U.S. Department of Labor

Occupational Safety and Health Administration
230 South Dearborn Street Room 3244
Chicago, Illinois 60604
(312) 353-2220

FEB 2 7 2013

Tom Shumaker, General Attorney
Norfolk Southern
Three Commercial Place, 17th Floor
Norfolk, VA 23510

Re: Norfolk Southern/Gary Reichert/5-2210-11-005

Dear Mr. Shumaker:

This is to advise you that we have completed our investigation of the above referenced complaint filed against Norfolk Southern Railway Company (Respondent) by Gary Reichert (Complainant) on December 16, 2010, under the Federal Railroad Safety Act, 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 911 Commission Act of 2007, Pub. L. No. 110-53 (FRSA). Complainant, a Crane Operator, alleges he was terminated effective August 24, 2010, in reprisal for reporting a workplace injury to Respondent on June 21, 2010. Complainant was charged with violating Respondent's General Conduct Rule N and providing false and conflicting statements. After an investigative hearing, held on July 20, 2010, and continued on August 17, 2010, Respondent terminated Complainant on August 24, 2010.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator of the Occupational Safety and Health Administration (OSHA), Region V, finds reasonable cause to believe that Respondent violated 49 U.S.C. §20109. The Secretary of Labor, therefore, issues the following findings:

Secretary's Findings

Respondent is a freight railroad with approximately 21,000 route miles of track in 22 states and the District of Columbia. Therefore, Respondent is a railroad carrier engaged in interstate or foreign commerce within the meaning of 49 U.S.C. §§20102(3) and 20109.

Respondent's predecessor hired Complainant on May 6, 1976, and at all relevant times thereafter, Complainant worked in the position of Laborer and/or Hoisting Engineer in Respondent's Lake Division. Therefore, Complainant was an employee within the meaning of 49 U.S.C. §20109.

Respondent removed Complainant from service on June 22, 2010. Removal from service is an adverse action under FRSA. Id. at §20109(a). Respondent's termination of Complainant's employment on August 24, 2010, is also an adverse action under FRSA. On December 16, 2010,

Complainant filed a complaint with the Occupational Safety and Health Administration alleging that Respondent discriminated against him in violation of FRSA. An employee who alleges he was discharged, disciplined, or otherwise discriminated against in violation of FRSA may seek relief by filing a complaint with the Secretary of Labor no later than 180 days after the date on which the alleged violation occurred. Id. at §20109(d)(2)(A)(ii). The complaint in this matter, therefore, was timely filed.

FRSA prohibits a railroad carrier from discharging an employee if such discharge is "due, in whole or in part, to the employee's lawful, good faith act...to notify, or attempt to notify, the railroad carrier...of a work-related personal injury or work-related illness of an employee..." Id. at §20109(a)(4). In this case, Respondent contends that Complainant violated Respondent's General Conduct and Safety Rule N and provided false and conflicting statements and, therefore, did not engage in activity protected by FRSA.

During the week of June 14, 2010, Complainant was working with the Bridges and Buildings group in Muncie, Indiana assisting in bridge repairs and maintenance. During this assignment, Complainant was operating a crane in order to drive steel pilings into the ground in support of a bridge-building operation in Albany, Indiana. During this job, Complainant's direct supervisor was Gang Foreman Dave Smith.

On Monday, June 21, 2010, Complainant reported to his Muncie, Indiana work site and attended the morning safety and job briefing. Following the briefing, Complainant's crew travelled to Albany, Indiana to resume work on their assigned job. The weather conditions at the work site on June 21, 2010, included rain and lightning. As a result of the inclement weather, Complainant could not operate the crane on the job site.

Complainant reported to Mr. Smith that he had been experiencing irritation in his right eye that felt like "flash burn" and wanted to schedule an appointment with an eye doctor for the purpose of having his eye examined. Mr. Smith granted permission for Complainant to schedule the eye appointment. Complainant then contacted the Low Vision Center in Hartford City, Indiana and scheduled an appointment for the following day, June 22, 2010, in order to have his eye examined. Specifically, Complainant reported to the clinic that he wanted to have his eyes checked for diabetes, as well as for a continuing irritation Complainant was experiencing in his right eye. Shortly thereafter, an individual from the clinic contacted Complainant and offered an appointment for the same day, June 21, 2010, with a different doctor due to concern for the irritation Complainant was experiencing.

