U.S. Department of Labor

Occupational Safety and Health Administration
Atlanta Regional Office
Sam Nunn Federal Center
61 Forsyth Street, SW Room 6T50
Atlanta, Georgia 30303
(678) 237-0400
(678) 237-0447 FAX

APR 0 4 2011

Mark Perreault, General Solicitor
Law Department
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510-9241

Re: Norfolk Southern Railway Company/Thompson/4-0520-08-008

Dear Mr. Perreault:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Jeff Thompson (Complainant) against Norfolk Southern Railway Company (Respondent) on June 11, 2008, under 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. In brief, Mr. Thompson alleged that Respondent suspended him between March 14, 2008, and May 1, 2008, in retaliation for reporting a workplace injury.

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 IV, 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. §20102. Respondent is engaged in interstate commerce within the meaning of 49 U.S.C. §20109. Complainant was employed by Respondent as a conductor, and assigned to Respondent's facility located in Charleston, South Carolina. Complainant was an employee covered under 49 U.S.C. §20109. Complainant died of natural causes on August 28, 2010 while still employed with Respondent.

Complainant was suspended on or about March 14, 2008. On June 11, 2008, Complainant filed a complaint with the Secretary of Labor alleging Respondent discriminated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Complainant began working for Respondent in March 2006 and was ultimately promoted to conductor. In his off duty time, Complainant was a volunteer fire chief in Berkley County, South Carolina, a member of the South Carolina Hazmat Response Team and a team leader with the Berkley County South Carolina Cobra Team which deals with Department of Homeland Security issues regarding hazardous materials. He had also worked in the past as a deputy sheriff

and was an intermediate Emergency Medical Technician with certification as a cardiac and trauma events care giver.

Complainant was hired by Norfolk Southern Railroad in March 2006 and was promoted shortly thereafter to conductor. On March 13, 2008, he began work about 3:00pm and was feeling well as he began his shift. Complainant alleged that while he was bleeding off railcars he smelled a nauseous odor which caused him to feel like he was about to vomit. His eyes started to water, his nose began to run and he had a burning sensation in his throat. Complainant initially thought the fumes he smelled were from a leaking railcar later determined to contain the chemical cresol. Complainant immediately reported his experience to yardmaster Andy Thompson (no relationship) and passed on to Andy Thompson his observations of the railcar and an over-spilled substance on the railcar which looked like molasses. Andy Thompson told Complainant to get out of the area. Complainant told his coworkers over the radio that something was wrong with the railcar. Complainant mentioned the nauseous odor present and the sticky substance on the railcar. Complainant met with his coworker, David Patten, and pointed out the possible leaking railcar to Patten. Complainant's supervisor, trainmaster Will DeShazor, who was on his way back to the company property from a business trip that day, called Complainant and asked what was happening. Complainant described to DeShazor the events. DeShazor asked if Complainant was OK and Complainant said he thought he was all right. Complainant told Andy Thompson that he was not feeling well and it seemed like his symptoms were getting worse. Complainant said his chest was tightening, his head was throbbing and he had a burning sensation in his chest. Andy Thompson began reading from their Emergency Response Guide about the chemical and the potential health issues associated with it. Complainant said he had seen an inhalation placard on the railcar and he was now beginning to become a bit nervous.

Patten later came into the office where Complainant was with Andy Thompson. Complainant then said he thought he needed to go to the hospital. Andy Thompson called DeShazor who said he was about 30 minutes away from the property. Complainant said he waited about another 10 or 15 minutes before again telling Andy Thompson that he needed to go to the hospital. Andy Thompson tried unsuccessfully to get DeShazor. A few minutes later, DeShazor called and said he was just about at the office location. Upon his arrival at the office, DeShazor got a MSDS and then took Complainant to a nearby hospital.

Due to Complainant's reports of a possible chemical leak, Respondent requested the assistance of the North Charleston-South Carolina Fire Department, the South Carolina Department of Health and Environmental Control (SCDHEC) and HEPACO, Inc., a contracted environmental response company, to assess the possible hazards in the yard. At the hospital, Complainant was placed on oxygen, had his blood drawn, had an EKG taken, a chest x-ray done and he was given 800 mg of Ibuprofen for his headache. Complainant said that when he first got to the hospital his tachycardia was a bit elevated but that reduced over his time in the hospital. Complainant stated he was at the hospital for about two hours and 45 minutes on oxygen. Complainant said his x-ray came back clear and his blood tests were OK. Medical personnel said Complainant's symptoms and signs reflected the reaction to the chemical cresol. Complainant said he was told to take the next day off and to stay away from inhalation irritants.

