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

JUN 1 2 2012

E. Scott Smith, Esq.
Fisher & Phillips, LLP
1075 Peachtree Street, N.E.
Suite 3500
Atlanta, Georgia 30309

RE: Norfolk Southern Railway Company/Morris/4-3750-10-028

Dear Mr. Smith:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Jerry Morris (Complainant) against Norfolk Southern Railway Company (Respondent) on February 9, 2010 and amended on August 5, 2010, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleged that Respondent terminated him on August 14, 2009, 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 FRSA and issues the following findings:

Secretary's Findings

Respondent Norfolk Southern Railway Company 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 was employed by Respondent as a laborer and assigned to Respondent's Piedmont Division facility located in Greenville, South Carolina. Complainant is an employee within the meaning of 49 U.S.C. §20109.

Complainant was terminated on August 14, 2009. On February 9, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him by terminating his employment in violation of FRSA. As the complaint was filed within 180 days of the alleged adverse action, it is timely.

On October 27, 1980, Respondent hired Complainant as a Laborer at the Maintenance of Way Department of Respondent's Piedmont Division. On the afternoon of April 22, 2009, Complainant and four other laborers, Colin Gentry, Joe Stokely, Jim Davis, and William Keller, were installing cross ties on a main line immediately south of the Catawba River Bridge in Belmont, North Carolina. The designated person for supervision and communication was Foreman Charles Snelson. At the end of the workday, Snelson gave the gang permission to leave the worksite. Foreman Snelson told Complainant and co-worker Gentry to walk along the tracks on their way back to the truck used earlier in the day to transport them to the site (this truck was just off the industrial track). Keller was manning the backhoe and Davis was manning the gang truck. Stokely was riding with Davis. Keller, Davis, and Stokely were on their way back to the terminal.

After the required Roadway Worker Protection (RWP) Rules briefing provided by Foreman Snelson, Complainant and Gentry began walking south on the pocket track headed for the crossing, or "hole", where they could get off the tracks. When they reached a switch on the pocket track, they walked over to the side (or back) track and continued south. The backhoe and gang truck began to leave the worksite and, traveling in reverse on the pocket track, headed in the same direction as Complainant and Gentry. Foreman Snelson, who was responsible for reviewing the work performed by the gang, was walking behind the gang truck, which was following the backhoe.

When the backhoe reached the switch on the pocket track, it switched over to the side track, the same track to which Complainant and Gentry had moved and on which they were walking. When they saw the backhoe approaching them, they crossed over into the gauge (the space between the rails) of the pocket track and continued walking toward their parked truck. Complainant and Gentry moved closer to the pocket track because they could not get off the side track due to dense, high weeds that would have obstructed their movement. They also could not walk on the ballast located on the east side of the side track because the backhoe was hauling several 10-foot ties, which could have struck them.

Complainant and Gentry were unaware that the gang truck, which was moving in reverse, was heading down the pocket track in their direction. Although the gang truck is equipped with a back-up alarm, they could not hear it due to the substantial noise coming from the backhoe as it was moving down the side track. Gentry saw the gang truck at the last second and leapt out of the way; however, the gang truck struck and injured Complainant. He was taken to the hospital where he was treated.

Track Supervisor Richard Snider arrived at the hospital intending to interview Complainant and take a statement, even though Complainant was in pain and receiving treatment for his injuries. Realizing that Complainant could not submit a statement while at the hospital, Snider told Complainant to come to his office the next day and provide a statement of events. The next day, Complainant did so.

Following Snider's internal investigation of the accident, Respondent issued charge letters to Complainant, Gentry, Davis, Stokely and Snelson. Keller was not charged. Complainant received his charge letter on May 1, 2009, informing him that an investigatory hearing was scheduled for May 12, 2009 in order to determine his

responsibility, if any, for Gang TM-70's improper performance of its duties after installing ties at the Catawba River Bridge on April 22, 2009. The charge letter, however, did not specify the exact safety rules and/or procedures allegedly violated.

The hearing was postponed four times due to the injuries Complainant suffered and his treatment for those injuries. The last scheduled date for the hearing was July 30, 2009. By letter dated July 20, 2009, the union informed Respondent that Complainant would not be able to attend the hearing because he was scheduled for surgery on July 30, 2009, the same day of the hearing. Respondent refused to postpone the hearing, claiming that Complainant had not submitted sufficient medical information to warrant another postponement. Respondent had requested a detailed written report along with progress notes and office visit notes specifically addressing Complainant's ability to attend a company investigation. While Complainant was having surgery, the hearing took place, as scheduled, on July 30, 2009, without Complainant's participation.

