U.S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
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August 15, 2011

Mr. Dane A. Freshour
Regional Director of Human Resources
BNSF Railway Company
2454 Occidental Ave. South, #2D
Seattle, WA 98134

RE: BNSF Railway Company/Wallis/0-1960-09-022

Dear Mr. Freshour:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Ms. Jeanette Wallis (Complainant) against BNSF Railway Company (Respondent) on May 8, 2009, and amended on June 22, 2009. This whistleblower complaint was filed under the Federal Railroad 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. L. No. 110-53. In brief, Ms. Wallis alleges that on or about March 9, 2009, she was suspended for 30 days without pay in retaliation for notifying BNSF Railway Company of a work-related personal injury. Ms. Wallis also alleged that BNSF brought charges forth against her in a disciplinary proceeding in retaliation for requesting medical and/or first aid treatment and for following the orders or a treatment plan of a treating physician.

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 (OSHA), Region 10, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §20109 and issues the following findings and preliminary order:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109 and §20102. Respondent is engaged in interstate commerce within the meaning of 49 U.S.C. §20109.

Complainant has been employed by Respondent since June 16, 2004. She held various job titles including Conductor, Brakeman, and Switchman. She was assigned to Respondent's facilities in Seattle, Washington. Complainant states she is a member of the Brotherhood of Locomotive Engineers and Trainmen. Complainant is an employee covered under 49 U.S.C. §20109.

On or about November 24, 2008, Respondent served a notice of disciplinary charges on Complainant requiring her appearance at an internal "investigative hearing" to determine whether she had violated one of Respondent's rules, and thus subject to discipline or termination.

As a result of the hearing, Complainant was formally disciplined and suspended for 30 days without pay. On May 8, 2009, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against her in violation of the FRSA. Complainant included in her FRSA complaint that Respondent discriminated against her for seeking medical treatment and following through with her doctor's treatment plan. Respondent was placed on notice of the FRSA complaint when it received a copy of it on May 26, 2009. Respondent did not formally respond to the allegation that it discriminated against Ms. Wallis for seeking medical treatment and following through with her doctor's treatment plan. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

On June 22, 2009, Complainant amended this whistleblower complaint. The amended complaint included the same suspension, except that it specifically referred to Respondent's disciplinary hearing as a separate adverse employment action which violated Section (c)(2) of the Act. The amended complaint was deemed to be timely filed.

The OSHA investigation revealed that Respondent has a policy of assigning forty points to employees, including the Complainant, after the employee reports a work-related injury. Respondent was put on notice about OSHA's concern with its points policy and given opportunities to respond. For example, on October 26, 2009, the OSHA investigator met with Respondent's Human Resources Manager in an effort to reach a fair and equitable resolution of the complaint. The investigator told the Human Resources Manager that OSHA believed the points policy was problematic in that it has the consequence of disciplining an employee who reports a work-related personal injury. The representative said he would discuss the policy with his superiors. On November 9, 2009, the representative sent OSHA an email message about Respondent's points policy. The Human Resources Manager wrote that "...on the face of the point system issue we know that there is statistical data suggesting that employee [sic] involved in an injury lack knowledge, training or behavioral focus. The point system simply helps us identify them so that additional support can be given." On August 11, 2010, the Regional Supervisory Investigator further discussed OSHA's concerns regarding the points policy with Respondent.[1] On August 20, 2010, Respondent sent OSHA a 5-page letter written by its legal counsel denying that the point policy violates §20109.[2]

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[1] On May 13, 2011, after the closing with Respondent, OSHA Region 10 Management met with Respondent's corporate officials for 3 hours. OSHA management advised Respondent of its concerns with Respondent's Personal Performance Index Point Distribution (PPI) policy applied to employees who are injured through no fault of their own and report the injury to Respondent.

[2] In October 2007, shortly after the FRSA was passed, the Congressional Committee on Transportation and Infrastructure held hearings about the impact of railroad injury, accident reporting and discipline policies on rail safety. One conclusion made by the Committee involved Respondent's unique points system. The Committee's written summary stated that Respondent's points policy "assigns 40 points for a FRA-reportable injury and 5 points for a non-reportable injury. The points are apparently assigned whether the injury is the fault of the employee or not. When an employee receives 40 points, he or she is automatically targeted with additional inspections and performance checks. The net effect to the employee is that suffering an FRA-reportable injury often places an employee in disciplinary jeopardy...BNSF reported to staff that they were re-evaluating their use of employee points system." (U.S. House of Representatives; Committee on Transportation & Infrastructure; *Summary of Subject Matter.* October 22, 2007.)

