

U.S. Department of Labor

Occupational Safety and Health Administration
J.F.K. Federal Building, Room E340
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VIA UPS # 1ZX104980190219739

January 18, 2017

Megan Kinsey, Esq.
Associate General Counsel
National Railroad Passenger Corporation (Amtrak)
Law Department 3E-108
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Re: National Railroad Passenger Corp. (Amtrak) / DeJoseph / 1-0080-11-061

Dear Ms. Kinsey:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mr. Michael DeJoseph (Complainant) against The National Railroad Passenger Corporation "Respondent" on August 3, 2011, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleged that he was terminated after raising safety and health concerns, violations of laws, regulations, and rules to Respondent.

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 1, finds there is reasonable cause to believe that Respondent violated the FRSA and issues the following findings:

Secretary's Findings

On or about June 24, 2011, Complainant contends that he suffered an adverse employment action because Respondent failed to place him into positions for which he applied, was qualified, and instead terminated his employment. On August 3, 2011, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Respondent is covered under the FRSA because 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 passengers using the general railroad system. Respondent is engaged in interstate commerce within the meaning of 49 U.S.C. § 20109. Complainant is covered under the FRSA because Complainant is an employee within the meaning of 49 U.S.C. § 20109.

As a result of the investigation, OSHA has determined that reasonable cause exists to believe that a violation of the FRSA occurred. Specifically, after evaluating all of the evidence provided by the

Respondent and the Complainant, OSHA finds reasonable cause to believe that Complainant's protected activities were a contributing factor in the adverse actions.

Background

Complainant began working for Respondent in July 1997 as Director of Planning and Development for the Amtrak Police Department. In November 2001, he accepted a position in Amtrak's OIG office as the Supervisory Special Agent-in-Charge of the NYC and Boston offices. Complainant performed a variety of investigative and analytical assignments to investigate and evaluate allegations of wrongdoing including investigating extremely sensitive and significant allegations of fraud and mismanagement by high-level management. He managed staff and offices in multiple locations in New England, and was responsible for staff compliance with OIG standards of investigative work including case management, acquisition, evaluation/analysis and preservation of evidence and reporting requirements. He planned, organized and conducted investigations from routine to the most complex including surveillance, undercover work, and apprehension and arrests of persons violating U.S. laws with regard to a wide variety of allegations.

Protected Activities

At the beginning of 2010, Complainant was working on an investigation of an Amtrak contractor, Testwell. In February 2010, the principals of Testwell were found guilty in state court of multiple counts of falsifying concrete mix and strength tests and filing false invoices on projects in the greater New York City metro area. Testwell also performed testing on certain Amtrak tunnel projects. During the course of his investigation, Complainant met with the New York County District Attorney's office and with the U. S. Attorney's Office for the Eastern District of New York about Testwell. The U.S. Attorney's office expressed an interest in pursuing the Testwell matter and Complainant continued building the case file. Complainant determined that ten Testwell concrete inspectors who worked on Amtrak's tunnel projects were not certified inspectors and that Respondent paid for invoices for services performed by those non-credentialed inspectors. Complainant was concerned that the uncertified Testwell employees' testing of the concrete in the Amtrak tunnels could have created safety issues for Amtrak employees and/or the general public.

In May 2010, Complainant first met with his new supervisor, Adrienne Rish, Deputy Inspector General for Investigations, and discussed the Testwell investigation, which included his concerns related to the uncertified Testwell inspectors who worked on Amtrak's tunnel projects. Rish was not interested in pursuing the investigation since the company was essentially bankrupt and she believed that there would be no monetary recovery. Complainant alleges that he expressed his belief to Rish that the Amtrak OIG had a legal, ethical, and moral duty to investigate these credible safety and fraud claims. According to Complainant, Rish replied, "We have no obligation to report anything. I'm interested in money, not safety and ethics." Complainant disagreed with Rish's assessment and continued to seek information related to Testwell. Complainant also alleges that he raised his safety concerns related to the uncertified Testwell inspectors and the concrete testing they conducted with Amtrak's engineering department. In July 2010, Complainant forwarded, for approval, a Petition for Issuance of Subpoena to establish information regarding the Amtrak tunnel projects. According to Complainant, this Petition was approved by OIG Counsel and/or OIG Deputy Inspector General Thomas Howard; however, Rish intervened, resulting in the subpoena not

being issued, which effectively halted Complainant from seeking any additional information related to the Amtrak tunnel projects.