On August 14, 2009, Complainant received a letter dated August 11, 2009 from Assistant Division Manager J.D. Bryant informing him that, after review of the investigatory transcript, it was proven that Complainant was guilty of the charges and thereby dismissed from service. Snelson, Stokely, and Davis received letters informing them that the investigation had established that they were not guilty of the charges.

Complainant's dismissal letter stated, in relevant part, "In the investigation you were charged with improper performance of duties concerning the manner in which TM-70 Gang cleared the track after installing ties at the Catawba River Bridge, mile post 387.5, on April 22, 2009 [the accident actually occurred on April 21, 2009]. Upon completion of the installation, the gang was not properly briefed with respect to the protection of employees who were to walk back to the pickup truck at the Industry Track, with the backhoe moving southward into the back track to clear, and the Gang Truck making a reverse move on the pocket track to clear; Laborers Gentry and Morris unnecessarily walked in the gauge of the pocket track and without looking for oncoming traffic; once the backhoe cleared the back track switch, the occupants of the Gang Truck did not use proper backup protection or ensure the location of Laborers Gentry and Morris before making the reverse move past the back track switch. After careful review of the transcript of the investigation, it was proven without doubt, you were guilty of the charges."

Complainant alleged that, before the hearing began, Respondent contacted Gentry and informed him that he would be discharged unless he accepted responsibility for the accident along with a 60-day suspension. Complainant indicated that Gentry knew that if he pursued a grievance and won, it could take several years before this process was completed and he was able to return to work; therefore, Gentry accepted the terms of this agreement. Complainant also stated that Respondent never made a similar offer to him. Complainant mentioned to the OSHA investigator that Respondent had already given assurances to Stokely, Davis, and Snelson that they would be exonerated. Complainant alleges that Respondent engaged in the hearing proceedings with the intent of only terminating Complainant because he was the only one injured.

Respondent denied that it terminated Complainant because he reported an on-the-job injury. Respondent asserted that Complainant was discharged because he violated fundamental safety rules, specifically, that Complainant was struck from behind by a

gang truck while walking in the gauge of the pocket track because he was not paying attention to his surroundings and did not notice the gang truck moving down the same track along which he was walking.

Respondent's position is not supported by the evidence.

Respondent admitted that the two occupants on the gang truck, Stokely and Davis, did not know that Complainant and Gentry were walking along the pocket track and were not vigilant as to their whereabouts. Furthermore, although Respondent's position statement to OSHA listed the safety rules that Complainant allegedly violated, Respondent's initial charge letter regarding Complainant as well as his dismissal letter did not list any specific safety rules and/or procedures.

In fact, the August 11, 2009 dismissal letter states, in relevant part, *"...the gang was not properly briefed with respect to the protection of employees who were to walk back to the pickup truck..."* and *"the occupants of the Gang Truck did not use proper backup protection or ensure the location of Laborers Gentry and Morris before making the reverse move past the back track switch."* Then Respondent inexplicably jumps to the conclusion that *"it was proven without doubt, you [Morris] were guilty of the charges."* The letter provides no specific reasons to explain why Complainant was found guilty of the charges. Nor does it mention any specific rule(s) or procedure(s) that Complainant was found guilty of violating. In this letter, Respondent clearly admits that Foreman Snelson did *"not properly [brief]"* the gang and that Davis and Stokely, the two occupants of the gang truck, *"did not use proper backup protection or ensure the location of Laborers Gentry and Morris."* Snelson appeared to have violated RWP Rule 751 (job safety briefing requirement) while Davis and Stokely appeared to have violated RWP Rule 817 (remain vigilant and be on the lookout for trains, people, etc.) However, Respondent exonerated these three employees of all charges.

The evidence in this case demonstrates that Complainant was treated disparately as compared to other employees involved in the accident. Respondent did not terminate Complainant because he was partly responsible for the accident. If Respondent had done so, Respondent would have also had to discipline at least three other employees. Instead, Respondent terminated Complainant because he was the only employee who was injured and initiated a reportable injury filing, thereby marring Respondent's self-proclaimed stellar injury and illness rates. Complainant admits sharing some responsibility for the incident. However, he contends that the vehicle operators who struck him also bear responsibility for the accident. Complainant alleges that he was treated differently because of his injury report. The evidence in this case supports Complainant's allegation.

