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
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NOV 2 7 2012

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

RE: Norfolk Southern Railway Company/Mull/4-4910-10-010

Dear Mr. Smith:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Timothy "Chuck" Mull (Complainant) against Norfolk Southern Railway Company (Respondent) on March 9, 2010, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleged that Respondent terminated him on November 5, 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 conductor and assigned to Respondent's Georgia Division facility located in Savannah, Georgia. Complainant is an employee within the meaning of 49 U.S.C. §20109.

Complainant was terminated on November 5, 2009. On March 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.

Respondent hired Complainant in October 2006. In March 2007, Complainant became a conductor with Respondent.

In his complaint, Complainant alleged that on September 19, 2009, at approximately 7:00pm, he was working in Respondent's Dillard Yard in Savannah, Georgia. While "lining a switch" (moving a switch so that a train goes from one set of tracks to another set of tracks) that required some additional force to manipulate, Complainant felt a sting or pain in the lower left side of his back. Complainant stated he did not believe the discomfort to be significant at the time and, as a result, kept working throughout his shift and performing his normal duty tasks. Complainant stated that his back did not present him with a lot of pain and, as he was scheduled to have two days off work following that work shift, he expected the little bit of pain he had to resolve itself during that time.

On the afternoon of his second day off, September 21, 2009, Complainant arose from a chair at home and experienced a severe pain in his back. He therefore decided to seek medical treatment at a local emergency room. Complainant then called his supervisor, Terminal Superintendent Daniel J. Bostek, whose initial statement to Complainant was, *"Chuck, don't tell me you're fixing to report an injury."* Complainant confirmed he was indeed reporting an injury and described the difficult switch he worked on during his last work shift on September 19, 2009. Complainant told Bostek of the pain he just experienced while arising from his chair. According to Complainant, Bostek asked him why he had not reported the injury during his work shift, and he told Bostek that he did not think it was a serious issue at the time and, thus, did not believe he needed to report it at the time primarily because Bostek had taught the employees that they only needed to report injuries if they needed to seek medical treatment. Bostek then told Complainant that he should have reported the injury the night it happened.

Bostek met Complainant at the local emergency room on September 21, 2009, and directed Complainant complete the company's Form 22, Personal Injury Report. Complainant stated that Bostek told him, *"Chuck, I hope this all works out for you the best as I've seen this kind of injury be a career ending injury."*

In a written statement to OSHA, Complainant stated that at the emergency room, Bostek asked Complainant if he reported his injury to the yardmaster and Complainant said, *"No."* Complainant stated that Bostek also asked him if he reported the switch problem, and he answered *"No I don't think I did"*. Complainant had also not informed any coworkers of a possible injury. Bostek gave Complainant a ride home from the emergency room.

Before leaving the emergency room, Complainant was prescribed muscle relaxants and medication for inflammation. Complainant also received a few days off from work so that he could make an appointment to see his personal physician. After seeing his personal physician, Complainant was taken out of work, given more medication, and scheduled for physical therapy.

Complainant told OSHA that, a few days after visiting the emergency room, Bostek removed Complainant from service telling him that *"people higher than Bostek were pushing things due to a high incidence of injuries."*

By letter dated September 29, 2009, Bostek charged Complainant with: (1) falsification of an alleged personal injury; (2) making false and/or conflicting statements relative to

the alleged personal injury; and (3) failing to promptly and properly report an alleged injury. An investigative hearing was scheduled for October 9, 2009, was later postponed until October 22, 2009, and was ultimately held on October 23, 2009.

By letter dated November 5, 2009, Respondent informed Complainant that he was found guilty of all charges and was discharged effective that date.

Complainant filed his FRSA complaint with OSHA on March 9, 2010, and Respondent filed its initial statement of position on April 5, 2010.

Respondent denies that it retaliated against Complainant for reporting an injury. Respondent's position is that Complainant falsified his injury and this falsification is not a protected activity under FRSA.

Respondent's position is not supported by the evidence.

Respondent's initial position statement contained a transcript of the investigative hearing, which was conducted by Nevill Wilson, the Assistant Division Superintendent of the Georgia Division. Bostek testified against Complainant for Respondent. Complainant testified at the hearing and was represented by three union personnel. Complainant's two coworkers with whom he last worked on September 19, 2009, testified on his behalf at the hearing.

Bostek's Testimony

Bostek testified as follows: At about 7:00pm on September 21, 2009, he received a phone call from Complainant, who initially told Bostek that, as he was getting out of a recliner, he twisted and subsequently felt a horrible pain in his back. Complainant related the pain to having thrown a switch during his last work shift, two days earlier. Complainant was not sure exactly which switch he had the problem with, but it was between the switches 19 – 23. Complainant said that he did not report the switch to the yardmaster, and that he did not report either the switch or the possible injury to his two crewmembers. When asked why he did not report the switch problem or the injury, Complainant told Bostek he just wanted to get the work done and get out of there. Bostek further testified that he and another manager each checked the switches in question but found no problems, and no maintenance had been done on that range of switches. Bostek concluded that Complainant was in violation of Respondent's General Rule "N", which essentially requires employees to report and document workplace injuries before leaving work.

On cross-examination, a union representative asked Bostek whether he testified that Complainant's injury "manifested" itself on September 21, 2009, but Bostek said that Complainant's injury had "manifested" on September 19, 2009, when Complainant felt the twinge in his back. Bostek testified that the pain Complainant had described to Bostek on September 21, 2009, was not the pain Complainant described had happened on September 19, 2009. The union representative then introduced Respondent's System Teamwork and Responsibility Training (START) Policy, which states that an injury "manifests" itself when it becomes evident to the employee. Bostek maintained in his

testimony that Complainant's back pain was associated with his *twisting* as he got out of his recliner at home on September 21, 2009.

Thus, with Bostek's cross-examination at the hearing, the topic of Respondent's "Manifestation Policy" was introduced. Respondent later provided OSHA a document entitled *"START Policy – Supervisor's Quick Reference Guide"*, which discussed Respondents' disciplinary program. That document also cited what Respondent's employees described to OSHA as Respondent's "Manifestation Policy". The guide states: "Employees will not be disciplined for failing to report an injury immediately, if, as soon as the injury manifests itself, the injury is reported. If the employee fails to report the injury as soon as it manifests itself, the situation will be handled as a serious offense." (START, General Program Outline, Item 7).

Also at the hearing, Complainant asked Bostek about the pre-work meetings during which, according to Complainant, Bostek had repeatedly told them that the time for them to report an injury was when they needed "to seek a doctor's care". Bostek denied making such a statement.

Other Testimony

In the investigative hearing, Complainant testified as follows, during this examination of Complainant by his Union Representative, Mr. Wallace:

> Wallace: So the atmosphere is that you try to work through bumps and bruises and –
> Complainant: Slight discomforts, yes sir.
> Wallace: And is that what you - - is that what you determined that this was on the 19th and was it obvious in your mind that you had any kind of pain in the back?
> Complainant: Yeah I knew that I had the pain but like I said it wasn't nothing that I couldn't work through at the time.
> Wallace: So when you say that you worked through, you didn't consider yourself injured at the time?
> Complainant: No sir, I did not.
> Wallace: And on the subsequent days when you were taking rest, did you think that it would get better?
> Complainant: Yes sir. That's one reason why I didn't do anything because I wanted to be able to go to work whenever my 48 hours was up.
> Wallace: And so you were resting your back?
> Complainant: Yes sir.
> Wallace: And on the 21st is when the pain became –
> Complainant: Unbearable. Yes sir.
> Wallace: And is that when you considered that you had been injured?
> Complainant: Yes sir.

The testimony of Complainant's co-workers corroborated his. Engineer William Hester, also one of Bostek's subordinates, testified that the topic of "Manifestation Policy" had been discussed by management in their pre-work Safety Quality meetings. Hester

testified that his understanding of the policy was that a worker did not have to report an injury until the worker was sure he was hurt and that the worker was the one who made that decision. Hester testified that this "Manifestation Policy" was a change from previous injury reporting policy.

Similarly, Trainman Scott Stapleton, also one of Bostek's subordinates, testified that the topic of "Manifestation Policy" was a "hot topic" in their terminal and that they had been briefed by management on the topic in their pre-work meetings. Stapleton testified that the new policy was a change from what he thought they were previously supposed to do regarding injury reporting.