On November 16, 2008, Complainant experienced a work-related personal injury which later became the subject of this whistleblower complaint. On that day, Complainant was standing on a ladder outside a string of locomotives attempting to connect them with other railcars while, at the same time, giving radio and hand signals to a new employee, a hostler pilot. Complainant was neither operating nor in control of the locomotive. Both visual and verbal contact were lost between Complainant and the new employee. The string of locomotives that Complainant was riding on approached the other railcars at what Complainant perceived to be an unsafe speed. Complainant feared that the locomotives were going to collide and she might be thrown under the wheels of the moving locomotive. Complainant jumped from the moving train in order to avoid being hurt when the trains collided, and as a result, she injured her left knee.

The injury happened while Complainant was on duty, and on Respondent's property. Complainant's injury was work-related. Respondent reported the injury to the Federal Railroad Administration (FRA).

Complainant's injury was witnessed by the new employee who called Respondent's yard master. The yard master, in turn, contacted Respondent's train master. The train master was Complainant's immediate supervisor the day of the incident.

Respondent's train master said he immediately went to the locomotive and saw Complainant and two other employees. He said, "I asked [Complainant] what had happened and [Complainant] told me that she had hurt her knee." The train master called 911 and a fire engine. The train master then notified Respondent's terminal manager who arrived about the same time as the ambulance.

In an email message dated November 16, 2008 (the same day of the injury), the terminal manager wrote to his supervisors, "this is initial notification of a Northwest Division Employee Incident/Injury...Employee says she felt a pop in her left knee after climbing on the BNSF...the employee stated that she could not walk and requested emergency medical services...the employee has been removed and is being transported to Swedish Medical Center." Two days later, on November 18, 2008, the terminal manager wrote a contradictory email that stated, when he asked the Complainant "are you o.k.?...She did not respond."

When the ambulance arrived, the medics put the Complainant's leg in supportive wrapping and she was placed on a stretcher. Complainant was then taken by ambulance to Swedish Medical Center for medical treatment.

Respondent's train master and terminal manager followed the Complainant to the hospital and waited in the waiting area. While at the hospital, the terminal manager contacted the terminal superintendent about the injury. About three months later, the same terminal superintendent would preside over Respondent's disciplinary hearing and, subsequently, suspend the Complainant.

Complainant claims that Respondent interfered with her medical treatment and harassed her while she was at the hospital.[3] Both of Respondent's officials denied asking hospital staff to be admitted into Complainant's exam room. To the contrary, evidence shows that each official asked hospital staff more than once to gain entry into Complainant's exam room, but was denied. One of them told hospital staff that he would wait and drive Complainant home. When Complainant was informed of this, she told the staffer to tell Respondent officials to leave. Complainant was described as being "paranoid" and "a little scared" knowing that Respondent was waiting at the hospital and asking questions about her condition.

Two hospital personnel and a hospital security guard asked Respondent's officials to leave. Hospital personnel described Respondent's officials as being persistent about wanting to stay at the hospital after being asked to leave, and as appearing more concerned about themselves than about Complainant. Evidence indicates that the officials were frustrated that they were not given any information about Complainant. After the hospital security guard "put his foot down," the officials finally left. There was no evidence that Respondent's officials communicated with Complainant when she was at the hospital or influenced the care she received.

On November 16, 2008, Complainant was diagnosed, at the hospital, as having twisted her knee when she "jumped off a moving train" travelling approximately 5-8 miles per hour. Complainant was prescribed some pain medication and given crutches to use. A work restriction note for Complainant with this information on it was faxed to Respondent from the hospital.

The work restriction form was completed by Complainant's health care provider on November 16, 2008, and written on Respondent's form entitled "BNSF On Duty Injury Medical Status Form." Respondent's form includes a clause which states "Work Status: BNSF is committed to providing injured employees with every opportunity to maintain employment by making accommodations for work restrictions."

