

Liability

This is a case brought under two federal laws applicable to railroads: (1) the Federal Employers' Liability Act (FELA), under which railroad employees may bring a lawsuit against their employer to recover monetary damages for work-related personal injuries caused in whole or in part by the negligence of the railroad employer, and (2) the Federal Rail Safety Act (FRSA), under which reporting a work-related injury is a protected activity that cannot play any part in the railroad's decision to take adverse action against the reporting employee. I will now instruct you on the law applicable to both the FELA and the FRSA, starting with FELA.

**I. Federal Employers' Liability Act**

In order to find Metro North liable to Mr. Barati under the FELA, you must find that Plaintiff has proved the following four elements by a preponderance of the evidence:

- (1) That the Defendant is a railroad engaged in interstate commerce;
- (2) That the Plaintiff was an employee of the Defendant in interstate commerce, and that Plaintiff was acting in the course of his employment;
- (3) That the Defendant or one of its employees or agents was negligent; and
- (4) That such negligence played a part in bringing about an injury to Plaintiff.

In this case, the first two elements are not disputed, and you may consider them proved. I will now describe the remaining two elements which Plaintiff must prove by a preponderance of the evidence.

### FELA Element Three: Negligence

As to the third element of a FELA claim, Plaintiff must prove that the Defendant was negligent. Negligence is the failure to use the degree of care which a person of ordinary prudence would use in these circumstances. It can be the doing of something which a reasonably prudent person would not have done, or the failure to do something which a reasonably prudent person would have done under the circumstances. In deciding whether Defendant was negligent, you may consider industry custom or safety rules, but determining what is "reasonable" is ultimately up to you. Defendant Metro North is a corporation, and any negligent act or omission of its officers, employees, or agents performed in the course of their duties is negligence attributable to the Defendant corporation.

A plaintiff does not recover automatically simply because he was injured on the job; rather, the Defendant is liable only if its negligence is proved. Metro North is not required to provide Mr. Barati with a workplace that is absolutely safe; Metro North's duty is to exercise reasonable and ordinary care to provide him with a reasonably safe place to perform his work. Defendant's duty is a "continuing duty," from which the railroad is not relieved by the fact that an employee's work at the specific place in question is fleeting. This duty of care includes adequate supervision of employees' work, reasonable inspection of the workplace premises and the employees' equipment, and adequate training as to how to perform the assigned work. Metro North's duty extends to guarding against risks or dangers that a reasonably prudent person would anticipate or foresee resulting from the particular circumstances. Even if no similar injury had ever occurred in a particular location, the injury may still have been foreseeable. However, if you find that Metro North could not have

reasonably anticipated the conditions or circumstances which caused the injury, then Metro North is not negligent.

In sum, on the question of whether Metro North was negligent in the present case, if you find that Mr. Barati has proved by a preponderance of the evidence that Defendant failed to exercise reasonable care to provide Plaintiff with a reasonably safe place to work, reasonably safe tools, or equipment, adequate training, or failed in any other way to exercise reasonable care for his safety in the circumstances, you may find that Defendant was negligent. You may also find that Defendant was negligent if you find that it instructed its employees to perform tasks with a specific procedure or method which it knew, or in the exercise of reasonable care should have known, would result in injuries.

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#### FELA Element Four: Causation

As to the fourth element of a FELA claim—causation—Plaintiff must prove that his injury resulted in whole or in part from the negligence of Metro North employees or agents. There can be more than one cause of an injury, and the involvement of another cause does not prevent a finding for the Plaintiff, as long as you find that the Defendant's negligence played any part, no matter how small, in causing an injury to the Plaintiff. However, the mere fact that an injury or accident occurred does not mean that an injury was caused by negligence.

### **Contributory Negligence**

Defendant Metro North alleges that Plaintiff's injuries were due at least in part to Plaintiff's own negligence. This is referred to as "contributory" negligence. If you find that Mr. Barati's own negligence was the sole cause of the accident, then it is proper to conclude that Metro North's negligence played no role in causing the injury. However, even if you find that Plaintiff was negligent, that does not prevent Plaintiff from recovering damages if you find that Defendant Metro North's negligence also played a part in causing Plaintiff's injuries. Rather, it would result in a reduction of Plaintiff's damages in proportion to the amount of negligence attributable to Plaintiff.

To determine whether the Plaintiff was contributorily negligent, you should apply the same definition of negligence I discussed earlier: that is, you should ask whether the Plaintiff took, or failed to take, actions which a reasonably prudent person would have taken in these circumstances. You will also apply the same rule of causation, and ask whether Defendant has proved that Plaintiff's negligence played a part in bringing about his injuries.

If you find that Defendant has proved that Mr. Barati was contributorily negligent—that is, that he failed to be as watchful and aware of his surroundings as a reasonable person would have been—and you determine that his negligence was at least partially the cause of his injuries, then you must consider the percentage to which Plaintiff's negligence contributed to his injury.

The law works as follows: If we combine every act and every omission of every party to the action which caused the injury, we then have a total of 100% of the negligence

involved. If the Defendant proved that Mr. Barati was partially at fault, then your award to him would be reduced by the amount you find the Defendant has proved he was negligent.

## **II. Federal Rail Safety Act (FRSA)**

Mr. Barati also claims that Metro North violated the Federal Rail Safety Act, or "FRSA," whose purpose is "to promote safety in every area of railroad operations." The FRSA gives protection to railroad workers who engage in certain "protected activity." An employee engages in a "protected activity" under the FRSA when he or she notifies the railroad of a work-related personal injury, refuses to violate or assist in the violation of any federal law, rule or regulation relating to railroad safety, or notifies the railroad of a hazardous safety condition. The Federal Rail Safety Act states that "A railroad carrier engaged in interstate commerce or an officer or employee of such a railroad carrier may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful good faith act."

To prove that a railroad violated the FRSA, a plaintiff-employee must prove the following four elements:

- (1) the Plaintiff-employee engaged in some activity protected by the FRSA;
- (2) the railroad knew or suspected the employee engaged in the protected activity;
- (3) the railroad subjected the employee to some form of adverse action; and
- (4) the Plaintiff's protected activity was a contributing factor to one or more adverse actions.

In this case, the parties do not dispute the existence of the first two elements. Specifically, (1) Mr. Barati engaged in the protected activity of reporting of a work-related

injury (not the mere occurrence of an injury); and (2) Metro North knew that Plaintiff reported his work-related injury. Thus, the elements in dispute are the third and fourth.

**Element Three: Adverse Action**

The Plaintiff must prove by a preponderance of the evidence that Metro North subjected him to some form of adverse action. The term "adverse action" is defined under the FRSA statute as: "discharge, demote, suspend, reprimand, or in any other way discriminate." The parties agree that Metro North's decision to terminate Mr. Barati was an adverse action under the statute, but disagree as to whether his suspension was also an "adverse action." It is for you to decide whether Metro North's decision to suspend Mr. Barati also constituted an "adverse action" under the FRSA.

**Element Four: Contributing Factor**

The Plaintiff must prove by a preponderance of the evidence that his reporting his work-related injury to Metro North was a contributing factor to at least one adverse action. A "contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the disciplinary actions. Thus, if Plaintiff proves that Metro North's disciplinary actions against him were in any way because of his reporting his workplace injury, then Plaintiff will have proved that his protected activity was a "contributing factor" in the disciplinary actions.

While Plaintiff is not required to prove a retaliatory motive by Metro North's management employees by direct evidence, such motive will prove a violation of the FRSA if it contributed or tended to affect in any way the outcome of the decision to take the adverse action.

**Employer Showing: Avoidance of FRSA Damages**

Even if Plaintiff proves by a preponderance of the evidence that Defendant's adverse action was taken in whole or in part because of his protected activity, Metro North can still avoid imposition of money damages under the FRSA if it proves by clear and convincing evidence that it would have suspended or terminated Mr. Barati even if he had not engaged in the protected activity.

"Clear and convincing evidence" is a higher burden of proof than a "preponderance of the evidence," which I already defined for you at pages 8-9 of these instructions. If evidence is "clear and convincing," it means that it is "evidence indicating that the thing to be proved is highly probable or reasonably certain." Thus, if you find that Metro North has proved that it was highly probable or reasonably certain that it would have terminated or suspended Mr. Barati, even if he had not reported his workplace injury, then you may find that Metro North is not liable under the FRSA and you should award no damages under the FRSA.



