

U.S. Department of Labor

**Occupational Safety and Health Administration
201 Varick Street, Room 670
New York, NY 10014
Tel: (212) 337-2365
Fax: (212) 337-2371**



April 6, 2010

Richard W. Schleifer, Esq.
Deputy Attorney General, counsel to
New Jersey Transit Corporation
One Penn Plaza East – 4th Floor
Newark, NJ 07105

Via Federal Express #8626 8898 2617

RE: New Jersey Transit Corporation /Araujo/2-2140-08-013

Dear Mr. Schleifer:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Anthony Araujo (Complainant) against New Jersey Transit Corporation (Respondent) on July 28, 2008, under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. In brief, Complainant alleged that in retaliation for reporting a work related lost time illness, NJTR charged complainant with disciplinary offenses, cancelled his EAP pay and suspended him from work, which complainant believes is designed and intended to intimidate NJTR workers from reporting injuries and illnesses to the railroad.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102. Respondent provides commuter rail service to locations in the states of New York and New Jersey. Complainant began working for Respondent on April 19, 1989. Complainant is an employee within the meaning of 49 U.S.C. §20109.

On March 5, 2008, Complainant was issued a Notice of Disciplinary Investigation. The Notice charged complainant with electrical code violations in relation to an incident in which a contract worker was burned to death on February 25, 2008. On July 23, 2008, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the Federal Railroad Safety Act (FRSA) § 20109(a)(4). Complainant filed an amended complaint on November 4, 2008 alleging further adverse actions. As the complaint and amended complaint were filed within 180 days of the alleged adverse actions, they are deemed timely.

Since Respondent was notified of this complaint on July 30, 2008, Respondent has failed and refused to submit any position statement or any evidence in this case despite numerous requests to do so by the OSHA Investigator and Supervisory Investigator.

In their only written response, dated September 19, 2008, Respondent's Director of Safety Jeff P. Kovacs stated, "NJ TRANSIT sees no relevancy to the Federal Rail Safety Act (FRSA) Whistleblower Protection for Railroad employees based on the employee's allegations." On December 19, 2008 OSHA responded by letter that Complainant had raised a *prima facie* allegation of a violation of the FRSA and that "[w]e expect that Respondent will fully cooperate with our investigation."

Respondent still submitted no position statement or evidence. At some point, Respondent assigned this case to Richard W. Schleifer, Esq., Deputy Attorney General for the State of New Jersey. In a letter dated June 9, 2009, Mr. Schleifer requested a 30 day extension to provide an answer. Respondent never did provide any answer, position statement or evidence despite numerous requests by the OSHA Investigator. Respondent has not provided an answer to the complaint as of this date, nor has it made any witnesses available to the investigation. Therefore, the following findings of fact are based on the available evidence.

On February 25, 2008, Complainant was working as a conductor/flagman¹ on New Jersey Transit's Morristown line at the Roseville Interlocking. Complainant was working with an outside contracting crew. Complainant's responsibility was to protect the crew from oncoming trains but he was not responsible for the monitoring of the overhead catenary wires – this was the responsibility of other employees known as linemen. (Complainant states that the linemen were not present at the time of the incident although they should have been present.) A fatal incident occurred on this date² which Complainant described as follows in his complaint:

At approximately 2:22 pm I was standing at the rear of the truck when the crew came in contact with overhead catenary wires carrying 13,000 volts of electricity. There was a sudden loud and violent electrical arc explosion, producing a huge fireball that instinctively caused me to jump in fear for my physical safety. I saw that one of the contractor employees was on fire and screaming in pain. His co-workers were screaming for me to do something. I radioed 911 and the Railroad dispatcher. His co-workers could not put out the flames and he continued to burn and scream until the EMT arrived. The contractor worker was taken away on a stretcher and died the next day from his burns.

