

Winning an OSHA Whistleblower Case: What Railroad Workers Need to Know

In 2007, after thousands of railroad workers had been disciplined and fired for reporting on-the-job injuries, Congress passed an amendment to the Federal Rail Safety Act (FRSA) making these actions illegal. The first thing to note is that these disciplines and firings are not recognized as a crime unless and until the victim first files a report with the Occupational Safety & Health Administration (OSHA). This means that the thousands who don't know about the law are helpless, and no one is responsible to inform them. There is no resource, no ombudsman available for the worker who has been violated by the carrier after sustaining an injury on the job. I have surfed the Internet for railroad law firms' web sites in order to find the wording of the law. As an individual, you have no right of explanation or resources to assist you in figuring out if you have a case or not. You are, and I will say this repeatedly, completely on your own.

So the individual, who may be severely injured, must locate the OSHA office, get the form, fill it out and hope that OSHA will take the case.

A degrading and insulting process

The Department of Labor (DOL) is looking for a violation of the law and says that it is investigating for law breaking. It does not say and never will admit that it represents the "client" in any way. The investigator takes all kinds of information: personal, financial, even medical from you. All of this becomes his property - you have no right to even look at it afterward. He conducts an investigation which he controls, decides who to talk to etc. He does not have to tell you anything.

You are immediately sealed off from everyone and everything that can give you support. You cannot talk to anyone. You may have stopped telling people what is going on because you're just repeating that you can't find out anything. Your friends may tell you they are tired of hearing about it. Some of them become former friends.

Within weeks, OSHA sends a notice to the company if they believe the case has merit, but there is no obligation to tell the client. The back-and-forth between the company and OSHA is hidden from the client. Meanwhile, you have to fend for yourself. OSHA is quite hostile to attempts just to find out what's going on!

What about building a fight back against the railroad?

Meanwhile, more of your coworkers can continue to be disciplined. They too are silenced. The union defers to OSHA. Each worker is in turn silenced and the facts in each case are suppressed. Most importantly, any chance of sharing information, isolating the guilty managers, or doing anything to stop them is not an option. Gone is the ability to bring this up at union meetings. Gone is the chance to publicize these crimes to the other unions even on the same property, much less nationally. Gone is the chance to prepare the other workers for their impending discipline. Social media, videos, newspapers etc. -- all silenced.

After OSHA issues merit finding

Having been silent for years (in my case four years), OSHA might, one day, out of the blue, send you a decision saying they find merit in your case. With great fanfare, they will announce hundreds of thousands of dollars in penalties, immediate reinstatement etc. ... But no. The railroads do not obey the order. That never has never happened. not even once.

FRSA states that the company is ordered to immediately reinstate the fired employee. The employee is supposed to go back to work pending appeal. But the rail carriers have refused each time. To this date, for

a law passed in 2007, in only one case has the administrative law judge denied a company appeal when he instructed the Union Pacific to send an employee back to work. What exactly happened remains a secret. That brother's case awaits trial is in the Sixth Circuit Court of Appeals. That case is over six years old. Apparently that his law is simply a device to prod the carriers to buy the silence of the victim with a settlement.

They start all over again!

Out of the thousands of railroad workers disciplined around a personal injury, only hundreds of those find a way to file a claim. Less than 3% whose cases are filed are deemed to have merit. A still tinier percentage of those have competent legal help. In every case, the railroads have appealed the merit finding. The case is presented before the administrative law judge, another department of labor employee. The client has no right whatsoever to any representation. When asked why a court date was scheduled so quickly in one case a lawyer answered "the administrative law judge knew that it was 'Pro Se', that the client had no lawyer and it could be handled quickly", that is, the case is dropped. In the rail industry, there are law firms that have developed a relationship with certain unions. For a percentage of the take, these firms will sue railroads for violations of laws such as the Federal Employers' Liability Act (FELA). Whether they call themselves designated counsels or not, it is completely up to these firms to cherry pick the fattest cases or to refuse to help those out of favor with a particular union leadership. I myself went through over 20 lawyers, only asking for information on FRSA, never even getting around to asking to be represented. Only two called me in to their office. Only after the press release from OSHA appeared in the Chicago Tribune, did I find a firm to represent me. Luckily for me, it was a good one.