Complainant sought permission from Mr. Smith to attend the appointment that same day, which Mr. Smith granted. Complainant travelled to Hartford City, Indiana and attended the eye appointment. During the appointment, Complainant stated that he may have flash burn or something in his eye. Complainant indicated to the doctor that the flash burn likely occurred while he was at work. Complainant reported to the doctor that he had first noticed the irritation the previous week. Complainant stated that he believed he had sustained the injury the "last Tuesday or Wednesday" but could not pinpoint the exact date. The dates of the previous Tuesday or Wednesday were June 15th and June 16th, respectively. Complainant did not provide

the doctor with dates, but rather the days during which Complainant believed he had initially sustained the injury.

At 10:53 a.m. on June 21, 2010, the clinic contacted Respondent Bridge Supervisor Steve Ketola in order to obtain authorization for treatment of Complainant under Worker's Compensation. Mr. Ketola informed the clinic that Respondent is not covered under Worker's Compensation and requested to speak with Complainant. Complainant told Mr. Ketola that he believed he was suffering from flash burn, but did not know for sure. Following his conversation with Complainant, Mr. Ketola reported the incidents to Respondent Assistant Division Engineer John Geary. Complainant continued with his eye appointment, which ultimately resulted in the doctor finding and removing a sliver of metal and a rust ring from Complainant's right eye. After the appointment, Complainant returned to his work site.

Upon speaking with Mr. Ketola regarding Complainant's situation, Mr. Geary instructed Mr. Ketola to travel to Muncie, Indiana and conduct an investigation into the circumstances surrounding Complainant's injury. Complainant had returned from the eye clinic by the time Mr. Ketola arrived, and Mr. Ketola questioned both Mr. Smith and Complainant regarding Complainant's injury. Complainant told Mr. Ketola that he was unsure as to when the initial injury had occurred. Complainant explained that he had begun experiencing irritation in his eye the previous week. Complainant further explained that since it was a metal shaving that had been embedded in his eye, he believed that he sustained the injury while at work. Mr. Ketola reported the results of his investigation to Mr. Geary on June 21, 2010.

On June 22, 2010, Mr. Geary travelled to Muncie, Indiana in order to speak with Complainant regarding his injury and the resulting events. Upon arriving in Muncie, Indiana, Mr. Geary questioned Complainant "on and off for two hours" regarding the events surrounding his eye injury. Mr. Geary instructed Mr. Ketola to have Complainant return to the doctor and obtain a release authorizing Complainant to return to work. Complainant complied, and returned with a note from the eye clinic releasing Complainant to work with no restrictions. Mr. Geary continued questioning Complainant about the circumstances surrounding his injury. Complainant repeatedly told Mr. Geary that he was unsure as to the exact date of the injury. Mr. Geary later testified that Complainant told him that "if the doctor had found a, some dirt in his eye or a piece of wood of some sort, a splinter or whatever in his eye…it might have happened, you know, not at work. But since it was a piece of metal in his eye, he [Complainant] felt that it, it did happen at work."

Mr. Geary then told Complainant "if you don't know when it happened or how it happened or even what day it happened…I'd like a statement from you that says it didn't happen at work. If you don't know that it happened at work, then you don't know that it didn't happen at work." Complainant replied that he did not want to provide a statement to that effect. After questioning Complainant "for several hours" by this point, Mr. Geary told Complainant "well if I can't get a statement that it didn't happen at work, then I guess our only option is to fill out a Form 22," which is Respondent's form for reporting a workplace injury. Complainant then completed the Form 22 in the presence of Mr. Geary.

While filling out the Form 22, Complainant looked at a calendar for reference pertaining to the previous week's dates. Complainant indicated on the form that the injury had most likely occurred "on or about 6-13 or 6-14-10." June 13th and June 14th, 2010, correspond with Sunday and Monday of the previous week. Upon noticing the discrepancy, Mr. Geary immediately removed Complainant from service pending an investigation into the circumstances surrounding Complainant's report of injury.