The health care provider wrote that Complainant was "able to return to restricted duty starting on November 16, 2008 ...until seen by orthopedist." Complainant was apparently put in crutches while at the hospital. Her restrictions included no walking on uneven surfaces, no stooping, bending, twisting, operating machinery or climbing ladders or working on unprotected heights. However, Complainant was able to "frequently" lift up to 10 pounds.

Although Complainant was given a work restriction of a treating physician and although Respondent claims that it is committed to accommodating work restrictions; nonetheless, Respondent placed her on medical leave without pay. On November 17, 2008, she was placed on unpaid leave under the Family and Medical Leave Act.

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[3] In March 2009, the FRA issued a Notice of Interpretation which states in pertinent part: Harassment and intimidation occur in violation of 225.33(a)(1) when a railroad supervisor accompanies an injured employee into an examination room, unless one or more of the exceptions listed in section II(B) of this notice exists." See Federal Register; Vol. 74, No. 59, March 30, 2009.

On November 17, 2008, Complainant completed and signed Respondent's form entitled "Employee Personal Injury/Occupational Illness Report." Complainant wrote she had a "knee injury" on November 16, 2008, which was caused by "jumping from locomotive to avoid collision." She further noted that the accident was caused by another person, by "BNSF's inadequate hostler training program" and by "inadequate radio procedure." She also wrote that she was taking medication and using crutches. Complainant faxed the completed injury report to Respondent's facilities that same day.

Respondent received Complainant's injury report within 72 hours of when the injury occurred. Even if Complainant was late in notifying Respondent, the railroad's policy prohibits taking a disciplinary action for late reporting of *muscular-skeletal injuries.* Respondent allows up to 72 hours for employees to notify the company of these types of injuries. By the time Respondent received the injury report, Respondent had sufficient information to discern how the injury had happened.

Subsequently, Complainant was assessed 40 points under Respondent's Personal Performance Index Point Distribution (PPI) policy. That policy, as previously discussed in these Findings, assigns an injured employee more points if the injury is reported to the Federal Railroad Administration, as Complainant's injury was, than if the injury is not reported to the FRA.[4]

Forty (40) points for a reportable injury is the largest number on Respondent's Point Distribution chart. Assignment of points is the single biggest factor in determining whether an employee will be placed in Respondent's Employee Review Process (ERP). The ERP, which lasts from six to twelve months, consists of coaching sessions with managers and field operations tests. These additional tests and any additional injuries may lead to additional assigned points and disciplinary action. Additionally, an employee's PPI rating also can affect the employee's ability to transfer to other jobs within the company. For example, Respondent's "craft transfer policy" dated 2004 states that employees who are "rated as a High Risk employee in their current craft...will not be considered for a craft transfer."[5]

On November 18, 2008, Complainant's attorney sent a letter to Respondent indicating that she was now represented by legal counsel. The letter asked Respondent to not have any direct contact with Complainant and, if additional documentation was needed, to contact her attorney.

On November 24, 2008, Respondent's official served a notice of disciplinary charges on Complainant. Respondent charged Complainant for not "being forthcoming with information regarding her injury sustained on November 16, 2008." Respondent's disciplinary charges were sent eight days after Complainant injured herself and sought medical treatment at the hospital.

On or about November 25, 2008, Complainant filed a claim in the U.S. District Court for the Western District of Washington under the Federal Employers' Liability Act ("FELA"),

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[4] A work-related personal injury, if it meets the criteria for "reportable," must be reported to the Federal Railroad Administration in accordance with federal regulations including 49 CFR 225.19.

[5] On May 1, 2010, Respondent revised its General Craft Transfer Policy; however, the policy continues to prohibit a "High Risk" employee from transferring.

45 U.S.C. 51 et seq., seeking damages for her knee injury caused by her employer's negligence. After receiving notice of Respondent's disciplinary charges, Complainant filed a Motion for Protective Order in her FELA case asking the court to enter an order preventing BSNF from requiring her to appear at the internal investigation and alleging that requiring her to appear at Respondent's disciplinary hearing would prejudice her FELA claim.

On December 5, 2008, Complainant had surgery on her injured knee.

On January 16, 2009, Complainant's Motion for Protective Order was granted by a Federal district court judge. The court ordered that Respondent could seek information from Complainant regarding her FELA claim only through the Federal Rules of Civil Procedure, could not conduct any form of examination or interrogation of Complainant outside the presence of her attorney, could not require Complainant to appear at the disciplinary hearing, and could not terminate Complainant for failing to appear at the hearing.

