

U.S. Department of Labor

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



APR 03 2014

Holly M. Robbins  
Littler Mendelson, P.C.  
80 South 8th Street, Suite 1300  
Minneapolis, MN 55402-2136

Re: Wisconsin Central Ltd./Janzen/5-0170-11-024

Dear Ms. Robbins:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mark Janzen (Complainant) against Wisconsin Central Ltd. (Respondent) on April 4, 2011, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Mr. Janzen alleged that while he was a probationary employee, Respondent terminated him by denying his application for employment in a *Removal from Service* letter, in retaliation for having reported an injury.

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

#### Secretary's Findings

Respondent is a subsidiary of the Canadian National Railway (CN), an establishment that provides rail service throughout Wisconsin, Illinois, Minnesota, and Canada. The business location germane to this case is located in Fond du Lac, Wisconsin. Respondent is a class 1 railroad and is a railroad carrier within the meaning of 49 U.S.C. §20109 and 49 U.S.C. §20102. Respondent provides railroad transportation, in that it transports goods using the general railroad system. Accordingly, Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109. Complainant was employed by Respondent as a Conductor in training and is an employee within the meaning of 49 U.S.C. §20109.

Respondent issued Complainant a *Removal from Service* letter on or about February 4, 2011, denying his application for employment during his probationary period, effectively terminating his employment. On April 4 2011, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is timely.

On September 27, 2010, Complainant began working for Respondent. Complainant entered into the training and testing period which he successfully completed and was consequently approved for work as a Conductor on December 6, 2010.

On December 7, 2010, Complainant was given his first assignment and began his 60 day probationary period, which would run until February 5, 2011. Complainant was not allowed to join the United Transportation Union Local 583 until he completed this probationary period. On January 1, 2011, Complainant reported to Respondent's Neenah rail yard at 7:00 P.M. and was assigned to work as the Conductor on Job #L524. The tour of duty went from 7:00 P.M. on January 1, 2011 through 5:45 A.M. on January 2, 2011. The job changed to Job #C7781, a train of approximately 75 cars destined for Manitowoc, Wisconsin. Complainant believes the train departed at approximately 8:30 P.M. Upon arrival in Manitowoc, Complainant went about his conductor duties.

On January 2, 2011, at approximately 1:00 A.M., Complainant needed to apply a handbrake on a rail car. He was required to climb a ladder on the right side of the rail car, which is next to an adjoining ladder on the end of the car. The side ladder does not go to the top of the car and he was required to transfer to the end ladder to get to the top of the car. He applied the brake and reversed the climbing procedure to descend down the left side of the ladder. However, while climbing down the side ladder, he missed a rung with his left foot because the ladder on the left side jogged in from 21 inches to around 11 inches and Complainant did not know the ladder did this. He prevented a fall as he maintained three points of contact. Complainant hung on with his hands and right foot, but the shift of his weight caused the stretching of his left arm.

Complainant finished the job and was released from duty at 5:45 A.M. Complainant did not report the injury during his tour of duty because his arm was only a little bit stiff at that time. He went home and went to bed. When he awoke at 1:45 P.M., he was not able to straighten or bend his left arm and he was experiencing increasing pain. He called the Trainmaster and reported his injury immediately. Complainant states the Trainmaster discouraged him from reporting his injury, stating that completing a "Personal Injury Report" was a lot of paperwork for the Trainmaster, and that it would not look good for Complainant as a new hire to report an injury. Complainant states the Trainmaster said he needed to talk to his boss, the Assistant Superintendent.

According to Complainant, the Trainmaster called Complainant back after the Trainmaster spoke with the Assistant Superintendent, gave Complainant the Assistant Superintendent's phone number, and instructed Complainant to call him. Complainant states he called the Assistant Superintendent and reported his injury. Complainant states the Assistant Superintendent also discouraged him from completing a "Personal Injury Report," but Complainant told him that he wanted to report his injury because the injury would prevent him from reporting for duty and doing his job. The Assistant Superintendent states he asked Complainant twice if he was injured and needed medical attention and Complainant's response both times was that he did not know and he was unsure what to do, but upon further discussion, Complainant told the Assistant Superintendent he wanted to go to a clinic.

On January 2, 2011, after Complainant reported his injury, he received a phone call from the Risk Mitigation Officer, who inquired about what happened. The Risk Mitigation Officer told Complainant to go to the hospital to get checked out. Complainant arrived at the Neenah rail yard at approximately 4:30 P.M., and the Trainmaster took him to the Theda Clarke Hospital. He was treated for a strained upper arm and elbow and released with a 10 day restriction, right

arm use only. Complainant completed the Report of Personal Injury (form 0475) and turned it in to Respondent.

Subsequently, Complainant's work restrictions were continued until February 14, 2011. However, Respondent terminated Complainant's employment prior to his release to duty. On February 3, 2011, Respondent mailed Complainant a certified letter informing him of his "Removal from Service." This termination letter did not state he was terminated for violation of any Respondent rule, but rather stated "Article 12 – Approval of Application for Employment" had been rejected, thereby terminating his relationship with the company effective immediately. Complainant received the letter on February 4, 2011.

