

THE ISSUE OF NOTICE AND THE FELA

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A railroad worker who is injured in the course and scope of his or her employment is granted the valuable right under the Federal Employers' Liability Act (FELA) to bring a legal claim against his employer for compensatory damages. In the typical FELA case, where the employee is unable to return to work and is otherwise deemed "occupationally disabled," the monetary stakes can be huge. Just the economic damage of past and future wage loss alone can be valued in the hundreds of thousands of dollars or more based upon the age of the employee and his or her ability to find suitable alternative employment. Because the monetary value of a FELA case can be quite considerable, it is extremely important to keep in mind that the FELA is **not** a worker's compensation statute where the mere occurrence of an injury at work gives rise to some kind of compensation - usually very small. Instead, a successful FELA claim requires the injured employee to prove, by the greater weight of the evidence, that his or her injury resulted, in whole or in part, even in the slightest, from the carrier's negligent failure to provide the employee with a reasonable, safe place to work.

Over my nearly three (3) decades of representing injured railroad workers, I have found that there is a never ending variety of ways in which a worker can sustain an injury. The purpose of this article is to introduce the reader to those particular brand of cases where the issue of **notice** is crucial to the successful prosecution of a FELA claim.

It is often times said that the FELA is a fault based statute. That is, an injured party must offer some evidence that would support a finding of negligence against the railroad. The traditional elements of negligence applicable to a FELA claim are (1) that a railroad owed a particular duty (i.e., duty to provide a safe place to work), (2) that the railroad breached such duty, (3) that the accident was **foreseeable** and (4) that as a result of the negligence of the railroad the injured employee sustained injury.

The essential element of foreseeability is often times crucial to the success of a FELA claim. This element of negligence requires the injured employee to prove that the railroad was on **notice** of an unsafe condition which caused the injury in question. The "grandfather" of FELA cases dealing with the issue of notice is the United States Supreme Court case of Gallick v. Baltimore & Ohio Railroad (1963). In that case, the injured employee was a "spotting" crew foreman who was working along the railroad right-of-way. In one particular stretch of roadbed where the employee was working, there was a pool of stagnant water where it was common to see dead and decayed rodents as well as insects. As the employee was working near the pool of water, he suffered an insect bite on his leg. He eventually developed an infection which progressed until it spread throughout his body. Tragically, the employee required the amputation of both legs. The pivotal issue in the employee's FELA claim was whether the insect bite and the resulting amputation of his legs

were reasonably foreseeable. Noting that reasonable foreseeability of harm is an essential ingredient of FELA negligence, the Court held that the injured employee satisfied this requirement by putting forth proof that since his employer was “on notice” as to the existence of the pool of stagnant and insect infested water in the employee’s assigned workplace, and that such a pool could produce dangerous insect bites, the railroad was negligent for failing to provide the injured employee with a reasonably safe place to work.

As one court noted, “the catalyst which ignites the duty to provide a safe work place is knowledge (notice), either actual or constructive.” If the proof in a particular case shows that the railroad had **actual** notice of an unsafe condition that was present in the injured employee’s workplace, then the employee who is subsequently injured by such a condition has established foreseeability and is well on his way to prevailing in his FELA claim. Actual notice of an unsafe condition may be found where the railroad created the condition, or was in fact aware of its existence prior to the accident.

An employee can also establish foreseeability of harm by establishing **constructive** notice on the part of the railroad of the existence of an unsafe condition. In establishing the railroad’s constructive notice of such a harmful condition, the employee must prove that the railroad, in the exercise of reasonable care, knew or should have known of the existence of the dangerous condition but failed to remedy same in a reasonable period of time prior to the employee’s injury. Based upon this writer’s experience, the typical manner in which an employee can prove constructive notice is by establishing that upon a reasonable inspection by the railroad it would have discovered the presence of the unsafe condition and therefore was negligent under the FELA for failing to remedy such a condition in a reasonably timely manner. Since the railroad has a continuing and non-delagable duty to make reasonable inspections of its property or equipment, establishing constructive notice in a particular case should not be difficult.

Perhaps some real life examples might be useful. Let us take the case of the Amtrak Conductor who suffered injuries when he was struck by a vestibule door which suddenly closed on him while he was assisting passengers with their on-board luggage. This employee suffered a head injury and subsequently filed a FELA claim against Amtrak. The pivotal issue in the case was whether a reasonable person (in this case Amtrak) could foresee that the vestibule door (alleged to be defective) would slide closed unexpectedly as it did in this injured employee’s case. The court rightfully held that the employee was required, under the FELA, to establish that the accident was foreseeable. The injured employee could not, however, show that Amtrak had actual notice of the allegedly defective vestibule door. As for constructive notice, the injured employee likewise failed to provide any evidence showing that the door had a defect which Amtrak could have discovered upon making a reasonable inspection. Accordingly, the court found in favor of the railroad and the injured employee was awarded no monetary recovery in his FELA claim.

In another interesting case, a Conrail Dispatcher was stabbed numerous times by a trespasser while he was attempting to physically inspect the railroad’s tracks in his effort to “learn the territory.” The employee filed a FELA claim against his employer claiming that the railroad was negligent for failing to maintain a safe workplace. Conrail countered by

claiming that it was not negligent since the knife attack was unforeseeable. The court, in ruling in favor of the injured employee, noted that the railroad was on notice that the area where the knife attack took place was a magnet for vagrants, alcoholics and drug addicts. Even Conrail police admitted that there was a safety concern presented by these conditions. The fact that Conrail failed to take action against a potentially dangerous condition which it had notice of in and around its property, such evidence gave rise to a fact issue for the jury as to whether the railroad was negligent for the knife attack on its employee.

The foregoing examples illustrate that an injured employee's proof of notice on the issue of foreseeability is an important ingredient which can lead to a successful FELA result. This author is aware that some railroads actually have a form which its employees can fill out if they observe a potentially dangerous condition in their work place. On the CSXT, it is called a PI-82 "Unsafe Condition Report." It cannot be emphasized enough that the use of these forms is often essential to the subsequent success of an injured employee's FELA claim. If you discover any unsafe condition at work such as debris in a walkway, a hard to throw switch, or defective equipment, be sure to write it down and submit the report either to your safety committee or to someone on the railroad whose job is to collect such reports. By taking this prudent course of action, you are putting your railroad on notice as to an unsafe condition. Should an injury thereafter occur due to such a condition, the railroad will be hard pressed to claim that the accident was not foreseeable since you were personally responsible for establishing NOTICE on the part of the negligent railroad for which your injured brother or sister (and his/her attorney) will be forever grateful.

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