Complainant's wife transported him back to Respondent's property so Complainant could get his vehicle. At the yard, Complainant spoke to Terminal Superintendent (TS) David Stinson, Respondent's terminal superintendent, who asked how Complainant was. Complainant said he thought he'd be fine. Complainant said he was asked how Complainant wanted to handle this incident. Complainant was asked if he wanted to be *"marked off company injury"* or if Complainant wanted to be *"marked off and then marked back up"*. *"Marking off"* means one is not available for work and "marking up" means one is available for work. Complainant requested he be *"marked off and then marked back up"* since he would be available for work the next day, March 14, 2008. Complainant filled out an injury report at Respondent's office for the incident after returning from the hospital.

While on his way home, as he'd not eaten that day, Complainant said he stopped into a local restaurant about 1:30am, March 14, 2008, and saw one of the HEPACO, Inc., crew members, Bill Hyatt, who had responded to evaluate the alleged leaking railcar. Complainant stated that when he asked Hyatt if they found anything leaking Hyatt told him they saw *"some stuff"* on the side of the car which he believe got hot, vaporized and Complainant inhaled it. Complainant later that day learned from a union official that he'd been listed as *"off duty injury"* instead of *"marked up"*.

On March 18, 2008, Respondent charged Complainant with providing false and conflicting statements concerning a personal injury on March 13, 2008, and the falsification of said injury. In this charge letter, Complainant was informed that a formal hearing/investigation will be held on March 20, 2008 to develop the facts and place Complainant's particular responsibility, if any, in connection with these charges.

On March 19, 2008, Respondent informed Complainant of a delay in the investigation hearing regarding the March 13, 2008 falsification charges until April 2, 2008. On April 1, 2008, Complainant received another letter from Respondent informing him of yet another delay in the date for hearing, now scheduled for April 16, 2008.

On April 16, 2008, Respondent conducted the investigative hearing relating to the injury falsification charges against Complainant. The Hearing was conducted by Assistant Division Superintendent (ADS) Michael Giles. As part of the hearing transcript, it was noted that no other workers were affected on March 13, 2008, and that no leaks were actually found by the emergency response agencies with the railcar in question. TS Stinson, Trainmaster William DeShazor, Yardmaster Andy Thompson and conductor David Patten testified at the hearing.

TS Stinson testified that DeShazor notified him of the incident involving Complainant about 6:00pm and Stinson began to drive to the Charleston, South Carolina, area arriving about 8:00pm. Stinson testified he spoke with the on-scene fire chief who essentially advised no leak had been found, that air sampling and imaging was clear, and that there was no danger to the public or any employees in the yard. Stinson met with Patten, engineer Roberto Mendoza and Andy Thompson regarding the incident and those employees provided statements of their observations. Stinson testified there were a lot of phone calls regarding the topic of taking Complainant out of service for the incident. Stinson stated he was the charging officer and made that decision.

DeShazor testified Complainant looked normal to DeShazor when he arrived at Respondent's office to transport Complainant to the hospital. DeShazor also testified Complainant was released without restrictions after being seen at the hospital. DeShazor testified his inquiries about the chemical indicated it was a bad skin irritant but essentially that the inhalation hazard was dependent upon one's exposure to the chemical. DeShazor acknowledged the chemical was listed as an inhalation hazard and that the company's Emergency Response Guide states *"Inhalation, ingestion or skin contact with material may cause severe injury or death"*. DeShazor essentially testified he and Stinson were the managers who decided to take Complainant out of service because of the unremarkable medical results and the lack of an actual leaking railcar.

Patten testified though the car was not leaking, he observed older and newer runoff substance on the railcar. Patten testified he didn't personally smell anything. Patten testified it appeared to him something physically affected Complainant that afternoon. Patten said Complainant reported that his chest was burning, that his head was hurting and he was having trouble breathing. Patten stated Complainant's eyes were red and Complainant looked *"fatigued"*. In the statement Patten provided on the night regarding the incident, Patten stated, *"Jeff appeared very flush in the face, his eyes were watering heavily and he was winded."* Patten stated Complainant appeared fine before the incident but was very different than when he came to work earlier that day. Patten testified that he believed Complainant needed to seek medical care that day.

