U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
300 Fifth Avenue, Suite 1280
Seattle, Washington 98104-2397

Via certified mail #7009 3410 0001 7957 9301
December 15, 2011

Mr. Jeffrey J. Devashrayee
Union Pacific Railroad Company
280 South 400 West, Suite 250
Salt Lake City, UT 84101

RE: Union Pacific Railroad Company/Annen/ 0-0160-10-018

Dear Mr. Devashrayee:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Gennese Annen (Complainant) against Union Pacific Railroad Company (Respondent) on July 7, 2010, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109. In brief, Complainant alleged that on or about May 26, 2010, she was discharged in retaliation for reporting a work-related personal injury. She further alleged that on or about May 3, 2010, Respondent attempted to interfere with her subsequent medical treatment in retaliation for her reporting a work-related personal injury. Complainant also alleged that prior to her discharge, she was subjected to a retaliatory internal investigation conducted by Respondent.

Postal records show that on August 22, 2011, Respondent received OSHA's letter stating that, based on the available evidence, reasonable cause existed to believe that Respondent had violated the Federal Railroad Safety Act. The letter also detailed the substance of the relevant evidence revealed in OSHA's investigation with attachments of the evidence. Per interim final rule 29 C.F.R. § 1982.104(f),[1] Respondent requested and was given an opportunity to submit additional and rebuttal evidence and an opportunity to meet with OSHA officials. Respondent was originally provided fifteen days to respond. Respondent subsequently requested two extensions and was given a total of 42 days to provide additional factual information in support of its contentions.

On September 14, 2011, OSHA officials had a conference call with you as the representative for Respondent. During that conference call, OSHA confirmed that the evidence gathered in the investigation, absent rebuttal evidence from the Respondent, provided reasonable cause to believe that retaliation had occurred. Respondent was informed of the specific actions needed to make the Complainant whole and to comply with the act. Respondent was also encouraged to provide rebuttal evidence.

[1] In the August 22nd letter, OSHA inadvertently referred to this Federal regulation as 29 C.F.R. Section 1979.104(e); however the correct regulation is referenced above.

On September 16, 2011, you sent OSHA an e-mail expressing concern that OSHA was advocating for the Complainant and had already made its determination without having received Respondent's response.

On September 21, 2011, Respondent sent a response, which consisted of a one and a half page letter in which Respondent again denied that it retaliated against Complainant and reiterated its original defense. Respondent failed to provide any rebuttal evidence of legitimate non-discriminatory reasons for delaying Complainant's medical care, the investigation of Complainant or the termination of her employment.

On September 29, 2011, after the deadline to provide rebuttal evidence had elapsed, Respondent contacted OSHA and made another request for additional time to provide rebuttal evidence. OSHA granted Respondent's request. In a letter dated October 3, 2011, Respondent claimed that the Department of Labor is "without subject matter jurisdiction to investigate" this complaint because the Complainant had allegedly elected a remedy under another provision of law by filing a grievance with her union and has "pursued her RLA grievance to the arbitration stage."

Respondent maintains that under 49 U.S.C. § 20109(f) a union grievance which proceeds to the arbitration stage is an election of remedy and therefore, the Complainant's FRSA whistleblower complaint should be dismissed. OSHA's position on 49 U.S.C. § 20109(f) was fully set forth in OSHA's Amicus Brief, submitted in *Mercier v. Union Pacific Railroad Co. and Koger v. Norfolk Southern Railway Co.*, ARB Case Nos. 09-121 & 09-101.[2] Additionally, in light of the ARB's recent decision in *Mercier* and *Koger*, ARB Case Nos. 09-121 & 09-101, which rejects Respondents' 49 U.S.C. § 20109(f) argument, this issue is moot.

In sum, while Respondent has reiterated its legal arguments since receiving OSHA's August 18, 2011, letter, it has not submitted any additional evidence to support its contention that it would have taken the same adverse employment action against the Complainant in the absence of her protected activity..

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region 10, finds that there is reasonable cause to believe that Respondent violated the FRSA and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. Respondent is engaged in interstate and/or foreign commerce within the meaning of 49 U.S.C. § 20109. Respondent's workforce includes approximately 43,500 employees. Complainant is a member of the United Transportation Union (UTU). Respondent employed Complainant as locomotive conductor at its facilities in Pocatello, Idaho. Complainant is an employee covered under 49 U.S.C. § 20109.

[2] OSHA's Amicus Brief can be found on the Department's website at http://www.dol.gov/sol/media/briefs/main.htm

Respondent terminated Complainant's employment on or about May 26, 2010. On July 14, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against her in violation of FRSA. As this complaint was filed within 180 days of the alleged adverse actions, it is deemed timely.

Respondent hired Complainant in October 2006. Complainant worked as a locomotive Conductor out of Respondent's Pocatello, Idaho terminal. As a Conductor, Complainant was responsible for, among other things, assuring the safe and efficient operation of a train.

Respondent's Manager of Terminal Operations, Complainant's immediate supervisor, described her as a "very good" employee who was "always willing to go out and just go do the job and she never complained." Respondent's Senior Manager of Terminal Operations told OSHA that prior to Complainant's May 3, 2010, injury he had no issues with her and stated that "she did her job, was conscientious." The evidence shows that prior to her May 3, 2010, injury, Complainant had a spotless disciplinary record.

At 6:39 a.m. on May 3, 2010, Complainant and an Engineer returned to the train yard in Pocatello. They had just completed a 36 hour "turn" using Locomotive 8370. As is typical, each carried a "grip" or bag. Both employees carried approximately 12 pounds of required railroad equipment in their respective grips, along with a change of clothes, toiletries and other items needed for the 36 hour journey. Complainant's "grip" was an over the shoulder bag that she had purchased a week or two earlier.

