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Reply to the Attention of EP/WPP

August 22, 2011

Mr. Rami S. Hanash
Regional Counsel
Union Pacific Railroad Company
Law Department – MS 1580
1400 Douglas Street
Omaha, Nebraska 68179

CERTIFIED MAIL # 7010 0290 0003 5632 1412

Re: Union Pacific Railroad Company/Pfeifer/7-4120-10-039

Dear Mr. Hanash:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Nick Pfeifer (Complainant) against Union Pacific Railroad Company (Respondent) under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleges that Respondent threatened him with discipline, subjected him to an increase in field testing, charged him with rule violations, and suspended him without pay for five days in retaliation for reporting safety concerns to Respondent's safety hotline.

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 alleges that he was threatened with discipline in July 2010 and subjected to an increase in field testing in August and September 2010. On September 9, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of FRSA.

Complainant was suspended for five days without pay on November 12, 2010. On November 26, 2010, Complainant amended his complaint to include the suspension. As both complaints were filed within 180 days of the alleged adverse actions, they are deemed timely.

Complainant, a conductor for Respondent, is stationed out of Respondent's Neff Yard, located in Kansas City, MO. Neff Yard is part of the Kansas City Service Unit (KCSU). Dennis Corcoran is the superintendent of KCSU. Complainant, who is a local chairman with the United Transportation Union, Local 1409, has worked for Respondent for almost seven years.

Complainant was concerned about rough spots on the railroad track. According to Complainant, when crew members would report the rough track to the dispatcher in accordance with railroad policy, the rough track would not get repaired. Complainant said this was an ongoing problem and was a cause of concern to him and his co-workers. Complainant had a meeting with Corcoran about this concern. The evidence indicates that this meeting took place in June 2010. Complainant said Corcoran told him to report the rough track to Respondent's safety hotline, so he would know who to hold accountable in case the repairs were not made. Corcoran said although he told Complainant he could report the rough track to the hotline, he needed to continue to follow procedure and report it to the dispatcher first.

On July 3, 2010, Complainant reported rough track to the hotline. He did not report it to the dispatcher. On or about July 12, 2010, Complainant had a meeting with Manager of Operating Practice (MOP) Skeeter French. According to Complainant, French told him he was fortunate that two derailments that had recently taken place in KCSU had not occurred where Complainant had reported the rough track. Complainant said French told him that Corcoran and Director of Road Operations Kevin Pratt were upset at Complainant because his hotline complaints had brought too much attention on KCSU. Complainant said French told him that he should have reported the rough track to the dispatcher because the dispatcher would have provided immediate protection and the complaints would have stayed off the hotline. Complainant said he told French that he reported the rough track the way he did because those were Corcoran's instructions. Complainant said French told him that Corcoran and Pratt wanted "his ass" put on Level 2 discipline, but that he would take care of him by allowing him to sign for Level 2 coaching.

French, however, said the purpose of the meeting was to make sure Complainant understood the importance of first reporting rough track to the dispatcher so that the dispatcher could provide immediate protection for other trains, not to discourage Complainant from using the hotline. French said he figured that when management found out that the hotline complaints had not been reported to the dispatcher they were probably pretty "excited" about it. French said he offered Complainant Level 2 coaching on the importance of the rule, not Level 2 discipline, but that none of his supervisors instructed him to discipline Complainant for his hotline use.

Complainant refused to sign off on any coaching or discipline. Both accused the other of becoming confrontational, with French accusing Complainant of kicking a chair in his cubicle, which Complainant denied. Complainant said French told him at the end of the meeting that he would adjust his schedule to see Complainant in the field. Complainant said he interpreted this to mean that French would subject him to more testing.

French denied making such a threat. In the end, Complainant agreed to report the rough track to the dispatcher, even though he said he told French that this practice was not solving the rough track problem. After their meeting, Complainant reported for duty.

