# FLETCHER & SIPPEL LLC

Legal Services for the Transportation Industry

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## WE'VE BEEN SUED!
## Your Duty To Preserve Evidence—How It Is Fulfilled—What Happens When It Is Not

A person (including a company) has a duty to preserve evidence relevant to litigation. The scope of that duty, however, is often unclear. What types of evidence should be preserved? When does the duty arise? How does a company with several employees go about fulfilling this duty? And, most importantly, what happens if the duty is breached?

***What types of documents must be preserved?*** Simple answer: all evidence relevant to the litigation. But what does that actually mean? The duty to preserve extends to: (1) all documents (in any format) relevant to the action for which you have been sued or for which you suspect you will likely be sued: (2) documents reasonably calculated to lead to the discovery of admissible evidence; (3) documents reasonably likely to be requested by an adverse party during discovery; and (4) documents that are the subject of a pending discovery request. The duty to preserve includes electronic data as well as traditional paper documents. Even if hard copies of materials/documents are provided, a party is still entitled to discover electronic versions as well. Thus, both versions should be preserved!

The duty also extends to documents identified by a potential litigant in what is called a "preservation letter" which you may receive. Preserve all materials identified in the letter even if you feel they are irrelevant. If the scope of the letter is overly broad and unduly burdensome, request the sender narrow the scope of the request. If that proves unsuccessful, you will need to seek protection from the court.

***When does the duty to preserve arise?*** Typically, the duty arises once a law suit is filed. However, the duty to preserve will arise when it is reasonably foreseeable that litigation will ensue. *(Continued on page 3)*

## IN THIS ISSUE



## Defense Verdict in Cumulative Trauma Case Upheld on Appeal

- **OSHA regulations cannot be used to establish per se negligence**
- **Disclosure of surveillance tape not untimely**

The Wisconsin Court of Appeals recently upheld a defense verdict obtained by Fletcher & Sippel in favor of Wisconsin Central Ltd. ("WCL") in a cumulative trauma FELA action. Fletcher & Sippel attorneys Peter McLeod, Jim Fletcher, and Tom Paschalis tried the case in the Circuit Court of Brown County, Wisconsin, and represented WCL in the subsequent appeal.

At trial, plaintiff, a maintenance mechanic, alleged that injuries to his shoulder, back and knees were caused by manpower *(Continued on page 2)*

**Cumulative Trauma Case Upheld** *(Continued from page 1)*
reductions at WCL's ore dock in Escanaba, Michigan. He claimed the staff reductions increased the workload of the remaining employees and left little time to perform maintenance and housekeeping tasks, thereby making his workload longer, harder, and less safe. WCL presented evidence that, upon acquiring the ore dock, WCL reduced the work week from 7 to 5 days, changed overtime from mandatory to voluntary, allowed employees to self-pace all tasks, provided assistance when requested, enacted appropriate safety measures, provided proper equipment, and performed sufficient and timely maintenance and housekeeping at the facility. Moreover, WCL demonstrated that employment reductions corresponded with dips in the volume of iron ore processed at the facility.

Plaintiff argued on appeal that the trial court should have: (1) admitted evidence of OSHA regulations to establish negligence per se; (2) admitted evidence of injuries to other employees; (3) excluded surveillance evidence depicting plaintiff's participation in a three-day golf tournament; (4) excluded evidence of WCL's ore production volumes; and (5) excluded evidence of WCL's safety inspections and audits. Plaintiff further argued the trial court erroneously declined to instruct the jury on the unavailability of worker's compensation and erroneously instructed the jury on negligence and causation.

The Wisconsin Court of Appeals sided with WCL on all issues and, in so doing, focused heavily on the circuit court's rulings on OSHA and surveillance evidence. With respect to OSHA, at trial WCL moved *in limine* to bar the introduction of OSHA regulations to establish negligence *per se* or WCL's standard of care, arguing that OSHA is a general workplace safety statute. It is not aimed specifically at the railroad industry and is not intended by Congress to expand the liabilities of railroad employers under existing law. The trial and appellate courts agreed with WCL. If OSHA regulations were admissible to establish negligence *per se* in FELA cases, then OSHA could be used to bar a plaintiff's contributory negligence, thereby expanding the liability of railroad employers. Moreover, both the trial and appellate courts concurred that OSHA regulations were inadmissible to establish WCL's standard of care in this matter. While the majority of jurisdictions allow OSHA evidence to be admitted for the more limited purpose of establishing an employer's standard of care, the court accepted WCL's argument that, in this case, OSHA evidence would tend to mislead or confuse the jury.

