



## Accord Regarding BNSF Policies

The Occupational Safety and Health Administration ("OSHA") and BNSF Railway Company ("BNSF") have reached an accord as described herein with respect to certain BNSF policies and practices as they may relate to OSHA's jurisdiction under the employee-protection provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 5 20109 ("Accord").

In conjunction with this Accord, BNSF, through OSHA, has extended settlement offers to the complainants in the individual pending OSHA complaints, listed by case number in Attachment A, according to the individual terms and conditions specified in the individual Settlement agreement offers for each such complaint. If any or all of the individual complainants accepts the terms of the offer communicated to the complaint by OSHA, OSHA will approve the resulting settlement agreement(s). Any individual complainant's decision to accept or reject the settlement offer communicated to it by OSHA shall not affect the validity of this Accord.

### I. Policy for Employee Performance Accountability ("PEPA")

- A. BNSF has previously revised its PEPA, a progressive-discipline policy, effective August 1, 2012, so that whether an employee has been injury free during the five years preceding his or her first serious incident is no longer a consideration when determining the length of an employee review or probationary period for a serious rule violation.
- B. BNSF has previously reduced to 12 months all active 36-month review or probationary periods which were assessed to an employee because that employee had sustained an on-duty personal injury within the previous five years.
- C. BNSF has issued written notice to each employee affected by Paragraph I (B) that his or her review period has been reduced from 36 to 12 months.
- D. BNSF will further revise its PEPA by revising item 7 in Appendix B to read as follows:

"7) Rule violation that could result in serious collision and/or derailment, serious injury to another employee or the general public, fatality, or extensive damage to company or public property"

BNSF will make this revision no later than 60 days after signing this Accord.

### II. Personal Performance Index ("PPI")

As of August 31, 2012, BNSF no longer uses a PPI, whereby employees accrue points corresponding to on-the-job injuries, to select employees for enrollment in the Employee Review Process or for any other purpose.

### III. Employee Review Process ("ERP")

- A. As of August 31, 2012, BNSF froze enrollment of additional employees into the ERP.
- B. BNSF resumed enrollment of ERP participants in late 2012, without using the designations "ERP A," "ERP B," or "ERP C" when enrolling participants.
  1. As of January 1, 2013, for each participant enrolled into the ERP:
    - a) BNSF will specifically communicate the reason to the participant in writing, and
    - b) the reason for enrolling an employee will not be that the employee reported an on-duty personal injury.
  2. An employee who is enrolled in the ERP within six months of reporting an on-duty personal injury may, within 30 days of his or her enrollment, submit a written request to have the circumstances for his or her enrollment reviewed by his or her General Manager or other equivalent senior officer.
  3. The current criteria for selecting employees to participate in the ERP are attached as Attachment B.

### IV. Management Review Process

- A. No later than 60 days after all parties sign this Accord, BNSF's discipline-review process will include a process for an additional review of cases in which an employee who reports an on-duty personal injury is also assessed discipline related to the incident giving rise to the injury report.
- B. The process will provide for review that (1) occurs before discipline is issued and (2) includes consultation with both:
  1. a high-level BNSF manager (such as a General Manager, Assistant Vice-President, or other high-ranking BNSF officer); and
  2. an attorney from BNSF's Law Department.
- C. Nothing contained in this Paragraph IV of the Accord, or elsewhere in this Accord, is intended to waive BNSF's attorney/client privilege or change the terms of any collectively bargained agreement.

### V. Review of Other Policies

No later than 120 days after all the parties sign this Accord, BNSF will complete its review of its personnel policies that concern employee discipline-such as its Policy for Employee Performance Accountability and TY&E Attendance Guidelines- to ensure those policies fully comply with the employee-protection provisions of the FRSA.

### VI. Non-admission of Liability

- A. It is understood and agreed that this Accord does not in any manner constitute an Admission of liability or wrongdoing on BNSF's part. BNSF expressly denies any such liability or wrongdoing and enters into this Accord in compromise and voluntary resolution of disputed claims for the sole purpose of avoiding further litigation and expense.
- B. This Accord is strictly between BNSF and OSHA.