On July 13, 2010, Complainant reported more rough track to the hotline after reporting it to the dispatcher. Also on July 13, Complainant wrote a letter to his labor union's general chairman, in which Complainant described his meeting with French. He wrote, "Mr. French then continued to yell at me, stating 'they want to Level 2 your ass because they are catching so much heat over what you have done,'" and that "he would adjust his schedule, I would be charged with discipline, and that he would be seeing me in the field." Complainant also wrote, "Mr. Corcoran advised to have the member report things on the safety hotline because those issues get assigned to individuals that will be held accountable if the conditions are not fixed. I indicated to Mr. French that is why I handled it as I did."

On July 28 and August 8, 2010, Complainant reported more rough track to the hotline after reporting it to the dispatcher. On August 10, 2010, Complainant and French exchanged emails. French wrote, "Thank you for properly turning in rough track. Obviously, a little good did come from our meeting. Good job!" He continued, "Although I appreciate your intent, simply following the reporting rule (as you are) is sufficient. There is no need to report on the hotline. The issue is addressed before you even report it." Complainant replied, "First of all I had a meeting with Supt. Corcoran about the rough track issues and he agreed to put them on the safety hotline so the persons would be held accountable for getting issues fixed. The current practice of reporting and fixing the rough track is not acceptable due to the same issues being reported over and over and no results are being provided. I know that the wind has changed directions (2 major derailments) as it often does after any incident. My guess is that Supt. Corcoran will deny ever having such a meeting." He added, "Regardless of the words that you were trying to put in my mouth about not caring about safety when you were explaining to me how I didn't deserved [sic] to be employed by the railroad and falsely accusing me of kicking a chair in your cubicle, I do care about safety. ... The men and I care so much about safety in the workplace that we will turn in rough track to ensure that no harm comes to our brothers or financial loss to the company."

On August 11, 2010, Respondent closed out Complainant's August 8, 2010 hotline complaint. The comment box states, "Per Skeeter French: Spoke to employee. Informed him that although his intent is appreciated, there is no need to turn in to the safety hotline. When condition is turned in to the dispatcher, protection is issued and [maintenance] of way notified." On August 13, 2010, Complainant wrote another letter to his general chairman, in which he accused management of harassing him by accusing him of using the hotline to support Federal Employers Liability Act (FELA) claims, by telling him that they would remove his complaints from the hotline, and by subjecting him to more field testing and to greater scrutiny during those tests. He wrote, "As you can see, it has been a long week and a half. I have been tested more in ten days that [sic] I am usually tested in 6 months. I notified you in my 07/13/10 letter that French stated to me he would adjust his schedule and see me in the field. ... I believe that Mr. French is making good on his threat."

On August 15, 2010, Complainant wrote a letter to Corcoran, in which he told Corcoran that he was being retaliated against for his hotline complaints. He wrote, "Your arrogant attitude of me as the Local Chairman and this organizations [sic] has brought zone 2 to the worst safety record since 2007. Also, you and your Gestapo may want to start addressing the safety issues instead of retaliating against your most important assets (the members reporting them)."

Complainant filed his first FRSA whistleblower complaint on September 9, 2010, alleging harassment on the part of Respondent's managers in retaliation for his hotline complaints.

On October 27, 2010, Respondent issued Complainant a notice of investigation letter. The charge was as follows: "On October 20, 2010, you allegedly failed to comply with instructions to properly fill out your conductors log form after multiple prior coaching opportunities for failure to log required entries." Respondent, which employs a five-step progressive discipline policy, charged Complainant with a Level 3 violation.

On November 3, 2010, Respondent held the formal investigation into the charges brought against Complainant. Complainant was represented by his union. Michael Johnson, an MOP and the charging manager, French, and Pratt were witnesses for Respondent. According to Johnson, he, French, and another MOP were conducting field tests on October 20, 2010. One of the tests involved the dispatcher limiting a locomotive's track warrant at Milepost 76. (In other words, the locomotive's authority to be on the main line ended at Milepost 76.) The locomotive stopped at Milepost 75.7. The three managers boarded the locomotive. Complainant was the conductor. Johnson reviewed Complainant's log book and said he noticed that Complainant had failed to document the end of authority per Rule 1.47A. (Rule 1.47 is titled "Duties of Crew Members." Section A covers the responsibilities of conductors, including notations in their logbook. The rule states, "Entries will be made when head end of train is at or about the milepost location of required entry.) Johnson said he took exception with Complainant's logbook because the locomotive was approaching its end of authority, but Complainant had not yet documented it. Johnson said Complainant was brought up on charges because he had two prior coaching sessions involving his logbook. Johnson said those occurred on August 12 and 17, 2010.