On June 23, 2010, Respondent Division Engineer Richard Klinkbeil, Mr. Geary's direct supervisor, sent an e-mail to Respondent Staff Physician Dr. Charles Prible, who was located at Respondent's headquarters in Norfolk, Virginia. In the e-mail, Mr. Klinkbeil asked Dr. Prible "Is it possible for a person to have a piece of steel in their eye for a week before needing treatment?" Also on June 23, 2010, Dr. Prible replied "I suppose anything is possible, but not likely." Dr. Prible further explained that "Most people would seek treatment within hours or a day or so...I would think it highly unlikely that this occurred 8 or 9 days earlier and no one would have been aware of it or the individual would not have wanted relief from the symptoms." The evidence shows that Dr. Prible did not examine either Complainant or Complainant's medical records aside from the eye clinic's report stating that a foreign body had been removed from Complainant's right eye prior to issuing his opinion.

On June 29, 2010, Complainant received a Notice of Hearing letter informing him that Respondent would hold a hearing on July 20, 2010, to "determine your [Complainant's] responsibility, if any, in connection with violation of Norfolk Southern General Safety and Conduct Rule N in that on June 22, 2010, you reported an alleged injury which you alleged to have occurred on June 13 or 14, 2010; and making false and conflicting statements in connection with such alleged injury."

At 9:12 a.m. on July 20, 2010, the investigative hearing began. The Hearing Officer was Mr. Geary's direct supervisor, Respondent Division Engineer Richard Klinkbeil. During Mr. Geary's testimony at the hearing, Mr. Geary indicated that he had been the individual to ask Dr. Prible about the likelihood that anyone could have a piece of metal in their eye for as long as Complainant had claimed. However, the only evidence provided by Respondent showing Dr. Prible's response regarding the likelihood of Complainant's injury was an e-mail sent by Mr. Klinkbeil at the behest of Respondent Vice President of Engineering Tim Drake.

In addition, Mr. Klinkbeil asked Mr. Geary to testify as to whether or not Mr. Klinkbeil had taken "any active role investigating" the events surrounding Complainant's injury. Mr. Geary answered by stating "no." However, the e-mail exchange between Mr. Klinkbeil and Dr. Prible refutes the assertion that Mr. Klinkbeil had not taken an active role in the investigation into the events surrounding Complainant's injury. The evidence also shows that Mr. Geary testified that he spoke with Mr. Klinkbeil regarding the decision to remove Complainant from service.

Mr. Geary testified during the July 20, 2010, hearing that the basis for charging Complainant with making false and conflicting statements was the discrepancy between what Complainant reported to the eye clinic and what Complainant listed on the Form 22 regarding the date(s) on which Complainant's injury occurred. Specifically, Complainant indicated to the eye clinic that his injury had occurred the previous Tuesday (June 15th, 2010) or Wednesday (June 16th, 2010),

while Complainant reported on Respondent's Form 22 that the injury occurred "on or about" June 13th and June 14th, 2010. The evidence indicates that Complainant did not work on June 13, 2010, which was a Sunday. In explaining the discrepancy, Complainant stated that he had mistakenly looked at the month of July 2010 on a calendar when attempting to obtain the dates for the previous Tuesday and Wednesday. An examination of the 2010 calendar confirms that June 15th and June 16th, 2010, were a Tuesday and Wednesday, respectively. When examining the month of July 2010, it can be seen that the corresponding Tuesday and Wednesday are dated July 13th and July 14th, 2010, respectively. In addition, the information provided by Complainant to the eye clinic did not include numbered dates, but rather the names of the days Complainant believed he sustained the injury. As a result, the evidence supports Complainant's claim that the discrepancy was the result of a clerical mistake rather than a conscious attempt to provide false information. The evidence does not show that Mr. Geary made an effort to immediately resolve the discrepancy with Complainant by asking Complainant about the difference between the two reports. Mr. Geary testified that "the information that was gathered from the Form 22 that afternoon of the 22nd was contradictory to the information that had been retrieved prior to that. I felt like I had no other choice but to take Mr. Reichert out of service at that time."

At 1:10 p.m. on July 20, 2010, Mr. Klinkbeil, as Hearing Officer, halted the hearing due to the absence of a witness, Foreman Dave Smith, whose testimony was determined to be necessary. Mr. Klinkbeil stated that Mr. Smith was on a scheduled two-week vacation, and that the hearing would have to be continued after Mr. Smith's return from leave. The hearing concluded on August 17, 2010, following the testimony of Mr. Smith. Mr. Smith's testimony corroborated the Complainant's evidence that he had reported the eye irritation on June 21, 2010.

On August 24, 2010, Respondent terminated Complainant's employment via letter.