In order to detrain from Locomotive 8370, Complainant was required to pass through the inner and outer doorway of that locomotive and climb down a ladder. The outside door of the locomotive is significantly narrower than a standard doorway: a standard doorway is typically 80" high, and between 30"-32" in width; the locomotive doorway here is essentially a hole punched through the steel nose of the locomotive, the dimensions of which are approximately 68" high and 22"-24" wide. The locomotive doorway contains multiple items on which an exiting railroad employee may be caught, including a lever door handle and an abrupt beveled edge.

As the Engineer was climbing down the ladder, Complainant approached the outside door of Locomotive 8370 carrying her grip and lunch pail. Before she reached the door, her grip caught on what she believed to be the outside door's doorframe, possibly the beveled edge, which twisted her sharply to the right. At the moment she was twisted, Complainant reported that she felt, for an instant, a muscle twinge on her right side, between her breast and stomach. According to Complainant, the pain she felt from the twinge subsided immediately.

The twisting motion caused Complainant's shoulder strap to fall off of her right shoulder and become caught in the crook of her elbow. Complainant stopped, set down her lunch pail, adjusted her shoulder strap and bumped her bag up. Complainant saw nothing wrong with the door or doorframe. She reported that being caught on the doorframe is a common occurrence.[3] After

[3] OSHA's investigation revealed that respondent's employees were regularly caught on the doors while detraining.

adjusting her grip, Complainant picked up her lunch pail, walked to the ladder, detrained and went home.

No witness observed Complainant get caught.

Once home Complainant took a shower and then worked on her computer. She felt another twinge in her right side between her breast and stomach. As had happened when she was twisted in the doorway of Locomotive 8370, Complainant felt a moment of pain that immediately subsided.

Around noon Complainant again felt pain on her right side. The pain occurred in the same spot where she had felt a twinge when she twisted while attempting to exit the narrow outside door of Locomotive 8370. However, this time the pain was intense and did not subside.

Complainant, who had never been injured while working for Respondent, phoned her Union Representative to ask what she should do. Her Union Representative told her that she needed to call a manager and seek medical attention.

Respondent has a policy dated February 27, 2009, and entitled, "Employee Personal Injury Response." This policy states that it is intended for "all operating department management employees" and includes the following "basic procedural guidelines:"

- Any harassment or intimidation of an employee to prevent reporting of the injury is forbidden. In all cases, proper reporting procedures will be followed.
- When an employee is taken for medical treatment, do not try to direct or influence the employee...as to the type of treatment the employee should receive.
- Any manager or supervisor who consciously jeopardizes an injured employee's ability to obtain appropriate medical care will be subject to discipline up to and including dismissal.
- The FRA [Federal Railroad Administration] has expanded their interpretation of what constitutes harassment and intimidation and/or interfering with medical treatment. Specifically, the FRA considers virtually ANY discussion of medical treatment options...to be interference with medical treatment.

Respondent required that its Employee Personal Injury Response policy "be posted at all locations where employees report to work, etc." Each of the managers interviewed specifically acknowledged that they understood that it was against the law to retaliate against an employee for reporting a work related injury.

At 12:06 p.m., while in route to a clinic, Complainant phoned her immediate supervisor, Respondent's Manager of Terminal Operations. When he did not answer, Complainant left him a

voicemail in which she explained that she believed that she might have been injured while exiting Locomotive 8370 and planned to seek medical attention.

Complainant next phoned the number for the "on-duty manager." No one answered. Complainant could not leave a voicemail because the on-duty manager phone's voicemail was not set up.

The third manager that Complainant tried to reach was Respondent's Manager of Operating Practices who answered her call. Complainant explained that she had suffered an injury. Complainant told Respondent that she believed that she was injured when her bag got caught up on the outside doorframe of Locomotive 8370, that she was in pain, and that she was on her way to seek medical attention.

Respondent's Manager of Operating Practices told Complainant that she needed to call Respondent's Senior Manager of Terminal Operations. At this point in time Complainant had arrived at a medical clinic. Complainant testified at Respondent Union Pacific's "Investigative Hearing" that despite the fact that she was "in a lot of pain" she "was trying to do the right things, make sure [she] notified the right people and he [Respondent Manager of Operating Practices] said you need to call [Respondent's Senior Manager of Terminal Operations], here is his phone number." Consequently, instead of going inside the clinic to seek treatment, Complainant wrote down Respondent's Senior Manager of Terminal Operations telephone number. Complainant, who had already phoned three managers then called a fourth. Respondent's Senior Manager of Terminal Operations did not answer and did not have his voicemail set up to accept messages.

Just before entering the medical clinic, Complainant received a phone call from Respondent's Manager of Operating Practices. At Respondent's Senior Manager of Operating Practices direction, Respondent's Manager of Operating Practices requested that Complainant come in to the depot to see the Respondent's Occupational Health Nurse, instead of seeking outside medical attention. Complainant told Respondent's Manager of Operating Practices that she was in a lot of pain, already at a doctor's office, and would like to see a doctor.

Complainant attempted to check in at the medical clinic and informed the clinic personnel that she was covered by the provisions of the Federal Employers' Liability Act (FELA), as opposed to Idaho's workers' compensation laws. Complainant had a "FELA Card," provided by her union, which explained some of the basic differences between FELA and workers' compensation including information that injured railroad employees do not have any rights under a state workers' compensation plan.

Complainant asked the medical clinic to obtain her authorization before releasing medical records to Respondent. However, the clinic reportedly told Complainant that it routinely released all information to employers regardless of the employee's consent. Complainant reiterated that she was not covered by workers compensation; and the clinic subsequently refused to treat her injury.