**VII. Communication**

- A. No later than 60 days after all the parties sign this Accord, BNSF will communicate to its scheduled employees the revisions it has made to its PEPA, PPI, and ERP.
- B. BNSF will provide OSHA with a copy of the written, official communication issued pursuant to paragraph VII (A).
- C. BNSF will include in the communication a statement notifying employees that they can:
  - 1. obtain a copy of their employee transcript by requesting it from their regional HR official; and
  - 2. request review of the basis for their enrollment as an active participant in the ERP, as provided in Paragraph 111.
- D. Respondent will post on its employee intranet a link to the OSHA Fact Sheet entitled Whistleblower Protection for Railroad Workers.

**VIII. Training**

- A. Within 60 days of all parties' signing this Accord, BNSF will develop and begin implementing a training program with an opportunity for questions and answers designed to reinforce compliance with the FRSA's anti-retaliation requirements ("FRSA training").
- B. This FIISA training will (1) further communicate BNSF's revisions to its PEPA Policy, PPI, and the ERI, and (2) educate attendees on employees' rights and a railroad's responsibilities under the FRSA.
- C. The parties agree that the appropriate primary audience for this FRSA training would be:
  - 1. Operations managers;
  - 2. First-line field supervisors;
  - 3. Labor Relations professionals; and
  - 4. Human Resources professionals.
- D. BNSF will make reasonable good-faith efforts to complete this FRSA training for Operations managers, Labor Relations professionals, and Human Resources professionals within the first six months 01-2013, and will provide training to First-line field supervisors as part of its annual supervisor certification training as discussed below.
- E. BNSF will incorporate into its annual supervisor certification training additional training on the FRSA's anti-retaliation provisions. BNSF will make reasonable good-faith efforts to incorporate this training as part of its next cycle of annual supervisor certification training. The supervisor certification training is given to all supervisors annually and will provide refresher training to incumbent supervisors and new training to all recently hired or promoted supervisors.

**IX. Effect of Accord**

- A. OSHA appreciates the constructive manner in which BNSF has worked with OSHA to reach this Accord, and BNSF's approach in revising its involved policies is viewed constructively by the Agency.
- B. Except to the extent necessary to enforce the terms and provisions of this Accord as part of an enforcement action brought by OSHA, the parties agree that neither this Accord nor any part of it may be construed, used, or admitted into evidence in any judicial, administrative, or arbitral proceedings.
- C. As a result of the changes set forth in this Accord, OSHA will sign and approve the settlements in the complaints listed in Attachment A if the offers made through OSHA are accepted by the complainants.
- D. Except as provided in this Accord and in the individual settlements listed in Attachment A, this Accord in no way restricts the authority of the Secretary of Labor in finding that BNSF violated 49 U.S.C. 5 20109 in any current or future complaint filed with OSHA where warranted.

**SIGNATURES:**

For BNSF Railway Co.:

For Occupational Safety and Health Administration:

Name: Charles Shewmake  
 Title: Vice President and General Counsel

Name: Richard E. Fairfax  
 Title: Deputy Assistant Secretary of Labor

Signed this 10<sup>th</sup> day of January, 2013

Signed this 11<sup>th</sup> day of January, 2013

Attachment A

**Cases Where OSHA Will Approve Settlement Agreements  
 If Signed by Complainant**

8-0370-12-035  
 4-1760-12-017  
 7-3620-10-024  
 9-3290-11-006  
 7-5880-12-009

0-1650-12-003  
6-3285-11-030  
7-5880-12-011  
0-0160-12-015  
7-7080-11-085  
0-1960-11-024  
0-1960-12-010  
7-4120-11-008  
7-4120-11-094  
7-7080-11-065  
7-5880-11-089  
6-2450-13-013  
8-0100-11-001  
5-6850-11-010  
6-2450-12-088  
7-2260-11-019  
8-0370-12-001  
5-4760-12-001  
8-0 00-12-045  
7-7080-12-016  
0-1960-12-026  
6-4140-11-023  
7-7080-11-033  
7-7080-12-015  
6-0030-11-006  
7-7080-12-017  
8-0740-12-017  
0-1960-11-031  
6-0030-11-004  
no case number  
no case number

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Attachment B

#### ERP Enrollment Criteria

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Employees will be identified as potential candidates for ERP based on the following:

- Human factor rail equipment incident
- Critical operations testing failure
- Three non-critical operations testing failures ( 12 month period)
- Discipline event (Includes attendance, if there are two or more attendance events)

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