CAN THE CARRIER REDUCE ITS DAMAGES BY DISMISSING THE EMPLOYEE FROM SERVICE?

By: Michael J. Warshauer

A railroad employee gets injured at work. He reports the injury as required by company rules. As a result, an investigation is held and he is found to have violated company safety rules. The carrier then dismisses him from service pursuant to the Railway Labor Act. The employee hires a lawyer, files suit to recover damages for the injury under the Federal Employers' Liability Act (FELA), and the case proceeds to trial. At trial, the carrier tries to introduce into evidence the dismissal of the employee to negate the employee's lost wage claim. What will the judge do? And why?

According to several federal cases interpreting such a situation, the trial judge must exclude the evidence of the dismissal. Under the Railway Labor Act, the railroad is the prosecutor, judge, and jury regarding investigations. Accordingly, giving the railroad the benefit of this dismissal to reduce its damages exposure gives it the unilateral right to affect the value of a worker's case without due process of law.

The decision of the United States Court of Appeals for the Seventh Circuit in *Kulavic v. Chicago & Illinois Midland Railway Co.*, 1 F.3d 507 (7th Cir. 1993) specifically addressed this situation. In *Kulavic*, the court carefully considered the interrelation between the Railway Labor Act (RLA), which addresses employee discipline, and the FELA. In doing so, the court considered the purpose of the RLA, and the procedural remedy it affords, versus the rights guaranteed injured railway workers under the FELA. First, the court determined, consistent with the holding of the United States Supreme Court in *Atchison, Topeka and Sante Fe Ry. v. Buell*, 480 U.S. 557, 566-567 (1987) that the two acts have different purposes and that "[a]s far as a worker's right to damages under the FELA is concerned, Congress' enactment of the RLA has had no effect." *Id.* at 513. The circuit court then determined that the procedures followed in the

course of an RLA disciplinary investigation "do not provide sufficient guarantees for reliable fact finding under the FELA". *Id.* at 517. The end result of this extensive discussion was the court's holding that "[t]he arbitral award by the PLB [Public Law Board] should not have been given preclusive effect in Mr. Kulavic's subsequent FELA action." *Id.* at 520.

The carriers are aware that their remedy for lost wages, *which relate exclusively to the discharge,* are controlled by the Railway Labor Act. 45 U.S.C. §153. (*Kulavic* similarly admitted that his discharge could not be re-litigated in his FELA trial. *Id.* 510). Nevertheless, the railroad may try to interject the discharge into the trial to prejudice the jury and keep the verdict low. This evidence must be excluded as irrelevant to the issues to be decided in the case.

The jury needs to hear only evidence about the damages that the worker suffered as a result of the injuries sustained. The fact that worker is disciplined by the railroad following the incident and temporarily discharged, does not limit the worker's damages directly related to the on-the-job incident. In other words, if the employee is unable to work for reasons unrelated to disciplinary action, and directly related to physical injuries sustained in the on the job incident, he is still entitled to the full amount of damages caused in whole or in part by that injury. The Supreme Court explained the rationale for this position in *Atchison, Topeka and Sante Fe Ry. v. Buell*, 480 U.S. 557 (1987):

> "[I]t is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion . . . 'the Railway Labor Act . . . has no application to a claim for damages to the employee resulting from the negligence of an employer railroad.'"

Id. at 1415 (cites omitted).

We want the judge to exclude the evidence of dismissal because lost wages caused by the injury which is the subject of the lawsuit are items of damages allegedly caused by the carrier's actions. If the railroad succeeds in proving dismissal, it is one step away from preventing us from proving lost railroad wages and benefits as an item of damages. To deny a worker the opportunity to prove his lost railroad wages and benefits would unfairly prevent the worker from

collecting damages for lost wages as is allowed by the Federal Employers' Liability Act. 45 U.S.C. §51. The Act provides that the railroad shall be liable in damages to any person suffering injury while he is employed by the railroad if the railroad's failure to provide a safe place to work, or its violation of a Safety Appliance Act, caused the employee's injuries. *E.g., Nashville, C. & St. L. Ry. v. Henry,* 158 Ky. 88, 164 S.W. 310 (1914).

If ever faced with this issue at trial, the plaintiff's lawyer should vigorously oppose any attempts by the carrier to introduce the dismissal into evidence. In doing so, an emphasis on the purpose of the FELA and its goal to compensate fully an employee injured as a result of the railroad's negligence, is essential. We cannot allow railroads to use the Railway Labor Act as an offensive tool to diminish FELA damage claims.