

HILDEBRAND MCLEOD & NELSON LLP

REPRESENTING INJURED RAILROAD WORKERS SINCE 1926

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TO THE INJURED RAILROAD WORKER:

If you become injured at work, there several things that should be done after the injury.

- Remember- The FELA is fault based and the railroad will want to argue that this injury is your fault.
- Make mental and written notes of the location and/or equipment involved in the injury, and take photographs if possible.
- Have coworkers take notes of the accident scene, i.e. location, equipment involved, witnesses, and the area surrounding the accident scene. What work was being performed at the time of the injury? What repairs or cleanup was done after the accident?
- Immediately contact your Local Union Representative and the Hildebrand Law Firm.
- Limit speaking to any company official.
- Do not give any written or taped statements to any company official as you are not required to do so under any rule or law.
- Do not allow company officials in the examination room to talk with you, your family, or your doctor.
- You must fill out an accident report for the company, but not until you are mentally and physically able. It should not be done in the examination room, while under medication, or the stress of being injured. Wait until you can reflect on what happened and why it happened.
- Have your Local Union Representative or The Hildebrand Law Firm help you fill out the accident report when you have recovered enough to think clearly and can accurately answer all of the questions on the accident report.
- The Hildebrand Law Firm will protect the rights you have under the FELA. You are not covered under any state workers compensation.

UNDERSTANDING YOUR RIGHTS UNDER FELA IS THE FIRST STEP IN PROTECTING YOUR RIGHTS.

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FOR THE SPOUSES OF RAILROAD EMPLOYEES:

The men and women working on the railroad are continually exposed to hazardous conditions. Because railroading is a dangerous business, it is vitally important that husbands and wives know what to do in the event of an on the job injury.

IT IS CRITICAL THAT SPOUSES HAVE THE PHONE NUMBERS OF THEIR LOCAL UNION REPRESENTATIVES ALONG WITH DESIGNATED LEGAL COUNSEL'S PHONE NUMBERS. Please print or request our tri-fold cards so you are prepared in the event of an injury.

Please see our listing of important questions below. Finding the answers to them as soon as possible will be of great benefit to you and your children in protecting your rights.

In the months and years to come, there will be strong efforts by the railroads in our country to abolish the Federal Employers' Liability Act. The reason the railroad will be working so hard in Washington to abolish the Act is that they know that it is of great benefit to railroad workers who are injured or to the families of railroad workers who are killed. Elimination of this Act would save the railroads untold amounts of monies, but would work hardship on railroad workers and their families, by deleting hard-earned rights and remedies. Only by understanding the Federal Employers' Liability Act and pursuing the rights and remedies contained in the Act can railroad workers protect themselves.

What if my husband died and a claims agent for the railroad offers to settle and wants me to sign a release. Do I?

Before you do anything after a tragedy, you must be sure that you have fully recovered from the shock and grief the event will bring before you take any action. Frequently, a claims agent and some attorney's representatives will want you to make decisions which will affect the rest of your and your children's lives before you have had an opportunity to step back and look at what has happened. Until you are sure that you have your wits about you, you should not talk to the claims agent.

Can a member of my husband's union help?

Absolutely. Most railroad workers have insurance policies and other provisions in their union contract which will assist the spouse and children in the event of catastrophic injury or death. Your local Union officers can help you apply for these monies and work to protect your rights..

When should I see an attorney?

You should see an attorney who is experienced with the Federal Employers' Liability Act, the law which is designed to protect railroad workers when they are injured or killed on the job, as soon as you feel that you can make wise rational choices. It is important that you retain an attorney who is experienced with the Federal Employers Liability Act as the attorney will know where to go and how to preserve the evidence which will be necessary to protect your and your children's rights. It will benefit you and your children to retain an attorney as soon after the catastrophic event as possible, as the attorney knows that the danger in losing valuable and important evidence grows greater as time passes. It is important that the attorney you select has knowledge of how the railroad works and the duties assigned to railroad employees. Your spouse's union has approved and designated certain law firms as having the knowledge and experience necessary to protect your rights.

I have children and need money as soon as possible to pay for my house and living expenses. The claims agent offers me advances. Should I accept the advances and not go to a lawyer?

