WHISTLEBLOWER PROTECTION FOR RAILROADERS

A QUICK GUIDE TO 49 USC 20109

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To: **Railroad Clients**

From: **John D. Roven**

Re: **49 USC 20109 "Whistleblower Protection" under the Federal Rail Safety Act**

The Federal Rail Safety Act was originally passed in 1970 as the first comprehensive set of safety laws to apply to all interstate carriers. For many years, the FRSA was administered only by the Federal Railroad Administration and was confined mostly to "online" safety issues.

In 2008 things changed. The FRSA was amended by Congress to include a new set of homeland security and worker protections which are now commonly known as "The Whistleblower Act". The idea was a basic one; to protect workers who report injuries, as well as safety and security hazards. This is accomplished by preventing Railroads from unfairly firing, investigating, disciplining or discriminating against one who reports an injury, or what they believe to be a violation of any safety rule or regulation. In order to enforce these provisions, congress gave OSHA the power to investigate and enforce the new law.

It is now unlawful for a railroad to retaliate against any employee who reports or attempts to report a personal injury or a safety violation. It is also unlawful for a railroad to interfere with an injured employee's medical treatment. For example, it is considered unreasonable for the railroad to send a supervisory employee into an examining room while an injured employee receives treatment or care from his doctor. Furthermore, because of past abuses by railroad supervisory personnel, an injured employee must be brought to the nearest hospital, where the employee can receive safe and appropriate medical care. No longer can a railroad transport an injured employee many miles simply to get him to the hand selected "company doctor".

Congress gave OSHA abundant powers to remedy violations of the Whistleblower Act. This includes back pay with interest, award of attorney's fees, and in egregious circumstances, the right to receive punitive damages.

We believe that the "Whistleblower Act" will go a long way in promoting safety and job security on the nation's railroads. There is no question that the new law has certainly lessened Carrier retaliation against persons who legitimately report injuries and seek medical care.

This pamphlet is a quick introduction to this important new issue in Railroad Law. Remember however that every worker's situation is unique and the whistleblower laws are quite new and have not yet been interpreted by the courts. If I can answer any questions or update you as to decisions under this new law, do not hesitate to call.

Fraternally,

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MEDICAL TREATMENT WHEN INJURED

The law says:

"If transportation to a hospital is requested by an employee who is injured during the course and scope 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."

Comments:

- Notice that the law requires transportation of an injured worker to the nearest hospital. The railroad may not direct a supervisor to take an injured worker to a company physician, a "doc in the box clinic", or any other type of private medical office.

- Of course, you can waive this right if you agree. But the choice is yours, not the Railroad's.

- The railroad may not delay or interfere with the medical or first aid treatment of any employee who is injured. This also means that if your doctor has not released you for duty, the railroad may not demand that you immediately see a company doctor for a return to work evaluation.

- The railroad my not bring charges against a person in a disciplinary proceeding or otherwise terminate, suspend, reprimand or place on probation an employee who is following his doctor's treatment plan.

- It is also unlawful for a railroad to have a supervisor or company officer present when you are being evaluated by a physician unless you agree.

In summary, the "Whistleblower Act" makes it unlawful for a railroad carrier to use "Discipline" to:

- ✓ Directly Interfere with an Individual's Medical Treatment
- ✓ Deny Benefits
- ✓ Threaten
- ✓ Reprimand
- ✓ Suspend
- ✓ Discriminate against
- ✓ Discharge
- ✓ Demote, or
- ✓ Fire…

Any person who notifies or attempts to notify the railroad of a work related personal injury or illness or of a safety or security hazard in the work place or on railroad property.

WHISTLEBLOWER ACT: ENFORCEMENT PROCEEDINGS

Q: How does the Whistleblower Act define "discipline"? How do I know whether the Railroad violated the Act?

A: It is not always a black and white issue. "Discipline" means the railroad bringing charges against an employee in a disciplinary proceeding, or suspending, terminating, or placing on probation, or viewing a written reprimand on an employee's record. Refusing to provide prompt medical attention or blatantly interfering with your doctor's treatment plan is also clear violation.

Q: What must I do to file a Complaint under the Whistleblower Act?

A: You must file a Complaint with your regional OSHA office no later than 180 days after the date the first discrimination or retaliatory act occurs.

Q: When does the 180 day clock start ticking for filing a FRSA complaint?

A: OSHA believes that the initial letter giving an employee notice of a disciplinary hearing or charge is an adverse action that begins the 180 day clock running. So you can't wait until punishment is actually assessed.

Q: Where do I send my Complaint?

A: See OSHA's "Whistleblower Fact Sheet" in this packet for the telephone number/location of your local OSHA office, or contact Designated Legal Counsel. Understand that OSHA prefers written complaints and that filing a written complaint will protect you under the short 180 day time limit. If you do not file your complaint within 180 days, it will be

disallowed. It is best to send your complaint by certified mail so you have a record of receipt by OSHA.

Q: What do I write in my complaint?

A: Set forth the basic facts concerning the incident. Provide OSHA with times, dates and places so they can be assured that your complaint is timely and that the correct regional office has received your complaint. Explain why or how you were discriminated against, especially if a co-worker was treated differently for the same activity. If you have a witness who can corroborate your complaint, be sure to list their name and telephone number. The Whistleblower Act protects the witness as well! OSHA will assign an investigator and will contact you for a more detailed interview and statement.

Q: What happens next?

A: After OSHA completes its investigation it will issue a decision. If your complaint is

found to be valid, OSHA has various remedies that it can impose including: reinstatement with back pay, interest on delayed back pay, attorney's fees and punitive damages of up to $250,000 in the most egregious cases. (Note: This is not the norm!)

If OSHA does not issue an opinion within 210 days of your filing date, an actual lawsuit (Civil Action) can be filed in Federal Court. After OSHA's decision is rendered, either party can request a review hearing before an administrative law judge. The administrative law judge will either agree with OSHA, modify OSHA's determination, or reverse OSHA's determination. The administrative law judge's opinion is ultimately reviewable by the OSHA's Review Board.

Important: A railroad employee may not seek remedies under the Whistleblower Act

and, at the same time, under another provision of law for the same allegedly unlawful act of the railroad.

For example, your Union may not be able to represent you before a Public Law Board for back pay if you have already filed an OSHA complaint for the very same discriminatory conduct.

Sometimes "you have to choose", but this does not mean that simply because a grievance has been filed by your union you automatically have given up whistleblower protection; particularly if the railroad has committed a second violation of your rights. In that case, you have the basis for a Railway Labor Act claim for the original harm and a Whistleblower claim for the second violation. This is an issue that requires thoughtful consideration and analysis of the best course available. If in doubt, call your Labor representative or Designated Legal Counsel for advice.

What other conduct by railroad management justifies a potential whistleblower claim?

- A railroad cannot use absences from work ordered by a treating doctor as a basis for attendance discipline. This means, for example, that an employee cannot be disciplined for insubordination when he follows his doctor's orders not to travel and thus refuses to attend a railroad medical department "fitness for duty" exam.
- Actively discouraging employees from filing injury reports or raising safety concerns.
- Formally charging an injured employee for falsifying an injury report without investigating, in good faith, the underlying cause of the particular injury and whether it is legitimate.
- Attempting to influence employee medical care or otherwise interfering with medical treatment
- Disciplining or bringing up on charges, employees who are following the orders or treatment plans or their treating doctors