U.S. Department of Labor

Occupational Safety and Health Administration
William R. Cotter Federal Building
135 High Street – Suite 361
Hartford CT 06103
(860) 240-3154
Fax: (860) 240-3155
www.whistleblowers.gov

August 14, 2013

Anthony Lomanto
Vice President of Human Resources
Pan Am Railways, Inc.
1700 Iron Horse Park
North Billerica, MA 01862

Via UPS # 1ZX104980390564488

Re: Pan Am Railways, Inc./Raye/1-0160-12-011

Dear Mr. Lomanto:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Jason Raye (Complainant) against Pan Am Railways, Inc. (Respondent) on December 6, 2011 and amended on December 27, 2011, under the Federal Railroad Safety Act, 49 U.S.C. §20109 and regulation 29 C.F.R. Part 1982. In brief, Complainant alleged that Respondent retaliated against him for reporting safety hazards in the rail yard, reporting a workplace injury and filing an FRSA whistleblower complaint.

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 I finds that there is reasonable cause to believe that Respondent violated FRSA by retaliating against Complainant for making the December 27, 2011 complaint to OSHA and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of the Federal Railroad Safety Act, 49 U.S.C. §20109 and 49 U.S.C. §20102. Respondent owns and operates regional railroads in northern New England. Complainant is an employee within the meaning of 49 U.S.C. §20109.

Complainant was charged with violating a safety rule on October 24, 2011. A disciplinary hearing was held on November 11, 2011. On November 28, 2011, Complainant received a reprimand for a violation of Respondent's safety rules. Complainant filed a whistleblower complaint on December 6, 2011. Because the complaint was filed within 180 days of the alleged adverse action, it is timely.

Complainant filed an amended complaint on December 27, 2011, after he was notified, on or about December 23, 2011, that he was being brought up on further charges and that another hearing would be held on December 29, 2011. The hearing was rescheduled to January 4, 2012. The amended complaint was filed within 180 days of the alleged adverse action, and is timely filed.

On October 5, 2011, Complainant reported to Trainmaster Dwynn Williams that a pile of old railroad ties on the east end of the Waterville railroad yard, in between the switch stand for Track 3 and Track IM#1, posed a safety hazard.

On October 24, 2011, at approximately 7:45 p.m., Complainant stepped down from a box car in the Waterville railroad yard near Track 3 onto the same pile of railroad ties that he had reported to Williams as a safety hazard on October 5, 2011. When he stepped down, Complainant rolled his ankle.

Complainant immediately reported the injury to Dispatcher Mark Ziko and was taken by ambulance to the Inland Hospital. Complainant was met at the hospital by Williams and Safety Manager Gordon Riordon who asked him to fill out an accident report. Complainant informed them that the accident took place at the same place where he had reported a safety hazard with the railroad ties. Complainant was instructed by the emergency room doctor not to put any weight on his foot for 3-4 days unless it felt better.

October 25 and October 26, 2011 were Complainant's scheduled days off. On October 27, 2011 Complainant did not work because his left ankle was still sore. This was considered lost time by the railroad. On October 28, 2011 Complainant returned to work.

On or about November 1, 2011 Complainant received a letter charging him with violating Pan Am Railways, Inc. Safety Rule P-76 and notifying him of a hearing scheduled for November 7, 2011. The hearing was rescheduled to November 11, 2011.

Complainant attended the disciplinary hearing on November 11, 2011. Respondent alleged that Complainant violated Pan Am Policy P-76, b. in that he did not, "Before getting on or off, carefully observe ground condition and be assured of firm footing". Complainant testified that he had intentionally stepped onto the pile of ties and admitted that he could have had the train moved to step on secure footing while exiting. He described the incident, "I had stepped down with my left foot. I had both hands on the ladder. I stepped down with both hands on the ladder, my right foot was in the stirrup and I put all my weight on my left foot. I put my left foot down and my ankle rolled."

On November 28, 2011, Respondent issued Complainant a letter of reprimand for violating Pan Am Policy P-76, b.

On December 6, 2011, Complainant filed a FRSA Complaint with OSHA, received by Respondent on December 13, 2011, alleging that Respondent retaliated against him for reporting a safety hazard and for reporting his injury. In the complaint letter from Complainant's attorney the incident was described as follows: "On the night of October 24,

2011, I was stepping down from a boxcar in the Waterville Yard, near track three and fell hard to the ground injuring my left ankle."

On or about December 23, 2011, Complainant received a notice of a second hearing scheduled for December 29, 2011. Respondent charged Complainant with providing false statements to the Carrier on November 11, 2011, and/or to a government agency [OSHA] in connection with his description of how the October 24, 2011 injury occurred.

Complainant was charged with violations of Carrier Safety Rules PGR-C and PGR-L which read in pertinent part:
PGR-C – "Any act of insubordination, hostility or wilful disregard of the Company's interests will not be condoned and is sufficient cause for dismissal."
PGR-C – "Employees must conduct themselves in such a manner that their Company will not be subject to criticism or loss of good will."
PGR-L- "Employees who are dishonest, immoral, vicious, quarrelsome, and uncivil in deportment or who are careless of the safety to themselves or of others will not be retained in service".

On December 27, 2011, Complainant's attorney filed an amended complaint in which he alleged the December 29, 2011 hearing was further retaliation for reporting safety hazards and a work place injury.

On January 4, 2012, Complainant attended the disciplinary hearing. The charging officer alleged that one of Complainant's statements was false because Complainant could not have both fallen hard to the ground as stated in the OSHA complaint and rolled his ankle, as he stated during the hearing.

Complainant testified that he had not reviewed the complaint before his attorney sent it to OSHA. He stated that if he had reviewed the part where it said he had fallen to the ground, it would not have been in the complaint. According to Complainant, the complaint to OSHA would have said: "rolled his ankle".

On January 13, 2012, Respondent notified Complainant that "the charges have not been sustained by the Carrier, therefore; no disciplinary action will be taken." Charges against Complainant were dropped.

No Reasonable Cause to Believe that Respondent Retaliated Against Complainant for Making a Safety Complaint and Reporting the Injury

Complainant engaged in protected activity on or about October 5, 2011, when he informed his supervisor of the safety hazard that railroad ties were causing. Complainant also engaged in protected activity on October 24, 2011, when he reported an injury to his ankle.

Respondent's knowledge of Complainant's protected activity is undisputed.

Complainant was subject to two adverse actions: a disciplinary hearing on November 11, 2011

after reporting a job related injury; and, a written reprimand on November 28, 2011, for not following PAR safety regulations.

There is no evidence that Complainant's safety complaint about the railroad ties contributed to the adverse action. However, a preponderance of the evidence does show that Complainant's protected activity of reporting the injury was a contributing factor in the adverse actions because if Complainant had not reported the injury, Respondent would not have known of the incident and would not have held a hearing or disciplined Complainant.

Although the protected activity contributed to the adverse action, Respondent provided evidence that demonstrates that it conducts hearings at the same rate for alleged work rule violations related to personal injuries as it does for alleged work rule violations unrelated to personal injuries. This evidence also shows that the percent of employees Respondent disciplined after a hearing is substantially similar in cases with or without personal injury. Furthermore, it is clear that Complainant violated a work rule. He himself had reported that it was a hazard to leave piles of railroad ties in the yard. Yet, while exiting the train, he deliberately chose to step on the same pile he had reported, even though he admitted that he could have had the train moved a few feet before exiting.

Although Complainant's protected activity was a contributing factor in the decision to take the adverse action, Respondent has provided clear and convincing evidence that it would have reprimanded Complainant if it had observed the incident, even if no injury resulted. Therefore, OSHA finds that Respondent did not violate FRSA when it issued the November 28, 2011 reprimand to Complainant.

Reasonable Cause to Believe that Respondent Retaliated Against Complainant for FRSA Complaint

Complainant engaged in protected activity when he filed the FRSA complaint on December 6, 2011, and Respondent was made aware of this protected activity on December 13, 2011, when it received the complaint. On December 23, 2011, Respondent took adverse action against Complainant by charging him with making false statements to the carrier and/or a government agency, and setting a disciplinary hearing date of December 29, 2011, (rescheduled and held on January 4, 2012.) Thus, a preponderance of the evidence shows that Complainant's protected activity was a contributing factor to the adverse actions (the charge and hearing that resulted).

Respondent argued that it had no choice but to charge Complainant and hold a hearing once it believed that Complainant had either lied at the November 11, 2011, hearing or lied to OSHA about the manner in which his injury occurred. Respondent asserted that a hearing is the only way it can determine what actually occurred.

However, Respondent knew how the accident had occurred as Complainant had admitted knowingly stepping down on the pile of railroad ties. Since it was undisputed that the accident had taken place and that Complainant had injured his ankle, Respondent has failed to satisfactorily explain why it was so important to find out the reason for the discrepancy between the two accounts of what had occurred.

It is impossible to see how this knowledge would have made any difference in the outcome. Respondent's issue was whether Complainant had violated a work rule when he stepped on the railroad ties. That had been established when Complainant admitted at the November 11, 2011, hearing that he knowingly stepped onto the pile of railroad ties and that he could have had the train moved to step down safely. Therefore, Respondent already knew that Complainant had violated a work rule. Whether Complainant fell hard to the ground or rolled his ankle after violating the work rule is inconsequential and would not affect the charges against Complainant.

The acts of accusing an employee of lying to OSHA after he filed an FRSA complaint, charging him with violating safety rules that if he was found guilty of could result in his termination, and conducting trial proceedings, have a chilling effect on Respondent's employees and would tend to dissuade others from asserting their rights under FRSA. Even if the charge is later dropped, as it was after the hearing in this case, that does not remedy this chilling effect, as the act of bringing the charge against an employee affects all of Respondent's employees' willingness and ability to exercise their most basic rights under FRSA.

The written disciplinary charges mentioned Complainant's complaint to "a government agency" and specifically stated that he would be subject to discipline for, "Providing false statements to the Carrier and/or a government agency, in connection with your description as to how the incident that you were involved in on Carrier property on October 24, 2011, took place..." The disciplinary charges, on their face, connect Complainant's discipline to his filing of the FRSA complaint. Respondent has not provided clear and convincing evidence that it would have taken the same adverse action even if the complainant had not engaged in protected activity. Moreover, once a FRSA allegation has been made to OSHA, it is OSHA's responsibility, not Respondent's, to establish the truth of assertions made by both parties. Under these circumstances Respondent's use of an internal, management-run disciplinary hearing to establish facts that are the subject of a federal OSHA investigation is overreaching at best and interfering with a federal investigation at worst. Regardless of Respondent's intent, such a heavy-handed approach would clearly chill other employees from filing similar claims. Therefore, OSHA finds that Respondent retaliated against Complainant when it charged him with lying and held an investigatory hearing.

Order

Respondent shall expunge all files and computerized data systems of disciplinary actions and references to disciplinary actions, related to the December 23, 2011 hearing notice and the January 4, 2012 trial. The expunging shall include, but not be limited to, the notice and any memoranda or letters referencing the notice and formal disciplinary hearing.

Respondent shall post the Notice to Employees included with this Order at all its locations in Maine where notices to employees are customarily posted, as well as on its internal website.

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

Respondent shall pay reasonable attorney's fees.

Respondent shall make Complainant whole for any lost wages and benefits due to attending the January 4, 2011, hearing.

Respondent shall pay Complainant compensatory damages in the amount of $10,000.

Respondent shall pay Complainant punitive damages in the amount of $40,000.

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

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

With copies to:

All Parties to this Case

Marthe B. Kent
Regional Administrator
U.S. Department of Labor, OSHA
25 New Sudbury Street
JFK Federal Building, Room E-340
Boston, MA 02203

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

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an 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 FRSA.

A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. Complaints under Federal Rail Safety Act are handled in accordance with Title 29, Code of Federal Regulations Part 1982, a copy of which may be obtained at www.whistleblowers.gov.

Sincerely,

Carole Horowitz

Carole Horowitz
Regional Supervisory Investigator

cc: Scott Perry, Esq. (Via UPS #1ZX104980390326664)
USDOT-FRA
USDOL-OALJ
USDOL-SOL/FLS

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:

OSHA® Occupational Safety and Health Administration

U.S. Department of Labor

www.osha.gov

(800) 321-OSHA

DEP 8/2010

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

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

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

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

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

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

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

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

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

A: Yes. This violates FRSA.

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

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

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

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

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

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

NOTICE TO EMPLOYEES

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

PAN AM RAILWAYS, INC. has been ordered to make whole four employees who were found to have been retaliated against for exercising their rights under the Federal Rail Safety Act (FRSA). Pan Am Railways, Inc. has also taken affirmative action to ensure the rights of its employees under employee whistleblower protection statutes including the FRSA.

PURSUANT TO THAT ORDER, PAN AM RAILWAYS, INC. AGREES THAT IT WILL NOT:

1. Discharge or in any manner discriminate against any employee because such employee has engaged in any activity, filed any complaint or instituted or caused to be instituted any proceeding under or related to the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53., or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself/herself or others of any right afforded by the FRSA.

2. Discharge, demote, suspend, threaten, harass, intimidate or in any other manner discriminate against an employee because such employee has reported a workplace injury or illness.

3. Deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

4. Discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

_____

PAN AM RAILWAYS, INC. Date

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

OSHA Occupational Safety and Health Administration

www.osha.gov