As a result of the foregoing, the evidence shows that Complainant engaged in protected activity on June 21, 2010, when he reported to Respondent Foreman Dave Smith that he was experiencing irritation in his eye which was possibly the result of a flash burn. The evidence also indicates that Complainant engaged in protected activity on June 22, 2010, when Complainant completed Respondent's Form 22 regarding his injury.

The evidence also shows that Complainant told his Supervisor, Foreman Dave Smith, about his eye injury on June 21, 2010, and verbally informed Assistant Division Engineer, John Geary on June 22, 2010, prior to completion of the Form 22, Personal Injury Report. As a result, Respondent knowledge of Complainant protected activity is established by the investigation.

Respondent confirmed that Complainant was removed from service on June 22, 2010, and was subsequently terminated following a formal hearing via letter dated August 24, 2010. As a result, the evidence established that Complainant suffered an adverse employment action on June 22, 2010, when Complainant was removed from service. The evidence also established that Complainant suffered an adverse employment action on August 24, 2010, when Respondent terminated his employment.

The evidence indicates that a period of one (1) day elapsed between Complainant's initial protected activity on June 21, 2010, and Complainant's initial adverse action of being removed

from service on June 22, 2010. In addition, Complainant was removed from service on June 22, 2010, immediately following Complainant's second protected activity of completing Respondent Form 22 to formally report his injury. As a result, the evidence shows that a strong temporal proximity exists between Complainant's protected activity and adverse action.

The evidence indicates that Respondent has created an atmosphere which discourages employees from reporting workplace injuries unless absolutely necessary. The investigation found that employees at Respondent will often avoid reporting injuries unless they are serious in nature due to the amount of scrutiny and the "hassle" received from Respondent as a result of filing a formal Report of Injury. Specifically, two employees reported that they would not report a "flash burn" because it usually goes away in a few days and because of the "hassle" received from Respondent when reporting injuries. As a result, the investigation established Respondent animus towards Complainant's protected activity of reporting a workplace injury.

The evidence shows that Complainant was immediately removed from service after he refused to provide Mr. Geary with a statement indicating that his injury was not work related. When asked if the Complainant would have been removed from service and charged with rule violations had he provided a statement indicating his injury did not happen at work, Mr. Geary testified with a simple "no." As a result, the evidence supports that Complainant would not have been removed from service and subsequently terminated had he provided a statement that his injury did not occur at work. Consequently, the evidence indicates that a clear nexus exists between Complainant's protected activity and adverse action.

According to Respondent's position statement, Complainant was terminated for:

(1) Violation of Respondent's General Conduct and Safety Rule N.
(2) Providing false and conflicting information pertaining to his injury.

Respondent's summary of its position is simply that the Complainant claimed he reported a workplace injury truthfully, while Respondent believed Complainant did not. Respondent's General Conduct Rule N addresses reporting of employee injuries and illnesses. Rule N reads:

> " *an employee who sustains a personal injury while on duty or on Company property or equipment must, before leaving Company premises, report it to his immediate supervisor and complete and sign a written report of the incident using the prescribed form.*"

Respondent asserts that Complainant should have reported his injury before the end of the shift in which the injury occurred in order to be in compliance with General Conduct Rule N. Complainant stated that he did not report the irritation as an injury at the time because he did not realize the full extent of his injury and believed it to be merely a flash burn. The evidence indicates that Respondent employees rarely formally report flash burns or other minor ailments as injuries. The evidence shows that Complainant reported the injury as soon as he became aware of its severity, even though he believed it happened during the previous work week.

Respondent further alleged that due to the type of injury and the pain that would be involved with a piece of metal in the eye, Complainant likely received it over the weekend and was trying to blame the railroad for an injury that occurred during Complainant's off time. Respondent's assertion that no one, including Complainant, could have gone for an entire week with a piece of metal in their eye is based on an opinion advanced by Dr. Prible. The evidence shows that Dr. Prible did not examine Complainant prior to issuing his assertion. The evidence further shows that Dr. Prible, in his e-mail exchange with Mr. Klinkbeil stated "I suppose anything is possible, but not likely." Respondent also alleged that Complainant had not informed any of his coworkers that he was experiencing symptoms of an eye injury prior to his appointment at the eye clinic. Contrary to the Respondent's assertion, the evidence shows that Complainant did inform Foreman Dave Smith that he thought he "had a flash burn or something" in his eye prior to going to the eye clinic. As a result, the evidence does not support Respondent's assertion that Complainant was likely injured at home over the weekend prior to June 21, 2010.

