

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

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DENNIS R. PIERCE
National President



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VIA ELECTRONIC AND FIRST-CLASS MAIL

June 25, 2012

BLET Advisory Board
All General Chairmen
All State Legislative Chairmen
All Local Chairmen
All Legislative Representatives

Re: FRSA/ OSHA Whistleblower Issue

Dear Brothers and Sisters,

As most of you are aware, an increasing number of railroad employees are exercising their rights under the Federal Railroad Safety Act ("FRSA") "Whistleblower" provisions codified at 49 U.S.C. Section 20109 in cases of harassment, intimidation, and retaliation by a carrier for reporting safety-related issues or for requesting prompt medical treatment, without interference, when they are injured on the job. With this increasing awareness and use of these provisions also comes the need for education and information to both the Organization representatives such as Union Officers, and the worker/union member. This letter provides additional information and furthers internal education, and involves a recent attempt by BNSF Railway to interject itself into Whistleblower investigations conducted by the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor ("DOL") under the guise of offering the non-management employee witnesses what the railroad describes as "representation."

OSHA has made us aware of this effort by the Carrier, in which BNSF legal counsel attempted to assert that it was entitled to know the identity of all employee witnesses, as well as the right to be present at any interviews that take place as part of an OSHA investigation. In his response, OSHA's Assistant Secretary for Occupational Safety and Health also alluded to the fact that this has been attempted not only by BNSF, but also by other rail carriers in other Whistleblower investigations at various locations throughout the industry.

Resourcefully, OSHA and the Department of Labor have upheld the clear and unambiguous provisions in the law providing employee confidentiality in all cases, and have seen through the veiled attempts and conflict of interest by the railroads in circumventing such confidentiality requirements. I am providing a copy of the OSHA response to BNSF, as well as a letter expressing our appreciation for the position OSHA has taken in defense of BLET members.

**BLET Advisory Board
All General Chairmen
All State Legislative Board Chairmen
All Local Chairmen
All Division Legislative Representatives**

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June 25, 2012

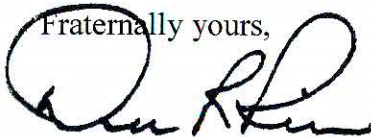
Equally important as Union Officers, as generally you are a point of contact a member has when they select a path toward a whistleblower case, is the respect of the law, and confidentiality on your part on behalf of that employee. While this may never arise, you should be prepared in the event a Carrier in its zeal resorts to pressure, or veiled inquiry or threat to Union Officers, and should view any attempts by the Carrier to discuss a whistleblower case with you with extreme suspicion and caution. You are under no obligation to discuss such matters with the Carrier. To the contrary, the very same confidentiality to which BLET members are entitled also extends to you, as their representatives.

Along these lines it is requested that if you or any member you represent, or have offered guidance to, runs up against, or is made aware of any attempt by a carrier to circumvent any whistleblower right a non-management employee has under Section 20109, you immediately notify the OSHA office conducting the investigation, as well as notifying this office, keeping in mind the confidentiality of the employee(s) involved is sacrosanct in any and all communications. Notification of this office is only for the purpose of follow-up with OSHA to advise that such attacks on members' rights under the law are occurring, and not with regards to any specific aspect of any case, or desired or undesired intervention by the BLET into the investigation.

In addition to the above, I also am enclosing a recent DOL News Release detailing more than \$800,000 in fines OSHA has ordered Norfolk Southern to pay three whistleblowers — including a locomotive engineer — who were fired after reporting on-duty injuries. Included in this sum is over half a million dollars in punitive damages and attorneys' fees. The DOL also reported that these actions follow several other orders issued by OSHA against Norfolk Southern in the past year, and that OSHA's investigations have found that the carrier continues to retaliate against employees for reporting work-related injuries and has effectively created a chilling effect in the railroad industry.

Trusting you will find this informative and helpful, and with warmest personal regards, I remain

Fraternally yours,



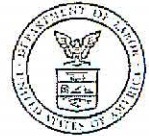
National President

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cc: E. L. Pruitt, First Vice President (w/encls.)
W. C. Walpert, National Secretary-Treasurer (w/encls.)
M. S. Wolly, Esquire, General Counsel (w/encls.)

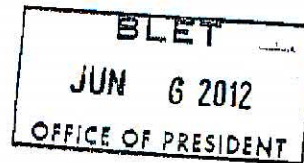
U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



JUN - 1 2012

Charles W. Shewmake
Vice President and General Counsel
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131-2830



Dear Mr. Shewmake:

I am writing to bring to your attention that Kristen Smith, an attorney representing the BNSF Railway Company ("BNSF"), has requested that the Occupational Safety and Health Administration ("OSHA") disclose the names of non-management employee witnesses that the agency intends to interview in several investigations of alleged retaliation in violation of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109. Ms. Smith has also requested that she be present at these interviews. Ms. Smith asserts that OSHA must disclose the names of these employee witnesses so that BNSF can "offer its representation" to those workers. This situation has arisen recently in connection with FRSA whistleblower investigations in both Atlanta and Seattle.