Also, a few months following the Testwell incident, Complainant provided information and support during an interview on behalf of a colleague, Joseph O'Rourke, who was then the OIG Special Agent-In-Charge of the Philadelphia Office. O'Rourke filed an internal complaint with Amtrak's Dispute Resolution Office in response to a Letter of Reprimand he received on September 2, 2010,¹ which was issued by Rish. O'Rourke was allegedly reprimanded for his decision to cede to Amtrak police in executing an arrest of an Amtrak employee in August of 2010.² O'Rourke believed that the OIG Agents did not have the proper training and equipment to execute the arrest and believed that it was not safe for the OIG agents to physically apprehend and place handcuffs on the suspect.³ Complainant agreed with O'Rourke's concerns and was identified as a supporting witness by O'Rourke. A DRO investigator interviewed Complainant on October 21, 2010. During the interview, Complainant claims he expressed to the DRO investigator his belief that he would be fired for participating in O'Rourke's DRO complaint and for expressing his support for O'Rourke's safety concerns.

Adverse Actions

Complainant received a negative performance evaluation in November 2010. The performance reviews provided by Respondent show that Rish's November 2010 evaluation of Complainant was the only negative review he received during the entire ten-year period he worked for Amtrak.⁴ Complainant received notice in March 2011 that his position as the OIG Agent-In-Charge of the New York/Boston office was being eliminated as part of an overall reorganization. The notice encouraged Complainant to apply for upcoming open positions for which he was qualified. Complainant did apply for at least three Special Agent positions, but Respondent refused to place him into any of those positions. It appears that lesser experienced applicants, both in terms of law enforcement and internal Amtrak experience, were hired over Complainant. Respondent identifies eight individuals that were "rehired" by Respondent over Complainant, and three of those

¹ OSHA received the first page of a December 9, 2010 letter addressed to O'Rourke from the DRO investigator following her review of O'Rourke's DRO complaint. In this section of the letter, the DRO investigator notes that her investigation examined his allegations involving age and disability discrimination, but did not specifically refer to O'Rourke's safety complaint. However, the DRO investigator does note that portions of O'Rourke's complaint were being investigated by Ted Alves, the Inspector General, including O'Rourke's Letter of Reprimand, which resulted from his safety concerns surrounding the August 2010 arrest.

² The letter specifically states, "This memorandum serves as a formal reprimand for your handling of the arrest that occurred on Thursday 19 [sic], 2010." The letter was signed by Rish. O'Rourke was eventually terminated on June 24, 2011. O'Rourke was terminated on the same day and for the same reasons as Complainant, i.e. that his position was being eliminated as a result of the OIG's reorganization. O'Rourke and Complainant were two of five employees who received notices that their positions were being eliminated.

³ Deposition of Adrienne Rish, Washington D.C., April 2014, Civil Action No. 2:13-cv-00603-(WY) Joseph O'Rourke v. National Railroad Passenger Corporation, pgs. 60-61. A memo written by O'Rourke following the arrest is cited by O'Rourke's attorney, which stated, "For officer-safety reasons it was my decision that we take a secondary role in the mechanics of this arrest. People, including myself, have not performed this function in a long time. Our bullet-proof vests need replacing, along with updating equipment such as handcuffs and leather gear."

⁴ According to Respondent's performance management system print-out, attached to Complainant's performance appraisal for the '09-'10 period, Rish wrote the review on October 22, 2010---one day following Complainant's interview with the DRO investigator and approximately 2 ½ months following the Petition for Issuance of Subpoena in the Testwell investigation.

individuals (Kimberly Tester, Paul Santoro, and Timothy McGill) were supervised by Complainant prior to the reorganization. As a result of not being hired for any of these positions, Respondent notified Complainant that he was being terminated in June 2011, (the actual termination was delayed until November 2011 because Complainant was on temporary disability at the time due to a knee injury).

