



BMWED Officer's Guide to Assisting Members Navigating At-Work Injuries



BMWED Education Department



Foreword

Our members and our families must be prepared in case of an unexpected accident, illness, injury, or even fatality while at work.

Events like these are difficult to think about, and many of us understandably choose not to focus on what to do if things go wrong.

As a leader within our union, you have a unique responsibility to support our members and our families as they navigate these events and the complex issues that come with getting hurt, sick, or killed while working on the railroad.

It's not an easy job, and none of us will ever be the "go-to" experts in handling these difficult experiences. However, this guide is intended to offer you vital context and support as you assist your members in navigating or defending their rights, restoring their health and safety, or fighting to be made whole for any losses they suffered while doing their job.

You aren't alone in this work, but you are vital to its success. Thank you.

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Proponency

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Approved for Unrestricted Release

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Getting Started

At some point you may get a phone call, from one of our members or from their loved ones, letting you know that something bad has happened.

When our members suffer injury, illness, or death while at work on their railroad, the ability for them or their families to be made whole for the losses they suffer must come through legal action under the Federal Employers' Liability Act (FELA). Our members also have several other legal rights, as well as a variety of bargained or optional benefits to support them as they navigate through an at-work injury and healing process.

This guide will help you navigate the work you need to do as a BMWED representative for our members and our families. You will find information and guidance on steps you should take right away, how your role fits within the role of BMWED Designated Legal Counsel (DLC) or other partners in supporting our members, and offer support as you identify all the resources, tools, and next steps you, your member, or their families will take as they respond to unexpected hardship, pressure, and uncertainty.

This guide will also offer information regarding common railroad tactics that seek to minimize their exposure to penalties or liability so that you can inoculate your members and their loved ones against these tactics.

While there are many tasks that you will not perform yourself within your capacity as a BMWED officer, awareness of these tasks and an understanding of how they fit within the overall response will help you and all our members to better utilize, defend, and sustain our rights.

If you receive that phone call, refer to this guide as one tool among many available to you in navigating the complexities of FELA, member support, advocacy, and protecting all our sisters and brothers.

What's my job here?

As an officer in your System Division or Federation, you should understand FELA so you can effectively communicate about our members' rights, support them in exercising those rights, advocate on their behalf, and assist members as they navigate a complex, interrelated set of bargained benefits, legal rights, and job responsibilities under our agreements.

You are part of a team, along with our National Division officers and our BMWED **Designated Legal Counsel**, that offers a full-spectrum of support to our members in navigating workplace illnesses or injuries.

As a leader in your System Division or Federation, you should be able to:

- **Communicate** accurate information regarding FELA, including its context within our industry.
- **Distinguish** between:
 - **FELA and Workers' Compensation.**
 - **Actions** the injured worker is required to perform by law or agreement, and actions that could be used against them in later claims under their legal rights.
 - **The various benefits available** to injured workers or their families through FMLA, EAP, ADA, other workplace laws, their agreements, or optional programs.
- **Provide Guidance** to members navigating their rights and benefits while injured or healing, informing them on timelines, key terms and concepts, and finding resources or information to empower them.
- **Understand** the relationship BMWED and our DLC can have working together to support our members as they seek to be made whole for their losses suffered while at work or protecting other legal rights.
- **Inoculate** members, their families, and their coworkers against railroad misinformation, pressure tactics, and attempts to minimize their legal exposure to financial damages under FELA.
- **Educate** members in your local Lodges and your System or Federation regarding the information and resources available to them in understanding their rights under FELA or other laws.

BMWED Designated Legal Counsel (DLC)

BMWED members are **strongly encouraged** to seek the advice of a BMWED Designated Legal Counsel in navigating their FELA rights and obligations.

As a System/Federation officer, you should always consider your work supporting members through this process to be a “tag team” with our DLC.

- Designated Legal Counsel will be the “subject matter experts” on what steps to take related to court proceedings, legal filings, preparing a FELA case, or how to counter the railroad’s tactics.
- DLC will also provide vital support if the incident involves a potential Whistleblower claim under FRSA §20109.
- While you will be the primary supporter for our member and their family regarding the terms of our bargaining agreement and understanding their work conditions and culture on their railroad, our DLC will be critical allies in how these factors tie into any potential future legal proceedings.

Local/Regional Designated Legal Counsel (DLC) contacts:

The Federal Employers' Liability Act

Title 45 United States Code, Chapter 2 – Liability for Injuries to Employees

§51. 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.

§52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, 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.

The Federal Employers' Liability Act

Title 45 United States Code, Chapter 2 – Liability for Injuries to Employees (continued)

§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.

§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.

§54a. 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.

The Federal Employers' Liability Act

Title 45 United States Code, Chapter 2 – Liability for Injuries to Employees (continued)

§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.

§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.

§57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

The Federal Employers' Liability Act

Title 45 United States Code, Chapter 2 – Liability for Injuries to Employees (continued)

§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.

§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.

The Federal Employers' Liability Act

FELA is a federal law that establishes the railroads' liability for injuries, sickness, or fatalities caused due, in whole or in part, to its negligence.

If a railroad worker, or their representative, can prove the railroad was negligent in the level of safety it provided, that worker or their family are entitled to monetary damages for their losses.

This right to monetary damages may be defended through legal proceedings in court. Our members and their families may sue for the monetary compensation to which they are entitled under the law. Doing so, they must prove the railroad's negligence.

The railroads mobilize teams of experts, lawyers, investigators, officials, and allocate huge amounts of money to prevent our members from succeeding in defending their legal right to be made whole.

Bottom line. Working closely with our Designated Legal Counsel, you are critical to giving our members the chance to secure the compensation they deserve.

Historical Context

“It is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.”

**-President Benjamin Harrison
December 3, 1889**

At the beginning of the 20th century between 1890 to 1917, more American railroad workers were killed on the job than American military forces killed in all US military actions combined during the same period:

American Rail Worker Deaths between 1890-1917 **229,106**
(from US Census data, includes operating and non-operating crafts)

American military deaths

1890-1898 Frontier conflicts	42
1898 Spanish-American War (combat & disease)	2,446
1898-1913 Philippine-American War	4,196
World War I (combat & non-combat)	116,516
1900-1901 Boxer Rebellion	131
1904 Santo Domingo Affair	1
US Occupation of Nicaragua	159
Mexican Revolution	181
US Occupation of Haiti	148

American military deaths between 1890-1917 **123,820**

Still reeling from the shock of the 1877 Great Railroad Strike, aware of the growing power of workers across the country, and recognizing the vital importance of railroads to the US economy, American lawmakers understood that they had to provide some legal pathway for American railroaders to seek compensation for workplace injuries, illness, or death.

combined

Historical Context

“The intent of the law is that the couplers actually used on two cars must couple with each other automatically on impact. To hold that the phrase, “couplers coupling automatically by impact,” means not couplers coupling with each other but with other couplers not used, is to do violence to the natural meaning of the words and to import into the statute language which will, to a large extent, render it nugatory. A construction of a law contrary to the obvious meaning of its language and which takes from under its operation a case clearly within its reason, should not be indulged.”