This letter serves to inform you that such requests are wholly inappropriate and that OSHA will not comply with them. OSHA has no obligation to disclose the names of non-management witnesses to BNSF prior to interviewing those witnesses. In fact, the FRSA's governing regulations explicitly state that "[i]nvestigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant." 29 C.F.R. 1982.104(d). Moreover, OSHA's Whistleblower Investigations Manual (2011), available at http://www.whistleblowers.gov/regulations_page.html, expressly provides for the confidentiality of non-management witness interviews and states that such interviews are to be conducted in private. See OSHA's Whistleblower Investigations Manual at 3-15, 3-20. OSHA is therefore not required to permit the respondent's designated representative to be present for an interview with a non-managerial witness.

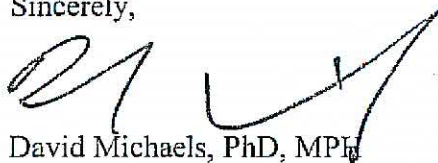
Of course, OSHA will honor a witness's request to have an attorney or other designated personal representative present at any time. See OSHA's Whistleblower Investigations Manual at 3-15. Ms. Smith errs, however, in equating witnesses' right to seek representation with BNSF's asserted right to offer representation to non-managerial employees. Indeed, OSHA assumes that BNSF counsel would be well aware of the conflict of interest that would inevitably arise if BNSF's attorney were to represent both the corporation and non-managerial employees in a whistleblower case.

We also wish to remind you that it is a violation of the employee protections of FRSA to discharge, demote, suspend, reprimand, or in any other way retaliate against an employee who provides information to OSHA or otherwise assists OSHA in an investigation of a FRSA whistleblower complaint. OSHA takes allegations of such retaliation extremely seriously and

will not tolerate retaliation against witnesses who cooperate in FRSA whistleblower investigations.

Thank you for your time and your anticipated efforts to resolve this issue of significant concern to OSHA. Please do not hesitate to contact Sandra Dillon, Director, Office of the Whistleblower Protection Program, with any questions at (202) 693-2199.

Sincerely,

A handwritten signature in black ink, appearing to read "DM", is written over the typed name "David Michaels, PhD, MPH".

David Michaels, PhD, MPH

CC: Kristen Smith, Counsel for BNSF Railway Company
Roger Nober, Executive Vice President Law and Secretary, BNSF Railway Company
Amy C. Hawkins, Vice President, Government Affairs, BNSF Railway Company
Justin Wormmeester, Director, Government Affairs, BNSF Railway Company
Paul Bovarnick, Counsel for Complainants (0-1960-12-026 and 4-1760-12-017)
Daniel R. Francis, Counsel for Complainant (4-0350-11-050)
Louis Jungbauer, Counsel for Complainant (0-0160-12-008)
Mike Futhy, International President, United Transportation Workers
Dennis R. Pierce, National President, Brotherhood of Locomotive Engineers and
Trainmen
Freddie N. Simpson, President, Brotherhood of Maintenance of Way Employees Division
of the IBT

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June 25, 2012

David Michaels, Ph.D., M.P.H.
Assistant Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: OSHA Whistleblower Confidentiality

Dear Dr. Michaels,

I am in receipt of your letter dated June 1, 2012, concerning a request by legal counsel for BNSF Railway Company ("BNSF") that the Occupational Safety and Health Administration ("OSHA") disclose the names of non-management employee witnesses to them, and an assertion that BNSF legal counsel must be present at interviews OSHA conducts in the agency's investigation of complaints filed pursuant to the Federal Railroad Safety Act ("FRSA") and 49 U.S.C. Section 20109.

Dr. Michaels, I first wish to thank you for your inclusion of the BLET in your response to the outrageous position taken by BNSF in an attempt an "end run" around the clear and unambiguous statutory protections. BNSF's effort to insert itself into a situation where employee confidentiality is key to providing a fair, harassment free and impartial investigation of an incident is reprehensible.

I also want to thank you for your strongly worded rebuke of BNSF's request and its position, as well as your affirmation of the obligations and responsibilities of both OSHA and the railroad in matters related to the FRSA and the protections for employees that it provides. BNSF's utterly disingenuous offer of "representation" for its non-management employees in these matters is nothing more than a transparent attempt to limit its exposure under the law, and would impose additional harassment through subterfuge to impede your investigations. I applaud your efforts, and support your position in respecting employee confidentiality as complete, unequivocal and paramount in cases such as this.

Sincerely,

National President

David Michaels, Ph.D., M.P.H.