Complainant returned to her car and a friend drove her to a different medical clinic in Chubbuck, Idaho. The second medical clinic agreed to obtain Complainant's consent before releasing medical records to Respondent.

The second medical clinic diagnosed Complainant with a right intercostal muscle strain. To treat the injury, Complainant was prescribed cyclobenzaprine (aka flexirel). According to the National Center for Biotechnology Information, cyclobenzaprine is "a muscle relaxant, used with rest, physical therapy, and other measures to relax muscles and relieve pain and discomfort caused by strains, sprains, and other muscle injuries."[4] However, before she could fill the doctor's prescription, Complainant received a phone call from Respondent's Senior Manager of Terminal Operations.

Respondent's Senior Manager of Terminal Operations phoned the second medical clinic and asked to speak with Complainant. A nurse answered the phone and went to find Complainant, who was still in the examination room. Complainant told the nurse that she would take the call. Complainant told Respondent that she had just been treated and "needed to take medication and then [she] was going to come down and fill out the accident report."

Respondent's Senior Manager of Terminal Operations ordered Complainant not to take the medication prescribed to her by the second medical clinic. He informed her that "before you take any medications, we [Respondent] need to drug [and alcohol] test you." Union Pacific's drug and alcohol testing policies explicitly state that an employee who fails to cooperate in the drug and alcohol testing process will be terminated. Complainant asked: "Are you telling me I can't receive medical treatment?" Respondent's Senior Manager of Terminal Operations repeated that Complainant was not to take any medications or to leave the second medical clinic until she had been drug tested. Complainant complied with Respondent's order. She did not object to the drug test at any point in time. To the contrary, she merely told Respondent's Senior Manager of Terminal Operations and Senior Manager of Operating Practices that she was in pain and needed to take the medication prescribed to her to address that pain.

Notably, 49 CFR 219.11(2) provides that "[i]n any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s)." (emphasis added). Respondent's Senior of Manager of Terminal Operations is not a medical doctor and has no medical training beyond basic first aid. He was not qualified to determine whether taking the medication prescribed to her was necessary medical treatment and made no attempt to determine whether it was until the date of Complainant's investigative hearing. Nevertheless, he ordered Complainant to forgo that treatment.

When asked about this exchange at his OSHA interview, Respondent's Senior Manager of Terminal Operations denied that he instructed Complainant to forgo the medication that the second medical clinic had prescribed. However, Respondent's Senior Manager of Terminal Operations admitted twice during Respondent's "Investigative Hearing" that he had instructed Complainant not to take the prescribed pain medication.

---

[4] Source: http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000699/

When asked about his statements as written in the transcript from Respondent's "Investigative Hearing," Respondent's Senior Manager of Terminal Operations changed his answer. He then admitted to OSHA that he had, in fact, instructed Complainant not to take any medications until the drug tester arrived. Indeed, once shown the statements that he made at the hearing, Respondent's Senior Manager of Terminal Operations also remembered the specific details of the reasons he had done so. Among other things, he indicated that he was concerned that he might be accused of having interfered with Complainant's medical treatment.[5] In fact, Respondent's Senior Manager of Terminal Operations was so concerned that on the day of the hearing, he reached out to Respondent's Drug and Alcohol Manager in an attempt to "have his bases covered." Thus it appears that, at the time of his instructions to the Complainant, Respondent's Senior Manager of Terminal Operations knew it was improper to delay and interfere with prompt medical attention for injured employees.

The available evidence indicates that at approximately 1:10 p.m. Respondent's Senior Manager of Terminal Operations, who has no medical background, did not consult with a single medical professional to determine whether it was medically necessary for Complainant to take the medication prescribed to her, yet he instructed her to not take the prescribed medication.

Complainant feared that Respondent would terminate her employment if she failed to follow the Official's instructions. Consequently, although in considerable pain, Complainant held off on taking the medication prescribed to her by the second medical clinic.

After getting off of the phone with Respondent, Complainant phoned her Union Representative. She told the Union Representative that she did not believe she was being treated fairly and asked him to come to the second medical clinic while she waited for the drug tester.

When the Union Representative arrived at the hospital, he spoke with the Respondent Official. Their conversation ended without Respondent agreeing to allow Complainant to take the medications prescribed to her by the second medical clinic. The Union Representative waited with Complainant for approximately one hour until the drug tester arrived.

---

[5] FRSA expressly prohibits delaying or interfering with medical or first aid treatment of an employee who is injured during the course of employment. 49 U.S.C. § 20109 (c)(1). The Federal Railroad Administration's regulations at 49 C.F.R. 225.33 also require railroads to maintain an internal control plan that includes a "policy statement declaring the railroad's commitment . . . to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment . . . will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation." Although Complainant delayed taking pain medication because Respondent's Senior Manager of Terminal Operations told her that she must be drug tested, no evidence could be found indicating that Respondent at any point disciplined or counseled its Senior Manager of Terminal Operations or any other manager as a result of this incident.

While Complainant was waiting for the drug tester, Respondent's Senior Manager of Operating Practices and Respondent's Occupational Health Nurse arrived at the second medical clinic. The Senior Manager of Operating Practices told OSHA that the Complainant "was in discomfort" and that she complained about being in pain.

Complainant's friend had filled her prescription and had the medication there ready for her to take. Respondent's Senior Manager of Operating Practices was aware that Complainant was holding off on taking the medication prescribed to her based on the Senior Manager of Terminal Operations' orders. However, at no point did Respondent's Senior Manager of Operating Practices tell Complainant that she could in fact take the medication prescribed to her. Instead, he asked Complainant to fill out a two page form entitled, "Report of Personal Injury or Occupational Illness."

Complainant wrote the following on the "Report of Personal Injury or Occupational Illness":

> I was walking out of the locomotive door and my bag that has my railroad equipment in it got caught on the door frame & twisted me & pulled me back a little...I believe my bag got caught on the door frame for some reason. I'm unsure if it was because of an obstruction or defect that shouldn't have been there.

Section VI box (6) of the Report of Personal Injury or Occupational Illness asks "WERE THERE ANY DEFECTS IN THE EQUIPMENT" and provides a "yes" and "no" check box. Complainant, who asserted that she saw no defect when she detrained, did not check either box and wrote "unsure". In Section VI box (7) Complainant continued to write "unsure if there was any defect on door frame."

Once she completed that form, Respondent Senior Manager of Operating Practices asked that she make a handwritten statement, which Complainant did:

> This is Gennese R. Annen. I was getting off the KPDG2 02 at the fuel plugs in Pocatello on 05/03/10 at about 6:45 a.m. when my bag caught on the outside door frame & twisted & pulled me back a little causing my stomach muscles to get twisted sharply. I got my bag unstuck, got off the locomotive & tied up. After I got home, the slight muscle twinge I felt at the depot gradually got worse & increased in pain. As soon as I realized I had actually gotten injured I sought out medical attention and contacted Management.

Complainant gave her authorization to the second medical clinic to provide all medical records requested by Respondent. Respondent Senior Manager of Operating Practices described Complainant as "very forthcoming."

Complainant received a drug test at 2:19 p.m., approximately one hour after being told that she could not take any medication until a drug tester arrived. The results of the drug test were negative.

Complainant was released to return to work on May 10, 2010. On that day, Complainant gave Respondent's Senior Manager of Operating Practices her release paperwork. Respondent's Senior

Manager of Operating Practices informed Complainant that she was being investigated and would not be allowed to return to work until after the investigation had concluded. Respondent's Senior Manager of Operating Practices told OSHA that Complainant appeared to be "flabbergasted" that Respondent had decided to investigate her.

On May 11, 2010, Respondent sent Complainant a "Notice of Investigation" and required her to attend an "Investigative Hearing." The alleged purpose of the hearing was to determine whether Complainant had violated Respondent's rules and would be subject to disciplinary action. Respondent's notice stated the following:

> While employed as a Conductor...on May 3, 2010, you allegedly failed to immediately report to the proper manager a case of personal injury that allegedly occurred at 0645 hours, while you were on duty. You did not notify a manager about the injury until approximately 13:00 hours on May 3, 2010. You allegedly were dishonest in completion of Form 52032 when you allege you were injured when a bag carrying company equipment was caught by the locomotive door frame of the outside door of the locomotive while you were exiting the locomotive. In addition, you allegedly failed to immediately report equipment (locomotive front door frame) to the train dispatcher, other crew members, or on duty yard manager, that you later reported may be defective and the cause of a personal injury. These alleged actions indicate a possible violation of Rule 1.6 (Conduct), Rule 1.2.5 (Reporting), Rule 1.2.7 (Furnishing Information), and any other applicable rules that may be brought up during the investigation that are contained in the General Code of Operating Rules, effective April 7, 2010.
>
> You are withheld from service effective May 10, 2010, and you will continue being withheld pending results of this investigation. This is a Level 5 infraction, and if you are found to be in violation of this alleged charge, the discipline assessment may result in dismissal.

With this Notice, the Complainant was suspended from work without pay beginning May 10, 2010.

On May 19, 2010, Respondent held its "Investigative Hearing". The Superintendent for Respondent's Pocatello Service Unit appointed two officials to act as the "Conducting Officers." The Conducting Officers manage the hearing, similar to a judge, and write a close out letter at the hearing's conclusion. The close out letter often makes a recommendation regarding whether the charges against the employee were sustained. Both Conducting Officers wrote close out letters and provided those letters to Respondent's Superintendent.

The evidence provided at Respondent's May 19, 2010, "Investigative Hearing" centered on Complainant's answers on form 52032, Report of Personal Injury or Illness, her handwritten statement and her description of events. Specifically, Respondent spent significant time at the hearing on the fact that Complainant stated that she was "unsure" of whether a defect existed, in her handwritten statement and in the answers she gave to Respondent's Senior Manager of Operating Practice when she was at the hospital. Respondent's scrutiny of Complainant does not take into account that she made those statements hours after the injury, on reflection and in the second

medical clinic's waiting room while she was in pain -- pain that could have been addressed but for Respondent's Senior Manager of Terminal Operation's instruction that she forego her prescribed medication.

Complainant insisted throughout the "Investigative Hearing" that at the time of the incident she saw nothing out of place and saw nothing that appeared to be a defect and thus had no reason to report a possible defect.

Respondent later inspected the door and door frame on which Complainant's bag was caught. Like Complainant, Respondent found nothing that could be perceived to be a defect.

At the conclusion of the "Investigative Hearing" both Conducting Officers wrote close out letters. Both Conducting Officers told OSHA that they sent their respective close out letters to the Pocatello Service Unit's Superintendent. Ordinarily the Pocatello Service Unit Superintendent would decide whether to sustain charges against an employee. Here, the responsibility for determining whether the charges were sustained was transferred to the Utah Service Unit Superintendent. The Utah Service Unit Superintendent reported that he had no memory of receiving the close out letters in this case.

While one of the conducting officers declined to make a recommendation, the other wrote the following in response to whether Complainant had violated rule 1.6 (Conduct): "I can find *nothing* in testimony from our witnesses nor in her testimony that indicates to me she was careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral, quarrelsome or discourteous...." [emphasis added.]. The same conducting officer also concluded that none of the charges were sustained: "[w]ith the information gathered during this Investigation and having personally been present to see and hear the entire proceedings, *I do not believe that these charges were sustained.*" [emphasis added].

The Utah Superintendent reached a different conclusion. He told OSHA that if Complainant believed that she was twisted on a door then she should have reported it "so that the subject matter experts in the mechanical department could determine whether there was something the matter." He explained "I do not think that is a normal experience that folks have, that their bags get caught on the door." He further stated that he believed that the door was "a standard size door."

In truth, the door frame on which Complainant reported being caught is *not* a standard sized door. To the contrary, evidence shows that the style of door through which Complainant had to exit on May 3, 2010, was roughly one foot narrower and one foot shorter than a standard doorway.

Respondent also charged Complainant with violation of GCOR 1.6(4) because she was allegedly dishonest in completion of Form 52032 (her injury report) insofar as she claimed that she was injured when her grip got caught on the locomotive's outside door's frame while she was detraining. Respondent contends that a video recording known as a "Track Image Recorder" (TIR) attached to another locomotive captured Complainant exiting UP 8073. Respondent claims that the TIR validates the dishonesty charge against Complainant.

Respondent's Conducting Officer gave a thorough description (the most detailed available to OSHA) of what he saw on that recording in his close out letter, which is quoted below:

> It showed the lead locomotive (UP 8370) stopped in Pocatello, Id. on main track just west of the Benton Street Overpass. We observed an employee come out the front door, turn to the left, properly position them self facing the locomotive then back down the locomotive steps to the ground. This employee[] was identified as [an] inbound locomotive engineer... Next we could observe an employee coming out thru the same front locomotive door. This employee was identified as Ms. Annen. The picture indicated that Ms. Annen had stopped prior to coming outside the door, made some kind of a bounce movement, stop, set something through the door (identified as her lunch cooler) to the outside platform. She then came through the door with her Grip on her right shoulder, pick[ed] up the lunch pail, move[d] toward the step. She stopped to place the lunch pail closer to the step. Turned around to face the locomotive steps with her bag over her right shoulder. Took a few steps down, stopped to reposition her lunch pail, then stepped off the bottom step, reached up to retrieve the lunch pail and walk westward toward her Engineer away from the locomotive.

This Conducting Officer determined that the available evidence, including the TIR video, did ***not*** provide a basis to conclude that Complainant lied about what happened.[6] Accordingly, he recommended against sustaining the dishonesty charge against Complainant. Notably, the only evidence, other than Complainant's testimony, that exists regarding what occurred as Complainant exited the train is the TIR video. However, Respondent's Utah Superintendent reported that he had no memory of ever receiving or viewing the TIR evidence. Respondent's Utah Unit Superintendent did not recall whether he had viewed the TIR video before sustaining the charged violation.

Respondent also charged and investigated Complainant for violating Rule 1.2.5; late reporting of injuries. Respondent upheld this charge against Complainant ostensibly because her injury report indicates that she suffered an on duty injury at 6:45 a.m. but she did not report her injury to Respondent until several hours later at approximately 1 p.m.[7]

Complainant said that she was unaware that she was injured at 6:45 a.m on May 3, 2011. She further reported that aches, pains and twinges are fairly common experiences for all conductors. She pointed out that conductors regularly tighten handbrakes, climb up and down ladders, operate pin lifters, align draw bars, walk on ballast and occasionally travel in rough riding locomotives. According to Complainant, these physical activities leave many railroaders with occasional aches, pains and twinges.

---

[6] Although Respondent allowed OSHA to view the TIR video on December 8, 2010, Respondent has refused multiple times to provide a copy of the TIR evidence to OSHA. Based on OSHA's observation of the video, OSHA finds the Conducting Officer's account of the video is accurate.

[7] In fact, Complainant established at the "Investigative Hearing" that she reported her injury by no later than 12:06 p.m. However, the termination notice adopts the charges listed in the "Investigative Hearing" notice without any alteration.

Evidence revealed during the OSHA investigation confirmed that Respondent's employees feel aches, pains and twinges fairly regularly as a part of their work. Employees said that they did not report every twinge that they felt and stated that to do so would likely bring a variety of retaliation from the Respondent.

As with the other rule violations, the only Respondent Conducting Officer to make a recommendation determined that there was insufficient evidence to uphold a 1.2.5 charge against Complainant. He wrote in part, "I believe what she stated [.] As soon as she was aware that the pain she was experiencing could be due to the '[t]winge' she felt in the locomotive door area she took action to contact a Railroad manager. She did not feel injured immediately when she felt a muscle twinge at 6:45 AM."

Respondent Conducting Officer told OSHA that Complainant's version of events was consistent with his own personal experiences: "during my life I have played a lot of sports and I know that you can injure a portion of your body and the pain will not actually start until sometime after the injury." He also said that an opinion from a medical professional that contradicted Complainant's contentions (and was contrary to his own anecdotal experiences) could raise suspicion.

Respondent's Utah Service Unit Superintendent upheld the charges against Complainant and fired her effective May 26, 2011.

With respect to the GCOR 1.2.5 charge, Respondent's Utah Superintendent agreed that a person cannot report an injury of which that person is unaware. Further, he acknowledged that Complainant claimed that she was unaware of her injury at the time she states that it occurred but he did not believe Complainant's account that she felt a twinge at the time of the injury and only later realized that she was injured.

