FRSA SPECIAL LEGAL STANDARDS

The legal standards applicable to Federal Rail Safety Act, 49 U.S.C. 20109, whistleblower retaliation cases are distinctly different from the standards that apply to Title VII or other discrimination cases.

The basic elements of a FRSA retaliation claim are simply stated. A railroad employee must prove by a preponderance of the evidence the following four elements:

(1) that he or she engaged in a protected activity under the FRSA (e.g., reported an injury or safety hazard, or followed a treating doctor's orders not to work);

(2) that the railroad was aware the employee engaged in the protected activity;

(3) that the railroad subjected the employee to some form of adverse action (e.g., discipline or discriminatory treatment); and

(4) that the employee's protected activity was a "contributing factor" to the adverse action.

A contributing factor is a factor which, alone or in connection with other factors, affected in any way the railroad's adverse action. A protected activity was a contributing factor if the railroad's adverse action was based "in whole or in part" on the protected activity--that is, if the protected activity affected the railroad's action to any extent.

Once an employee establishes that his or her protected activity was a contributing factor in the adverse action, a railroad can escape liability only if it proves by "clear and convincing evidence" it would have taken the same action in the absence of the protected activity. "Clear and convincing" is a much higher standard of proof than a mere preponderance of the evidence, and requires the railroad to prove to a reasonable certainty that it would have taken the exact same adverse action against the employee even if the employee had not engaged in the protected activity.

The starting point for the case law interpreting and applying these elements is the U.S. Circuit Court's landmark *Araujo* decision, augmented by the U.S. District Court's *Barati* decision and the Administrative Review Board's decisions in *DeFrancesco*, *Henderson*, *Hutton*, and *Rudolph*. Below are summary excerpts from those decisions taken from the Train Law Blog posts that contain links to the full documents. And all of those decisions and much more can be found at the Rail Whistleblower Resources page.

Remedial Protective Purpose

"The purpose of the FRSA is to promote safety in every area of railroad operations."
"The rail industry has a long history of under reporting incidents and accidents, and railroad labor organizations have frequently complained that harassment of employees who report injuries is a common management practice."
"The intent of the FRSA is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employer railroads" and "by amending the FRSA, Congress expressed an intent to be protective of plaintiff-employees."

http://www.trainlawblog.com/2013/02/articles/federal-railroad-safety-act/frsa-alert-landmark-federal-appeals-court-decision-clarifies-legal-standards/

True Meaning of "Contributing Factor"

"The railroad employee need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause. In other words, a contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." This test means an employee does NOT have to prove "his protected conduct was a significant, motivating, substantial, or predominant factor in an adverse personnel action." This is consistent with the "in whole or in part" language used in the text of the FRSA statute, and means that if the protected activity played any part at all, even to the slightest degree, then it is a "contributing factor."

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McDonnell Douglas Burden Shifting Does NOT Apply to FRSA Cases

"The FRSA burden shifting is much more protective of plaintiff-employees than the *McDonnell Douglas* framework."
"It is worth emphasizing that the FRSA's burden-shifting framework is much easier for an employee to satisfy than the *McDonnell Douglas* standard." In order "to emphasize the steep burden that railroads face under the FRSA," the Circuit Court pointed out that it is not enough for a railroad to "articulate a legitimate, non-discriminatory reason for the adverse action." So, what would be a valid defense under the *McDonnell Douglas* standard fails in a FRSA case.

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No Need to Prove Pretext

The types of evidence an employee can use to prove a FRSA complaint include:

Direct or "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely on inference"

Circumstantial evidence showing that the railroad's "proffered reason was not the true reason, but instead a pretext"; such circumstantial evidence may include:

1) timing of the unfavorable personnel action in relation to the protected activity
2) disparate treatment of the whistleblower employee
3) deviation from routing procedures
4) attitude of supervisors towards the whistleblower or the protected activity in general
5) the employee's work performance rating before and after engaging in the protected activity

But under the FRSA, an employee also can prevail even without showing the railroad's reason was a pretext: that is, an employee "can alternatively prevail by showing that the railroad's reason, while true, is only one of the reasons for its conduct and that another reason was the employee's protected activity."

http://www.trainlawblog.com/2013/02/articles/federal-railroad-safety-act/how-to-analyze-false-and-misleading-injury-report-retaliation/

No Need to Prove Retaliatory Motive

"A railroad employee need not demonstrate the existence of a retaliatory motive on the part of the supervisory employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the adverse personnel action."
"We note the fact an employee need not ascribe a motive to the supervisor or manager greatly reduces the employee's burden in making a prima facie case. However, we believe this reduced burden is appropriate in FRSA cases. We note that the legislative history shows that Congress was concerned that some railroad supervisors intimidated employees from reporting injuries to the FRA."

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An Ultimate Decision Maker's Lack of Knowledge of FRSA Protected Activity Is No Defense

Railroad's often try to argue that because the manager who made the ultimate decision to discipline was not aware of the employee's FRSA protected activity, there can be no violation of the FRSA. The ARB makes it clear that "defense" is a loser:

to focus on the knowledge possessed by the final responsible decision-maker constitutes error as a matter of law. Proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process. Proof of a contributing factor may be established by evidence demonstrating "that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity."