According to Complainant, he told Johnson on the locomotive that he had not yet documented the end of authority because he had not yet reached it when the locomotive had stopped for the field test. He said, "I write it down just so it's written down when my head end approaches it ... I don't write it down a half a mile in advance. I write it down as the head end approaches it." Complainant concluded, "And that's all that this boils down to is that I reported safety issues to the safety hotline and too many people saw it and they had too many incidents during that time and they got in trouble. And in the meantime since all these incidents and since the reporting of the safety hotline, they've went out there with track equipment and they've dug the ballast out from under this rail and under these ties and they've fixed these rough track issues; in fact, that I reported. So, some good did come out of it because we got the safety issues fixed, but all these managers come in here and say safety is their number one job concern and I don't believe that for a minute because all they do is disregard safety when we bring it to them and claim that they don't have the money to fix it or they advised so and so and they give us the run around. But when we report safety issues to the safety hotline, that's whenever we get their attention and that's whenever they're coming to us trying to tell us not to report things

to the safety hotline." At the investigation, Pratt denied that he ever ordered anyone to target Complainant. Both Johnson and French said that no one had ever given them such orders.

On November 12, 2010, Respondent found Complainant in violation of Rule 1.47A. Complainant was issued Level 3 discipline and made to serve a five-day suspension without pay. Complainant served this suspension from November 13 to 18, 2010. Complainant amended his whistleblower complaint on November 26, 2010, to include the suspension and loss of pay.

Complainant engaged in protected activity under FRSA when he reported rough track on the safety hotline on four different occasions in July and August 2010. The investigation found that Complainant reported the rough track in good faith, and that Corcoran had instructed Complainant to use the hotline in order to ensure that his concerns were addressed in a satisfactory manner. Complainant and his co-workers had become frustrated with the normal reporting process due to their belief that the rough track was not getting repaired, and the evidence indicates that Corcoran told Complainant to use the hotline so that he would know who to hold accountable.

Respondent does not dispute that it had direct knowledge of Complainant's protected activity. Complainant submitted his hotline complaints by computer with his own name attached. Respondent's managers have access to the hotline complaints.

Complainant suffered adverse actions under FRSA. The first took place during his meeting with French, in which the evidence indicates that French threatened Complainant with Level 2 discipline for using the hotline, and sought to harass and intimidate Complainant by telling him that he did not deserve to work for the railroad, and that he would adjust his schedule to see him in the field. The evidence also indicates that French told Complainant that Corcoran and Pratt wanted "his ass" put on Level 2 discipline. These sorts of threats and harassment serve to chill the use of Respondent's hotline. The second adverse action took place when Complainant received a notice of investigation letter on October 27, 2010, which stemmed from the four field tests he was subjected to in August 2010, alleging a Level 3 rule violation on his part. The final adverse action took place on November 12, 2010, when Respondent issued Complainant Level 3 discipline, resulting in a five-day suspension without pay.

A preponderance of the evidence indicates that Complainant's protected activities were a contributing factor in the adverse actions. There is evidence of temporal proximity between the protected activities and adverse actions, animus toward the protected activities, and disparate treatment toward Complainant. As for temporal proximity, Complainant made his first report of rough track to the hotline on July 3, 2010. His meeting with French, in which the evidence indicates he was subjected to harassment and the threat of discipline because of his hotline complaints, took place just nine days later. Complainant proceeded to report more rough track on the hotline in July and August 2010. In August 2010, Respondent field tested Complainant five times, which resulted in four coaching sessions; no other conductor in the unit received as many coaching sessions. The five tests were the most tests conducted on Complainant in a single month during 2009 and 2010. Complainant did not come under this much scrutiny until after he started to use the hotline.