OSHA asked every manager involved in the decision to discipline Complainant whether any attempt whatsoever had been undertaken to determine whether Complainant's description of the pain that she felt was likely to be true. According to Respondent's Managers, nothing was done to investigate the medical probability that Complainant's description that she initially felt a twinge and then felt pain hours later was accurate. Thus, the available evidence suggests that Respondent simply assumed that Complainant felt injured immediately, waited 5.5 hours to report that injury and then lied when she said that she was unaware that she was injured at the time she felt a twinge.

With respect to the GCOR 1.2.7 charge (Failure to Furnish Information), the ultimate decision maker, Respondent's Utah Service Unit Superintendent, could offer no explanation as to why he upheld that charge. He told OSHA that he simply could not remember.

The evidence demonstrates that Complainant engaged in activity protected by FRSA. Specifically, on May 3, 2010, Complainant engaged in protected activity when she reported a work-related personal injury. Complainant also engaged in protected activity when she sought medical treatment and questioned Respondent's repeated instructions to "hold off" on taking the medication prescribed to her by the second medical clinic.

On May 3, 2010, Complainant engaged in a protected activity when she reported, in good faith, a possible hazardous safety condition, specifically she reported that she was unsure about whether there was a defect on the outside door frame of Union Pacific Locomotive 8073.

On July 14, 2010, Complainant engaged in a protected activity when she filed a whistleblower complaint with the Occupational Safety and Health Administration.

Respondent had knowledge of each of Complainant's protected activities.

Complainant was subjected to four distinct adverse employment actions:

1. On May 3, 2010, Complainant was subjected to an adverse action when Respondent's Senior Manager of Terminal Operations ordered her to forgo medical treatment.

2. On May 10, 2010, Complainant was subjected to an adverse action when she was suspended without pay pending an investigation.

3. On May 19, 2010, Complainant was subject to an adverse action when Respondent brought charges against her and subjected her to an "Investigative Hearing."

4. On May 26, 2010, Complainant was subject to an adverse action when she was terminated.

The available evidence indicates that Complainant's protected activities were a contributing factor in the adverse actions that she experienced.

The timing of Complainant's protected activity and the adverse actions supports the conclusion that her protected activity was a contributing factor in the adverse actions taken against her. Complainant reported a work-related injury to numerous Respondent officials starting at approximately 12:00 p.m. on May 3, 2010. She also informed them that she was seeking medical treatment. Later that same day, Complainant identified a possible defect on Respondent's Locomotive 8073. Within roughly an hour of her first phone call to Respondent, Complainant was ordered to forgo medical treatment in spite of the fact that she was in pain, and that Respondent knew that Complainant was in pain. She then had to wait for approximately one hour for a drug tester to arrive and administer a drug test before she was allowed to take the medication prescribed to her by the second medical clinic.

On May 10, 2010, seven days after being injured, Complainant attempted to return to work and was notified that she was being charged with possible disciplinary action, she was immediately suspended without pay, and was required to attend Respondent's "Investigative Hearing."

On May 19, 2010, sixteen days after Complainant was involved in a protected activity of reporting a work-related injury, Respondent held its "Investigative Hearing." Respondent's Conducting Officers wrote close out letters and provided those letters to Respondent's Superintendent. One of the Conducting Officers declined to make a recommendation; the other concluded that none of the charges were supported by the evidence offered at the hearing. Consequently, the only

recommendation to come out of Respondent's "Investigative Hearing" was that none of the charges against Complainant were supported by the evidence.

On May 26, 2010, and contrary to the Conducting Officer's recommendation, Respondent upheld each and every charge against Complainant and terminated her employment. It is important to note that Respondent's Official who made this decision was not present during the hearing and did not interview Complainant. Instead, he claims to have based his decision on the transcript of the hearing and the exhibits attached thereto. This Official said he had no memory of receiving a close out letter from either Conducting Officer and no memory of reviewing the TIR evidence.

The close temporal proximity between Complainant's protected activities and the subsequent adverse actions create an inference of retaliation. That inference is strengthened in this case by Respondent's deciding official's seeming failure to consider the close-out letter of the Conducting Official, which thoroughly explained his reasons for recommending that the charges not be sustained, and the TIR video, which the Conducting Official found corroborated Complainant's account of events.

The investigation also uncovered substantial evidence of disparate treatment. Prior to being injured, Complainant appears to have been highly regarded by her supervisors. However, shortly after she reported an injury and identified a possible defect, Complainant was ordered to forgo medical treatment, suspended, investigated and then terminated. Indeed, Complainant was never allowed to return to work after she reported an injury and possible defect.

Respondent contends that Complainant was careless insofar as she failed to immediately report a possible defect. Setting aside Complainant's testimony that she did not believe a defect existed at the time she was injured (indeed there was none), the weight of the available evidence suggests that Respondent does not regularly discipline employees who fail to immediately report possible or even actual defects.

OSHA's investigation revealed numerous instances in which employees failed to immediately report defects. Although Respondent eventually learned of the defects, typically through an employee report, the evidence indicates that the Respondent did not take any action with respect to employee failure to immediately report the defects. These defects included at least one missing horn button, one missing locomotive door cable (which created a pinch point) and seven locomotive cables so short that the doors on those locomotives only opened 2/3rds of the way, which in turn narrowed the already narrow passage way even more. However, where Complainant was terminated for allegedly failing to report a possible defect, the employees who did not immediately report the defects identified in this paragraph do not appear to have been in any respect disciplined or even counseled.