Respondent's disciplinary hearing was scheduled for December 4, 2008; however, it was rescheduled several times, and was not conducted until February 24, 2009. Respondent wrote in its notice of disciplinary charges that Complainant was "ineligible for alternative handling because she *failed to timely report the incident.*"

During the disciplinary hearing, Respondent's terminal manager discussed what he did while at the hospital where Complainant was being examined. The terminal manager acknowledged that he and the other company official were asked by a hospital security guard to leave the hospital. During the hearing, Respondent's terminal manager denied that he asked to be admitted into Complainant's exam room.

During the disciplinary hearing, Respondent's terminal manager said that Complainant was, in fact, forthcoming with information about her injury, but "not promptly." Respondent admitted, during the hearing, that Complainant had completed and submitted all of the required paperwork needed to report an injury. Further, Respondent acknowledged receiving information about the incident from other employees. The hearing shows that Respondent had sufficient information about how Complainant was injured in November 2008.

On March 9, 2009, Respondent disciplined Complainant by suspending her for 30 days without pay. Respondent's March 2009 disciplinary letter stated the following:

> *"This letter will confirm that as a result of formal investigation on February 24, 2009 at Seattle, Washington concerning your conduct and failure to be forthcoming with all information regarding a personal injury that occurred at Balmer yard at approximately 1030 hours on November 16, 2008 while working as a crew member...you have been issued a Level S30 Day Record Suspension for violation of General Code of Operating Rules 1.6 and 1.2.7 furnishing information. This letter will be placed in your personal file."*

Respondent's policy for deciding when to discipline employees with a 30-day suspension is found in its "General Notice No. 4; Revised Policy for Employee Performance Accountability" and dated

July 13, 2006. This policy states that "an employee involved in a serious incident will be given a 30-day record suspension." Respondent has a list of "serious rule violations" when suspending an employee for 30 days. This list does not include a violation of 1.2.7, furnishing information. However, the list includes violating Respondent's general code of operating rules 1.6, but indicates that such violation must be of a "serious" nature to justify a 30-day suspension. Although Respondent did not categorize Complainant's violation of 1.6 as *serious* per its policy, she was suspended anyway.

This policy also makes allowances for an automatic dismissal of employees who have a second serious incident within 36 months. The exception for automatic dismissal is when the employee has completed 5 years of service and has been "injury-free" for those 5 years. Complainant has not been injury-free for 5 years and her 2008 injury could jeopardize her job.

On October 19, 2009, Complainant's treating physician released her to return to work with a restriction and on October 26, 2009, Complainant reported to work. This was almost 11 months after her injury.[6] Complainant sought to return to work on a "trial basis."

When Complainant reported to work, Respondent would not allow her to perform any tasks until the protective order of January 2009 was clarified. Respondent said that the protective order prohibited it from having "any form of examination or interrogation" with the Complainant except through her attorney. Respondent indicated that any questions asked of Complainant might violate the court order. Furthermore, Respondent required Complainant to undergo a fitness for duty exam, and to meet with its employee assistance program prior to returning her to work as a conductor in a safety sensitive job.

In November 2009, Complainant agreed to take a fitness for duty test in order to return to work. However, Respondent would not agree to give her the fitness for duty test until she provided Respondent with all of her medical records from the time she was not working. It appears that some of the medical records were confidential, and it is not clear whether Respondent was entitled to all of them.

On December 15, 2009, Complainant's attorney mailed some of Complainant's medical records to Respondent so that she could take a fitness for duty exam. Complainant complied with Respondent's request in order for her to return to work by submitting requested medical documents and taking a fitness for duty exam.

On January 15, 2010, the Complainant was evaluated by a forensic psychiatrist. In the report, the forensic psychiatrist wrote that the Complainant's home was under foreclosure because she was not able to work for Respondent and collect wages. Also, that the Complainant separated from a long-term relationship and became the sole support for her child. The psychiatrist noted that the Complainant had undergone psychological and emotional injury caused by "company policies resulting in harassment regarding her filing of her injury report, the infliction of additional company discipline, i.e., potential points on her employment record, which in her mind could lead to termination; all of the psychological and emotional effects of the injury itself

[6] Complainant's work restriction involved using a leg brace until about January 2, 2010.

coupled with an intense and protracted chronic pain syndrome." The psychiatrist indicated that in his professional opinion, Respondent's mistreatment of the Complainant, her work-related injury and protracted pain caused her mental pain and suffering.