First, the record shows that five employees, including the foreman, were initially charged and subjected to an investigative hearing regarding the April 21, 2009 accident that resulted in Complainant's injury. One employee, Gentry, the Complainant's co-worker who "jumped off the tracks" to avoid being hit by the gang truck, was offered a waiver in lieu of termination with a 60-day suspension. Davis, Stokely and Snelson, the other three employees, were exonerated of all charges. Only Complainant was found guilty of the accident. He was also the only person injured in the incident.

During his OSHA interview, Respondent manager James Bryant denied that he had offered a waiver to Gentry shortly before the hearing began; however, the evidence shows this claim to be false. The union told Gentry just before the hearing that Bryant had told them that they would give him a 60-day waiver if he accepted the charges. In fact, the bargaining agreement provides that waivers can be an option for charged employees but the employee must accept responsibility for the alleged violation(s). Bryant must have been fairly certain that Gentry would accept the waiver and admit to the charges. When asked why Complainant was not offered the same waiver rights as Gentry, Bryant replied that Complainant was not at the hearing and the union did not request a waiver for him. It is often the practice, however, that a charged employee will accept a waiver well in advance of a scheduled hearing and a hearing will not even take place if the charged employee has accepted responsibility. It is also puzzling that neither Respondent nor the union discussed waivers for Snelson, Stokely, and Davis.

It also appears that the fates of Snelson, Stokely and Davis were predetermined, based on a review of the hearing transcripts. This result is particularly troubling because it appears that these three employees directly violated Respondent's safety rules and procedures. The following discrepancies in the conduct of the investigative hearing were identified:

- Hearing Officer Bryant's questioning of Snider focused exclusively on the actions of Complainant and Gentry and not on the actions of Snelson, Stokely, or Davis.

- Bryant's questioning of Division Engineer Edward Cody was also limited to the actions of Complainant and Gentry.

- Bryant did not ask Snider or Cody whether Snelson, Stokely and/or Davis violated any safety rules. In response to the OSHA investigator, Bryant indicated that the testimony provided at the hearing established that gang members Davis, Stokely, and Snelson were not guilty of having violated any specific rules and that is why no rule violations against them were recorded at the hearing. This response does not comport with the fact that these three individuals received the same charge letter as Complainant and Gentry, yet were not even questioned about their actions.

- Bryant did not question Snelson, Stokely, and Davis in an impartial manner and failed to examine the answers they provided to his questions. For example, instead of asking Snelson whether he conducted the required job briefing, Bryant "assisted" Snelson by establishing that Snelson did conduct the briefing. Bryant asked Snelson if he directed Complainant and Gentry where they should walk during the briefing. Snelson answered that he did not and he never does. Bryant should have, but did not, ask Snelson any follow-up questions. RWP Rule 751(b) requires that the job briefing include a safety discussion, but the hearing record reveals that Snelson did not address safety during the job briefing. Therefore, Snelson most likely violated Rule 751(b).

- It also appears that Stokely and Davis violated Operating Rule 817, which requires that:

> each employee must assist the operator in keeping vigilant lookout for trains, other equipment or obstructions, on or off the track, including people, vehicles, animals, contractors' equipment or anything that could affect safe movement. While in motion, operators and occupants of equipment must remain vigilant, not engage in unnecessary conversation or in boisterous conduct while equipment is in motion.

  Stokely indicated at the hearing that before leaving the bridge, he asked Davis if he could see Complainant and Gentry; Davis replied "yes". However, after Davis indicated to Stokely where Complainant and Gentry were, Stokely followed the backhoe down the pocket track, stopping briefly while the backhoe switched over to the side track. Stokely testified at the hearing that, after they started down the pocket track, they did not see Complainant and Gentry and assumed they had gone to the truck. Bryant chose not to interrogate Stokely any further. Stokely's response suggests that neither Stokely nor Davis knew where Complainant and Gentry were, in violation of Rule 817. If Stokely or Davis could not see them they should have stopped and ascertained their location before continuing down the pocket track. Doing so could have prevented the accident.

- Foreman Snelson was behind the gang truck during this movement. Because of this location, had Stokely radioed and asked Snelson where Complainant and Gentry were, Snelson would not have been able to answer him. As the designated safety person, Snelson had an obligation to be in a position to monitor movement. MW&S Standard Procedure Sections .08 thru .11 require that the foreman ride the rear machine – in this case, the gang truck – in the direction of travel when moving machinery. Although Bryant contends that these procedures do not apply to this type of gang machinery, the procedures do not make this distinction.