-Johnson v. Southern Pacific Co., 196 U.S. 1, 4-5 (1904)

Lawmakers could not trust American railroads to do the right thing without a firm regulatory hand. The recent 1904 Supreme Court decision in *Johnson v. Southern Pacific Co.* (196 U.S. 1) clearly demonstrated that railroads would defy the intent of any safety laws or regulations that affected their bottom line.

In the *Johnson* case, a rail worker on Southern Pacific suffered an injury that resulted in the amputation of his hand when the railroad required him to couple a railcar to a locomotive equipped with incompatible coupling devices. These couplers would not work together to automatically close, as required by the **Railroad Safety Appliance Act** which took effect 4 years earlier.

The railroad argued that since each coupler was compliant on its own within the Railway Safety Appliance Act, and since the car was on a siding track and not being actively used in interstate traffic at that time, they had no liability for the injury under the letter of the law and the employee “assumed the risk of their profession.” While both the state district court and a US Circuit court found in the railroad’s favor, the US Supreme Court overturned these lower court decisions.

Even in the face of a clear law providing for rail worker safety, the railroads were determined to avoid any liability for the working conditions they maintained or the level of safety they provided for their workers. Railroads will torture the language of the law to get out of the law’s clear intent.

Historical Context

In the context of growing labor tension, the recent Supreme Court decision, recent efforts to reduce the monopolistic power of railroads through anti-trust legislation and policies, and an urgent need to address the hazardous, unforgiving conditions within rail labor, Congress passed a Federal Employers' Liability Act in 1906.

This earlier FELA was struck down by the Supreme Court.

Undeterred, another Federal Employers' Liability Act was passed in 1908. This law withstood the constitutional tests set against it and continues to govern today.

FELA is an older law than the Railway Labor Act, which governs how we organize, bargain, and resolve labor disputes. Just as with laws like the Railroad Retirement Act (which preceded the Social Security Act), the Occupational Safety and Health Act, and many others, the rights of our members to be compensated for their work-related illness or injury came before similar laws for other workers.

There are many today who write long articles explaining why FELA needs to be abolished, why we need to fall in with the Workers' Compensation laws that now govern workers' rights in other industries. For over 100 years, however, Congress has chosen to leave FELA in place for rail workers.

FELA v/ Workers' Compensation

Many of our members are likely more familiar with the processes and protections afforded by Workers' Compensation (also called Workmen's Compensation) than our own FELA rights and responsibilities.

This is also true for many of the medical providers, insurance providers, or other people with whom our members may interact when they navigate their next steps after a workplace injury.

It's important to understand some key differences between FELA and Workers' Compensation, so you can steer your member and their family in the right direction.

FELA

- **Employee must prove the railroad was negligent, in whole or in part, to be awarded compensation for their loss.**
- **Issues may be tried before a jury in court.**
- **Damages awarded are determined by the court and can exceed Workers' Comp. amounts for similar injuries but may be reduced if the railroad demonstrates the employee bears some responsibility.**

Workers' Comp.

- **Compensation is granted through "No Fault" administrative procedures which can be appealed, in some cases, through Administrative Law Courts.**
- **States run Workers' Comp. programs, and benefits vary.**
- **Employees receive a set amount, per schedule, for injuries suffered, which are often far less than FELA awards for similar injuries.**

For more information regarding FELA v/ Workers' Comp., contact your DLC.

Key Points Regarding Workers' Comp.

If your member seeks medical treatment, the medical care providers will often have to be informed that this is **NOT** a Workers' Compensation matter. This will likely change the way the medical care providers proceed with examinations, administration of the treatment program, and how they share information regarding our member's (their patient's) diagnosis and treatment plan.

Medical providers may unknowingly provide railroad officials with medical information to which they are not entitled, or which they must request from our member.

While our member may be dealing with a significant amount of pain, stress, anxiety, or confusion on their way to the hospital or in the treatment facility, we need to make sure they know to inform the doctor (if they can) that this is **NOT** a Worker's Compensation case!

Being able to meet our member or their family as soon as possible will help to protect our member's rights as he or she focuses on their treatment. Our DLC are also well-versed in this issue and can offer additional assistance.

During an initial visit to the doctor or hospital, members or their family should avoid using the phrase "injured at work," during initial intake. This phrase will automatically make hospital administrators start treating the issue as a Worker's Compensation matter, and some staff are difficult to convince otherwise. This may save bureaucratic headaches later.

INFORM THE DOCTOR, OUR MEMBER AND THEIR FAMILY, HOSPITAL STAFF, OR ANYONE INVOLVED WITH OUR MEMBER'S CARE THAT THIS IS NOT A WORKERS' COMPENSATION ISSUE!

Obtaining Medical Treatment

The **Federal Railroad Safety Act (FRSA)** prohibits the railroad from interfering with, directing, denying, or delaying an employee's medical or first aid treatment. 49 USC §20109, paragraph (c), states:

(c) Prompt medical attention.--

(1) Prohibition.--A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline.--A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

This is federal law. Our members have a right to be taken to the nearest hospital, not an alternate treatment center designated by the railroad. They are not required to be treated by railroad-approved doctors for a work-related injury or illness.

Railroad officials should not be present within a treatment room, speak directly to doctors or hospital staff regarding a member's care or treatment plan, or otherwise be involved. The railroad will try various methods to insert themselves in the employee's treatment plan or gather their information, possibly through offers to take an employee to receive care, the use of "Wellness" officials, giving our members confusing or contradictory information, or getting a "foot in the door" through railroad-sponsored EAP, wellness, or healthcare programs.

Obtaining Medical Treatment

When teaching our members about their rights under FELA and FRSA, offer the following guidance:

Encourage

- **If an employee needs to be taken to a hospital, encourage them to use an ambulance.**
- **If members are actively engaged in seeking medical treatment (they're at the hospital), they should respectfully deny any railroad requests for statements, reports, or documentation until they have received necessary care.**
- **Members or their families should, as soon as it is safe or appropriate for them to do so, contact their BMWED Designated Legal Counsel to offer support in handling railroad attempts to get involved in medical treatment.**

Discourage

- **Members should not let their Roadmaster, supervisor, or other railroad official take them to receive medical treatment.**
- **Members should NEVER give permission to any railroad official to discuss their medical treatment or diagnosis directly with their doctor or hospital staff. This includes their supervisor, railroad medical department officers, claims department agents, or "wellness" officers.**
- **Members may be required to complete an accident or injury report, but only AFTER they have received appropriate care.**
- **Members should NEVER post information about the incident, their injury, or their treatment on social media.**

Accident Reports – Injured Member

Our members are understandably hesitant to complete reports or fill out forms without guidance, knowing how often railroads will use such information for their own benefit and, often, to our members' cost.

For legal, government reporting purposes, railroad policies and within the obligations of our collective bargaining agreements, members may be required to complete accident or injury reports. You should work with your System Division or Federation leadership to understand each railroad's policies and procedures regarding incident reporting, as well as seek guidance from DLC regarding how and when such reports should be completed by our members. **These reports should never be completed before or during our member's receiving care or treatment for their injury!**

You should use the space provided within this guide to list the specific railroad policies, rules, or other guidance on reporting. Where possible, you should be with your member as they complete any accident or incident report to ensure they do not receive "coaching" from railroad officials or agents on what to write.

