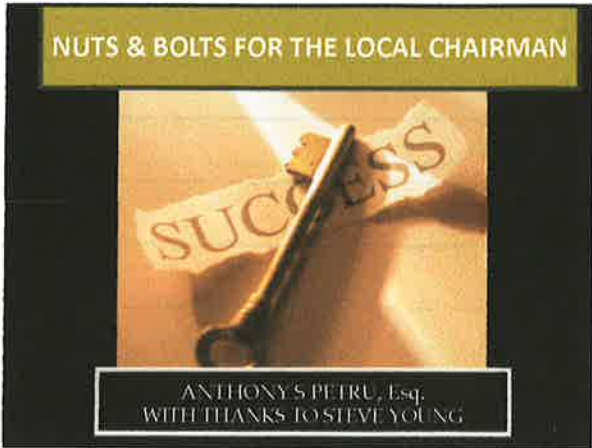


# NUTS AND BOLTS

Anthony Petru



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### Class Summary

- Importance of the Local Chairman
- What the Union is Doing for Me
- RRB Disability
- Union Officer Immunity
- Your Right to be Present
- Electronic Devices
- Availability
- Conductor Qualification
- Medical standards
- ADA
- Taking Prescription Drugs at Work
- Hours of Service & Drug Testing
- FRSA Rights
- FELA Rights

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### CORNERSTONE OF THE UNION

- LC - single most important position in the Union
- Members have the most contact with LC
- Members perceive the LC as the Union
- Must have credibility with the members



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## LOCAL CHAIRMAN

A Local Chairman's office transcends time claims and disciplinary actions. The Union's business is to promote the welfare of its members. "Union Business" is not limited to such matters as are set forth in the Agreement. The **successful** Local Chairman is at times nursemaid, counselor, advocate, and friend to his members." PLB 2143, Award 73, David Brown, 1979.

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## CORNERSTONE OF THE UNION

- Must know his members
- Must give personal advice:
  - Agreement
  - Drugs & alcohol
  - Marital issues
  - Layoff rights
- Must give critical advice on discipline
  - Waive hearing
  - Arbitrate



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## YOU ARE THE UNION

- Your job is crucial
- You are viewed as the union by members & management
- Union is responsible for:
  - 8 hour day
  - Fringe benefits
  - Railroad Retirement
  - Safe workplace
  - No discipline without hearing
  - Employee protection
- Be proud of your job and your union



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## SCREW'M ?

- Credibility - a must!
- Conduct yourself as a professional
  - Be cool
- Know the facts of the case
- Know the agreement on the issue
- Know the law of the issue
- Do what you say



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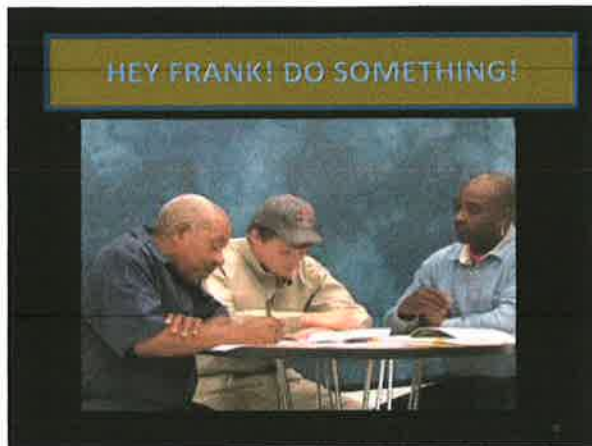
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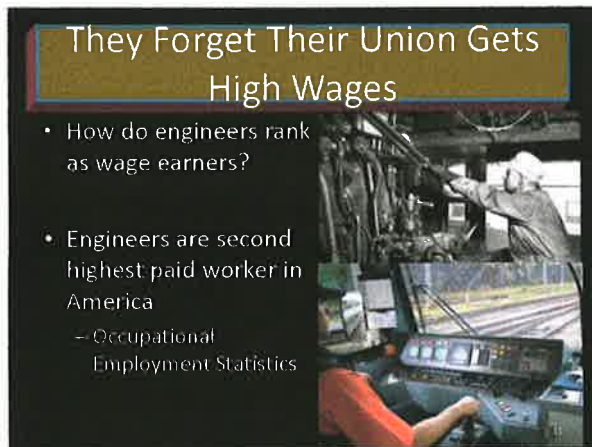
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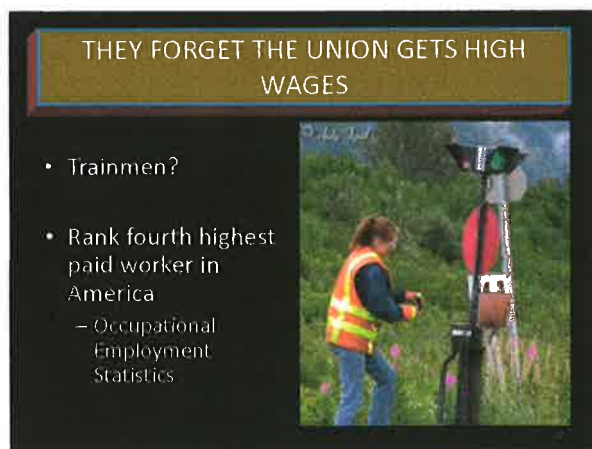
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### THE CURRENT MONETARY VALUE OF YOUR FRINGE BENEFITS

|                          |                    |
|--------------------------|--------------------|
| • RRB Tier I             | \$7,886.40         |
| • RRB Tier II            | \$12,379.50        |
| • RRB unemployment       | \$1,029.00         |
| • RRB Medicare           | \$1,548.60         |
| • Health/Welfare         | \$20,324.64        |
| • Health/Welfare Retiree | \$2,001.00         |
| • Dental                 | \$781.44           |
| • Vision                 | \$101.28           |
| • Vacations              | \$3,008.00         |
| • Holidays               | \$1,569.82         |
| • Misc                   | <u>\$662.55</u>    |
| • <b>TOTAL</b>           | <b>\$51,291.93</b> |




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### Union Fringe v. NYC Employees

|                          |                    |
|--------------------------|--------------------|
| • RRB Tier I             | \$ 7,886.40        |
| • RRB Tier II            | \$12,379.50        |
| • RRB unemployment       | \$ 1,029.00        |
| • RRB Medicare           | \$ 1,548.60        |
| • Health/Welfare         | \$20,324.64        |
| • Health/Welfare Retiree | \$ 2,001.00        |
| • Dental                 | \$ 781.44          |
| • Vision                 | \$ 101.28          |
| • Vacations              | \$ 3,008.00        |
| • Holidays               | \$ 1,569.82        |
| • Misc                   | <u>\$ 662.55</u>   |
| • <b>TOTAL</b>           | <b>\$51,291.93</b> |



NYC Employees  
\$38,000

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### RRB/SSA Comparison Chart - Annual Amounts

|   | RRB      | SSA      |
|---|----------|----------|
| Average Employee Age Annuity on the Rolls*    | \$40,880 | \$18,460 |
| Average Spouse Annuity on the Rolls           | \$12,120 | \$8,340  |
| Average Employee Age Annuity Awarded in 2017* | \$48,380 | \$22,380 |
| Average Spouse Annuity Awarded in 2017*       | \$17,820 | \$11,100 |
| Average Disability Annuity Awarded in 2017    | \$35,980 | \$15,540 |
| Occupational Disability Awarded?              | Yes      | No       |
| Full Annuity at 60 with 30 Years?             | Yes      | No       |
| Average Widower(s) Annuity on the Rolls       | \$19,908 | \$15,840 |
| Average Widower(s) Annuity Awarded in 2017    | \$24,720 | \$14,700 |

\*Current old employees with at least 10 years of service. (Total RRB figures do not include employees who are awarded an annuity based on disability.)

Note: - Amounts shown are as of the close of fiscal year ending September 30, 2017.