Plaintiff moved to bar WCL's use of a surveillance video at trial claiming WCL's disclosure was untimely and the content was not probative. The week before trial, WCL disclosed the surveillance video of plaintiff's participation in a three-day golf tournament. The video depicted plaintiff stooping, bending, walking on uneven terrain, lifting his arms above his shoulders, and doing other physical tasks he claimed he could not perform. Unlike the majority of jurisdictions, Wisconsin courts hold that surveillance video is protected work-product which can be disclosed on the eve of trial rather than earlier in discovery. Thus, the Wisconsin Court of Appeals found that WCL's disclosure was timely and the surveillance evidence was highly probative.

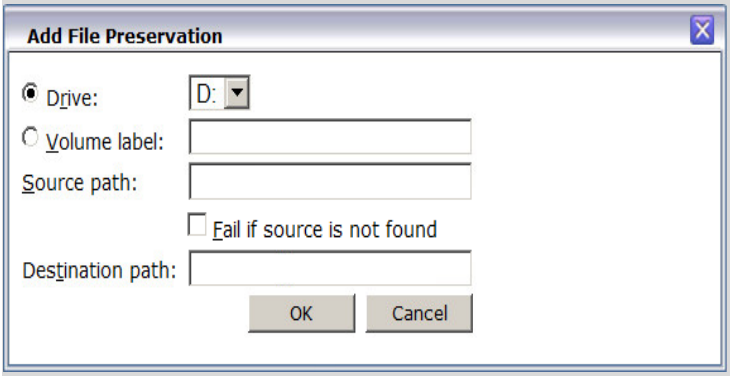
The dispute regarding a jury instruction on the unavailability of worker's compensation stemmed from a formal inquiry made by the jury during deliberations. Plaintiff's counsel argued that the jury should be instructed that plaintiff was not entitled to receive worker's compensation. WCL, on the other hand, argued the jury should simply be instructed to refrain from any consideration of worker's compensation in its deliberations. The trial court agreed with WCL. The Court of Appeals concurred, holding the curative instruction proposed by WCL and offered by the trial court was an accurate statement of the law and plaintiff's proposed instruction was improper. The Court found advising the jury that other means of compensation are unavailable to a plaintiff would tend to prejudice a defendant and create fears that plaintiff's injury might go uncompensated.

For more information, or to receive a copy of the decision, you may contact Peter McLeod at pmcleod@fletcher-sippel.com or Tom Paschalis at tpaschalis@fletcher-sippel.com or by calling either at (312)252-1500.

**Duty to Preserve Evidence** *(Continued from page 1)* In other words, the duty to preserve arises when you have been put on notice that litigation is likely to occur. This can happen in several ways: (1) you receive knowledge that a party in a matter involving your railroad has retained counsel; (2) you receive a lien or preservation letter relating to potential future litigation; (3) you know you have received prior complaints or other lawsuits have been filed against you relating to similar incidents; or (4) the incident in question involves serious injury or death or significant property damage. For example, one court held that a railroad was put on notice when the railroad learned of a crossing accident that resulted in the death of a motorist because it was reasonably foreseeable that the motorist's estate would file suit.

***How do you assure your employees know what must be preserved and how to preserve it?*** A company must be diligent in upholding its duty to preserve evidence. When you are first on notice of a lawsuit or potential lawsuit, your company should send out what is known as a "litigation hold letter" to employees who may have control of relevant evidence. Most companies tend to name one individual as the person responsible for disseminating the letter and making sure other employees understand the process.