Our members should:

- State clear facts about what occurred (what happened, not why).
- Be sure to record any tool, task, order, procedure, or condition that they considered unsafe at their worksite or nearby.
- Where possible, identify others on site or nearby by name, title, and with contact information.
- **Request a copy of any form or report they complete.**

Our members should **NOT**:

- Attempt to assign or take on responsibility for what occurred within an accident report.
- Use terms like "*I should have...*" or "*I shouldn't have...*"
- Make any comment or statement on whether the accident could have been prevented.

Accident Reports – Injured Member

Railroads are required to report accidents or injuries to the FRA in compliance with CFR 49 § 225 – Railroad Accidents/Incidents.

To do this, each railroad has developed a form or process for accident or injury reporting. As a BMWED officer, you should take time to carefully examine and understand these forms or processes, since the railroad's legal or risk mitigation departments have likely devoted a considerable effort to tailor these forms questions in such a way that, when our members complete them, they can also be used by the railroad to "shift blame" for any accident!

While each form will be unique, here are some common traits:

- Many of these forms will reference some regulation or rule to create anxiety within our members and imply some pressure to complete them according to railroad instructions. On the railroads where your members work, **be sure to understand what each form asks, and HOW it asks for information**, so you can inoculate your members against any pressure.
- **Some railroads require a railroad official be present when the form is completed.** If a railroad official is present, a BMWED representative or DLC should also be present to advise our members and assist them in completing this report.
- Many forms include checkboxes with questions like "Did working conditions cause or contribute to your injury?" or "Did another person cause or contribute to your injury?" Our members should always answer "yes" to questions like this or check the appropriate box for yes. **Our members should never accept or imply sole responsibility for any accident or incident based off incomplete knowledge or pressure from their railroad!**

Each railroad's form is unique. If you have any specific questions or issues with a railroad's accident/injury reporting forms or processes, seek guidance from your General Chairperson and working with your DLC!

Accident Reports – Injured Member – Timely Reporting

Regardless of a railroad’s published rules or policies regarding how long an employee has to report an illness or injury, our members retain specific rights under the Federal Railroad Safety Act regarding their notifying the railroad or a work-related personal injury. If the railroad attempts to discipline a member for “late reporting,” this may be considered an adverse action or retaliation under FRSA §20109.

From the Department of Labor’s FRSA Whistleblower Digest Supplement https://www.dol.gov/agencies/oalj/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/FRSA_DIGEST_SUPPLEMENT#IX_Timely

(retrieved September 27, 2023):

Timely Injury Reporting Rule

RAILROAD’S ENFORCEMENT OF TIMELY INJURY REPORTING RULE FOUND SO UNREASONABLE AND UNDULY BURDENSOME UNDER THE FACTS OF THE CASE AS TO CONSTITUTE RETALIATION UNDER THE FRSA

In [*Thorstenson v. USDOL*](#), No. 20-70211 (9th Cir. Dec. 21, 2020) (unpublished) (2020 U.S. App. LEXIS 39927), the Ninth Circuit reversed the ARB’s rejection of “Thorstenson’s contention that BNSF’s enforcement of its timely injury reporting policy was so unreasonable and unduly burdensome that it constituted retaliation when enforced on [the facts of case].” The Ninth Circuit stated:

Notifying the railroad carrier of a work-related personal injury is an enumerated protected activity under the FRSA. See 49 U.S.C. § 20109(a)(4). A violation to the FRSA occurs where, as here, an employee is disciplined for failure to comply with a railroad carrier’s time or manner reporting rule even though its requirements could not reasonably be met. The following circumstances made it virtually impossible for Thorstenson to know he had experienced a new injury in time to comply with BNSF’s 72-hour reporting rule: the injury presented as an aggravation to an existing injury which Thorstenson had already reported, his injury did not require him to miss work until after the 72-hour period had expired, and a medical expert examining him within the 72-hour period did not identify his symptoms as a new injury or take him off work.

Accident Reports – Injured Member – Timely Reporting

Continued from the Department of Labor's FRSA Whistleblower Digest Supplement

https://www.dol.gov/agencies/oalj/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/FRSA_DIGEST_SUPPLEMENT#IX_Timely

(retrieved September 27, 2023):

The fact that BNSF staff, including Thorstenson's supervisor, initially did not know that Thorstenson's symptoms required him to file a new injury report further underscores the unreasonableness of expecting Thorstenson to have known he was required to file such a report and disciplining him because he did not. Accordingly, because it was virtually impossible for Thorstenson to comply with the injury reporting rule, he was effectively disciplined for the protected activity of reporting a workplace injury.

The Ninth Circuit also determined that the ARB had erroneously replaced the FRSA's statutory contributing factor standard with a proximate cause standard.

[Editor's note: The ARB had held that the ALJ erred in applying "inextricably intertwined" and "chain of events" causation analysis at the contributing factor stage. The ARB, however, did not decide the appeal on the contributing factor element. Rather, it affirmed the ALJ's finding that the affirmative defense had been established. The affirmative defense determination was based on a finding that Complainant was disciplined "because his report was late, not because he reported an injury." The ARB agreed with the ALJ's "rejection of Complainant's contention that BNSF's enforcement of its timely injury reporting policy is unreasonable and unduly burdensome. The ALJ found that so long as a rule is lawful, an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary." Thorstenson v. BNSF Railway Co., ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019) (per curiam).]

[Editor's note update: In [Thorstenson v. BNSF Railway Co.](#), ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Dec. 21, 2021) (per curiam), casenoted below in the Affirmative Defense Section of this Digest, the ARB affirmed its earlier decision affirming the ALJ on the affirmative defense element of an FRSA case, and explained that it does not review the wisdom of an employer's policy, but only determines whether the respondent retaliated against the complainant for activity protected under the FRSA.]

Accident Reports – Other Members Nearby

If railroad officials demand a member's fellow employees fill out reports or witness statements about an injury or incident, you should definitely be aware of this demand and offer these members guidance.

Once again, a thorough understanding of each member's obligations within their railroads policies, RSIA and Critical Incident Stress Plans, and their rights within their agreement, are vital to your offering accurate guidance and support.

The reports these other members complete should follow the same overall guidance as any submitted by the injured employee. Members should be truthful, accurate, but not attempt to assign responsibility for any action or incident. They should note any safety concerns they may have had with the task, location, or conditions they worked in at that time, including any perceived pressure or unsafe directions from their supervision. Our members should not make any "*should have*" statements, confining their reports only to what actually occurred, without attempting to determine any underlying reasons why something occurred.

Our members should:

- State clear facts about what occurred (what happened, not why).
- Be sure to record any tool, task, order, procedure, or condition that they considered unsafe at their worksite or nearby.
- Where possible, identify others on site or nearby by name, title, and with contact information.
- **Request the original copy of any form or report they complete.**

Our members should **NOT**:

- Attempt to assign or take on responsibility for what occurred in an incident while completing an accident report.
- Use terms like "*I should have...*" or "*I shouldn't have...*"
- Make any comment or statement on whether the accident could have been prevented.