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### RRB SICKNESS BENEFITS

- **INJURY OR ILLNESS**

- Qualify: \$3,637.50 in 2016 earnings, no more than \$1,455 in any month
- Waiting: at least 14 days
- Length: up to 130 days-26 weeks
- Extension: of 65 days if 10 years of service
- Amount: up to \$72/day



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### SMART-TD DISABILITY COVERAGE ON or OFF DUTY

- Your International Officers have established a **DISABILITY PLAN** for you and your members:

- VSTD (Voluntary Short Term Disability) – **Do Not Opt Out!**

- \$34.50/mo, premium covers up to \$450/wk. up to 34 weeks

- VLTD (Voluntary Long Term Disability) – **Opt In!**

- \$51.63/mo, premium covers 50% of salary up to \$7,000/mo. after 34 weeks
- \$73.88/mo, premium covers 60% of salary up to \$7,000/mo. after 34 weeks

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### RRB DISABILITY ANNUITY

- **TOTAL & PERMANENT**

- 120 months of service
- Disabled from all regular employment
- 5 month waiting period
- Early Medicare after waiting 29 months



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## RRB DISABILITY ANNUITY

- **OCCUPATIONAL**

- 240 Months of service
- 120 Months if 60 years old
- Permanently disabled from Regular Railroad Occupation
- 5 month waiting
- Medicare if totally disabled from all work



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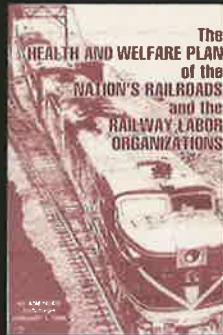
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## RRB DISABILITY & INSURANCE

- Employee maintains active plan for TWO years after the year last worked
- Dependents have ONE year coverage
- No retiree plan
- Employee will typically go on Medicare 29 months after last perform service



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## YOUR RRB BENEFIT LIFE SAVER

- Your member is charged and probably can't win
- He/she has 20 plus years of service
  - 10 years/60 years of age
- Consider occupational disability
- Easy to qualify
- Saves insurance
- Monthly annuity



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### RETIREMENT

- Retire at age 60 with 30 years of service
  - Spouse draws unreduced annuity at age 60
- Retiree insurance
  - 60/30 GA 46000
  - Spouse goes on when employee retires and stays on until employee reaches age 65



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### RETIREMENT

- Retire with less than 30 years of service at age 62
  - Reduction of up to 30%
  - No retiree insurance
- Retire at normal retirement age of 65-67
  - Medicare



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### UNION OFFICER IMMUNITY

- Immune from rules of insubordination, quarrelsome, indifference to duty, etc:
- Immune when:
- Meeting with management & conducting union business-on or off duty:
  - Handling time claims
  - Investigations
  - Safety issues
  - Contract compliance



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### UNION OFFICER IMMUNITY

- Award 15 PLB 6586
- Employee is designated by LC to represent two charged employees at investigation.
- Attempts to introduce evidence were denied.
- Hearing officer turned off recording tape and berated the representative



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### UNION OFFICER IMMUNITY

- Representative used vulgarity.
- Hearing officer suspends the investigation.
- Superintendent instructs claimant to submit to a drug test.
- Representative refuses and leaves the property.



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### UNION OFFICER IMMUNITY

Union Representative is granted a unique status that permits him/her to perform union duties aggressively in the best interests of the members.



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## UNION OFFICER IMMUNITY

- Vulgarity, personal name calling or threats are not protected.
- Claimant was guilty of quarrelsome and discourteous behavior.
- Must apologize
- Carrier's demand for drug screen was improper.
- Discharge reduced to letter of reprimand.




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## YOUR RIGHT TO BE PRESENT

- Member derails train
- Member is confronted by the TM
- TM demands to know what happened
- Member calls you and wants to know if he can refuse to talk to the TM until you arrive
- What is your advice?




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## YOUR RIGHT TO BE PRESENT

- LC has no lawful right to be present for investigatory interview
  - Weingarten Rights do not apply to RLA workers
- RR workers do not lawfully have the right to have a union representative present during an investigatory interview.  
*Johnson, 944 F.2d 247 (5th Cir. 1991)*




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**RAILWAY LABOR ACT**

- 99.9% of the issues you will handle are minor disputes
- All minor disputes are arbitrated
  - You must file a time claim
- The decision of arbitrator is final and binding
  - If you lose its is over
  - No appeal
  - Court case – rare & loser



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**RAILWAY LABOR ACT**

- Is this a good process?
- Dispute resolution in America:
  - Courts
  - Mediation
  - Arbitration
- RLA arbitration is paid for by government
  - No cost to union
- Decision is final & binding



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**RAILWAY LABOR ACT**

- Constitution:
  - GC is highest designated officer to interpret contract
- When GC & Carrier cannot agree on meaning:
  - Resolution is arbitration
- Don't force GC to arbitrate rules case
  - Could wipe out agreement



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### DUTY OF FAIR REPRESENTATION

- Union Officer has a fiduciary duty to each member
- Must treat each member in "good faith"
- Wide range of "reasonableness"



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### DUTY OF FAIR REPRESENTATION

- Duty of FR is breached if:
- Conduct is in "bad faith"
- "Arbitrary Conduct"
- "Perfunctory handling"
- ALPA v O'Neill, 499 US 65 (1991)



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### DUTY OF FAIR REPRESENTATION

- Six (6) month statute of limitations
- Suit must be filed within 6 months of the breach
- Write letter declining to handle
- DelCostello v. Teamsters, 462 U.S. 151 (1983)



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## DUTY OF FAIR REPRESENTATION

### • No Breach:

- Refuse to handle invalid claim
- Claim dies because you make honest mistake
- New agreement is detrimental to one member and helpful to another



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## DUTY OF FAIR REPRESENTATION

### • Breach:

- Refuse to handle claim or grievance because you don't like member, or due to race, religion, color, age, etc;

- Perfunctory handling of claim - don't try



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## DUTY OF FAIR REPRESENTATION

### • Breach:

- Handle valid claim for one and not another - arbitrary

- Refusing to handle **non-member** claim who is a member of the bargaining unit



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## ELECTRONIC MEDIA

- New Federal Law authorizes the use of a camera to take pictures and video at the workplace - 49 C.F.R. 220.309
- To document a safety hazard
  - Not defined
  - Very broad
- To document a violation of rail safety law, regulation, order or standard



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## ELECTRONIC MEDIA

- Can I take pictures and video while I am on a moving train?
- Yes. The regulations specifically provides for taking pictures or video while the train is moving by someone other than the engineer.
- 49 C.F.R. 220.309



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## ELECTRONIC MEDIA

- RESTRICTIONS:
- Can't use a cell phone
  - The device's primary function must be for taking still pictures or video
- Device must be turned off immediately after the documentation has been made



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## ELECTRONIC MEDIA

- Q. I am not on duty, but I want to go on the property to take pictures. Do I as a union officer have that right?
- A. NO. No law, rule or regulation provides this right.
  - If not on company business, trespassing



**ASK PERMISSION FIRST**

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## FRSA Whistleblower

- What is a "Whistleblower violation"?
  - Definition
  - Examples
  - Medical treatment
- How to protect yourself
- Filing complaints
- Recent cases
- Questions

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## What is a "Whistleblower violation"?

- Under 49 U.S.C. Section 20109:
- Railroad commits a violation when it undertakes an **adverse action**, due, in whole or in part, to employee's **protected activity**



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### What is a "Whistleblower violation"?

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#### Required Elements

1. Protected Activity by Employee
2. Adverse Action by RR
3. Connection between (1) and (2)

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### What is a "Whistleblower violation"?

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#### Common Protected Activities

- Providing Information
- Notifying RR of **work-related injury**
- Reporting **hazardous safety / security condition**
- Accurately reporting **hours of service**
- Filing / assisting with **OSHA complaint**
- Asking for **medical treatment** of on-duty injury

Below, OSHA will investigate a complaint, but will refer to HRA for a final decision. "Protected Information" - employees will have to provide this info to the HRA.

