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MEMORANDUM

To: John Previsich

From: Larry Mann *LM*

Re: The whistleblower law covers off duty illnesses and sickness, and a railroad's availability policies violate those provisions.

The relevant statutory provision:

49 U.S.C. 20109(c)(2) provides, *inter alia*, that a carrier or person covered by the law may not discipline, or threaten discipline to, an employee for following orders or a treatment plan of a treating physician. For purposes of this section, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Analysis:

The first issue is whether the above provision is limited to injuries, and doesn't cover illness and sickness. The answer is that illness and sickness are also covered. In the legislation, section 20109(c)(1) covers the interference with requests for medical attention when injured. Subsection(2) does not limit the protections to injuries only. It covers any medical condition.

Railroads have argued that subsection (2) is limited to illness and sickness which occurs during the course of employment. That issue was decided recently by the highest appeals tribunal in the Department of Labor, the Administrative Review Board, in a case entitled Bala v. Port Authority Trans-Hudson Corp., ARB Case No. 12-048(Sept. 27, 2013). In that decision, the ARB concluded at 7-10 that the protection afforded by 20109(c)(2) protects railroad employees from discipline for following a physician's orders for off duty sicknesses or illnesses. The ARB correctly analyzed the legislative history and pointed out that subsection (1) is limited to injuries occurring during the course of employment. However, subsection (2) does not contain that limitation. *See*, H.Rep. No. 110-336(Sept. 19, 2007), and Sen. Rep. No. 110-270(Mar. 3, 2008).

The next issue is whether an employer's attendance policy is a "discipline" under Section (2). An attendance policy was at issue in the Bala case, and the ARB held at 14-15 that Mr. Bala suffered an adverse action within the meaning of discipline under the law.

While the railroad may appeal Bala, I am convinced that the law is clear and that the ARB decision is valid and will be upheld by a court of appeals.