



Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters

Freddie N. Simpson
President

Perry K. Geller, Sr.
Secretary-Treasurer

February 27, 2010

BMWED Efforts Preserve Strong Whistleblower Protection for Rail Workers

Washington, DC: After months of effort and engagement with the Occupational Safety and Health Administration/Department of Labor (OSHA), BMWED's substantial efforts have paved the way for strong whistleblower protection for BMWED members and all railroad workers nationwide.

On August 3, 2007, the Federal Rail Safety Act (FRSA), 49 U.S.C. Section 20109, was amended by *The Implementing Recommendations of the 9/11 Commission Act* to transfer authority for rail carrier whistleblower protections to OSHA. The law provides railroad workers with rights and remedies against unlawful carrier retaliation for reporting injuries and violations of federal laws and regulations related to railroad safety and security. In addition, the intent of the whistleblower law is to protect rail workers from retaliation for reporting hazardous safety or security conditions, refusing to work under certain conditions, or refusing to authorize the use of any safety- or security-related equipment, track or structure.

Since the whistleblower law went into effect, rail carriers have routinely raised a facile defense to Section 20109 whistleblower complaints, falsely claiming that a rail employee's grievance filed under the terms of the collective bargaining agreement became an "election of remedies" barring the filing of a complaint under Section 20109. Based upon that facile defense, OSHA/DOL initially adopted a policy which forced rail workers to forfeit their contractual rights in order to pursue a whistleblower complaint under Section 20109. After many months of intensive engagement by BMWED, OSHA/DOL has reversed its policy, effectively opening the door to genuine whistleblower protection for railroad workers as the Congress intended.

"This is a significant victory for BMWED and all of Rail Labor," said BMWED President Freddie N. Simpson. "The National Division Officers fully understood what was at stake, and our Executive Board approved the expenditure of funds necessary to take on this significant fight. The substantial efforts of our National Division Officers, BMWED legal counsel, and our legislative and safety departments have delivered this victory for BMWED and all of Rail Labor," said Simpson.

Whistleblower complaints must be filed within 180 days after an employee becomes aware of retaliatory action. Railroads found to have violated a rail worker's rights under Section 20109 may be ordered by OSHA/DOL to reinstate a dismissed employee, provide back pay, restore seniority and benefits, and provide other such relief to make an employee whole. In addition, railroad carriers can be ordered to pay punitive damages not to exceed \$250,000 for violation of the law.

"Thanks to the efforts of the BMWED, the tide has finally turned and railroads will now be held liable for their unlawful retaliation against rail employees," said Simpson. "Railroads will no longer be able to retaliate against railroad employees who report injuries and safety violations with impunity. This is a substantial victory for all of Rail Labor and every rail worker nationwide, and I am proud that BMWED led the way to this important victory,"

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OSHA FactSheet

Your Rights as a Whistleblower

You may file a complaint with OSHA if your employer retaliates against you by taking unfavorable personnel action because you engaged in protected activity relating to workplace safety and health, commercial motor carrier safety, pipeline safety, air carrier safety, nuclear safety, the environment, asbestos in schools, corporate fraud, SEC rules or regulations, railroad carrier safety or security, or public transportation agency safety or security.

Whistleblower Laws Enforced by OSHA

Each law requires that complaints be filed within a certain number of days after the alleged retaliation.

You may file complaints by telephone or in writing under the:

- *Occupational Safety and Health Act* (30 days)
- *Surface Transportation Assistance Act* (180 days)
- *Asbestos Hazard Emergency Response Act* (90 days)
- *International Safe Container Act* (60 days)
- *Federal Rail Safety Act* (180 days)
- *National Transit Systems Security Act* (180 days)

Under the following laws, complaints must be filed in writing:

- *Clean Air Act* (30 days)
- *Comprehensive Environmental Response, Compensation and Liability Act* (30 days)
- *Energy Reorganization Act* (180 days)
- *Federal Water Pollution Control Act* (30 days)
- *Pipeline Safety Improvement Act* (180 days)
- *Safe Drinking Water Act* (30 days)
- *Sarbanes-Oxley Act* (90 days)
- *Solid Waste Disposal Act* (30 days)
- *Toxic Substances Control Act* (30 days)
- *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century* (90 days)

Unfavorable Personnel Actions

Your employer may be found to have retaliated against you if your protected activity was a contributing or motivating factor in its decision to take unfavorable personnel action against you.

