U.S. Department of Labor

Occupational Safety and Health Administration
201 Varick Street, Room 670
New York, NY 10014
Tel: (212) 337-2368
Fax: (212) 337-2371

May 2, 2016

Mr. Thomas Chiavetta
Jones Day
51 Louisiana Avenue, N. W.
Washington, D.C. 20001-2113

Via UPS #1ZX1051V0192775005

RE: CSX Transportation, Inc., Dan Lisowski, Timothy Woodall, Eric Datri, Pat Street and Ashley Roffe /Giuliano/2-0050-14-036

Dear Mr. Chiavetta:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Jeremiah J. Giuliano (Complainant) against CSX Transportation, Inc., Timothy Woodall, Eric Datri, Ashley Roffe, Dan Lisowski, and Pat Street (Respondents) on March 18, 2014, and amended complaint filed on June 20, 2014 under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11Commission Act of 2007, Pub. Law No. 110-53.

In brief, Complainant alleges on December 18, 2014, he was issued a five day suspension without pay and a five day suspension held in abeyance, in retaliation for having submitted a letter detailing numerous alleged safety hazards and FRA safety violations and withdrawing the union's support and partnership from Respondent CSX Transportation, Inc. Safety Committee. Complainant filed an amendment to his complaint and further alleged the action of denying his union business time for April 30 to May 2, 2014, and that initially listing Complainant as failing to report was in reprisal for his protected activity. In addition, Complainant alleged that the adverse action of being denied union business time for June 14 and 15, 2014, and that the adverse action of additional cost of airline tickets and penalty fees were also in reprisal for his protected activity.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds that there is reasonable cause to believe that Respondents violated FRSA and issues the following findings:

Secretary's Findings

On December 18, 2013, Complainant was issued a five day suspension with an additional five day suspension held in abeyance, due to a September 11, 2013 incident where Complainant was observed crossing from a train platform to a locomotive without the use of a cross walk board. On March 18, 2014 Complainant filed his FRSA complaint, with the Secretary of Labor. Complainant filed an amendment to that complaint on June 20, 2014. As these complaints were filed within 180 days of the adverse actions, they are deemed to be timely filed.

Respondent CSX Transportation, Inc. (CSXT) is a railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102. Respondent CSXT provides freight rail service to locations in 23 states and the District of Columbia. Respondents Woodall, Datri, Lisowski, Roffe and Street were employees of CSXT at the time of the events set forth in the complaint and are therefore covered Respondents.

Complainant is employed by Respondent CSX Transportation, Inc. (CSXT) as an electrician in its Selkirk Locomotive Shop where locomotives are maintained and repaired. Complainant is an employee within the meaning of 49 U.S.C. §20109. Complainant and Respondent CSXT are, therefore, covered by FRSA.

Complainant, Local 770 IBEW Chairman, engaged in FRSA protected activity on September 6, 2013 when he and Local 770 Vice-President Brian Riley gave Plant Superintendent Lisowski a letter reporting alleged violations of safety rules and regulations. The letter also notified Respondent that the union and therefore Complainant were withdrawing their support and involvement from Selkirk's Safety Committee because of Respondent CSXT's failure to provide a safe and clean working environment for its employees. It is undisputed that later that same day, Assistant Plant Superintendent Woodall (Respondent) spoke to both Complainant and Riley and advised that he would set up a meeting for the following day to discuss the matters addressed in the letter. It is also undisputed that on September 7, 2013, Complainant engaged in FRSA protected activity when he and Riley met with Plant Superintendent Lisowski (Respondent) and discussed Respondent CSXT's failure to provide a safe and clean working environment for its employees and the withdrawal from the Safety Committee. Consequently, Respondent Lisowski and Respondent Woodall had knowledge of Complainant's protected activities.