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### PROVIDING INFORMATION

49 USC § 20109 (a) (1) Protected Activities:

- Providing information, or to otherwise assist in any investigation regarding **any** conduct which the **employee believes** constitutes a violation of:
- **ANY** Federal law
- **ANY** Federal rule
- **ANY** Federal REGULATION
- Relating to railroad **SAFETY**, security, gross fraud, waste or abuse of Federal grants or public funds intended for railroad safety or security

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### PROVIDING INFORMATION

49 USC § 20109 (a) (1) Protected Activities:

- If the information **is provided to** or an investigation stemming from the provided information is conducted by:
  - A Federal or State regulatory agency
  - Any member of Congress
  - **A PERSON WITH SUPERVISORY AUTHORITY OVER THE EMPLOYEE**

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### PROVIDING INFORMATION

➤ Safety Regs include:

- FRA violations –CFR's
- OSHA violations
- LIA violations
- SAA violations
- Hours of Service Act
- Rail Safety Act



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### PROVIDING INFORMATION

➤ You complain the:

- Tire tread is low
  - Federal tire tread
- Seat belt does not work
  - Federal seat belt law



➤ Each is a protected activity

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## PROVIDING INFORMATION

Safety Regs - examples:

- You complain the:
  - Piston travel is too long
    - 49 CFR 229.55
  - Sanders don't work
    - 49 CFR 229.131
  - Seat does not adjust
    - Firmly mounted & braced
      - 49 CFR 229.119
- Each is a protected activity



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## REFUSING TO VIOLATE FEDERAL LAW

49 USC § 20109 (a) (2) Protected Activities:

- A RR worker may **REFUSE TO VIOLATE** or assist in the violation of **ANY**
  - Federal law
  - Federal rule
  - Federal Regulation
- Relating to railroad **SAFETY** or security



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## REPORTING AN INJURY

49 USC § 20109 (a) (4) Protected Activities:

Notifying RR of **work-related injury**

- Can be
  - ✓ Verbal OR
  - ✓ Written



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## HOURS OF SERVICE

49 USC § 20109 (a) (7) Protected Activities:

- Discharge
- Discriminate
- Demote
- Suspend
- Reprimand
- In any way discriminate, in whole or in part
- **TO ACCURATELY REPORT HOURS ON DUTY**



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## REPORTING INJURIES

- **IT IS UNLAWFUL FOR A RAILROAD**
- Discharge
- Discriminate
- Demote
- Suspend
- Reprimand
- In any way discriminate, in whole or in part
- **TO NOTIFY OR ATTEMPT TO NOTIFY, THE RAILROAD OF A WORK RELATED PERSONAL INJURY OR ILLNESS**

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## MEDICAL TREATMENT WHEN INJURED

49 USC § 20109 (c) (1)

- If transportation to a **hospital** is requested by an employee who is injured during the course and scope of employment, the railroad shall **PROMPTLY** arrange to have the injured employee transported to the **NEAREST** hospital where the employee can receive safe and appropriate medical care.



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### MEDICAL TREATMENT WHEN INJURED

49 USC § 20109 (c) (1)

- Q. Can the RR take me to a doc in the box or other type medical clinic?



- NO. The law requires transportation to the nearest **HOSPITAL** where one can receive safe and appropriate medical care.

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### MEDICAL TREATMENT WHEN INJURED

49 USC § 20109 (c) (1)

- Q. Under this new law can the RR transport the injured worker in a company vehicle?



- YES. The new law does not specify the mode of transportation, nor does it require an ambulance.

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### MEDICAL TREATMENT WHEN INJURED

49 USC § 20109 (c) (1)

- A railroad carrier may not **DENY, DELAY, or INTERFERE** with the medical or first aid treatment of an employee who is injured during the course and scope of his employment



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**MEDICAL TREATMENT WHEN INJURED**

49 USC § 20109 (c) (1)

- Q. Can the RR force me to see a company doctor?
  - NO
  - This would be interfering



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**MEDICAL TREATMENT WHEN INJURED**

49 USC § 20109 (c) (1)

- Q. My doctor has not released me for duty, but the RR demands that I see a company doctor for a return to work physical. Is that lawful?
  - NO - The RR may not interfere with the employees treatment plan



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**MEDICAL TREATMENT WHEN INJURED**

49 USC § 20109 (c) (2)

- A railroad carrier may not discipline or threaten discipline for requesting medical or first aid treatment.



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What is a  
"Whistleblower violation"?

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Common Adverse Actions

- Intimidation
- Threats
- Harassment
- Discipline
- Termination
- Probation or adverse "points"



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What is a  
"Whistleblower violation"?

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Connection between (1) and (2)

- KEY!!
- The RR's adverse action must have been done in whole or in part because of the employee's protected activities



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What is a  
"Whistleblower violation"?

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Possible Examples:

- Discipline for late reporting an injury
- Threatening discipline / termination if an injury is reported
- Termination / retaliation for filing an OSHA complaint

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## FRSA Whistleblower

### How to Protect Yourself:

1. Ask questions
2. Make request for medical treatment
3. Keep notes
4. 180 days

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## FRSA Whistleblower

### Ask Questions!!

- Union reps
- Co-workers
- Attorneys and investigators at Hildebrand, McLeod & Nelson or other DLC/ARLA counsel.



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## FRSA Whistleblower

### Explicitly Request Medical Treatment

- Maximum protection is if you **request hospital/ER**
- RR **must promptly** arrange transport to **nearest hospital**



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## FRSA Whistleblower

### Keep Notes:

- The more detail, the better
- Key events
- Conversations
- Times & dates
- Witnesses

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## FRSA Whistleblower

Statute of Limitations: Strict Filing Deadline

### 180 days:

- SHORT TIME LIMIT!!
- Must file complaint within 180 days from adverse action
- Not exactly 6 months



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## FRSA Whistleblower

- Complaints are filed through Federal OSHA
- Region 9 & 10
  - San Francisco Regional Office: (415) 625-2527
  - Seattle Regional Office: (206) 757-6700
- Who can file
  - Employees - Union Reps - Attorneys

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## FRSA Whistleblower

### Why file?

- Punitive damages up to \$250,000
- Back pay & other economic damages
- Emotional damages
- Reinstatement, discipline expungement
- Attorneys fees

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## FRSA Whistleblower - Process

- OSHA Complaint & Investigation\*
- OSHA Merit Finding or Dismissal
- Appeal to Administrative Law Judge\* (automatic right)
- Appeal to Administrative Review Board (discretionary)
- Appeal to Federal Circuit Court of Appeals (discretionary)



\*NOTE: after 210 days with OSHA, can file in Federal trial court; appeal to Federal Circuit Court of Appeals

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## FRSA Whistleblower

Case: Harvey v. UP

1. **What happened:**
  - Harvey injured from slipping on water from defective locomotive ice box
2. **Protected activities:**
  - Notified UPRR of on-duty injury two months later
  - Requested medical treatment
3. **Adverse actions:**
  - RR told Harvey he would be investigated
  - Termination for late reporting

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## FRSA Whistleblower

### Case - Harvey v. UP

#### Violations of 20109(a)(4) and (c)(2) based on:

- On day of injury report, RR told Harvey of Level 5 charges & investigation
- Time proximity between termination and report
- RR manager became angry at Harvey when injury reported
- Disparate treatment between Harvey and conductor
- Incomplete investigation by RR
- Charges disproved by investigation testimony

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## FRSA Whistleblower

### Recent Case: Harvey v. UP

#### OSHA Order:

- \$75,000 for pain and suffering
- \$150,000 in punitive damages
- Expunge adverse reference from personnel records relating to suspension
- Attorney fees

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## FRSA Whistleblower

### FIRST EVER WHISTLEBLOWER JURY TRIAL --

#### Barati v. Metro North

#### 1. What happened:

- Claimant hurt toe using the method taught by the RR

#### 2. Protected Activities:

- Notified RR of an on-duty injury that day

#### 3. Adverse Actions:

- Terminated for not following RR safety rules (Rules are contrary to what RR taught him)

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### FRSA Whistleblower

Barati v. Metro North (con't)

Violations of 20109(a)(4) because:

- Time proximity between termination and injury notification
- Termination was disproportionate to violation
  - Clean discipline record
  - Testified he was not taught method in safety rules
- Testimony of RR managers established RR discriminated