Andy Thompson testified and read from the statement he wrote the night of the incident. Andy Thompson testified that when Complainant first notified him of a problem Complainant seemed to be sneezing. Complainant said his eyes and nose were running and that his chest was burning slightly. When Andy Thompson asked Complainant if he needed help, Complainant said he thought he'd be OK. Complainant walked about half a mile back to the yard office and complained to Andy Thompson that he had a headache and that his chest was burning. Thompson testified he saw Complainant's eyes watering and that Complainant was sniffing. When asked if he needed medical help, Complainant initially declined. Andy Thompson told Complainant to sit down and drink water. About 10 minutes later, Complainant said he was not feeling better and needed help. Andy Thompson contacted DeShazor and advised him of the incident. DeShazor arrived at the office some minutes later. Andy Thompson testified he asked Complainant if he needed an ambulance but Complainant declined. He testified he read about the chemical in question from the company's Emergency Response Guide in the company office. When asked by Hearing Officer Giles if there was any doubt in his mind that Complainant had encountered something that day, Andy Thompson testified he believed Complainant had encountered something as he was different than when he came to work that day. Andy Thompson stated that while they were waiting for DeShazor to get to the office, Complainant's symptoms didn't improve.

Respondent issued their hearing decision on May 1, 2008, and found Complainant guilty. The hearing officer assessed Complainant with his time out of service without pay between March 14, 2008, and May 1, 2008 as his punishment. Complainant then returned to work.

The Complainant's union representative appealed the hearing decision on May 27, 2008. Respondent's Division Superintendent denied the appeal on June 16, 2008 stating that *"Mr. Thompson was granted a fair and impartial hearing"* and that *"...the discipline assessed was appropriate"*. On July 3, 2008, Complainant's union submitted another appeal to the Director of Labor Relations; however, on July 29, 2008, that appeal request was also denied by Respondent's Assistant Director for Labor Relations, again stating that *"the claimant was granted a fair and impartial investigation"* and *"the discipline was proper."*

Complainant then proceeded to file for an arbitration hearing under the collective bargaining agreement. On December 18, 2009, Complainant received a favorable arbitration decision and was awarded his lost wages.

In the simultaneous OSHA investigation, Respondent stated that they believed Complainant fabricated his injury of March 13, 2008 based on the fact that: 1) no leaking car was found, 2) no other employees experienced symptoms like Complainant did and, 3) Complainant's medical results did not show any significant medical issue other than an elevated tachycardia reading.

Respondent's Hearing Officer told OSHA that upon being selected as the hearing officer for Complainant's investigative hearing, he spoke to the charging officer, Stinson, to get a general idea of what the hearing was going to be about and that he may have discussed the upcoming hearing with his supervisor, Division Superintendent (DS) Patrick Whitehead. Giles denied having any preconceived ideas prior to the hearing.

Giles told OSHA he believed Complainant deserved to be discharged for falsifying his injury on March 13, 2008. Giles initially told OSHA he didn't recall discussing his preferred decision with Respondent's Labor Relations Section, but later said he indeed remembered discussing the matter with Andrew Shepherd in the Labor Relations Section. Shepherd told Giles he did not believe a discharge decision would survive an arbitration hearing.

Giles told OSHA that he saw Complainant was a *"big"* man and opined that Complainant might have blood pressure issues or other health issues. Giles said he believed that Complainant could have been easily out of breath from exerting himself by some effort that would require some amount of exercise. Giles said he believed Complainant fabricated his symptoms and could have easily caused his face to become red and his eyes to water.

Giles stated he did not put a lot of weight in the testimony given by Patten and Andy Thompson regarding the symptoms they said they noticed in Complainant.

Giles said he noticed that Complainant had lost quite a bit of time from work but stated he didn't know why Complainant was out of work. Giles said he learned about Complainant's off duty activities as a fire chief and Giles believed Complainant preferred to be a firefighter rather than a railroad worker.