On September 11, 2013, Complainant was observed by Respondent Woodall and Service Center Manager Datri walking onto a locomotive without a cross walk board. There is a raised platform next to each track to allow Respondent CSXT's employees to access locomotives parked there. Each platform has stairs that go from the platform to ground level. Respondent CSXT's rules require employees to use a crosswalk board when stepping from a raised platform to the stairwell of a locomotive and vice versa. Respondent Woodall instructed Datri to initiate an investigation of the O test[1] (Operational test) violation. Datri informed Complainant he would be investigated

[1] Operational test of an employee's work, planned in advance. Operational tests are considered minor offenses that are only tracked, and often don't result in write-ups unless it is a repeated offense. A rules violation indicates the observation of the employee was not planned, but was observed.

for an O test violation, indicating the observation was planned. On October 8, 2013, an investigative hearing was conducted. On December 18, 2013, Complainant suffered an adverse action when Respondents suspended Complainant for five days with an additional five days held in abeyance (for one year) for violating safety rules on September 11, 2013. Complainant's records affirmed the issuance of this discipline and the withholding of pay.

Evidence supports a causal relationship between Complainant's protected activities and the adverse action of suspension that he experienced. The adverse actions were proximate in time to Complainant's protected activities. Complainant submitted a letter to Respondent Lisowski on September 6, 2013 and then met with Respondent Lisowski to discuss the safety concerns and the withdrawal from the Safety Committee on September 7, 2013. Respondent Woodall arranged the meeting on September 7, 2013 and had knowledge of the letter and the safety related concerns. On September 11, 2013, Respondent Woodall and one other manager observed Complainant walking onto a locomotive without the use of a cross walk board. Complainant was informed by manager Datri that this was an O test failure. Datri later advised during the investigative hearing that he had misinformed Complainant that this was an O test investigation when it had been a rules violation. Datri never shared this information with Complainant. Following the investigative hearing on December 18, 2013, Complainant was issued the five day suspension and the five day suspension held in abeyance.

Evidence supports Complainant was treated disparately. Complainant had a clean corrective action history prior to September 2013. Although Complainant did violate work rules by failing to use a crosswalk board, Respondents did not discipline another employee who violated the same rule just prior to Complainant on the same day and with the same locomotive. Additionally, evidence supports that a suspension is not a typical form of discipline for this type of a violation and that Respondents have never administered a 5 day suspension for a crosswalk board violation prior to Complainant's violation. Complainant was observed by Respondent Woodall and Service Center Manager Datri. Respondent Woodall instructed Datri to handle the situation and Datri initiated an investigation of the O test failure. According to Datri, an O test failure would not normally cause the initiation of an investigation and to the best of his knowledge no other employee had been investigated for an O test failure or been issued disciplinary action for the same offense. Evidence also indicates Complainant did not receive a fair and impartial disciplinary hearing. Complainant had a clean disciplinary record (IDPAP history). Complainant's disciplinary record shows that Respondent had not charged Complainant with any rule violations in more than three years. According to Respondents' position statement, the IDPAP history report clearly states that all other IDPAP were removed from consideration due to Respondents' policy requiring a 3 year rolling period. Previous adverse actions were removed prior to the aforementioned protected activity indicating that Complainant had a clean disciplinary record. However, during Complainant's disciplinary hearing his record was not considered.

Evidence shows Respondent had animus towards Complainant as demonstrated by the increased scrutiny and observation (O test) of Complainant on September 11, 2013. Respondent asserted that the manager who decided to suspend Complainant, Rimer, did not have knowledge of Complainant's alleged protected activity when he made the decision to suspend. Clear evidence

indicates that the managers who recommended charges be brought against Complainant (Woodall, Datri, and Lisowski) had knowledge of Complainant's protected activity. This demonstrates that although Rimer may not have direct knowledge of the protected activity the recommending managers of the adverse action did, and would not have recommended it but for Complaint's protected activity.

Amended FRSA Complaint:
Respondents received notification of the initial FRSA complaint on April 7, 2014. Complainant alleged that as a result of his protected activity of filing a FRSA complaint, he experienced additional adverse actions when Respondents denied his official union business time and initially recorded Complainant as failing to report for work from April 30 – May 2, 2014. Complainant further alleges that Respondents initially denied his request for union business time for June 14-15. The denial forced Complainant's Union to purchase roundtrip plane tickets in order to fly back home to work those two days and then return back to the union event. The actual expenses were paid for by the union.