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### FRSA Whistleblower

Jury Verdict: Barati v. Metro North:

- \$40,000 emotional distress
- \$1,400 lost wages for attending trial
- \$1,000,000 in punitive damages (reduced to \$250,000)

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### Other Notable Developments

- Bala v. Path – 20109(c)(2) protects following doctor's orders for on ~~and off~~-duty medical conditions
- Reed v. NS – No "election of remedies" defense between FRSA and RLA PLB process (7<sup>th</sup> Cir.)
- April 2014 OSHA decision – UP ordered to pay \$85,000 for its retaliation against employee who reported injury and defective seat

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## FRSA Whistleblower

Whistleblower in the Future – A New Law

- This is a VERY new law, it's still developing
- Not all questions for all situations are answered



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## FRSA Whistleblower

1. If you are hurt, request hospital / ER
2. Have a witness / buddy
3. 180 days to file
4. Ask questions
  - Union reps

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## MEDICAL STANDARDS

- RR has the right to establish reasonable medical standards
  - TDA 28505
  - FDA 24042
- RR has the right to know that each employee is mentally and physically able to safely perform their duties



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## MEDICAL STANDARDS

- When questioned, it is the employee's responsibility to prove he/she is mentally and physically able to safely perform their duties.
- EE can sign medical release
- EE can provide records of treatment



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## MEDICAL RECORDS

- **ADA – Americans With Disabilities Act:**
  - RR cannot get any/all records
  - Only if RR has reasonable belief med condition prevents EE from performing essential function of job
  - Records sought must be limited to **that** condition



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## MEDICAL STANDARDS

- RR has the right to have an employee examined by a doctor of its choosing
  - RR has to pay for exam
  - Doctor cannot perform invasive procedure
  - Must arrange in reasonable time



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## AMERICANS WITH DISABILITY ACT

- Unlawful to discriminate against an employee based on a disability so long as the employee can perform the **essential functions** of the job



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## Questions & Answers

- Q. An MOP saw your member limping at work and wants to remove him from service pending a physical. Can he do that?
- A. Yes. Anytime there is an issue regarding an employee's physical or mental ability to safely perform their job the company has the right to withhold them from service for an exam.



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## Questions & Answers

- Q. My member was removed from service and examined by a company doctor who says he can't be an engineer due to his bad knees. His doctor says he can work. What are his remedies?
- A. File a claim of disability discrimination with the EEOC
  - Must file within 180 days unless state law equivalent
- Pursue a labor claim for
  - Three doctor panel



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## AMERICANS WITH DISABILITY ACT

- Applies to the RR's
- Disability is: "physical or mental impairment that substantially limits one or more major life activities, or an association with one who has a disability."



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## ESSENTIAL FUNCTIONS CONDUCTOR

- Get on & off stationary equipment
- Couple & uncouple air hoses
- Ride on moving cars by holding onto handrails
- Lift 25 pounds frequently
- Lift 50 pounds occasionally
- Walk on ballast for up to 1 mile
- Infrequent bending, stooping



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## Questions & Answers

- Q. Your conductor was hurt and had back surgery. He is released to full duty with a 10 pound occasional lifting restriction. Does the railroad have to let him/her return to work?
- A. Probably not. However, there would be a fight as to whether lifting 10 pounds is really an essential job function. Essential function is case by case.



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Questions & Answers

- ADA – Reasonable Accommodations:
  - RR required to accommodate if:
    - Doing so does not create undue hardship
  - Examples of Accommodation:
    - Modifying workspace/access
    - Restructuring job
  - Undue Hardship:
    - Too expensive
    - Nature of business



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ESSENTIAL FUNCTIONS ENGINEER

- Run trains
- Inspect engines
- Get on & off engines
- Interpret & communicate signals
- Lift 25 pounds occasionally
- Walk on ballast infrequently



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Questions & Answers

- Q. Your engineer/conductor member has sleep apnea and has trouble staying awake at work. Is he/she protected by ADA and if so can he/she work?
- A. If the condition is bad enough to substantially limit a major life activity, such as staying awake, yes. However, the ADA is no help as the member must be able to stay awake.



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### INVESTIGATION PRACTICE TIPS- ABSENTEEISM

- Policy is vague-
  - Will not win the case, even if it is vague
  - RR has the right to establish a reasonable policy
  - Don't ask the company offer to explain the policy
  - Don't ask the officer to interpret the policy
  - YOU testify as to the vagueness and how it affects the case
- You must get the work history for the involved period
- You must have a reason for the low performance:
  - Illness/sickness
  - Must have medical records
  - Family issues
  - Personal leave days
  - Vacation days
  - FMLA

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### INVESTIGATION PRACTICE TIPS- ABSENTEEISM

- Remember- If the employee misses work because he/she is following the treatment plan of the treating physician due to an on duty injury or illness and the RR is aware of this, it is unlawful to discipline for missing work.
- BALA v PAT (2012)




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### AVAILABILITY

- Some principals:
- Railroad has a right to expect full time work from employees
  - SDA 5049
- Even excused absences cannot be limitless
  - Employee who is legitimately ill is not entitled to limitless layoff - SDA 10864




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### AVAILABILITY

- Some principals:
- Entitled to take off 1 day per month in addition to rest days is reasonable layoff
  - FDA 25141 UP (2005)
  - FDA 26018 SOO (2004)



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### AVAILABILITY

- Some principals:
- Taking care of a sick child, no excuse after so long
  - Award 434 PLB 3304 (1999)
- Laying off with permission – no defense
  - SDA 7748
  - SDA 7803



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### AVAILABILITY DEFENSES

- FMLA
  - 12 weeks of unpaid leave
  - Employee serious health condition
  - Birth – adoption of child
  - Care for parent, spouse or child with serious health condition
- Time off for FMLA does not count against availability



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### AVAILABILITY DEFENSES

- Union business:
  - Official union business
- Time claim conference
- Disciplinary meeting
- Union meeting
- Not fishing and discussing discipline



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### ADA – DEFENSE TO AVAILABILITY

- The ADA also prohibits discriminating against one who misses work due to medical reasons
  - 42 USC § 12102(2)
  - 29 C.F.R. § 1630.2(g)
- However, indefinite leave is not a reasonable accommodation
  - Gant v Wilson 143 F 3rd 1042



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### AVAILABILITY DEFENSE

#### 49 U.S.C. 20109 (c) (2)

- A railroad carrier may not discipline or threaten discipline for requesting medical or first aid treatment or for following the orders or treatment plan of a treating physician



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### AVAILABILITY DEFENSE

- A railroad carrier may not discipline or threaten discipline for requesting medical or first aid treatment or for following the orders or treatment plan of a treating physician
- Applies to on and off the job injuries:
- Employee charged for not working because he/she is off following doctor's orders,
- Violation of 49 U.S.C. 20109 (c) (2)

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### PRESCRIPTION DRUGS & WORK

- Can I take prescription drugs and work?
- GCOR 1.5 – The use of over the counter or prescription drugs, narcotics or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed.



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### PRESCRIPTION & OVER THE COUNTER DRUGS

- In the last two years railroads have changed their drug and medication policies. Each carrier has a list of:
  - medications which they forbid
  - others which require approval



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### Questions & Answers

- Q. Your engineer/trainman member was given a prescription for a narcotic pain medication. Can he/she take the drug and work at the railroad?
- A. Yes. 49 CFR 249.103
  - The doctor or company doctor says use is consistent with safe job performance
  - Drug is used as prescribed
  - Doctor is aware of all prescriptions



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### DRUG TESTING & HOURS OF SERVICE

- Random:
  - Stop testing at 12 hours
  - Exception – Direct observation due to bad test – exceed
- All other tests:
  - Accident
  - Reasonable suspicion
  - Probable cause
  - Allowed to exceed HS if necessary to complete test



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### REPORTING DUI'S

- Federal law requires that one report to the carrier; "completed state action" within 48 hours
- Refusal to blow with suspension is completed state action
- Final adjudication
- UP's new rule (4-16-12): "Certified employees must report any arrest, citation or convictions to an employee assistance representative with 48 hours for:
  - Operating a motor vehicle under the influence of or impaired by alcohol or a controlled substance;
  - Refusal to undergo such testing when a law enforcement official seeks to find out whether a person is operating under the influence of alcohol or a controlled substance.
  - State sponsored diversion programs, guilty pleas and completed state actions to cancel, revoke, suspend or deny a driver's license are considered convictions as applied to this rule.