Frequently, claims agents will tell injured railroad workers or the spouses of deceased railroad workers that they would love to help them out, but can only do so if they have not hired an attorney and if they will give a recorded statement. THIS IS NOT TRUE. The railroad, if it wants to help out any employee who is injured or the family of an employee who has been killed. Furthermore, there is no requirement that an injured employee provide a statement other than an accident report. These are means by which the claims agent tries to get evidence for the railroad to defeat your claim. It is the claim agent's job to minimize the railroads liability. The railroad will make an advance if it is a good business decision—just as when they furlough people. Although having money quickly from the claims agent can help in the short run, the potential of losing important facts and evidence in your case is great. The railroad advances money to minimize their liability and also allow evidence to be lost and witnesses' memories to fade. You and your families will need that evidence and those witnesses to protect your rights. Do not, for any reason, give a statement, either taped, oral or written, about the accident to the claims agent. Furthermore, never discuss family matters or problems with the railroad. If the claims agent approaches you about these subjects, contact an attorney.

I know I am entitled to a certain amount from the company in the event of death. If they pay, can I still sue?

The monies to which you are entitled are the result of insurance policies, the collective bargaining agreement or the Railroad Retirement Board. These monies are earned through employment and do not come from the railroad. This means that you may still collect those monies and sue the railroad. However, if you accept money directly from the railroad and you sign a release, it will prevent you from suing. It is important to understand the difference

I have signed a release with the claims agent while under stress. Can I get out of this release?

The answer to this question depends on the facts involved in your signing the release. If it can be shown that you did not understand the circumstances surrounding the injury or death, did not understand the significance of the injuries (if there is no death), or signed because of false or concealed statements by the claims agents or doctors, a good attorney should be able to get you out of the release. This, however, is very difficult. Of course, the best procedure is to not sign in the first place until you have fully recovered your emotional and mental faculties and had an opportunity to consult with a lawyer.

My husband was in accident while away from home. I have to travel out of state to be with him at the hospital. Will the railroad pay for the cost of my going to the accident scene to be near my husband?

The railroad is not obligated to pay these costs. Sometimes the claims agent will offer to "put you up" and, in so doing, will try to control you and your claim. Again, this is a ploy to prevent early investigation of the accident scene and to procure necessary witness statements. The money which you are out of pocket can eventually become an element of damage in your lawsuit and can be recovered through trial. If you need money in the event your husband is involved in an accident away from home, first look to family and friends for support. If there are problems, contact an attorney.

What am I entitled to?

This is a difficult question and cannot be answered at the time of a catastrophe. Any claims agent or attorney who tells you what your case is worth or what he can get for you immediately after the time of the catastrophe is not giving you a straight answer. A case may only be fully evaluated after all of the facts and circumstances surrounding the event have been discovered, medical records have been evaluated, and the present value of future losses is ascertained.

Under the Federal Employers Liability Act, negligence must be proven. This means that there must be facts sufficient to support a claim that the railroad or one of its agents or employees did something wrong, or failed to do something that should have been done. Included in this area are unsafe tools, equipment and property as well as the failure to institute and oversee proper safety procedures. Then it must be shown that the act or omission played any part, even the smallest, in bringing about the injuries or death. Also, the actions of the injured or deceased railroad worker have to be evaluated to determine whether he or she was responsible in any way for the injury or death.

What do I do now?

Only after the questions are answered can a thorough evaluation of the value of the case be made.

There are special laws which apply if your spouse was injured or killed as a result of a defect of an engine or a defect in the train's safety appliances. These laws the Locomotive Inspection Act and Safety Appliance Act must be thoroughly evaluated. There are some things which you must know in order to make good decisions. As soon as possible, find out the answers to the questions listed below:

1. Where did the accident happen?
2. What time did the accident happen?
3. Who was with my husband at the time the accident happened?
4. Did anyone else see the accident?
5. What happened?

These are important questions and finding the answers to them as soon as possible will be of great benefit to you and your children in protecting your rights.