Complainant's protected activity was not a contributing factor in the adverse actions alleged in the amended complaint; evidence does not support a causal relationship between Complainant's protected activities and the adverse action experienced. Respondent Roffe stated that Complainant was not given permission for the time off from April 30 to May 2, 2014, and Complainant took time off without permission. Complainant's 'failure to report' pay coding was ultimately changed to a 'without pay' code, an act favorable to Complainant. Furthermore the initial denial of June 14 and June 15, 2014 for union business time was changed to allow Complainant to take the union business time. Ultimately Complainant was not disciplined for taking time off that he was not granted. On June 2, 2014 Complainant requested two weeks of union business time off covering the period of June 11 to June 20, 2014. Respondent denied the dates for June 14 and June 15, 2014 but approved the rest of the request, On June 13, 2014, Respondent reversed their decision and granted the union business time off. Although Complainant booked flights for this time period in April 2014, he did not request the time off with Respondent until two weeks before his requested union business time off. However according to Respondent Roffe the time off request was within Respondents' time off request guidelines, and Complainant was not required to furnish his request earlier than he did. Furthermore Complainant did not experience any monetary loss as the Union paid for the travel expenses. Respondent demonstrated that they would have taken the same course of action absent protected activity. Complainant's amended complaint lacks a nexus.

Respondents contend Complainant's September 5, 2013 letter is not an FRSA protected activity, that the hearing officer who assessed the discipline did not have knowledge of the alleged protected activity, and that the alleged protected activity was not a contributing factor in the decision to carry out the adverse actions. Respondents also assert Complainant did not request the time off for April 30 to May 2, 2014 but stated he was taking the time. Complainant's alleged disrespect led Respondents to record Complainant as a 'failure to report' for his shift during the relevant week. On May 30, 2014 Respondents changed Complainant's record to reflect his absence as absence 'without pay', not a failure to report. Respondents asserted that Complainant's June 2, 2014 request for union business time for the period of June 11 to June 20, 2014 did not

provide them with sufficient notice to secure coverage for June 14 to 15, 2014. However, when Complainant did report for work on June 14, he asserted that he observed sufficient coverage where his absence should not have presented a problem for Respondents.

The September 5, 2013, letter submitted by Complainant on behalf of the International Brotherhood of Electrical Workers Local 770 was a very strongly worded letter. The letter identified 21 alleged safety hazards, many very serious in nature. Complainant noted Respondents were not practicing what they preached and, "More frustrating, however, is management's daily ritual of placing production over all else, such as shop cleanliness, locomotive quality, safety of its employees and safety of the communities its trains pass through…" Complainant noted that as the Local Chairman he spoke for the membership and as such he was notifying Respondents that the union (and therefore Complainant) was terminating their partnership with the Selkirk Diesel Shop's Safety Committee. Respondents' contention that this letter is not protected under the FRSA is incredible.

Respondents have also asserted that the hearing officer had no knowledge of Complainant's protected activities and therefore, couldn't have contributed to the decision to issue the suspension. No evidence was developed that suggests Respondents have ever brought charges against another employee for this type of a rule violation. Evidence substantiates that another employee had violated the same rule that very same day and Respondents did not initiate an investigation and they did not issue any disciplinary action. Respondent Woodall was aware of the September 5, 2013 letter, he observed Complainant's behavior on September 11, 2013, and he instructed Respondent Datri to handle the situation. Respondent Woodall intentionally caused an investigation knowing that a hearing would likely result in disciplinary action regardless of whether or not the hearing officer had knowledge of Complainant's protected activity.

The initial FRSA complaint, evidence supports that Complainant's protected activities contributed to the issuance of the adverse action of suspension. Respondents have not demonstrated by clear and convincing evidence that absent Complainant's protected activities Complainant would have still experienced the enumerated adverse actions.

The amended FRSA complaint, Respondents have demonstrated by clear and convincing evidence, that they would have taken the same adverse action, absent the protected activity by Complainant and Complainant's protected activities were not a contributing factor in the adverse employment actions.