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### FEDERAL RAILROAD VISION REQUIREMENTS 49 cfr 240.121

- Engineer/remote control/ Conductor
  - 20-40 vision both eyes corrected/uncorrected
  - 70 degrees horizontal meridian – each eye
  - Ability to recognize and distinguish between the colors of railroad signals



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### Questions & Answers

- Q. Your engineer/trainman has been working at the railroad for ten years, but is color deficient in one of the primary colors. Can he/she work?
- A. Maybe. Both crafts must be able to distinguish the primary colors.



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### Questions & Answers

- Q. Your engineer/trainman has been working at the railroad for ten years, but is color deficient in one of the primary colors. Can he/she use a chromatic lens to pass the eye exam?
- A. No. Both certification requirements for engineers and trainmen prohibit the use of the lens to pass the test. Essential job function.



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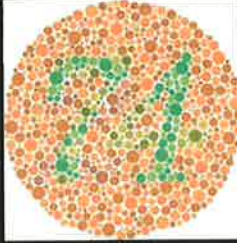
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### Questions & Answers

- Q. Your engineer fails the color Ishihara perception test. Does he/she have the right to additional testing?
- A. Yes, 49 CFR Part 40 Appendix F provides for at least one "approved scientific screening test or field test" or other ophthalmologic referral.



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### FAMILY & MEDICAL LEAVE ACT



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### TO QUALIFY FOR FMLA

- Must be employed for 12 months prior
- Must have worked 1250 working hours in the twelve months prior



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## TO QUALIFY FOR FMLA

- Working hours:
- (1) time spent on duty, including deadhead time and limbo time;
- (2) time spent in mandatory classes, or acting as a peer trainer;
- (3) paid time spent in "OS" status; and
- (4) time spent in company officer status.



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## TO QUALIFY FOR FMLA

- Does time spent at the away from home terminal count as "working" for the purpose of the 1250 working hours?
- Answer: NO.
  - Periods during which an employee is completely relieved from duty and which are lengthy enough to allow them to use their time for their own purposes are not hours worked under FMLA. *Rich v. Delta*, 921 F. Supp. 767
  - *BLET v UP, ND Ill. 2009*

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## ENTITLED TO

- Employee entitled to 12 work weeks of unpaid leave during any 12 month period for:
- Birth of a child – adoption of child



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## ENTITLED TO

- To care for an employee's:
  - spouse
  - son
  - daughter
  - parent
  - with a serious health condition



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## ENTITLED TO

- Employee is entitled to 12 weeks of unpaid leave:
- Because of a serious health condition are unable to perform the functions of your job.



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## ENTITLED TO

- Employee is entitled to 26 weeks of unpaid leave in a 12 month period to care for a covered service member
- This is for a member of the service injured in the line of duty



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### COMPUTATION OF A WEEK

- FMLA leave calculation methodology
- Determine an employee's "normal workweek" by (1) determining the number of hours worked in the 52-week period proceeding the first FMLA leave request, including the adding-back of any leave taken, then dividing by 52 weeks to get an average number of hours worked in a week, and then (2) multiplying by 12 weeks.

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### COMPUTATION OF A WEEK

- Example:
- Employee requests FMLA beginning June 1
- Employee works 1400 hours in the previous 52 weeks
- $1400 \text{ is divided by } 52 \text{ weeks} = 27 \text{ hour work week}$
- $27 \text{ hours} \times 12 \text{ weeks} = 323$
- Employee is entitled to 323 hours of leave

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### NOTICE REQUIREMENTS

- Must give the employer 30 days notice, unless the need is not foreseeable.
- When not foreseeable, must give notice as soon as possible.
- Notice may be in writing, phone, or verbally.
- Employer may not deny FMLA for failure to give proper notice.

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### Questions & Answers

- Q. My member was hurt in a car accident and asked for leave due to the injury. Can the RR have his FMLA run concurrently without his/her permission?



- A. Yes;
  - 29 C.F.R. 825.207(d)

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### Questions & Answers

- Q. Does one off on FMLA have to pay health premiums?



- A. No. The plan continues to pay while the employee is off. The employee does have to pay the member contribution of \$200.00 per month

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### Questions & Answers

- Q. If my member is injured or sick and requests leave, can the railroad count the time off against the FMLA without my member's request or permission?



- A. Yes;
  - 29 U.S.C. 2612(d)(2)(B)
  - 29 C.F.R. 825.207(d)

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### Questions & Answers

- Q. Can the railroad require an employee who takes FMLA for a serious health condition to provide documentation proving fitness for duty?
- A. Yes.
  - 29 C.F.R. §§825.312 and 825.313



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### HOURS OF SERVICE

- Limited to 6 consecutive work days
- 7<sup>th</sup> day exception to work home
- 48 hours mandatory rest after 6 consecutive work days
- 72 hours mandatory rest after 7 consecutive work days



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### HOURS OF SERVICE

- Effective January 1, 2013 consecutive starts changed.
- A break of service of 24 hours breaks consecutive days and restarts clock.
- Example: Employee on duty at 12:01 AM on Monday and off at 8:00 AM on Monday. Next called at 9:00 AM Tuesday. More than 24 hours and clock reset



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### HOURS OF SERVICE

- Effective May 29, 2012 consecutive starts changed.
- Stand alone deadhead does not count as work.
- DH cannot be comingled with other work.
- Must be preceded and followed by UDR.



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### HOURS OF SERVICE

- Effective May 29, 2012 consecutive starts changed.
- Employee works to the away from home terminal on 6<sup>th</sup> consecutive start and gets rest. DH home after rest. Now, only needs 48 hours rest at home terminal.



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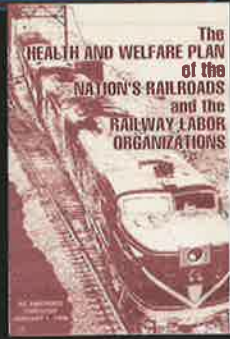
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### MEDICAL INSURANCE

- DISCHARGE
- Month of discharge plus 4 – Employee & dependents
- Can use COBRA thereafter for about \$1,300 per month for employee and all dependents



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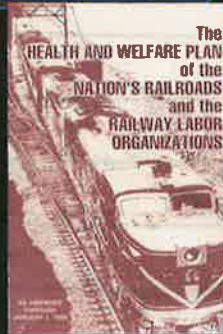
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### MEDICAL INSURANCE

- COVERAGE - OFF WORK DUE TO SICKNESS OR INJURY
- Year of the sickness or injury plus 2 for employee
- Year plus 1 for dependents



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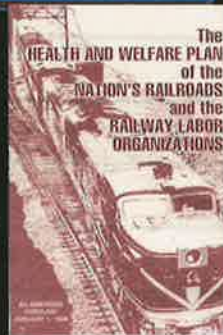
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### MEDICAL INSURANCE

- Q. My member has a bad back and last worked on April 7, 2018. How long does he have medical coverage?
- The employee has coverage through December 31, 2020 and the dependents have one year less.



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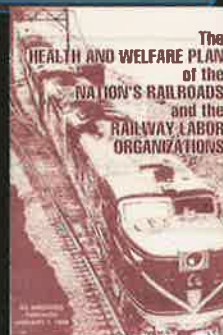
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### MEDICAL INSURANCE

- COVERAGE - OFF WORK DUE TO SICKNESS OR INJURY
- Vacation pay earned in the year of the sickness or injury taken in the following year extends coverage by an additional year.