Accident Reports – Local Requirements

Railroad Policies on Accident or Incident Reporting

Railroad Rules on Accident or Incident Reporting

Railroad time limits or requirements for Accident or Injury Reporting

Agreement Rules that may pertain to making reports, reporting accidents, reporting injuries, or similar provisions. (Who is required to submit reports, time limits, etc.)

Sample Report Statements

Note: These are representative examples, not templates or scripts.

Good:

I saw [injured employee] in the ditch. I did not see him fall or slip. He indicated that his ankle hurt. We stopped work and helped him back up onto the truck, then drove to the crossing. (Simple facts, no guesses, judgments, or opinions)

Bad:

[Injured employee] fell in the ditch. I think he was carrying too much, since he didn't want to go back and forth to the truck. He said he hurt his ankle. I didn't see him fall, but I think he was walking on loose ballast near the shoulder. We got him to the crossing. (Guesswork, opinions, implying fault, etc.)

Reenactments

Some railroads have policies requiring reenactments of safety incidents, ostensibly to determine the facts of what occurred.

Unless it is absolutely required and even then, only when a member is clearly directed to do so in writing (with a copy of this written direction made available), our members should not participate in a reenactment of any incident in which they were directly harmed.

If a railroad official attempts to compel an injured employee's participation in a reenactment, you should request that order in writing, indicating the reasons for why the injured employee is required to participate. If railroad officials have documented reports of what occurred, their insistence on an injured employee taking part in an incident reenactment may be solely to provide opportunity for the employee to incriminate themselves within the railroad's rules or policies, or to pressure the employee to assume responsibility.

As an experienced BMWED officer, you understand that many railroad procedures to "collect facts" are in fact designed to craft narratives. You should use the tools available to you within the agreement to protect your members from being forced to perform tasks that the railroad can use against them.

If the railroad proceeds with a reenactment, a BMWED officer should be present to observe (not participate). Any documented results or findings from this reenactment should be requested, since they pertain to the safety of our members generally and could impact the rights of our injured member specifically.

Your System Division or Federation will have further guidance on how to handle these issues. You should work with your General Chairperson to have a response plan in place for handling reenactments.

FELA and other Employment Laws

BMWED members are protected by a number of employment laws, including those that protect workers generally and rail workers in particular.

The Americans with Disabilities Act (ADA), the Occupational Safety and Health Act (OSHA), the Federal Railway Safety Act (FRSA), the Family and Medical Leave Act (FMLA), and others can all be involved in the particular incident or accident that harmed our member. While we cannot navigate all the complexities of these laws, it is important to understand they each contain provisions which may protect our members or affect their claim under FELA.

Our best resource to understand how these laws intersect are our BMWED Designated Legal Counsel. As a union officer, you are charged with helping your members access all their available support and resources. Forming a close working relationship with one of our DLC can help you perform this work.

FELA and Employee Assistance Programs (EAPs)

Your member may be participating in a railroad-provided or BMWED-provided **Employee Assistance Program (EAP)**, which may be related to the incident or accident in which they were involved. If this is the case, they also have specific rights and protections.

For questions related to how EAPs may affect our members' rights or interact with potential FELA claims, you should contact BMWED's program partner for EAPs, **Union First**, at **(855) 215-2023**.

Railroad-sponsored EAPs should not be considered confidential.

FELA and §20109

Whistleblower Protections

For some incidents, or during the actions following an incident, your member may have a valid claim for relief against adverse actions taken against them for protected actions regarding their workplace safety.

If your member, or any other member involved, is subjected to retaliation, intimidation, or other adverse action related to a protected activity they engaged in related to their workplace safety, you should assist these members in navigating their rights under the **Federal Railroad Safety Act** and its **§20109**. These are “**whistleblower rights**.”

More specific guidance regarding whistleblower rights and claims can be found in the ***BMWED Officer’s Guide to Whistleblower Protections for BMWED Members***.

Keep in mind that, if a potential whistleblower case is identified, it can impact or be impacted by a concurrent FELA case. In this instance, if you’ve identified a potential whistleblower issue, **inform your member’s DLC as soon as possible**. Our BMWED DLC can assist our members in navigating their rights under FELA, FRSA, or other employment and labor laws. As BMWED officers we are not fully trained to understand how these laws may interact and should defer to the guidance of DLC for these issues.

There are still many tasks you can perform on behalf of your members to support potential whistleblower cases. Please refer to the appropriate Officer’s Guide to learn more about those tasks. For any potential whistleblower cases, you should also inform our BMWED Safety Department.

FELA, FMLA, and Agreement-Governed Medical Leaves

Your member's collective bargaining agreement will have provisions for leaves of absence and medical leaves. While their railroad may automatically initiate procedures to place your member on an appropriate leave of absence, you should work with your member or the railroad to confirm the proper change in status has taken place.

You should also inform your System Division/Federation staff, the National Division's Secretary-Treasurer's Department, or update the member's status within the BMWED Membership Services application. This will ensure your member's BMWED status and standing can be appropriately managed during any leave of absence.

The **Family and Medical Leave Act (FMLA)** also entitles eligible employees to job-protected, unpaid leave for medical reasons. The protections of FMLA may overlap with those found in your member's agreement, and they may need guidance on how or when to apply for FMLA leave through their railroad. Keeping a copy of the railroad's FMLA policy or procedures with this Guide is recommended, so it's available for reference when you need it.

The protections afforded an employee under FMLA may offer benefits their Agreement-based Medical Leaves of Absence do not. Specifically, proper use of FMLA benefits during treatment may protect an employee's healthcare coverage if follow-on treatment programs cause their attendance to fall below the eligibility requirements in the Railroad Employees' National Health and Welfare Plan.

This Guide cannot make recommendations on how to navigate each member's FMLA leave in relation to any medical leave provided within their Agreement. Further training and guidance on FMLA will be available, but guidance specific to your System Division, Federation, or those railroads where you represent members should come from your General Chairperson or through working with Designated Legal Counsel.

Critical Incident Stress Plans

The **Rail Safety Improvement Act (RSIA)** requires that each Class I railroad, intercity passenger railroad, and commuter railroad develop a **Critical Incident Stress Plan** that provides for debriefing, counseling, guidance, and other appropriate support services to employees affected by a critical incident. You may need to assist other members involved in the event to access these services, if the event caused significant injury, death, or trauma.

Following some accidents or injuries, the railroad may implement its Critical Incident Stress Plan to offer legally-required services or support to employees that may have been on site or involved in the event. These plans have provisions for:

- Informing affected employees of their options under the critical incident stress plan.
- Relieving any directly-involved employee from duty once they've completed any tasks required to establish safety and document the incident.
- Offering timely transportation to directly-involved employees back to their home terminal, if needed.
- Permitting time away from duty, upon request, for a necessary and reasonable period of time as determined within the railroad's critical incident stress plan.
- Permitting each directly-involved employee additional leave to receive services or treatment related to the incident, if directed by a health care provider.