(2)

June 25, 2012

cc: E. L. Pruitt, First Vice President
W. C. Walpert, National Secretary-Treasurer
J. P. Tolman, Vice President and National Legislative Representative
BLET Advisory Board
M. S. Wolly, Esquire, General Counsel



News Release

Connect with DOL at
<http://social.dol.gov/>



U.S. Department of Labor
Office of Public Affairs
Atlanta, Ga.
Release Number: 12-1028-ATL

For Immediate Release
Contact: Michael D'Aquino
Phone: 404-562-2076
Email: d'aquino.michael@dol.gov

June 18, 2012
Michael Wald
404-562-2078
wald.michael@dol.gov

Norfolk Southern Railway Co. ordered by US Labor Department's OSHA to pay more than \$800,000 after terminating injured workers *Investigation found violations of Federal Railroad Safety Act whistleblower provisions*

WASHINGTON – The U.S. Department of Labor's Occupational Safety and Health Administration has found that Norfolk Southern Railway Co. violated the whistleblower protection provisions of the Federal Railroad Safety Act and consequently has ordered the company to pay three whistleblowers \$802,168.70 in damages, including \$525,000 in punitive damages and attorneys' fees. Additionally, the company has been ordered to expunge the disciplinary records of the whistleblowers, post workplace notices regarding railroad employees' whistleblower protection rights and provide training to its employees about these rights.

Three concurrent investigations were completed by OSHA's offices in Columbia, S.C.; Nashville, Tenn.; and Harrisburg, Pa. The investigations revealed reasonable cause to believe that the employees' reporting of their workplace injuries led to internal investigations and, ultimately, to dismissals from the company.

A laborer based in Greenville, S.C., was terminated on Aug. 14, 2009, after reporting an injury as a result of being hit by the company's gang truck. The railroad charged the employee, a laborer, with improper performance of duties. OSHA found that the employee was treated disparately in comparison to four other employees involved in the incident. The laborer was the only employee injured and, thus, the only employee who reported an injury. He also was the only employee terminated. OSHA has ordered the railroad to pay punitive damages of \$200,000 as well as compensatory damages of \$110,852 and attorney's fees of \$14,325.

In Louisville, Ky., an engineer at a Norfolk Southern facility was terminated on March 31, 2010, after reporting an injury as a result of tripping and falling in a locomotive restroom. The railroad, after an investigative hearing, charged the employee with falsifying his injury. OSHA found that the investigative hearing was flawed and orchestrated to intentionally support the decision to terminate the employee. OSHA has ordered the railroad to pay the employee \$150,000 in punitive damages, \$50,000 in compensatory damages and \$7,375 in attorney's fees.

On July 22, 2010, a railroad conductor based in Harrisburg, Pa., was terminated after reporting a head injury sustained when he blacked out and fell down steps while returning from the locomotive lavatory. The company, after an investigative hearing presided over by management officials, found the employee guilty of falsifying a report of a work-related injury, failing to promptly report the injury, and making false and conflicting statements. The day before the injury, the employee had been lauded for excellent performance, highlighted by no lost work time due to injuries in his 35-year career. OSHA found that the investigative hearing was flawed, and there was no evidence the employee intended to misrepresent his injury. OSHA is ordering the railroad to pay the employee \$175,000 in punitive damages, \$76,623.27 in back wages plus interest and \$17,993.43 in compensatory damages, as well as all fringe benefits.

-- more --

US DEPARTMENT OF LABOR NEWS RELEASE – PAGE 2

“Firing workers for reporting an injury is not only illegal, it also endangers all workers. When workers are discouraged from reporting injuries, no investigation into the cause of an injury can occur,” said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. “To prevent more injuries, railroad workers must be able to report an injury without fear of retaliation. The Labor Department will continue to protect all employees, including those in the railroad industry, from retaliation for exercising these basic worker rights. Employers found in violation will be held accountable.”

These actions follow several other orders issued by OSHA against Norfolk Southern Railway Co. in the past year. OSHA’s investigations have found that the company continues to retaliate against employees for reporting work-related injuries and has effectively created a chilling effect in the railroad industry.

Any party to this case can file an appeal with the Labor Department’s Office of Administrative Law Judges.

Norfolk Southern Railway Co. is a major transporter/hauler of coal and other commodities, serving every major container port in the eastern United States with connections to western carriers. Its headquarters are in Norfolk, Va., and it employs more than 30,000 union workers worldwide.

OSHA enforces the whistleblower provisions of the FRSA and 20 other statutes protecting employees who report violations of various securities laws, trucking, airline, nuclear power, pipeline, environmental, rail, maritime, health care, workplace safety and health regulations, and consumer product safety laws.

Under the various whistleblower provisions enacted by Congress, employers are prohibited from retaliating against employees who raise various protected concerns or provide protected information to the employer or to the government. Employees who believe that they have been retaliated against for engaging in protected conduct may file a complaint with the secretary of labor for an investigation by OSHA’s Whistleblower Protection Program. Detailed information on employee whistleblower rights, including fact sheets, is available online at <http://www.whistleblowers.gov>.

Note: The U.S. Department of Labor does not release names of employees involved in whistleblower complaints.

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