

Q. How should the claim be worded?

A. Claim of engineer Deadhead Jones for reasonable and punitive damages as provided for in the Rail Safety Act account discharged (discriminated against) account of making a complaint regarding the enforcement of the Rail Safety Act.

Remember this law allows the arbitrator to award reasonable and punitive damages, not to exceed \$20,000.00. in cases where the employee is not disciplined or discharged. In addition the law requires the dispute to be resolved within 180 days after filing.

Q. If I am fired or disciplined because I refuse a direct order based on a belief that the order confronts me with a hazardous condition, do I have the remedies provided for in the act?

A. YES. You are entitled to make a claim and have your claim arbitrated within 180 after filing. You are also entitled to claim the other benefits of the act.

Q. If I call the FRA and make a complaint regarding the enforcement of the Rail Safety Act, do I have to give them my name?

A. NO. The law specifically provides that you do not have to give a name to make a complaint. However, if the FRA is going to recommend that a fine be levied against the carrier for the violation, the individual must give his or her name.

Q. How can I find out what safety regulations are covered by the Act?

A. Most of the regulations that the Rail Safety Act encompasses are those contained as 49 CFR §§ 200.1 – 266.25. You can purchase a book containing all of the regulations at any government bookstore. They are also available on the web at <http://www.fra.dot.gov/index.asp>.

III. CODE OF FEDERAL REGULATIONS

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Pursuant to the Rail Safety Act the Federal Railroad Administration has promulgated many laws that govern safety in the rail industry. These regulations are codified as 49 CFR Part 210. Below is a summary of some of the regulations.

A. Noise Emission Standards - 49 CFR 201

The FRA has promulgated several standards, which govern the amount of noise that can be emitted from the operation of trains and the switching of cars. These standards set forth the maximum amount of noise that can be emitted from the operation. Below is a brief summary of those standards:

Locomotives manufactured prior to December 1, 1979:

- Standing still at idle 73 dbs.
- Stationary all other throttle settings 93dbs.
- Moving 96dbs.

Locomotives manufactured after December 1, 1979:

- Standing still at idle 70dbs.
- Stationary all other throttle settings 87dbs.
- Moving 90dbs.

Rail Cars:

- Moving at speeds of 45 MPH or less 88dbs.
- Moving at speeds of more than 45MPH 93dbs.
- Retarders 83dbs.
- Car couplings 92dbs.

B. Track Safety Standards - 49 CFR 213

There are numerous regulations for track safety standards. These regulations cover many aspects of the track, including, but not limited to: drainage, vegetation, ballast, cross ties, rail anchors, gauge, switches, frogs and track speed.

1. Drainage - 49 CFR 213.33:

Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

This regulation is clearly intended to ensure that there is adequate drainage for the track. Poor drainage will cause Apumping. This is a condition where a low spot in the track will move up and down as a train goes over the track. Mud and water will splash to the top of the ties and rail when trains go over the spot. Poor drainage will also cause the track to sink and will lead to wide gauge of the rails.

These regulations mean that ditches along side of the track, drains in the rail yard, and other water carrying facilities must be kept free of obstructions, such as vegetation and any other debris that prevents the water from draining.

2. Vegetation - 49 CFR 213.37:

There are numerous regulations which regulation vegetation on and near the roadbed, as follows:

Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not -- (a) Become a fire hazard to track-carrying structures; (b) Obstruct visibility of railroad signs and signals:

- (1) Along the right-of-way, and
- (2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.)

- (c) Interfere with railroad employees performing normal trackside duties;
- (d) Prevent proper functioning of signal and communication lines; or
- (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.®

Among other things, these regulations require the railroad to cut the vegetation so that it does not obstruct the visibility of trackside signals, including but not limited to:

- Crossing signals
- Block and absolute signals
- Milepost signs
- Whistle Boards

The vegetation must be controlled so that it does not interfere with the performance of normal trackside duties. This means that the weeds alongside the track must be cut so that it is safe to walk a train without tripping or walking in high weeds.

3. Ballast - 49 CFR 103:

Basically the regulations provide that the track shall be supported a material which will support the track and provide proper drainage as follows:

Unless it is otherwise structurally supported, all track shall be supported by material, which will --

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
- (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
- (c) Provide adequate drainage for the track; and
- (d) Maintain proper track crosslevel, surface, and alignment.®

The regulations do not provide for a certain size of ballast for yard or main track. It is not a violation of the law for the railroad to have main line size ballast within the yards for crews to walk on while doing switching operations. Most railroads do have more stringent standards that require 1 2 inch ballast for the yards and 2 2 inch ballast for the main track.

4. Switches 49 CFR 213.37:

The regulations for the conditions of switches are as follows:

- A(a) Each stock rail must be securely seated in switch plates, but care shall be used to avoid canting the rail by over tightening the rail braces.
- (b) Each switch point shall fit its stock rail properly, with the switch stand in either of its closed positions to allow wheels to pass the switch point. Lateral and vertical movement of a stock rail in the switch plates or of a switch plate on a tie shall not adversely affect the fit of the switch point to the stock rail. Broken or cracked switch point rails will be subject to the requirements of ' ' 213.113, except that where remedial actions C, D, or E require the use of joint bars, and joint bars cannot be placed due to the physical configuration of the switch, remedial action B will govern, taking into account any added safety provided by the presence of reinforcing bars on the switch points.
- (c) Each switch shall be maintained so that the outer edge of the wheel tread cannot contact the gage side of the stock rail.
- (d) The heel of each switch rail shall be secure and the bolts in each heel shall be kept tight.
- (e) Each switch stand and connecting rod shall be securely fastened and operable without excessive lost motion.
- (f) Each throw lever shall be maintained so that it cannot be operated with the lock or keeper in place.
- (g) Each switch position indicator shall be clearly visible at all times.
- (h) Unusually chipped or worn switch points shall be repaired or replaced. Metal flow shall be removed to insure proper closure.@

Thus, the regulations make it unlawful for a switch to be hard to throw, for the points to be worn or chipped, for there to be space between the stock rail and the points and for the connecting rod to hit the ties, the tie plate, ballast or any other obstruction when the switch is actually lined.

C. Railroad Freight Safety Standards - 49 CFR 215

The regulations regarding freight car standards are extensive. They cover everything car suspension, ladders, handbrakes, couplers, wheels, and platforms. Trainmen come

into contact with the regulations regarding couplers as a major part of their duties is to couple and uncouple cars. Below are some of the regulations that cover couplers:

- A railroad may not place or continue in service a car, if--
- (a) The car is equipped with a coupler shank that is bent out of alignment to the extent that the coupler will not couple automatically with the adjacent car;
 - (b) The car has a coupler that has a crack in the highly stressed junction area of the shank and head.
 - (c) The car has a coupler knuckle that is broken or cracked on the inside pulling face of the knuckle.
 - (d) The car has a knuckle pin or knuckle thrower that is: (1) Missing; or (2) Inoperative; or
 - (e) The car has a coupler retainer pin lock that is-- (1) Missing; or (2) Broken; or
 - (f) The car has a coupler with any of the following conditions: (1) The locklift is inoperative;
- (2) The coupler assembly does not have anticreep protection to prevent unintentional unlocking of the coupler lock; or
- (3) The coupler lock is--
- (i) Missing; (ii) Inoperative; (iii) Bent; (iv) Cracked; or (v) Broken.

Thus, it is unlawful for a freight car to have a broken or cracked knuckle, or a bent or broken cut lever, or a bent or missing knuckle pin. The cars must couple and uncouple automatically. Thus, it is a violation of the law if the cars come uncoupled unless the cut lever is pulled. It is also a violation of the law if the joint does not make. A railroad employee is not supposed to have to go in between the cars to make a joint or uncouple the cars.

D. Step sills and Side ladders - 49 CFR 231.1

The regulations have specific requirements for step sills and side ladders. Below are the most current:

Sill steps--(1) Number. Four. (2) Dimensions. Minimum cross-sectional area 1/2 by 1 1/2 inches, or equivalent, of wrought iron or steel. Minimum length of tread, 10, preferably 12, inches. Minimum clear depth, 8 inches. (3) Location. (i) One near each end of each side of car, so that there shall be not more than 18 inches from end of car to center of tread of sill step.

(ii) Outside edge of tread of step shall be not more than 4 inches inside of face of side of car, preferably flush with side of car. (iii) Tread shall be not more than 24, preferably not more than 22, inches above the top of rail.

Ladders--(1) Number. Four. (2) Dimensions. (i) Minimum clear length of tread: Side ladders 16 inches; end ladders 14 inches. Maximum spacing between ladder treads, 19 inches.

(ii) Top ladder tread shall be located not less than 12 nor more than 18 inches from roof at eaves. (iii) Spacing of side ladder treads shall be uniform within a limit of 2 inches from top ladder tread to bottom tread of ladder. (iv) Maximum distance from bottom tread of side ladder to top tread of sill step, 21 inches. (v) End ladder treads shall be spaced to coincide with treads of side ladders, a variation of 2 inches being allowed. Where construction of car will not permit the application of a tread of end ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder. (vi) Hardwood treads, minimum dimensions 1 1/2 by 2 inches. (vii) Iron or steel treads, minimum diameter five-eighths of an inch. (viii) Minimum clearance of treads, 2, preferably 2 1/2, inches.

(3) Location. (i) One on each side, not more than 8 inches from right end of car; one on each end, not more than 8 inches from left side of car; measured from inside edge of ladder stile or clearance of ladder treads to corner of car.

E. Radio Communications - 49 CFR 220

The regulations also cover the use of radios in railroad work. The regulations require that call letters be given before and after a transmission, except in some yard switching operations. They also cover many other aspects of radio communications including a little known rule regarding shoving operations:

When radio communication is used in connection with the shoving, backing or pushing of a train, locomotive, car, or on-track equipment, the employee directing the movement shall specify the distance of the movement, and the movement shall stop in one-half the remaining distance unless additional instructions are received. If the instructions are not understood, the movement shall be stopped immediately and may not be resumed until the misunderstanding has been resolved, radio contact has been restored, or communication has been achieved by hand signals or other procedures in accordance with the operating rules of the railroad. (49 CFR 221.49)

This regulation requires that an engineer be given a specific distance and direction before beginning any shoving movement. Further, the engineer must be stopped within 2 the distance specified, unless further instructions are received. Therefore, it is a violation of the law and the operating rules for a shoving movement to commence on A shove =em back, clear track@ or A shove them in the clear.@

F. Railroad Locomotive Safety Standards - 49 CFR 229

Railroad safety standards cover all aspects of the condition of the locomotive, including but not limited to:

- a. Speed indicators.
- b. Unobstructed cab floors and passageways.
- c. Cab lights.
- d. Toilets.
- e. Event recorders.

A. SPEED INDICATORS:

- (a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a speed

indicator which is-- (1) Accurate within +/-3 miles per hour of actual speed at speeds of 10 to 30 miles per hour and accurate within +/-5 miles per hour at speeds above 30 miles per hour; and (2) Clearly readable from the engineer's normal position under all light conditions.

- (b) Each speed indicator required shall be tested as soon as possible after departure by means of speed test sections or equivalent procedures.

B. CAB FLOORS AND PASSAGEWAYS:

- (a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.
- (b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, Safety Glazing Standards, 49 CFR part 223, 44 FR 77348, Dec. 31, 1979.)
- (c) Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.
- (d) The cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 50 degrees Fahrenheit 6 inches above the center of each seat in the cab.
- (e) Similar locomotives with open-end platforms coupled in multiple control and used in road service shall have a means of safe passage between them; no passageway is required through the nose of car body locomotives. There shall be a continuous barrier across the full width of the end of a locomotive or a continuous barrier between locomotives.
- (f) Containers shall be provided for carrying fusees and torpedoes. A single container may be used if it has a partition to separate fusees from torpedoes. Torpedoes shall be kept in a closed metal container.

C. CAB LIGHTS:

- (a) Each locomotive shall have cab lights, which will provide sufficient illumination for the control instruments, meters, and gauges to enable the engine crew to make accurate readings from their normal positions in the cab. These lights shall be located, constructed, and maintained so that light shines only on those parts requiring illumination and does not interfere with the crew's vision of the track and signals. Each controlling locomotive shall also have a conveniently located light that can be readily turned on and off

by the persons operating the locomotive and that provides sufficient illumination for them to read train orders and timetables.

- (b) Cab passageways and compartments shall have adequate illumination.

D. TOILETS:

- (a) Sanitation compartment. Except as provided in paragraph (b) of this section, all lead locomotives in use shall be equipped with a sanitation compartment. Each sanitation compartment shall be: (1) Adequately ventilated; (2) Equipped with a door that:
 - (i) Closes, and (ii) Possesses a modesty lock by [18 months after publication of the final rule];
- (3) Equipped with a toilet facility, as defined in this part;
- (4) Equipped with a washing system, as defined in this part, unless the railroad otherwise provides the washing system to employees upon reporting for duty or occupying the cab for duty, or where the locomotive is equipped with a stationary sink that is located outside of the sanitation compartment;
- (5) Equipped with toilet paper in sufficient quantity to meet employee needs, unless the railroad otherwise provides toilet paper to employees upon reporting for duty or occupying the cab for duty; and (6) Equipped with a trash receptacle, unless the railroad otherwise provides portable trash receptacles to employees upon reporting for duty or occupying the cab for duty.
- b) Exceptions. (1) Paragraph (a) of this section shall not apply to:
 - (i) Locomotives engaged in commuter service or other short-haul passenger service and commuter work trains on which employees have ready access to railroad-provided sanitation facilities outside of the locomotive or elsewhere on the train, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift; (ii) Locomotives engaged in switching service on which employees have ready access to railroad-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift; (iii) Locomotives engaged in transfer service on which employees have ready access to railroad-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift; (iv) Locomotives of Class III railroads engaged in operations other than switching service or transfer service, that are not equipped with a sanitation compartment as of June 3, 2002. Where an unequipped locomotive of a Class III railroad is engaged in operations other than switching or transfer service, employees shall have ready access to railroad-provided sanitation facilities outside of the locomotive that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift, or the

railroad shall arrange for enroute access to such facilities; (v) Locomotives of tourist, scenic, historic, or excursion railroad operations, which are otherwise covered by this part because they are not propelled by steam power and operate on the general railroad system of transportation, but on which employees have ready access to railroad-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift; and (vi) Except as provided in ' ' 229.14 of this part, control cab locomotives designed for passenger occupancy and used in intercity push-pull service that are not equipped with sanitation facilities, where employees have ready access to railroad-provided sanitation in other passenger cars on the train at frequent intervals during the course of their work shift.