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IF YOU ARE INJURED WHILE ON DUTY:

1. Obtain medical treatment as soon as possible. You have the right to see the medical provider of your choice. You **do not** have to use railroad provided treatment centers. If threatened with insubordination, comply with managers request and then seek treatment with your own medical provider or hospital.
2. **Do not** allow railroad management into the examination room, or to discuss treatment of your injury with your medical provider or your family.
3. **Do not** fill out the accident report until you are mentally and physically able.
4. **Do not** give a taped or written statement to the railroad.
5. **Immediately** contact our Office or your Union Representative to help you fill out the accident report if you are unsure of how to answer any question.

Call Hildebrand McLeod & Nelson LLP 1-800-447-7500

Important Medical Information for Medical Providers:

- All medical bills are paid through the employee's group health insurance policy.
- Railroad workers do not have any rights under state worker's compensation.
- When injured on the job, railroad workers are governed by the Federal Employer's Liability Act ("FELA").
- FELA does not have a medical provision clause.
- The employer railroad does not have a right to talk to the employee's medical providers, obtain medical records, or participate in medical examinations without the employee's prior approval.
- Employees and medical providers are not required to get the company's authorization for medical treatment.
- The employer railroad might process the bills, but that does not waive the employee's doctor/patient privilege.

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FELA PROTECTED STATEMENTS

IT IS A CRIME FOR THE RAILROAD TO TAKE ACTION AGAINST YOU FOR GIVING A STATEMENT:

- The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq., was passed by Congress 100 years ago to provide a remedy to railroad workers injured in the course and scope of their employment.
- In 1939, Congress amended the FELA by adding 45 U.S.C. § 60 ("Section 60"), **making it a crime** for the railroad to take action against a railroad worker who provides a statement to an FELA attorney:

"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..."

CONGRESS EXPRESSLY INTENDED TO PROTECT RAILROAD WITNESSES FROM RETALIATION:

- "When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railroad company against a possible suit for damages. On the other hand, the claimant may be seriously handicapped in his attempt to procure the information necessary to the determination of the question of liability. For example, a substantial number of railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them." S.Rep. No. 661, 76th Cong., 1st Sess. 5 (1939).

COURTS HAVE HELD THAT YOU MAY NOT BE DISCIPLINED FOR GIVING A STATEMENT:

"Section 60 prohibits a railroad from disciplining or attempting to discipline an employee for furnishing information to an FELA plaintiff. Thus, any disciplinary investigation held solely for the purpose of punishing an employee for such conduct is violative of this statute...the disciplinary procedure not only violates the mandate that an employer refrain from disciplining an employee for furnishing information, it also becomes a device the "effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest." *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146.

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OFF TRACK VEHICLE ACCIDENTS

THE F.E.L.A. IS A FAULT BASED COMPENSATION LAW.
IF THERE IS **NO CARRIER FAULT**, THERE IS **NO FELA COVERAGE**.
PLEASE FIND BELOW HILDEBRAND MCLEOD & NELSON'S RECOMMENDATIONS.

Frequently Asked Questions:

1. When I'm on duty and being transported in a company carry-all or contract van and we are struck by another vehicle through no fault of the railroad or the driver of our vehicle, and suffer an injury, where do I turn for compensations for my damages?

- A. The at fault vehicle's insurance carrier.
- B. If the at fault vehicle is uninsured:
 - 1. The Uninsured Motorist provision (UM) of your private vehicle policy;
 - 2. The off track vehicle accident provision of your collective bargaining agreement (The Union Contract).
- C. If the at fault vehicle has inadequate insurance:
 - 1. The Underinsured Motorist provision of you private vehicle policy (UIM);
 - 2. The off track vehicle accident provision.

2. What is UM and UIM coverage?

If you have automobile liability coverage, chances are that you have UM and UIM coverage. UM and UIM coverage is not mandatory, but California state law states you can only decline it in writing. For example, as a general rule, if you have 25/50 liability coverage you have the same in UM and UIM. UM coverage applies to the extent of your stated limits, when the uninsured party is at fault. UIM coverage applies when the at fault party's coverage is insufficient to cover your actual damages, again to the extent of your coverage limits.