This includes not just lower level supervisors, but also the attorneys within a railroad's own legal department. In *Rudolph*, the deciding manager's "decisions and action were based on the advice of attorneys within Amtrak's legal department, who surely were aware of Rudolph's protected activities." Thus the ARB held that the legal department's "knowledge is imputed to [the deciding manager]."

http://www.trainlawblog.com/2013/04/articles/federal-railroad-safety-act/more-frsa-railroad-defenses-shot-down/

Intervening Events Do Not Necessarily Break FRSA Causal Connection

In *Rudolph*, the ARB confirmed that:

an "intervening event" does not necessarily break a causal connection between protected activity and adverse action simply because the intervening event occurred after the protected activity. The employee's burden of proving contributory causation will be met even if the railroad also had a legitimate reason for the unfavorable employment action against the employee. Again, proof of causation for "contributing factor" is not a demanding standard. The employee need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. It is enough that an employee establish that the protected activity in combination with other factors affected in any way the adverse action at issue.

Thus, the only way an intervening event can help a railroad is if the railroad proves by clear and convincing evidence that, due to the intervening events, it would have taken

the same adverse action even if the employee had not engaged in the protected activity.

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Meaning of Disparate Treatment

Even if an injured employee violates a Rule by following a common practice, the railroad nevertheless violates the FRSA if it disciplines that injured employee after ignoring other employees who followed the same practice. For example, in *Araujo*, the Court noted "it was common practice for conductor-flagmen not to talk to the electrical linemen, and thus be unaware of the extent of the catenary power outages" but that "no other conductor-flagmen were disciplined for violating any rules" due to following that practice. "While the facts in the record may show that Araujo was technically in violation of written rules, they do not shed any light on whether the Railroad's decision to file disciplinary charge was retaliatory." Why? Because the key is whether the Railroad treated Araujo disparately. As the Circuit Court stressed, the fact Araujo was the only flagman involved in a fatal incident does not matter: "while Araujo may have been the only conductor-flagman to have been on duty during a fatal accident, it is not appropriate to put him in a class by himself, and not compare him to other conductor-flagmen who did not know about catenary outages but were not on duty during fatal accidents."

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A Railroad's Burden of Proof Is Tough to Meet

The Railroad's burden of proof is much higher than an employee's. Once the employee proves his prima facie case by a mere preponderance of the evidence, "the burden shifts to the railroad to demonstrate by clear and convincing evidence the railroad would have taken the same unfavorable personnel action in the absence of the protected activity." "Clear and convincing evidence" is just below "proof beyond a reasonable doubt" and way above a mere preponderance of the evidence. The Circuit Court noted that "for employers, this is a tough standard, and not by accident. . . . the standard is 'tough' because Congress intended for railroads to face a difficult time defending themselves, due to a history of harassment and retaliation in the industry."

http://www.trainlawblog.com/2013/02/articles/federal-railroad-safety-act/frsa-alert-landmark-federal-appeals-court-decision-clarifies-legal-standards/

Emotional Distress

In *Barati*, after noting "the issue of whether compensatory damages for emotional distress are recoverable under the FRSA appears to be one of first impression," the District Court went on to hold "the Court concludes that damages for emotional distress are available under the FRSA." Judge Arterton explained that the term "compensatory damages" includes both "pecuniary" and "non-pecuniary" damages, and that "non-pecuniary compensatory damages includes compensation for bodily harm and emotional distress, and are awarded without proof of pecuniary loss." The plain language of the FRSA text controls, and "in the absence of any indication from the statutory language of an intention to limit 'compensatory damages' to less than its generally accepted definition, the Court concludes that the FRSA permits recovery for emotional distress."

http://www.trainlawblog.com/2013/03/articles/federal-railroad-safety-act/first-frsa-jury-verdict-upheld-with-landmark-damages-decision/

Punitive Damages

The FRSA has a statutory cap of $250,000 for punitive damages. But as is the proper practice, the jury was not informed of that limit and was allowed to award the amount of punitive damages it felt was just in light of "the degree of reprehensibility of the defendant's misconduct." The *Barati* jury awarded $1 million in punitive damages. As Judge Arterton explained, that award was supported by the evidence:

Here, by their award of four times the statutory maximum, the jury registered their measure of reprehensibility to underscore their finding that the Railroad's conduct was in reckless disregard of Mr. Barati's safety and FRSA rights. Their conclusion was supported by the evidence that the Railroad singled Barati out for discipline for a safety violation. The jury also had evidence that Metro North's termination of Barati was contrary to its written policies and FRA regulations, was a self-serving effort to discourage employee injury reporting in order to keep its injury and lost workday statistics low, violated Metro North's own obligation to accurately report employees' on-the-job injuries and resulting lost work days, and contravened Metro North's "safety statement" that "we are committed to the safety of our employees and our customers," and "we are determined to provide a work environment where all employees work safety."

Accordingly, the Court found the maximum punitive damages amount of $250,000 "does not violate due process" because it was fully justified by the evidence.

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For more detailed information and resources regarding the FRSA, go to the "Rail Whistleblower Resources" page at http://www.gowhistleblower.com

For updates on the latest developments in the FRSA, go to the Train Law Blog at www.trainlawblog.com

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