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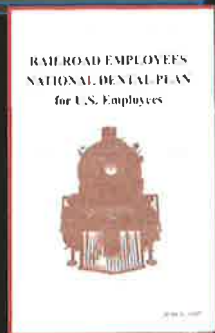
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## DENTAL INSURANCE

- Must have 1 year service
- Must work in prior month
- Max \$1,500 per person
- \$1,000 orthodontic - children
- Discharge – plus 4 months
- Furlough – plus 4 months
- Disabled – plus 1 year
- Vacation pay adds 1 year
- Retire – plus one month



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## THE INJURED MEMBER

### YOU GET THE CALL

- Member calls and says he is hurt and needs advice
- What do you do?
- Protect him from Carrier
- Refer him to DLC
- Referral to DLC is a protected activity
- RR cannot fire you for referral to DLC



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## INSUBORDINATION

- The rule of the railroad has always been to: "comply now and grieve later."
- Thousands of awards uphold this principal
  - FDA 18874
  - FDA 13374
  - FDA 16111
- This is still the rule



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### EXCEPTIONS TO INSUBORDINATION

- A RR worker may **REFUSE** to violate or **ASSIST** in the violation of **ANY**
  - Federal law
  - Federal rule
  - Federal Regulation



- Relating to railroad **SAFETY** or security

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### EXCEPTIONS TO INSUBORDINATION

#### Definition of Safety Laws

- Safety laws include:
  - FRA violations –CFR's
  - OSHA violations
  - LIA violations
  - SAA violations
  - Hours of Service Act
  - Rail Safety Act



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### EXCEPTIONS TO INSUBORDINATION

- The sanders on the lead locomotive are not working at the initial terminal. As the conductor could I refuse to go?
- A. Yes. 49 CFR 229.131 provides that the lead locomotive out of the initial terminal must have operative sanders



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### EXCEPTIONS TO INSUBORDINATION

- The seat belt is not working on your seat in the van. Could you refuse to go?

- A. Yes. Seat belts are required 49 CFR 392.16



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### ASSISTANCE PROTECTION

- FELA -- 49 USC § 60

- **Unlawful** for RR to retaliate against an employee for voluntarily furnishing information incident to injury or death of another employee



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### ASSISTANCE PROTECTION

- FELA -- 49 USC § 60

- Telling your co-worker's lawyer what you know about the injury --**PROTECTED!**
- What you know about the condition of the equipment, area, etc. - **PROTECTED!**
- Could testify about the facts
- Cannot disclose privileged or confidential material



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## ASSISTANCE PROTECTION

- FELA – 49 USC § 60
- Must be a co-worker
- Stinchfield – FDA 26915:
  - Got earning info from UP
  - Got privileged UP info w/o permission
  - Testified as an expert
  - Paid as an expert
  - No protection



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## ASSISTANCE PROTECTION

- FELA – 49 USC § 60
- Stark v BNSF 531 F. Supp. 1061
- Looked at police pictures for plaintiff's lawyer to identify employees – **PROTECTED!**
- Goes to police to determine the names of those in pictures – **PROTECTED!**
- Calls another co-worker to get the name - **PROTECTED!**



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## ASSISTANCE PROTECTION

- FELA – 49 USC § 60
- No automatic right to go on property to take pictures
- No right to take lawyer onto property
- But could draw a diagram of the property



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CONDUCTOR CERTIFICATION

Anthony S Petru, Esq.  
Designated Legal Counsel  
with continued thanks to Steve



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CONDUCTOR CERTIFICATION

- January 1, 2012  
— Effective date
- All employees eligible to work as conductors as of January 1, 2012 will be certified as of January 1, 2012
- All certified conductors must be recertified by June 1, 2015



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CONDUCTOR CERTIFICATION

VISION REQUIREMENTS

- 20/40 vision corrected or uncorrected
- 70 degrees in the horizontal meridian in each eye
- Ability to recognize and distinguish between railroad signals



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### CONDUCTOR CERTIFICATION

**VISION REQUIREMENTS**

- Ishihara plates used for color testing
- One who fails the acuity or color test is entitled to retake the exam
- Chromatic lenses may not be worn for testing
- Contact lenses may be worn for testing and working




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### CONDUCTOR CERTIFICATION

**DRIVING RECORDS**  
**49 CFR 240.115**

- After June 1, 2012 an employee of a Class I railroad cannot be certified or recertified unless the person has provided or requested that his/her driving record for the past five (5) years be provided to the railroad




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### CONDUCTOR CERTIFICATION

**DRIVING RECORDS -- 49 CFR 240.115 - CRITERIA**

- The RR will only consider information regarding action to cancel, revoke, suspend, or deny a license while under the influence of alcohol or a controlled substance or for one who refuses a test to determine if under the influence or impaired by the use of alcohol or a controlled substance.




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**CONDUCTOR CERTIFICATION**

**DRIVING RECORDS – 49**  
**CFR 240.115 - CRITERIA**

- Railroad action required if:
  - (a) **convicted** or
  - (b) driver's license **revoked**

For operating a motor vehicle **under the influence** of or **impaired** by:

- alcohol or
- controlled substance; or



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**CONDUCTOR CERTIFICATION**

**DRIVING RECORDS – 49**  
**CFR 240.115 - CRITERIA**

- Railroad action required if:
  - (a) **convicted** or
  - (b) driver's license **revoked**

For **refusing to take a test** to determine if:

- alcohol or
- controlled substance



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**CONDUCTOR CERTIFICATION**

**DRIVING RECORDS – 49**  
**CFR 240.115 - CRITERIA**

- One whose driving record indicates a violation would be referred to an SAP with "any information concerning the employee's service record"
- An employee with an **active problem** shall **not be certified**



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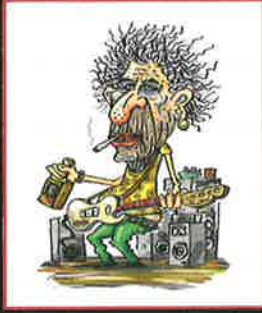
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**CONDUCTOR CERTIFICATION**

**SUBSTANCE ABUSE**

- An employee who has an active substance abuse problem cannot be certified or recertified
- Active substance abuse means the person is currently using drugs or alcohol



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**CONDUCTOR CERTIFICATION**

**SUBSTANCE ABUSE**

- An employee who does not have an active substance abuse problem would be required to participate in a **follow up after care** program and testing, subject to an SAP referral



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**CONDUCTOR CERTIFICATION**

**SUBSTANCE ABUSE**

- One in possession of drugs or alcohol, or one who fails a drug screen or one who refuses will lose his/her certificate for 9 months



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**CONDUCTOR CERTIFICATION**

**SUBSTANCE ABUSE**

- A second offense for possession of drugs or alcohol, or one who fails a drug screen or one who refuses will lose his/her certificate two (2) years
- More than 2 violations, minimum of 5 years



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**CONDUCTOR CERTIFICATION**

**§242.119 TRAINING**

- After June 1, 2012 the railroad must determine the person has the knowledge to safely perform the work of a conductor:
  - Must complete training program
  - Must make passing grade under testing and evaluation procedures
  - Qualified on the physical characteristics of the railroad



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**CONDUCTOR CERTIFICATION**

**§242.121 KNOWLEDGE TESTING**

- Must pass written objective test
  - Safety & operating rules
  - Timetable instructions
  - Compliance with all applicable Federal regulations
  - Physical characteristics of the territory
- No open book test
- Ineligible if one fails but can *retake the test*



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### CONDUCTOR CERTIFICATION

**§242.123 COMPLIANCE TRAINING**

- RR shall monitor the conduct of its certified conductors by performing unannounced operating rules tests
- At least one test within 30 days of returning to work
- At least one test per year



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### DRUGS & ALCOHOL PROHIBITION

**Violation of Federal Law:**

- Possession of alcohol or illegal drugs while assigned to perform covered service
- Use alcohol on duty
- Use within 4 hours of reporting
- Use after receiving notice to report
- Use of illegal drugs on or off duty



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### DRUGS & ALCOHOL TESTING

- Testing for drugs
  - urine
- Testing for alcohol
  - Breathalyzer – saliva swab
- Blood:
  - Post accident FRA



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### DRUGS & ALCOHOL TESTING

- Alcohol concentration below 0.02 is negative
- Between 0.02 – 0.039 positive for alcohol
  - RR must remove from service for at least 8 hours



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### DRUGS & ALCOHOL TESTING

- Alcohol concentration at or above 0.04 or higher or positive for illegal drugs:
  - Violation of Federal law
  - Must be removed from service
- To return to work:
  - Evaluated by SAP
  - Negative return to work test
  - Follow up testing for 5 years
  - At least 6 follow up tests - 1<sup>st</sup> year



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### NON NEGATIVE DRUG TEST

#### Adulterated, invalid or substituted result

- Reported to Medical Review Officer of the RR
- Employee will interview with MRO for legitimate excuse
- Right to request split specimen
  - 72 hours to make the request
  - Done at different lab



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### DIRECT OBSERVATION

#### Test required when:

- Prior urine specimen was not normal temperature
- Collector observes one tampering with specimen
- Previous result invalid due to interfering substance without legitimate medical explanation
- Split specimen could not be tested following non-negative test
- After positive test or refusal



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### SHY BLADDER

- After unsuccessful attempt one has 3 hours to provide sufficient sample
  - Can't combine
  - Can drink up to 40 ounces
- No sample within 3 hours
  - Must undergo medical evaluation
  - No legitimate reason = failure
- Hours of service applies to random testing



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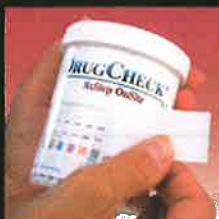
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### REFUSAL TO TEST

- Failure to appear or remain for a test
- Failure to cooperate with testing process
- Failure to provide sufficient amount of breath or urine without medical explanation
- Adulteration-substitution
- Failure to permit direct observation



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### HIGHWAY/RAIL CROSSING ACCIDENTS

- FRA does not permit drug or alcohol testing just because of a grade crossing accident
- State and local laws do not apply and FRA law governs
- Advise law enforcement of the regulation
- Subject to state and local testing if probable cause exists, such as open beer can



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### VOLUNTARY REFERRAL - EAP

- One time deal
- RR required to maintain your employment
- Required to maintain confidentiality
- Required to give 45 day leave of absence for treatment
- Must follow program guidelines



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### TESTING & RECALL

- Employee cannot be recalled to duty after being released for testing
- UNLESS:
  - EE went off duty before being contacted by the supervisor
- AND
  - There is a clear probability that the employee played a major role in the cause or severity of the accident



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## RIGHT TO REFER

- Union officer has right to refer member to DLC
- RR cannot retaliate for the referral
- Protection by 1<sup>st</sup> & 14<sup>th</sup> amendment
  - Trainmen 377 US 1 (1964)
  - UTU v MSB 401 US 576 (1971)



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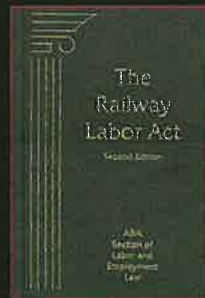
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## LAYING OFF ON UNION BUSINESS

- Right comes from the RLA
- Section 152 fourth:  
No carrier, its officer or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees.



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## LAYING OFF ON UNION BUSINESS

- Legitimate union business
- Union business broadly defined



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### WHAT THE BOARD CASES HOLD

- First Division Award 23817
- 1987
- Chairman Rodney Dennis
- Claimant is involved in recall for union president.
- Says he has the right to lay off all the time because of his union position and recall efforts.

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### WHAT THE BOARD CASES HOLD

- First Division Award 23817
- Chairman Rodney Dennis
- 1987
- FD supports the concept that Carrier cannot interfere with the proper exercise of a union representative's duties.
- **BUT** here claimant was not acting as an elected or appointed officer in dealing with carrier over labor relations problems.
- Protection **does not** apply

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### PRIMARY SAFETY REGULATOR - FRA

- FRA is primary safety regulator for RR
- Thousands of regulations:
  - Track structure
  - Engine safety
  - Car safety
- Make these the basis of your safety complaints




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## OSHA SAFETY JURISDICTION

- OSHA has some jurisdiction over rail safety
- Buildings, such as depots
- Non track & equipment
  - Ladders
  - Jacks



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## Federal Employer's Liability Act

Enacted by congress in 1906 & 1908, the FELA exempts the railroads from having to answer to any State Worker's Compensation Program. Instead the rights of injured railroad workers is EXCLUSIVELY GOVERNED by the FELA

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## Federal Employer's Liability Act

### FELA – Key Features

- **Liability** = Railroad responsibility. MUST establish liability before any recovery. Liability can be established two ways.
  1. FELA Negligence;
  2. FELA Strict Liability
- **Causation**. MUST show #1 or #2 caused harm
- **Damages**. IF you establish liability caused harm, then entitled to common law damages

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## Federal Employer's Liability Act

### FELA Negligence - Definition

- Can be active or passive: "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation...(or fails to do that which a reasonably careful person would do)" CACI 401
- Note: "Person" can be any railroad employee

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## Federal Employer's Liability Act

### FELA Negligence - DUTY

- Railroad has **NON-Delegable** duty to:
  1. Provide a reasonably **safe place to work**;
  2. Reasonably **safe/suitable tools/machinery**;
  3. Perform reasonable **inspections**;
  4. Institute and oversee reasonably safe **methods and procedures** to perform work
  5. Not to assign employee to task for which he is **unfit**
  6. Failure to assign **sufficient number** of employees to task

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### Federal Employer's Liability Act

FELA Negligence – **Comparative fault**  
“If defendant railroad proves 1, that plaintiff railroad employee was negligent, and 2, that plaintiff employee’s negligence was a cause of his/her harm, then **plaintiff employee’s damages are reduced** by the jury’s determination of the **percentage of plaintiff employee’s responsibility.**”  
CACI 2904

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## Federal Employer's Liability Act

### FELA STRICT LIABILITY – Definition

"Defendant railroad is responsible for harm caused by *a violation of a statute enacted for the safety of employees* even if it was *not negligent*. If you find that defendant railroad is responsible for plaintiff employee's harm, plaintiff's recovery, if any, *must not be reduced* because of plaintiff's own conduct." CACI 2920

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## Federal Employer's Liability Act

### FELA STRICT LIABILITY – Examples

- **LIA – Federal Locomotive Inspection Act** – Locomotive and its parts and appurtenances must be "in proper condition and safe to operate without unnecessary danger of personal injury." 49 USC § 20701
- **FSAA – Federal Safety Appliance Act** – sill steps, ladders, cross-over platforms, grab irons, handbrakes, air brakes, couplers, air hoses, etc 49 USC § 20302(a)

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## Federal Employer's Liability Act

### FELA STRICT LIABILITY – Examples

- **FRSA – Federal Railroad Safety Act** – the FRSA includes many provisions for the safety of railroad workers, including: Utility Employees, Radio Communication Rules, Rear End Marking Devices, Hours of Service, Track Standards, Noise Emission, ETDs, etc. 49 USC §§ 20101 *et seq* 49 CFR §§ 213 *et seq*
- **State Walkway Standards** – CPUC GO 118 & 26D

## Federal Employer's Liability Act

### FELA NEGLIGENCE AND STRICT LIABILITY

#### Definition of **CAUSATION**

“Defendant’s negligence/violation of safety act, if any, was a cause of plaintiff’s harm/death if it played **any part, no matter how small**, in bringing about the harm/death, even if other factors also contributed to the harm/death.” CACI 2903

## Federal Employer's Liability Act

### FELA NEGLIGENCE AND STRICT LIABILITY – ELEMENTS OF DAMAGES

1. Past Lost Earnings (after tax)
2. Future Lost Earnings & Capacity (after tax)
3. Unpaid past and future Medical Bills
4. Past physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress.
5. Future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress.
6. Lost Ability to Provide Household Services

## Federal Employer's Liability Act

### FELA ELEMENTS OF DAMAGES (cont.)

Under the provision of the FELA, potential damages do **NOT** include:

- Punitive Damages
- Loss of Consortium (effect of injury on spouse)

## Federal Employer's Liability Act

### DUTIES OF LEGISLATIVE REPRESENTATIVES

- Gather Safety Concerns from **educated** members
- **Document, Document, Document** concerns
- **COMMUNICATE** SAFETY CONCERN TO CARRIER!!!
- Know FELA need for evidence – NOTICE!
- Gather and preserve post accident evidence
- Know /teach Section 60 Rights – Provides broad protection to any person voluntarily providing information to injured employee or their representative!