(2) Paragraph (a)(3) of this section shall not apply to:

(i) Locomotives of a Class I railroad which, prior to the effective date of this section], were equipped with a toilet facility in which human waste falls via gravity to a holding tank where it is stored and periodically emptied, which does not conform to the definition of toilet facility set forth in this section. For these locomotives, the requirements of this section pertaining to the type of toilet facilities required shall be effective as these toilets become defective or are replaced with conforming units, whichever occurs first. All other requirements set forth in this section shall apply to these locomotives as of June 3, 2002; and (ii) With respect to the locomotives of a Class I railroad which, prior to June 3, 2002, were equipped with a sanitation system other than the units addressed by paragraph (b)(2)(i) of this section, that contains and removes human waste by a method that does not conform with the definition of toilet facility as set forth in this section, the requirements of this section pertaining to the type of toilet facilities shall apply on locomotives in use on July 1, 2003. However, the Class I railroad subject to this exception shall not deliver locomotives with such sanitation systems to other railroads for use, in the lead position, during the time between June 3, 2002, and July 1, 2003. All other requirements set forth in this section shall apply to the locomotives of this Class I railroad as of June 3, 2002.

(c) Defective, unsanitary toilet facility; prohibition in lead position. Except as provided in paragraphs (c)(1) through (5) of this section, if the railroad determines during the daily inspection required by ' ' 229.21 that a locomotive toilet facility is defective or is unsanitary, or both, the railroad shall not use the locomotive in the lead position. The railroad may continue to use a lead locomotive with a toilet facility that is defective or unsanitary as of the daily inspection only where all of the following conditions are met:

(1) The unsanitary or defective condition is discovered at a location where there are no other suitable locomotives available for use, ie., where it is not possible to switch another locomotive into the lead position, or the location is not equipped to clean the sanitation compartment if unsanitary or repair the

toilet facility if defective; (2) The locomotive, while noncompliant, did not pass through a location where it could have been cleaned if unsanitary, repaired if defective, or switched with another compliant locomotive, since its last daily inspection required by this part; (3) Upon reasonable request of a locomotive crewmember operating a locomotive with a defective or unsanitary toilet facility, the railroad arranges for access to a toilet facility outside the locomotive that meets otherwise applicable sanitation standards; (4) If the sanitation compartment is unsanitary, the sanitation compartment door shall be closed and adequate ventilation shall be provided in the cab so that it is habitable; and (5) The locomotive shall not continue in service in the lead position beyond a location where the defective or unsanitary condition can be corrected or replaced with another compliant locomotive, or the next daily inspection required by this part, whichever occurs first.

(d) Defective, unsanitary toilet facility; use in trailing position. If the railroad determines during the daily inspection required by ' ' 229.21 that a locomotive toilet facility is defective or is unsanitary, or both, the railroad may use the locomotive in trailing position. If the railroad places the locomotive in trailing position, they shall not haul employees in the unit unless the sanitation compartment is made sanitary prior to occupancy. If the toilet facility is defective and the unit becomes occupied, the railroad shall clearly mark the defective toilet facility as unavailable for use. (e) Defective, sanitary toilet facility; use in switching, transfer service. If the railroad determines during the daily inspection required by ' ' 229.21 that a locomotive toilet facility is defective, but sanitary, the railroad may use the locomotive in switching service, as set forth in paragraph (b)(1)(ii) of this section, or in transfer service, as set forth in paragraph (b)(1)(iii) of this section for a period not to exceed 10 days. In this instance, the railroad shall clearly mark the defective toilet facility as unavailable for use. After expiration of the 10-day period, the locomotive shall be repaired or used in the trailing position. (f) Lack of toilet paper, washing system, trash receptacle. If the railroad determines during the daily inspection required by ' ' 229.21 that the lead locomotive is not equipped with toilet paper in sufficient quantity to meet employee needs, or a washing system as required by paragraph (a)(4) of this section, or a trash receptacle as required by paragraph (a)(6) of this section, the locomotive shall be equipped with these items prior to departure. (g) Inadequate ventilation. If the railroad determines during the daily inspection required by ' ' 229.21 that the sanitation compartment of the lead locomotive in use is not adequately ventilated as required by paragraph (a)(1) of this section, the railroad shall repair the ventilation prior to departure, or place the locomotive in trailing position, in switching service as set forth in paragraph (b)(1)(ii) of this section, or in transfer service as set forth in paragraph (b)(1)(iii) of this section. (h) Door closure and modesty lock. If the railroad determines during the daily inspection required by ' ' 229.21 that the sanitation compartment on the lead locomotive is not equipped with a door that closes, as required by paragraph (a)(2)(i) of this section, the railroad shall repair the door prior to departure, or place the locomotive in trailing position, in

switching service as set forth in paragraph (b)(1)(ii) of this section, or in transfer service as set forth in paragraph (b)(1)(iii) of this section. If the railroad determines during the daily inspection required by ' ' 229.21 that the modesty lock required by paragraph (a)(2)(ii) of this section is defective, the modesty lock shall be repaired pursuant to the requirements of ' ' 229.139(e). (i) Equipped units; retention and maintenance. Except where a railroad downgrades a locomotive to service in which it will never be occupied, where a locomotive is equipped with a toilet facility as of [the effective date of the final rule], the railroad shall retain and maintain the toilet facility in the locomotive consistent with the requirements of this part, including locomotives used in switching service pursuant to paragraph (b)(1)(ii) of this section, and in transfer service pursuant to paragraph (b)(1)(iii) of this section. (j) Newly manufactured units; in-cab facilities. All locomotives manufactured after June 3, 2002, except switching units built exclusively for switching service and locomotives built exclusively for commuter service, shall be equipped with a sanitation compartment accessible to cab employees without exiting to the out-of-doors for use. No railroad may use a locomotive built after June 3, 2002, that does not comply with this subsection. (k) Potable water. The railroad shall utilize potable water where the washing system includes the use of water.

E. SERVICING REQUIREMENTS FOR TOILETS

(a) The sanitation compartment of each lead locomotive in use shall be sanitary.

(b) All components required by ' ' 229.137(a) for the lead locomotive in use shall be present consistent with the requirements of this part, and shall operate as intended such that:

(1) All mechanical systems shall function; (2) Water shall be present in sufficient quantity to permit flushing; (3) For those systems that utilize chemicals for treatment, the chemical (chlorine or other comparable oxidizing agent) used to treat waste must be present; and (4) No blockage is present that prevents waste from evacuating the bowl.

(c) The sanitation compartment of each occupied locomotive used in switching service pursuant to ' ' 229.137(b)(1)(ii), in transfer service pursuant to ' ' 229.137(b)(1)(iii), or in a trailing position when the locomotive is occupied, shall be sanitary. (d) Where the railroad uses a locomotive pursuant to ' ' 229.137(e) in switching or transfer service with a defective toilet facility, such use shall not exceed 10 calendar days from the date on which the defective toilet facility became defective. The date on which the toilet facility becomes defective shall be entered on the daily inspection report. (e) Where it is determined that the modesty lock required by ' ' 229.137(a)(2) is defective, the railroad shall repair the modesty lock on or before the next 92-day inspection required by this part.

F. EVENT RECORDERS

(a) Duty to equip. Effective May 5, 1995, and except as provided in paragraph (b) of this section, any train operated faster than 30 miles per hour shall have an in-service event recorder in the lead locomotive. The presence of the event recorder shall be noted on Form FRA F6180-49A, under the REMARKS section, except that an event recorder designed to allow the locomotive to assume the lead position only if the recorder is properly functioning is not required to have its presence noted on Form FRA F6180-49A. For the purpose of this section, "train" includes a locomotive or group of locomotives with or without cars, and "lead locomotive" means the locomotive from whose cab the crew is operating the train and, when cab control locomotives and/or MU locomotives are coupled together, is the first locomotive proceeding in the direction of movement. The duty to equip the lead locomotive may be met with an event recorder located elsewhere than the lead locomotive provided that such event recorder monitors and records the required data as though it were located in the lead locomotive.

(b) Response to defective equipment. A locomotive on which the event recorder has been taken out of service as provided in paragraph (c) of this section may remain as the lead locomotive only until the next calendar-day inspection. A locomotive with an inoperative event recorder is not deemed to be in improper condition, unsafe to operate, or a non-complying locomotive under ' ' ' ' 229.7 and 229.9, and notwithstanding any other requirements in this chapter, inspection, maintenance, and testing of event recorders is limited to the requirements set forth in ' ' 229.25(e).

(c) Removal from service. A railroad may remove an event recorder from service and, if a railroad knows that an event recorder is not monitoring or recording the data specified in ' ' 229.5(g), shall remove the event recorder from service. When a railroad removes an event recorder from service, a qualified person shall cause to be recorded the date the device was removed from service on Form FRA F6180-49A, under the REMARKS section. An event recorder designed to allow the locomotive to assume the lead position only if the recorder is properly functioning is not required to have its removal from service noted on Form FRA F6180-49A. (d) Preserving accident data. For the purposes of this section, the term "event recorder" includes all locomotive-mounted recording devices designed to record information concerning the functioning of a locomotive or train regardless of whether the device meets the definition of "event recorder" in ' ' 229.5.

(1) Accidents required to be reported to the Federal Railroad Administration. If any locomotive equipped with an event recorder is involved in an accident that is required to be reported to FRA, the railroad using the locomotive shall, to the extent possible, and to the extent consistent with the safety of life and property, preserve the data recorded by the device for analysis by FRA. This preservation requirement permits the railroad to extract and analyze such data; provided the original or a first-order accurate copy of the data shall be retained in secure custody and shall not be utilized for analysis or any other purpose except by direction of FRA or the National Transportation Safety Board. This preservation requirement shall expire 30 days after the date of

the accident unless FRA or the Board notifies the railroad in writing that the data are desired for analysis. (2) Relationship to other laws. Nothing in this section is intended to alter the legal authority of law enforcement officials investigating potential violation[s] of State criminal law[s] and nothing in this chapter is intended to alter in any way the priority of National Transportation Safety Board investigations under 49 U.S.C. 1131 and 1134, nor the authority of the Secretary of Transportation to investigate railroad accidents under 49 U.S.C. 5121, 5122, 20107, 20111, 20112, 20505, 20702, 20703, and 20902.

(e) Disabling event recorders. Except as provided in paragraph (c) of this section, any individual who willfully disables an event recorder is subject to civil penalty and to disqualification from performing safety-sensitive functions on a railroad as provided in ' ' 218.55 of this chapter and any individual who tampers with or alters the data recorded by such a device is subject to a civil penalty as provided in appendix B of this part and to disqualification from performing safety-sensitive functions on a railroad if found unfit for such duties under the procedures in 49 CFR part 209.

G. ENGINE HORN REQUIREMENTS

§ 222.1 What is the purpose of this regulation? [Effective Dec. 18, 2004.]

The purpose of this part is to provide for safety at public highway-rail grade crossings by requiring locomotive horn use at public highway-rail grade crossings except in quiet zones established and maintained in accordance with this part.

§ 222.3 What areas does this regulation cover? [Effective Dec. 18, 2004.]

This part prescribes standards for sounding locomotive horns when locomotives approach and pass through public highway-rail grade crossings. This part also provides standards for the creation and maintenance of quiet zones within which locomotive horns need not be sounded.

§ 222.5 What railroads does this regulation apply to? [Effective Dec. 18, 2004.]

This part applies to all railroads except:

(a) A railroad that exclusively operates freight trains only on track which is not part of the general railroad system of transportation;

(b) Passenger railroads that operate only on track which is not part of the general railroad system of transportation and which operate at a maximum speed of 15 miles per hour; and

(c) Rapid transit operations within an urban area that are not connected to the general railroad system of transportation. see 49 CFR part 209, appendix A for the definitive statement of the meaning of the preceding sentence.

§ 222.11 What are the penalties for failure to comply with this regulation? [Effective Dec. 18, 2004.]

Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of least \$ 500 and not more than \$ 11,000 per violation, except that: penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$ 22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 222.21 When must a locomotive horn be used? [Effective Dec. 18, 2004.]

(a) Except as provided in this part, the locomotive horn on the lead locomotive of a train, lite locomotive consist, individual locomotive, or lead cab car shall be sounded when such locomotive or lead car is approaching and passes through each public highway-rail grade crossing. Sounding of the locomotive horn with two long, one short, and one long blast shall be initiated at a location so as to be in accord with paragraph (b) of this section and shall be repeated or prolonged until the locomotive or train occupies the crossing. This pattern may be varied as necessary where crossings are spaced closely together.

(b) The locomotive horn shall begin to be sounded at least 15 seconds, but no more than 20 seconds, before the locomotive enters the crossing, but in no event shall a locomotive horn sounded in accordance with paragraph (a) of this section be sounded more than one-quarter mile (1,320 feet) in advance of the nearest public highway-rail grade crossing.

§ 222.23 How does this regulation affect sounding of a horn during an emergency or other situations? [Effective Dec. 18, 2004.]

(a)(1) Notwithstanding any other provision of this part, a locomotive engineer may sound the locomotive horn to provide a warning to vehicle operators, pedestrians, trespassers or crews on other trains in an emergency situation if, in the locomotive engineer's sole judgment, such action is appropriate in order to prevent imminent injury, death or property damage.

(2) Notwithstanding any other provision of this part, including provisions addressing the establishment of quiet zones, limits on the length of time in which a horn may be sounded, or installation of wayside horns within quiet zones, this part does not preclude the sounding of locomotive horns in emergency situations, nor does it impose a legal duty to sound the locomotive horn in such situations.

(b) Nothing in this part restricts the use of the locomotive horn where active warning devices have malfunctioned and use of the horn is required by one of the following sections of this Chapter: §§ 234.105; 234.106; or 234.107, or where warning systems are temporarily out of service during inspection, maintenance, or testing. Nothing in this part restricts the use of the locomotive horn for purposes other than highway-rail crossing safety (e.g., to announce the approach of the train to roadway workers in accordance with a program adopted under part 214 of this Chapter, or where required for other purposes under the railroad's operating rules).

§ 222.25 How does this rule affect private highway-rail grade crossings? [Effective Dec. 18, 2004.]

This rule does not require the routine sounding of locomotive horns at private highway-rail grade crossings. Except as specified in this section, this part is not meant to address the subject of private grade crossings and is not intended to affect present State or local laws or orders, or private contractual or other arrangements regarding the routine sounding of locomotive horns at private highway-rail grade crossings.

(a) Private highway-rail grade crossings may be included in a quiet zone.

(b) Private highway-rail grade crossings which are located in New Quiet Zones and which allow access to the public, or which provide access to active industrial or commercial sites, may be included in a quiet zone only if a diagnostic team evaluates the crossing and the crossing is equipped or treated in accord with the recommendations of such diagnostic team.