Complainant cooperated with the subsequent investigation into the incident by the New Jersey Transit Police. According to Complainant, he was told by NJTR General Superintendent Joseph Meade that he was not responsible for the accident and did nothing wrong. Complainant was not required to submit to alcohol or drug testing after the accident. If he had been suspected of being at fault in some way, testing

¹ "Conductors" also work as "flagman" (these are considered the same craft) since they are familiar and qualified with the signals and equipment.

² According to the FRA incident report (Incident #200802096) there were 5 reported injuries associated with this incident: 1) "Fatality" (contractor employee); 2) "Electric shock/burn, hand" (contractor employee); 3) "Emotional trauma/nervous shock" (railroad employee); 4) "Emotional trauma/nervous shock" (contractor employee); and 5) "Emotional trauma/nervous shock" (contractor employee). #3 above is presumably Complainant.

would have been required by FRA regulations.³ The two linemen were tested for drugs/alcohol and were both subsequently disciplined. Respondent's "Procedures Governing Critical Incidents" requires that the supervisor at the time of an incident inform the crew that EAP services are available and that EAP contact all members of the crew within 24 hours of the incident.

On February 26, 2008 complainant reported as ordered to corporate headquarters at 10:00 am where he was questioned until noon. Complainant again fully cooperated in the investigation, but he was distraught about the incident and had been unable to sleep the night before because of it. Complainant, through his union, requested that Complainant be allowed to go to EAP, specifically because he was upset and had not been able to sleep. When Superintendent Meade asked Complainant if he needed to see a NJT EAP supervisor, Complainant replied "yes" and was ordered to see NJT'S Senior EAP Counselor Kathleen Halczli. Complainant reported to EAP immediately as ordered.

Complainant was interviewed by Ms. Halczli and was referred to psychotherapist Elizabeth McCue for treatment of anxiety and Post Traumatic Stress Disorder (PTSD). Complainant began therapy which consisted of twice weekly visits. In addition complainant was referred to a psychiatrist, Dr. Alison Weiner, for medical treatment. Complainant was also examined by psychiatrist Dr. Roberto Figueroa. Medical evidence confirms that Complainant was suffering from anxiety/PTSD.

On February 26, 2008, the date of Complainant's initial visit with Dr. Halczli, he was instructed not to go to work but to go for treatment and continue meeting with her at EAP. On February 27, 2008 Complainant started to lose time from work and began to receive EAP payments pursuant to an agreement with the UTU. On February 27, General Superintendent Meade called Counselor Halczli to follow up on Complainant and was informed that Complainant would lose time for work. Mr. Meade reportedly told Complainant and Counselor Halczli that Complainant "manipulated" the counselor (i.e., that complainant was malingering).⁴

Complainant was not medically cleared to return to work until October 6, 2008, but on May 22, 2008 Mr. Meade called Complainant's voice mail and stated that he had discontinued Complainant's EAP pay.⁵ Yet Respondent did not allow Complainant to return to work until February 20, 2009 pending the outcome of the disciplinary investigation.

On March 5, 2008 Complainant was given a Notice of Disciplinary Investigation, charged with violating electrical operating instructions, despite Superintendent Meade's having assured Complainant that he had done nothing wrong in connection with the accident. Respondent held an investigation (hearing) beginning on December 11, 2008⁶ and as a result, issued a notice of discipline to Complainant on February 11, 2009 and a letter dated April 3, 2009 in which the discipline assessed was "Time Held Out Of Service To Apply." That is, the time that Complainant had already been kept out of work—from October 6, 2008 through February 20, 2009—satisfied the suspension, and he lost all wages for that time period.

³ 49 CFR 219.203(a) provides that "(a) *Employees tested.* (1)(i) Following each accident and incident described in § 219.201, the railroad (or railroads) must take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine specimens for toxicological testing by FRA." However, §219.203(a)(3) provides an exception "if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) or severity of the accident/incident."

⁴ According to Form FRA F 6180.55A for incident #200802096, Complainant's "days absent" were reported as 180.

⁵ Complainant still went to EAP sessions and had follow up calls with Counselor Halczli even after his EAP pay was stopped.

⁶ The hearing was reconvened on January 14, 2009 and January 27, 2009.

As a result of being denied EAP pay and the suspension, Complainant lost income from May 22, 2008 through February 20, 2009⁷. Complainant was forced to live off his credit cards, soon maxed them out and began to fall behind on his credit card payments. Complainant's credit rating plummeted. Prior to the retaliation, Complainant had a FICO score of 606 and was not behind on any credit card [or "bill"] payments according to his credit report. As of March 19, 2010, Complainant had a FICO score of 444 and was seriously delinquent on all his debts. Complainant's car was repossessed in October of 2009, the bank recently foreclosed on his home and Complainant's credit has been severely damaged. Complainant has suffered mental anguish due to this financial stress.

49 U.S.C. § 20109(a)(4) protects employees who notify the railroad carrier or the Secretary of Transportation of a work-related personal injury. Complainant engaged in protected activity when he reported a work-related illness to Superintendent Meade by stating that he needed to see an EAP counselor on February 26, 2008 and went to EAP. Respondent, having received the report of the incident, as well as having been present when complainant cooperated with the investigations and having asked Complainant if he wished to go to EAP on February 26, 2008 and having spoken with the EAP counselor on February 27, 2008, knew of the protected activity. It took adverse action against Complainant when it notified him of disciplinary hearing on March 5, 2008, less than one week after his work-related illness became a lost-time work-related illness, when it cut off his EAP pay on May 22, 2008, and when it did not permit him to return to work on October 6, 2008 (delaying his return until February 20, 2009) even though he was medically cleared to do so.⁸

The timing between Respondent learning of the lost time injury, bringing Complainant up on charges and then its decision to cut off Complainant's EAP pay is proof of nexus. Moreover, Respondent has proffered no defense, and there is no evidence of any motivation other than illegal retaliation. The evidence indicates that until Respondent learned of Complainant's reportable lost time injury, Complainant was not suspected of any wrongdoing in connection with the incident, as evidenced by not being tested for drugs or alcohol and being told by his supervisor after the accident that he had done nothing wrong. Yet, as soon as Complainant's illness became a lost time incident, Respondent retaliated, without regard for Complainant's rights.

Respondent's conduct in retaliation against an employee for reporting an FRA reportable lost time injury exhibited reckless disregard for the law and complete indifference to complainant's rights. Respondent's complete disregard for the law and the rights of an employee under the FRSA warrants punitive damages.

A preponderance of the available evidence indicates that Complainant's reporting of his work related illness was a contributing factor in the adverse actions taken against him. Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated FRSA. OSHA hereby orders the following to remedy the violation.

Order

⁷ Complainant received modest disability payments until October 6, 2008 but these payments did not come close to replacing his lost income.

⁸ Further, 49 U.S.C. § 20109(a)(6) protects employees who furnish information to, among others, any federal, state, or local law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual occurring in connection to railroad transportation. Complainant engaged in protected activity when he reported the incident to the dispatcher and cooperated in the investigation of the incident by the New Jersey Transit Police.

Respondent shall expunge all files and computerized data systems of disciplinary actions and references to disciplinary actions related to the incident on February 25, 2008.

Respondent shall pay Complainant \$23,350 in lost EAP benefit payments for the period of May 22, 2008 through October 6, 2008. Respondent shall pay interest at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code.

Respondent shall pay Complainant \$40,271 in lost wages for the period of October 6, 2008 through February 20, 2009. Respondent shall pay interest at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code.

Respondent shall restore all lost sick days, vacation days and other benefits, including retirement plan contributions, as well as any employer contributions and matches in 401(a) and 457 plans, resulting from the complainant's lost time between February 27, 2008 and February 20, 2009.

