



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,



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 Futhey, 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