(c)(1) At a minimum, every private highway-rail grade crossing within a New Quiet Zone shall be marked by a crossbuck and a "STOP" sign, each of which shall conform to the standards contained in the MUTCD, and shall be equipped with advance warning signs in compliance with § 222.35(c).

(2) At a minimum, every private highway-rail grade crossing within a Pre-Rule Quiet Zone shall, by December 18, 2006, be marked by a crossbuck and a "STOP" sign, each of which shall conform to the standards contained in the MUTCD, and shall be equipped with advance warning signs in compliance with § 222.35(c)

§ 222.33 Can locomotive horns be silenced at an individual public highway-rail grade crossing which is not within a quiet zone? [Effective Dec. 18, 2004.]

(a) A railroad operating over an individual public highway-rail crossing, may, at its discretion, cease the sounding of the locomotive horn if the locomotive speed is 15 miles per hour or less and train crew members, or appropriately equipped flaggers, as defined in 49 CFR 234.5, flag the crossing to provide warning of approaching trains to motorists.

(b) This section does not apply where active grade crossing warning devices have malfunctioned and use of the horn is required by 49 CFR 234.105, 234.106, or 234.107.

§ 222.35 What are minimum requirements for quiet zones? [Effective Dec. 18, 2004.]

The following requirements apply to quiet zones established in conformity with this part.

(a) Minimum length. (1) The minimum length of a New Quiet Zone established under this part shall be one-half mile along the length of railroad right-of-way.

(2) The length of a Pre-Rule Quiet Zone may continue unchanged from that which existed as of October 9, 1996. Because the addition of any crossing to a Pre-Rule Quiet Zone ends the grandfathered status of that quiet zone, the New Quiet Zone resulting from the addition of one or more crossings to a Pre-Rule Quiet Zone shall be at least one-half mile in length and shall comply with all requirements applicable to New Quiet Zones. The deletion of any crossing from a Pre-Rule Quiet Zone, with the exception of a grade separation or crossing closure, must result in a quiet zone of at least one-half mile in length in order to retain Pre-Rule Quiet Zone status.

(3) A quiet zone may include highway-rail grade crossings on a segment of rail line crossing more than one political jurisdiction.

(b) Active grade crossing warning devices. (1) Each public highway-rail grade crossing in a New Quiet Zone established under this subpart must be equipped, no later than the implementation date of the New Quiet Zone, with active grade crossing warning devices comprising both flashing lights and gates which control traffic over the crossing and that conform to the standards contained in the MUTCD. Such warning devices shall be equipped with constant warning time devices, if reasonably practical, and power-out indicators.

(2) Pre-Rule Quiet Zones must retain, and may upgrade the grade crossing safety warning system which existed as of December 18, 2003. Any such upgrade shall include constant warning time devices, where reasonably practical, and power-out indicators. In no event may the grade crossing safety warning system which existed as of December 18, 2003, be downgraded. Risk reduction resulting from upgrading to flashing lights or gates may be credited in calculating the quiet zone's Quiet Zone Risk Index.

(c) Advance warning signs. (1) Subject to paragraph (c)(2) of this section, each highway approach to every public and private highway-rail grade crossing within a Pre-Rule Quiet Zone or New Quiet Zone shall be equipped with an advance warning sign which advises the motorist that train horns are not sounded at the crossing. Such sign shall conform to the standards contained in the MUTCD issued by the Federal Highway Administration.

(2) Each highway approach to every public and private highway-rail grade crossing in a Pre-Rule Quiet Zone shall be equipped with such advance warning signs described in paragraph (c)(1) of this section by December 18, 2006.

(d) All private crossings within the quiet zone must be treated in accordance with this section and § 222.25.

(e) All public crossings within the quiet zone must be in compliance with requirements of the MUTCD.

§ 222.39 How is a quiet zone established? [Effective Dec. 18, 2004.]

(a) Public authority designation. This paragraph (a) describes how a quiet zone may be designated by a public authority without the need for formal application to, and approval by FRA. If a public authority complies with either paragraph (a)(1), (2), or (3) of this section, and complies with the information and notification provisions of § 222.43, a public authority may designate a quiet zone without the necessity for FRA review and approval.

(1) A quiet zone may be established by implementing, at every public highway-rail grade crossing within the quiet zone, one or more SSMs identified in Appendix A of this part.

(2) A quiet zone may be established if the Quiet Zone Risk Index is at, or below, the Nationwide Significant Risk Threshold, as follows:

(i) If the Quiet Zone Risk Index is already at, or below, the Nationwide Significant Risk Threshold without being reduced by implementation of SSMs; or

(ii) If SSMs are implemented which are sufficient to reduce the Quiet Zone Risk Index to a level at, or below, the Nationwide Significant Risk Threshold.

(3) A quiet zone may be established if SSMs are implemented which are sufficient to reduce the Quiet Zone Risk Index to a level at or below the risk level which would exist if locomotive horns sounded at all public crossings in the quiet zone.

(b) Public authority application to FRA. (1) A public authority may apply to the Associate Administrator for approval of a quiet zone which does not meet the standards for public authority designation under paragraph (a) of this section, but in which it is proposed that one or more safety measures be implemented. Such proposed quiet zone may include only ASMs, or a combination of ASMs and SSMs at various crossings within the quiet zone. Note that an "SSM"

which does not fully comply with the requirements for an SSM under Appendix A, is considered to be an ASM. The public authority's application must:

(i) Contain an accurate, complete and current Grade Crossing Inventory Form for each public and private highway-rail grade crossing within the proposed quiet zone;

(ii) Contain sufficient detail concerning the present safety measures at the public highway-rail grade crossings proposed to be included in the quiet zone to enable the Associate Administrator to evaluate their effectiveness;

(iii) Contain detailed information as to which SSMs or ASMs are proposed to be implemented and at which public or private highway-rail grade crossings within the proposed quiet zone, including membership and recommendations of the diagnostic team, if any, which reviewed the proposed quiet zone;

(iv) Contain a commitment to implement the proposed safety measures within the proposed quiet zone;

(v) Demonstrate through data and analysis that the proposed implementation of these measures will cause a reduction in the Quiet Zone Risk Index to, or below, either the risk level which would exist if locomotive horns sounded at all crossings in the quiet zone or to a risk level at, or below, the Nationwide Significant Risk Threshold; and

(vi) Be provided to the parties listed in § 222.43(a)(1) in the manner specified in that section.

(2)(i) The Associate Administrator will approve the quiet zone if, in the Associate Administrator's judgment, the public authority is in compliance with paragraph (b)(1) of this section and has satisfactorily demonstrated that the SSMs and ASMs proposed by the public authority result in a Quiet Zone Risk Index which is either:

(A) At or below the risk level which would exist if locomotive horns sounded at all crossings in the quiet zone or

(B) At, or below, the Nationwide Significant Risk Threshold.

(ii) The Associate Administrator may include in any decision of approval such conditions as may be necessary to ensure that the proposed safety improvements are effective. If the Associate Administrator does not approve the quiet zone, the Associate Administrator describes in the decision the basis upon which the decision was made. A decision denying approval may be reviewed as provided in § 222.57(b).

There are hundreds of other regulations that cover other aspects of the rail industry. It is imperative that a Union officer has a good working knowledge of all of the safety regulations the FRA has promulgated.

IV. HOURS OF SERVICE ACT

IV. THE HOURS OF SERVICE ACT

The Hours of Service Act is a federal law, which was initially enacted March 4, 1907, to allow railroad employees an opportunity to obtain rest in connection with the operation of trains. The law has been amended several times over the years. Initially, the law allowed train and engine crews to work a 16-hour day. Today the law allows a train and engine crew to work only 12 hours. The law is applicable to brakemen, conductors, firemen, engineers, hostlers, train operators, and train dispatchers.

1. What time counts as on-duty time?

Time on duty shall commence when an employee reports for duty, and shall terminate when the employee is finally released from duty.

2. What does time-on-duty include?

- a) Interim periods available for rest at other than a designated terminal;
- b) Interim periods available for less than 4 hours rest at a designated terminal;
- c) Time spent in deadhead transportation by an employee to a duty assignment; however, time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty;
- d) The time an employee is actually engaged in or connected with the movement of any train.

3. If I am called for duty at 8:00 a.m. and transported and deadheaded by a vehicle from 8:00 a.m. to 10:00 a.m., how long may I work?

You may work from 8:00 a.m. to 8:00 p.m., since time spent in deadhead transportation by an employee to a duty assignment is counted as time-on-duty.

- 4. I was called on duty at 8:00 a.m. and worked from 8:00 a.m. until 8:00 p.m. and then was deadheaded to my away-from-home terminal from 8:00 p.m. until 10:00 p.m. Was I required to violate the Hours of Service?**

No. Time spent in deadhead transportation from duty to his point of final release shall not be counted in computing time off duty. This is "limbo" time.

It is not counted as "on-duty" or "off-duty" time.

- 5. I went on duty at 8:00 a.m. and worked in train service from 8:00 a.m. until 8:00 p.m. and was deadheaded from an intermediate point to my away-from-home terminal from 8:00 p.m. until 10:00 p.m. What time am I rested for service?**

I'm rested after 10 hours off duty. Thus, if I put off at 10:00 p.m., I would be rested to report for duty at 8:00 a.m.

- 6. I went off duty at 8:00AM and was called by the crew caller at 2:30PM instructing me to report for duty at 4:00PM. Did the phone call I received at 2:30PM interrupt my rest, pursuant to the Hours of Service Act?**

NO. A phone call by the crew caller instructing an employee to report for duty does not interrupt rest, pursuant to the Hours of Service Act. California State Legislative Board v. FRA, 328 F 3d. 605.

- 7. Are there exceptions to the Hours of Service Act for crews of wreck or relief trains?**

Yes. The crew of a wreck or relief train may be permitted to remain on duty for not to exceed four additional hours in any period of 24 hours whenever an actual emergency exists and work of the crew is related to the emergency. The emergency ceases to exist when the track is cleared and the line is open for traffic.

8. What do the terms "require" or "permit" mean?

The word "permit" as has been interpreted by the court means the failure of the railroad to prohibit, by one who has the power and authority to do so, an employee from violating the Act. Thus, the railroad violates the Act if it requires an employee to work in excess of 12 hours, requires an employee to work without proper rest, permits an employee to exceed the prescribed number of hours on duty, and/or permits an employee to return to work without adequate rest.

9. What happens if the Hours of Service is violated?

The Federal Railroad Administration can subject the railroad to a fine.

10. If the railroad requires or permits me to violate this Hours of Service, will I be required to pay a fine?

No. If the railroad requires or permits an employee to violate the Hours of Service, then the railroad, and not the employee, is responsible for that violation and should be required to pay the fine.

11. If I am a member of a train or engine crew operating a train in main line freight service, under the control of the dispatcher, is it my

responsibility to clear the main track prior to the expiration of my Hours of Service?

No. While operating on the main track, the train and engine crew is under the jurisdiction of the railroad management, including the train dispatcher, who should make arrangements to clear the main track prior to the expiration of the Hours of Service Act.

V. RAILROAD RETIREMENT ACT

V. THE RAILROAD RETIREMENT ACT

The Railroad Retirement Act is a federal law, which establishes a pension for retiring railroaders as well as disability benefits, sickness benefits, and unemployment benefits. The Railroad Retirement Act was enacted in 1934, but was declared unconstitutional in 1935 in the case of *Board v. Alton Rail R. Company*, 295 U.S. 330 (1935). The law was re-enacted in 1935 as the Railroad Retirement Act of 1935. It has been amended on several occasions since then.

Railroad retirement and disability benefits basically replace Social Security Benefits. RRB Unemployment and Sickness benefits basically replace state unemployment and sickness benefits.

Today, the Railroad Retirement System is headquartered in Chicago, Illinois. It is an agency of the federal government. It is funded in part by the railroads and in part by the railroad employees. **It is not an arm of the railroads and operates separately and apart from the railroads.**

There is actually a Railroad Retirement Board (RRB), which is composed of three members that are appointed by the President of the United States with the advice and consent of the Senate. Each member holds office for a term of five years. One member of the Board is appointed from recommendations made by representatives of the employees, i.e., the Unions; one member is appointed from recommendations made by the representative of the carriers; and one member, who is the Chairman of the Board, is appointed without recommendation by either the carriers or the employees.

If you have any questions regarding Railroad Retirement Act benefits, call the Railroad Retirement Board or visit its online web page at www.rrb.gov. The Railroad will not know that you have contacted the Board, since the Retirement Board does not report to the railroads. RRB employees are government employees and not railroad employees. When you call the RRB, have your Social Security number handy so that they can enter your number in their computers. By entering your Social Security number, they can tell you the amount of benefits you are entitled to receive for Sickness, Unemployment and Disability, send you forms for Sickness, Unemployment and/or Disability, and provide other information.

The RRB has field offices in Houston, Fort Worth, Albuquerque, Phoenix and New Orleans. The phone numbers are: Houston (713) 209-3045, Fort Worth (817) 978-2638, Albuquerque (505) 346-6405, Phoenix (602) 379-4841, and New Orleans (504) 589-2597. The Board also has a web site at www.rrb.gov.

1. What benefits does the Act provide for me?

Employees are basically entitled to four different kinds of benefits: 1) unemployment benefits; 2) sickness benefits; 3) disability benefits; and 4) retirement benefits.

2. When am I considered a qualified employee?

A "qualified employee" is one who earns qualifying creditable compensation in a base year (\$2,512.50 in 2001), counting no more than a certain amount in any month (\$1,005 in 2001). In addition, a new employee must have some

employment in at least five months of the first year worked in the railroad industry in order to draw benefits in the following benefit year.

A. Unemployment Benefits

1. When am I entitled to unemployment benefits?

A "day of unemployment" is a day on which a qualified employee is able to work and available for work and does not receive any pay, is not disqualified, and has properly registered for unemployment benefits. Any calendar day on which the employee does not work solely because of mileage-limitation or work restriction agreements or solely because he is between regularly assigned trips or tours of duty or because a turn in pool service was missed is not considered a day of unemployment.

An earnings test is also applied to unemployment claims. If a claimant's earnings for days worked, days of vacation, paid leave, or other pay in a 14-day registration period are more than a certain indexed amount, no benefits are payable for any days of unemployment in that period. For the benefit year, which began July 2000, the test was \$970.00; for the benefit year, which began July 2001, the test is \$1,005. The amounts correspond to the base year monthly compensation amounts used in determining eligibility for benefits in each year.

2. How much are my unemployment benefits?

As of July 2000, the maximum daily benefit payable was \$48.00 per day.