On January 28, 2010, Complainant's doctor stated that the Complainant had "reached maximum medical recovery," as of January 2, 2010.

In spite of being released to return to work with maximum medical recovery, Respondent continued to refuse to allow the Complainant to work. In February 2010, Respondent required the Complainant to be interviewed by Respondent's manager for its Employee Assistance Program (EAP) in "determining [Complainant's] ability to return to her safety sensitive job with the railroad."

The EAP manager sent the Complainant several forms to complete and return. On April 8, 2010, Respondent's EAP manager notified the Complainant that the company was not able "to consider you for return to duty until" her health care provider agrees that the Complainant is able to return to work.

On April 14, 2010, Complainant passed the fitness for duty exam. The physician who completed the exam wrote, in part, that Complainant had "rehabilitated satisfactorily." The physician also noted that no further treatment was needed for Complainant's injured knee, and there was no reason for restriction of [Complainant's] physical activities or work capacity resulting from the subject accident.

On or about June 4, 2010, Complainant returned to work even though her treating physician had already cleared her to return to work about eight months earlier, in October 2009, again on January 28, 2010, and again on April 14, 2010.

June 4, 2010, was the first time that Respondent allowed Complainant to return to work full time since she had been placed on unpaid FMLA leave in November 2008.

Complainant underwent counseling and therapy to deal with the psychological and emotional duress she endured when Respondent would not allow her to return to work. Complainant experienced great anxiety and stress which was caused by Respondent charging her with a disciplinary hearing, disciplining her, assessing 40 points and classifying her as "high risk," and preventing her from working and earning a salary even after she passed the fitness for duty exam.

Complainant was described as having an ongoing anxiety state. In January 2010, Complainant's home went into foreclosure because she had no salary even though she had been cleared by her doctor to return to work in October 2009. Complainant also separated from her partner of five years and she became a single parent. The strain of having to support her child without an income, in spite of being able to work, resulted in additional stress for Complainant. Complainant's mental pain and suffering were caused by Respondent's treatment of her as a result of her protected activity.

Complainant was involved in several activities protected under FRSA as follows: when she notified Respondent of her work-related personal injury on November 16, 2008; when she requested medical treatment for her work-related injury; when she followed the treatment plan of a treating physician at Swedish Medical Center rather than allowing Respondent's managers to enter her hospital room and possibly influence her treatment; when she filed this whistleblower complaint on May 8, 2009; and when it was amended on June 22, 2009. Respondent had knowledge of all of Complainant's protected activities.

Complainant was subjected to several unfavorable personnel actions. Complainant was charged with a disciplinary notice in November 2008, a disciplinary hearing was held, and she was subsequently disciplined in March 2009. Complainant also suffered unfavorable personnel actions when she was suspended from work for 30 days without pay, and when she received 40 points under the PPI policy.

The preponderance of evidence shows that Complainant's protected activities contributed to the unfavorable personnel actions. Section (a)(4) of the Act prohibits a railroad carrier from retaliating against an employee for notifying or attempting to notify the railroad of a work-related personal injury. Section (c)(2) of the Act prohibits respondent from disciplining or threatening to discipline an employee who requests medical treatment or follows the orders or treatment plan of a treating physician.

After Complainant notified Respondent of her injury, requested medical treatment, and followed the orders of her treating physician on November 16, 2008, she was assessed 40 points under Respondent's PPI policy, served a notice of disciplinary charges, and ordered to attend a disciplinary hearing.

Complainant's protected activities under the Act contributed to these adverse actions. The proximity in time (eight days) between Complainant's protected activities and service of the notice of disciplinary charges gives rise to an inference of a discriminatory motive by Respondent. In addition, Respondent's charge of failing to promptly report the injury was not supported by the facts available to Respondent when it made the charge. According to Respondent's policy, Complainant had up to 72 hours to report her injury, and she reported the injury within 72 hours. As of November 24, 2008, Respondent knew that Complainant had submitted all required injury reports within 72 hours of the injury.