We unequivocally recommend that you buy the highest coverage you can afford for two reasons:

- A. To protect yourself in the situations that we described. Loss of income, medical bills, and permanent residual injury can quickly add up to a large figure.
- B. To protect your family and your assets if you or a family member causes an accident and are sued.

Remember the victim's damages can run up just as fast as yours and in this day and age you need adequate coverage to protect your home and assets.

The State of California only requires a 15/30 policy to meet licensing requirements.

3. Why should I buy a lot of coverage? This probably won't happen to me.

In 2009 our firm is and was involved in four such accidents involving UM and UIM coverage's involving 10 railroad employees.

4. What is Off Track Vehicle Accident Compensation?

As a part of every craft's collective bargaining agreement, there is an off track vehicle accident provision which provides certain money benefits to employees injured in accidents involving off track vehicles while on duty.

A. The value of benefits:

The employee is entitled to 80% of his wages with a set maximum that varies by union contract (for example, with a maximum of \$1,000 per week).

If the employee is also collecting RRB benefits, those will be deducted from the amount paid by the off track policy. Example: John Doe would get \$1,000 from the off track policy. John Doe gets \$350 a week in RRB. So he can only get \$650 per week in off track benefits.

The employee is also entitled to a lump sum benefit based on the severity of the injury (for example, death loss of limbs, loss of vision, etc.). Different unions may have negotiated different amounts.

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B. The disability requirements for the benefits:

The employee must be disabled from the date of the accident for 30 days or more immediately and continuously. If he goes back to work for one day right after the accident and then is off 30 days or more he cannot get the benefits. If he goes back to work for one day to test himself during the first 30 days, he cannot get the benefits.

C. The duration of benefits:

An injured employee can continue to receive off track benefits up to 156 weeks, so long as he remains disabled, even after RRB benefits have stopped. If RRB benefits stop, the off track benefits should be recalculated.

D. How to apply:

The employee should make this claim through the carrier's claim agent, preferably in writing, with copies to the superintendent's office and the employee's union representative.

E. Third party case:

If the employee has a third party case, UM or UIM claim and is able to collect on it, he must, by contract, pay back the carrier for the benefits received.

The carrier off track vehicle provisions are intended to cover accidents involving employees while they are riding in, boarding, alighting from off-track vehicles authorized by the carrier and are:

1. deadheading under orders or
2. being transported at carrier expense

5. What if I am driving a carrier vehicle or my own vehicle at the request of the carrier and get into an accident?

- A. If you are at fault, you are the carrier's agent and you will be represented by the carrier and the carrier's assets. Your own Insurance Co. may be involved.
- B. If the other driver is at fault your remedies are the same as if you were being transported with the exception that comparative fault might apply.
- C. Everyday commuting is not covered. However, if you are requested to drive from your assigned terminal to an outside point and no company transportation is available, and are within the scope of the request and are involved in an accident, you are covered under (a), or (b) depending on fault.

Remember when you are being transported in an off-track vehicle and the accident is caused or partially caused by your driver or by a defect in the off track vehicle you probably have an F.E.L.A. claim. A contract vehicle, by law is an agent of the carrier. It is important to have an experienced legal team from the Union Designated Legal Counsel analyze the facts of your accident as each accident is unique. This is also true in the handling of a UM or UIM situation, as an attorney will be familiar with the statutes involved and can also analyze the facts to see if there is any concurrent fault such as highway design, improper signage, etc

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WHAT ARE WHISTLEBLOWER VIOLATIONS?

Pursuant to **49 U.S.C. Section 20109**, the railroad commits a whistleblower violation when it engages in any **adverse action** against a railroad worker because that worker performed a **protected activity**.