The litigation hold letter should provide detailed instructions on the steps employees should take to identify and preserve relevant evidence. The letter should instruct employees to preserve hard-copy and electronically stored documents and materials and provide a detailed list of what these materials might be. Hard-copy documents include such things as letters, memoranda, notes, drawings, reports, studies, manuals, contracts, and records of conversations. Electronically stored information would include e-mail and attachments, voice mail, instant messaging, spreadsheets, databases, calendar entries, and internet usage files. The letter should instruct employees to keep both the hard-copy and electronic versions of evidence if both exist and to preserve hardware such as laptops, hard drives, computer servers, USB thumb drives, PDAs, and other electronic processing devices. Finally, bear in mind, in a serious incident, you may want to consult with your attorney about preserving the instrument of the injury or damage such as the railcar or part of the rail car involved, the track or track materials removed following the incident, or the equipment being used during the incident.




Most important -- when the duty to preserve arises, you must suspend all ordinary-course deletion of electronic documents as well as enforcement of document retention and destruction policies regarding electronic and hard copy information relevant to the litigation or threat of litigation. A good first step is to preserve any back-up tapes you have and be sure other tapes that may be involved are not overridden. For example, if you have a crossing accident and anticipate litigation, take steps to ensure that any audio or video recordings, and the information from the event data recorder, are not automatically overridden following the accident.

***What happens if you fail to preserve the documents?*** This is referred to as "spoliation." Some states recognize spoliation as a separate cause of action but most jurisdictions instead choose to impose sanctions. Sanctions can include: monetary sanctions, such as attorney fees or fines; instructing the jury that it may draw an adverse inference that the destroyed documents were unfavorable to the party that destroyed them; excluding evidence relating to the material destroyed; holding a person or company in contempt; or, in severe cases, dismissing the lawsuit or entering a default judgment. Generally speaking, the type of sanction imposed depends on whether the destruction of evidence was negligent, intentional, or egregious. One caveat that may mitigate sanctions -- except in egregious cases, courts are not inclined to impose sanctions for spoliation unless the opposing party was prejudiced as a result of the destruction.

Sanctions can severely impact the strategy of a case and can lead to harsh results at trial. It is important that are aware of the existence of your duty to preserve and take proactive steps to assure evidence is preserved once you are on notice that litigation is likely to ensue. Also remember, litigation sometimes drags on for years. Periodically follow up with employees to ensure they are following any litigation hold letter instructions, understand how to preserve the relevant evidence and are preserving it accordingly. For further information, please contact Elizabeth Bryant at (312) 252-1547 or ebryant@fletcher-sippel.com

# Federal Court Victory In a Battle over Language in a Track Lease

After a week-long bench trial and post-trial briefing, Fletcher & Sippel attorneys, Michael Barron and Peter McLeod, obtained judgment in favor of Chicago Rail Link ("CRL") in a case brought by Freight Train Advertising, LLC ("FTA"), alleging breach of contract, fraudulent concealment and fraudulent misrepresentation.

In August of 2010, CRL entered into a track lease with FTA for an unused section of CRL track located on an overpass over the Dan Ryan Expressway in Chicago, IL. FTA wanted to use the track to place a specially constructed railcar called a "mobile signage unit" to display advertising to Expressway users. The lease agreement obligated FTA to strictly comply with all applicable laws.

CRL had the right to move the signage unit if required by governmental authority. Soon after FTA placed the car on the track, the Illinois DOT ("IDOT") contacted FTA demanding that the car be removed. FTA ignored repeated demands from IDOT and, as a result, IDOT threatened to withhold disbursement of grant money to CRL if the sign was not removed. Shortly thereafter, the City of Chicago issued an emergency vacate order requiring immediate removal of the sign. CRL moved the unit off the track.

FTA sued CRL in federal court in the Northern District of Illinois claiming CRL had breached the contract by removing the unit with the sign without its permission and by preventing FTA from defending against the legal challenges asserted by IDOT and the City of Chicago. FTA argued the lease obligated CRL to keep the unit in place even in the face of the City of Chicago order. FTA did not prevail on that argument because the lease expressly authorized CRL to move the unit in response to a directive from a public authority like the City of Chicago.

FTA also asserted a claim against CRL for fraudulent misrepresentation, alleging that CRL materially misrepresented its ability to lease the section of track in question due to a 1961 agreement between IDOT and the prior owner of the track prohibiting the construction of advertising in that location. CRL was able to establish it had no knowledge of the 1961 agreement and could not have discovered the agreement with due diligence because it had never been recorded.