Knowledge

As detailed above, Complainant raised his safety and fraud concerns related to the Testwell investigation directly to Rish in the Spring of 2010. In addition, while Rish may have been aware of Complainant's support of O'Rourke's safety concerns prior to November 2010, she was definitely made aware of his concerns and his support of O'Rourke by November 15, 2010. As set forth in the DRO's response to Complainant's internal complaint (regarding his negative performance review), the DRO investigator noted that Rish was interviewed by the DRO on November 15, 2010, during which, Rish was asked by the DRO investigator as to whether she was aware of Complainant's participation in the investigation of O'Rourke's case.

Nexus

The adverse actions, i.e. Complainant's negative performance review and the failure to place Complainant in a similar position following the reorganization, all occurred in the months following his protected activities. Complainant first raised concerns about the uncertified Testwell inspectors and the testing they performed on the concrete in Amtrak's tunnel projects in May 2010 and it came to Rish's attention again in July 2010 when she intervened in the issuance of the subpoena. By mid-October 2010, Complainant received a negative performance evaluation. Also during this time, Complainant was expressing his support for O'Rourke's safety complaints and by March 2011, he was informed that his position was eliminated (along with O'Rourke).

Respondent's Position

Respondent claims that it did not retaliate against Complainant because he reported potential safety and security concerns, but terminated Complainant's employment because 1) his position was eliminated after an OIG NAPA realignment report and 2) Complainant failed to meet the Federal Law Enforcement Training Center ("FLETC") criminal investigator training program ("CITP") or equivalent training requirements.

During 2010, at the time of Complainant's protected activities, Amtrak's OIG was undergoing a study, conducted by an outside third party, in preparation for the OIG to obtain independent law enforcement authority from the U.S. Attorney General. As part of that process, Amtrak's IG, Ted Alves, and his deputy Rish, believed that all OIG agents should take FLETC's CITP, or an equivalent federal program (FBI training academy or the Secret Service program). The purpose of obtaining independent law enforcement authority was for the Amtrak OIG to have the ability to execute searches and seizures as well as to independently apprehend and/or arrest suspects. O'Rourke's belief, and Complainant's support of his belief, that the OIG agents did not have the proper training and equipment to execute arrests and/or physically apprehend suspects was inconsistent with those goals.

The evidence shows that Rish's two deputies; deputy assistant inspector general for Headquarters Operations Tom Bonnar, and deputy AIGI for Field Operations LaVan Griffith, were tasked with the review, and Rish ultimately was the decision maker. Evidence shows that Rish, even after being informed that she was wrong about her interpretation of required training, insisted that all the agents would need to have either the FLETC training or training from two other federal academies, the FBI or the U.S. Secret Service.⁵

Respondent claims that Complainant's termination was due to Complainant's position being eliminated and his not being placed in a Special Agent position. Respondent asserts that Complainant was not placed in a Special Agent position following the reorganization because he had not completed FLETC's CITP or an equivalent course. Respondent also argues that without attending FLETC CITP, Amtrak OIG agents could not be authorized to exercise statutory law enforcement powers and to carry firearms; however, at the time his position was eliminated and when he applied for the Special Agent position(s), Amtrak OIG "agents" relied on a "special deputation" from the U.S. Marshal Service for their law enforcement authority. At Amtrak's request, DeJoseph was granted authorization as a Deputy U.S. Marshal on August 4, 2005; DeJoseph's authorization was renewed in 2007, and 2009, based on his attendance at the Connecticut Police Academy and the FBI National Academy. He was also considered qualified to bear a firearm in the performance of his OIG duties.

