

## SUMMARY OF RAIL WHISTLEBLOWER RIGHTS

The Federal Rail Safety Act, 49 U.S.C. 20109, is an extremely powerful law that provides extensive "make whole" remedies for railroad workers who suffer retaliation for engaging in "protected activities." But the window for filing a FRSA claim is very short, and it is critical to consult a knowledgeable attorney as soon as possible in order to protect your rights.

The FRSA covers all employees of a railroad who engage in certain *protected activities*.

### Protected Activity Under the FRSA

Some examples of "protected activity" under the FRSA include:

#### Injuries

- Notifying the railroad of your own work-related injury or illness
- Notifying the railroad of a coworker's work related injury or illness

#### Safety Concerns

- Reporting a hazardous safety or security condition
- Refusing to violate any federal law, rule, or regulation relating to rail safety or security
- Refusing to authorize the use of unsafe railroad equipment, track, or structures

#### Medical Treatment

- For any work-related injury, a railroad's managers or medical department cannot deny, delay, or interfere with the entire course of your injury's medical treatment
- For any work-related injury medical condition, following the orders or treatment plan of your treating doctor
- For any non-work related medical condition, following your doctor's written order not to work because it would be unsafe for you to attempt to do so

#### Fraud or Waste of Public Funds

- Providing information regarding the fraud, waste, or abuse of governmental funds connected to rail safety or security

### What Must An Employee Prove?

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.

### **What is a Contributing Factor?**

A *contributing factor* is a factor which, alone or in connection with other factors, affected in any way the railroad's adverse action. A protected activity 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.

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. Indeed, the employee's burden will be met even if the railroad also had a legitimate business reason for the unfavorable employment action against the employee. Unlike other discrimination statutes, under the FRSA all an employee need show is that the protected activity, either alone or in combination with other factors, affected in any way the railroad's adverse action.

This means a railroad employee does not have to prove the existence of a retaliatory motive on the part of the manager or supervisor who took the adverse action. And it means a railroad manager can have a valid reason for taking disciplinary action against an employee and still be in violation of the FRSA, as long as the employee shows that another reason was his or her protected activity (such as reporting an injury, raising a safety concern, or following a treating doctor's orders).

### **Railroad Defense**

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. It 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.

## **Make Whole Remedies**

The FRSA is a "make whole remedy" law that gives workers the power to force the railroad:

- To avoid and expunge your discipline
- To reinstate you with all seniority and benefits unimpaired
- To pay you back wages with interest
- To pay for all your economic losses
- To pay unlimited emotional distress damages
- To pay punitive damages up to \$250,000
- To pay your attorney's fees and costs

## **How Does the Process Work?**

After the Complaint is filed, OSHA's Office of Whistleblower Protection assigns an investigator to the file who conducts an investigation by: obtaining a written response from the railroad; interviewing the complainant, co-workers, managers, and any other relevant witnesses; and collecting all relevant documentation. OSHA then issues a written Finding explaining whether or not a violation occurred. If OSHA finds a violation occurred, OSHA orders all remedies necessary to make the employee whole.

After OSHA issues a Finding, if either the railroad or the employee objects within 30 days, the case proceeds to a *de novo* evidentiary hearing before a federal administrative law judge (ALJ). Any appeal from a decision of an ALJ goes to the federal Administrative Review Board (ARB) in Washington, D.C.

However, if OSHA has not issued a final decision within 210 days (and a decision is not final if it is still pending before OSHA, an ALJ, or the ARB), the FRSA allows the employee the option of filing his or her FRSA complaint in federal district court for a jury trial on all the issues, including the amount of punitive damages.

Any appeal from a district court jury verdict or ARB decision is to a United States Circuit Court of Appeals, and then to the United States Supreme Court only if a petition for certiorari is granted.

## **Beware of the Short 180 Day Window to File**

The window for filing a FRSA complaint with OSHA's Whistleblower Protection Directorate is only 180 days. That means railroad workers must file a FRSA complaint within 180 days following the date the worker knew or should have known the railroad decided to take an adverse action against them.

So if you believe a railroad has retaliated against you for reporting an injury (or due to any of the other "protected activities" listed above), call an experienced FRSA attorney as soon as possible to determine if you have a FRSA claim and if so how best to protect your rights.

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](http://www.trainlawblog.com)

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