B. Sickness Benefits:

1. When am I entitled to sick benefits?

A "day of sickness" is a day on which the employee is unable to work because of sickness or injury and for which he does not receive any pay and has filed a "statement of sickness" (sickness benefit application). As indicated above, a claimant may not receive benefits for any day for which pay is received. Also, the earnings test described is also applied. Benefits are normally paid for the number of days of sickness beyond the fourth day in a 14-day registration period. Initial sickness claims must also begin with four consecutive days of sickness.

2. For what period of time am I entitled to sick benefits?

Normal benefits are paid for up to 130 days (26 weeks) in a benefit year (generally begins July 1). Benefit rights are exhausted when a benefit year ends (normally June 30) or earlier if benefit payments equal base year creditable earnings. For purposes of determining maximum normal benefits payable in benefit year 2001-2002, monthly earnings of up to \$1,253 for base year 1999 were counted. If an employee has at least 10 years of service and exhausts normal unemployment or sickness benefits, he may be eligible for 13 consecutive weeks (65 days) of extended benefits. In addition, an employee who is not qualified for normal benefits in the current benefit year but received normal benefits in the previous year may still be eligible for extended benefits.

3. When do sick benefits begin?

Sick benefits are payable to an employee who is unable to work because of any sickness, whether it be on-the-job related or otherwise. The forms must be signed by a treating physician, and they must be submitted to the Retirement Board within seven days of when the sickness begins. For every day beyond seven days that the employee waits to submit the forms, he may lose that day of benefits unless he can show good cause why the form was turned in late.

C. Disability Benefits:

1. What kind of disability benefits am I entitled to?

- a. Occupational Disability Benefits
- b. Total and Permanent Disability Benefits

2. What do I have to do to qualify for an Occupational Disability?

First, the employee must have at least 240 credits, i.e., 20 years of service. An employee obtains one credit for each month in which he performs compensated service for the railroad. Second, the employee must be unable to perform his usual occupation. Thus, if the employee is a conductor with a back injury that his doctors believe will prevent him from continuing to perform his duties as a conductor, he is entitled to an Occupational Disability.

3. How long am I entitled to receive Occupational Disability Benefits?

You are entitled to receive them from the time you qualify until the time of death.

4. Who makes the determination as to whether or not I am qualified for an Occupational Disability?

The Railroad Retirement Board decides, and not the railroad. The Railroad Retirement Board makes the determination: 1) if the employee has the required number of credits; and 2) if the employee's physical condition prevents him from performing duties in his usual occupation with the railroad.

5. How do I qualify for a Total and Permanent Disability?

To qualify for a Total and Permanent Disability an employee must have at least 60 credits, i.e., 5 years of continuous service and the employee must, basically, be unable to perform any job in the national economy.

6. How long am I entitled to receive Total and Permanent Disability Benefits?

You are entitled to receive them from the time you qualify until the time of death.

7. Who makes the determination?

The Retirement Board makes the determination based on the credits and the age of the person and his physical condition. The rules regarding a Total Occupational and Total and Permanent Disability are fairly complex and are basically governed by the Disability Rules of the Social Security Administration; if you are seeking a Disability you should contact the Railroad Retirement Board and designated legal counsel for advice.

8. How do I qualify for a Retirement Annuity?

The basic requirement for a regular employee annuity is 120 months (10 years) of creditable railroad service or sixty (60) months (5 years) of creditable railroad service if such service was performed after 1995. Employees with 30 or more years of service are eligible for regular annuities based on age and service the first full month they are age 60. Early retirement reductions are applied if the employee first becomes eligible for a 60/30 annuity July 1, 1984 or later, and retired at ages 60 or 61 before 2002. Employees with 10 to 29 years of creditable service are eligible for regular annuities based on age and service the first full month they are age 62. Early retirement annuity reductions are applied to annuities awarded before full retirement age, which ranges from age 65 for those born before 1938 to age 67 for those born in 1960 or later, the same as under Social Security.

**VI. OCCUPATIONAL SAFETY
AND HEALTH ACT**

VI. OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act of 1970 (OSHA) is a law, which provides safe and healthful working conditions for all American workers. Generally, the Act requires employers to furnish their employees with safe employment conditions and authorizes penalties for those employers who fail to do so. The purpose of the Act is to: "to ensure, so far as possible, every working man and woman in the Nation safe and healthful working conditions, and to preserve our human resources." 29 U.S.C. ' 651(b).

The question that always arises in the rail industry is whether OSHA regulations apply to the rail industry. The answer is "yes," unless the Federal Railroad Administration has promulgated a rule or regulation, which covers the specific safety concern in dispute. *Southern Pac. Trans. Co. v. Usery*, 539 F.2d 386 (1976). For example, OSHA regulations provide that places of employment must be kept clean and orderly, the floors dry and free of protruding nails, splinters, holes or loose boards, and that aisles and passageways be kept clear. 29 C.F.R. 1910.22 (a) (2); 29 C.F.R. 1910.22(b)(1); 29 C.F.R. 1910.22(c). The Federal Railroad Administration has not promulgated any specific rule regulating the specific categories; therefore, the OSHA regulations would apply.

Conversely, OSHA contains specific regulations for noise control. 29 C.F.R. 1910.95(a)(b). However, the Federal Railroad Administration has also promulgated specific rules regarding noise in the rail work place. Therefore, the Federal Railroad Administration rules regarding noise levels are applicable.

OSHA regulations are published in the Code of Federal Regulations in three volumes. The general regulations are published at 29 C.F.R. ' '1910.1-309. The

construction regulations are published at C.F.R. ' '1926.1-1551, and the maritime regulations are published at 29 C.F.R. ' '1915.1-111. OSHA and the Federal Railroad Administration have both promulgated thousands of regulations pertaining to safety, and the only sure way to know which agency has authority to regulate a specific area is to compare the Federal Railroad Administration and OSHA regulations regarding the safety issue of concern.

However, as a general rule, the Federal Railroad Administration regulations apply to the railroad track and rolling stock. OSHA regulations are generally applicable to the condition of the on and off duty facilities. For example, OSHA requires that trash containers must be leak proof, and periodically cleaned and maintained in a sanitary condition. 29 C. F. R. 1910.141 (a) (4). The on and off duty shanty must be constructed to prevent the entrance of rodents or insects. 29 C. F. R. ' 1910.141 (a) (5). Lavatories are required and must be equipped with hot and cold water, soap, and hand towels. 29 C.F.R. ' 1910.141(d)(2).

OSHA regulations are important to railroad workers for the same reason as the Federal Railroad Administration regulations: to provide a safe work place. Thus, if one believes the railroad is violating an OSHA regulation, OSHA should be contacted to take corrective measures and/or fine the railroad for the violation. If an employee is injured as a result of a condition that is violative of an OSHA regulation, the violation may establish the negligence of the railroad, and may eliminate any contributory negligence of the employee.

There are literally thousands of OSHA and Federal Railroad Administration

regulations. The regulations are published by the federal government and are available at the government bookstores. However, if you have a question regarding whether there is an OSHA or Federal Railroad Administration regulation which controls a particular safety issue, or which regulation is applicable, contact your legal counsel.

VII. FAMILY MEDICAL LEAVE ACT

VII. FAMILY MEDICAL LEAVE ACT

Railroads who employ fifty or more employees for each working day during each of twenty or more calendar work weeks in the current or preceding calendar year are covered by the Family Medical Leave Act (FMLA). Thus, the Union Pacific, Burlington Northern Santa Fe, Kansas City Southern, Tex-Mex, Econo-Rail and the Port Terminal railroads are covered by the Act. Others may be if they meet the above criteria. An employee is eligible for FMLA leave if they have worked for the covered employer for at least twelve months and 1250 hours during the year preceding the leave.

1. *Basic Requirements of FMLA*

An eligible employee is entitled to a total of twelve workweeks of leave during any twelve-month period for any one or more of the following:

1. *The birth of a child or the placement with the employee of a child for adoption or foster care;*
2. *To care for an employee's spouse, son, daughter, or parent with a serious health condition; and*
3. *Because of a serious health condition that makes the employee unable to perform the functions of his or her job.*

2. *Serious Health Condition*

A serious health condition is an illness, injury, impairment or physical or mental condition that involves in patient care in a medical facility, or continuing treatment by (or under the supervision of) a health care provider for any period of incapacity of more than three calendar days, or continuing treatment by (or under the supervision of) a health care provider for a chronic or long term health condition which if left untreated would result in a

period of incapacity of more than three days, or for prenatal care. Incapacity means the ability to work, attend school or perform other regular daily activities.

Chronic conditions such as asthma and diabetes that continue over an extended period of time are considered serious health conditions if the individual episodes of incapacity are not more than three days duration. Long term chronic conditions such as Alzheimer's or a severe stroke do not have to be incurable to be considered a serious health condition.

Continuing treatment means two or more visits to a health care provider, two or more treatments by a health care services provider on referral or under the direction of a health care provider. Continuing treatment also includes, a single visit to a health care provider which results in a regimen of continuing treatment under the supervision of a health care provider.

An employee is considered unable to perform the functions of the position if the employee could not perform any one of the essential functions of the job held by the employee at the time the need for FMLA leave arose.

A health care provider is defined as licensed doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, chiropractors (only when providing manual manipulation of the spine to treat certain demonstrated maladies), nurse, midwives and nurse practitioners practicing within the scope authorized by the state, registered Christian Science practitioners and any health care provider that is recognized by the employer or accepted by the group health plan.

3. Leave Time

FMLA leave may be taken in a continuous period of time or may be taken intermittently in separate blocks of time ranging from an hour to weeks. Leave time is unpaid.

4. Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid leave for fewer than 12 workweeks,

the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title [29 USCS §§ 2611 et seq.] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

5. *Notice Requirements*

An employee must give the employers thirty days notice of the need for FMLA leave along with anticipated time for and duration of the leave, when such need is foreseeable. When the leave is not foreseeable or thirty day notice is not practicable, the employee should provide notice as soon as practicable, preferably within one or two days of the employee becoming aware of the need for the leave. The notice does not have to reference the FMLA, but a valid reason under the FMLA must be given.

Employees may provide notice in writing, verbally, by telephone, facsimile or other electronic methods, or through a personal representative if the employee is unable to provide notice personally. The employer may not deny FMLA leave for failure to follow such procedures. If an employee fails to provide thirty days notice when the need for leave was clearly foreseeable, the employer may delay leave for thirty days after the employee provided notice.

6. *Medical Certification*

An employer may require a medical certification from a health care provider to support a request for FMLA leave based upon the serious health condition of the employee or the employee's family member. If the employer will require a certification, the employee must advise the employer of the requirement at the time the employee requests leave. When requested the employee must provide such certification within fifteen days, when practicable. If not provided the employer may deny the employee's request.

An employee may require an employee to obtain a certification from a second health care provider to support the request for leave at the employer's expense. If the first and second opinions differ, the employer may require a third opinion, which shall be binding.

It is illegal for an employer to interfere with, restrain or deny the exercise of any right provided by the FMLA. It is also unlawful for an employer to discharge or in any way discriminate against an individual for imposing or complaining about unlawful practices under the act. Employees who believe their FMLA rights have been violated may file a complaint with the Secretary of Labor and may file a lawsuit within two years of the last violation.

QUESTIONS AND ANSWERS

Q. If I have a common cold or just don't feel good take I use FMLA to lay off for one day?

A. No. FMLA time cannot be used in this manner for a single day of layoff.

Q. Does a regime of taking over the counter medications, bed rest and/or drinking fluids initiated without a visit to a doctor constitute a serious health condition?

A. No. The common cold, flu, ear ache, upset stomach, minor ulcers, headaches, (except migraines) routine dental or orthodontic problems do not meet the definition of a serious medical condition and do not qualify for FMLA time.

Q. In what blocks of time may FMLA time be taken?

A. FMLA time may be taken in a continuous period of time or may be taken intermittently in separate blocks of time ranging from days to weeks.

Q. Can the railroad require me to provide proof from a health care provider to

support my request for FMLA time?

A. Of course! However, the railroad must make the request at the time the FMLA request is made. When requested by the railroad the employee has 15 days to provide the information.

Q. Can the railroad require me to have a second opinion to support my request for FMLA?

A. Yes. The railroad may require you to have a second opinion to support your request for FMLA time.

Q. Can the railroad require employees to take sick leave, personal leave and vacation time concurrently with FMLA?

A. It appears so. The act states in pertinent part: "An eligible employee may elect, **or an employer may require the employee, to substitute** any of the accrued paid vacation leave, personal leave, or family leave of the employee" for FMLA. As of March 1, 2004 this dispute is in litigation and not totally resolved. All major railroads and many other employers currently require employees to take sick leave etc. concurrently with FMLA.

VIII. BLOCKING RAILROAD CROSSINGS

VIII. BLOCKING RAILROAD CROSSINGS

Tex. Transp. Code ' 471.007 (2000) Obstructing Railroad Crossings; Offense

- (a) A railway company commits an offense if a train of the railway company obstructs for more than 10 minutes a street, railroad crossing, or public highway.
- (b) An offense under this section is a misdemeanor punishable by a fine of not less than \$100 or more than \$300.
- (c) An officer charging a railway company for an offense under this section shall prepare in duplicate a citation to appear in court and attach one copy of the citation to the train or deliver the copy to an employee or other agent of the railway company. The citation must show:
 - (1) the name of the railway company;
 - (2) the offense charged; and
 - (3) the time and place that a representative of the railway company is to appear in court
- (d) It is a defense to prosecution under this section that the train obstructs the street, railroad crossing, or public highway because of an act of God or breakdown of the train.
- (e) The hearing must be before a magistrate who has jurisdiction of the offense in the municipality or county in which the offense is alleged to have been committed.
- (f) An appearance by counsel complies with the written promise to appear in court.

IX. ENGINEER= S OPERATOR PERMITS

IX. ENGINEER=S OPERATOR PERMITS

Tex. Rev. Civ. Stat. art. 6419a (2000)

A. Issuance of Permit

Sec. 1. (a) A railroad company shall issue to each person that it employs to operate or permits to operate a railroad locomotive in this state an engineer=s operator permit. A permit must include the engineer=s name, address, physical description, photograph, and date of birth.

(b) A railroad company shall issue to each person that it employs to operate or permits to operate a train in this state, other than a person issued a permit under Subsection (a) of this section, a trainman=s permit. A permit must include the trainman=s name, address, physical description, photograph and date of birth.

B. Operation of Locomotive or Train

Sec. 2. (a) A person operating a railroad locomotive in this state shall have in his or her immediate possession an engineer=s operator permit issued under this Act.