During the hearing and later in an OSHA interview, Respondent's terminal manager and the second Respondent official who was present at the hospital on November 16 stated that they did not try to enter Complainant's hospital room. Respondent's bringing disciplinary charges shortly after Complainant refused to allow them access to her at the hospital and Respondent officials' refusal to acknowledge that they tried to enter Complainant's hospital room both indicate that but for Complainant's protected activity of seeking medical treatment and following the treatment plan of her treating physician, Respondent would not have brought charges against her or subjected her to a disciplinary hearing. In fact, one of the reasons why Respondent brought charges against the Complainant so soon after the injury was because its officials were not able to communicate with her while she was on pain medication and being treated at the hospital. Instead, the officials were forced to leave the hospital; and a mere 8 days later, Respondent

claimed that Complainant was not forthcoming with information, and charged her with a disciplinary hearing.

Complainant's protected activity was a contributing factor in Respondent's decision to discipline her and apply 40 points to her personnel record.

Respondent failed to provide any credible evidence to justify why it brought disciplinary charges against Complainant, and suspended her. Respondent has not demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior or conduct.

Respondent's non-discriminatory explanation for the suspension -- that Complainant reported her injury late -- is not credible. The evidence shows that Complainant reported her injury the same day that it occurred and had submitted the required injury report form to Respondent within 72 hours of the injury, as required by Respondent's policies. Respondent's official gave contrary information about how he learned of Complainant's injury. Two of Respondent's officials gave contradictory statements about attempting to enter Complainant's exam room at the hospital. Respondent said Complainant was not forthcoming with information or prompt about reporting her injury even though Respondent had received sufficient information in a timely manner about it.

Finally, Respondent retaliated against Complainant when it assigned 40 points to Complainant under its PPI policy. The assignment of 40 points was not based on Complainant violating a FRA safety regulation or rule, but was based instead on her having a reportable injury.

FRSA prohibits a railroad from discharging, demoting, suspending, reprimanding, or "in any other way" discriminating "against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done... to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee...." Pursuant to the PPI policy, Respondent assigned points to Complainant, thereby increasing the chance that she will be placed in an Employee Review Process and subject to other adverse consequences, because she reported a work-related injury. Respondent's enforcement of this policy against Complainant, to the extent that it punished her for reporting a work-related injury, violates FRSA.

In summary, a preponderance of the evidence indicates that Complainant's protected activities were a contributing factor in the unfavorable personnel action. Consequently, these Findings, concluding that there is reasonable cause to believe Respondent violated the Act, are accompanied by a Preliminary Order.

The following is a Preliminary Order which provides relief in accordance with 49 U.S.C. §20109 of the Federal Rail Safety Act.

Preliminary Order

1. Respondent shall pay Complainant back wages, at the hourly rate of $21.00 per hour for 30 business days from March 9, 2009, through April 17, 2009, minus any interim earnings. Respondent shall pay Complainant interest in accordance with 26 U.S.C. §6621, which sets forth the interest rate for underpayment of federal taxes.

2. Respondent shall pay Complainant compensatory damages in the amount of $125,000 for mental pain and suffering.

3. Respondent shall pay Complainant punitive damages in the amount of $150,000 based on its reckless and callous indifference to the legally protected rights afforded to Complainant.

4. Respondent shall expunge any adverse references from Complainant's personnel records relating to the suspension and not make any negative references relating to the suspension in any future requests for employment references.

5. Respondent shall remove and destroy the 30-day suspension dated March 9, 2009, from Complainant's personnel file. Respondent shall remove 40 points, and any other points, assessed on Complainant's "index score" as a result of her protected activity, i.e., notifying Respondent of her work-related personal injury on November 16, 2008.

6. Respondent shall pay Complainant's attorney's fees in the amount of $22,917.50.

7. Respondent shall post the OSHA Fact Sheet entitled, *Whistleblower Protection for Railroad Employees,* in a conspicuous place in or about its facility, including all places where notices for employees are customarily posted. Said Fact Sheet is attached.

8. Respondent shall post the enclosed *Notice to Employees* for 60 consecutive days to all its employees acknowledging its obligations under the whistleblower provisions of the Federal Rail Safety Act. Said Notice is attached.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to 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
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
PH: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:

William Jungbauer, Complainant's Attorney
Law Offices of Yaeger, Jungbauer & Barczak, PLC
2550 University Avenue West, Suite 345N
St. Paul, MN 55414

Dean Y. Ikeda, Regional Administrator
U.S. Department of Labor – OSHA
1111 Third Avenue, Suite 715
Seattle, WA 98101-3212

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 the complaint.

