

U.S. Department of Labor Occupational Safety and Health Administration
Two Pershing Square
2300 Main Street, Suite 1010
Kansas City, Missouri 64108
Phone: 816.283.8745
Fax: 816.283.0547



Reply to the Attention of EP/WPP

December 3, 2010

Robert Graham
Director of Human Resources
The Burlington Northern and Santa Fe Railway Company
4515 Kansas Avenue
Kansas City, KS 66106

CERTIFIED MAIL # 7010 1670 0002 1101 5011

Re: The Burlington Northern and Santa Fe Railway Company/

Dear Mr. Graham:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by (Complainant) against The Burlington Northern and Santa Fe Railway Company (Respondent) under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleged that Respondent issued him a Level S 30 Day Record Suspension and one year of probation in retaliation for reporting an on-the-job 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 VII, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §20109 and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109 and 49 U.S.C. §20102. Respondent provides railroad transportation, in that it transports goods using the general railroad system.

Complainant is an employee within the meaning of 49 U.S.C. §20109.

Complainant was issued discipline on June 29, 2010. On August 12, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse actions, it is deemed timely.

Complainant is a switchman for Respondent. Complainant has been with the railroad for over 33 years. He is stationed out of Respondent's Argentine Yard, located in Kansas City, KS, which is part of Respondent's Kansas Division.

On May 11, 2010, Complainant suffered an on-the-job injury. He was in the process of adjusting mismatched couplers (also referred to as lining a draw bar). He was using a pin lifter that he found off the ground to perform the task. A hickory stick, which would have been the proper tool to use, was not located in the storage box closest to Complainant. The pin lifter slipped out of Complainant's hands, causing him to fall against the rail. Complainant, who reported the incident to Trainmaster Justin Wivag, was taken to the hospital by another trainmaster. At the hospital, Complainant was diagnosed with bruised ribs and administered pain medication.

Assistant Superintendent John Sutphin and Wivag took pictures of the pin lifter used by Complainant. Terminal Superintendent Lance Brewer informed General Manager John Williams in an email that Complainant had used the wrong tool to perform the task. In response, Williams wrote, "Very disappointing that the proper tool was not used after [identified] by system test team as an issue." Brewer replied, "Agree. I suppose I have your support to issue investigation?" Williams wrote back, "If we provided the tools and instruction then yes."

On May 12, 2010, Complainant submitted a personal injury report to Sutphin. In his report, he wrote that he was injured while attempting to line a draw bar, and that there were no hickory sticks available. Respondent reported the injury to the Federal Railroad Administration.

On May 18, 2010, Complainant was issued a notice of investigation letter. He was accused of "failing to take sufficient time to perform [his] work and maintain the safe course through [his] use of an improper tool while attempting to adjust mismatched couplers...on May 11, 2010, resulting in personal injury." Complainant was charged with violating a number of rules, including GCOR 1.6, the rule governing employee conduct.

Complainant was on leave for his on-the-job injury from May 25 to June 10, 2010.

On June 17, 2010, Respondent held a hearing into the charges brought against Complainant. Complainant's union had requested that Complainant receive Alternative Handling, a substitute for Respondent's formal discipline process. Respondent denied the request, relying on GCOR 1.6. At the hearing, Complainant admitted- as he had all along- that he used the wrong tool to perform the task, but stated that the proper tools, such as a hickory stick, were not available for use. On June 29, 2010, Respondent found Complainant in violation of the charged rules, issuing him a Level S 30 Day Record Suspension and one year probation.

In addition, Respondent assessed Complainant's Personal Performance Index (PPI) 40 points for suffering a reportable on-the-job injury. Reportable injuries result in more points than non-reportable ones. Before the injury, Complainant's PPI was zero. An employee's PPI rating is the single biggest factor in determining whether an employee will be placed in Respondent's Employee Review Process (ERP). The ERP, which lasts from six to 12 months, consists of coaching sessions with managers and field operation's tests.

This whole process, according to Complainant, has caused great anxiety and stress, affecting his family and work life. He noted that the uncertainty surrounding the outcome of the investigation contributed to these feelings. He noted that the one-year probation makes him fearful that his job is in jeopardy, which makes him worry about how he would be able to support his family if he did lose his job. Further, Complainant reports being humiliated by the whole ordeal.

Complainant engaged in protected activity when he reported his on-the-job injury to Trainmaster Wivag and when he submitted a personal injury report to Assistant Superintendent Sutphin.

Respondent does not dispute that it had direct knowledge of Complainant's protected activities.