(b) A person operating a train in this state other than a person issued a permit under Section 1(a) of this Act, shall have in his or her immediate possession a trainman=s permit issued under this Act.

C. Proof of Identification

Sec. 3. A person who operates a railroad locomotive or train and who is required by a peace officer to show proof of identification in connection with the person=s operation of a locomotive or train shall display the person=s permit issued under this Act and may not be required to display an operator=s, commercial operator=s, or chauffeur=s driver=s

license issued under chapter 173, Acts of the 47th Legislature, Regular Session, 1941, as amended (Article 6687b, Vernon=s Texas Civil Statutes).

D. Records Relating to Accidents or Violations

Sec. 4. If a person operating a railroad locomotive or train is involved in an accident with another train or a motor vehicle or is arrested for violation of a law relating to the person=s operation of a locomotive or train, the number or other identifying information about the person=s operator=s, commercial operator=s, or chauffeur=s driver=s license may not be included in any report of the accident or violation, and the person=s involvement in the accident or violation may not be recorded in the person=s individual driving record maintained by the Department of Public Safety.

X. FEDERAL EMPLOYERS= LIABILITY ACT

X. FEDERAL EMPLOYER=S LIABILITY ACT

A. Historical Perspective of the Federal Employers' Liability Act (F.E.L.A.)

The F.E.L.A. was enacted in 1908 in response to the hazardous working conditions in the rail industry.⁶ In 1901, 2,675 interstate rail employees were killed and 41,142 were injured.⁷ Before the Act was passed, employees were covered by unfavorable state laws which usually prevented employees from making any recovery for injury or death. Finally, the public outcry was heard by Congress and to the chagrin of the "robber barons" who owned the railroads, the Act was passed.

Rail management had opposed all laws allowing injured employees to recover, especially the new "no fault" recovery theories of the day, which were embodied in state workers= compensation acts. When bills were eventually introduced, the owners successfully lobbied for a recovery statute patterned after common law theories, which required employees to prove negligence in order to make any recovery.⁸ In the early years, the strategy worked well for management. It was very difficult for an employee to recover because of defenses such as assumption of the risk, the fellow servant doctrine, and contributory negligence. Litigation expenses undoubtedly deterred many employees from obtaining counsel.

⁶ Act of April 22, 1906, Ch. 149, 34 Stat 65, 45 U.S.C. SS 51-60

⁷ Interstate Commerce Commission, Sixteenth Annual Report 764 (1902).

⁸ Liability of Common Carriers: Hearings before the House of Representatives Committee of the Judiciary, 59th Cong., 1st Sess. 1906 (1906) (Statement of Albert H. Harris, General Attorney of New York Central and Hudson River Railroad Co.)

The unions initially lobbied for a no fault system.⁹ Their strategy was to avoid the obvious problems regarding fault, special defenses, and litigation expenses. But no fault recovery was new and since the management lobby was strong at the turn of the century, the unions were not successful.¹⁰ They did continue, however, to push for modifications of the Act, especially with regard to the defenses.

In 1910, Congress created the "Employers' Liability and Workmen Compensation Commission" to review the new law.¹¹ The Commission made a two-year investigation of the act and its effect and rendered its report in June of 1912. The report recommended that the defenses of "assumption of the risk, fellow servant fault, and contributory negligence" be eliminated.¹² However, management was again successful in defeating the Commission's recommendation as the House and Senate passed different and conflicting versions of the recommendation.¹³

⁹ A.B. Elkind, Should the Federal Employers= Liability Act be Abolished?, 17 Forum 416-16 (1981).

¹⁰ B. G. Fox, Has F.E.L.A. Run Off the Tracks? 19 A.B.A. 22 (1990).

¹¹ Act of June 25, 1910, Pub. Res. No. 45, 36 Stat. 884 (1910).

¹² S. Rep. No. 338, 62nd Cong. 2d Sess. (1912).

¹³ S. 5382 was reported by House Judiciary, H.R. Rep. No. 1441, 62d Cong. 2d Sess. (49 Cong. Rec. 2580 (1913)), amended and passed on March 1, 1913, by a vote of 218 to 81 (49th Cong. Rec. 4547). S. 5382 was reported by Senate Judiciary S. Rep. No. 553, 62d Cong., 1st Sess. (48 Cong. Rec.4232, 4643 (1912)), amended and passed on May 6, 1992, by a vote of 64 to 15.

Other attempts at reform were periodically made with little success.¹⁴ No change in the law was made until 1939.¹⁵ The 1939 amendments eliminated assumption of the risk and the fellow servant rule as a defense to recovery. Contributory negligence was changed to comparative negligence and employers were prohibited from penalizing employees who furnished information concerning an accident to the injured employee.¹⁶

Although Congress has only made one major change in the Act in the past 84 years, decisions of the United States Supreme Court have interpreted the Act on numerous occasions. Until recent years, the Court has broadened recovery and liberalized causation requirements.

Beginning in 1914, the Court held that violations of the Safety Appliance Act and the Boiler Inspection Act basically made the railroads strictly liable for injuries resulting from violations.¹⁷ The primary objective of both Acts was to protect railroad workers by requiring carriers to furnish safe equipment. Thus, proof of a violation was deemed to be negligence

¹⁴ S. 4927 was introduced by Senator Wagner on June 23, 1932. He also introduced S. 1320 on April 13, 1933, and S. 3630 on May 17, 1934.

¹⁵ H. R. Rep. No. 1222, 76th Cong., 1st Sess. (1939), and S. Rep. No. 661, 76th Cong., 1st Sess. (1939).

¹⁶ 45 U.S.C. H 51, 53, 54 (1988).

¹⁷ *Grand Truck Western R. R. Co. v. Lindsay*, 233 U.S. 42 (1914).
The Safety Appliance Act 45 U.S.C. 51-16, (1988) was enacted in 1893. It requires the carriers to use certain safety appliances such as specific types of train brakes, automatic car coupling devices, and car handholds.
The Boiler Inspection Act, 45 U.S.C. 522-34 (1988), was enacted in 1911. The Act makes it unlawful for a carrier to use a locomotive in service unless all parts and appurtenances are in safe condition and safe to operate, without unnecessary peril to life or limb.

per se.¹⁸ In 1958, the Court extended this doctrine of statutory liability to include carrier violations of any applicable safety statute or regulation.¹⁹ The encompassed regulations include those imposed by the Secretary of Transportation and the Occupational Safety and Health Commission Administration.²⁰

The Court also departed from the general rule that a violation of statute or regulation gives rise to tort liability only if the injury is one which the statute was designed to prevent. The Court's decision created liability under the F.E.L.A. for statutory violations, without regard to whether the injury that occurs from the breach was the injury the statute sought to prevent.²¹ Thus, the Court relaxed the employee's burden of proving fault.

In 1957, the Court further liberalized the definition of fault and proximate cause for F.E.L.A. cases. In the case of *Rogers v. Missouri Pacific Railroad*, the Court held that a jury

¹⁸ *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

¹⁹ *Kernan v. American Dredging Co.*, 355 U.S. 426, 437-438 (1958).

²⁰ *Pratico v. Portland Terminal Co.*, 783 F. 2d 255 (1st Cir. 1985). In *Pratico*, a railroad worker was injured while helping to lift a wheel-bearing on a railroad car with a jacking mechanism which did not comply with OSHA standards. The worker sued under The F.E.L.A. contending that a violation of an OSHA standard constituted negligence per se. The court agreed with the argument holding that OSHA regulations serve as irrefutable evidence that conduct in violation of the standards is unreasonable. 783 F.2d at 265. The result is that where a railroad violation of an OSHA standard has contributed to an injury, the railroad is absolutely liable.

²¹ *Kernan*, 355 U.S. 426, 433 (1958).

question of fault was presented if employer negligence played any part, "even the slightest," in producing death or injury.²²

Six years later, a second softening of proof of fault was rendered by the Court in the case of *Gallick v. Baltimore & Ohio R. Co.*²³ In *Gallick*, the Court held that a jury question of causation was presented when there was evidence that employer negligence played "any role" in producing the harm.²⁴

These historical decisions were undoubtedly influenced by the broad remedial purpose of the Act.²⁵ As the Supreme Court indicated, the clear Congressional intent was to provide liberal recovery for injured workers. It is also clear that Congress did not intend for the remedies to be static. Congress enacted the F.E.L.A. in such a manner that the details of the injured employee's remedies were left to the courts. If 84 years of history means anything, it is clear that the Congressional intent was to expand and not limit the remedies of injured rail workers.

B. Important Provisions of the Federal Employers= Liability Act.

An F.E.L.A. cause of action for injury or death cannot be successfully brought unless: (1) the railroad and the worker fall within the scope of the F.E.L.A.; (2)

²² 352 U.S. 500, 503 (1957).

²³ 372 U.S. 108 (1963).

²⁴ *Id.* at 117-18.

²⁵ 45 U.S.C. 9 51 (1988), AEvery common carrier by railroad... shall be liable in damages to any person

management has breached its duty of care; and (3) a causal link between the breach and injury is proved. Damages are basically limited to lost earnings and earning capacity, disfigurement, physical pain, mental anguish, physical impairment, and medical expenses.²⁶

1. Covered Employers and Employees.

The F.E.L.A. applies to employees of common carriers by railroads engaging in interstate or foreign commerce.²⁷ A common carrier is a carrier of persons or goods belonging to others for hire that holds itself out as ready and willing to engage in that business as a public employment.²⁸ Most courts have held that it is not necessary that a railroad actually cross a state line in order to be involved in interstate commerce.²⁹ It is generally sufficient if the railroad is a link in interstate or foreign commerce.³⁰

suffering injury while he is employed by such carrier.®

²⁶ Chesapeake & Ohio R.R. Co. v. Carnahan, 2421 U.S. 241 (1916).

²⁷ 45 U.S.C. ' 51 (1988).

²⁸ *Ciacco v. New Orleans Public Belt Railroad*, 285 F. Supp. 373, 375 (E.D. La. 1968).

²⁹ *Lone Star Steel Company v. McGee*, 380 F.2d 640, 642-648 (5th Cir. 1967).

³⁰ Id.

A covered employee is one who is employed by a covered employer, where injury occurs in the course of employment and while in the furtherance of interstate commerce.

The employment relationship is satisfied when the employer generally has the right to control the physical conduct of the employee's work activities.³¹ In general, a worker injured while engaged in an activity that is a discharge of the duty of the employee is considered injured in the course of employment.³² In some instances, course of employment may include employees on company property who are not actually engaged in work related activities.³³

2. General Duty of Care.

Once it is established that the railroad, the worker, and the injury fall within the scope of the F.E.L.A., a general duty of care and breach of that duty must be established. A duty of care can be established either by application of a common law duty of care or by statute. Liability may be imposed due to a breach of either.

The standard of care is reasonable and ordinary care with regard to the circumstances.³⁴ Circumstances involve the dangers of the operation at hand. The

³¹ *Robinson v. Baltimore & O. R. Co.*, 237 U.S. 84, 94 (1915).

³² *Erie R. Co. v. Winfield*, 244 US. 170, 173 (1917).

³³ *Id.* Engineer struck in rail yard by passing train, while off duty and en route to residence, considered in course of employment for FELA purposes.

³⁴ *Delaware, L & W.R. Co. v. Koske*, 279 U.S. 7, 11 (1928).

standard requires a carrier to give proper instructions to employees so that they may work safely,³⁵ to provide necessary assistance on the job,³⁶ and to warn of known dangerous conditions.³⁷ The railroad also has a non-delegable duty to provide its employees with a reasonably safe place to work.³⁸ This duty does not make the carrier a guarantor of the safety of the place of work or of the machinery and appliances of work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised... [so that] the place in which the work is to be performed... may be safe for the workmen.³⁹

3. Breach and Causal Link.

Common law duties, the Safety Appliance Act, the Boiler Inspection Act, and other regulatory statutes create a standard of care for rail workers. When a breach of the duty is causally linked to a resulting injury, the carrier is liable in a manner very similar to a common law negligence cause of action. A breach can occur if the carrier fails to give proper safety instructions, fails to provide necessary assistance, fails to warn of known

³⁵ Wattiney v. Southern Pacific Company, 411 F. 2d 854, 855 (5th Cir. 1969) . Long time employee not instructed as to proper safety procedures.

³⁶ Blair v. Baltimore & O. R. Co., 323 U.S. 600, 603-604 (1945).

³⁷ Bassett v. New York, Chicago & St. Louis Railroad Co., 235 F.2d 900, 901-903 (3rd Cir. 1956).
General discussion of duty to warn.

³⁸ 45 U.S.C. § 51 (1988), as interpreted by Missouri P. R. Co. v. Aeby, 275 U.S. 426, 427-428 (1928).

³⁹ Seaboard A.L.R. Co. v. Horton, 233 U.S. 492, 501 (1914).

dangerous conditions or fails to provide a safe place to work. If a breach of the duty plays any part at all in the injury, the railroad is liable.⁴⁰

4. Damages

The Act does not provide any special measure of damages. Recoverable damages for injuries include the present value of past and future wage loss, conscious physical pain, mental anguish, disfigurement, physical impairment and past and future medical expenses.⁴¹

In death actions, damages are limited to pecuniary loss sustained by the survivors. Damages are authorized only to the extent they have been deprived of reasonable expectations of financial benefits, assistance or support.⁴² Survivors may also recover the pecuniary value for the loss of care, guidance and education the decedent would have probably provided.⁴³ The decedent's children can recover for loss of care, attention, instruction, training, advice, and guidance.⁴⁴

⁴⁰ Rogers, Supra, note 19

⁴¹ Chesapeake & Ohio R.R. Co. v. Carnahan, 241 U.S. 241 (1916)

⁴² *Torchia v. Burlington Northern Inc.*, 568 P. 2d 558 (1977) cert. denied, 434 U.S. 1035 (1977).

⁴³ *Id.*

⁴⁴ *Liepelt v. Norfolk & Western Ry. Co.*, 378 N.E. 2d 1232 (1978), rev=d on other grounds, 444 U.S. 490 (1980).

There is no recovery for grief, mental anguish, sorrow, loss of vitality, loss of enjoyment of life, loss of companionship and society, or loss of consortium.⁴⁵ Funeral expenses are not recoverable.⁴⁶ There is no provision for recovery of attorney fees for the prevailing party. The most glaring deficit of the Act is the inability to penalize a carrier for gross negligence since punitive damages are not recoverable.⁴⁷

5. F.E.L.A. Prohibition of Retaliation

A critical aspect of the F.E.L.A. is the last section of the Act. Section 60 prohibits a railroad from retaliating against an employee who provides facts to a party in interest regarding the injury or death of a fellow employee. Thus, the law specifically allows a co-worker to provide information about an employee=s injury to the injured employee, his family, or his lawyer." ⁴⁸

In pertinent part, Section 60 provides as follows:

Any contract, rule, regulation, or device whatsoever, the purpose intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void.⁴⁹

⁴⁵ *Devine v. Southern Pacific Transportation Co.*, 295 P. 2d 201 (1956).

⁴⁶ *Heffner v. Pennsylvania R. Co.*, 81 F.2d 28 (2nd Cir. 1936).

⁴⁷ *Kosar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, (6th Cir. 1971).

⁴⁸ 45 U.S.C. Sec. 60 (1988)

The intent of the law is to equalize the access to information available to the highly efficient claim departments of the railroads and the injured employee, and to prohibit the promulgation and enforcement of rules, which inhibit the free flow of information to claimants.⁵⁰

The purpose of Section 60 is to help eliminate the danger that railroad management would coerce or intimidate employees to prevent them from testifying or to prevent their furnishing information about a fellow employee's injury or death.⁵¹ Thus, if a co-worker is injured and another co-worker meets with the injured person's lawyer and tells him what he knows about the accident, it is illegal and in violation of Section 60 for the railroad to discharge or in any way discipline the employee for providing the information.⁵² For example, if a co-worker reviewed pictures relating to an injury of a fellow employee, Section 60 would protect the co-worker.⁵³

Should the railroad attempt to discipline or discharge an employee who furnishes information about an injury to a person in interest, the employee may obtain injunctive relief

⁴⁹ *Id.*

⁵⁰ *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061, 1062 (1982).

⁵¹ *Gonzalez v. Southern Pacific Transportation Company*, 755 F.2d 117.9 (5th Cir. 1985).

⁵² *Hendley v. Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980), cert. denied, 449 U.S. 1093 (1981).

⁵³ *Stark*, 538 F. Supp. 1061.

without exhausting the remedies of the Railway Labor Act.⁵⁴ Thus, one who was charged for such conduct could abate the investigation with the assistance of a court order.

The protection afforded by Section 60 should not be confused with railroad rules, which generally prohibit employees from discussing injuries or accidents that occur to non-railroad employees. Section 60 does not provide any protection for an employee who discusses a hobo's injury with the hobo's lawyer.

Section 60 is a powerful law that is designed to protect employees who want to provide facts incident to the injury or death of a fellow employee. It is Congress's way of placing the injured employee on equal footing with rail management.

⁵⁴ *Gonzalez*, 755 F.2d 1179.

D. Reporting an Injury.

1. Reporting Requirements.

Virtually every railroad has a rule which requires the injured employee to promptly report an injury to his immediate supervisor.⁵⁵ Failure to do so often results in disciplinary action. It is very hard for the union to successfully defend a claimant who fails to timely report his injury. Further, most arbitrators will usually uphold disciplinary action imposed for failure to timely report an on-duty injury. Thus, an employee who believes he has sustained an injury, regardless how minor the injury, should make the required reports.

2. The Dilemma of Reporting.

The problem with the reporting requirements is an employee's fear of filing too many reports. Many employees fear that they will be disciplined as accident prone if they report every on-duty injury, since railroad employees are subjected to numerous bumps and bruises during their career. On the other hand, failure to report an injury may result in discipline. Late reporting may also create major legal problems, as the railroad will undoubtedly argue that the injury was not an on-duty injury, because it was not timely reported.

The solution to the dilemma is to simply report the injury. Failure to timely report the injury may result in disciplinary action that arbitrators are likely to uphold. The

⁵⁵ Southern Pacific Lines, Operations Manual, April 10, 1994. Rule 1.2.5, Reporting:

All cases of personal injury, while on duty or on company property, must be immediately reported verbally to the proper manager before leaving company property. Form CS 2611 (Employee Report of Accident) must be completed as soon as possible by the injured employee and any witness.

employer certainly has a right to know when an employee is injured and the rule of reporting is absolute.

It is unlikely a railroad will discipline an employee simply because numerous accident reports have been submitted. Those who are normally charged with being accident prone are employees who submit numerous accident reports and who habitually miss work due to injuries. But even those who are charged for being accident prone have a reasonable chance of overturning discipline, so long as it can be shown that the railroad was, in whole or part, the cause of the injuries.

Numerous awards have been written on the subject of being accident prone. The awards have generally held that an employee will not be disciplined for accident proneness if the injury complained of is minor and the employee is not totally responsible:

We recognize that it is possible, under the laws of chance, for a particular employee to be involved in an extraordinary number of accidents or personal injuries through no fault of his or her own. The Board believes that reasonable criteria for determining the fitness of an employee to continue in service may include, among other things, the number of on the job injuries in which the employee is involved. Any statistical correlation between the number of injuries reported and the individual being accident prone must, however, be weighed in light of the requirements that an employee reports, either verbally or in writing, every case of personal injury and more importantly, **culpability. That an employee would file a written report for what might be termed a minor or inconsequential injury may not be held alone to establish accident proneness.** PLB 5149, Award 6, Robert E. Peterson (1993).

The Division understands that an accident prone employee is one who has demonstrated a propensity to get hurt in his occupation under conditions where successive injuries could have been avoided if the employee had experienced more care or foresight or had possessed better physical or mental traits, such as faster reflexes and better neuro-muscular coordination. Evidence suggesting accident proneness would include a rate of accident frequency and/or severity that is significantly higher for said employee than

the rates, which in the light of experience might reasonably be expected of him. First Division Award, 20438, Daugherty.

Any employee who sustains an inordinate or large number of personal injuries resulting **in a loss of time** that is per se, accident prone, and permanent dismissal is justified under these circumstances. PLB 912, Award 395, Preston J. Moore.

Thus the above cited awards make it clear that an employee should not fill out an accident report for fear of being later disciplined as being accident-prone. In PLB 5149, Award 6 the claimant had been injured 17 times between February of 1972 and June of 1990 and had missed a total of 391 days. Nevertheless, the board reinstated the claimant to service without pay for time lost stating in pertinent part:

It concerns the board that despite the total number of injuries reported by the claimant that he had been subjected to but one formal investigation prior to the charge in the case before us. In that one prior instance, the claimant was administered but a ten day suspension on a carrier determination that a personal injury which eh had allegedly sustained to his right shoulder in setting a handbrake on December 26, 1989 was account of his failure to maintain a constant presence of mind to insure safety to himself and others.

An employee who believes he is injured should, at a bare minimum, immediately tell a crew member of the injury. Preferably, report the injury to a supervisor and complete the required written reports. Thus, the dilemma of reporting an injury is really no dilemma at all: If injured, file a report.

3. The Most Common Injuries and Late Reporting

The most common injuries are not the tragic death or amputation cases. Rather, they are the soft tissue injuries to backs, knees, and shoulders. They characteristically begin with a pop or pull and minor pain. Quite often the injured employee believes the problem is of little significance and believes it will resolve itself with aspirin and time.

Commonly, the injured employee fails to timely report the injury during the shift it occurs, because the initial pain and symptoms are believed to be minor. But as the hours roll by, the pain increases to the point where the employee realizes something is seriously wrong.

At that point, the employee is faced with a real problem. If a late injury report is filed, discipline is likely. Further, the railroad will have solid grounds to argue that the injury is not work related. The best course of action in such a situation is to file a late injury report. Most reputable doctors realize that soft tissue injuries do not manifest themselves with immediate excruciating pain. For example, it may take 24 to 36 hours for a back injury to fully develop and cause severe pain. A late report may result in some discipline, but it probably will be a short suspension or demerits. Even if it results in a permanent discharge, the employee may still pursue an F.E.L.A. claim for all future wage loss beyond the date of discharge.⁵⁶ Conversely, if a report is not filed, the railroad has strong grounds to argue that the injury was not work related, and the jury may return a verdict against the claimant. The employee should file an injury report, even if it is late.

The employee should seek competent medical care and explain to the doctor at the initial visit when the pain first began and what brought it on. In short, a late report may result in discipline, but it may save the F.E.L.A. claim.

⁵⁶ Kulavic v. Chicago & Illinois Midland Railway Company, 1 F.3d 507 (7th Cir. 1993). In short, the date of discharge does not preclude the injured employee from being compensated for all future wage loss.

4. The Accident Report.

When an employee is injured, an accident report must be completed timely. It should be completed correctly and truthfully. However, remember that the accident report is a legal document that has been drafted by the railroad law department. It will probably be Exhibit 1 at the trial of the case. Thus, the injured employee must be careful in preparation of the report.

By way of example, Exhibit 1 (see Appendix A) is an accident report completed by U.P. Conductor Joe Smith, who was injured on March 18, 1998. Joe was working on a train with a bad order dynamic brake. The train also had a dynamiter. After the train experienced an unintentional emergency brake application, Joe slipped and fell in loose ballast while inspecting the train and hurt his back. Joe timely filled out an accident report, as required by the rules, and basically blamed himself for his injury by stating:

- (1) I slipped and fell in loose ballast;
- (2) that equipment nor tools did not cause or contribute to the accident by checking "no" to Question No. 12;
- (3) that working conditions did not cause or contribute the accident, by checking "no" to Question No. 13; and
- (4) by answering "no" to the question that states, "Did other persons cause or contribute to the cause of the accident?"

Exhibit 2 (see Appendix A) is the proper way to complete a Union Pacific accident report under the circumstances described above:

In Exhibit 2, Conductor Smith:

- (1) Properly blamed the Railroad for his injury (and not himself) by stating in response to Question 11 exactly what specifically caused the accident as

follows: ADefective brakes on train - dynamic brake not working - vegetation in walkway@;

- (2) That equipment and tools caused or contributed to cause the accident by checking Ayes@ to Question 11 and stating Adefective brakes on train - dynamic brake not working - vegetation in walkway@ ;
- (3) By stating that working conditions did cause or contribute to the cause of the accident by checking Ayes@ to Question 13 and stating Adefective brakes on train - dynamic brake not working - vegetation in walkway.@
- (4) Not placing blame on himself for the cause of the accident by answering Ayes@ to Question 14 which states ADid other persons cause or contribute to the cause of the accident?@ and stating in the Remarks column A Those who maintain engine brakes, train brakes, and main track walkways.@

Thus, Conductor Smith, by simply correctly filling out the accident report, has made the accident report his friend. The accident report now correctly blames the railroad and its faulty equipment and right-of-way as the true cause of the accident and not him.

Exhibits 3 and 4 (see Appendix A) are BNSF personal injury forms, which contain the same basic questions as on the UP form. Exhibit 3 is an example of an improperly completed accident report under the circumstances set forth above. Exhibit 3, in essence, contributes all the blame on the injured employee. Exhibit 4 properly blames the railroad for the accident, pursuant to the facts set forth in this example. Similarly, Exhibits 5 and 6 are KCS personal injury forms and Exhibits 7 and 8 are Tex Mex personal injury forms.

5. Harassment by the Company When Reporting an Injury.

Of course, employees do not want to be injured and do not want to fill out accident reports. They know that the completion of an accident report will normally bring about charges of some rule violation and for sure will bring about a confrontation with management about the injury. Quite often the employee will be told to wait and see if he is

truly hurt, or the officer may suggest or instruct the employee not to turn in an accident report. This type of conduct has brought on a new law, which came into effect January 1, 1997, which prohibits such harassment and intimidation. 49 CFR '225.33 states in pertinent part:

Each railroad shall adopt ... a policy statement declaring the railroad's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad, to full compliance with the letter and spirit of FRA's accident reporting regulations, and to the principle, and absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury, or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation.

This provision clearly makes it a violation of the law for an officer of the company to try to prevent an employee from reporting an injury or completing an accident report. For example, should a trainmaster tell the injured employee he is going to be disciplined if he turns in an accident report, that certainly is a violation of the law. If the officer tells the employee to wait until later to turn in an accident report to see if he's injured, that, too, would constitute a violation of the law. Possibly even charging an employee simply because he turns in an accident report constitutes violations of the law. The law is written very broadly in an attempt to cover all such acts of harassment and intimidation for an employee who attempts to report an accident, incident, injury, or illness. Such violations should be reported, verbally or in writing, to the FRA immediately by the employee or his representative.

E. Post-Accident Statements

1. The Importance of Statements

A statement is an issue that virtually every injured employee can expect to deal with. Soon after the injury, the claim agent will routinely request that the injured employee give a statement. A statement is important for two reasons: it may establish the facts and liability of both the railroad and the injured employee, and it may later become evidence in a court of law.

Remember that the employee must prove the railroad's negligence caused his injury in order to recover under the F.E.L.A. In order to avoid liability, the claim agent must prove that the railroad was not negligent. Thus, the claim agent will undoubtedly want the injured employee to say that the injury was not the railroad's fault. If that is not possible, the claim agent will attempt to establish that the employee was contributory negligent or that his conduct was the sole cause of the injury. The statement is an inexpensive and clever tool the claim agent uses for that purpose.

For example, in the typical slip and fall case, the claim agent will attempt to prove that the railroad was unaware that water had accumulated on the floor by asking: "Have you ever reported water on the floor?" Obviously, if there were no prior reports of water on the floor, the railroad will attempt to argue it had no knowledge and thus no liability.

The next issue is how much, if any, the employee contributed to his own injury? The claim agent will attempt to prove that the employee was contributorily negligent by asking: "Did you see the water before you slipped and fell?" or "Could you have seen the water had you been looking?"

If the employee answers that he could have seen the water if he had just been looking, he will undoubtedly be held to be contributorily negligent or possibly the sole cause of his injury. Either way, the value of his case is severely diminished and the statement has virtually exonerated the railroad.

Equally important is that the statement may come into evidence in a court of law. Generally statements are not considered hearsay and are admissible in a court of law.⁵⁷ If the un-counseled employee doesn't realize the significance of his statement and inaccurately says in his statement that he got hurt because he failed to watch where he stepped, the jury may get to hear that seemingly innocent statement. The case could be lost!

If the claimant tries to change his story, his credibility will be damaged and the case may be lost. The jury will probably not be sympathetic to someone who says, "It really

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TX R. Civ. P. 801e A(e) Statements Which are Not Hearsay. A statement is not hearsay if - (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or (2) Admission by Party-Opponent. The statement is offered against a party and is (A) his own statement in either his individual or representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-

wasn't like what I said," or "I didn't know I was hurt that bad," or "The claim agent didn't tell me how important this was."

Thus, a statement is a critical aspect of every injured employee's case. It must be taken seriously as it can quickly destroy your case. It is important as it is generally not considered hearsay and may establish liability.

