THE TRAIN USUALLY WINS, THE CREW TOO OFTEN LOSES

A Multi-Pronged Approach to Recovery for Crew Injuries Caused By Grade Crossing Collisions

By: Michael J. Warshauer

When a train hits a vehicle it usually wins. Usually, the driver and passengers of the motor vehicle are seriously injured or killed. Far too often, the crewmembers on the train are injured too. Usually a strong state common law claim can be brought against the driver of the motor vehicle (and perhaps his employer too). But this course of action should not be the only cause of action brought on behalf of the injured worker. This article discusses a multi-pronged approach for recovering compensation for the injured crewmembers.

Counsel is advised to remember the Federal Rule of Unitary Negligence that allows the jury to consider the railroad's conduct as a whole and consider all of the facts and circumstances of that conduct as a whole. *Union Pacific Railroad Co. v. Hadley*, 246 U.S. 300; *Bailey v. Central Vermont Railroad Co.*, 319 U.S. 350; *Blair v. Baltimore & Ohio Railroad Co.,* 323 U. S. 600; *Arnold v. Panhandle and Santa Fe Rv. Co.*, 353 U.S. 360. Track maintenance, training, and cab safety, must be considered as a whole body of conduct that comes together during a grade crossing collision. This rule prevents the railroad from separating the claims into their more easily defendable parts.

I. Common Law Claims

Railroads are very successful in defending grade crossing claims. Accordingly, FELA counsel should usually bring suit against the motorist. But bringing suit only against the motorist can have disastrous consequences. The motorists' defense counsel, often with the aid of a plaintiff's lawyer experienced in grade crossing litigation, will use the empty chair defense and point to the many possible defects in the grade crossing, training of the crew, and cab safety to shift the blame to the absent railroad.

A state law claim against the motorist provides venue choices too. However, the combined common law/FELA case will not be removable if filed in state court. 45 U.S.C. 56.

II. Attack the Crossing and Track

The railroader's workplace includes the grade crossing. The FELA claimant has advantages not enjoyed by the common law plaintiff. When the common law claimant proves that vegetation interfered with the visibility at the crossing he must still prove negligence and contend with his own negligence. The FELA plaintiff, on the other hand, can argue that a failure to maintain vegetation interfered with his trackside duties of keeping a lookout ahead and that this violation of 49 C.F.R. § 213.37 imposes strict liability on the railroad and removes any defense of contributory negligence. 45 U.S.C. §54a; *Kernan v. American Dredging Co.,* 355 U.S. 426 (1958); *Pratico v. Portland Terminal Co.*, 783 F. 2d 255 (1st Cir. 1985); *Norfolk Southern v. Blackmon*, 262 Ga. App. 266, 585 SE2d 194 (2003). Every possible federal regulation the violation of which might have contributed in the slightest to the cause of the event should be considered as well as every potential claim that the common law claimant might lodge against the railroad.

III. Attack the Train

There are multiple avenues for attacking the train itself. Always consider the crash worthiness of the cabin. Even in the absence of the locomotive being crushed, allegations about the lack of padded surfaces, seatbelts, and proper seating should be alleged (would any of us allow our children to drive cars equipped as poorly as the cabs of locomotives?). The makeup of the train is often a contributing factor in injuries suffered by crewmen in that the heavy loads might have been placed on the rear, or the locomotives arranged short nose first. While recent case law is to the contrary, timetable dictated train speed should still be raised when the railroad is, or should have been, aware that conditions demanded slower speeds. The duty to provide a safe place to work is not usurped by FRA regulations. FELA claimants should not be preempted from complaining about timetable speeds that are lower than FRA approved track speed because once the railroad exercises any judgment of its own it must do so carefully. If the railroad exercised its judgment and chose to operate slower than speed permitted by the FRA, there is no reason why the engineer cannot say the speed chosen should have been even slower still.

i. The Locomotive Cab is Unsafe.

Expert testimony can establish that handholds, padding, seatbelts, etc. are necessary accoutrements of a safe work place to work in the transportation industry. These kinds of features encourage measured safe responses to emergencies instead of panicked reactions. Crew members who are able to find positions of safety with proper bracing and who can get to these locations safely are less likely to be injured.

