U.S. Department of Labor

Occupational Safety and Health Administration
201 Varick Street, Room 670
New York, New York 10014
Tel: (212) 337-2365
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March 26, 2012

Jacqueline Holmes, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

Via United Parcel Service # 1Z X10 51V 02 9226 4903

RE: CSX Transportation, Inc. / Young / 2-4173-10-058

Dear Ms. Holmes:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Robin Young (Complainant) against CSX Transportation, Inc. (Respondent) on March 1, 2010, under the employee protection provisions of 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. Law No. 110-53. In brief, Complainant alleged that his employment was terminated on October 8, 2009, in retaliation for reporting safety hazards to the FRA while cooperating with FRA during a near miss accident review. Complainant further alleged that his employment was terminated for a second time on March 17, 2010, in retaliation for filing the March 1, 2010 FRSA complaint.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA by retaliating against Complainant for making the March 1, 2010 complaint to OSHA and issues the following findings:

Secretary's Findings

On October 8, 2009, Complainant's employment was terminated as a dispatcher. March 1, 2010 Complainant filed a complaint with the Secretary of Labor alleging he was retaliated against in violation of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. On March 17, 2010, Complainant exercised his seniority rights under the CBA for the Brotherhood of Maintenance of Way Employees and was reinstated as a track maintenance worker[1]. After working the full shift

[1] Following Complainant's dismissal as a train dispatcher Complainant's union began the grievance process in accordance with the American Train Dispatchers Association's collective bargaining agreement. In or about December and January of 2010 union officials were actively negotiating a lesser degree of disciplinary action and Complainant's return to work with the Labor Relations Department in Jacksonville, FL. In or about January 2010 management at the Albany Division rejected the agreement and declined to reinstate Complainant. After being

Complainant was notified that his employment was terminated. On March 18, 2010, Complainant filed an amendment to his complaint alleging his second termination of employment was in violation of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. As these complaints were filed within 180 days of the alleged adverse actions, they are deemed timely.

CSX Transportation, Inc. is the largest Class 1 railroad in the Eastern United States, operating in 22 states and the District of Columbia. Respondent employs approximately 30,000 workers. Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and §20102.

Complainant began working for Respondent as a track maintenance worker in July of 1998. He was a member of the Brotherhood of Maintenance and Way Employees. In December of 2003 Complainant was promoted to train dispatcher and became a member of the American Train Dispatchers Association. Complainant worked as a train dispatcher until his discharge on October 8, 2009. Complainant was reinstated as a track maintenance worker on March 17, 2010 and worked one shift. Complainant was notified of his discharge this same date. Complainant is an employee within the meaning of 49 U.S.C. § 20109.

On September 14, 2009, Complainant was involved in a near miss incident where two trains were routed in error, toward each other on the same track. The trains came within 150 feet of colliding with each other. Complainant was taken out of service. On September 16, 2009, Complainant fully cooperated in the meeting with CSX management and an FRA inspector in reviewing the incident. On September 18, 2009, Complainant was notified that an informal investigative hearing was scheduled for September 25, 2009, and later postponed until September 29, 2009. Complainant alleged he engaged in protected activity during the hearing with the FRA and then again during the investigative hearing when Complainant raised various safety issues that contributed to the errors and near miss incident on September 14, 2009. Respondent does not dispute knowledge of the raising of the safety concerns but does dispute that the concerns were specific enough to be covered by FRSA. Complainant's concerns were memorialized in the hearing transcript and demonstrate that he had a reasonable belief that the safety issues he raised may have contributed to the near miss incident. On October 8, 2009, Complainant was dismissed from the service of CSX Transportation effective immediately. Respondent determined Complainant had failed to determine that a conflicting movement had been authorized and failed to obtain a BDA (blocking device applied) from the Amtrak Terminal Dispatcher causing two opposing passenger trains to occupy the same segment of track. Prior to the investigative hearing Complainant and his union representative were told Complainant should accept responsibility for the incident and not muddy the waters with other issues that may or may not have contributed to the incident and the disciplinary action taken would not result in a permanent dismissal. Complainant's protected activity was a contributing factor in the adverse action. However, Respondent has shown by clear and convincing evidence that they would have taken the same adverse action in the absence of Complainant's protected activity. Thus, there is no reasonable cause to believe that Respondent retaliated against Complainant for raising safety issues when it terminated Complainant's employment on October 8, 2009.

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notified that the deal was rejected Complainant and the union began making inquiries about Complainant exercising his seniority rights with the Track Department.

In or about the end of February early March 2010, Complainant and the Brotherhood of Maintenance of Way Employees advised Chris Lorensen, Staff Engineer at the Albany Division that Complainant would like to exercise his seniority rights and return to the Track Department as a track maintenance worker. Lorensen contacted John Tolin, Manager of Labor Relations for the Albany Division Engineering Department to be certain this was possible. Tolin is responsible for managing the collective bargaining agreement for the Engineering Departments in the Albany and Baltimore Divisions. Tolin handles all negotiations, interpretations, claims and grievances associated with the CBA. On March 2, 2010, John Tolin sent an email to Associate General Counsel, Sarah Hall in the corporate office in Jacksonville, FL. Tolin attached Complainant's October 8, 2009 dismissal letter and advised Complainant intended to displace to the Engineering Department and that Complainant had been dismissed from CSX service. Tolin asked if Complainant had a displacement right for an engineering position or if he was dismissed entirely from CSX. Hall forwarded the email on the David Hoffman, Senior Counsel as well as other individuals. On March 8, 2010, Mr. Tolin inquired with David Hoffman if a conclusion had been reached. Tolin acknowledged that the displacement would most generally be acceptable but was uncertain by the language of the dismissal letter form the Transportation department. On March 10, 2010, Hoffman stated that based on Tolin's previous email Respondent's practice would be to allow Complainant to return to the Engineering Department and that the October 8th dismissal letter would not prohibit such action. On March 11, 2010, Tolin forwarded the series of email communications to Chris Lorensen advising that based on David Hoffman's response Complainant would be allowed to displace into the Engineering Department once he became medically qualified.

On March 17, 2010 Complainant returned as a track maintenance worker and worked his full shift. At 2:12PM Lorensen sent out an email noting Complainant had made a bump into Selkirk (Albany Division) and inquired as to how to restore Complainant's seniority on the BMWED rosters. Later that same afternoon while sitting in the airport waiting for a delayed flight to depart, Tolin received a call from the Director of Labor Relations, Noel Nihoul. Nihoul is Tolin's direct supervisor and according to Tolin discussed the matter with him prior to Complainant's return to work. Nihoul advised Tolin that he reached an incorrect interpretation of the CBA and that Complainant had not met the time limitation for exercising his seniority. Tolin was instructed to convey the decision to Chris Lorensen. After Complainant's shift had ended Tolin left a message for Lorensen advising him accordingly. Complainant received a call at his home late that night instructing him not to come to work in the morning; Complainant had forfeited his seniority rights and should not have been permitted to return to work on March 17, 2010. Complainant was dismissed in all capacities.

On March 1, 2010 Complainant filed his complaint with the Secretary of Labor alleging his discharge as a train dispatcher was in retaliation for raising safety concerns in connection with the September 14, 2008, incident. On March 15, 2010, the notice of complaint was received in the corporate office in Jacksonville, FL. On March 16, 2010, the notice of complaint was received in the Corporate Secretary's office and date stamped accordingly.

In its May 17, 2010 position statement Respondent argued that Complainant was bound by the CBA to exercise his seniority rights within ten days after returning to duty after a leave of

absence. Respondent considered the October 2009 termination the end of the leave of absence. Respondent asserted on page two "Mr. Young did work for one day, March 17, 2010, as a trackman before CSXT realized that this exercise of seniority rights did not comply with provisions in the bargaining agreement. The local management where Mr. Young showed up to work on March 17, 2010, was not aware that Mr. Young had been terminated five months prior when they allowed him to return to service on March 17, 2010. When CSXT attempted to place him back on payroll on March 17, 2010, the computer system indicated that Mr. Young had been dismissed on October 8, 2009, which was previously unknown to the local management. CSXT realized that Mr. Young had failed to comply with the CST-BMWE agreement by waiting so long to exercise his seniority rights and informed him of such." This assertion is completely undermined by the email communications between Chris Lorensen, John Tolin, and David Hoffman. Chris Lorensen during his OSHA interview advised that he was aware of Complainant's termination and that it was the language in the discharge letter that led him to contact John Tolin for clarification on whether or not Complainant was eligible to return to service. Lorensen also advised OSHA that he had spoken with Jerald Lewandowski, Assistant Division Manager, who advised that it was his belief that Complainant had been discharged in all capacities and was surprised Complainant was returning to the track department. Consequently, the assertion by Respondent that local management was not aware of Complainant's discharge five months earlier is disingenuous at the least.

Respondent asserts that Complainant forfeited his BMWE seniority rights as a trackman by failing to exercise them on a timely basis under the CSXT-BMWE Agreement. This assertion is contrary to the legal interpretation provided by David Hoffman, Senior Counsel and the interpretation of the CBA by John Tolin, Manager Labor Relations for the Albany Division whose responsibility it is to manage this collective bargaining agreement for the Albany Division. The matter had been thoroughly reviewed and vetted by those two departments and Complainant was returned to work on March 17th with the knowledge of both John Tolin and Noel Nihoul that Complainant had been discharged five months earlier. Although Nihoul disputes that he had knowledge of the five month gap, Tolin advised OSHA that he had discussed this with his supervisor prior to March 17th. It appears highly suspect that the FRSA notification was received in the Corporate Secretary's office on March 16th and one day later the decision to reinstate Complainant to the track department was reversed even after Complainant had returned to work. Respondent's actions signify a high degree of animus. Respondent submitted a second supplemental response dated September 21, 2011 in which Respondent contends that the decision to terminate Complainant and not permit him to exercise his seniority rights was made in good faith and not actionable under the FRSA. Evidence indicates that the termination of March 17th was in retaliation for Complainant's exercising his rights under the FRSA, and is therefore; not only actionable under the FRSA, but is the very reason the amendments to the FRSA were enacted. The preponderance of the evidence also strongly indicates that the decision by Nihoul to terminate Complainant's employment on March 17th was not made in good faith, especially since the Legal Department and the Labor Relations Department had made the good faith decision to reinstate Complainant until it reversed itself upon notification of the FRSA complaint.

Complainant filed grievances in accordance with the CBA for American Train Dispatchers Association regarding his October 8, 2009, discharge from his train dispatcher position and also

with the CBA for the Brotherhood of Maintenance and Way Employees regarding his discharge from his track maintenance position. The American Train Dispatchers Association had argued that although discipline might have been warranted, complete dismissal from the Company was excessive. In April of 2011 the Public Law Board upheld Complainant's dismissal as a train dispatcher ruling that the discipline imposed was not arbitrary or excessive. Also in April of 2011 the Public Law Board in an expedited determination ruled that the carrier waived any claim it might have had on forfeiture of seniority by permitting Complainant to return to work in the BMWE unit on March 17, 2010. The Board ordered reinstatement without loss of seniority and for Complainant to be made whole for all lost wages and benefits. Complainant has since been reinstated as a track maintenance worker. His seniority, vacation and sick time, and benefits have been restored as well. Respondent has made payment to the Railroad Retirement Board.

Respondent asserts Complainant was precluded from bringing his FRSA retaliation claim because he had already elected to pursue his remedies under the RLA. The ARB has recently ruled that the pursuit of the grievance does not preclude the filing of an FRSA claim. Respondent has also asked that OSHA defer to the outcome of the collective bargaining agreement's grievance and arbitration process. Respondent contends Complainant was afforded a complete remedy after a fair and impartial hearing before a neutral arbitrator. However, the full remedies available to Complainant under the FRSA are not available to Complainant under the collective bargaining agreement process and for that reason the complaint cannot be deferred.

CSX had a conscious disregard for how its practices obstruct congress's mandate in the FRSA. Director Noel Nihoul acknowledged that at the time he made the decision to discharge Complainant in March of 2010, he was aware of the amendments to the FRSA, aware of the provisions of the FRSA, and aware that other FRSA retaliation complaints have been filed against CSX. Yet, within one day of the corporate secretary's office receiving notification of the FRSA retaliation complaint, Mr. Nihoul directed the termination of Complainant despite the fact Complainant had already returned to work and Mr. Nihoul's department had approved Complainant's return to work after obtaining legal advice that Complainant's return to work was permissible under the CBA. Mr. Nihoul worked in the corporate office and is responsible for enforcing corporate policies. The decision maker was not a low level manager working in a remote location and possibly not familiar with standard policy. Mr. Nihoul's outrageous behavior and callous disregard for the rights of its employees warrants punitive damages. Respondent's conduct in retaliation against an employee for filing a FRSA complaint with OSHA exhibited reckless disregard for the law and complete indifference to Complainant's rights and the rights of Respondent's other employees. Discharging an employee for claiming violations of FRSA functions to chill employees from exercising their most basic rights under FRSA.

Complainant's protected activity, filing his FRSA complaint, was a contributing factor in his March 17, 2010 discharge. OSHA finds reasonable cause to believe that Respondent has violated the Federal Railroad Safety Act, 49 U.S.C. § 20109 and issues the following preliminary order.

ORDER

Respondent shall pay Complainant compensatory damages in the amount of $86,082.64, for the following:

- Premium differential from Complainant's health insurance plan to his wife's plan: $ 688.94
- Chapter 7 bankruptcy attorney's and filing fees: $ 1,549.00
- Job search/certifications/clearances: $ 1,454.00
- Orthodontic fees not covered by wife's insurance previously covered by Complainant's: $ 2,223.00
- Late mortgage fees: $ 167.70
- Emotional Distress: $80,000.00

Respondent shall pay Complainant punitive damages in the amount $100,000.

Respondent shall expunge Complainant's employment records of any reference to the exercise of his rights under FRSA. This is to include, but is not limited to, references to Complainant's discharge of March 17, 2010.

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

Respondent shall post immediately in a conspicuous place in or about Respondent's Albany facility, including all places where notices for employees are customarily posted, including Respondent's internal website for employees or emails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days form the date of posting, the attached notice to employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

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

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

With copies to:

Complainant/Respondent

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

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

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N-2716
Washington, D.C. 20210

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

Complaints under Federal Rail Safety Act are handled in accordance with the rules and procedures found in Title 29, Code of Federal Regulations Part 1982, a copy of which may be obtained at http://www.osha.gov/dep/oia/whistleblower/index.html.

Sincerely,

Robert D. Kulick
Regional Administrator

cc: Robin Young (Via UPS # 1Z X10 51V 02 9111 2293)
USDOL/OALJ-Chief Administrative Law Judge
USDOL/SOL-FLS
US DOL/SOL-Regional Solicitor, Region II
Federal Railroad Administration