Under 49 C.F.R. § 229.21, Respondent is required to inspect locomotives at least once each calendar day, identify non-complying conditions and create a report of such conditions. On numerous occasions, employees reported that they received locomotives, after those locomotives were inspected per 49 C.F.R. § 229.21, with actual defects that went unnoticed and unidentified. While some of these defects were arguably subtle, such as one locomotive that did not have a

locomotive door cable (which created a pinch point), others ranged from profound to obvious, including a missing horn button and door cables that were so short that the locomotive door only opened two-thirds of the way.

On April 19, 2011, OSHA requested the inspection reports, required to be maintained under 49 U.S.C. § 229.21, for nine separate incidents, all of which appeared to involve a failure to immediately report an actual defect. OSHA also requested the name of the person who inspected the locomotive with the defect, whether that person reported the defect, and if not whether that person was investigated or disciplined. Respondent refused to provide the requested information. Consequently, the available evidence suggests that Respondent does not discipline employees for failing to immediately report possible (or actual) defects.

The available evidence indicates that Respondent was hostile toward Complainant's protected activities in multiple respects. The most direct evidence of hostility is Respondent's swift termination of Complainant contrary to the recommendations of the Conducting Officer, who found that there was no basis for sustaining the charges against Complainant.

Respondent's Officials (Senior Manager of Terminal Operation and Senior Manager of Operating Practices) also demonstrated hostility to Complainant's injury report by prolonging Complainant's suffering while she was at the second medical clinic. Respondent's Officials failed to comply with the railroad's policy about interference with medical treatment. Respondent knew about the actions of these Officials (and confirmed such knowledge to OSHA in interviews), yet, again failed to follow its own policy when neither Official was disciplined.

Additionally, evidence confirmed a belief among employees that Respondent is hostile toward injury reporting and that employees will be terminated for reporting injuries. For example, an employee told OSHA during the investigation that he has been specifically told, "if you report an injury, you will be fired." While he was told this prior to the current Pocatello Service Unit Superintendent's arrival, he believes that it is still the case with respect to the current superintendent. Another witness reported that it is "common knowledge" that if you report an injury you are opening yourself up to discipline. Yet another witness, who claimed not to know the Complainant or the basis of her allegations, told OSHA that under the current Pocatello Service Unit Superintendent it seems like people are more intimidated with respect to reporting injuries. That witness testified that under the current Pocatello Service Unit Superintendent, Respondent is "way, way harsher on people who have been injured." Two other witnesses confirmed that Respondent, especially under the current Pocatello Service Unit Superintendent, is particularly hostile toward injury reporting.

The investigation also revealed that Respondent rewards its managers for low injury statistics, which may have contributed to the Respondent's managers' motive to retaliate against Complainant. According to several Respondent Officials, injury statistics play an important role in their promotions, raises and bonuses. Management witnesses, with the exception of the Senior Manager of Terminal Operations, reported that injury statistics play an important role in their evaluations. For example, Respondent Senior Manager of Operating Practices told OSHA that *safety* (of which injury statistics is a component) makes up approximately half of his evaluation.

On the other hand, Respondent Manager of Terminal Operations stated that half of his evaluation was based on ***injuries***.

As described above, and as demonstrated by the thoroughly explained close-out letter of the Conducting Officer, Respondent's claimed legitimate non-discriminatory reasons for its actions remain unsupported by the evidence. All available evidence shows that Complainant was injured, informed multiple managers immediately as soon as she discovered the injury, and honestly recounted what she remembered about what occurred as she exited the train.

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

Respondent's non-discriminatory explanation for the discharge – that Complainant failed to report a defect and was dishonest – is not credible. All available evidence indicates that there was no defect, that Complainant honestly reported to Respondent what she believed occurred, and that, hours after the extremely brief instant when her bag got caught as she exited the train, she was unsure whether there was a defect.

FRSA prohibits a railroad from discharging, demoting, suspending, reprimanding, or "in any other way" discriminating "against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done...to notify, or attempt to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee..." 49 U.S.C. 20109(a)(4)

Under Section (c)(2) of FRSA, a railroad carrier is prohibited from disciplining, or threatening to discipline, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

As outlined above, OSHA finds reasonable cause to believe that Respondent violated Sections (a)(4) and (c)(2) of FRSA when it delayed Complainant's medical treatment, brought disciplinary charges against her and ultimately fired her in retaliation for reporting a work-related injury and seeking medical treatment.

The preponderance of the evidence establishes that Respondent's retaliatory acts caused Complainant to suffer emotional distress. Complainant was treated by a mental health professional for anxiety, stress and depression related to Respondent's retaliatory treatment of her for exercising her rights under the Act.

As a result of the termination of her employment, Complainant was forced to rent out her home and had to borrow money to pay bills. Complainant resides in a small town and was humiliated with the loss of her job. The preponderance of the evidence indicates that instances of the emotional

distress, humiliation, depression, mental anguish, lessened self esteem, anxiety and embarrassment resulted directly from Respondent's retaliatory acts.

49 U.S.C. §20109(e)(3) provides an award up to $250,000 in punitive damages. Here, punitive damages are warranted for several reasons, including:

- Respondent's retaliation caused Complainant to suffer both economic and physical harm and left her financially vulnerable;

- Respondents' managers consistently acknowledged that they were aware that it is against the law to retaliate against an employee for reporting a work related injury. However, the evidence establishes that despite this knowledge, Respondent managers did in fact retaliate against Complainant because she reported a work related injury;

- Respondents' managers' actions and omissions evidenced an indifference to and a reckless disregard of Complainant's safety and health: specifically, Respondent's Senior Manager of Terminal Operations ordered Complainant to forgo the medications prescribed to her without doing anything to determine whether those medications were medically necessary. Respondent's Senior Manager of Operating Practices failed to act: he merely allowed Complainant to wait in pain for a drug tester to arrive; Respondent's Pocatello Service Unit Superintendent, upon learning of his subordinate's treatment of the Complainant, suspended, investigated and then had terminated the Complainant. Respondent's Pocatello Service Unit Superintendent did not counsel or in any respect address the interference with the Complainant's medical treatment that occurred here. This failure to act tacitly endorses the conduct of Respondent's Senior Manager of Terminal Operations and Senior Manager of Operating Practices, which evidences an indifference to the Complainant's safety and indeed the safety of other employees who may be instructed to forgo treatment just as Complainant was here.

- Respondent has terminated and otherwise retaliated against other employees in the past for exercising their rights under the Act to report work-related injuries. Respondent has been put on notice by OSHA that retaliatory treatment of injured employees is not acceptable, and yet, continues to retaliate against injured employees. Respondent's conduct in this regard is egregious and intentional.[8]

[8] See OSHA's Secretary's Findings in Union Pacific Railroad /9-3290-10-023 Union Pacific Railroad Company /0-1650-09-003 and Union Pacific /7-3620-10-008. On August 25, 2011, OSHA's Assistant Secretary David Michaels reminded Respondent that workers have the right to report work-related injuries without fear of retaliation and advised Respondent to "take immediate steps to change" the "climate of fear" it has created (U.S. Department of Labor News Release dated August 25, 2011). In July 2010, OSHA notified Respondent that it had retaliated against an employee who reported a work-related injury and subsequently issued a news release from this Regional Office about the violation in September 2010.

- Respondent's conduct is egregious. Complainant had a spotless record before she suffered a minor on-duty injury. Upon reporting her injury, Respondent interfered and delayed the prompt medical attention offered to Complainant by a treating physician. She was then quickly charged with discipline, suspended, investigated and terminated. Neither of the officers who conducted her disciplinary hearing recommended her termination. In fact, one Conducting Officer persuasively explained the reasons why none of the charges against her should be sustained and the other Conducting Officer declined to make any recommendation. Nonetheless, Respondent terminated Complainant based on the decision of the Utah Service Unit Superintendent who did not consider either the close out letter of the Conducting Officer or the TIR video of the incident.

Cases suggesting less employer culpability than present here have awarded significant punitive damage awards. For example, in *Anderson v. Amtrak*, 2009-FRS-00003 (ALJ, Aug 26, 2010), the Office of Administrative Law Judges awarded a railroad employee punitive damages in the amount of $100,000 because the employee was suspended for 30 days without pay in retaliation for reporting a work-related injury.[9] Here, in view of the Respondent's greater culpability a higher punitive damage award is ordered.

In summary, a preponderance of the evidence indicates that Complainant's protected activities were a contributing factor in the unfavorable personnel actions taken against her. Respondent has not provided clear and convincing evidence that it would have taken the same actions against Complainant absent her protected activity. Consequently, these Findings, concluding that there is reasonable cause to believe Respondent violate the Act, are accompanied by a Preliminary Order, including the Preliminary Reinstatement of the Complainant effective immediately.

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

Preliminary Order

(1) Upon receipt of these Findings and Preliminary Order, Respondent shall immediately reinstate Complainant to her former position with all the pay, benefits, and rights she had before her discharge.

   a. Respondent shall pay Complainant back wages in the amount of $3,358.40 per month from May 10, 2010 to the date of her reinstatement. Respondent shall pay Complainant interest at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code ($67,426.28 as of November 5, 2011);

(2) Respondent shall pay Complainant compensatory damages in the amount of $120,537.00 for the following:

[9] Complainant remains unemployed over a year after her termination.

- $512.00 for moving and rental expenses;
- $14,085.00 for retraining related expenses;
- $5,940.00 in attorney fees;
- $100,000 for Complainant's emotional distress;

(3) Respondent shall pay Complainant punitive damages in the amount of $175,000;

(4) Respondent shall refrain from retaliating or discriminating against Complainant in any manner for exercising her rights under the FRSA;

(5) Respondent shall provide all employees in its Pocatello Service Unit with a copy of the FRSA Fact Sheet, *Whistleblower Protection for Railroad Workers* and a copy of the "FAQs on Employee Protections for Reporting Work-Related Injuries." Both documents are enclosed with this Preliminary Order;

(6) Respondent shall post in its Pocatello Service Unit for no less than 60 consecutive days the Notice to Employees enclosed with this Preliminary Order; and,

(7) Respondent shall remove from Complainant's employment records any reference to the exercise of her rights under FRSA and any references to the unfavorable personnel actions taken against her, including the disciplinary and termination letters dated May 2010.

Respondent has thirty (30) days from the receipt of these Findings to file objections and to 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:

Paul S. Bovarnick
Rose, Senders & Bovarnick, LLP
1205 NW 25th Avenue
Portland, OR 97210
Phone: (503) 227-2486;
Facsimile: (503) 226-3131

Dean Y. Ikeda
Regional Administrator
U.S. Department of Labor, OSHA
300 Fifth Third Avenue, Suite 1280
Seattle, WA 98104
Phone: (206) 757-6700;
Facsimile: (206) 757-6705

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

Please be advised that the U.S. Department of Labor generally does not represent any complainant or respondent 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 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 29 C.F.R. §1982, which may be found at http://www.whistleblowers.gov.

Sincerely,

Dean Y. Ikeda
Regional Administrator

Enclosures: Notice to Employees
OSHA Fact Sheet, *Whistleblower Protection for Railroad Workers*
Frequently Asked Questions for Reporting Work-Related Injuries in the Railroad Industry

cc: Paul Bovarnick, counsel for Complainant #9325
Rami Hanash, general counsel for Respondent #9318