An FELA case can be based on a lack of reasonable care, (negligence), or a violation of a statute passed for worker protection, in which case negligence is proven as a matter of law and

good care is irrelevant. The Locomotive Inspection Act provides that all parts and appurtenances of a locomotive must be safe to operate "without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). The LIA does not create a cause of action – it merely provides that certain conduct constitutes negligence per se. The railroad's duty to exercise reasonable care extends to all aspects of the work place it provides - including, as noted in 45 U.S.C. § 51, "engines." Similarly, an "unnecessary danger" can exist on a locomotive in the absence of a violation of a regulation. Both theories can be pursued at once. *E.g.*, *Calabritto v. NY, NH and Hartford R. Co.*, 287 F.2d 394 (2nd Cir. 1960) (recognizing that a plaintiff could pursue a claim premised on a dangerous locomotive walkway under an FELA negligence theory and a LIA strict liability theory at the same time.); *See also Lilly v. Grand Trunk Western R. Co*., 317 U.S. 481 (1943). Compliance with a safety regulation does not mean that a safe place to work has been provided. An employee may still allege a cause of action premised on a *negligent* failure to provide a safe place to work. *See, Delevie v. Reading Co*., 176 F.2d 496 (3rd Cir. 1949).

The LIA and the FRSA compliment and expand the reach of the FELA and the obligations it imposes on railroads. *See Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949). The FELA and LIA are to be read in pari materia – that is, the LIA is to complement and give teeth to the FELA. *Id.; Moore v. Chesapeake & O. R. Co.*, 291 U.S. 205, 54 S.Ct. 402 (1934); *Baker v. CSX Transp., Inc.*, 581 N.E.2d 770 (Ill. App. 1993); *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088 (4th Cir. 1987); *Morgan v. Consolidated Rail Corp*., 509 F. Supp. 281 (S.D.N.Y. 1980); *King v. Southern Pacific Transportation Co.*, 855 F.2d 1485, 1488-1489 (10th Cir. 1988); *Failing v. Burlington Northern Railroad Company*, 815 P.2d 974 (Colo. App. 1991). Similarly, Congress provided in the *General Authority* section of the FRSA that the Secretary of

Transportation "shall prescribe regulations and issue orders for every area of railroad safety supplementing [not replacing] laws and regulations in effect on October 16, 1970." 49 U.S.C. ¶20103(a).

In *Don Hall v. Central of Georgia Railroad Company,* United States District Court, Albany Division, Case. No. .1:00-CV-49-1(WLS) the railroad argued that because the railroad had complied with the FRSA, it could not be held liable under the general negligence provisions of the FELA. Judge Sands rejected the railroad's argument holding negligence in the design of the locomotive continues to be a viable theory of recovery for men injured while working on locomotives, as does strict liability for having an unnecessary danger on the locomotive. (Opinion available from ATLA.)

Common law negligence claims can be maintained even where a regulation exists, if that regulation does not speak to the allegations at issue. In *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367 (11th. Cir. 1999), the court rejected a pacemaker manufacturer's allegation that the plaintiff's product defect claim was preempted by the Medical Device Amendments even though the Food and Drug Administration had approved the product. Similarly, locomotives can be provided with safety features and be in compliance with FRA regulations at the same time. *Harris v. Great Dane Trailers*, 234 F3d 398 (8th Cir. 2000), and *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000) provide that preemption is to be avoided whenever possible and that there is no preemption where the other duties at issue do not interfere with compliance with the mandated obligations.

IV. Attack the Lack of Training

In every transportation industry but railroading the operating crews are carefully trained and routinely drilled on what to do in the event of an emergency. Imagine the public outcry if an airline crashed and the crew was heard on the black box sharing this conversation:

Captain: "It looks like we're going to crash, got any ideas?"

Co-pilot: "Not really, I wasn't trained what to do."

Captain: "Well, the last time I crashed, I dove for the floor but I got injured when I hit the back wall of the cockpit, so maybe this time I'll try something different."