DeShazor advised OSHA he was Complainant's immediate supervisor. DeShazor said his immediate supervisor was Stinson whose supervisor was Giles and that Giles worked for Whitehead. DeShazor stated that prior to the April 16, 2008 investigative hearing, he spoke to

Giles about Complainant's attendance issues. DeShazor stated be believed Complainant was in "Step 2" or "Step 3" of Respondent's five step attendance discipline program. DeShazor didn't believe Complainant had any other disciplinary problems. DeShazor described Complainant as a friendly man whose productivity was overshadowed by his attendance issues. DeShazor said that he, Stinson and Whitehead made the decision to keep Complainant out of work after Complainant's March 13, 2008 incident and to conduct an investigation on the matter. DeShazor essentially stated one of his greatest concerns was that based upon the information he was given about the chemical effects, they didn't match with Complainant's alleged exposure in the open air. Also, no actual leak was found and two other employees had been in the same general area but experienced no problems. DeShazor stated a belief that Complainant's injury was *"false or unfounded"*. DeShazor said he believed Complainant reported a false injury and as a result that meant Complainant *"made it up."* DeShazor said he *"shies away from"* using the term *"fabricated"* as it implies motive. DeShazor told OSHA he saw nothing wrong with Complainant when he arrived to transport Complainant to the hospital. DeShazor told OSHA he too would have recommended Complainant be discharged but that he was OK with the ultimate decision made in the matter.

OSHA interviews of Complainant's coworkers disclosed Complainant was out of work a lot and they assumed it was because Complainant was working with the fire department. He was well liked by his coworkers.

Respondent's Labor Relations Representative Andrew Shepherd advised his role was to try and view the incident from the position of a "neutral" or arbitrator. Shepherd confirmed to OSHA that Giles requested to discharge Complainant but in looking at Complainant's hearing, Shepherd believed Complainant was simply "wrong" rather than he "falsified" the matter. Yet, Shepherd advised he was OK with the suspension without pay which Giles assessed Complainant because of some of Complainant's statements which Shepherd believed were "false".

Stinson told OSHA that because Complainant's other crew members were OK, Complainant had no medical problems and there was no leak with the railcar, Stinson and DeShazor didn't believe Complainant's reports to be accurate or factual. Stinson told OSHA he believed Complainant fabricated the incident. Stinson said he briefed Whitehead about the events of March 13, 2008. Stinson characterized the decision to remove Complainant from service as a *"joint conclusion"* and said that Whitehead had to agree to the charge letter for the investigative hearing to be issued. Stinson said management dealt only with the event issues and did not explore any motivation for Complainant's alleged falsely reporting. Stinson said management gave some credence to the statements of Patten and Andy Thompson, who stated they saw Complainant's symptoms, but it appeared to management those coworkers didn't see anything too much out of the normal for Complainant.

Whitehead told OSHA he was briefed on the March 13, 2008 events as they were happening and that with all the evidence which came in that day, Whitehead began to have doubts about the validity of Complainant's reported exposure. Within a day or two of the incident, Whitehead began to believe Complainant had falsified the incident and needed to be charged. Whitehead consulted his supervisor about that matter and subsequently contacted Stinson and requested he construct the charge letter to comply with the existing union processes.

Whitehead stated he kept Giles fully briefed on the events because he is Whitehead's deputy and they discussed the findings of the events of March 13, 2008, subsequent to that night and they talked about all aspects of the matter. Whitehead said that he and Giles discussed Giles' investigative hearing findings and that the hearing produced the information they'd previously discussed. Whitehead and Giles discussed Giles' desire to discharge Complainant. Whitehead thought that to be a proper action. Whitehead said they will usually discuss hearing decisions with their Labor Relations Section and that was done in this instance.

Whitehead told OSHA Respondent does not take action against all employees when leaks are reported but no leak is found. Whitehead said that in this instance he felt he needed to protect Respondent against a Federal Employee Liability Act (FELA) fraud. Whitehead said he thought Complainant might want to take advantage of a FELA claim against Respondent with his injury report. Whitehead said he truly believed Complainant may have been setting Respondent up for a FELA claim. Mr. Whitehead said he's only had *"minimal"* false claim issues, but he felt this one needed to be challenged. He said FELA was not like Workman's Compensation. He said FELA lawsuits against a company can be *"astronomical"* in cost and Complainant had a reportable injury due to the prescription medication he was given at the hospital on March 13, 2008. Whitehead expressed a belief that a very high percentage of FELA claims were settled without litigation.

When asked if Complainant would have been disciplined had he not filed the injury report and if the matter had been simply a reported leaking car which was not substantiated. Whitehead said Complainant would not have been disciplined. However, Whitehead believed Complainant fabricated his symptoms in his reported injury. Whitehead said that to take action against Complainant for simply reporting a leaking car when there was not actually a leak found, Whitehead would have had to have some reason to think Complainant was sabotaging Respondent's operations but Respondent had no reason to believe Complainant was doing that on March 13, 2008. When asked about what made him think Complainant might submit a false FELA claim, Whitehead essentially again said the lack of evidence of a leaking car and the lack of any other employees being affected. Whitehead said that while he didn't initially know Complainant's background before the incident, Stinson mentioned several times throughout the events that Complainant was familiar with chemicals based on his off duty activities. Whitehead said he personally *"could not get it right"* that Complainant was indeed exposed to something. Whitehead said the only thing suspect in Complainant's background was his work attendance problem which Whitehead attributed to a belief that Complainant wanted to be a fire fighter more than a railroad worker.