### III. Damages

If you find that Plaintiff has proved Defendant's liability on his FEHA and/or FRSA claims, then you will decide how much to award in monetary damages. The damages claimed under each statute are different, so you must be careful not to award duplicative damages if you find liability under both statutes. The fact that I am instructing you concerning damages does not mean that I have any opinion as to whether the defendant should be found liable under either law.

In affixing damages under either statute, you should not speculate or guess as to damages, and under no circumstances should you let sympathy, bias, or prejudice affect your consideration of the law and the evidence. Damages must be based on the evidence presented at trial, and only on that evidence. It is Plaintiff's burden to prove each element and item of damage; it is not Defendant's burden to disprove them.

A. Damages under the Federal Employers Liability Act (FELA)

The purpose of the FELA is to compensate an injured employee for the damages sustained as a result of his or her employer's negligent conduct. Insofar as money can compensate, the plaintiff is to receive full, fair and just compensation for the economic and non-economic injuries he has proved he suffered and will continue to suffer in the future. This includes damages for non-economic injuries including physical injury; pain and suffering; emotional injury, disfigurement, and reduction in his enjoyment of life's activities. Mr. Barati also claims economic damages consisting of lost wages from April 22 to June 17, 2008.

As to non-economic injuries, it is for you, in the exercise of your best judgment, to say what is full, just, and fair compensation for the injuries proved. There is no fixed formula for you to apply. In determining and assessing damages resulting from pain, suffering and disfigurement, you should take into consideration the plaintiff's health at the time of his injuries, and preceding those injuries; the activities that he was able to perform; his age; and his life expectancy. The parties have stipulated that Andrew Barati's life expectancy is 30.8 years from today. Damages based on pain, suffering, and disfigurement are compensatory, that is, they should be fixed with the idea of compensating the plaintiff adequately and reasonably for the pain, suffering and disfigurement he has endured, as well as any pain, suffering and disfigurement he will likely suffer in the future.

You may also include a sum of money that will reasonably compensate the Plaintiff for any scarring and disfigurement he has suffered from the injury in question. If you choose to award Plaintiff compensatory damages for future pain and suffering, the law requires the

amount of anticipated future loss be reduced to its present value. The parties have agreed to leave to the Court this present-value-discounting of any award you may make for future pain, suffering, and disfigurement.

Also, if you choose to award Plaintiff damages for personal injuries under the FELA, bear in mind that such an award is not subject to federal income taxes and you should not consider any tax consequences in determining the amount of damages, if any.

**B. Damages under the Federal Rail Safety Act (FRSA)**

**1. Compensatory Damages under the FRSA**

Under the FRSA, "an employee prevailing in any action . . . shall be entitled to all relief necessary to make the employee whole." If you find that Plaintiff has proved by a preponderance of the evidence that Defendant violated the FRSA, and that Defendant has not proved to you by clear and convincing evidence that it would have taken the adverse action against Plaintiff regardless of his protected activity, then you will consider awarding Plaintiff damages for: lost wages for court proceedings seeking relief from the FRSA violation, emotional suffering as a result of Defendant's adverse against him, and non-wage economic losses (property damage) resulting from Defendant's unlawful actions.

When considering whether to award damages for emotional distress, keep in mind that it is not necessary for Plaintiff to produce expert medical testimony on that subject. It is up to you to apply your common sense knowledge of human affairs to the facts as you find them proved.

**2. Punitive Damages under the FRSA**

The FRSA also permits a jury to award punitive damages to a plaintiff to punish a defendant for misconduct and to set an example in order to deter it and others from committing similar acts in the future. Under the FRSA, an award of punitive damages is appropriate if Metro North acted with callous indifference to or reckless disregard for the federally protected rights of Mr. Barati. When a railroad manager acts with callous indifference to or reckless disregard for an employee's federally protected rights, those acts are imputed to the railroad and may serve as a basis for punitive damages against the railroad.

"Reckless disregard" refers to an employer's state of mind regarding its knowledge that it may be acting in violation of federal law. Thus, Metro North acted with callous indifference or reckless disregard if Plaintiff proves that Defendant, or its agents responsible for disciplining the Plaintiff, knew that Plaintiff's discipline was in violation of the FRSA, or if it acted with reckless disregard of that statute. At the least, Mr. Barati must prove to you that Metro North discriminated against him in the face of a perceived risk that its actions would violate federally protected rights under the FRSA.