Co-pilot: "Your guess is as good as mine, I sure wish they would have told us what to do though . . . . "

This kind of conversation is exactly what goes through the minds of train crews in the moments they have before they collide with a large truck. Yet, neither the AAR, nor any railroad, has ever studied the problem or issued any kind of guidelines to crews, although there are people who have the training to analyze the data and come up with reasonable guidelines for crew conduct. While this author has certainly not done any kind of scientific study, anecdotally he is convinced that the vast majority of injuries to rail crews in grade crossing collisions occur as they panic and dive to the floor, the back wall, the electrical cabinet, and on top of each other in an effort to avoid being injured at impact. Training eliminates panic and without panic there would be very few injuries. While the rail industry has not done much in this area, there are numerous industrial and biomechanical experts who can speak to the issue and give opinions concerning what is done in the industry and what should be done.

Training not only prevents and reduces physical injuries but it also reduces the likelihood of emotional injuries such as Post Traumatic Stress Disorder. One of the key elements in PTSD causation is the lack of control over the events as they unfold. Proper training gives the crewmembers something to do, a control if you will over an otherwise uncontrollable event.

Railroads rely on three cases to avoid responsibility for their lack of training. The first, *Dent v. Consolidated Rail Corp*., (1999 WL 551402 (6th Cir. (Ohio)), is an *unpublished* opinion of a split panel of three judges. This case is not only inconsistent with the holdings of the United States Supreme Court, it is also inconsistent with another *unpublished* decision of the Sixth Circuit that recognizes that the failure to train employees can be the basis of an unsafe place to work claim under the FELA. *Homan v. Norfolk and Western*, 862 F.2d 316, WL 120877 (6th Cir. 1988). The second and third are *Norfolk Southern Railway Company v. Denson*, 774 So.2d 549 (Ala. 2000) and *Sindoni v. Consolidated Rail Corporation*, 4 F.Supp.2d 358 (M.D. Pa. 1996), both of which can usually be distinguished because there was a failure of proof that training would have made a difference.

In fulfilling its duty to provide a safe place to work a railroad must establish safety rules for the guidance and protection of its employees. *E.g., Wilson v. Norfolk & Western Railway Co.*, 440 N.E.2d 238 (Ill. App. 1982). This is a uniformly accepted aspect of FELA law. *E.g., Bailey v. Grand Truck Lines New England*, 805 F.2d 1097 (2d Cir. 1985); *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147 (8th Cir. 1982). In addition to railroads' duties to train as a subset of the general duty to provide a safe place to work, the FRA regulations demand that every locomotive engineer will be provided training that includes instructions on "personal safety". 49 CFR 217.11. 49 CFR 218, and 49 CFR 240.123 (b) and (c)(i) demand that crew members be

given personal safety training and that records be kept of this training. No railroad can meet these requirements as they relate to conduct to be followed in a grade crossing collision.

V. Attack Post Injury Events.

Far too often one of the most devastating aspects of injury suffered by train crews following a catastrophic grade crossing collision is the onset of Post Traumatic Stress Disorder. A train wreck is the classic setup for PTSD. There is an event that is outside the usual and ordinary course of human events, it is life threatening, and the crew has no control over the inevitability of the outcome. One of the ways to reduce the likelihood of PTSD becoming a career ending illness is through the aggressive use of post event triage to insure that the emotional needs of the crewmen are met before they become an illness.

One caveat is worth noting. *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396, 512 U.S. 532 (1994) limits FELA claims for pure emotional distress to situations where the worker is in the zone of danger. He must reasonably believe that he is at risk of injury. Being a mere bystander to a co-worker's injury or death is not enough. Some courts have found as a matter of law that a train hitting a car does not rise to this level but a train hitting a truck surely does.

VI. Protect the State of the Law

In this paper the author suggests causes of action that many of us have not pursued before and which are, in some ways at least, new causes of action. In the last eighteen months we have seen the evil intrusion of preemption serve to bar, in several jurisdictions, some of the theories suggested in this paper. FELA lawyers must be careful to insure that when we appeal an adverse ruling that we have the best record possible, that we seek out the advice and assistance of our

fellow lawyers, and that we do everything necessary to protect our clients rights to the protection afforded them by the FELA, the most powerful engine for work place safety that exists.

.