The evidence supports that Complainant had no motivation to blame the Respondent for his injury as Complainant's personal insurance covered the medical services. Complainant ultimately paid approximately $34.00 out-of-pocket after reimbursement from his insurance company. The evidence also indicates that employees at Respondent will often avoid reporting an injury sustained in the course of their duties in order to avoid undue scrutiny from Respondent.

Respondent also alleged that Complainant provided false and conflicting information regarding his injury. Respondent accused Complainant of trying to blame the railroad for something that happened on his own time. Respondent based their accusation on the fact that the dates of injury that the Complainant provided to the eye clinic at the time of his appointment conflicted with the dates the Complainant indicated on Respondent's Form 22. However, Complainant provided a simple explanation for this discrepancy, as discussed above, when he stated that he had inadvertently looked at the wrong month when completing the Form 22. Prior to filling out the Form 22 Complainant had also been interrogated for "several hours" by Mr. Geary's own admission, which likely contributed to Complainant's mistake.

The evidence shows that Complainant had worked for Respondent for over 30 years and had no motivation financially or otherwise for falsely claiming the injury to be work-related. However, Respondent, winner of the Harriman Award for several consecutive years, had significant motivation to ensure that the injury would not be reportable under FRA rules. Specifically, Mr. Geary confirmed in testimony that Complainant's injury would have been reportable to the Federal Railroad Administration but that Respondent was not required to count it against their injury rate once Complainant was removed from service and subsequently terminated.

Consequently, Respondent failed to show by clear and convincing evidence that it would have taken the same action toward Complainant had he not reported a work-related injury. To the contrary, Mr. Geary indicated during the investigative hearing on July 20, 2010, that but for Complainant's formal report of injury, Complainant would not have been removed from service on June 22, 2010, and subjected to the investigative hearing that led to Complainant's termination on August 24, 2010.

Respondent's actions reflect a disregard for FRSA and Complainant's rights thereunder. Respondent is well aware of these rights, as it has litigated numerous cases under FRSA before the Department of Labor's Administrative Law Judges and the Administrative Review Board. Further, this is not the first case where OSHA has found reasonable cause to believe that Respondent retaliated against an employee in violation of FRSA by instituting disciplinary proceedings and terminating an employee for reporting a workplace injury[1]. Respondent's disregard for Complainant's rights under FRSA warrants a significant award of punitive damages.

In addition, although Complainant was reportedly unable to work from January 13, 2011 to August 1, 2011, there is sufficient medical evidence to support an award of back pay for this period as well as the medical evidence supporting that the Respondent's adverse actions caused the Complainant's subsequent depression that prohibited him from working during this period. *Luder v. Continental Airlines, Inc., DOL ARB No. 10-026 (January 31, 2012).*

Complainant has been under the care of a clinical psychologist to deal with depression, which has been greatly exacerbated by the loss of his job as well as the anger he has experienced over having his career destroyed after more than 30 years of service working for Respondent. Complainant's family stated his termination causes days when he refuses to leave the house, or sits in the basement or stays in bed all day. Further, Complainant's family stated that Complainant job loss has caused marital strain, something that did not exist prior to his job loss.

Based on all the foregoing, OSHA finds that there is reasonable cause to believe that Respondent has violated 49 U.S.C. §20109(a). Accordingly, OSHA orders the following:

Order

1. Upon receipt of this Secretary's Finding and Order, Respondent shall immediately reinstate Complainant to his former position at the same rate of pay he earned prior to his termination. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had he never been terminated. Such reinstatement is not stayed by an objection to this order. If Complainant is unable to pass any required functional capacity exam as a condition of reinstatement, Respondent shall provide and pay for a work hardening/conditioning program by an appropriate health care provider for an appropriate length of time and retest Complainant following same.

