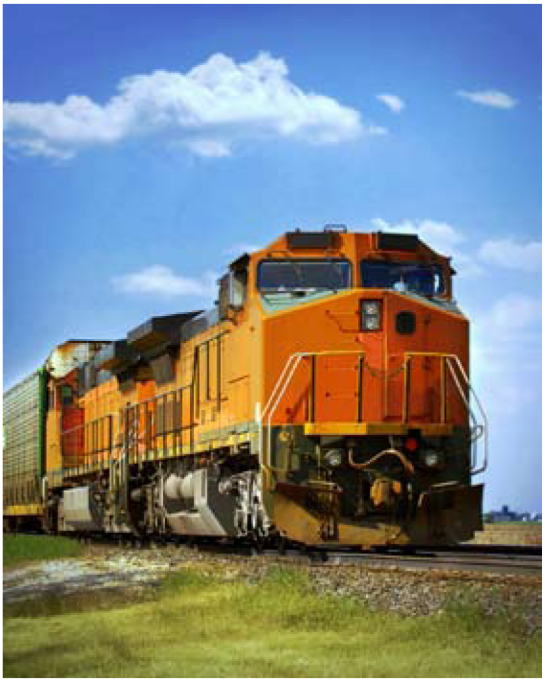
# A Spouses' Guide

to The Federal Employers' Liability Act (FELA)

- or -

# *WHAT TO DO WHEN TRAGEDY STRIKES*



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# OUR MISSION

As Civil Justice Attorneys we do one thing, and one thing only: demand justice on behalf of people who have been seriously injured or killed. Demanding justice means getting results for our clients. Real results. Not just talk.

We seek the highest compensation possible for traumatic, life-threatening or life-ending injuries – the kind of funding that not only helps people be whole again, but can protect families from the financial difficulties that arise when a loved one is maimed or killed.

Our practice is driven by catastrophic personal injury cases. Injuries may involve paralysis, amputation, disfigurement, brain damage, burns or death.

**Our specialty is taking on difficult cases and obtaining full, fair and just compensation for our clients.**

Experience has taught us that we maximize our client's recovery by preparing every case with the expectation that it will go to trial. Being prepared to go to court means we are often able to negotiate pre-trial settlements that guarantee the results our clients deserve. At the Warshauer Law Group, our partners have successfully obtained multiple jury verdicts of more than $1 million with several judgments exceeding the $10 million mark. This kind of success for our clients comes from a stubborn insistence that they should get what they deserve and need – not a penny less.

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A Spouses' Guide to The Federal Employers' Liability Act (FELA)

or

# WHAT TO DO WHEN TRAGEDY STRIKES

## 1.
## INTRODUCTION

The business of railroading has long been a dangerous calling. President Theodore Roosevelt noted in 1906 that the average life expectancy of a railroad worker was just a few years. Indeed, only 1 in 5 rail workers could expect to die of natural causes – the rest died at work. Thanks to strict safety laws and ever-improving equipment, railroading is safer now than it was a hundred years ago, but it remains one of the most dangerous jobs in America.

Being the wife or husband of a railroader takes a special kind of person. The long hours, days away on road jobs, and the never ending worry about whether a loved one will return home can stress a spouse and a marriage. Being prepared for the worst events in life makes them much less frightening and a lot easier to handle. This booklet provides some basic information about what to do when tragedy strikes. Husbands and wives are encouraged to sit down, discuss this booklet, and make a plan of action. In the unfortunate event your loved one is seriously injured or killed while working for the railroad, the burden of making good decisions to protect your family will often fall on you – the spouse. This booklet will help you understand the unique laws and regulations that govern railroad injuries, protect your family from aggressive railroad claim agents and lawyers, and understand pension and medical issues. Armed with the information provided in this pamphlet, you will see that there is a light at the end of the tunnel – and it's not an approaching freight train.

## 2.
## THE LAW GOVERNING RAILROAD WORKER INJURIES

There are usually two sources of law in the United States: federal and state laws. This certainly holds true in railroad cases. Federal law is almost always relevant to railroad worker injuries; state law is less commonly involved, but cannot be ignored. Both bodies of law are discussed here so that you will get a sense of what to look out for, know when you are being misled, and understand what rights and remedies are available.

## 2a.
## FEDERAL LAW

In just about every workplace in America, when a worker gets hurt at work he or she is covered by state workers' compensation laws. These state laws provide that no matter who or what caused the injury, the worker will be provided medical care and be compensated in some small amount every week until he recovers. These laws do not protect railroad workers.

Instead, railroad workers are protected by what every rail union, and even the U.S. Government Accounting Office, agrees is a vastly superior set of work place protections. These laws are collectively known as the Federal Employers' Liability Act. A complete copy of the statute, and several other important regulations and reference materials, are included in the appendices at the back of this booklet. This federal law, usually referred to as the FELA, provides that a railroad has a non-delegable duty to provide its employees with a reasonably safe place to work. If a railroad carelessly fails to provide this federally mandated safe place to work, and that failure contributes, in whole or in part, to an injury, then the railroad is liable for all damages caused by its negligence. The FELA is the exclusive legal vehicle for railroad workers to bring actions against their railroad employers for personal injury and death claims. There are no claims allowed against co-workers or supervisors. Instead, every claim must be brought against the railroad.

The duty to provide a safe place to work extends to safe and adequate training, careful co-workers, adequate walkways, properly maintained track equipment like switches and derail devices, and even safe motel rooms and transportation for railroaders when in taxis and vans. Literally every aspect of railroading is governed by this statute. The FELA requires railroads to exercise reasonable care to insure that the family member you send off to work comes home in the same condition as when he or she walked out the door.

Usually, for a railroad to be liable for injuries to its workers, the workers must show that the railroad knew or should have known of the danger that caused them to be injured. This is called a "negligence" standard. Negligence is the failure to exercise reasonable care – the failure to do what a careful railroad would do in the same or similar circumstances. Negligence is also doing something a careful railroad would not do. Negligent conduct can be anything from ignoring an unsafe walkway to failing to lubricate a switch. In fact, the railroad is liable for negligence even when a co-worker or supervisor causes the injury by being careless.

When Congress wrote these laws a century ago, it recognized that some aspects of railroading are so critical to safety that the railroads should be liable even when they are not careless. In other words, the railroads are absolutely, or strictly, liable even in the

absence of carelessness if a worker is injured as a result of the violation of what are called the Safety Appliance Acts. These Safety Appliance Acts provide for strict liability against the railroad if the worker is injured, in whole or in part, by:

**a locomotive that is in any way deficient or unsafe;**

**any failure of a grab iron or side ladder;**

**any inefficiency in a hand brake;**

**a defect in the train brakes;**

**a failure of any part of an automatic coupler to operate correctly; or**

**any violation of a Federal Safety Regulation.**

When there is an injury or death, it makes a difference whether the "negligence" standard, or the "strict liability" standard imposed by the violation of a safety law is applied to the situation. Understanding this difference is important as it relates not just to liability issues but also to the all important damages aspects of an FELA claim.