Common Protected Activities:

- Notifying the railroad of **work-related injuries and medical conditions**
- Reporting **hazardous safety or security conditions**
- Accurately reporting **hours of service**
- **Filing or assisting** with an **OSHA Complaint**
- The railroad **cannot delay, deny, or interfere** with your **medical treatment**

Common Adverse Actions :

- Discipline
- Firing
- Harassment
- Probation or adverse “points” assessments
- Retaliation
- Intimidation
- Threats
- Reduced pay, hours, or choice of jobs
- Blacklisting

Examples of Potential Violations:

- 1) Termination, discipline, or harassment for reporting an on-duty injury or hazardous safety condition
- 2) Delaying or denying an employee’s request for hospital or medical care
- 3) Railroad nurse or railroad doctor interfering with or delaying medical care
- 4) Intimidation/Harassment: Threatening investigation or discipline if an injury is reported

HOW TO PROTECT YOURSELF

1) Ask questions and get advice before and after reporting an injury

- Contact your union reps and experienced attorneys at Hildebrand McLeod & Nelson LLP

2) Explicitly request medical treatment

- Your **maximum protection** is when you **request hospital/ER** care immediately after an injury
- If you ask for the **hospital**, the railroad **must** promptly arrange transport to the **nearest hospital**
- With or without a request, the railroad still cannot delay, deny, or interfere with your treatment

3) Keep detailed notes

- Write down all key events, dates, times, witnesses, and conversations with railroad managers

4) Timely file a whistleblower complaint with OSHA

- **Timing: You must file your complaint no later than 180 days after an adverse action**
- Potential remedies: Punitive damages up to \$250,000, back pay and other economic damages, emotional damages, reinstatement and clearing of personnel record, attorney fees, and other relief afforded by the law

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FRA Federal Regulations Concerning the Use of Electronic Devices

49 CFR Part 220 Subpart C

General Prohibitions – §220.303

Railroad operating employees (Generally T & E employees - refer to 49 CFR §220.5 for complete definition) shall not use an electronic device if that use would interfere with their safety-related duties or safety-related duties of another railroad operating employee.

No individual in the cab of a controlling locomotive shall use an electronic device that would interfere with a railroad operating employee's performance of safety-related duties.

Personal Electronic Devices – §220.305

Railroad Supplied Electronic Devices – §220.307

Must be turned OFF with earpieces removed when:

- On a moving train
- Any member of the crew is on the ground
- Any member of the crew is riding equipment during a switching operation
- Any RR employee is assisting in the preparation of the train for movement

Note: A railroad supplied electronic device not being used for an authorized business purpose is subject to the provisions of *Use of Personal Electronic Devices* in this regulation.

May only be used for authorized business purposes which must be designated in writing by the railroad

A locomotive engineer operating the controls of a train may NOT use a device when –

- On a moving train
- Any crewmember is on the ground
- Any crewmember is riding equipment during a switching operation
- Any RR employee is assisting in the preparation of the train for movement

Use in a controlling cab (freight and passenger locomotives): Railroad operating employees shall NOT use a device unless-

- A safety briefing is held between all crewmembers; and
- All crew members agree it is safe to use the device

Use outside freight locomotive cabs is permitted if-

- The freight train crewmember is not fouling a track; and
- All crewmember agree it is safe to use the device

Dead Head Status – §220.311

Use by Dead Heading employees NOT in the controlling locomotive:

- May use an electronic device only if the employee is not using the device in such a way that interferes with any railroad operating employee's personal safety or performance of safety-related duties.

Use by Dead Heading employees IN the controlling locomotive: Each electronic device must be turned OFF with earpieces removed when-

- On a moving train
- Any crewmember is on the ground (while any safety-related duty is being performed)
- Any crewmember is riding equipment during a switching operation
- Any RR employee is assisting in the preparation of the train for movement

Exceptions to Subpart C Prohibitions – §220.309

(Must not interfere with any employee's performance of safety-related duties)

Use of a personal device to take a photograph of a safety hazard or a violation of rail safety law, regulation, order or standard, provided:

- Camera is stand-alone, unless device is provided by RR and used in accordance with written guidance
- Camera, unless otherwise permitted, is turned off immediately after documentation
- Crewmember using the device is other than the locomotive engineer on a moving train

(Refer to 49 CFR §220.307 regarding use of RR supplied devices to take photographs)

A Medical device consistent with RR standards for medical fitness for duty

Device is a stand-alone calculator used for authorized business purposes

Use of a device to conduct train or switching operations on a RR exempt under §220.9(b) when RR has fewer than 400,000 annual working hours

This document is general guidance only. Refer to 49 CFR Part 220 Subpart C for complete regulatory text.

*** Railroad operating rules may implement more stringent requirements than this Federal regulation. ***