Respondent shall adjust Complainant's seniority on all rosters to reflect no break in time of service and give Complainant the seniority ranking of other employees who started their employment on April 19, 1989.

Respondent shall amend and/or expunge statements in complainant's personal file to reflect that no violation of policy and/or procedure on the part of Complainant contributed to Complainant's injury.

Respondent shall pay Complainant compensatory damages for pain and suffering in the amount of \$5,000; for the damage to Complainant's credit in the amount of \$50,000; for the loss of Complainant's car in the amount of \$12,297.08; and for the loss of Complainant's home in the amount of \$345,754.37. The total amount of compensatory damages due to Complainant: \$413,051.45

Respondent shall pay Complainant punitive damages in the amount of \$75,000 for its reckless disregard for the law and complete indifference to Complainant's rights.

Respondent shall pay Complainant's attorney's fees in the amount of \$17,915.00.

Respondent shall permanently post the Notice to Employees included with this Order in all of its stations in areas where employee notices are customarily posted.

Respondent shall provide to all employees a copy of the FRSA Fact Sheet and the Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry included with the Order.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
(202)693-7542, Facsimile (202)693-7365

With copies to:

Complainant

OSHA Regional Administrator
201 Varick Street, Room 670
New York, NY 10014


Department of Labor, Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under Federal Rail Safety Act are handled in accordance with the rules and procedures for the handling of AIR-21 cases. These procedures can be found in Title 29, Code of Federal Regulations Part 1979, a copy of which may be obtained at <http://www.osha.gov/dep/oia/whistleblower/index.html>.

Sincerely,



Robert D. Kulick
Regional Administrator

cc: Charlie C. Goetsch, Esq. (Via Federal Express #8626 8898 2628)
Chief Administrative Law Judge, USDOL/OALJ
USDOL/SOL-FLS
USDOL/SOL-Regional Solicitor, Region II
Federal Railroad Administration

OSHA FactSheet

Whistleblower Protection for Railroad Employees

Employees working for railroad carriers are protected from retaliation for reporting certain safety or security violations to their employers or the government.

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* (Public Law 110-53) to transfer authority for rail carrier employee whistleblower protections to OSHA, and to include new rights and remedies.

Covered Employees

Under FRSA an employee of a railroad carrier and its contractors and subcontractors are protected from retaliation for reporting certain safety and security violations.

In general, under FRSA a railroad carrier is covered if it provides any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area, certain commuter railroad services, and high-speed ground transportation systems that connect metropolitan areas. However, rapid transit operations in an urban area that are not connected to the general railroad system of transportation are not covered.

Protected Activity

If your employer is covered under FRSA, it may not discharge or in any other manner retaliate against you because you provided information to, caused information to be provided to, or assisted in an investigation by a federal regulatory or law enforcement agency, a Member or committee of Congress, or your company about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste or abuse of funds intended for railroad safety or security. Your employer may not discharge or in any manner retaliate against you because you filed, caused to be filed, participated in, or assisted in a proceeding under one of these laws or regulations. In addition, employees of railroad carriers are protected 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 structures.

Unfavorable Personnel Actions

Your employer may be found to have violated this statute if your protected activity was a contributing 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

Deadline for Filing a Complaint

Complaints must be filed within 180 days after the alleged unfavorable personnel action occurs (that is, when you become aware of the retaliatory action).

How to File a Complaint

An employee, or representative of an employee who believes that he or she has been retaliated against in violation of this statute may file a complaint with OSHA. It is important to note that FRSA prohibits complainants from filing multiple discrimination complaints under other laws for the same allegedly unlawful act of the employer.

The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. 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.

Complaints may be filed orally or in writing, 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.

Results of the Investigation

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue an order requiring your employer to reinstate you, pay back wages, restore benefits, and other possible relief to make you whole, including:

- Reinstatement with the same seniority and benefits.
- Payment of back pay with interest.
- Compensatory damages, including compensation for special damages, expert witness fees, and reasonable attorney's fees.
- Punitive damages not to exceed \$250,000, in certain cases.