OSHA's Investigation

Complainant and other employees explained during the OSHA investigation that Respondent's "General Rule N" had been slightly modified by the "Manifestation Policy" and that Bostek and another Respondent manager had specifically trained employees in pre-work "Quality/Safety Briefings" on the policy. Complainant and the other employees stated that Bostek had clearly told them that an employee did not need to report an injury until the employee realized that he/she needed medical attention. Hence, OSHA concludes that, although employees were not prohibited from reporting possible injuries earlier, they were allowed to delay the reporting of injuries until the point where they realized they needed medical attention.

Thus, with that training and understanding, Complainant maintained a belief that he acted in accordance with company policies.

OSHA's interview of Hearing Officer Nevill Wilson disclosed that Wilson was the Assistant Division Superintendent for the Georgia Division. While not directly in Bostek's chain of command, both he and Bostek reported directly to Division Superintendent Brig Burgess, who approved subjecting Complainant to the investigative hearing for his September 21, 2009, injury report. Wilson was apparently well briefed by Bostek before the hearing about Complainant's injury report and Bostek's investigation of that injury. Wilson expressed a belief that Complainant was being untruthful about his report of a workplace injury and was, therefore, guilty as charged because: Complainant had not mentioned his back issue to any supervisor or coworker before getting off work on September 19, 2009; no switch problems were reported by Complainant or later found in two checks by Bostek and another supervisor; and Complainant stated that he experienced pain upon getting out of his recliner at home on September 21, 2009.

During his OSHA interview, Bostek professed a belief that Complainant was not injured while on duty with Respondent on September 19, 2009. Bostek also denied ever discussing the company's "Manifestation Policy" with his subordinates. Based on information provided to OSHA and at the investigative hearing by several of Bostek's subordinates, it appears that Bostek was intentionally untruthful in Complainant's investigative hearing and to OSHA about the instructions Bostek gave Complainant and his coworkers about injury reporting.

Despite Bostek's denials, it appears to OSHA that Bostek and other company managers did train their personnel that they could delay the reporting of a possible injury up to the point where the employee personally decided that he/she needed medical attention, hence the "manifestation".

Several employees told OSHA that they were trained on the "Manifestation Policy" and were told that it was a way to reduce the unnecessary reporting of minor injuries. Apparently, the company hoped that employees might be able to "work through" some injuries and, thus, not have to report them, thereby reducing the company's overall injury rate. This policy appears to have generated much discussion at the workplace. It further appears that, in this specific instance, Complainant was doing what he was trained to do. The "Manifestation Policy", superficially, gives employees some discretion for reporting. In reality, however, it appears to have become yet another tool to suppress injury reporting.

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 September 21, 2009, he reported a work-related injury he suffered on September 19, 2009. The evidence also shows that Respondent was aware of Complainant's injury, as Respondent manager Bostek met Complainant at the hospital on September 21, 2009 and directed him to complete the Form 22, Injury Report. The evidence also shows that Complainant suffered adverse action when, on September 29, 2009, he was suspended pending a formal investigation and again when, on November 5, 2009, he was terminated from employment.

The evidence establishes a nexus between Complainant's 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. Furthermore, Respondent did not follow its own "Manifestation Policy" and instead used this policy to trick and target Complainant for following this policy.

The preponderance of the evidence indicates that Complainant, who had no prior disciplinary actions, was subjected to emotional anguish and distress during the suspension period and after dismissal. Complainant was subjected to an investigative hearing that was neither fair nor impartial. Respondent directly targeted Complainant because of his injury report and humiliated him for filing the report. Complainant was simply following Respondent's specific instructions regarding reporting an injury after it "manifests" itself. He should not have been charged for following Respondent's own

injury reporting policy. It thus appears that this "Manifestation Policy" was used as a ploy by Respondent to reduce injury reporting while targeting employees for reporting injuries.

During union negotiations after Complainant's discharge on November 5, 2009, Respondent agreed to allow Complainant to return to work in exchange for Complainant signing a "Leniency Waiver" in which Complainant acknowledged responsibility for the offenses for which he was charged on September 29, 2009. Complainant, under pressure and eager to return to "normalcy", signed that waiver on March 30, 2010. Complainant and Respondent subsequently became embroiled in a disagreement regarding the medical documentation Complainant was to submit so that the company's medical department could clear Complainant to return to work without restrictions. That disagreement was resolved approximately around August 18, 2010, and Respondent returned Complainant to work on September 20, 2010. Complainant continues to be employed with Respondent; however, Complainant's personnel records still reflect this leniency waiver, which is illegal and contrary to FRSA. Therefore, full restitution was not attained.

Respondent's immediate retaliation against this employee for reporting an on-the-job injury on September 21, 2009, exhibited reckless disregard for the law and total indifference to Complainant's statutorily-protected rights. Respondent's retaliatory conduct towards employees who 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[1]. Respondent's continued callous disregard for Complainant's and other employees' protected rights under FRSA warrants significant punitive damages.

Furthermore, Respondent's apparent coercion into Complainant's admission of guilt in order to return to work demonstrates the mental and emotional hardship Complainant endured and continues to endure in this matter. That the leniency waiver is still part of Complainant's personnel file when, in fact, he did nothing wrong further demonstrates the continuing animus displayed by Respondent against an employee who was simply reporting a work-related injury, following the company's own "Manifestation Policy". Additionally, while he was not employed by Respondent, Complainant suffered a great deal of distress because he had to work away from home in order to support his family, and had to work under extremely difficult conditions.

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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[1] Norfolk Southern Railway Corp, Case Numbers: 4-1760-10-010;; 5-2700-11-011; 5-2070-10-010; 5-6850-10-012; 4-3750-10-028; 4-1221-10-007; 3-3500-11-001; 4-3750-10-006; 4-0520-08-008; 3-6600-10-033.

Order

1. Respondent shall pay Complainant back pay from the date he signed the leniency waiver, March 30, 2010, until his actual reinstatement date of September 20, 2010, minus interim earnings, totaling $4,721.32[2].

2. Respondents shall pay Complainant interest in accordance with IRS Code 26 U.S.C. §6621, which sets the interest rate for underpayment of federal taxes.

3. Respondent shall pay Complainant costs associated in purchasing back lost retirement benefits for the period of April 2010 until August 2010, totaling $5,829.25[3] and shall ensure that Complainant continue to accrue benefits in the same way he would have accrued them had he not been terminated.

4. Respondent shall pay Complainant compensatory damages, totaling $125,000.00 for mental anguish, pain and suffering.

5. Respondent shall pay Complainant punitive damages in the amount of $150,000.00 for reckless disregard for the law and indifference to Complainant's rights under FRSA.

6. Respondent shall pay Complainant reasonable attorney fees in the amount of $3,150.00.

7. Respondent shall expunge from Complainant's personnel records any adverse references relating to the discharge or the facts at issue in this case, including but not limited to the "Leniency Waiver" Complainant signed on March 30, 2010.

8. 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.

9. 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.

10. Respondent shall post immediately the attached "Notice to Employees" and "Fact Sheet" in a conspicuous place in or about Respondent's Georgia 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

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[2] Expected wages at NSR between 3/30/10 and 9/20/10 (23 weeks): $22,881.32, less actual interim earnings in the same period: $18,160.00 = lost wages after mitigation of damages: $4,721.32

[3] Figure includes Tier I, II, and II-Medicare for employee and employer at: employee portion of retirement contribution: $1,900.15; and employer portion of retirement contribution: $3.929.10 = total dollars needed to purchase five months of lost service months = $5,829.25

responsible official of the Respondent and the date of actual posting to be shown thereon.

11. Respondent shall train its managers and employees assigned to the Georgia Division facility about employee's rights to file injury reports without fear of retaliation. Respondent shall complete the training within 60 days of the date of this Order. Within 30 days of the date of the training's completion, Respondent will provide OSHA with proof of such training by mailing the materials and list of attendees 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:

John Moss (Attorney for Complainant)
Attorney-at-Law
Matthews Steel & Moss, LLP
15 Piedmont Center, Suite 1560
3575 Piedmont Road, NE
Atlanta, GA 30305

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 the complaint.

Sincerely,

CINDY A. COE
Regional Administrator

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