2. Respondent shall pay Complainant lost wages and benefits, increases in costs, penalties and special damages incurred as a result of the employer's adverse employment action totaling

[1] Norfolk Southern Railway Corp., Complaint # 4-4910-10-010 on 11/27/2012; Norfolk Southern Railway Corp, Complaint # 5-2700-10-010 on 8/23 /2012; Norfolk Southern Railway Corp., Complaint # 5-6850-10-012 on 8/23/12; Norfolk Southern Railway Corp, Complaint # 4-1760-10-010 on 7/18/2012; Norfolk Southern Railway Corp, Complaint # 4-3750-10-028 on 6/12/12; Norfolk Southern Railway Corp., Complaint # 4-1221-10-007 on 6/12/12; Norfolk Southern Railway Corp., Complaint # 3-3500-11-001 on 6/14/12; Norfolk Southern Railway Corp., Complaint # 4-3750-10-006 on 8/8/11; and Norfolk Southern Railway Corp., Complaint # 4-0520-08-008 on 4/4/11.

$156,518.94 plus interest compounded at the daily IRS rate for underpayment of taxes. This amount includes:

a. Lost Wages of $150,916.97;
b. Stock Awards for 2011 and 2012 of $1,074.46; and
c. Employer 3 percent matching contributions to Complainant's 401(k) account in the amount of $4,527.51.

3. Respondent will file with the Railroad Retirement Board all forms necessary to ensure that the Complainant is properly credited for the months of service that the employee would have earned absent Respondent's adverse action. Respondent's report will allocate the backpay award to the appropriate calendar month in which Complainant would have earned the compensation.

4. Respondent shall pay Complainant compensatory damages incurred by Complainant, as follows:

   a. $6,072.76 in penalties incurred when Complainant cashed in savings bonds prior to the bonds' maturity date.

   b. Interest that Complainant would have otherwise accrued on $66,216.88 he used from his personal savings account in absence of income from Respondent.

   c. Interest and/or dividends he would have received from Employer's matching 401(k) contributions had they been timely made.

5. $100,000.00 for the humiliation, mental and emotional pain suffered by Complainant.

6. Respondent shall pay Complainant's attorney reasonable attorney fees.

7. Respondent shall pay Complainant punitive damages in the amount of $175,000.00.

8. Respondent shall expunge from Complainant's personnel records any reference to the exercise of his rights under FRSA.

9. Respondent shall remove from Complainant's personnel records any reference to the June 22, 2010, removal of Complainant from service, the July 20, 2010, and August 17, 2010, investigative hearing, and his August 24, 2010 termination. Complainant's personnel records shall reflect continuous employment with Respondent to Complainant's date of reinstatement.

10. Respondent shall not retaliate or discriminate against Complainant in any manner for instituting and causing to be instituted any proceeding under or related to FRSA.

11. Respondent shall provide to all employees at Complainant's former workplace in Fort Wayne, Indiana, copies of the Whistleblower Protection for Railroad Workers Fact Sheet enclosed herewith.

12. Respondent shall post for a period of 180 days copies of the Notice to Employees, enclosed herewith, at least 8½"x11" in size, at all locations at Complainant's Fort Wayne workplace where employee notices are customarily posted.

13. Within thirty (30) days of its receipt of this Findings and Order, Respondent shall inform the Regional Administrator in writing of the steps it has taken to comply with the provisions of this 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. 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
Phone: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:

Nick A. Walters
Regional Administrator
230 S. Dearborn Street, Room 3244
Chicago, IL 60604

Mary Ann Howe, CFE
Assistant Regional Administrator
Whistleblower Protection Program
U.S. Department of Labor-OSHA
365 Smoke Tree Plaza
North Aurora, IL 60542

Associate Solicitor
Division of Fair Labor Standards
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue NW, Room N2716
Washington, D.C. 20210

Jeff Dingwall, Complainant's Attorney

The U.S. Department of Labor 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 decisions under FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint.

Sincerely,

Nick A. Walters
Regional Administrator

cc: Chief Administrative Law Judge
Jeff Dingwall, Complainant's Attorney
Federal Railroad Administration

Enclosures: Notice to Employees
FRSA Fact Sheet

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 or health, asbestos in schools, cargo containers, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, motor vehicle safety, and securities laws.

Whistleblower Laws Enforced by OSHA

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

- *Asbestos Hazard Emergency Response Act* (90 days)
- *Clean Air Act* (30 days)
- *Comprehensive Environmental Response, Compensation and Liability Act* (30 days)
- *Consumer Financial Protection Act of 2010* (180 days)
- *Consumer Product Safety Improvement Act* (180 days)
- *Energy Reorganization Act* (180 days)
- *Federal Railroad Safety Act* (180 days)
- *Federal Water Pollution Control Act* (30 days)
- *International Safe Container Act* (60 days)
- *Moving Ahead for Progress in the 21st Century Act* (motor vehicle safety) (180 days)
- *National Transit Systems Security Act* (180 days)
- *Occupational Safety and Health Act* (30 days)
- *Pipeline Safety Improvement Act* (180 days)
- *Safe Drinking Water Act* (30 days)
- *Sarbanes-Oxley Act* (180 days)
- *Seaman's Protection Act* (180 days)
- *Section 402 of the FDA Food Safety Modernization Act* (180 days)
- *Section 1558 of the Affordable Care Act* (180 days)
- *Solid Waste Disposal Act* (30 days)
- *Surface Transportation Assistance Act* (180 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:

- Applying or issuing a policy which provides for an unfavorable personnel action due to activity protected by a whistleblower law enforced by OSHA
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Firing or laying off
- Intimidation
- Making threats
- Reassignment to a less desirable position, including one adversely affecting prospects for promotion
- Reducing pay or hours
- Suspension

Filing a Complaint

If you believe that your employer retaliated against you because you exercised your legal rights as an employee, contact OSHA as soon as possible because you must file your complaint within the legal time limits.

An employee can file a complaint with OSHA by visiting or calling the local OSHA office or sending a written complaint to the closest OSHA regional or area office. Written complaints may be filed by facsimile, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier. The date of the postmark, facsimile, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA

office is considered the date filed. No particular form is required and complaints may be submitted in any language.

For OSHA area office contact information, please call 1-800-321-OSHA (6742) or visit www.osha.gov/html/RAmap.html.

Upon receipt of a complaint, OSHA will first review it to determine whether it is valid on its face. All complaints are investigated in accord with the statutory requirements.

With the exception of employees of the U.S. Postal Service, public sector employees (those employed as municipal, county, state, territorial or federal workers) are not covered by the *Occupational Safety and Health Act* (OSH Act). Non-federal public sector employees and, except in Connecticut, New York, New Jersey, the Virgin Islands, and Illinois, private sector employees are covered in states which operate their own occupational safety and health programs approved by Federal OSHA. For information on the 27 State Plan states, call 1-800-321-OSHA (6742), or visit www.osha.gov/dcsp/osp/index.html.

A federal employee who wishes to file a complaint alleging retaliation due to disclosure of a substantial and specific danger to public health or safety or involving occupational safety or health should contact the Office of Special Counsel (www.osc.gov) and OSHA's Office of Federal Agency Programs (www.osha.gov/dep/enforcement/dep_offices.html).

Coverage of public sector employees under the other statutes administered by OSHA varies by statute. If you are a public sector employee and you are unsure whether you are covered under a whistleblower protection statute, call 1-800-321-OSHA (6742) for assistance, or visit www.whistleblowers.gov.

How OSHA Determines Whether Retaliation Took Place

The investigation must reveal that:

- The employee engaged in protected activity;
- The employer knew about or suspected the protected activity;
- The employer took an adverse action; and
- The protected activity motivated or contributed to the adverse action.

If the evidence supports the employee's allegation and a settlement cannot be reached, OSHA will generally issue an order, which the employer may contest, requiring the employer to reinstate the employee, pay back wages, restore benefits, and other possible remedies to make the employee whole. Under some of the statutes the employer must comply with the reinstatement order immediately. In cases under the *Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act*, and the *International Safe Container Act*, the Secretary of Labor will file suit in federal district court to obtain relief.

Partial List of Whistleblower Protections

Whistleblower Protections under the OSH Act

The OSH Act protects workers who complain to their employer, OSHA or other government agencies about unsafe or unhealthful working conditions in the workplace or environmental problems. You cannot be transferred, denied a raise, have your hours reduced, be fired, or punished in any other way because you used any right given to you under the OSH Act. Help is available from OSHA for whistleblowers.

If you have been punished or discriminated against for using your rights, you must file a complaint with OSHA within 30 days of the alleged reprisal for most complaints. No form is required, but you must send a letter or call the OSHA Area Office nearest you to report the discrimination (within 30 days of the alleged discrimination).

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, where possible, to get your employer to correct the condition, and been unable to obtain a correction 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. For details, see 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 or security are protected from retaliation by their employers for, among other things, reporting violations of federal or state commercial motor carrier safety or security regulations, or refusing to operate a vehicle because of violations of federal commercial motor vehicle safety or security regulations or because they have a reasonable apprehension of death or serious injury to themselves or the public and they have sought from the employer and been unable to obtain correction of the hazardous condition.

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 from retaliation because they 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 from retaliation for raising 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, bank or securities fraud; violations of SEC rules or regulations of the SEC; or violations of federal laws relating to fraud against shareholders.

Whistleblower Protections for Voicing Consumer Product Concerns

Employees of consumer product manufacturers, importers, distributors, retailers, and private labelers are protected from retaliation for reporting reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Safety Product Safety Commission.

More Information

To obtain more information on whistleblower laws, go to www.whistleblowers.gov.

This is one of 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 and regulations, refer to Title 29 of the Code of Federal Regulations. Because some of these whistleblower laws have only recently been enacted, the final regulations implementing them may not yet be available in the Code of Federal Regulations but the laws are still being enforced by OSHA. This information will be made available to sensory-impaired individuals upon request. Voice phone number: (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For assistance, contact us. We can help. It's confidential.

U.S. Department of Labor
www.osha.gov (800) 321-OSHA (6742)

DWP FS-3638 02/2013

OSHA® FactSheet

Whistleblower Protection for Railroad Workers

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

On August 3, 2007, the *Federal Railroad Safety Act* (FRSA), 49 U.S.C. §20109, was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to transfer authority for railroad carrier worker whistleblower protections to OSHA and to include new rights, remedies and procedures. On October 16, 2008, the *Rail Safety Improvement Act* (Public Law 110-432) again amended FRSA, to specifically prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

Covered Employees

Under FRSA, an employee of a railroad carrier or a contractor or subcontractor is protected from retaliation for reporting certain safety and security violations.

Protected Activity

If your employer is covered under FRSA, it may not discharge you 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 other 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, you are protected from retaliation for reporting hazardous safety or security conditions, reporting a work-related injury or illness, refusing to work under certain conditions, or refusing to authorize the use of any safety- or security-related equipment, track or structures. You may also be covered if you were perceived as having engaged in the activities described above.

In addition, you are also protected from retaliation (including being brought up on charges in a disciplinary proceeding) or threatened retaliation for requesting medical or first-aid treatment, or for following orders or a treatment plan of a treating physician.

Adverse Actions

Your employer may be found to have violated FRSA if your protected activity was a contributing factor in its decision to take adverse 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
- Making threats
- Reassignment affecting promotion prospects
- Reducing pay or hours
- Disciplining an employee for requesting medical or first-aid treatment
- Disciplining an employee for following orders or a treatment plan of a treating physician
- Forcing an employee to work against medical advice

Deadline for Filing a Complaint

Complaints must be filed within 180 days after the alleged adverse action occurred.

How to File a Complaint

A worker, or his or her representative, who believes that he or she has been retaliated against in violation of this statute may file a complaint with OSHA. The complaint should be filed with the OSHA office responsible for enforcement activities in the geographic area where the worker lives or was employed, but may be filed with any OSHA officer or employee. For more information, call your nearest 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 the Whistleblower Protection Program's website, www.whistleblowers.gov, and in local directories. Complaints may be filed orally or in writing, by mail (we recommend certified mail), e-mail, fax, or hand-delivery during business hours. The date of postmark, delivery to a third party carrier, fax, e-mail, phone call, or hand-delivery is considered the date filed. If the worker or his or her representative is unable to file the complaint in English, OSHA will accept the complaint in any language.

Results of the Investigation

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue a preliminary order requiring the appropriate relief to make you whole. Ordered relief may include:

- Reinstatement with the same seniority and benefits.
- Payment of backpay with interest.
- Compensatory damages, including compensation for special damages, expert witness fees and reasonable attorney's fees.
- Punitive damages of up to $250,000.

OSHA's findings and preliminary order become a final order of the Secretary of Labor, unless a party objects within 30 days.

Hearings and Review

After OSHA issues its findings and preliminary order, either party may request a hearing before an administrative law judge of the U.S. Department of Labor. A party may seek review of the administrative law judge's decision and order before the Department's Administrative Review Board. Under FRSA, if there is no final order issued by the Secretary of Labor within 210 days after the filing of the complaint, then you may be able to file a civil action in the appropriate U.S. district court.

To Get Further Information

For a copy of the statutes, the regulations and other whistleblower information, go to www.whistleblowers.gov. 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

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