**RNSF RAILWAY**  
EMPLOYEE PERSONAL INJURY/OCCUPATIONAL ILLNESS REPORT

Report required reporting on injury, condition or occupational illness that results in property loss of \$1,000 or more and/or prevents the employee from performing his or her regular job for 3 or more days, or prevents the employee from performing his or her regular job for 3 or more days, or prevents the employee from performing his or her regular job for 3 or more days.

Describe injuries or illness/condition:  
– Hurt back

Describe fully how injury or occupational illness occurred:  
– Hurt back on bad order switch

**BNSF RAILWAY**  
EMPLOYEE PERSONAL INJURY OCCUPATIONAL ILLNESS REPORT

Report an injury or illness that requires medical attention or a lost workday. This report is for the employee's use only. It is not a claim for compensation. The BNSF Railway will investigate the incident and determine if it was caused by the conduct of another person.

Was the accident caused by the conduct of another person?  
**—YES! Those responsible to maintain switch**

Could you by more care on your part have prevented the injury?  
**—NO**

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**BNSF RAILWAY**  
EMPLOYEE PERSONAL INJURY OCCUPATIONAL ILLNESS REPORT

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Was there any defect, malfunction, or problems of or with the equipment or work procedures?  
**—YES**  
**—B/O Switch**

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**BNSF RAILWAY**  
EMPLOYEE PERSONAL INJURY OCCUPATIONAL ILLNESS REPORT

Report an injury or illness that requires medical attention or a lost workday. This report is for the employee's use only. It is not a claim for compensation. The BNSF Railway will investigate the incident and determine if it was caused by the conduct of another person.

If you do not receive medical treatment as the result of this injury or occupational illness, you must promptly notify your supervisor:  
**—YES**

If you experience any complications resulting from your injury/illness:  
**—YES**

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**BNSF RAILWAY**  
EMPLOYEE PERSONAL INJURY/OCCUPATIONAL ILLNESS REPORT

Basic employee information: Name, Title, Department, Division, Location, Date of Injury, Date of Report, Report made by (Employee/Supervisor), and a section for the injured employee's signature and date.

Medical treatment received: A section with checkboxes for 'First Aid', 'First Aid Only', 'First Aid and Medical Attention', 'Medical Attention', 'Hospitalization', 'Surgery', 'Other Medical Treatment', and 'Other'. A red arrow points to the 'First Aid' checkbox.

Notification of supervisor: A section with checkboxes for 'Notified', 'Notified by', and 'Date Notified'. A red arrow points to the 'Notified' checkbox.

Supervisor's signature and date: A section for the supervisor's signature and date.

Medical professional's signature and date: A section for the medical professional's signature and date.

Remarks: A section for additional information.

- If you do not receive medical treatment as the result of this injury or occupational illness, you must promptly notify your supervisor:
- If you are unable to perform normal duties or absent yourself from your regular assignment because of your injuries

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**BNSF RAILWAY**  
EMPLOYEE PERSONAL INJURY/OCCUPATIONAL ILLNESS REPORT

Basic employee information: Name, Title, Department, Division, Location, Date of Injury, Date of Report, Report made by (Employee/Supervisor), and a section for the injured employee's signature and date.

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Supervisor's signature and date: A section for the supervisor's signature and date.

Medical professional's signature and date: A section for the medical professional's signature and date.

Remarks: A section for additional information.

- If you do not receive medical treatment as the result of this injury or occupational illness, you must promptly notify your supervisor:
- Before visiting a health care professional for subsequent treatment or observation of your injury

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## BNSF 72 HOUR RULE

- If the employee experiences muscular aches and pains from "routine" work that do not appear to be serious when they first occur, he or she has 72 hours to notify the appropriate supervisor that an injury has occurred. Employees will not be disciplined for "late reporting" of this type of injury as long as they:

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## BNSF 72 HOUR RULE

1. Report the injury within 72 of the probable triggering event;
2. Notify the supervisor before seeking medical attention; and
3. The medical attention verifies that the injury was most likely linked to the event specified.

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**1. Describe Fully how the accident occurred.**

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**2. What Specifically caused the accident?**

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3. Did equipment—tools cause or contribute to the cause of the accident?

**YES**  
**BAD ORDER SWITCH**

4. Did working conditions **cause or contribute** to the **cause** of the accident?

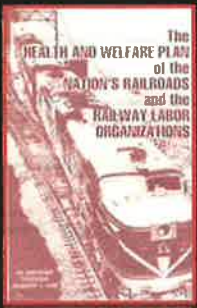
**YES**  
**BAD ORDER SWITCH**

5. Did **other** persons **cause** or **contribute** to the **cause** of the accident?

**YES**  
**THOSE RESPONSIBLE TO**  
**MAINTAIN THE SWITCH**

### Who Pays The Medical Bills

- **GA 23000 covers all injuries**
  - On the job
  - Off the job
- **NO claim agent approval**
- **Bills are sent directly to administrator**



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### THE INJURED MEMBER

Member calls and says he is hurt and needs advice

- What do you do?
- Protect the employee
- Refer him to DLC
- Referral to DLC is a protected activity
- RR cannot fire you for referral to DLC



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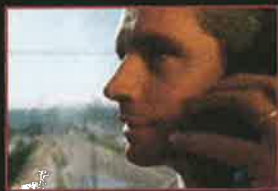
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### THE REFERRAL

- Advice is free
- Advice is confidential
- 25% (33% if the case needs to be filed) fee only if there is a recovery
- Expenses of the case are advanced by the lawyer



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### YOU ARE THE UNION

- Your job is crucial
  - You are viewed as the union by members & management
  - Union is responsible for
    - 8 hour day
    - Fringe benefits
    - Railroad Retirement
    - Safe workplace
    - No discipline without hearing
    - Employee protection
  - Be proud of your job and your union



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### NUTS & BOLTS FOR THE LOCAL CHAIRMAN



ANTHONY S. PETRU, ESQ.  
HILDEBRAND, McLEOD & NELSON, LLP  
800-447-7500  
[www.HIMNLAW.com](http://www.HIMNLAW.com)

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## Questions & Answers

- Q. Your engineer/conductor member has sleep apnea and had trouble staying awake at work, but the problem is now under control due to the use of a CPAP machine. Is he/she protected by ADA and if so can he/she work?



- A. The condition is still protected by the ADA, but if the employee has the condition under control and is able to stay awake, he/she can work. It would be unlawful for the railroad to withhold them from service.

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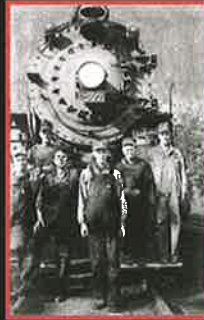
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## AVAILABILITY

- Railroad availability has always been an issue
- Many are on call 24-7 without regular assigned rest days
- The issue has always been
  - How much do I have to work
  - When is layoff excessive



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## AVAILABILITY

- Spring 1999:
  - BNSF announces its layoff policy
  - Unassigned service 75% weekends & weekdays
- Layoff for:
  - Personal business
  - Sickness
  - Sickness in family
  - Missed calls
- Counts against 75%



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AVAILABILITY

- Does not include:
  - Vacations
  - Personal Leave days
  - Jury Duty
  - FMLA
  - Under the care of a doctor



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AVAILABILITY

- UTU & BLE file lawsuit in Federal Court
- Argue BNSF can't implement without agreement
- Court rules minor dispute



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AVAILABILITY

- October 29, 1999-  
Richard Kasher
  - PLB 6264 & 6265
- Carrier may establish **reasonable** policies with respect to employee attendance



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