You can find a copy of your railroad's Critical Incident Stress Plan available on our National Division website, under the Safety Department's page at bmwe.org/safety. You should keep a copy of your railroad's Critical Incident Stress Plan with this *Guide* for reference in case it is needed.

Inoculating Your Members Against the Railroad's Response

Each railroad has response plans and procedures that can be enacted very quickly to limit their exposure to any potential claims resulting from railroad accidents. While a lot of this capability resides within the railroads' **Claims Departments**, other officials may also be involved.

Once notified of an accident or injury, Claims Departments can access an employee's full on-property record. They will review this record to find any potential facts they can use to shift responsibility to the employee for any accident. This can include previous discipline, operations testing records, rules testing records, medical information on file, or any other facts the railroad believes it can use.

The railroad's Claims Department also trains first-line officials, like your member's Roadmaster, on tasks they should perform in responding to an at-work injury. While this may seem harmless, these tasks could include:

- Offering to drive an injured employee to get medical attention, then taking them to a railroad-friendly treatment center for treatment and diagnosis.
- "Chatting" with the injured employee enroute to treatment with loaded questions designed to collect personal information about the employee's personal life, hobbies, or recent activities.
- Letting an employee use the official's phone to communicate with a medical provider or railroad medical department official regarding the injury or event.
- Quickly collecting (or destroying) evidence regarding the accident or injury.
- Quickly establishing a narrative (through an "all hands call," safety call, or bulletin) that shifts any liability or responsibility to the employee or employees involved. This will often "poison the well" for any other employees who witnessed the incident, creating conflicting stories that can be used against our member in court.

Inoculating Your Members Against the Railroad's Response

The following images were taken from a Class I Railroad's Claims Department Presentation on Investigative Techniques from 2009. There is no indication that any railroad has rejected these tactics since that time.

- **Normal or Traditional investigative techniques in Workers' compensation cases typically include:**

- **Fixed-Point Surveillance**
- **Mobile Surveillance**



- **Thinking outside the box can often produce information not otherwise available**
- **Unique circumstances often require unique solutions**
- **Today's objectives:**
 - **Share ideas about non-traditional investigative techniques & equipment**
 - **Provide alternatives to meet your informational needs**
 - **Look at an example of using surveillance in a non-traditional manner**

- **Hospital Searches**

- **Up to 16 facilities within a 60 mile radius, depending on program**
- **Provides dates, types & locations of previous treatments which may indicate pre-existing condition**
- **Points you to exactly where you need to request records**
- **Can indicate pattern of injuries/treatments, and/or other claims**
- **Available for hospitals, clinics, chiropractors, pharmacies.**



"Your medical records are safe with us.
We take patient privacy very seriously."

Inoculating Your Members Against the Railroad's Response

The following images were taken from a Class I Railroad's Claims Department Presentation on Investigative Techniques from 2009. There is no indication that any railroad has rejected these tactics since that time.

- **Going through the Claimant's Trash**

- Done when it becomes public domain, but check venue restrictions
- Can provide a wealth of information
- Travel Itineraries, brochures
- Prescription use
- Events
- Team participation
- Financial information
- Home-based business information
- Descriptions of the business
- Client lists
- Equipment ordering sheets or catalogues



- **Background Checks--Non-Traditional**
 - Department of Wildlife Records
 - Hunting draw results
 - Additional surveillance opportunities
 - Opportunity to interview companions

- **Sports Checks**

- Bowling Leagues
- Workout Facilities
- Softball Leagues
- Specialized Events, i.e. Highland Games, Competitions, etc.



Inoculating Your Members Against the Railroad's Response

The following images were taken from a Class I Railroad's Claims Department Presentation on Investigative Techniques from 2009. There is no indication that any railroad has rejected these tactics since that time.

- **Newspapers**

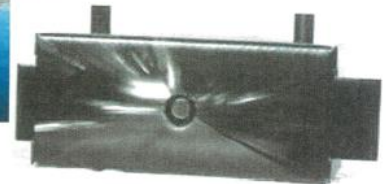
- Can show participation in clubs, events, employment, crimes



- **Photographs**
- Request all video, digital and still pictures taken of plaintiff over the past three years that is in their possession

- **Non-Traditional equipment can facilitate obtaining info not normally available.**

- Cell Phone Camera
- Pin Hole Camera
- Time Lapse Recorder
- Undercover Camera Bag
- Many other types of equipment are available.



Inoculating Your Members Against the Railroad's Response

You should have a frank conversation with your member and their family that as they pursue their legal rights their employer **WILL** begin surveillance on them and attempt to find evidence to use against them!

As the previous slides demonstrate, the railroads have no problem training their personnel to use invasive surveillance techniques to gather information, and they are creative in what information they attempt to find.

Our members should **NEVER** assume their social media accounts are safe or private. Even posts or comments to “private” Facebook pages or similar social media can be obtained by railroad Claims Departments. Railroads may scrutinize or misrepresent photos, video, or other information about our members to “smear” their reputation before a jury or influence the jury to suspect our members’ motives in getting compensated for their at-work injury.

Inoculating Your Members Regarding Claims Department Settlement Offers

While the decision to accept a settlement from the railroad prior to filing a FELA case is ultimately the choice of our member and their family, we should encourage our members to consult with BMWED Designated Legal Counsel to review any proposed settlements. Railroad proposals may often offer less compensation than our members or their families are entitled to receive or may include provisions that can be used against our members or their families in the future. Advise caution in signing anything the railroad offers before thoroughly examining it and encourage members to call our DLC!

Railroad Support Resources

Some railroads have specialists to offer employees counseling or support regarding traumatic events. While these railroad officials or contractors may be an honest commitment by the railroad to support its employees or meet its legal obligations regarding Critical Incident Stress Plans, we should always assume anything our employees communicate to them or obtain from them will be accessed by Claims Department personnel looking to bolster their defense against any FELA Claims.

This can include railroad-sponsored Employee Assistance Programs, “Wellness” officers, Hardship Programs, or “toll free” numbers provided by the railroad. Where you are able, advise our members to be mindful that if they use these railroad services, there is no guarantee that information collected won’t be used by the railroad for other purposes.

No information provided to any railroad official should ever be considered confidential.

Also, keep in mind that the railroad may offer these services both to an employee injured directly, as well as to other employees on site or indirectly involved (especially for serious incidents). Crisis response services, grief counseling, or similar services

While we should encourage our members to obtain all the help they need, there may be other paths to obtain that support.

Railroad “Wellness” Official (if applicable): _____

Railroad EAP officer (if applicable): _____

Helping Members Access Benefits

While our member's Designated Legal Counsel will likely take the lead in handling issues on any FELA claim, FRSA case, or other legal issue, we can still offer support for our member and their family at this time by assisting them with navigating their healthcare benefits.

As a reminder, our members are not required to use railroad-approved or provided hospitals or treatment centers when seeking care for their work-related injury. Railroads are also prohibited from involvement in our member's healthcare decisions regarding their work-related injury.

Our members and their families will have likely already provided their insurance information to the hospital. If they need more information about their benefits or options regarding their scheduled healthcare benefits, they should visit the website for Railroad Enrollment Services at:

Healthcare

<https://www.yourtracktohealth.com/>

If our member is covered under the National Agreement's health and welfare provisions, their healthcare benefits are managed by one of the following three companies:

Aetna	(800) 842-4044
Blue Cross Blue Shield	(866) 267-3320
United Healthcare	(800) 842-9905

Member Benefits Checklist (for your reference)

- | | |
|---|---|
| <input type="checkbox"/> RUIA Sickness Benefits | <input type="checkbox"/> The Hartford
(Supplemental Sickness Benefits) |
| <input type="checkbox"/> Optional Sickness Benefits
(i.e. BMWED/Aflac) | <input type="checkbox"/> OTV Claim
(check Agreement) |
| <input type="checkbox"/> AD&D Claim
(MetLife or other) | <input type="checkbox"/> FMLA application (if needed) |
| <input type="checkbox"/> Other (specify) _____ | |

Helping Members Access Benefits

Sickness Benefits

Our members are eligible to receive RRB/RUIA Sickness Benefits during their time away from work. More information on these benefits can be found at <https://rrb.gov/Benefits/Sickness>. As RRB is a government office, some members have difficulty navigating the bureaucratic systems that administer these benefits. You may want to familiarize yourself with RRB online or Field Office claims procedures to provide guidance to our members and their families.

RRB (General Switchboard)

(877) 772-5772

Member's RRB Field Office _____

Field Office email or number _____

Our members covered under the Railroad Employees' National Health and Welfare Plan also have access to Supplemental Sickness Benefits as part of their collective bargaining agreement. These benefits are administered by the Hartford. When our member files for a Sickness Benefit Claim through RRB, they should also file for with the Hartford. Any claims for Supplemental Sickness Benefits will work from an initial RRB claim, so members should file their claim with RRB first.

The Hartford

(800) 205-7651

Some of our members have opted to participate in additional, voluntary coverage plans. Your System Division may have a unique plan and/or may be part of the BMWED/Aflac plans that offer additional benefit coverage.

Aflac/BMWED Dedicated Member Support Line

(855) 249-5999

**Your System Division's or Federation's
Optional Disability or Healthcare Benefits Plan**

Helping Members Access Benefits

Accidental Death and Dismemberment

In the unfortunate case that your member suffers a dismemberment or is killed while at work, National Plan covered employees have coverage for Accidental Death and Dismemberment. MetLife administers this coverage.

MetLife (National Plan AD&D Benefits)

(800) 310-7770

Your System Division or Federation may offer additional benefits policies for your members. Contact your General Chairperson for more information.

Your System Division's or Federation's AD&D Policy Point of Contact for Claims (if applicable)

If our members work under the national agreement, their collective bargaining agreement likely has provisions for compensating members injured or killed while in a company-owned vehicle.

Article V of the February 10, 1971 Mediation Agreement (amended September 26, 1996) provides for compensation according to a listed schedule of payments, as well as other benefits, for an accidental death or dismemberment while employees are operating, riding in, boarding, or alighting from off-track vehicles authorized by the carrier and any accident which occurs while an employee is under pay.

The terms and limitation of this **"Off-Track Vehicle Agreement"** may require you or your General Chairperson to file claims for this compensation within your agreement's processes for claims and grievances. If your member is eligible for benefits or has other rights under this agreement, you should work with your General Chairperson and your member's DLC to navigate how these rights or benefits are to be claimed and how they interact within other rights or benefits due to the member.

Key Laws and Regulations

Federal Employers Liability Act (FELA) (1908) 45 U.S.C. § 51 et seq.

This law provides for a rail worker's legal right to compensation for workplace illness, injury, or death, provided they can establish the railroad's negligence, in whole or in part, as contributing to that injury. FELA claims may be tried in federal court.

Workers' Compensation

State-administered laws which provide workers' rights to compensation for workplace illnesses or injuries. Our members are **NOT** governed under state Workers' Compensation laws.

Federal Railroad Safety Act (FRSA) (2007) 49 U.S.C. §20109

Also known as **Whistleblower Protection**, amends the FRSA of 1970. This amendment protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a workplace injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public fund appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition. (OSHA, 2021)

Railroad Safety Improvement Act (RSIA) (2008) Public Law 110-432

Among other provisions, the RSIA mandated railroads develop Critical Incident Stress Plans to offer services and relief for rail workers directly involved in serious accidents or incidents. This law also mandated that railroads may not deny, delay, or interfere with medical or first aid treatment of an employee injured at work, also requiring that the railroad arranges for an injured employee to be transported to the nearest hospital for appropriate care instead of a railroad-designated or approved facility.

CFR 49 §225 – Railroad Accident/Incidents: Reports, Classification, and Investigations

The federal regulation governing accident reporting for railroads .



BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, IBT (BMWED)

INJURED MEMBER SUPPORT WORKSHEET

MEMBER NAME: _____

MEMBER CONTACT: _____

EVENT LOCATION: _____

EVENT DATE: _____

EVENT TIME: _____

EVENT CONDITIONS: _____

EVENT DESCRIPTION: _____

(BRIEF, FOR YOUR REFERENCE) _____

MEMBER FAMILY CONTACT: _____

MEMBER GANG CONTACTS: _____

WAS OUR MEMBER TAKEN TO A HOSPITAL OR TREATMENT FACILITY? **YES** **NO**

IF YES, WHERE? _____

WHO TOOK OUR MEMBER TO THE HOSPITAL?

WAS OUR MEMBER TREATED AND RELEASED, OR ADMITTED? **RELEASED** **ADMITTED**

HAS OUR MEMBER'S FAMILY BEEN NOTIFIED? **YES** **NO**

WERE RAILROAD OFFICIALS PRESENT AT THE HOSPITAL? **YES** **NO**

IF YES, WHOM? _____





BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, IBT (BMWED)

INJURED MEMBER SUPPORT WORKSHEET

HAS OUR MEMBER OR FAMILY CONTACTED DESIGNATED LEGAL COUNSEL? YES NO

IF YES, WHOM? _____

CONTACT THIS DLC TO BEGIN COORDINATING SUPPORT FOR OUR MEMBER!

WILL OUR MEMBER REQUIRE A MEDICAL LEAVE OF ABSENCE? YES NO

IF YES, HAS AN EXPECTED RETURN TO WORK DATE BEEN IDENTIFIED? YES NO

DATE OF EXPECTED RETURN TO WORK, IF KNOWN: _____

HAS OUR MEMBER'S BMWED STATUS BEEN UPDATED? YES NO

WILL OUR MEMBER REQUIRE SUPPORT FROM OUR BMWED/UNION FIRST EMPLOYEE ASSISTANCE PROGRAM (WAS THIS EVENT RELATED TO A POSSIBLE MENTAL HEALTH SUBSTANCE ABUSE, CRISIS, OR OTHER MEDICAL ISSUE)?

YES NO

IF YES, CONTACT UNION FIRST AT (885) 215-2023 FOR FURTHER GUIDANCE

WILL OUR MEMBER OR THEIR FAMILY NEED ASSISTANCE FILING FOR RRB/RUIA SICKNESS BENEFITS?