Such actions may include:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining

- Denying benefits
- Failing to hire or rehire
- Intimidation
- Reassignment affecting promotion prospects
- Reducing pay or hours

Filing a Complaint

If you believe that your employer retaliated against you because you exercised your legal rights as an employee, contact your local OSHA office *as soon as possible*, because you must file your complaint within the legal time limits. OSHA conducts an in-depth interview with each complainant to determine whether to conduct an investigation. For more information, call your closest OSHA Regional Office:

- *Boston* (617) 565-9860
- *New York* (212) 337-2378
- *Philadelphia* (215) 861-4900
- *Atlanta* (404) 562-2300
- *Chicago* (312) 353-2220
- *Dallas* (972) 850-4145
- *Kansas City* (816) 283-8745
- *Denver* (720) 264-6550
- *San Francisco* (415) 625-2547
- *Seattle* (206) 553-5930

Addresses, fax numbers and other contact information for these offices can be found on OSHA's website, www.osha.gov, and in local directories. Some complaints must be filed in writing and some may be filed verbally (call your local OSHA office for assistance). Written complaints may be filed by mail (we recommend certified mail), fax, or hand-delivered during business hours. The date postmarked, faxed or hand-delivered is considered the date filed.

If retaliation for protected activity relating to occupational safety and health issues takes place in a state that operates an OSHA-approved state plan, the complaint should be filed with the state agency, although persons in those states may file with Federal OSHA at the same time. Although the *Occupational Safety and*

Health Act covers only private sector employees, state plans also cover state and local government employees. For details, see <http://www.osha.gov/fso/osp/index.html>.

How OSHA Determines Whether Retaliation Took Place

The investigation must reveal that:

- The employee engaged in protected activity;
- The employer knew about the protected activity;
- The employer took an adverse action; and
- The protected activity was the motivating factor (or under some laws, a contributing factor) in the decision to take the adverse action against the employee.

If the evidence supports the employee's allegation and a settlement cannot be reached, OSHA will issue an order requiring the employer to reinstate the employee, pay back wages, restore benefits, and other possible remedies to make the employee whole.

Limited Protections for Employees Who Refuse to Work

You have a limited right under the OSH Act to refuse to do a job because conditions are hazardous. You may do so under the OSH Act only when (1) you believe that you face *death or serious injury* (and the situation is so clearly hazardous that any reasonable person would believe the same thing); (2) you have tried to get your employer to correct the condition, and there is no other way to do the job safely; and (3) the situation is so urgent that you do not have time to eliminate the hazard through regulatory channels such as calling OSHA.

Regardless of the unsafe condition, you are not protected if you simply walk off the job. For details, see <http://www.osha.gov/as/opa/worker/refuse.html>. OSHA cannot enforce union contracts or state laws that give employees the right to refuse to work.

Whistleblower Protections in the Transportation Industry

Employees whose jobs directly affect commercial motor vehicle safety are protected from retaliation by their employers for refusing to violate or for reporting

violations of Department of Transportation (DOT) motor carrier safety standards or regulations, or refusing to operate a vehicle because of such violations or because they have a reasonable apprehension of death or serious injury.

Similarly, employees of air carriers, their contractors or subcontractors who raise safety concerns or report violations of FAA rules and regulations are protected from retaliation, as are employees of owners and operators of pipelines, their contractors and subcontractors who report violations of pipeline safety rules and regulations. Employees involved in international shipping who report unsafe shipping containers are also protected. In addition, employees of railroad carriers or public transportation agencies, their contractors or subcontractors who report safety or security conditions or violations of federal rules and regulations relating to railroad or public transportation safety or security are protected from retaliation.

Whistleblower Protections for Voicing Environmental Concerns

A number of laws protect employees who report violations of environmental laws related to drinking water and water pollution, toxic substances, solid waste disposal, air quality and air pollution, asbestos in schools, and hazardous waste disposal sites. *The Energy Reorganization Act* protects employees who raise safety concerns in the nuclear power industry and in nuclear medicine.

Whistleblower Protections When Reporting Corporate Fraud

Employees who work for publicly traded companies or companies required to file certain reports with the Securities and Exchange Commission are protected from retaliation for reporting alleged mail, wire, or bank fraud; violations of rules or regulations of the SEC, or federal laws relating to fraud against shareholders.

More Information

To obtain more information on whistleblower laws, go to www.osha.gov, and click on the link for "Whistleblower Protection."

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For more complete information:



U.S. Department of Labor

www.osha.gov

(800) 321-OSHA