If the event that caused your loved one's injury or death arose from the railroad's careless failure to provide a safe place to work, the worker's own careless conduct, if any, will serve to reduce his damages. This is called "comparative negligence." It works this way: if the worker stumbles on a bad walkway that the railroad knew about but did not repair, and he is partly at fault for not watching where he was walking, the amount of damages he is entitled to recover can be reduced in proportion to this fault. In other words, if the worker is 25% at fault, he or she will only get 75% of what he or she would otherwise have recovered. If, on the other hand, the worker suffers an injury because of a defective safety appliance or a violation of a federal safety regulation, like a broken grab iron, then the damages he recovers will not be reduced even if he is partly at fault. When he is hurt because the railroad violated a safety statute or regulation, the worker's carelessness is irrelevant.

Regardless of what caused the injury, Congress has mandated that the railroad is barred from claiming that the worker should not recover because he or she assumed a risk by working in a known dangerous industry or work place.

## 2b.
## FELA DAMAGES

The FELA provides that injured railroad workers are entitled to all damages caused, in whole or in part, by the railroad's wrongful conduct. This means that if the railroad is at fault (by carelessness or violation of a safety law) the worker can recover compensation for his or her pain and suffering and all past, present, and future wages and benefits, as well as all uninsured medical expenses. The amount of wages that can be recovered is the net present value of the gross past, present, and future lost wages after federal and state taxes are deducted. Just as importantly, any emotional injuries arising from the event – commonly known as pain and suffering, including disfigurement, impairment of ability to work, and even mental injuries – are compensable, too. There is no formula for calculating these damages and every case is different, just as every one of us is different in how we experience our own pain and suffering.

Because the FELA is designed primarily to compensate the worker, claims for "loss of consortium" are not allowed. In other words, the spouse who sent his or her healthy loved one out the door and got back an invalid cannot recover under the FELA

for the losses suffered as a spouse. While that is a hole in the FELA's safety net, the good parts of the FELA more than make up for this omission.

Regardless of how careless, or even intentional, the railroad is in causing an injury, the FELA does not allow punitive damages to be imposed against the railroad. This can certainly be a cause of great frustration to those workers who feel like the railroad should be punished. In practice, however, juries seem to consider bad conduct and sometimes allow for higher damages even when they are told that punishment is not allowed. One other point related to punitive damages is worth noting: actions taken by the railroad after the event, including trying to cover up the injury or even firing the injured employee, are not damages under the FELA either. Again, this can be frustrating, but jurors do not tolerate bad conduct by railroads so it all seems to work out in the end.

## 2c.
### FELA DEATH CLAIMS

In the horrible event that a railroad worker dies as a result of an on-the-job injury, two aspects of damages come into play. The first relates to any pain and suffering the worker experienced prior to dying. The second relates to economic losses suffered by the dependent spouse and children and the loss of parental guidance suffered by the minor children who survived the death. Pre-death pain and suffering can involve just a few minutes of horrific pain of the kind someone might suffer after getting coupled between two cars or it might be months of suffering when injuries do not result in immediate death.

The value of pre-death pain and suffering obviously depends on the extent and duration of the pain involved and is determined by the enlightened conscience of a jury if a case goes to trial. Determining the economic value of the worker is a little more technical. In death cases, the damages recovered by survivors depend on the ages of any children and how economically dependent the surviving spouse is on the railroad worker. For example, if two men of the same age and income die in the same event, the survivors of the man whose wife is not employed and who has two little kids at home will recover more than the survivors of the worker whose kids were grown and whose wife is employed outside the home. This difference occurs because the law is designed to compensate survivors to the extent they have suffered an economic loss, as opposed to a purely emotional loss. Compensation for adult children is not usually allowed in death cases. However, they can sometimes recover a portion of the pre-death pain and suffering damages; but this might be reduced by the claims of a dependent spouse and minor children.

## 2d.
### FELA TIME LIMITS

All claims against railroads for damages under the FELA must be brought within three years of when the worker first knew, or should have known, about his injury and its relationship to his railroad work. In the case of a catastrophic event like an amputation or a death, calculating this date is easy enough – three years from the date of the incident. For injuries like worn out knees or backs, the time begins to run when the worker first puts two and two together and figures out that his problems were caused by his unsafe workplace. If a lawsuit is not commenced within this three year period, usually the claim is lost forever.

## 2e.
## STATE LAW

State laws must also be considered when a worker is injured while working on the railroad. These laws usually only apply to claims against third parties like log truck companies, industries, and motel operators who contribute to, or solely cause, a railroad worker's injuries. The claim for an injury will be governed entirely by state law when the railroad has not contributed, in whole or in part, to the cause of the injury. But, more often, a worker will have a state law claim against a third party and, at the same time and arising from the same event, an FELA claim against the railroad. Once in awhile, a state law might also be relevant by providing a minimum safety standard in areas not covered by federal law.

While the FELA is the same everywhere, state law obviously varies depending on what state the worker is in when he is injured. Here is an example: A worker who is injured when his train collides with a log truck might have a state law claim against the log truck for not yielding to the train, and an FELA claim against the railroad for failing to keep the vegetation cut back so that the truck could see the on-coming train. The validity of the FELA claim is pretty much the same everywhere. However, the strength of the claim against the log truck will vary depending on what state law provides. Some state's laws make such claims a lot easier than do others.

The decision as to whether to bring a state law claim against a third party at the same time as pursuing an FELA claim is one that must be carefully considered by experienced competent legal counsel. There are many issues including venue choices (where the case will be filed), defenses available to the

third party that are not available to the railroad, and damages limits.

A word of caution is in order: on some occasions railroad claims agents have led workers and their families to believe that the railroad will take care of the claim – even when the railroad knows that it has no liability and only the third party is responsible for the loss. The danger is that the railroad will play out this charade until the shorter state law time limit expires and then abandon the worker and his family after it is too late for the worker to sue the responsible party. Be careful that this does not happen to you or your spouse. Get advice early on so that you understand the time limits and the strength of your case.

## 2f.
## STATE LAW DAMAGES

Usually state law and the FELA are pretty much the same when it comes to damages, but there are some important differences. For example, the FELA is a little more generous in dealing with pre-existing conditions. State law in some states (for example Georgia) allows for the recovery of more wage loss by allowing the worker to be awarded gross wages instead of net wages. Additionally, state law may allow a loss of consortium claim for the spouse

of the injured worker that, in very horrific injury cases, can be an important source of recovery. Lastly, state law allows for punitive damages against third parties, whereas the FELA does not allow a worker to recover punitive damages from his employer railroad – no matter how careless, callous, and willful is its negligence.

Commonly encountered state law claims include those arising from a train-truck collision, van and taxi wrecks, fires and other problems at motels, contractor-caused accidents, or medical malpractice during treatment for a railroad injury. The list is literally endless. In these kinds of cases, legal counsel must not only be familiar with the FELA, but should also have demonstrated the ability to prosecute a wide variety of cases successfully.