Finally, FTA claimed CRL fraudulently concealed the IDOT grant to induce FTA to enter into the track lease. CRL presented evidence that such grants are routine in the industry and that CRL had not contemplated a legal challenge to the unit that would impact its grant before or during the negotiation of the track lease. The Court held FTA failed to present any evidence to support an intent by CRL to conceal the grant.

If you would like further information, If you would like more information, please contact Michael Barron at mbarron@fletcher-sippel.com or Peter McLeod at pmcleod@fletcher-sippel.com.

# OSHA Updates

Railroads are continuing to see an influx of whistleblower claims brought pursuant to the Federal Railroad Safety Act, 49 U.S.C §20109. Many of these claims are now being filed in Federal District Court. Some more recent decisions are noted below:

**Engineer Fails to Prove He Engaged in "Protected Activity" in Claim Against CSX Transportation, Inc.**

An engineer was charged with parking his train in excess of 60 minutes without notifying a supervisor, causing the train to be delayed. The engineer wrote a letter to the FRA describing in detail prior incidents that had resulted in him being at "Step 3" of a progressive discipline policy. He argued the prior incidents were not serious enough to justify his facing the risk of termination for the delayed train incident. The engineer was ultimately terminated as a result of the violation. He filed a complaint with OSHA alleging retaliation against because: 1) he was working with a conductor who had suffered a personal injury and 2) he had complained to the FRA about the railroad's conduct regarding discipline.

As to the first allegation, the Administrative Law Judge ("ALJ") held that the fact that the engineer was working with a conductor who had suffered a personal injury was not "protected activity" under the Act (protected activity in 49 U.S.C. Sec. 20109(a)(4) is "to notify, or attempt to notify, the railroad carrier of . . . a work-related personal injury or work-related illness of an employee.")

With regard to the second allegation, the ALJ held the complaint to the FRA also was not "protected activity" because his complaints were not related to safety or security. There was no evidence the train created a hazard by sitting motionless for what the company considered an excessive period of time.

The ALJ dismissed the case.

*Lenzy v. CSX Transportation, Inc.*, Case No. 2013-FRS-00047 (ALJ August 9, 2013).

**District Court Holds that Employee can File Whistleblower Claim in District Court Even After Decision by Administrative Law Judge has been Issued**

The United States District Court for the District of Kansas held that a railroad employee who progressed his OSHA Whistleblower claim through the Department of Labor and filed a notice of appeal with the Administrative Review Board could still re-file in District Court where the Department of Labor had not issued a final decision.

*Pfeifer v. Union Pacific Railroad Co.*, 2013 WL 1367054 (Kan. 2013).

**District Courts Reject Election of Remedies Argument**

Three District Courts have now held that an employee who has pursued a remedy under the Railway Labor Act is not precluded from filing a whistleblower claim under Section 20109. The District Court for the Southern District of Iowa further held that the rulings made by the Public Law Board did not preclude the District Court from addressing the same issues.

*Reed v. Norfolk Southern Railway Co.*, 2013 WL 1791694 (N.D. Ill. 2013); *Ratledge v. Norfolk Southern Railway Co.*, 2013 WL 3865239 (E.D. Tenn. 2013); *Ray v. Union Pacific Railroad Company*, 2013 WL 5297172 (S.D. Iowa 2013).

**Administrative Review Board Affirms *Bala v. Port-Authority Trans-Hudson Corp*. Ruling that Employee may Not Be Disciplined for Following Physician's Treatment Plan for Off-Duty Injury**

The Administrative Review Board affirmed Administrative Law Judge Theresa C. Timlin's holding in *Bala v. Port Authority Trans-Hudson Corp*., 2010-FRS-00026, that Section 20109(c)(2) which prohibits employers from disciplining employees "for following orders or a treatment plan of a treating physician" applies to all sick or injured workers, regardless of where the injury occurred. Bala was injured while moving boxes at home. He was charged with violation of the railroad's attendance policy due to failure to appear for work and was subsequently suspended. Judge Timlin held that Bala was disciplined for following *(Continued on page 6)*

**OSHA Updates** *(Continued from page 5)* the treatment plan of his doctors and assessed damages of $1,101 plus interest and attorneys' fees.

*Bala v. Port Authority Trans-Hudson Corp.*, 12-048 (ARB Sept. 27, 2013).

**Don't Forget About EEOC Claims**

OSHA has been busy looking into claims of medical interference and discriminatory treatment of injured employees. Don't forget that a railroad's treatment of injured employees is also within the jurisdiction of the Equal Employment Opportunity Commission under the Americans with Disabilities Act. This month the EEOC filed a complaint in the United States District Court for the Northern District of Georgia alleging that Norfolk Southern Railway engaged in discrimination against an employee who was diagnosed with degenerative disc disease in his spine. The employee was on leave as a result of a limited ability to walk, stand and lift. When the employee's symptoms allegedly resolved, his physician cleared him to work without any restrictions. However, Norfolk Southern allegedly disqualified him and refused to allow him to return to work in any position and the employee was ultimately discharged.

*EEOC v. Norfolk Southern Railway Company*, U.S. District Court for the Northern District of Georgia, Case No. 1:13-cv-03126-SCJ.

If you have specific questions or would like copies of the above decisions, please contact Kristin Bevil at (312) 252-1504 or at kbevil@fletcher-sippel.com.

# DISMISSAL OF APPEAL FOR LACK OF JURISDICTION

In a case of first impression in Illinois, Fletcher & Sippel obtained dismissal of an appeal from a jury verdict in favor of Quality Terminal Services, LLC ("QTS") on a contractual indemnification claim asserted against QTS by BNSF.

On November 18, 2011, the trial court entered judgment in favor of QTS on an indemnify claim brought by BNSF. Judgment was also entered in favor of the plaintiff. BNSF filed a post-trial motion arguing the trial court made 45 different errors. A favorable ruling on any of these issues would have necessitated a new trial or judgment in favor of BNSF. BNSF also sought a set-off for any taxes it might owe for lost wages paid to the plaintiff which, if successful, would have only satisfied part of the judgment. On April 18, 2012, the trial court denied BNSF's post-trial motion as to the 45 alleged errors but reserved ruling on the set-off issue. The trial court subsequently denied BNSF's request for a set-off on June 6. BNSF appealed to the First District Appellate Court of Illinois on June 29, arguing the trial court had erred by failing to rule it was entitled to indemnification from QTS as a matter of law as well as asserting various errors necessitating judgment in BNSF favor on plaintiff's claims.

Under Illinois law, a notice of appeal must be filed within 30 days after the last pending motion directed against a judgment. QTS, in conjunction with the plaintiff, moved to dismiss the appeal for lack of jurisdiction . Both parties argued that BNSF's appeal was untimely because the time to appeal had run out long before BNSF filed its notice of appeal. That motion was denied but, at oral argument, the three-judge panel devoted significant time to questions surrounding the jurisdictional issue.

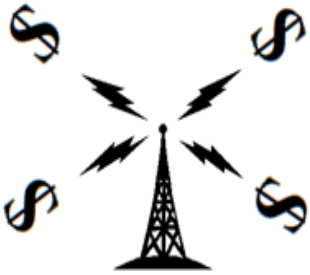
QTS argued that BNSF's requested set-off did not attack the judgment itself but, instead, was merely a request to satisfy a portion of the judgment. As a consequence, the set-off request did not toll the time in which to file a notice of appeal and the 30-day time period for BNSF to appeal any claim of error began to run on April 18, long before BNSF filed its notice of appeal. The appellate court agreed with QTS. The set-off issue did not toll the 30-day filing period and BNSF's notice of appeal was untimely thereby stripping the court of jurisdiction over the appeal. On September 25, 2013, the First District dismissed BNSF's appeal for lack of jurisdiction.

If you would like more information, please contact Peter McLeod at (312) 252-1546 or pmcleod@fletcher-sippel.com.

# Transactional Tips

## REMEMBER YOUR RADIOS!

### The Federal Communications Commission is Another Federal Agency to Watch



Railroads use radios, and those radio facilities -- yard and dispatch radio transmitters, locomotive control units, AEI readers -- require FCC licenses. Even once those licenses are obtained, however, further FCC approval is often required for any corporate transaction involving the licensee. If a railroad holding FCC licenses is sold to another company, or is merged with a sister railroad, or is otherwise a part of a corporate reorganization, it is usually the case that authorization must be obtained from the FCC. This is a frequently overlooked regulatory requirement, compared to better-known processes like Surface Transportation Board approval.

Obtaining FCC approval for corporate transactions is generally straightforward and not time consuming. It involves filing a "Form 603" application in the FCC's Universal Licensing System. That electronic filing involves coordination between the various parties to the transaction, and requires that each of the parties be registered in the FCC's Commission Registration System (known as "CORES") and have a FCC registration number or "FRN." If done correctly, a Form 603 application is normally granted "overnight" by the FCC -- essentially automatically -- and that authority becomes effective immediately. A further FCC notice filing is required once the transaction has been consummated.

So the process is not difficult -- the biggest potential pitfall is just making sure it gets done. When creating the checklist for your next railroad transaction, make sure to remember the FCC!

If you have specific questions, please contact TJ Litwiler at (312) 252-1508 or at tlitwiler@fletcher-sippel.com.

# Upcoming Events

*November 10-12* **ASLRRA Central Pacific Region Meeting**

*Newport Beach Marriot Hotel & Spa — Newport Beach, CA*

*November 18-19* **ASLRRA General Counsel Symposium**

*Intercontinental Kansas City at the Plaza — Kansas City, MO*

*If you would like more information on upcoming events please contact thines@fletcher-sippel.com.*

# 2013 Race Judicata



CHICAGO VOLUNTEER LEGAL SERVICES

*Because equal access to justice is everyone's fight*

Fletcher & Sippel recently participated in the 20th Annual Race Judicata 5k to raise money for Chicago Volunteer Legal Services (CLVS). CVLS is an organization of almost 3,000 volunteer attorneys who provide free legal services to thousands of low-income Chicagoans annually. F&S attorneys Liza Bryant, Jim Helenhouse, Colleen Konicek, Stephen Rynn, Myles Tobin and clerk Timothy Hines all completed the 5k and had a great time raising money for CLVS.

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# New Additions to the F&S Family.

On Wednesday, May 8th 2013, Elizabeth and Patrick Bryant welcomed Trey Collins Bryant to the F&S family. Then again on Friday, July 12th 2013, Kristin and Patrick Bevil gave **two** additions to the F&S family, Kira Dale and Quinn Mary Bevil. Congratulations to everyone!

Kira Dale and Quinn Mary Bevil

Trey Collins Bryant

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**Fletcher & Sippel LLC**
29 North Wacker Drive, Suite 920
Chicago, Illinois 60606-2832

**Phone: (312) 252-1500** **Fax: (312) 252-2400** www.fletcher-sippel.com

| | | |
|---|---|---|
| Michael J. Barron, Jr. | (312) 252-1511 | mbarron@fletcher-sippel.com |
| Audrey L. Brodrick | (312) 252-1518 | abrodrick@fletcher-sippel.com |
| Elizabeth O. Bryant | (312) 252-1547 | ebryant@fletcher-sippel.com |
| James A. Fletcher | (312) 252-1509 | jfletcher@fletcher-sippel.com |
| Janet H. Gilbert | (312) 252-1507 | jgilbert@fletcher-sippel.com |
| James D. Helenhouse | (312) 252-1501 | jhelenhouse@fletcher-sippel.com |
| Colleen Konicek | (312) 252-1506 | ckonicek@fletcher-sippel.com |
| Ronald A. Lane | (312) 252-1503 | rlane@fletcher-sippel.com |
| Kristin Liddle Bevil | (312) 252-1504 | kbevil@fletcher-sippel.com |
| Thomas J. Litwiler | (312) 252-1507 | tlitwiler@fletcher-sippel.com |
| Peter C. McLeod | (312) 252-1546 | pmcleod@fletcher-sippel.com |
| Thomas C. Paschalis | (312) 252-1545 | tpaschalis@fletcher-sippel.com |
| Stephen J. Rynn | (312) 252-1539 | srynn@fletcher-sippel.com |
| William C. Sippel | (312) 252-1505 | wsippel@fletcher-sippel.com |
| Myles L. Tobin | (312) 252-1502 | mtobin@fletcher-sippel.com |

Timothy J. Hines
-Designer & Editor
thines@fletcher-sippel.com