On April 4, 2015, Respondents reduced Complainant's five day suspension without pay and five day suspension held in abeyance to an Informal Corrective Instruction (ICI) which is not considered part of Respondent's progressive disciplinary program. On May 7, 2015, Complainant was reimbursed for the lost wages incurred as a result of the five day suspension. As previously noted, On May 30, 2014, Respondents corrected Complainant's employment record to reflect Complainant was on union business time from April 30 to May 2, 2014 and Complainant was ultimately approved for union business time on June 14 to 15, 2014. The airplane ticket expenses incurred as a result of Respondents' initial denial were absorbed by Complainant's union; there was no monetary cost for Complainant.

Punitive damages are appropriate in this matter. Respondent CSX Transportation, Inc. has demonstrated a pattern of retaliation against employees who file FRSA complaints with OSHA. See CSX/ 2-4173-10-058. There can be no dispute Respondent is aware of the FRSA and its obligations under the law.

Complainant's protected activity was a contributing factor in issuance of Complainant's suspension. However, Complainant's protected activity was not a factor in the circumstances involving Complainant's union business time. OSHA finds reasonable cause to believe that Respondents have violated FRSA and issues the following preliminary order.

ORDER

Respondent CSX Transportation, Inc. shall pay Complainant punitive damages in the amount of $5,000.

Respondent CSX Transportation, Inc. shall pay Complainant's attorney's fees in the amount of $27,735.

Respondent CSX Transportation, Inc. shall have all managers at CSX's Selkirk Locomotive Shop/Diesel Shop receive training provided by OSHA relative to the FRSA and the rights afforded employees.

Respondent CSX Transportation, Inc. shall provide all new hires with information on FRSA and the rights afforded to them.

Respondents shall expunge Complainant's employment records of any reference to the exercise of his rights under FRSA and any record of the December 18, 2013 suspension.

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

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

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

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

With copies to:

Charles C. Goetsch
Charles Goetsch Law Offices LLC
405 Orange Street
New Haven, CT 06511

CSX Transportation, Inc.
C/O Thomas R. Chiavetta, Esq.
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113

And:

Teri M. Wigger
Assistant Regional Administrator
U.S. Department of Labor-OSHA
201 Varick Street Room 670
New York, NY 10014

In addition, please be advised that the U.S. Department of Labor 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 for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments, 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. These procedures can be found in Title 29, Code of Federal Regulations Part 1982, a copy of which

may be obtained at http://www.whistleblowers.gov.

Sincerely,

Robert D. Kulick
Regional Administrator

cc: Charles C. Goetsch, Esq. (UPS #1ZX1051V0191871706)
USDOL/OALJ-Chief Administrative Law Judge
US DOL/SOL-Regional Solicitor, Region II
Federal Railroad Administration

NOTICE TO EMPLOYEES

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

CSX TRANSPORTATION, INC. has been ordered to make whole an employee who was found to have been retaliated against for exercising his rights under the Federal Rail Safety Act (FRSA).

PURSUANT TO THAT ORDER, CSX TRANSPORTATION, INC. AGREES:

1. CSX Transportation, Inc. will not discharge or in any manner discriminate against any employee because such employee has engaged in any activity, filed any complaint or instituted or caused to be instituted any proceeding under or related to the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself/herself or others of any right afforded by the FRSA.

2. CSX Transportation, Inc. will not intimidate employees by suggesting or threatening that employee contact, conversation, or cooperation with OSHA officials might result in closure of the employers' facilities, in loss of employment for the employees, or in civil legal action being taken against the employees.

3. OSHA will provide training to all mangers at the Selkirk Locomotive Shop/Diesel Shop concerning the employee protection provisions of the FRSA.

4. CSX, Transportation, Inc. will provide all new hires with information on the rights afforded to them under the employee whistleblower protections provisions of the FRSA;

_____

CSX Transportation, Inc. Date

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

OSHA Occupational Safety and Health Administration

www.osha.gov