

U.S. Department of Labor

Occupational Safety & Health Administration
230 S. Dearborn St., Room 3244
Chicago, IL 60604
(312) 353-2220



JUL 27 2011

Andrea Hyatt, Attorney
BNSF Railway Company
Law Department
P.O. Box 961039
Forth Worth, Texas 76161-0039

Re: Burlington Northern Santa Fe Railway Company BNSF/Winkler/5-6850-10-025

Dear Ms. Hyatt:

This is to advise you that we have completed our investigation of the above referenced complaint filed by Steven Winkler (Complainant) against Burlington Northern Santa Fe Railway Company (Respondent) on April 16, 2010, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleges that Respondent issued Complainant a "Notice of Investigation," Level S-Thirty (30) Day Record Suspension, and one-year probation in retaliation for reporting a work related injury and for reporting a hazardous safety condition, which contributed to his work related injury.

Following an investigation of this matter 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 V, issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109. Respondent is engaged in interstate commerce within the meaning of 49 U.S.C. §20109.

Complainant is employed by Respondent as a Conductor and assigned to Respondent's facility located in Galesburg, Illinois. Complainant is an employee covered under 49 U.S.C. §20109.

Respondent issued Complainant a Level S-Thirty (30) Day Record Suspension and a one-year probation on March 1, 2010. On April 16, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is timely.

On December 6, 2009, Complainant reported a work injury to Respondent Management Officials, an activity protected by 49 U.S.C. §20109 (a) (4). On December 10, 2009, Respondent issued Complainant a Notice to attend a Formal Investigation on February 12, 2010. The notice states; “Arrange to attend investigation...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged inappropriate conduct (careless of the safety of yourself and others, and dishonesty), failure to immediately advise a supervisor of the incident and complete the prescribed form, failure to comply with instructions, failure to properly maintain a safe course and remain alert and attentive to train movement, in addition your alleged failure to properly position yourself to operate the end mounted handbrake with brake steps or crossover platform and allegedly fouling the track during your duties, resulting in your personal injury that occurred on December 6, 2009, at the Y GAL7211 06.”

The Investigation was postponed several times but ultimately occurred on February 16, 2010. On March 1, 2010, Respondent issued Complainant a level s-thirty (30) Day record suspension and one-year probation, asserting that based on Assistant Terminal Superintendent Randy McMahan’s review of the February 16, 2010, transcript; Mr. McMahan concluded that Complainant violated five company rules when sustaining injuries to his ribs, lung, and kidney, GCOR Rules 1.1.1 “Maintaining a Safe Corse;” GCOR 1.20 “Alert to Train Movement;” GCOR 1.6 Conduct (1) “Careless of the safety of themselves or others;” TY&E Safety S-1.2.3 “Alert and Attentive;” and S-13.6.3 “Position to Operate.”

Respondent asserts that Complainant violated GCOR 1.6 – (1) Careless of the safety of themselves or others. The hearing officer, who is also a Respondent manager, testified that all injuries are preventable and because Complainant reported a work-injury, he must have violated this rule.

The evidence confirms that Complainant reported a work injury, however, the evidence does not support that Complainant was performing his job in a careless manner. Complainant provided a consistent account on how his injury occurred throughout Respondent’s investigation. The evidence shows that Respondent’s hearing officer determined that Complainant violated this rule based on his opinion that all injuries are preventable, and not on any credible evidence.

Respondent asserts that Complainant violated TY&ES-13.6.3 Position to Operate Handbrakes when he failed to perform this operation correctly. Respondent stated that Complainant has received training on this operation and had he been performing this function as trained, he would not have been injured.

The evidence shows that Complainant had received training on the correct way to operate handbrakes. At the time of the accident, Complainant testified that when operating the handbrake he placed one foot inside the rail and one foot outside the rail while applying the handbrake on the tank car. However, nearly 90% of the employees performing this operation routinely did it from the ground. The evidence suggests that the Complainant was operating the handbrake in the same manner as other employees. However, there is no evidence that supports that the manner in which Complainant was operating the handbrake led to his injury. Rather, Respondent’s procedure of “blocking and rolling” caused Complainant’s injury.

The Respondent alleged that the Complainant violated GCOR Rules 1.1.1 Maintaining a Safe Course, 1.20 Alert to Train Movement, 1.6 Conduct, and TY&E Safety S-1.2.3 Alert and Attentive.

Respondent has no evidence to support these alleged rule violations. These are simply the opinion of Respondent's hearing officer and are not based on credible evidence. Complainant consistently stated that he looked down the track for moving cars and when he did not see any, he then operated the handbrakes. Complainant had radio contact with the Tower who informed him the track was blocked. Based on Complainant's failure to observe rolling cars and the Tower confirming that the track was blocked, Complainant had an expectation that he had placed himself in a safe environment to operate the handbrakes.

Complainant has made a prima facie showing that his protected activity was a contributing factor in the adverse action alleged in the Complaint and Respondent has failed to demonstrate by clear and convincing evidence that they would have taken the same adverse action in the absence of the Complainant's protected activity.

OSHA finds that there is reasonable cause to believe that Respondent violated FRSA. OSHA hereby orders the following to remedy the violation.

Order

Respondent shall cease and desist automatic issuance of notice of investigation for employees who report work injuries without reasonable suspicion that the hearing will uncover evidence of a policy violation or misconduct.

Respondent shall pay Complainant compensatory damages of \$25,000 for mental pain and emotional distress due to the humiliation and the loss of income from the wrongful suspension.

Respondent shall pay Complainant \$75,000 in punitive damages for its reckless disregard for the law and complete indifference to the United States Congressional authority to enact laws and delegate investigatory authority to the Secretary of Labor and the rights afforded the Complainant by 49 U.S.C. §20109 and 29 CFR 1982.

Respondent shall pay Complainant's attorney fees of \$7,500.

Respondent shall expunge all files and computerized data systems of references to the disciplinary hearing involving Complainant, announced on December 10, 2009. This includes, but is not limited to, the hearing notice and all subsequent memorandums or letters referencing the scheduling of the disciplinary hearing.

Respondent shall expunge all files and computerized data systems of references related to the Level S-Thirty (30) Day Record Suspension, and one-year probation in retaliation issued on March 1, 2010. This includes, but is not limited to, the Notice to attend a Formal Investigation and all subsequent memorandums or letters referencing the Formal Investigation.

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.

Respondent shall post for a period of 180 days the Notice to Employees included with this Order in all of its stations in areas where employee notices are customarily posted.

Respondent shall within 30 days inform the Regional Administrator in writing of the steps it has taken to comply with the above order.



NOTICE TO EMPLOYEES

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

Burlington Northern Santa Fe Railway Company (BNSF) has been ordered to make whole an employee who was found to have been retaliated against for exercising rights under the Federal Rail Safety Act (FRSA). Burlington Northern Santa Fe Railway Company (BNSF) has also taken affirmative action to ensure the rights of its employees under employee whistleblower protection statutes including the FRSA.

PURSUANT TO THAT ORDER, Burlington Northern Santa Fe Railway Company (BNSF) AGREES THAT IT WILL NOT:

1. 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, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53., 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. Discharge, demote, suspend, threaten, harass, intimidate or in any other manner discriminate against an employee because such employee has reported a workplace injury or illness.
3. Deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.
4. Discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

Burlington Northern Santa Fe Railway Company (BNSF)

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.