Complainant experienced adverse actions when he was charged with rule violations on June 17, 2010, when his PPI was assessed 40 points, and when he was issued a Level S 30 Day Record Suspension and one year probation on June 29, 2010.

A preponderance of the evidence indicates that Complainant's protected activities were a contributing factor in the adverse actions. First, there is close temporal proximity between the protected activities and the adverse actions. Complainant was issued an investigation letter six days after he submitted his injury report. He was issued discipline shortly thereafter. Second, there is evidence of animus on the part of Respondent toward the protected activities. Complainant's PPI, for example, was issued 40 points for suffering a reportable on-the-job injury, which puts Complainant closer to being placed in Respondent's ERP. A non-reportable injury would have resulted in just five points. Complainant was also denied alternative handling. Third, there is evidence of disparate treatment toward Complainant. Results from an audit conducted at the Argentine Yard in March 2010, which was referenced in Williams' email above, show that an employee was spotted using the wrong tool to adjust a drawbar. That employee, who did not report an on-the-job injury, was counseled on using the proper tool- the equivalent of alternative handling- and not charged with rule violations.

The evidence, based on witness testimony, indicates that at the time of Complainant's injury, which occurred after the audit, the proper tools were not in their proper location, that it was common practice to use whatever tools could be found to perform the work, that management was fine with the practice so long as the work got done in a timely manner, and that the proper tools were not placed in their proper location until after Complainant was injured. Sutphin admitted that the box closest to Complainant at the time of his injury did not contain a hickory stick. Witnesses indicated that if they took the time to locate the proper tool or to call for assistance, they would draw the ire of management for not completing their work in a timely manner.

Respondent failed to show by clear and convincing evidence that it would have taken the same adverse actions even if Complainant had not engaged in his protected activities. No employee has been charged with rule violations for using the wrong tool to adjust misplaced couplers until Complainant.

In addition, Respondent's outrageous behavior and callous disregard for the rights of its employees warrant punitive damages. Witnesses indicated that they are reluctant to report injuries at the Argentine Yard because managers look to place blame on those who do. Respondent's policies contribute to this reluctance. Points are assessed to employees' PPI whenever they suffer an on-the-job injury, with more than double the points issued for reportables than for non-reportables.

Respondent rewards work groups that go injury free with gift cards. An employee who is found in violation of two serious rule violations within a 36-month review period is subject to dismissal, unless the employee's five years of service preceding the first serious rule violation were injury and discipline free, in which case the review period is reduced to 12 months. The number of on-the-job injuries factors into management's compensation.

The evidence also indicates that Respondent's officials placed undue pressure on Complainant to sign paperwork and to take part in a reenactment of his injury after he had just been released from the hospital and was under the influence of pain medication.

OSHA finds reasonable cause to believe that Respondent has violated the FRSA and issues the following order.

ORDER

1. Respondent shall remove the Level S 30-Day Record Suspension and one year probation from Complainant's employment records.
2. Respondent shall remove the 40 points assessed to Complainant's Personal Performance Index.
3. Respondent shall pay Complainant back wages in the amount of \$369.10, which represents one day of missed work on October 12, 2010, to participate in OSHA's investigation of his FRSA complaint.
4. Respondent shall pay Complainant punitive damages in the amount of \$75,000
5. Respondent shall pay Complainant compensatory damages in the amount of \$15,032.20, for the following:
 - Pain and suffering in the amount of \$15,000.
 - Attorney's expenses in the amount of \$32.20.
6. Respondent shall pay Complainant \$4,695 in attorney's fees.
7. Respondent shall refrain from retaliating or discriminating against Complainant in any manner for exercising his rights under the FRSA.
8. Respondent shall provide to all employees in the Kansas Division a copy of the FRSA Fact Sheet included with this Order.
9. Respondent shall post for 60 consecutive days the Notice to Employees included with this Order in all areas where employee notices are customarily posted in the Kansas Division.
10. Respondent shall remove from Complainant's employment records any reference to the exercise of his rights under the FRSA.

Respondent has thirty 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:

Rick Holtsclaw
Complainant's Attorney
Holtsclaw & Kendall, LC
2029 Wyandotte, Suite 100
Kansas City, MO 64108

Charles E. Adkins, CIH
Regional Administrator
2300 Main Street, Suite 1010
Kansas City, MO 64108

Department of Labor, Associate Solicitor
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 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 decision under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Sincerely,



Charles E. Adkins, CIH
Regional Administrator