- During the hearing, Bryant asked Snider to summarize his findings from the accident investigation. Interestingly, Snider's accident report was not entered into the hearing record. This accident report contained information that would have been potentially damaging to both Stokely and Davis. In his report, Snider indicated that Stokely and Davis were "trying to observe the backhoe and the view being hindered by the ties it was carrying, they lost sight of Gentry and Morris." Again, Stokely and Davis thought that Complainant and Gentry had walked down the back track to the truck. Once the backhoe was clear "they started south checking their mirror, but due to Gentry and Morris being in the gauge of the track they could not be seen." This information should have been presented at the hearing because it raises questions about the actions of Stokely and Davis, as well as the veracity of their testimonies.

- Bryant did not ask Stokely at what speed he had operated the gang truck and, most importantly, whether he was traveling at a speed that would allow him to be prepared to stop within half the range of vision, as required by Operating Rule 814(a).

Respondent maintains that Complainant and Gentry violated RWP Rule 750(b) that states a roadway worker will not foul, that is, be in close proximity to,[1] a track unless necessary in the performance of duty. It appears, however, that Complainant and Gentry did not violate this rule since they were still working under "track authority" and working limits had not yet been released. Moreover, it is customary practice for roadway workers to foul tracks in order to get to and from the worksite as long as they are working under "track authority." Surprisingly, Respondent does not have a procedure detailing how roadway workers will get to and from worksites. It appears that they can travel to and from the worksite in any manner they choose as long as they have track authority.

Another argument by Respondent was that Complainant elected a remedy when he appealed the termination through the collective bargaining process. However, current case law refutes Respondent's position. *See Mercier v. Union Pacific Railroad, ARB 09-121*; and *Koger v. Norfolk Southern Railway Company, ARB 09-101 (Sept. 29, 2011).*

Based on the above, Respondent's investigation and hearing process appear to have been intentionally orchestrated to support the decision it had already made: to terminate Complainant's employment.

49 U.S.C. §20109(a)(4) states that "A railroad carrier engaged in interstate or foreign commerce... may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done...to notify, or attempt to notify, the railroad carrier, or the Secretary of Transportation of a work-related personal injury or work-related illness of any employee."

All the elements of a prima facie case are present in this case. The evidence shows that Complainant engaged in protected activity when, on April 22, 2009, he reported a work-related injury he suffered on April 21, 2009.

The evidence also shows that Respondent had knowledge of Complainant's protected activity because Respondent went to the hospital and attempted to interview and take a statement from Complainant, even though Complainant was in extreme pain and awaiting medical treatment. Respondent had to file an injury report with the Federal Railroad Administration (FRA) for the injury Complainant suffered on April 21, 2009. Complainant suffered an adverse action when he was informed of his termination on August 14, 2009.

The evidence clearly establishes a nexus between the protected activity and the adverse employment action. Respondent showed animus towards Complainant for reporting an injury, which directly affects Respondent's injury and illness rates.

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[1] **Fouling a track (OTS)** - Means the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail. An individual could be farther than four feet from the rail and still be fouling the track if the individual's position or actions could cause movement into the four foot zone, or if there were any possibility of the individual being struck by a part of a moving train or on track machine that might extend more than four feet outside the rail. An example would be an individual working on the slope of a cut above the track, where a slip could cause movement into the track area. *See* http://www.mytpu.org/tacomarail/rail-service/rail-terminology.htm.

In addition, the evidence demonstrates that Respondent treated Complainant disparately as compared to other employees involved in the accident. Five employees were initially charged yet only Complainant was found guilty and terminated. Three other employees, who directly violated Respondent's safety rules, were exonerated of all charges. The evidence collected during this investigation shows that Complainant and his co-worker Gentry, who accepted a 60-day suspension in lieu of termination, did not actually violate any safety rule or procedure. Even if they had, the disparate treatment meted out to Complainant in contrast to Gentry, as well as the other employees, is glaring.

Complainant has been out of work because of the injury for more than two years and has endured numerous surgeries and other medical treatment. Complainant is currently under Social Security Disability coverage as a result of this on-the-job injury and is receiving disability annuity payments under the Railroad Retirement Act. Based on Complainant's current physical condition related to this injury and his inability to return to work at full capacity, the Department is not ordering reinstatement or back pay.