Respondent argued that Attorney General Eric Holder granted Amtrak's OIG Statutory law enforcement powers on September 25, 2013, based on the fact that Respondent complied with the Attorney General Guidelines for Office of Inspector General with Statutory Law Enforcement Authority ("the AG Guidelines"). Respondent's argument that mandating attendance at FLETC's CITP or another federal training program (e.g. the FBI Academy) was necessary to comply with the AG guidelines is inconsistent with the explicit language of the guidelines, which state:

Each Office of Inspector General must certify completion of the Basic Criminal Investigator Training Program at the Federal Law Enforcement Training Center by each Inspector General, Assistant Inspector General for Investigations, and Special Agent/Investigator who will be exercising powers under these Guidelines. *As an alternative, this training requirement may be satisfied by certification of completion of a **comparable course of instruction** to the Federal Law Enforcement Training Center Basic Criminal Investigator Training Program.* (emphasis added)

The AG guidelines specifically recognize that an alternative training to FLETC's CITP is sufficient and do not specifically require participation in a basic or new agent training at another federal agency.

⁵ Deposition of John Grimes, Chief Inspector, Amtrak OIG, August 13, 2013, Washington, D.C. Civil Action No.1:12-CV-01361-(JEB) Michael Weiss v. National Railroad Passenger Corporation, pgs. 86-89. During the deposition Grimes stated that in April 2010 he met with Rish after she joined the Amtrak OIG and that he and Rish discussed what law enforcement training was considered comparable to FLETC CITP. Grimes recalled that he showed Rish the OIG standards which stated that many different law enforcement and police academies were considered comparable to CITP. Rish disagreed with him and claimed that only the FBI new agent academy or the Secret Service program were accepted as comparable training.

Moreover, Amtrak's job announcements for the Special Agent positions to which Complainant applied are inconsistent with Respondent's assertion that Complainant was not placed into those positions because he allegedly lacked training at FLETC's CITP or an equivalent course. The announcements contained the following minimum qualifications: "A Bachelor's Degree in Business Administration, Criminal Justice, or other related field or equivalent combination of education, training and work experience. One to five years relevant work experience in Operations, Business, Law Enforcement, Criminal Justice or related field." The job descriptions also stated, "Newly hired OIG Special Agents must successfully complete the basic criminal investigator training program course at Federal Law Enforcement Training Center (FLETC), or comparable federal training." Thus, Respondent's own job description explicitly limited the requirement for FLETC or comparable federal training to "newly hired" Special Agents.

At the time Respondent failed to place the Complainant, Respondent knew that Complainant possessed a Bachelor of Science in Criminal Justice Administration, an Associate in Science in Police Science and Administration, had graduated from the Connecticut Police Academy and served 29 years on the Newtown Connecticut Police Department and retired as the Chief of Police. He also graduated from the FBI National Academy, 12th session, 1982, (which Respondent had historically recognized as a "comparable course of instruction" to the FLETC CITP) and the FLETC Basic Non-Criminal Investigator Training Program (BNCITP). The experience and training possessed by Complainant, as well as his ten years of on-the-job experience with Amtrak's OIG as a Railroad Police Officer, Supervisory Special Agent, and Special Deputy U.S. Marshal, were sufficient to meet, and in fact met, the U.S. Attorney General statutory law enforcement authority for Amtrak's OIG. While Amtrak's OIG, as a whole, may have lacked law enforcement authority in 2010/2011, certain employees within the organization, including Complainant, possessed that authority which was conferred upon them by the U.S. Marshals Service. This authority included the ability to make arrests, execute search warrants, and carry firearms. Indeed, in Amtrak OIG's Semi-annual Report to Congress in 2010 (Exhibit 2 of Respondent's December 9, 2016 response), Amtrak cited as evidence of their efforts towards seeking independent law enforcement authority the six current OIG criminal investigators who possessed the authority to search, seize, arrest, and carry a firearm conferred upon them by the U.S. Marshals Service. As noted above, Complainant, who had not attended the FLETC CITP course, was conferred that authority by the U.S. Marshals Service in 2005 and again in 2007 and 2009.