Complainant died on August 28, 2010, of natural causes away from Respondent's workplace. Complainant's wife, Brandy Thompson, was appointed as the "Personal Representative" of Complainant's estate and she requested through Complainant's attorney, John Moss, to continue this complaint.

OSHA determined from the investigation that Complainant was charged for the March 13, 2008 event because he filed an injury report that day. Whitehead confirmed that action by saying Respondent was afraid Complainant may file a FELA claim against Respondent. Whitehead told

OSHA Complainant would not have been charged had he not filed the injury report and the car was not found to be leaking. Filing that injury report was a protected activity under FRSA.

Respondent unreasonably and illogically ignored or discounted the physical symptoms observed by two of Complainant's coworkers. Patten and Andy Thompson both testified that Complainant appeared physically different after his declared exposure than when he came to work that day. These two workers were the first two to observe Complainant within minutes of his declaration of an exposure.

Respondent attempted to justify their actions against Complainant by stating the fact that: 1) no leaking car was found, 2) no other employees experienced symptoms like Complainant did and, 3) Complainant's medical results did not show any significant medical issue other than an elevated tachycardia reading.

OSHA does not believe Giles was totally truthful in this investigation as during his interview he indicated that when he was appointed to be the hearing officer, he discussed with Stinson the basis for the hearing. However, it later became clear to OSHA that Giles was intimately familiar about the events of March 13, 2008 prior to having been chosen to be the hearing officer. Based upon Giles' interactions with Whitehead during and subsequent to the March 13, 2008 incident, OSHA does not believe Complainant's investigative hearing to have been a *"fair and impartial"* hearing even though it was required by union processes. OSHA believes Giles clearly had his mind made up prior to conducting the April 16, 2008 hearing. OSHA discovered no evidence to support Giles' apparent belief that Complainant could easily have caused his face to turn red and caused his eyes to water.

Other than the fact that Complainant might file a FELA claim against Respondent they expressed no motivation for Complainant possibly having fabricated the matter. OSHA received no information that Complainant was seen either by management or his coworkers as an inherently dishonest person. Complainant's attorney advised OSHA that while there was indeed the potential to file a FELA claim within three years of the March 13, 2008, incident, Complainant never took action to file such a claim and he never indicated to any Respondent personnel that he intended to file such a complaint. At any rate, Complainant had the right to file an FRSA and a FELA claim simultaneously. Filing for one complaint does not bar the Claimant from filing under another statute with differing remedies being sought.

To further support Complainant, he was eventually awarded his lost wages in his union arbitration hearing. And finally, although the favorable arbitration hearing awarded Complainant his 45-day back pay, Respondent did not expunge Complainant's disciplinary charge from his personnel file, showing continued animus towards Complainant for filing his injury report and subsequent FRSA complaint.

A preponderance of the evidence indicates that Complainant's filing of an injury report on March 13, 2008, was a contributing factor in his suspension without pay. Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated the FRSA. OSHA hereby orders the following to remedy the violation:

Order

1. Respondents shall expunge any adverse references from Complainant's personnel records relating to the charge.

2. Respondent shall permanently post the Notice to Employees included with this order on all of its company's areas where employee notices are customarily posted.

3. 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 this order.

4. Respondent shall pay Complainant's estate reasonable attorney fees in the amount of $14,400.00.

5. Respondent shall pay compensatory damages to Complainant's estate in the amount of $15,000.00 for the pain and suffering experienced between March 14, 2008 and May 1, 2009 (his out of work status), as well as the period of time Complainant waited until the arbitration board awarded him his lost wages.

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

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
PH: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:

Mrs. Brandy Thompson
C/O John Moss
Matthews Steel & Moss LLP
15 Piedmont Center, Suite 1560
3575 Piedmont Road, NE
Atlanta, GA 30305

Cindy A. Coe, Regional Administrator
U. S. Department of Labor, OSHA
61 Forsyth Street, SW, RM 6T50
Atlanta, GA 30303