2. Do I Have to Give a Statement?

No! The injured employee does not have to give a recorded statement to the claim agent. Statements by an injured employee are not mandatory. There is no law, nor is there any operating rule that requires an injured employee to give a statement. In fact, statements are, by their very nature, "voluntary.@" If the claim agent asks the injured employee to give a statement, he is requesting a voluntary consensual statement . If the employee simply indicates he does not want to give this statement, there is no consensual agreement to give a statement and, therefore, the statement, if taken, would not be voluntary.

Thus, the injured employee does not have to give a statement, and should not do so until he has received advice from legal counsel. The claim agent may imply that the statement is required or that charges will be filed if the statement is not given, however employees are never disciplined for refusal to give statements.

conspirator of a party during the course and and in furtherance of the conspiracy.

3. Typical Statement Questions.

Claim agents generally use a similar format to take a statement. It generally has three main parts: what happened, what the railroad did wrong, and what the injured employee did wrong.

The following is a list of typical questions you can expect to be asked:

1. State your name.
2. State your address and phone number.
3. Are you married? Children?
4. Are you giving this statement voluntarily?
5. What time did you go to work?
6. What job were you working?
7. Please tell me how you got hurt.
8. Who saw you get hurt?
9. Who did you report your injury to?
10. When did you first report your injury?
11. What do you think the railroad did wrong?
12. Is there anything the railroad could do in the future to avoid this type of injury?
13. Is there anything that could have been done to avoid the injury?
14. Is there anything you could have done to avoid the injury?
15. What did you do wrong, if anything, that caused your injury?

4. Pitfalls to Avoid

The obvious pitfall to avoid is saying that the railroad was not liable for their injury, or that they caused their own injury. The declarant must be truthful, but the declarant may not be totally aware of all the causes of the injury. For example, the declarant may think he caused his own injury because he was not properly positioned when he lined the switch, only to find out later that the primary cause of the injury was that the switch was in disrepair and in violation of one or more federal regulations.

Unless a complete and thorough investigation is made prior to giving a statement, all the causes of the injury may not be known. Thus, the declarant could truthfully state that they are simply not sure what caused the injury or whose fault it was. Such a response does not make the railroad liable, but it does not place liability on the injured person either.

Discovery of causation factors is one of the primary purposes of litigation, which often takes many months to develop. Of course, if the declarant is absolutely sure of what caused the injury, he should so state. However, such absolute causation knowledge is very difficult, if not impossible to know, especially soon after the injury.

5. The Most Common Mistakes Regarding Statements.

Most railroad employees, even the most experienced, simply do not understand the detrimental effect statements will have on their case. Quite often an injured employee thinks the injury is very minor and thus a statement doesn't make much difference because of the insignificant nature of the injury. This is wrong for two reasons. First, even minor injuries are compensable. However, to recover for a minor injury the employee must still prove the railroad was at fault and that he was not contributorily negligent. Just because it is a minor injury doesn't mean the claim agent will pay lost time and medical expenses.

Second, and more importantly, many injuries, which at first appear to be insignificant and minor, later turn out to be serious and often career ending. For example, if an employee slips and twists his knee while walking in loose ballast, it may be several weeks before his doctor requests that an MRI of the knee be done. Although the employee may only be experiencing somewhat minor pain in the knee, an MRI is the best way to determine the true nature of the injury. If the MRI reveals a torn anterior cruciate ligament, then although the pain is minor, the employee's career as a trainman may be over.

However, if the employee, thinks his injury is minor, gives a statement to the claim agent and fails to properly blame the railroad for his injuries or admits fault simply because he did not want to make waves with the railroad, his case may be lost. His foolish act may result in no job and no money! Why take such an unnecessary chance?

6. Questions and Answers Regarding Statements

1. May I have my union representative present while giving a statement?

The injured employee does not have an absolute right to have a union representative present for a statement. Pursuant to the Railway Labor Act, an employee is not entitled to have a union representative present at an investigatory interview. (The National Labor Relations Act has been interpreted to provide for representation at such interviews, but this right does not extend to railroad workers.)⁵⁸ Thus, even a meeting to discuss a possible rule infraction with a claim agent would not entitle the employee to have a union representative present, as no discipline can be assessed without formal representation. Be sure and check your labor agreement, as there may be some

⁵⁸ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

provision, which requires or allows a union representative to be present during a statement. Further, the company may voluntarily allow a union representative to be present, but the law does not provide the employee with an absolute right to have one present. Finally, even if a union representative is present, he may be precluded from asking questions and/or participating in the questions and answers.

2. If the claim agent asks me questions about an unrelated incident, accident, or injury, do I have to answer the questions?

The rules of evidence do not apply to a statement. **In, fact, there are no rules for statements.** Thus, the law does not provide any restrictions on what can be asked. The declarant could simply refuse to answer, but such refusal clearly indicates the declarant is hiding something. Further, such refusal could raise questions of doubt and credibility in the eyes of the jury.

Thus, once the employee has agreed to give a statement, the door is opened for a myriad of questions. Refusal to answer could cause more harm than the derogatory information the question calls for.

3. Does my lawyer have the right to be present during a statement?

Certainly. Your lawyer may suggest that a statement not be given, but should one be given, the lawyer certainly has the right to be present.⁵⁹ You should not give a statement until you have hired legal counsel who can protect your interests. The sooner you have capable counsel, the fewer mistakes you will make.

F. What Happens After An Employee is Injured?

The post-injury activities of the respective parties are asymmetrical and disparate. Rail management builds their case while the injured employee (claimant) recovers from his injuries. Management has access to virtually all the facts and is keenly aware of the need for investigation and documentation. The claimant has little

⁵⁹ *United Transportation Union vs. State Bar of Michigan*, 401 U.S. 576 (1971).

access to the facts and often fails to realize the need for fact gathering. Armed with this distinct advantage, management takes control from the moment of injury.

1. Employee Post-Accident Conduct

Railroad rules require the injured employee to immediately notify a supervisor of a personal injury and to complete a detailed injury report.⁶⁰ The employee is normally examined and treated by a doctor of the employer's choosing. The injured employee may be allowed to participate in a company-sponsored program that continues to pay the employee's wages during recovery or provides advances.⁶¹

During the recovery period, an injured employee has very little access to information regarding the accident. He may talk to fellow employees who were involved or witnessed the accident, but he normally has no other means to gather information. He is generally denied access to take pictures of the accident scene or equipment. If rolling stock is involved, it will normally continue in service, and it may be thousands of miles away and impossible for the employee to later locate. Defective equipment and structures may be repaired prior to subsequent inspections.

Thus, the injured employee normally is subject to the care and control of the company. He performs very little post-accident fact gathering. His best source of information is from other employees. Even this source is limited, as fellow employees may be hesitant to discuss

⁶⁰ General Code of Operating Rules, 3d ed., Effective April 10, 1994. Rule 1.2, Personal Injuries and Accidents, govern employee conduct with regard to personal injuries. These rules require that every on-duty personal injury be reported. The focus of this notebook is on those injuries that result in 90 days or more of lost wages. Rule 1.2.5 requires prompt reporting of all cases of personal injury to the proper officer on the prescribed form. Virtually every major rail carrier has adopted these rules.

⁶¹ These programs began in the early 1980's on most major carriers. Initially they were referred to as 'light duty.' Injured employees were required to perform insignificant tasks, such as reporting to a company official and reading the rulebook. In some instances those who were unable to drive were provided transportation. Management's theory was that injured employees would recover faster if they returned as quickly as possible to their work environment. Today these programs have new names, such as wage continuation. The railroad may, or may not, offer wage continuation to an injured employee, and an individual is not forced to accept. Obviously, most accept due to a need for monthly income. Injured employees no longer have to report for duty to receive their pay. While the program does benefit the injured employee, management uses it as leverage to induce the employee to see company doctors and to settle. In order to participate an employee must release all medical records to the company. Further, the programs have allowed the railroads to make the industry appear safer, as those who receive pay while injured are often not reported to the Federal Railroad Administration as lost time injuries

the accident for fear of employer retaliation. The overall consequence is that the injured employee is at a distinct disadvantage to develop his case.

2. Management Post-Accident Conduct.

Conversely, management usually begins an immediate and extensive post-accident investigation. Each involved employee is required to submit a written report of the accident.⁶² A management representative, normally referred to as a claim agent, begins a thorough investigation, which includes statements from all involved employees and managers.⁶³ Pictures of the accident site and any involved equipment are usually taken.⁶⁴ This factual information strengthens the company's negotiating position. The claim agent will usually interview and take recorded statements from fellow employees to ascertain information about the accident and even the claimant's personal life. Specifically, the claim agent determines his likes and dislikes, company loyalty, the circumstances of his family life, and personal traits such as temperament. The claim agent will also review company records to determine the employee's educational background, work habits, earning capacity, claims history and extent of prior discipline. This information allows the claim agent to know whom he is dealing with even before the first meeting.

The claim agent will normally make personal contact with the injured employee shortly after the injury. This is usually the first contact the employee has with anyone outside the work place. Others who could be helpful at this early stage, such as union representatives or legal counsel, normally become aware of the injury long after management. Even if legal

⁶² General Code of Operating Rules, *supra* note 64, Rule 1.2.5.

⁶³ Andy Carrola, former Union Pacific Claim Agent, 1986-1990. Interview, January 2, 1995. Statements taken from employees are normally recorded. Those taken from managers are usually carefully worded, written statements.

⁶⁴ *Id.* If defective rolling stock is involved such as a defective car stirrup, pictures may not be taken, based on the assumption that later relocation of the car will be extremely difficult.

counsel were aware of the accident, rules of professional responsibility may prohibit them from making an uninvited visit.⁶⁵

In this first encounter, the claim agent is armed with valuable information that the injured employee is unaware of. In addition to knowing the facts of the case, as well as the employee's background, the claim agent is armed with the law, the experience, and the negotiating skills necessary to place the injured employee at a severe disadvantage.⁶⁶

⁶⁵ Model Rules of Professional Responsibility Rule 7.3 (a) (1989). Generally a lawyer must not seek fee-paying work by initiating a personal or live telephone contact with a prospective client with whom the lawyer has no prior personal or professional relationship.

⁶⁶ Southern Pacific Transportation Company, Negotiating Skills. Claim Agent Training Manual Prepared for 1990 Staff Meeting in San Antonio, Texas. (Training manual on file with the author). The manual instructs the claim agent how to negotiate with injured employees: to be alert for body signals, to listen carefully to what the injured employee says, and "let him talk," and to listen for "key words." The manual also instructs how to negotiate with an injured employee who has been discharged due to the injury, and how to negotiate without authority.

During the first visit, the claim agent normally begins the slow process of developing the claimant's trust.⁶⁷ He will usually advise that management will pay all medical bills, perhaps with some implication that they are not required to do so. He will also suggest the "best" doctors in the locale for the particular injury.

He will provide forms for railroad sickness benefits and disability insurance, if applicable.⁶⁸ He may offer to continue to pay the employee's salary during recovery. In short, the claim agent attempts to assure the employee that the company will "take care" of him. Claim agents often refer to this tactic as "don't bite the hand that feeds you." The theory is that the claimant will be more inclined to cooperate because the railroad is paying his medical bills and salary.

Thus, the claim agent has the first opportunity to make a favorable impression and comfort the injured employee and his family. In so doing, the agent builds leverage for later use in the settlement process. The agent's conduct can cause the injured employee to feel grateful and indebted. Equally important for management, the injured employee may begin to trust and view the agent as the "good guy" of rail management.

⁶⁷ J. D. Conser, What is a Good Settlement?, 74 The Bulletin 122, 123 (1989) . The author is a District Claim Agent for Consolidated Rail Corporation. The Bulletin is a management publication, published by the American Association of Railroads and the National Association of Railroad Trial Lawyers.

⁶⁸ Railroad sick benefits are paid by the Railroad Retirement Board. The program is administered by the Federal Government. Many union contracts also provide disability insurance for injured employees.

After the first encounter the claim agent will continue to address the needs of the claimant in the hopes of averting attorney intervention. He normally makes routine phone calls and occasional visits. The mission is twofold: to become the confidant of the injured employee and to subtly pressure for a direct settlement⁶⁹. At the same time, however, the dutiful claim agent continues to build his case. Because the company usually pays all medical bills, the agent has direct access to all the claimant's medical records.⁷⁰ Accordingly, the claim agent has an "open sesame" to information.⁷¹ Thus, the railroad has a wealth of information about the all-important physical condition of the claimant. The medical information places management in virtual control of the claimant's medical treatment, and further strengthens its negotiating position.

Management's obvious motive is to disprove or minimize the severity of the injury. To bolster management's position, the claim agent will attempt to persuade the claimant to make a statement.⁷² If the case presents unusual questions of liability or damages the claim agent may consult with in-house legal counsel or one of the many knowledgeable outside retained counsel.

⁶⁹ C. L. Merritt, Jr., Holding Cases with Basic Claims Practices, 73 *The Bulletin* 452, 453 (1988). The author is a Regional Claims Agent for the Santa Fe Railroad.

⁷⁰ Many rail employees are provided medical insurance under Travelers Insurance policy GA-23000. The policy is funded by the employer and administered by Travelers Insurance Company, The Health & Welfare Plan of the Nation's Railroads and the Railway Labor Organizations (1993). Some carriers have Hospital Associations, whereby the employer-provided doctors treat workers at the employer's expense.

⁷¹ Richard Turner, Obtaining Medical Evidence of Injury, 523 *Ins. L.* 473, 477 (1966). The author extols the virtues of the insurance adjuster who can get the claimant to authorize release of their medical records. He states an adjuster is at a disadvantage in obtaining medical records. Railroad management simply does not have this problem. The accepted and customary practice is for the railroad to pay medical bills for the injured employee, and consequently receive all medical records.

⁷² Statements can be fatal to the claimant's position: they may exonerate the railroad from liability or establish improper contributory negligence.

Thus, management's post-accident conduct is two fold: build the case in the railroad's best interest, but at the same time develop the claimant's trust and indebtedness. Since most cases turn on facts, railroad companies are keenly aware that good facts are absolutely essential to an advantageous settlement.⁷³ In addition, claimant indebtedness weakens his negotiating posture and strengthens that of management. Both tactics are conducive to a low settlement or no settlement for the injured employee.⁷⁴

G. Selecting a Doctor and Insurance Concerns.

1. Getting the Right Medical Care.

The injured employee's primary concern should be to get well. In order to get well, the injured employee should seek out physicians who have his best interest at heart. Some doctors are more inclined to treat patients with an eye toward reducing the railroad's liability and damages, while others simply want their patients to have the best recovery possible. The latter of the two is preferable for the injured employee.