YES NO

RRB (Toll Free Switchboard) (877) 772-5772

WILL OUR MEMBER OR THEIR FAMILY NEED ASSISTANCE FILING FOR BARGAINED SUPPLEMENTAL SICKNESS BENEFITS (i.e. The Hartford)?

YES NO

The Hartford – Supplemental Sickness Benefits (800) 205-7651

WAS OUR MEMBER COVERED UNDER OPTIONAL SICKNESS, DISABILITY, OR HOSPITALIZATION BENEFITS (i.e BMWED/Aflac, Optum, etc.)?

YES NO

BMWED/AFLAC Dedicated Support Number (855) 249-5999

Additional Benefits Information can be found in your Agreement or at <https://www.yourtracktohealth.com/>





**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION, IBT (BMWED)**

INJURED MEMBER SUPPORT WORKSHEET

WILL OUR MEMBER OR THEIR FAMILY NEED ASSISTANCE FILING A CLAIM FOR AGREEMENT-PROVIDED AD&D BENEFITS?

YES NO

Check your member's Agreement for provisions on filing Agreement-provided AD&D claims.

WILL OUR MEMBER OR THEIR FAMILY NEED ASSISTANCE FILING FOR SYSTEM DIVISION OR FEDERATION SPONSORED AD&D BENEFITS (i.e. American Income Life)?

YES NO

Check with your General Chairperson for how to file claims for System Division or Federation sponsored benefit plans.

USE THIS SECTION FOR ANY NOTES REGARDING BENEFITS AVAILABLE TO OUR MEMBER OR THEIR FAMILY (POINTS OF CONTACT, FILE NUMBERS, DEADLINES, RENEWALS, ETC.):

WILL OUR MEMBER NEED ASSISTANCE FILING FOR FMLA LEAVE?

YES NO

WAS ANY ACTION RELATED TO THIS INCIDENT, FROM ANY MEMBER DIRECTLY INVOLVED, A PROTECTED ACTION UNDER THE PROVISIONS OF [FRSA §20109](#) (SEE THE [BMWED OFFICER'S GUIDE TO WHISTLEBLOWER PROTECTIONS FOR BMWED MEMBERS](#) FOR MORE DETAILS)?

YES NO

IF YOU SUSPECT A POTENTIAL WHISTLEBLOWER CASE RELATED TO THIS INCIDENT, INFORM OUR MEMBER'S DLC AND COORDINATE ACTIONS WITH THEM.





BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, IBT (BMWED)

INJURED MEMBER SUPPORT WORKSHEET

RAILROAD RESPONSE:

MEMBER'S SUPERVISOR: _____

OTHER OFFICIALS OR AGENTS INVOLVED: _____

(SENIOR MANAGERS, CLAIMS, LEGAL, MEDICAL, RISK MITIGATION, RR POLICE, ETC.) _____

HAS THE RAILROAD ATTEMPTED TO SOLICIT A WITNESS STATEMENT FROM OUR MEMBER? YES NO

HAS AN ACCIDENT REPORT BEEN FILED FOR THIS EVENT? YES NO

HAS THE RAILROAD DIRECTED OTHER EMPLOYEES TO COMPLETE WITNESS STATEMENTS? YES NO

IF YES TO ANY OF THE ABOVE, OBTAIN COPIES IF POSSIBLE. ENCOURAGE OUR MEMBER OR THEIR FAMILY TO REQUEST A COPY OF ANY PAPERWORK THEY SUBMIT TO THE RAILROAD OR TO RAILROAD OFFICIALS, IF POSSIBLE.

IS THE RAILROAD CONDUCTING A REENACTMENT? YES NO

IF YES, WHEN AND WHERE?

HAS THE RAILROAD DIRECTED OUR INJURED MEMBER TO PARTICIPATE? YES NO

HAS THE RAILROAD DIRECTED OTHER EMPLOYEES TO PARTICIPATE? YES NO

HAS THE RAILROAD INFORMED YOU, INVITED YOU TO PARTICIPATE, OR PREVENTED YOU FROM PARTICIPATING? _____

HAS THE RAILROAD ACTIVATED THEIR *CRITICAL INCIDENT STRESS PLAN* TO OFFER STRESS OR TRAUMA SUPPORT TO EMPLOYEES DIRECTLY INVOLVED IN THIS INCIDENT? YES NO

Information on railroad Critical Incident Stress Plans can be found at <https://www.bmwe.org/safety>.





BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, IBT (BMWED)

INJURED MEMBER SUPPORT WORKSHEET

IF A RAILROAD OFFICIAL TRANSPORTED OUR MEMBER TO A TREATMENT FACILITY, DID THAT OFFICIAL RECOMMEND SPECIFIC FACILITIES OR PREVENT OUR MEMBER FROM GETTING TO THE NEAREST TREATMENT FACILITY OR FACILITY OF THEIR CHOICE?

YES NO

IF A RAILROAD OFFICIAL TRANSPORTED OUR MEMBER TO A TREATMENT FACILITY, DID THEY ATTEMPT TO ENGAGE OUR MEMBER IN CONVERSATION, INTERVIEW THEM, OR ATTEMPT TO DISCUSS THE EVENT OF GATHER INFORMATION DURING TRAVEL?

YES NO

DID A RAILROAD OFFICIAL ATTEMPT TO ACCOMPANY OUR MEMBER INTO THE TREATMENT ROOM?

YES NO

DID A RAILROAD OFFICIAL ATTEMPT TO DISCUSS OUR MEMBER'S TREATMENT WITH MEDICAL STAFF OR DOCTORS?

YES NO

NOTE ANY ACTIONS TAKEN BY RAILROAD OFFICIALS

(MEDICAL DEPARTMENT,
CLAIMS, LEGAL,
RISK MITIGATION,
SUPERVISORS, ETC.)

HAS THE RAILROAD CONDUCTED AN "ALL HANDS CALL" WITH OTHER EMPLOYEES TO DISCUSS THE EVENT OR ASSIGN RESPONSIBILITY?

YES NO

HAS THE RAILROAD PUBLISHED ANY BULLETIN OR NOTICE TO OTHER EMPLOYEES REGARDING THIS EVENT?

YES NO

ARE THERE OTHER STATEMENTS OR BULLETINS THE RAILROAD HAS MADE ABOUT THIS EVENT?





BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, IBT (BMWED)

INJURED MEMBER SUPPORT WORKSHEET

GATHER:

- A COPY OF ANY CORRESPONDENCE, BULLETIN, NOTICE, ALERT, REENACTMENT FINDINGS, OR SIMILAR DOCUMENT THE RAILROAD RELEASES REGARDING THIS EVENT.
- IF POSSIBLE, COPIES OF ANY PAPERWORK THE MEMBER OR THEIR FAMILY SUBMITTED TO THE RAILROAD REGARDING THIS EVENT (GET PERMISSION FROM THE MEMBER AND THEIR FAMILY FIRST)
- IF POSSIBLE, COPIES OF ANY WITNESS STATEMENTS OR REPORTS SUBMITTED TO THE RAILROAD BY OTHER MEMBERS OR EMPLOYEES REGARDING THIS EVENT.
- REQUEST FELLOW MEMBERS TO PROVIDE STATEMENTS IN THEIR OWN WORDS REGARDING THIS EVENT, NOTING ANY OBSERVED SAFETY ISSUES OR CONDITIONS ON THE SITE OR NEARBY.
- COPIES OF RELEVANT AGREEMENT RULES, RAILROAD RULES, OR POLICIES.
- ANY RELEVANT FORMS THE MEMBER OR THEIR FAMILY MAY NEED TO REQUEST A LEAVE OF ABSENCE, CLAIM ELIGIBLE BENEFITS, OR ASSIST THEM IN FINDING SUPPORT (THESE ARE TO BE PROVIDED TO THE MEMBER OR THEIR FAMILY).