For more information about OSHA's Whistleblower Protection Program, please visit our website at: https://www.osha.gov/ and go to the link marked "Enforcement" and "Whistleblower Protection."

Sincerely,

Dean Y. Ikeda
Regional Administrator

Enclosures: (1) OSHA Fact Sheet entitled, Whistleblower Protection for Railroad Employees
(2) Notice to Employees

cc: William Jungbauer, Complainant's Attorney, via certified mail 7009 3410 0001 7957 8632
Richard P. Lentini, Respondent's Attorney, via certified mail 7009 3410 0001 7957 8649
Chief Administrative Law Judge, USDOL
Federal Railroad Administration, Washington D.C.

NOTICE TO EMPLOYEES

PURSUANT TO A PRELIMINARY ORDER ISSUED BY THE U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, THE EMPLOYER AGREES:

In Re the Matter of: BNSF Railway Company/Wallis/0-1960-09-022

THE EMPLOYER HAS BEEN ORDERED BY THE OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION TO PROVIDE ALL APPROPRIATE RELIEF FOR AN EMPLOYEE WHO WAS RETALIATED AGAINST FOR EXERCISING HER RIGHTS UNDER 49 U.S.C. §20109 OF THE FEDERAL RAILROAD SAFETY ACT (FRSA). THE EMPLOYER AGREES THAT IT WILL NOT DISCIPLINE, OR IN ANY OTHER WAY, DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS FILED ANY COMPLAINT OR INSTITUTED OR CAUSED TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THE EMPLOYEE PROTECTION PROVISIONS OF THE FRSA, OR HAS TESTIFIED OR IS ABOUT TO TESTIFY IN ANY PROCEEDING OR BECAUSE OF THE EXERCISE BY SUCH EMPLOYEE ON BEHALF OF HIMSELF, HERSELF OR OTHERS OF ANY RIGHT AFFORDED BY THIS ACT.

THE EMPLOYER AGREES THAT IT WILL NOT DISCIPLINE OR IN ANY OTHER WAY DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS NOTIFIED OR ATTEMPTED TO NOTIFY THE RAIL CARRIER OF A PERSONAL WORK-RELATED INJURY.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST EXERCISING RIGHTS GUARANTEED UNDER THE FRSA, INCLUDING THE RIGHT TO NOTIFY THE RAIL CARRIER OF A WORK-RELATED PERSONAL INJURY, AND THE RIGHT TO SEEK MEDICAL TREATMENT, AND/OR FOLLOW A MEDICAL TREATMENT PLAN, WHEN INJURED DURING THE COURSE OF EMPLOYMENT.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST CONTACTING, SPEAKING WITH, OR COOPERATING WITH FEDERAL RAILROAD ADMINISTRATION OFFICIALS, AND/OR WITH OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) OFFICIALS EITHER DURING THE CONDUCT OF A SAFETY-HEALTH INSPECTION OR DURING THE COURSE OF AN INVESTIGATION.

THE EMPLOYER AGREES THAT IT WILL NOT USE ITS "POINTS POLICY," AS RELATED TO INJURED EMPLOYEES WHO EXERCISE THEIR RIGHTS UNDER THE ACT, IN A RETALIATORY MANNER SUCH THAT IT CREATES A "CHILLING EFFECT" AND DISSUADES AN INJURED EMPLOYEE FROM REPORTING THE WORK-RELATED INJURY.

THE EMPLOYER FURTHER AGREES TO PERMANENTLY POST THE OSHA FACT SHEET ENTITLED, *WHISTLEBLOWER PROTECTION FOR RAILROAD EMPLOYEES,* IN A CONSPICUOUS PLACE IN ITS FACILITY, INCLUDING ALL PLACES WHERE NOTICES FOR EMPLOYEES ARE CUSTOMARILY POSTED. SAID FACT SHEET IS ATTACHED.

Matt Rose
Chief Executive Officer
BNSF RAILWAY COMPANY

DATE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL. ANY QUESTION CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE APPROVING OFFICIAL.