Evidence shows that in Complainant's case, Respondent viewed the NAPA report and resulting reorganization as an opportunity to terminate Complainant. Respondent's argument that Complainant was not qualified for the position of Special Agent was a pretext to retaliate against Complainant for raising concerns related to the uncertified Testwell inspectors and the concrete inspections they conducted on Amtrak's tunnels and for expressing support and cooperation with O'Rourke's safety complaint.

Respondent admits that there was a personality conflict between Rish and Complainant, which they claimed was not sufficient to form the basis of a FRSA retaliation complaint. OSHA believes that Complainant's protected activities were a part of the reason that he and Rish had a personality conflict, and that his protected activities were in fact a contributing factor in Respondent's decision to terminate Complainant instead of placing him into another position.

The facts are sufficient to raise the inference that the protected activities were a contributing factor to the adverse actions, specifically, that Respondent retaliated against Complainant when he raised

concerns related to the uncertified Testwell inspectors and the concrete inspections they conducted on Amtrak's tunnels and when he supported a colleague's safety concerns. After Complainant engaged in activities that are protected by the FRSA, Respondent eliminated Complainant's job and failed to place him into similar positions to which he applied, and filled those positions with lesser experienced employees, some of whom were Complainant's subordinates.

Respondent has not clearly and convincingly established that it would have taken the same adverse action in the absence of the Complainant's protected activities. In light of the above, OSHA issues the following preliminary order:

PRELIMINARY ORDER

1. Upon receipt of this Secretary's Findings and Preliminary Order, Respondent shall immediately reinstate Complainant to his former position or a similar position. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had he never been discharged. Such reinstatement is not stayed by an objection to this order.
2. Respondent shall pay Complainant back pay in the amount of \$723,332.92, which represents back pay minus interim earnings for the period beginning November 18, 2011 until January 11, 2017. Please note that back pay will continue to accrue at the rate of \$2,692.31 per week until Respondent makes Complainant a bona fide offer of reinstatement.
3. Respondent shall pay Complainant interest in the amount of \$34,218.16, which represents interest on the back pay at the IRS underpayment rate (26 U.S.C. § 6621), compounded daily, as of January 11, 2017. Please note that interest will continue to accrue at the above rate until the back pay is paid to Complainant. Complainant's enrollment in any retirement plan or pension shall be deemed to have been continuous for purposes of vesting requirements.
4. Respondent shall pay Complainant compensatory damages in the amount of \$35,000.00, for the following:
 - Job-hunting expenses in the amount of \$5,000.00
 - Pain and suffering, including mental distress, depression, humiliation and embarrassment: \$30,000.00
5. Respondent shall pay Complainant punitive damages in the amount of \$100,000.00.
6. Respondent shall pay Complainant's reasonable attorney's fees.
7. Respondent shall expunge from all of its files, including but not limited to Complainant's employment records, any reference to the discharge and any reference to Complainant exercising his rights under the FRSA.
8. In responding to any inquiry regarding Complainant's employment with Respondent, Respondent, as well as Respondent's agents, representatives, employees and/or all

those in active concert with Respondent, shall not make any adverse statements with respect to Complainant's termination and/or any of the facts at issue in this case.

9. Respondent, as well as Respondent's agents, representatives, employees, and all of those in active concert with Respondent, shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the FRSA.
10. Respondent 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 180 consecutive days from the date of posting, the attached notice to employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

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
Phone: (202) 693-7300
Fax: (202) 693-7365

With copies to:

All parties to this case

Regional Administrator
J.F.K. Federal Building, Room E340
Boston, MA 02203

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 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 the Act. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

The rules and procedures for the handling of FRSA cases can be found in Title 29 of the Code of Federal Regulations, Part 1982 (FRSA/NTSSA) and may be obtained at www.whistleblowers.gov.

Sincerely,

A handwritten signature in blue ink that reads "Kristen Rubino". The signature is written in a cursive style and is positioned above the typed name.

Kristen Rubino
Regional Supervisory Investigator

cc: Charles Goetsch Esq. Via UPS #1ZX104980192677955
Chief Administrative Law Judge Via UPS #1ZX104980193355961
U.S. DOT-FRA (Via e-mail)