As for animus, the evidence indicates that French's comments toward Complainant during their meeting, which is described in detail above, were designed to chill Complainant's use of the hotline. The investigation found that the recent derailments, in conjunction with Complainant's hotline complaints, had brought local management under criticism. Absent the hotline complaints, the evidence indicates that Complainant would not have been subject to this encounter with French. Complainant was credible when he spoke about it. His credibility was enhanced by the letters he sent to his general chairman shortly after the incident, in which he wrote about the situation in great detail. The evidence also indicates that some local managers accused Complainant of using the hotline to support FELA claims, and told him they would remove future complaints. Moreover, Complainant's field testing picked up after he started putting complaints on the hotline. Data from Respondent shows that Complainant was field tested 14 times in 2009, resulting in two coaching sessions. In 2010, Complainant was field tested 22 times, resulting in seven coaching sessions. Six of the seven coaching sessions took place after Complainant's hotline use in July and August 2010. Complainant was field tested five times in August 2010, four of which resulted in coaching.

Complainant's field testing numbers also point toward disparate treatment. Between July and December 2010, for example, Complainant received the most coaching sessions of any conductor in KCSU. Coaching sessions can lead to charges of rule infractions and even discipline. Employees who did not use the hotline like Complainant were subject to less scrutiny.

In addition, the investigation found that Respondent failed to put forth clear and convincing evidence that it would have taken the adverse actions in the absence of the protected activities. For one, the evidence indicates that Respondent's reasons for charging and disciplining Complainant were based on pretext. Witnesses noted that they have never heard of another employee being disciplined like Complainant in regards to the end of authority logbook rule, noting that it was clear evidence of overreach on the part of management. Complainant's locomotive stopped short of its end of authority. He did not document the end of authority because the locomotive had not yet reached it. The governing rule states that "entries will be made when head of train is at or about the milepost location of required entry." Respondent claimed that Complainant's field testing numbers were up because of "holiday havoc," which management said is a period that results in more field tests around certain holidays. This, however, does not explain why Complainant was coached more than any other conductor in the KCSU after he started to use the hotline, or why six of his seven coaching sessions during 2010 took place after he started to use the hotline.

This situation has impacted Complainant and his family in a number of ways. Complainant took a position at less pay to limit his interaction with management officials and to provide them with fewer opportunities to field test him. His unpaid suspension took place right around Christmas, which, according to Complainant, made it difficult for him and his wife to buy gifts for their children. Complainant said he fell behind on some bills and had to deplete his savings just to be able to pay his taxes and most pressing bills. In addition, Complainant said the stress from the uncertainty has placed a strain on his marriage. Complainant said he has become more irritable around his wife and children.

Respondent's outrageous behavior and callous disregard for the rights of its employees warrant punitive damages. More than one witness noted that the chilling effect is real, noting that they will not report safety issues to the hotline out of fear that they will suffer the same fate as Complainant. They also noted that company officials have discouraged them from using the hotline. As shown above, Complainant was at first threatened with discipline. This then escalated into more field testing and ultimately formal discipline, all in an effort to halt his use of the safety hotline.

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

ORDER

- (1) Respondent shall pay Complainant back wages in the amount of \$2,170.80, representing loss of pay from the one-day investigative hearing and the five-day suspension.
- (2) Respondent shall pay interest at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code.
- (3) Respondent shall pay Complainant punitive damages in the amount of \$100,000.00.
- (4) Respondent shall pay Complainant attorney's fees in the amount of \$10,725.00.
- (5) Respondent shall pay Complainant compensatory damages in the amount of \$5,056.50, for the following:
 - Pain and suffering in the amount of \$5,000.00.
 - Attorney's expenses in the amount of \$56.50.
- (6) Respondent shall refrain from retaliating or discriminating against Complainant in any manner for exercising his rights under FRSA.
- (7) Respondent shall provide to all employees in the KCSU a copy of the FRSA Fact Sheet included with this Order.
- (8) 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 KCSU.
- (9) Respondent shall remove from Complainant's employment records any reference to the exercise of his rights under FRSA and expunge from his employment records any and all discipline stemming from the November 3, 2010 investigative hearing.

Mr. Nick Pfeifer

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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: