



February 21, 2014

Andrea Hyatt  
BNSF Law Department  
2500 Lou Menk Drive AOB-3  
Fort Worth, TX 76131

**CERTIFIED MAIL # 7012 1010 0000 0087 8911**

Re: BNSF Railway Company/Helmink/7-3620-12-002

Dear Ms. Hyatt,

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mr. Jeffrey G. Helmink ("Complainant") against BNSF Railway Company ("Respondent") under the whistleblower provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §20109. In brief, Complainant alleges that Respondent brought him up on a rule violation on June 27, 2011, permanently abolished his job on July 21, 2011, interfered with his medical treatment, forced him to fill out an accident report while under the influence of medication, and issued him Personal Performance Index ("PPI") points in retaliation for Complainant reporting a work-related personal injury.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent, the Acting 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 took the above-referenced adverse actions on June 27, 2011 and July 21, 2011. On October 4, 2011, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of FRSA. On August 27, 2013, Complainant filed an amended complaint, adding that he first discovered in August 2013 that he was issued PPI points in connection with his workplace injury from 2011; the same injury that he sustained on June 14, 2011, which formed the basis of his original complaint.

The original complaint is timely because it was filed within 180 days of the alleged adverse actions. The amended complaint is valid because it reasonably relates to the original complaint.

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 is employed by Respondent as a carman. Complainant and Respondent are, therefore, covered by FRSA.

In order to establish a prima facie allegation of retaliation under FRSA, Complainant must show the following by a preponderance of the evidence: (1) that he engaged in protected activity, (2) that his employer had knowledge – actual or inferred – of the protected activity, (3) that he experienced an adverse employment action, and (4) that his protected activity was a contributing factor in the adverse action. If Complainant makes this showing, Respondent can avoid liability by showing, by clear and convincing evidence, that it would have taken the same adverse action even in the absence of the protected activity.

Complainant engaged in protected activity on June 14, 2011 when he reported a workplace injury to his foot. Complainant further engaged in protected activity on this day when he requested and received medical attention in response to his injury to his foot.

Respondent does not dispute that it had direct knowledge of the protected activities.

Complainant suffered an adverse action on June 27, 2011 when he was brought up on charges of possible rule violations related to negligence and carelessness, for the safety of himself or others.

Complainant further suffered an adverse action on July 21, 2011 when Respondent permanently abolished his job and reposted it for permanent bid.

Complainant further discovered on August 27, 2013 that he suffered an adverse action of being assessed points to his Personal Performance Index (PPI) in response to his reportable injury.

Evidence was not found that indicates Respondent interfered with Complainant's medical treatment, thereby forcing him to complete an accident report while under the influence of narcotic pain killers.

Respondent has provided clear and convincing evidence that some of the adverse actions were not taken in retaliation for the protected activities. The evidence, for example, shows that when Respondent issued the charge letter to Complainant, there were reasons to believe that Complainant might have been in violation of the charged rules.

As for the charge of "negligent and carelessness, for the safety of yourself or others" when attempting repairs to HBWX 99264, there was evidence that Complainant might have been negligent or careless when he admitted that he attempted to board a moving railcar. Complainant further disclosed in his injury and illness report that he "[doesn't] really know for sure how it happened...but [his] left foot got run over by the car."

As for the abolishment of Complainant's job, Complainant states, and currently still states, that he was, and still is, ineligible to perform work as a carman because of his current medical status. Due to the fact that Complainant was expected to be on leave for an extended period of time, Respondent abolished and reposted Complainant's job to meet its operational demands. Complainant is eligible to a "bump" once he can return to service – where he can take over the position of any employee with less seniority than him for which he is qualified. When Respondent abolished Complainant's job, moreover, it was to meet its operational demands since Complainant could not, and still cannot, return to work as a carman.

Respondent, however, has failed to show, by clear and convincing evidence, that it would have issued the PPI points even in the absence of the protected activity. The evidence shows that Respondent issued points to Complainant's record in retaliation for Complainant reporting his workplace personal injury on June 14, 2011. Respondent does not deny the issuing of the points and further supports the contention that Complainant would not have been issued points if he would not have engaged in protected activity. Respondent asserts Complainant should have had knowledge of the points assessed to his record before his amended filing in August 2013. Respondent claims that the PPI system was a huge topic of discussion for Respondent managers, employees, OSHA, and the unions for several years and since the PPI system has been abolished, Complainant's points are not an adverse action. The evidence revealed that Respondent never notified Complainant of him being issued points and Complainant certainly experienced an adverse action when he was issued PPI points.

Respondent's actions warrant an award of compensatory damages, in the form of pain and suffering, to Complainant. Complainant stated that he suffered from anxiety and stress when he discovered he had been issued PPI points. He also stated that he was fearful for his job, noting that this has only added to his stress and the difficulty of the situation.

OSHA finds reasonable cause to believe that Respondent's issuance of the PPI points has violated the FRSA and issues the following order:

**ORDER**

- (1) Respondent shall remove from Complainant's employment records any reference to the PPI Points.
- (2) Respondent shall pay Complainant reasonable attorney's fees.
- (3) Respondent shall pay Complainant compensatory damages in the amount of \$2,000 for pain and suffering.
- (4) Respondent shall refrain from retaliating or discriminating against Complainant in any manner for exercising his rights under FRSA.
- (5) Respondent shall provide to all employees in its Lincoln Service Unit a copy of the FRSA Fact Sheet included with this Order.
- (6) 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 its Lincoln Service Unit.

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:

Robert J. Friedman, esq.  
c/o C. Marshall Friedman, P.C.  
1010 Market Street, Suite 1340  
Saint Louis, MO 63101

Marcia P. Drumm  
Acting Regional Administrator  
U.S. Department of Labor, OSHA  
2300 Main Street, Suite 1010  
Kansas City, MO 64108

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 FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint. The rules and procedures for the handling of FRSA cases can be found in Title 29, Code of Federal Regulations Part 1982 and may be obtained at [www.whistleblowers.gov](http://www.whistleblowers.gov).

If further information is desired concerning this matter, please contact Christine Stewart, Regional Supervisory Investigator, at (816) 283-8745 ext. 231.

Sincerely,



Marcia P. Drumm  
Acting Regional Administrator

cc: Complainant's Attorney (Certified #7012 1010 0000 0087 8928)  
USDOL/OALJ - Chief Administrative Law Judge (Certified #7012 1010 0000 0087 8935)  
USDOL/SOL - Division of Fair Labor Standards (Certified #7012 1010 0000 0087 8942)  
Federal Railroad Administration - National (Certified #7012 1010 0000 0087 8959)  
Federal Railroad Administration - Local (Certified #7012 1010 0000 0087 8966)

Enclosures: (2)

# OSHA<sup>®</sup> FactSheet

## Whistleblower Protection for Railroad Workers

**Individuals working for railroad carriers are protected from retaliation for reporting potential safety or security violations to their employers or to the government.**

On August 3, 2007, the *Federal Railroad Safety Act* (FRSA), 49 U.S.C. §20109, was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to transfer authority for railroad carrier worker whistleblower protections to OSHA and to include new rights, remedies and procedures. On October 16, 2008, the *Rail Safety Improvement Act* (Public Law 110-432) again amended FRSA, to specifically prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

### Covered Employees

Under FRSA, an employee of a railroad carrier or a contractor or subcontractor is protected from retaliation for reporting certain safety and security violations.

### Protected Activity

If your employer is covered under FRSA, it may not discharge you or in any other manner retaliate against you because you provided information to, caused information to be provided to, or assisted in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or your company about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste or abuse of funds intended for railroad safety or security. Your employer may not discharge or in any other manner retaliate against you because you filed, caused to be filed, participated in, or assisted in a proceeding under one of these laws or regulations. In addition, you are protected from retaliation for reporting hazardous safety or security conditions, reporting a work-related injury or illness, refusing to work under certain conditions, or refusing to authorize the use of any safety- or security-related equipment, track or structures. You may also be covered if you were perceived as having engaged in the activities described above.

In addition, you are also protected from retaliation (including being brought up on charges in a disciplinary proceeding) or threatened retaliation for

requesting medical or first-aid treatment, or for following orders or a treatment plan of a treating physician.

### Adverse Actions

Your employer may be found to have violated FRSA if your protected activity was a contributing factor in its decision to take adverse action against you. Such actions may include:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Making threats
- Reassignment affecting promotion prospects
- Reducing pay or hours
- Disciplining an employee for requesting medical or first-aid treatment
- Disciplining an employee for following orders or a treatment plan of a treating physician
- Forcing an employee to work against medical advice

### Deadline for Filing a Complaint

Complaints must be filed within 180 days after the alleged adverse action occurred.

### How to File a Complaint

A worker, or his or her representative, who believes that he or she has been retaliated against in violation of this statute may file a complaint with OSHA. The complaint should be filed with the OSHA office responsible for enforcement activities in the geographic area where the worker lives or was employed, but may be filed with any OSHA officer or employee. For more information, call your nearest OSHA Regional Office:

- *Boston* (617) 565-9860
- *New York* (212) 337-2378
- *Philadelphia* (215) 861-4900
- *Atlanta* (404) 562-2300
- *Chicago* (312) 353-2220
- *Dallas* (972) 850-4145
- *Kansas City* (816) 283-8745
- *Denver* (720) 264-6550
- *San Francisco* (415) 625-2547
- *Seattle* (206) 553-5930

Addresses, fax numbers and other contact information for these offices can be found on the Whistleblower Protection Program's website, [www.whistleblowers.gov](http://www.whistleblowers.gov), and in local directories. Complaints may be filed orally or in writing, by mail (we recommend certified mail), e-mail, fax, or hand-delivery during business hours. The date of postmark, delivery to a third party carrier, fax, e-mail, phone call, or hand-delivery is considered the date filed. If the worker or his or her representative is unable to file the complaint in English, OSHA will accept the complaint in any language.

#### **Results of the Investigation**

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue a preliminary order requiring the appropriate relief to make you whole. Ordered relief may include:

- Reinstatement with the same seniority and benefits.

- Payment of backpay with interest.
- Compensatory damages, including compensation for special damages, expert witness fees and reasonable attorney's fees.
- Punitive damages of up to \$250,000.

OSHA's findings and preliminary order become a final order of the Secretary of Labor, unless a party objects within 30 days.

#### **Hearings and Review**

After OSHA issues its findings and preliminary order, either party may request a hearing before an administrative law judge of the U.S. Department of Labor. A party may seek review of the administrative law judge's decision and order before the Department's Administrative Review Board. Under FRSA, if there is no final order issued by the Secretary of Labor within 210 days after the filing of the complaint, then you may be able to file a civil action in the appropriate U.S. district court.

#### **To Get Further Information**

For a copy of the statutes, the regulations and other whistleblower information, go to [www.whistleblowers.gov](http://www.whistleblowers.gov). For information on the Office of Administrative Law Judges procedures, decisions and research materials, go to [www.oalj.dol.gov](http://www.oalj.dol.gov) and click on the link for "Whistleblower."

**This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.**

For more complete information:



U.S. Department of Labor  
[www.osha.gov](http://www.osha.gov)  
 (800) 321-OSHA



# NOTICE TO EMPLOYEES

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

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

### PURSUANT TO THAT ORDER, THE RAILROAD 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 Railroad 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.

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BNSF Railway Company

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.**