Also on February 4, 2011, the Trainmaster called Complainant around 8:00 A.M. and read the dismissal letter to Complainant. Complainant was terminated per Article 12 of the UTU contract, which also happened to be his last day of probation, one day prior to being eligible to join the union. Article 12 of the UTU contract states, "A. Applications for employment as Trainman shall be approved or disapproved in writing within sixty (60) days following the day the Trainman first becomes qualified for and performs service as a Trainman with the Company. B. An application that is rejected any time within such period shall result in termination of the Trainman's relationship with the company."

On February 14, 2011, Complainant's physician cleared him for full duty without restrictions. Complainant provided Respondent with a copy of his medical release to duty.

Respondent contends that they issued Complainant a "Removal from Service" letter after he violated USOR-D by failing to report an injury before his tour ended and before he left the rail yard. However, the "Removal from Service" letter itself offered no rationale for the termination and instead stated "Article 12 – Approval of Application for Employment" had been rejected, thereby terminating his relationship with the company effective immediately. Later, when Complainant filed his FRSA complaint, Respondent claimed Complainant was removed from service for violating USOR-D.

Respondent's U.S. Operating Rules incorporated USOR-D, which states:

Reporting Injuries and Defects. Employees must report promptly to the proper authority any injury sustained on duty or on company property. Notification of the injury must be made prior to the end of the employee's tour of duty and before leaving company property. Off-duty injuries that will in any way impair the work performance of an employee must be reported to the proper authority as soon as possible.

Threatening conditions, including, but not limited to, mechanical failures, defects in track, bridges, or signals, must be reported. Any practices or episodes of misconduct or negligence that may threaten the safety of employees, impair the operation of trains, or may affect the interest of the railroad must also be reported by the first available means of communication.

While Respondent could have dismissed Complainant for no reason under the terms of the collective bargaining agreement since he was within the probationary period, Respondent instead asserts it fired him for reporting an injury – albeit in a manner Respondent deemed untimely. Complainant’s report of injury – a protected activity – contributed to his termination.

Respondent cannot show by clear and convincing evidence that they would have taken the same adverse action in the absence of Complainant’s protected activity in violation of the FRSA. 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 these Finding and Preliminary Order, Respondent shall immediately reinstate Complainant to his former position at the rate of \$33.00 per hour. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had he not been discharged. Such reinstatement is not stayed by an objection to this Order.
2. Respondent shall pay Complainant back pay in the amount \$217,082.75, less applicable employment taxes. This figure represents back pay (\$1,617.00 x 161 weeks), minus interim earnings (\$87,934.02), for the period of February 4, 2011 until March 1, 2014, and continuing until Respondent makes Complainant a bona fide offer of employment. Complainant worked intermittently between December 3, 2011 and March 2, 2013, before beginning a new position on March 9, 2013.
3. Respondent shall pay interest on the back wages in accordance with 26 U.S.C. §6621.
4. Respondent will file with the Railroad Retirement Board all forms necessary to ensure that 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 back pay award to the appropriate calendar month in which Complainant would have earned the compensation.
5. Respondent shall pay Complainant compensatory damages in the amount of \$60,000.00, for the following:
  - a. To avoid foreclosure and to mitigate damages, Complainant was forced to sell his home under market value, claiming a loss of \$35,000.00 and a loss of \$20,000.00 in home improvements, and
  - b. \$5,000.00 for mental anguish and emotional distress due to the humiliation and the loss of income from wrongful termination.
6. Respondent shall pay Complainant punitive damages in the amount of \$75,000.00 for its reckless disregard for the law and complete indifference to Complainant’s rights under 49 USC §20109. There is evidence of animus in the case. It appears that Respondent fabricated the reason for Complainant’s termination based on an after-the-fact citation to USOR-D.

7. Respondent shall pay Complainant's attorney reasonable fees accrued solely in association with this complaint.
8. Respondent shall provide to all employees at the Neenah Yard a copy of the FRSA Fact Sheet included with this Order.
9. Respondent shall post for 60 consecutive days the Notice to Employees included with this Order in all areas where employee notices are customarily posted at the Neenah Yard.
10. Respondent shall remove from Complainant's employment records all references to the exercise of his rights under FRSA and delete the Removal from Service letter from his record, and any reference thereto.

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:

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Chief Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Department of Labor  
800 K Street NW, Suite 400  
Washington, D.C. 20001-8002  
Telephone: (202) 693-7365  
Fax: (202) 693-7365

With copies to:

Randall W. LeNeave  
Hunegas, LeNeave & Kvas, P.A.  
900 Second Avenue South, Suite 1650  
Minneapolis, MN 55402

Nick A. Walters  
Regional Administrator  
U. S. Department of Labor – OSHA  
230 South Dearborn Street, Room 3244  
Chicago, Illinois 60604

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

In addition, please be advised that the U.S. Department of Labor does not represent any Complainant or Respondent in the hearing; rather, each party presents his or her own case. The hearing is a *de novo* adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments 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. The rules and procedures for the handling of FRSA cases can be found in Title 29, Code of Federal Regulations, and may be obtained at [www.whistleblowers.gov](http://www.whistleblowers.gov).

Sincerely,



<sup>PL</sup> Nick A. Walters  
Regional Administrator

Enclosures: Notice to Employees  
FRSA Fact Sheet

cc: Chief Administrative Law Judge, USDOL  
Federal Railroad Administration  
Randal W. LeNeave, Complainant's Attorney