## 2g.
## STATE LAW TIME LIMITS

The time within which a claim must be brought against a third party like a log truck driver and his employer depends on where the event occurred. Here are the basic rules, called the statutes of limitation, as of May, 2010:

| | |
|---|---|
| Alabama: | Two years |
| Florida: | Four years |
| Georgia: | Two years |
| South Carolina: | Three years |
| Tennessee: | One year |

While the three-year deadline for FELA cases has been the same for more than a century, state law time limits are subject to change with the whims of each state's legislature. Therefore, you should always check with a competent FELA lawyer immediately after tragedy strikes to be sure of the time limits that govern your family's particular case.

One last word about time limits. The time limits govern the last date a lawsuit must be filed; they do not relate to the date by which it must be concluded. Lawsuits are long journeys. The sooner the first step is taken, the sooner the journey will end. The more serious the injury, the less likelihood the railroad will pay full value, and the more reason to retain a good lawyer early.

## 3.
### WHAT SHOULD YOU DO AFTER AN INJURY OR DEATH OF A LOVED ONE?

Serious injury or death always puts a family into a whirlwind of medical, legal, and emotional turmoil.

The following checklist should help you manage the situation:

- Get the best medical care from doctors you choose.
- Contact your spouse's local union chairman.
- Get advice from a skilled FELA lawyer.
- Complete an accident report *after* getting advice.
- Begin gathering evidence – names, witness statements, photographs, consists, etc.
- Apply for sickness benefits with the Railroad Retirement Board.

## 3a.
### GET THE BEST MEDICAL CARE

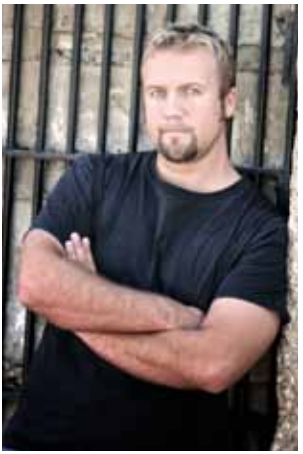
The first and most important step to take after any injury is to get the best medical care available. One of the best aspects of the FELA is that, unlike workers' compensation, the employees and their families get to make their own medical decisions. Unionized rail workers benefit from negotiated health insurance coverage that is among the best in the United States. Even though the railroad might have taken the injured worker to the "Industrial Medicine Clinic" where the company doctor, in cahoots with the railroad, says "take an aspirin and get back to work so this will not be a reportable injury," the worker can go to any doctor who will accept his insurance for another opinion and actual treatment and expert care. All workers should seek their own medical care providers whose allegiance is to the worker and not the railroad.

Be wary of any nurse assigned by the railroad who claims to be working for you. The companies that employ these nurses advertise that their goal is to reduce claims exposures, reduce medical costs, and reduce lost time from work. These are surely valid goals, but not at the expense of good medical care and safety. A railroad worker who is shortchanged in his medical care might well return to work too early only to face catastrophic injury when he stumbles or falls under a train because he was not really ready to return to work safely.

Often the railroad's claim agent will tell the worker or his family that the railroad will take care of all of the medical bills. What this really means is that the railroad will pay the co-pay and deductible in exchange for the ability to have complete control over the worker's health care. This is a very poor exchange for the worker and his family if it results in substandard medical care that benefits the railroad's interests instead of the worker's. As part of this strategy, the claim agent will also provide the family "advances" against any future settlement. In some cases accepting such medical help and advances is a good idea; in others, it is not. Only by seeking confidential, early, and independent legal advice will you and your family have the information necessary to make a good decision.

## 3b.
### GET GOOD ADVICE

Once an injured railroad worker is getting good medical care, the second thing the worker and his family needs to get is good advice – from your spouse's union leadership as well as from legal counsel of your choice. Such advice will provide you with the tools you need to make good decisions.



There will be no cost for this advice, but its value is immense.

Your spouse's union leadership will assist in completing an injury report, applying for sickness benefits, and avoiding dismissal merely because of an injury.

Sometimes union leadership will recommend a specific attorney. This can be good or bad. If the attorney is recommended because he or she has taken the local chairman on a variety of expensive junkets to foster his loyalty, the recommedation might not be "unbiased." If, on the other hand, the union leader can explain why he is suggesting a particular lawyer – the lawyer's experience, union designation, service to his members, and courtroom results - the advice is surely worth considering. But this advice should not be the be-all and end-all in your decision-making process. You must have personal confidence that the lawyer understands your family's needs, will give your case the personal attention it needs, and has the skill set necessary to deliver results.

Keep in mind that you can have completely confidential conversations with your lawyer

that the railroad will not know about. This confidentiality is important as it allows you to get advice even when the railroad's claim agent tells you he will cut off medical care and advances if you get a lawyer involved.

Regardless of how you find a lawyer, the lawyer you select MUST have a demonstrated expertise in handling FELA claims. A lawyer might well be the best real estate, divorce, or criminal lawyer in America but still be completely unprepared to handle the complexities of an FELA case. There are land mines everywhere and your case is not the one for the inexperienced FELA lawyer to cut his teeth on.

Examples of mistakes made by non-FELA lawyers include failing to consider RRB in settlements, failing to understand that FELA cases cannot be dismissed and re-filed as easily as other kinds of civil actions, and failing to understand the difference between the kind of frog that swims in a pond and the kind that is part of a railroad track. Some inexperienced lawyers don't even know the difference between the FELA and workers' compensation!

Usually, experienced FELA counsel will charge union members only 25% of the net amount recovered for the FELA portion of their claims. Other lawyers will too often demand more. A word of caution, however: if the fee is too low, human nature might encourage the lawyer to move your case to the back burner and work more lucrative cases first. A fee that is fair for both the lawyer and the client is important.

**When choosing a lawyer, question the lawyer carefully about the following topics:**

*Is he or she AV rated? (Insist on an AV rating as that is the highest available.)*

*Is he or she a "Super Lawyer" if that designation exists in his or her state? (Only the top 5% of lawyers are so listed.)*

*Is the lawyer a "Designated Legal Counsel" of a major rail labor union? (Designated Legal Counsel have been interviewed and approved by the executives of unions by virtue of experience, courtroom skill, and dedication to the goals of safe railroading. They are not the union's lawyers; they are instead lawyers who can help members with FELA and other legal matters.)*

*Has he or she tried FELA cases to verdict and defended those verdicts in appellate courts? (You do not want to be the lawyer's first FELA case.)*

*Do the lawyer's verdicts evidence good case preparation and good trial skills?*

*Has the lawyer written on FELA law so that judges will look to him or her as an authority who can be trusted?*

*Does the lawyer have experience in areas of law other than the FELA? (A well-rounded lawyer with skills acquired from helping families in a variety of catastrophic injury settings is more likely to bring creative thinking to the task.)*

*Has the lawyer been asked to teach other lawyers? (This evidences that other lawyers respect their skills and reputation.)*

*Has the lawyer shown a commitment to the protection of the FELA and railroad workers' rights by taking leadership roles in legal and political organizations?*

*Will the lawyer charge a fair fee and be responsible for all case expenses if the case is lost? (If a lawyer needs you to finance your own case, you should find another lawyer.)*

*And most importantly, does the lawyer show more interest in helping you put your life back together than in his fee?*

Keep in mind that while skilled FELA lawyers usually charge only around 25% for

union members, lawyers who are not experienced in this area of law will often attempt to obtain fee agreements with fees as high as 45%. Often these inexperienced lawyers will not be sufficiently skilled to earn the premium they charge.