Then in the second step, an entirely new case begins

After the merit finding is issued, OSHA deserts the "battlefield." The worker, after years of waiting and one day of celebrating, now finally gets a notice of a hearing date. The case all of a sudden reads "worker Smith versus the railroad". That's right. Not Department of Labor or OSHA, just worker Smith. The case then starts from scratch. All the information gathered by years of investigating by the OSHA investigator is sealed, not just from the company but from the plaintiff and cannot be used! Of course, since the company did its own research, had its own witnesses, stool pigeons, etc., they have full access to their records. They still have their investigators and law firms in place.

Then begins an arduous process lasting at least another year of first identifying, then digging up witnesses, many who may have retired, left town etc. Hours are spent reconstructing OSHA's original case, going over facts, re-interviewing witnesses etc. If you thought you had a right to privacy, think again! Everything including your medical and psychological records is part of the case and gets open to the railroad lawyers and cross examination. On the other hand, a list of exceptions allows many management personnel to avoid testifying on "personal" grounds.

Third level of appeal for the companies

If the judge rules in favor of the worker, it has -- in every case -- been again appealed by the company, this time to the federal courts, a lengthy process, that I have reason to believe has never been completed. That is, not one single case has been able to run the full course to an ultimate finding of guilty! At least one case has been going on for seven years. I have heard lawyers say they don't really know how many appeals the railroads could make; perhaps all the way to the Supreme Court?

Whatever the case, sometimes, the company proposes discussing a settlement to avoid the hearing altogether.

The settlement

The settlement process may or may not involve OSHA at all. As long as certain parts of the settlement do not conflict with FRSA, OSHA will not interfere. So this major federal crime which has been released to the media - and this triumph of the people of the United States versus the rail carrier, all of a sudden ... well, it just disappears! The worker him or herself is now actually allowed to exonerate the former criminal by signing a statement that there was never a crime at all! And in exchange, the railroad will pay you off. Not for your injuries. Not for back pay. Not in lieu of an apology. Not so that you can hold your head up again... No, only so you shut up and not tell how much money you got. Other victims may want more. That is indeed the final insult. The amount is pulled out of thin air.

and has nothing to do with the damages listed in the press releases. The companies will of course, press to keep all the discipline on your record. As far as I know, there have been over a thousand cases of law breaking by the rail corporations since the law went into effect, and maybe in just one case was the carrier found guilty! And this represents just the tally of those who actually fought back and filed a case. It makes one wonder about just how many cases are actually out there that have gone uncontested?!

To sum it all up

The DOL whistle blower law affecting thousands has resulted in some hundreds of cash payoffs, but practically no guilt findings against the railroads. No real penalty against rail management. No disciplining of company officers, no order to educate the workforce, no remand to change the climate of fear and intimidation and reprisal.

On our side, a few of us more fortunate rails may break even with a payoff, but thousands more will not. We are further isolated from each other. The real criminals' identities remain hidden. The union is simply a bystander, relegating all of their power to a roll of loaded dice tossed by lawyers, judges, and the corporate owned court system.

We need to take back the right to strike over safety issues. I would postulate that when over a thousand injured workers file whistle blower cases and are denied justice (and these are only the ones who have had the audacity to exercise their rights and file) that we have one big fat safety issue. And this issue is not just the concern of those who are currently ensnared in this unjust legal process, but it is the concern of every single railroad worker today. "An injury to one" is indeed, like the historic labor slogan says, "an injury to all!" As such, I would argue that this entire process is fatally flawed and should be dumped and replaced with a collective union fight.