SCHEDULE:

- MEETING WITH MEMBER'S DLC TO COORDINATE SUPPORT.
- MEETING WITH OTHER MEMBERS INVOLVED IN THE INCIDENT TO DEBRIEF THEM, CHECK ON THEIR NEEDS, AND INOCULATE THEM AGAINST LIKELY RAILROAD REACTIONS (SURVEILLANCE, EVIDENCE GATHERING, INTIMIDATION, ETC.)
- OBSERVATIONS OF ANY RAILROAD REENACTMENT, IF ALLOWED.
- CHECK-IN MEETINGS WITH MEMBER AND THEIR FAMILY, AS APPROPRIATE.



How BNSF Railway Managed Medical Claims While Working with 12 Unions

Despite federal laws that limit transparency and control of care for its injured employees, BNSF Railway seeks strategic opportunities for safety engagement and improved outcomes.

By: **Nina Luckman** | September 30, 2022

Topics: Claims | Teddy Award | Transportation | Workers' Comp | Workers' Comp Forum

Through its annual Teddy Award program sponsored by PMA Companies, Risk & Insurance® has the opportunity to learn the stories of organizations across the country making incredible strides in their injury prevention and workers' comp programs. From among each year's finalists, we select Programs of Distinction, programs with unique characteristics and inspiring stories to tell.

***BNSF Railway** is a 2022 Teddy Award Program of Distinction. With a workforce of 44,000 at numerous regional locations, a unique set of employee characteristics, and governance under the Federal Employer Liability Act (FELA) rather than state workers' compensation statutes, BNSF has continuously decreased its frequency ratio while increasing services for employees.*

FELA, Unions Add Unique Layers of Challenge

A full 89% of BNSF Railway's employees are represented by one of 12 different unions, with agreements in place that make workers' comp management different from the norm.

“The main thing is that our employees are not covered under state compensation, they're covered under a federal program, FELA,” said Lisa Gladney, Heartland Division Field Medical Manager.

HOW BNSF RAILWAY MANAGED MEDICAL CLAIMS WHILE WORKING WITH 12 UNIONS

From <https://riskandinsurance.com/how-bnsf-railway-managed-medical-claims-while-working-with-12-unions/>

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“The difference there is that we don’t have a lot of the same opportunities as an employer that we would under state comp. We can’t direct care, we have to follow the rules of their health plan, sometimes we’re able to think outside the box and approve treatments that might not be covered under insurance, but it’s very limited by the agreements. They have a choice of three different health insurance carriers.”

There are additional complications due to the high union participation rate and the agreements therein – employees filing work injuries are not required to work with the medical department to manage the injuries, they do not have to provide any medical records or treatment plans, they can seek care with any provider they choose, and they can even choose to have medical bills paid by their own insurance rather than notifying a provider that their injury occurred in the workplace.

Further, because each of the 12 unions is represented by a FELA attorney who is notified by the union when an injury occurs, it is possible for an employee to be represented by an attorney the very same day a claim is filed.

Fresh Perspectives and a Focus on Engagement

BNSF’s efforts to overhaul its workers’ comp management to address spiraling employee engagement and injuries on the rise began in 2005 and unfolded in three phases.

The first was to hire a dedicated team of medical managers that would be in each of the operating divisions of BNSF. The second phase in 2014 added a licensed mental health professional for every division. The last phase was implemented in 2015 with the addition of a wellness manager to every division.

Changing the coverage area from roughly 12,000 employees per manager down to 3,000 certainly had an impact, but according to Gladney and BNSF leadership, the real game changer was who BNSF hired for these roles.

The medical department leadership was determined to create a diverse team of return-to-work specialists who were not just well educated, but who also were laser focused on identifying barriers that impact an employee’s ability to stay at work safely and willing to develop return-to-work plans tailored specifically to each individual.

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“Our employees are so multi-faceted and don’t just care about the tasks they do for 40 or 50 hours a week,” said Gladney, who started in 2006 as one of the original field managers.

“At the time, the director wanted to get away from focusing on injury management and the legal aspect of that and instead get the boots on the ground focusing on what keeps our employees struggling to stay engaged at work when they come to work,” Gladney explained, “in the hopes that attacking it from that angle would reduce our injuries as a whole. The director used to start every meeting with our employees saying, ‘I’m the person who you are trying to put out of a job.’”

Galdney explained that “BNSF Railway has a culture driven by safety with a frequency ratio measured by number of reportable injuries per 200,000 manhours.”

In 2017, the frequency ratio was 1.09 as process improvements were being implemented. While the 2021 numbers are still being finalized, BNSF finished 2020 with a frequency ratio of 0.87 — a reduction from 445 reportable injuries in 2017 to 351 in 2020.

Building Trust and Participation

Another pillar in BNSF’s workers’ comp administration is its Employee Assistance Program (EAP). As with other organizations that have implemented EAPs, the BNSF team had to contend with the commonly-held perception that the assistance provided through EAP was not confidential.

“The way we combat it is through a local representative who is a licensed counselor and SAP provider, and she is available nearly 24/7 to personally help anybody in a situation,” Gladney said.

“People know her personally and she’s invested in every single location to make sure that employees know her by name. What we’re often battling is the majority male workforce who think they don’t need help. Continuing to meet in small groups and making it seem like the right thing to do for your family is to get help is where we are driving.”

Gladney noted that EAP participation is slowly rising since this tactic was employed. In 2015, 5.1% of BNSF’s total employee base took advantage of at least one service. Every medical team member was involved in promoting the

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programs, presenting to work groups at all opportunities, and all programs were made accessible from a single 24/7 hub.

Even with a two-year pause to in-person meetings and traveling during the pandemic, the BNSF team was able to double utilization in 2021 with just under 10% of the total population accessing at least one EAP service.

Gladney explained that medical management services have also greatly benefited from the three-phase evolution of BNSF's workers' compensation program. The number of employees who work directly with the BNSF team was at an all-time low in 2015, with only 53% of injured workers participating with the medical field managers team. In 2021, that number increased to 73%.

“And these numbers do not include the countless hours spent working with our employees who have suffered life-altering injuries or illnesses outside of the workplace that require a more complex return-to-work plan,” she said. &

The Teddy Award, established in 1994 by Risk & Insurance®, was named in honor of President Theodore “Teddy” Roosevelt, who introduced the first piece of significant workers' compensation legislation in the U.S. Risk & Insurance honors two additional employers for their exceptional efforts in driving continuous improvement and caring for injured workers.

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