The injured employee can certainly expect the claim agent to strongly recommend a doctor. The recommended company doctor is usually one that the railroad routinely recommends for injured employees. Unfortunately, such a doctor may have the railroad's best interest at heart rather than the injured employee's, because of the volume of business the doctor receives from the railroad.

The problem with company doctors is best illustrated in the case of a back injury. One doctor may review an MRI and decide the patient has a mild bulge while another may diagnose a ruptured or herniated disc. One doctor may recommend that a patient with a herniated disc return to work in train or engine service, while another may advise that such work would be detrimental. One may recommend surgery while another may not.

⁷³ Robert L. Simmons, Winning Before Trial: How to Prepare Cases for the Best Settlement or Trial Result, 2 vol. (Englewood Cliffs: Executive Reports, 1974), 87. Although not explicitly written for the railroad claim agent, the principles are identical. The author details the importance of facts and how to effectively gather them.

⁷⁴ Id.

Normally, the company doctor will be the doctor who is of the opinion that a herniated disc is not really herniated, but only bulged, or that a trainman can return to work with a herniated disc. Doctors who do not obtain referrals from the railroad may be of the opinion that a damaged disc is truly herniated and that such an injury is serious, which could result in paralysis if the patient returns to work.

The injured employee can expect the claim agent to state that company doctors are good doctors who have extensive knowledge about the injury, simply because they are "railroad doctors." Should the injured employee seek care from a non-company doctor, the claim agent may imply that the doctor is adverse to the interest of the employee. He may suggest that the doctor is a "plaintiff=s" doctor and that he will perform unnecessary surgery and never allow even a completely healthy person to return to full duty.

Whom should one believe? The answer is simple. The claim agent works for the railroad. His job is to protect the railroad's best interest, not that of the injured employee. If the railroad truly had the employee's best interest at heart, what would be the need for having company doctors? The answer is simple: the injured employee's best interest and physical well being is best served by a doctor of his own choosing.

2. Paying for Medical Treatment

One of the most common ways to coerce an injured employee to see a company doctor is to imply that the railroad will pay for medical care only if the employee is treated by a company doctor. Such representations are false. Railroad employees have health insurance in the form of Regence Life & Health (BCBS), United Health Care or Aetna/U.S. Health Care. Either way, existing insurance pays the bulk of all related medical expenses, not the railroad.

**Regence Life & Health (BCBS), United Health Care and
Aetna/U.S. Health Care (athe plans@)**

Active railroad employees covered by these plans have two basic types of coverage: GA 23000 and Managed Medical Care Program. Both provide coverage that pays virtually all-medical expenses related to an injury regardless of the doctor chosen.

Under the GA 23000 policy, the plans pay 85 percent of all related medical expenses and the employee pays 15 percent. However, once the employee pays \$1500 out-of-pocket expenses in a year, the plans pay 100 percent of all reasonable and necessary expenses. When an injured employee covered by GA 23000 allows the railroad to pay related medical expenses, the railroad submits the claims to the plans for payment. The plans pay 85 percent and the railroad pays 15 percent or \$1500, whichever is greater.⁷⁵ Thus, if an employee has back surgery in 1995 at a cost of \$50,000, the railroad pays a maximum of \$1500 and Travelers pays \$48,500.

Those covered by the Managed Medical Care Program must first see a designated general practitioner. The general practitioner may then refer the employee to a specialist for necessary treatment. The plan pays 100% of all medical costs, and the employee pays a \$15.00 office visit charge.

⁷⁵ The portion that UHC pays is counted against the employee=s lifetime maximum payment of one million dollars. (See GA 23000, Section VI, p. 33)

Pursuant to the plan, the employee can always elect to seek treatment from doctors not listed as providers. In that event, the plan pays 75% of all medical care until the employee has incurred \$1500 out of pocket for the year. However, these penalties do not apply to on-the-job injuries. If the injured employee covered by this plan allows the railroad to control his medical care, the cost to the railroad for any one-year would be a minimum of \$15.00 and a maximum of \$1500.00.⁷⁶

Medical Treatment by Company Doctors

One of the most misunderstood issues in the realm of railroad personal injuries is whether the injured employee has a right to obtain medical treatment from a doctor of his own choosing or whether he must be treated by a company doctor.

An injured employee has the absolute right to seek medical treatment from a doctor of his choosing. He does not have to be treated by a company doctor or a doctor recommended by the railroad. He has his absolute choice in seeking medical treatment from those doctors or providers of his own choosing. Numerous awards have so held:

Indeed, an injured employee has the undisputed right to select his own physician for the treatment of injuries sustained on the job, and to that extent, is clearly entitled to reject treatment from physicians selected by the carrier...We think it is inescapable that the thrust of the free choice rule cuts against any duty on the part of an injured employee to accept either first aid or transportation from carrier personnel...Involved here is a personal injury sustained by an employee and his right to deal with it in his own way, without interfering with or disrupting the normal operations of the carrier. In this kind of case the personal rights of the individual employee must be given precedence over the normal principle which requires employees to obey now and grieve later. PLB 2796, Award 3, Eugene Middleton (1981).

The claimant is entitled to be treated by a doctor of his choice, and the carrier does not have the right to direct the claimant to see a specific doctor

⁷⁶ There are numerous exclusions and requirements for coverage under the plans. The information in this notebook is general in nature and not intended to take the place of the actual policy. For specific questions, contact Travelers (see Appendix I).

or a specific hospital for treatment...PLB 94, Award 331, Preston J. Moore (1983).

Furthermore, in addition to the awards of many rail arbitrators federal law now supports an employee=s right to seek medical care without interference from the railroad. 49 C.F.R. ' 225.33 states in pertinent part:

Each railroad shall adopt...a policy statement declaring the railroad=s commitment to...the principle, and absolute terms, that harassment or intimidation of any person is calculated to discourage or prevent such persons from receiving proper medical treatment...would not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or other officer of the railroad committing such harassment or intimidation.

Most recently the FRA has interpreted this law as follows to mean that it is absolutely improper for the railroad to attempt to force an employee to see a specific doctor. Further the FRA says that it is improper for a company officer to accompany an employee into the examining room without a “truly voluntary invitation.” That means the employee must actually invite the officer into the examining room, or it is unlawful for the officer to be there.

Thus, it is abundantly clear than an employee has an absolute right to seek medical treatment of his own choosing without interference from the railroad and the awards of many rail arbitrators with federal law protect such right as well.

However, the railroad does have a right to require an employee to submit to a physical examination, not treatment, from a doctor of its choosing when an issue arises as to an employee=s physical or mental ability to perform his or her job. Thus, an injured employee who has requested permission to return to full duty may be required by the railroad to submit to a physical examination to determine that person=s physical and mental abilities to fully perform his job. Most labor agreements provide for such physical and mental examinations when there is a question regarding the person=s physical or mental ability to safely perform his job as well as numerous awards. However, this right to require an employee to submit to a physical exam in no way interferes with an employee=s right to select his own doctor for medical treatment.

Miscellaneous Questions About Treatment and Coverage

- 1. If I am injured on duty, (for example, 7-16-03) how is my insurance affected?**

Answer: If the NRC/UTU Plan covers you, you will have full coverage, including prescription drug coverage for all of 2003, 2004, and 2005. Periodically, you may be required to send proof of disability to your health insurance vendor.

If you receive any vacation pay in the year next following the year of the injury, your coverage is extended for one full year. Therefore, you would have full coverage for 2003, 2004, 2005 and 2006.

- 2. How is the insurance for my dependents affected?**

Answer: Dependents are covered for the year of the injury and the year following the year of the injury. Thus, if injured July 16, 2003, dependents would be covered for all of 2003 and 2004.

If you receive vacation pay during 2003, your dependents= coverage is extended one full year, through 2005.

- 3. Once the coverage ends, may I continue coverage by paying the premiums?**

Answer: Yes. You can buy coverage through the plans by paying the required premiums. However, the coverage is basically a major medical policy.

H. Questions and Answers Regarding the Federal Employers= Liability Act

1. Is a F.E.L.A. case like a workers' compensation case?

No. There are a number of significant differences between the F.E.L.A. and workers' compensation laws. Under workers' compensation laws, the workers= compensation policy pays the injured employee, no matter how the accident occurred, so long as the accident and injury occurred during the course and scope of the employee's normal job. Therefore, the cause of the injury could be 100% the employee's fault, and he would still recover the benefits allowable under workers= compensation laws.

However, under the F.E.L.A., the employee must prove, by a preponderance of the evidence, which his injuries were caused by the negligence of the railroad. Thus, if the injury is 100% the employee's fault, under the F.E.L.A. the employee can make no recovery.

Another major difference between the two laws is the amount of recovery. Most workers' compensation laws provide a set amount for certain losses. The F.E.L.A., on the other hand, allows a jury to determine the proper amount of damages the employee should recover for his injuries. Therefore, a jury could award much more than would be provided for under workers' compensation law.

2. Can I recover under the F.E.L.A. if I am partially at fault in causing my injuries?

Yes. The F.E.L.A. provides that a jury must determine the percentage of fault of both parties. The final amount of the jury's award is reduced by the percentage of fault of the injured employee. For example, if the jury awards \$100.00 for the employee's injuries and finds the employee to be 20% at fault, the injured employee is awarded \$80.00.

The F.E.L.A. is different from most common law negligence laws in that the injured employee could be 90% at fault and could still recover. Under the laws of Texas, for example, if the injured employee is more than 50% at fault, he cannot recover. Therefore, under the F.E.L.A., an injured employee who was 90% at fault could still recover \$10.00, whereas under most state laws, an injured employee who was 90% at fault could make no recovery.

3. What kind of fault must be proved to recover under the F.E.L.A.?

The fault, which must be established to make the railroad responsible for the injury, is called "negligence." Negligence is a legal term, which means "the failure to use reasonable care to avoid injury to another." The employee must be able to prove that the railroad's negligence was a cause, in whole or in part, of his injuries. Thus, if there were oil on the running board of a locomotive that had dripped from the sump, which caused an employee to slip and fall, the railroad, in all probability, would be held negligent for allowing the oil to drip on the running board. That negligence would be a cause, in whole or in part, of the injury to the employee.

4. Who is included under the railroad's negligence?

The negligence of the railroad includes the negligence of any person who is either working for the railroad or who is an agent of the railroad. The railroad is vicariously liable for the acts of its employees. Thus, if a co-worker is the cause of your injury, the negligence of the co-worker is imputed to the railroad and the railroad is then responsible for your injury.

5. Am I covered while riding in a carryall?

If the railroad has hired another person or entity to perform some of its work, such as a carryall company, the railroad is responsible for that entity's or person's negligence. Thus, if a contract carryall the railroad has hired is transporting a crewmember and the carryall driver runs a red light causing a wreck and injury, the carryall company and the railroad are liable.

The railroad continues to remain responsible in situations where an injury occurs to an employee while performing work off of the railroad property. For example, if an employee is switching at an industry and is injured due to a defective switch within the industry, the industry is liable, as is the railroad.

Generally speaking, the railroad has a "non-delegable duty" to provide its employees with a safe place to work. That duty cannot be dissolved simply by hiring someone to perform the railroad's work, or by sending the employee off the railroad property to perform work.

6. If I am riding in a carryall and an accident occurs which is not the fault of the carryall driver or of the carryall itself, is the railroad liable for my injuries?

Probably not. In order for the railroad to be liable for your injuries, you must always prove that the railroad was at fault. If an accident occurs while you are being transported in a carryall that is not the fault of the equipment or the carryall driver, in all probability the railroad is not at fault, and the railroad would not be liable for your injuries.

For example, if you were in a carryall that is lawfully stopped at a red light and the carryall is rear-ended by another vehicle which causes injury, it will probably be very difficult to prove that the railroad, through its agents or equipment, was negligent under those circumstances. The cause of the accident would be the failure of the person who rear-ended the carryall and that person, in all probability, would be the only responsible party for the injury.

7. What is the role of the lawyer in my case?

Obviously, you must have a lawyer if you bring suit. If the case is not actually filed, the law permits you to settle your claim without a lawyer.

8. What does a lawyer charge?

We work on a contingent fee basis. That means that you pay nothing unless there is a recovery. If there is a recovery, you pay 25% of the recovery, plus some expenses involved in the litigation. Lawyers other than designated legal counsel may charge different rates, which may be as high as 40% of the recovery.

9. If I contact a lawyer to discuss my injury, will the railroad find out?

No! At Tavormina & Young, your consultation is absolutely confidential. Neither the railroad nor anyone else will be made aware of your inquiry or any of the subject matter of any discussions. Such matters are protected by the attorney/client privilege, which generally prohibits the lawyer from disclosing anything relevant to the case.

10. How long do I have to bring suit under the F.E.L.A.?

The Federal Employers= Liability Act has a three-year statute of limitations. That means your case must be filed within three years of your injury. Thus, if you wait three years and one week to file your lawsuit, your claim will be barred and you will be prohibited from making a recovery.

However, in some instances, where a third party such as a carryall company or an industry is involved, the state statute of limitations becomes critical. For example, in Texas, the law requires a personal injury suit be filed within two years of

the injury, and in Louisiana, the state statute is one year from the date of the injury. Thus, if you are injured while switching at an industrial plant in Louisiana, a lawsuit against the industry must be brought within one year, and a lawsuit against the railroad must be brought within three years. Thus, if you are injured, it is critically important to contact designated legal counsel immediately to determine the applicable statute of limitations in your case.

11. Is the statute of limitations extended as long as I am negotiating with the railroad claims agent?

No. The mere fact that you are talking to the railroad about settling your claim in no way extends the statute of limitations under the F.E.L.A. or under any state law. Thus, you could technically discuss settlement of your claim with the claim agent for three years without settlement, and on the first day after three years, the railroad would owe you nothing.

12. May my co-workers provide information to me or my attorney to assist me with my claim?

Yes. Section 60 of the F.E.L.A. specifically prohibits the railroad from retaliating in any manner against any co-worker who wants to voluntarily provide information about your claim to you or your attorney. In fact, it is a crime to attempt to ~~A~~by threat, intimidation, order, rule, contact, regulations, or advice whatsoever~~@~~ to prevent an employee from voluntarily giving information regarding an F.E.L.A. claim.

13. What should I do if the railroad offers to give me money for my injury?

The railroad may advance you money without affecting your right to later bring a lawsuit, so long as you do not sign a release. If you sign a release in return for accepting money, you may be forever barred from later bringing a lawsuit. A

release is a document that prevents you from suing the railroad in the future for that injury. Do not accept the word of a claim agent who may indicate that the document that you are signing is only a receipt for the money that was paid to you. Make sure it is not a release, because a release for that injury may bar you from ever suing regarding the injury.

APPENDIX A

SAMPLE ACCIDENT REPORTS

(Exhibits 1-8)