OSHA's findings and order become the final order of the Secretary of Labor, unless they are objected to within 30 days.

Hearings and Review

After OSHA issues its findings and order, either party may request an evidentiary hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision and order may be appealed to the Department's Administrative Review Board for review.

If a final agency order is not issued within 210 days from the date your complaint is filed, then you have the option to file a civil action in the appropriate U.S. district court.

To Get Further Information

For more information on FRSA and other employee whistleblower protection provisions, including copies of the statutes and regulations, go to www.osha.gov and click on the link for "Whistleblower Protection."

For information on the Office of Administrative Law Judges procedures, decisions and research materials, go to www.oalj.dol.gov and click on the link for "Whistleblower."

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

Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry

Employees working for railroad carriers who notify, or attempt to notify, a railroad carrier, the Secretary of Transportation, or any Federal, State, or local regulatory or law enforcement agency, of a work-related personal injury or work-related illness are protected from retaliation under the Federal Rail Safety Act (FRSA), 49 U.S.C. 20109. Below are some answers to frequently asked questions about these employee whistleblower protections. The specific facts of every FRSA case will be different, so the information below may not apply in every instance.

Q: Who is protected under FRSA for reporting a work-related injury or illness?

A: The Federal Rail Safety Act protects public and private sector employees of railroad carriers, as well as employees of contractors and subcontractors of railroad carriers who report a work-related personal injury or work-related illness.

Q: Can a railroad carrier discipline an employee for reporting a work-related personal injury or work-related illness?

A: No. Reporting a work-related personal injury or work-related illness is specifically protected under FRSA.

Q: Can a railroad discipline an employee for violating safety rules which caused a work-related injury?

A: Yes. An employee can be disciplined for violating safety rules, but not for reporting the injury.

Q: Is it a violation of FRSA for a railroad to harass or intimidate an employee into not reporting an injury, or to report it as non-work related?

A: Yes. This violates FRSA.

Q: Is it a violation of FRSA for a railroad to classify an employee's work-related injury as not work-related?

A: Yes. If the railroad classifies a work-related injury as not work-related in an effort to avoid having the injury be "reportable" then this practice would violate FRSA.

Q: Is it a violation of FRSA for a railroad to force an employee to work against medical advice?

A: Yes. FRSA prohibits a railroad from requiring an employee to work against the orders of a treating physician. FRSA does not prohibit a railroad from requiring that an employee perform alternate duties that would be permitted under a treating physician's treatment plan.

Q: Is it a violation of FRSA for a railroad to discipline anyone who is injured on the job?

A: Yes. Except to the extent that a railroad may discipline an injured employee for violating work safety rules, a railroad may not discipline employees who get injured on the job. A policy or practice that disciplines employees who receive on-the-job injuries would violate FRSA.



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER BY THE U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION:

New Jersey Transit Corporation (NJ Transit) has been ordered to make whole an employee who was found to have been retaliated against for exercising his rights under the Federal Rail Safety Act (FRSA). NJ Transit has also taken affirmative action to ensure the rights of its employees under employee whistleblower protection statutes including the FRSA.

PURSUANT TO THAT ORDER, NJ TRANSIT AGREES THAT IT WILL NOT:

1. Discharge or in any manner discriminate against any employee because such employee has engaged in any activity, filed any complaint or instituted or caused to be instituted any proceeding under or related to the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53., or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself/herself or others of any right afforded by the FRSA.
2. Discharge, demote, suspend, threaten, harass, intimidate or in any other manner discriminate against an employee because such employee has reported a workplace injury or illness.
3. Deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course 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.
4. Discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

New Jersey Transit Corporation

Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE
MUST REMAIN POSTED AND MUST BE NOT ALTERED, DEFACED, OR COVERED BY
OTHER MATERIAL.**