The preponderance of the evidence indicates that Complainant suffered severely as a result of improper termination. He was treated disparately as compared to other employees involved in the accident. In fact, he was the only employee terminated from a group of five employees involved in the accident. Respondent directly targeted Complainant because of his injury report and humiliated him for doing so. Respondent wanted to make Complainant an example of what would happen if an employee reports an injury. Moreover, Complainant lost the opportunity to qualify for employer-provided long term or short term disability benefits as a result of the termination. As a result, his family suffered extreme financial hardship, while he waited to qualify for Social Security Disability Benefits and Railroad Retirement Act Benefits. He was forced to sell personal property to make ends meet, and suffered the humiliation of the retaliatory termination at a time when he and his family were already suffering because of the extensive treatment he needed for the injury.

Respondent's immediate retaliation against this employee for reporting an on-the-job injury on April 22, 2009 exhibited reckless disregard for the law and total indifference to Complainant's statutorily-protected rights. Respondent's retaliatory conduct towards employees that report injuries and/or illnesses has created a chilling effect in the workplace. In fact, in several other instances, Respondent has been cited by OSHA for violating the whistleblower protection provisions of the FRSA[2]. Respondent's continued callous disregard for Complainant's and other employees' protected rights under FRSA warrants significant punitive damages.

In the absence of clear and convincing evidence indicating that Respondent would have taken the same adverse action even if Complainant had not engaged in protected activity (reporting his on-the job injury), OSHA finds reasonable cause to believe that Respondent violated 49 U.S.C. §20109 and therefore issues the following order to remedy the violation:

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[2] Norfolk Southern Railway Company– 4-0520-08-008 on 4/4/11 and Norfolk Southern Railway Company-- 4-3750-10-006 on 8/8/11.

Order

1. Respondent shall pay Complainant compensatory damages, totaling $110,852.00, as follows:

a. Early withdrawal penalty of Complainant's 401K retirement plan, in the amount of $852.00.

b. Sale of Complainant's pickup truck due to financial hardship because of his termination in the amount of $10,000.00[3]

c. Compensation for mental anguish and pain and suffering in the amount of $100,000.00.

2. Respondent shall pay Complainant punitive damages in the amount of $200,000.00 for reckless disregard for the law and indifference to Complainant's rights under FRSA.

3. Respondent shall pay Complainant reasonable attorney fees in the amount of $14,325.00.

4. Respondent shall expunge from Complainant's personnel records any adverse references relating to the discharge or the facts at issue in this case.

5. Respondent, as well as any of Respondent's agents, representatives, employees or any person in active concert with them, shall not provide any adverse information in response to any requests for information about Complainant, including (but not limited to) any requests for employment references.

6. Respondent, as well as any of Respondent's agents, representatives, employees or any person in active concert with them, shall not direct future retaliation or discrimination against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the referenced Act.

7. Respondent shall post immediately the attached "Notice to Employees" and "Fact Sheet" in a conspicuous place in or about Respondent's Piedmont Division facility, including all places where notices for employees are customarily posted, including on a Website for employees, if there is one, and maintain for a period of at least 60 consecutive days from the date of posting, said Notice to Employees to be signed by a responsible official of the Respondent and the date of actual posting to be shown thereon.

8. Respondent shall train its managers and employees assigned to the Piedmont Division facility about employee's rights to file injury reports without fear of retaliation. Respondent shall complete the training within 60 days and will provide proof of such

[3] Blue Book value of truck was determined at $12,000.00

training to OSHA by mailing it to Cindy A. Coe, Regional Administrator, U.S. Department of Labor, OSHA, 61 Forsyth Street, S.W., RM 6T50, Atlanta, GA 30303.

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:

Charles Collins, P.A. (Attorney for Complainant)
Attorney-at-Law
411 Main Street, Suite 410
St. Paul, MN 55102

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

U.S. Department of Labor
Office of the Regional Solicitor
61 Forsyth Street, SW, Suite 7T10
Atlanta, GA 30303

U.S. Department of Labor Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, DC 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 decisions under FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Sincerely,

CINDY A. COE
Regional Administrator

cc: Charles Collins, P.A. (Attorney for Complainant)
Chief Administrative Law Judge, USDOL
Federal Railroad Administration, USDOT
Office of the Solicitor, USDOL