## 3c.
### FILE AN INJURY REPORT

If an injury report has not been completed, preparing such a report is the third step in preparing for the future. A Norfolk Southern injury report is called a Form 22; a CSX injury report is called a PI1A. This report should be completed with help from your spouse's union representative and a good lawyer. The combination of input from the union and a competent lawyer will insure that this critical paperwork is completed properly and in a manner that is both truthful and helpful to the worker's position at trial.

Certain critical issues must always be kept in mind when completing injury reports. First and foremost, the injury report form must show how the workplace was "unsafe." Men and women do not get hurt in safe workplaces. Therefore, if there is a question that asks if the employee was provided with a safe place to work, the answer must be "no." Second, workers must take great care in completing the portion of the form that requires a description of the cause of the accident. The answer must be truthful and complete; the answer must describe the worker's conduct in a manner that accurately shows his or her compliance with the rules; and, dangerous walkways, tracks, switches and other apparatus that caused the injury must not be characterized as being "ok" or "usual" or "all right." An injury will not be deemed the railroad's fault if the workplace is safe and the equipment is "ok." While the injury reports should be completed promptly, they should not be completed until the worker has all of his wits about him, is not in pain, is not worried about getting medical care, and is not under the influence of pain medications. The railroad can wait – don't allow an aggressive supervisor to push your spouse into signing or completing a report until he is completely prepared and able to do so. And he can't be completely prepared unless he has obtained advice from an expert.

## 3d.
### BE WARY OF CLAIM AGENTS

A word about claim agents is in order at this point. A claim agent has one job: to protect the railroad's interests and reduce its exposure in the event of an injury. Do not ever make the mistake of thinking that a claim agent is working for you and your family. He or she will say anything to lead you to believe that. For example, if you need $1,000 to pay a mortgage payment, the claim agent may say "I went to the mat for you. I argued and argued and I finally got the people at headquarters to pay it. I tried everything. I really stuck my neck out for you." This is simply not true. Indeed, this is part of a carefully orchestrated plan to make you think the claim agent is working as your advocate against the railroad. He will do this every month as he brings you the money you and your family need. This is designed to make you trust him or her so that when the railroad offers you $150,000, on a case that is worth $500,000, and the claim agent tells you that it is a good deal and he or she really pulled some strings to get the offer over $125,000, you will believe him. This is also part of a bigger plan to keep you and your spouse from seeking independent advice from an experienced FELA lawyer. Think about it

for a moment. If the claim agent was really interested in what was best for your family, he or she would encourage you to get legal advice. He or she would want you to be well-educated about your rights and well-represented. Instead, claim agents will insist that if you hire a lawyer, they will cut off your advances and no longer pay your medical bills. This too is a lie. If you get confidential advice the claim agent will not even know about it. If you hire counsel, the claim agent can stop the payment of advances, but your medical insurance will pay all of your bills whether the railroad helps or not.

The claim agent is NOT on your side. The agent and the railroad are your family's adversaries. The minute your spouse is injured or killed, before the blood is dry, the claim agent and the railroad's lawyers will be at the scene preparing a defense. While you are at your spouse's hospital bed the railroad will be gathering evidence, taking photographs, pressuring crew members to give statements that only help the railroad, and even doing re-creations with the very railroad equipment that caused your loved one's injuries. The railroad officials and lawyers will be doing all of this while the claim agent is at the hospital is telling you that the railroad is going to take care of everything, putting your family up in a hotel, and even paying your bills. While these offers are important (and should not usually be turned down), they should not blind you to the the claim agent's real long term goal, which is to minimize the railroad's financial liability.

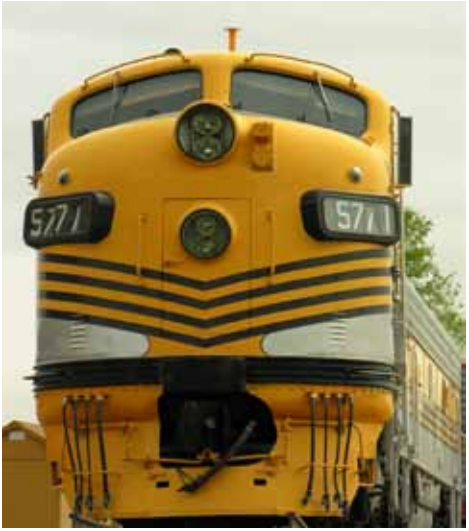
## 3e.
### STATEMENTS

Early in the process, the claim agent will demand a recorded statement. This is often required by the Collective Bargaining Agreement. It is certainly necessary if the worker expects to obtain money "advances" against an eventual settlement. However, there is no requirement that the worker provide the statement when he is not physically or mentally ready to doing so. Most important, it can be financial suicide to fail to consult confidentially with legal counsel prior to giving a statement. The railroad will use a carelessly worded statement to defeat what would otherwise be a valid and legitimate FELA claim. Finally, you should demand that the claim agent agree to give you a copy of both the statement and the incident report in exchange for agreeing to cooperate.

## 4.
### RAILROAD DISCIPLINE INVESTIGATIONS

Far too often, when a railroad worker suffers an on-the-job injury, the railroad's reaction is to hold an investigation in which it serves as the judge, the jury and the prosecutor. This investigation is held under the auspices of the Railway Labor Act (RLA) and the Collective Bargaining Agreement. Sadly, the result is almost always that the worker gets fired or suspended for some alleged rules violation. Only the union is able to appeal this and there is very rarely anything a lawyer can do to help.

When called to attend an investigation, your spouse should notify his or her local union representative immediately. Keep in mind that the railroad too often is not




looking to make the work place safer; it is looking for a way to blame its worker and start building its defense to an FELA claim. Remember: an investigation is supposed to be a fact-finding event. Go on the offensive by tendering medical records, photographs, drawings, and witness statements. Get advice from your lawyer as to what will help your spouse's FELA case while keeping in mind that you are preparing the case for labor arbitration more so than to win it during the investigation itself. The arbitrator will have the last say in that part of your case.

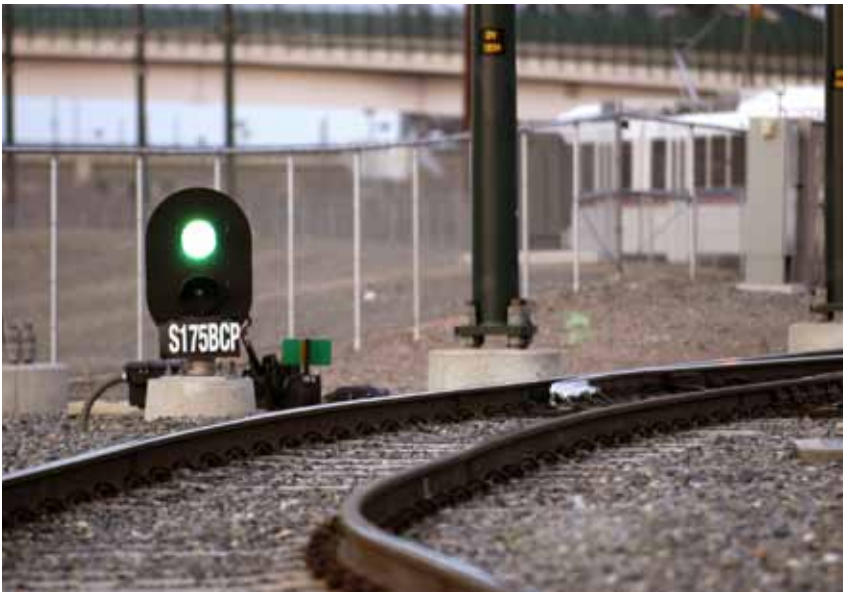
Your spouse should never admit guilt or agree that the hearing is fair. Instead, when your spouse is asked whether he or she violated a rule, or whether the investigation has been a fair and impartial investigation the answer should be, "Let the record speak for itself." Countless cases have been lost at arbitration because workers admitted guilt or agreed that the hearing was fair even when the facts were in their favor and numerous procedural errors existed.

The unions have a very good record of winning cases at arbitration when the case is properly prepared. Early involvement of the union and legal counsel is essential to best insure a good result. While lawyers cannot participate in RLA investigations, they can, and often do, assist the local union official in preparing the case and identifying helpful evidence.

## 4a.
### WHAT IF MY SPOUSE IS FIRED BECAUSE HE WAS INJURED?

Even if your spouse is fired after the discipline investigation, all is not lost. First, there is insurance available that often provides wage replacement. Obviously, this insurance only pays if it was obtained before the event. Be careful; not all "whammy" or "fired" insurance is the same. The UTU's policy usually pays, whereas policies issued by other entities often do not. Second, your spouse's union will appeal the decision; and most really unfair decisions by the railroad are reversed. Third, even if the dismissal is upheld on appeal to the Labor Board, it does not affect the value of the FELA claim. In other words, experienced counsel will not allow the fact that a worker has been fired to reduce the amount of lost wages he is entitled to recover under the FELA.

In our experience, the best retaliation after being fired is to hire a lawyer who is able and willing to file an FELA suit immediately. The early filing of a lawsuit results in the earliest resolution of the claim. Unfortunately, it is the rare case indeed where legal counsel can assist the worker in getting his or her job back if the Labor Board's neutral does not reverse the railroad's decision at arbitration.




## 5.
## WHISTLEBLOWER PROTECTION (49 U.S.C. § 20109)

It is against the law for the railroad to retaliate against a worker or their spouse for reporting certain safety or security violations. It is also illegal for the railroad to withhold "prompt medical attention."

The railroad may not discharge or in any other manner retaliate against workers because:

- They provided information to or assisted in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or the railroad about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste or abuse of funds intended for railroad safety or security.
- They filed or assisted in a proceeding under one of these laws or regulations.
- They reported hazardous safety or security conditions, refused to work under certain conditions, or refused to authorize the use of any safety- or security-related equipment, track or structures.

Railroads are prohibited from retaliating and may not:

- Fire or lay off
- Blacklist
- Demote
- Deny overtime or promotion
- Discipline
- Deny benefits
- Fail to hire or rehire

- Intimidate
- Reassign to affect promotion prospects; or
- Reduce pay or hours

This is a new law and its protections are still being worked out. But some things are clear, complaints must be filed within 180 days after the alleged unfavorable personnel action occurs (that is, when you become aware of the retaliatory action); complaints may be filed with OSHA and lawsuits may be filed in certain situations. Like with an FELA case, early consultation with experienced counsel is important.

## 6.
## WHAT ABOUT RAILROAD RETIREMENT BENEFITS?

Another unique aspect of railroading is the retirement and disability safety net. While other working Americans and their families are protected by Social Security, railroaders have an even better system administered by the United States Railroad Retirement Board. The RRB, as it is known on the railroad, is a vastly superior system as it pays higher retirement benefits and its provisions for disabled workers are also significantly more generous.

One of the best things about the RRB is that its offices throughout the United States are uniformly helpful and willing to assist injured railroad workers and their survivors understand the system and maximize their benefits. The nightmarish run-arounds we too often hear about with the Social Security System are few and far between. To get the process started, one needs only to call the local office. The staff there will walk you through the process. To learn more, go to www.rrb.gov. There are even charts explaining how the system works and when you, as a spouse, qualify for benefits.

There a few things about the RRB that are important enough to include in this brochure. First, there are three important time periods to keep in mind – 60 months of service, 240 months of service and 360 months of railroad service. The last is known as the 30/60 rule. As railroad workers work past each of these milestones, their benefits improve substantially. A worker with under 60 months of service does not qualify for RRB benefits and instead must look to Social Security. A worker with more than five years of service, who is totally disabled, will be able to participate in the RRB system.

Workers who are injured after 240 months of service, qualify for their pensions, regardless of their age, if they are unable to perform the usual functions of their job. For instance, if a conductor with 20 years of service hurts his knee and can't walk a train or work as a conductor, he qualifies for his pension, even if there are other jobs he might be able to perform. The 360 months of service milestone is important because working 30 years pretty much maximizes the possible RRB benefits.

The 30/60 rule simply provides that a railroader who is 60 years of age and has 30 years of service can retire. What makes that relevant to injury claims is that sometimes a claim agent will try to lead a worker who is 55 or so when disabled, to say that he was going to retire at 60 with 30 years of service. The claim agent does this so that he can use this as an admission to reduce the worker's wage loss claim. Be careful! None of us know exactly when we will retire. We'll know when we get there. In the meantime, children in college, love of the work, and mortgages are reasons that many will work well into their 60's. There is no mandatory retirement age for railroad workers.

Even when your spouse does not qualify for a long term pension, they should always file for RRB sickness benefits. This benefit will help you through the hard times when no money is coming into the household. Keep in mind that when an FELA case is resolved, these sickness benefits must be paid back to the RRB, out of the settlement.

## 7.
## HEALTH INSURANCE

The health insurance benefit that railroad workers enjoy is a very valuable asset. In fact, each railroad pays more than $7,000 a year, per employee, to cover the premiums. As you know, this insurance covers the employee and his or her family. But it does not last forever. When an employee is so injured that he is unable to return to work, his insurance will only last for a finite period of time, even when the employee remains on the seniority roster. The rule is this: Coverage for the employee lasts for the remainder of the calendar year in which he received his last paycheck plus two additional years. Coverage for the family is one year less than for the employee.

An example will help you understand how this works. If a railroader is injured in June 2010, and gets his last paycheck in July 2010, his insurance will continue for all of 2010, 2011, and 2012. His family's insurance will expire on December 31, 2011. If, on the other hand, the worker figures out a way to get his last paycheck in January of 2011, then he will be covered through 2013 and his family through 2012. The easiest way to do this is by scheduling a vacation the last week of 2010 so that the final paycheck will arrive in January 2011. Skilled legal counsel and an attentive local union chairman can assist in the goal of maximizing this valuable benefit.

# 8.
## RAILROAD WORDS

The equipment on railroads is unique to railroads and the words that describe it sometimes make no sense at all. Too often you, as a spouse, will be told about your loved one's injury in terms that make little sense. With that in mind here is a glossary of some common railroad terms:

"A" End of Car – The end opposite of the end on which the hand brake is mounted. The hand brake is on the "B" end of the car.

Air Brake Hose – Two air brake hoses connect with a "glad hand."

"B" End of Car – The end of the rail car on which the hand brake is located.

Bad Order – a) Car in need of repair; b) When a defective car is found by a car inspector, he attaches a small card labeled "bad order" in bold lettering on the car. That car may not be moved from the terminal where the inspection occurred until the necessary repairs are made.

Ballast – Selected material (gravel, slag or other heavy material) placed on the roadbed to support the track. Road ballast is about the size of a plum and yard ballast is more like that found in a driveway.

Bowl – The collection of tracks in a switching yard where the cars are separated into groups before being assembled into a train.

Brakeman – Train service employee who assists with train and yard operations. Often the duties of a brakeman are also performed by the conductor.

Brake Step – A small shelf or ledge on the end of a freight car on which the worker stands when applying the hand brake. Sometimes called a brake footboard.

Conductor – Train service employee in charge of train or yard crew. Also called Yard Foreman.

Coupler – An appliance for connecting cars or locomotives together. Government regulations require that these must couple automatically by impact and must be capable of being uncoupled without going between the ends of the cars.

Cut – a) To uncouple a car; b) A group of cars coupled together; c) That part of the right-of-way which is excavated out of a hill or mountain instead of running up over it or being tunneled through it.

Cut Lever – A rod with a bent handle attached to the end of a car that is used to open the automatic coupler without going between the cars. This is part of the automatic coupler safety appliance.

Derail – A track safety device designed to guide a car off the rails at a selected spot to prevent a collision or another accident, commonly used on spurs or sidings to prevent cars from fouling the main line.

Frog – a) A track structure used at the intersection of two rails at what is called a turnout, to provide support for wheels allowing a car on either rail to cross to the other; b) An implement for rerailing car wheels; c) An amphibian often named Kermit.

Grab Iron – The side ladders attached to cars and engines as a handhold.

Hand Brake – The brake apparatus used to manually apply the brakes on a car or locomotive. Usually consisting of a wheel that tightens a chain that applies the brakes.

Hump Yard – A switching yard on an incline where cars are allowed to roll by gravity to their destination in the bowl. There are usually retarders and skates that squeeze the wheels of the cars to control their speed.

Knuckle – The pivoting coupler which rotates open and closed to couple and uncouple cars. It is opened by use of a cut lever that is on the side of the car.

Piggy Back – The transportation of semi truck trailers and containers on railroad flat cars.

Switch – a) A connection between two lines of track to permit cars or trains to pass from one track to the other track. The device that causes the cars to move is the switch stand; b) Switching - The action of moving cars to create trains.

Spotting (cars) – Switching freight cars to a specified location for loading and unloading.

# 9.
## OTHER AREAS OF EXPERTISE

**Dangerous & Defective Products (Product Liability)**

There is no excuse for machines, vehicles or other products that maim or kill. Products hurt people because of faulty design or manufacture, or because they lack sufficient warnings or instructions. We represent people who have been hurt by these products.

Product liability cases are often like David versus Goliath, but we are ready, willing and able to take them on — having handled cases on behalf of consumers against the nation's largest corporations. We have the resources needed to compete and win, including a continually updated library of technical bulletins and standards. We also have the networking capabilities to retain superior experts who can go toe-to-toe with representatives of big industry. We can organize and control tens of thousands of documents, ensure scale models are built, charts are compiled, and computer simulations prepared, so that the jury understands how and why the particular product failed, and how drastically that failure has impacted our clients' lives.

In addition to helping injured people who ask our firm to represent them, we also regularly help other law firms identify, understand and litigate product liability claims in conjunction with other kinds of actions. We have helped people who thought workers' compensation was their only remedy to obtain substantial recoveries from other sources that helped put their lives back on track.

**Medical Malpractice**

While some firms' medical malpractice experience is limited to a specific area of medicine, we have successful experience in all types of medial negligence cases. At any given time, our clients will span the spectrum from newborn babies who will never leave the nursery to great grandparents who suffer premature death in nursing homes.

The procedural and legal hurdles in malpractice cases are frequently traps for the inexperienced. The medical community, in particular, protects itself through a "shield of silence" and powerful lobbyists in the insurance and medical industries. Consequently, medical malpractice cases are often the most difficult and costly to pursue. We feel, however, that those who have been harmed through bad medicine deserve excellent representation and a chance at a fair compensation. We endeavor to provide both.

We succeed in resolving medical malpractice cases by combining our long history in this complicated area of the law with a trustworthy cadre of doctors and nurses to guide us through the medical aspects of each case an help locate top medical experts to testify on our client's behalf.

We will only prosecute a medical malpractice case, however, if we genuinely believe

that a medical mistake was made. We take particular care to ensure that any claim against a medical professional is warranted and supported by competent medical testimony.

**Motor Vehicle Accidents**

Our attorneys represent clients who have suffered serious injuries, such as brain injuries, spinal cord injuries, severe burns, dismemberment and amputation in car, truck, motorcycle or boat accidents, or as pedestrians.

Victims of motor vehicle accidents should know that the insurance industry typically follows a policy that no injured person should be offered compensation that accurately reflects the long-term extent or cost of the injury. To protect and promote this agenda, many insurance carriers have created in-house captive law firms and hired low cost outside counsel, giving them the option to affordably try cases. Against this resistance, many motor vehicle accident lawyers either refuse to aid injury victims or talk their clients into accepting the crumbs that the insurance company has offered. The insurance companies know who these "settling" lawyers are and they pay the clients of these lawyers accordingly.

At the Warshauer Law Group, we consider this a reprehensible approach to practicing personal injury law and refuse to play along. Insurance companies are aware of our willingness to go to trial and of our formidable reputation in the courtroom. As a result, our firm is often able to persuade an insurance company to settle before trial for full compensation that covers all costs for the many interruptions and changes a motor vehicle wreck can cause in someone's life, including their long-term medical care, mental health and well being. However, should the insurance company refuse to settle for a fair amount, we have tried many large cases and know how to put together all of the elements to successfully try and win them.

Many wrecks are caused, or made worse by, defective parts or design flaws in the vehicle. Success in these cases requires significant experience in both product liability and personal injury law; the Warshauer Law Group has this broad experience.

**Construction Equipment & Tool Accidents**

Unfortunate events on the construction work site sometimes cause catastrophic injuries and monumental damage. Injured construction workers should never settle for workers' compensation without allowing an attorney to review and investigate their cases for the potential liability of a third party. We have represented and obtained compensation for workers injured by defective tools, cranes, scaffolds, forklifts, and dangerous conduct by subcontractors and general contractors.

# 10.
## APPENDICES

Railroad workers' rights are governed by federal statutes and regulations. Some of the more important statutes, as well as jury charges that describe railroads' obligations to jurors at the ends of trial are set out below.

## Appendix A:
## STATUTES

### 45 U.S.C. § 51.
*(This is the FELA)*
Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

### 45 U.S.C. § 53.
Contributory negligence; diminution of damages

In all actions on and after April 22, 1908, brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall

not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

## 45 U.S.C. § 54.
### Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

## 45 U.S.C. § 54(a).
### Certain Federal and State regulations deemed statutory authority

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49 or by a state agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 53 and 54 of this title.

## 45 U.S.C. § 55.
### Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

## 45 U.S.C. § 56.
### Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued. Under this chapter an action may be brought in a district court of the United

States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

## 45 U.S.C. § 59.
### Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

## 45 U.S.C. § 60.
### Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense:

Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports. If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

## 49 U.S.C. § 20302.
### General requirements
*(This is the Safety Appliance Act)*

(**a**) General. - Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines -

(**1**) **a vehicle** (**this refers to any rail car**) **only if it is equipped with -**

(**A**) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(**B**) secure sill steps and efficient hand brakes; and

(**C**) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure hand holds or grab irons on its roof at the top of each ladder;

(**2**) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(**3**) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(**4**) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) **a train only if -**

(**A**) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(**B**) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(**b**) Refusal To Receive Vehicles Not Properly Equipped. A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.

(**c**) Combined Vehicles Loading and Hauling Long Commodities. Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(**d**) **Authority To Change Requirements. - The Secretary may -**

(**1**) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(**2**) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(**3**) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(**e**) Services of Association of American Railroads. In carrying out subsection (d) (2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

## 49 U.S.C. § 20304.
### Assumption of risk by employees

An employee of a railroad carrier injured by a vehicle or train used in violation of section 20302(a)(1)(A), (2), (4), or (5)(A) of this title does not assume the risk of injury resulting from the violation, even if the employee continues to be employed by the carrier after learning of the violation.

## 49 U.S.C. § 20701.
Requirements for use
*(This is the Locomotive Inspection Act)*

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances -

(**1**) are in proper condition and safe to operate without unnecessary danger of personal injury;

(**2**) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(**3**) can withstand every test prescribed by the Secretary under this chapter.

## Appendix B:
REGULATIONS

### 49 CFR Sec. 213.33 Drainage.

Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

### 49 CFR Sec. 213.103 Ballast; general.

Unless it is otherwise structurally supported, all track shall be supported by material which will--
(**a**) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
(**b**) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
(**c**) Provide adequate drainage for the track; and
(**d**) Maintain proper track crosslevel, surface, and alinement.

### 49 CFR Sec. 213.321 Vegetation.

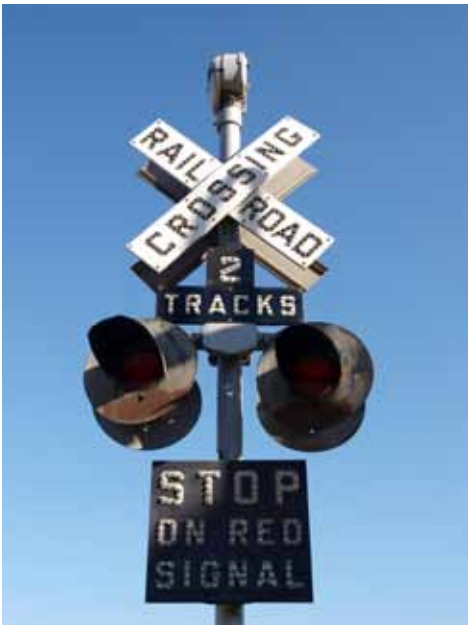
Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not--
(a) Become a fire hazard to track-carrying structures;
(b) Obstruct visibility of railroad signs and signals:
(1) Along the right of way, and
(2) At highway-rail crossings;
(c) Interfere with railroad employees performing normal trackside duties;
(d) Prevent proper functioning of signal and communication lines; or
(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

## Appendix C:
JURY INSTRUCTIONS

Here are "jury instructions" or "jury charges." If an FELA case goes to trial, these are samples of the instructions the judge will give the jury to direct them in their deliberations.

In this case, the Plaintiff's claims are asserted under the Federal Employers' Liability Act and violations of Federal Safety Regulations by the Defendant.

Plaintiff's first claim is based upon the Federal Employers' Liability Act, which provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages




to any of its employees who are injured as a result of negligence by the railroad.

In order to prevail on this claim the Plaintiff must prove each of the following elements by a preponderance of the evidence:

First: That at the time of the Plaintiff's injury, Plaintiff was an employee of the Defendant performing duties in the course of his employment - the Defendant has agreed Plaintiff has satisfied this element;

Second: That the Defendant was at such time a common carrier by railroad, engaged in interstate commerce - the Defendant has agreed Plaintiff has satisfied this element;

Third: That the Defendant was "negligent" as claimed by the Plaintiff; and

Fourth: That such negligence was a "legal cause" of damage sustained by the Plaintiff. As noted above, in this case the parties have stipulated or agreed that the first two of these requirements have been satisfied. Accordingly, the first issues for you to consider involve items three and four, that is whether the Defendant, or any of its employees other than the Plaintiff, was "negligent" and, if so, whether such negligence was a "legal cause" of any damages sustained by the Plaintiff.

Under the FELA, it was the continuing duty of the Defendant to use reasonable care under the circumstances in furnishing the Plaintiff with a reasonably safe place in which to work, and to use reasonable care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean that the Defendant was a guarantor of the Plaintiff's safety, and the mere fact that an accident happened, standing alone, does not require the conclusion that the incident was caused by anyone's negligence. The extent of the Defendant's duty is to exercise reasonable care under the circumstances to see that the place in which the work is to be performed is reasonably safe.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would *not* do under like circumstances, or in *failing* to do something that a reasonably careful person would do under like circumstances.

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from the evidence in the case that any negligence

of the Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's negligence.

You are also instructed that negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the Plaintiff's claim under the FELA for negligence, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support the Plaintiff's claim, you will then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was himself negligent and that such negligence was a legal cause of his own injury. This is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant who must establish:

First: That the Plaintiff was also "negligent;" and

Second: That such negligence was a "legal cause" of the Plaintiff's own damage. If you find in favor of the Defendant on this defense that will not prevent recovery by the Plaintiff; it only reduces the amount of Plaintiff's recovery. In other words, if you find that the incident was due partly to the fault of the Plaintiff, that his own negligence was, for example, ten percent responsible for his own damage, then you would reduce the amount of your award to him by that percentage. Such a finding would not prevent the Plaintiff from recovering; it will merely reduce the Plaintiff's total damages by the percentage that you find. Of course, by using the number ten percent as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find one percent or ninety-nine percent.

Plaintiff's second claim is based upon alleged violations of Federal Safety Regulations. Specifically, Plaintiff claims that Defendant violated the regulations of the Federal Railroad Administration at 49 Code of Federal Regulations §213. Specifically, Plaintiff claims that the switch with which he was working at the time he claims to have been injured was in violation of certain regulations and that these violations contributed to the cause of his injuries. In that regard, the relevant provision of the Federal Safety Regulation is as follows:

## Sec. 213.7
## Designation of qualified persons to supervise certain renewals and inspect

This regulation requires Defendant to have qualified persons perform track inspections and for the owner to give the inspectors "written authorization". Defendant is also required to maintain a written record of each inspector's qualifications.

## Sec. 213.13
## Measuring track not under load

This regulation requires each track owner to take into account the amount of movement when the rail is loaded (when a train is on the track) when taking measurements of unloaded (empty) track.

## Sec. 213.103
## Ballast, general

This regulation requires each track owner to have a ballast that is structurally solid and with adequate drainage.

## Sec. 213.135
## Switches

This regulation requires that each switch stand and connecting rod shall be securely fastened and operable without excessive lost motion.

If you should find from a preponderance of the evidence that the Defendant did violate a provisions of the Federal Safety Regulation, as alleged, by the Plaintiff, and that violation played any part, no matter how small, in bringing about or actually causing injury to the Plaintiff, then the Plaintiff is entitled to recover from the Defendant those damages which you find from a preponderance of the evidence that the Plaintiff actually sustained as a result of the violation without any requirement of a showing of negligence on the part of the Defendant.

You are further instructed that contributory negligence on the part of the Plaintiff himself is not a defense in whole or in part to damages caused by a violation of the Federal Safety Regulation.
If you find for the Plaintiff on any of his claims, you should award the Plaintiff an amount of money that will fairly and adequately compensate him for such damage, including any damage the Plaintiff is reasonably certain to expect in the future.

If you should find that the Plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include within your verdict for the Plaintiff:

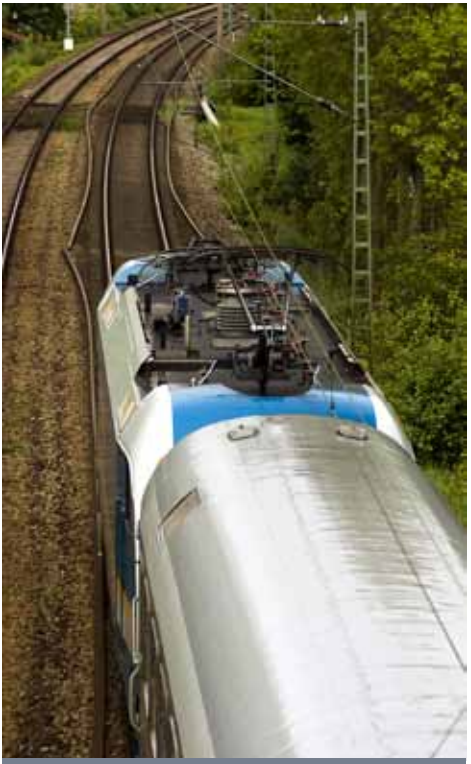
(**1**) A sum for the reasonable value of the lost income shown by the evidence in the case to have been necessarily lost up to the present date by the Plaintiff since his injury, because of his being unable to pursue his occupation as a result of the injury. In determining this amount, you should consider any evidence of Plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find from the evidence what you believe he would have earned during the time so lost. You are authorized to include this sum in your verdict if Defendant's violation of a Federal Safety Regulation played

any part, no matter how small, in bringing about or actually causing the loss; and

(2) You should also include such sum as will reasonably compensate the Plaintiff, as an element of his pain and suffering, for any loss of his capacity to labor, caused, in whole or in part, by the injury in question, which you find from the evidence in the case that Plaintiff will suffer in the future. In determining this amount, you should consider what Plaintiff's health, physical ability and earning power were before the accident and what they are now; the nature and extent of his injuries; whether or not there is evidence the injuries are permanent; or if not permanent, the extent of their duration; all on the end of determining,the effect of his injury upon his future earning capacity to labor, as a result of the injury in question. You are authorized to include this sum in your verdict if Defendant's violation of a Federal Safety Regulation played any part, no matter how small, in bringing about or actually causing the loss; and

(3) You should also include a sum which will reasonably compensate Plaintiff for any pain, suffering and mental anguish already suffered by him and resulting from the injury in question if the Defendant's violation of a Federal Safety Regulation played any part, no matter how small, in bringing about or actually causing this element of injury or damage; and

(4) You should include a sum to compensate Plaintiff for any pain, suffering and mental anguish which you find from the evidence in the case that the Defendant's violation of a Federal Safety Regulation played any part, no matter how small, in bringing about or actually causing Plaintiff to suffer in the future from the same cause; and



(5) Lastly, you should also include a sum for any lost wages, benefits, and income which you find from the evidence in the case that the Defendant's violation of a Federal Safety Regulation played any part, no matter how small, in bringing about or actually causing Plaintiff to lose in the future from the same cause.

# 11.
## ABOUT THE AUTHOR

Michael Warshauer is, first and foremost, a family man. He and his wife Lyle, who happens to be one of his law partners, have five children and two golden retrievers. They know the importance of family and understand the fears, confusion, and anxiety a spouse suffers when his or her best friend is injured or killed. Michael and Lyle understand the cost of raising and educating children and the role two parents play in providing soccer transportation, boy scout merit badge advice, and piano lessons. Not to mention school work, volunteering, and tummy aches!

Michael is also an experienced trial lawyer. He was admitted to practice law in 1983 after a stellar academic background that included membership on his law school's law review. He has twenty years experience as a Designated Legal Counsel by the United Transportation Union. He is AV rated, as are all his partners, he is a Georgia Super Lawyer, as are his partners, and he is one of the few personal injury lawyers who is a Board Certified Civil Trial Advocate by the National Board of Trial Advocacy. In addition, he is the author of the chapter titled "Railroad Law" in a 22 volume treatise published by the largest law book publisher in the world. He has tried dozens of FELA cases and appeared before not only several state and federal appellate courts, but is also one of the very select few lawyers in America who has appeared before the United States Supreme Court. He has lectured on legal topics, including the FELA, all over the United States and Canada. He has provided background information about railroad issues to congressmen and senators, to National Public Radio and the New York Times among others. He has chaired the Railroad Law Section for the American Association for Justice and has served on that group's executive committee for many years. In 2010 he served as the president of the Georgia Trial Lawyers Association.

His experience as an FELA lawyer covers all aspects of traumatic injuries and deaths caused by railroads. From helping men who are hurt operating switches and walking on ballast, to helping widows whose husbands were coupled between two freight cars - he has seen it all. On many occasions, when company officials – and even claim agents – need a lawyer, they turn to Michael for help. They do this because they know that he will not be intimidated by the railroad or its lawyers. Michael takes particular pride in the fact that many times he discourages men from hiring him when they can get a better deal without paying his fee. But most importantly, Michael Warshauer is a lawyer who helps railroad families get their lives back on track after disabling injuries derail them.

In addition to his years of experience as an FELA lawyer, Michael also works on product liability cases, medical negligence cases, and car and truck wrecks. From this wide variety of legal work he has gained a skill set that includes creative thinking, relentless pursuit of success, and the trial skills to help his clients no matter how tough the challenges.

For more information about Michael and the FELA, go to www.georgiafela.com.
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