

U.S. Department of Labor

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



FEB 18 2014

Kathleen Hughes, Esq.  
General Attorney  
Union Pacific Railroad Company  
Law Department – MS 1580  
1400 Douglas Street  
Omaha, NE 68179

RE: Union Pacific Railroad Company/McKinley/5-2962-12-002

Dear Ms. Hughes:

This is to advise you that we have completed our investigation of the above referenced complaint filed by Scott McKinley (Complainant) against Union Pacific Railroad Company (Respondent) on October 18, 2011, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleges that Respondent issued him a level 3 discipline on September 23, 2011, and required him to attend a one-day remedial training without pay, and develop a Corrective Action Plan in reprisal for reporting a work-related injury.

Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region V, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following Findings:

#### **Secretary's Findings**

Respondent is a rail carrier that operates within the United States. Respondent provides railroad transportation, in that it transports goods using the general railroad system. Accordingly, Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109.

Complainant works for Respondent as an Engineer and is an employee within the meaning of 49 U.S.C §20102.

Complainant suffered an adverse action on September 23, 2011 when he was issued a level 3 discipline, which required him to attend a 1-day remedial simulator training without pay and develop a Corrective Action Plan. On October 18, 2011, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is timely.

On September 30, 2002, Respondent hired Complainant to work as a Brakeman. Complainant has held a variety of jobs including Conductor until August 27, 2004, when he was promoted to Engineer.

On June 23, 2011, at approximately 5:00 P.M., Complainant had just finished assembling a train in the Dupo, Illinois Yard and was waiting for the conductor to finish checking the brake lines and couplings when a mechanical problem developed in the lead engine. Complainant heard a loud banging sound followed by a puff of white smoke from the rear of the locomotive he was operating. After Complainant heard the loud bang, he grabbed a fire extinguisher and went to the rear of the engine to investigate. Complainant thought a radiator blew and since no fire was visible he opened the engine compartment door and was exposed to battery acid fumes. Complainant experienced eye, nostril, and lung discomfort. Complainant went back to the engine operator compartment and waited on the Conductor. When the Conductor came in he stated that he noticed an odor of chemicals. The Complainant contacted the Yardmaster and was instructed to evacuate the engine with the Conductor. Complainant and the Conductor were taken to the Dupo Yard Tower. The Manager of Terminal Operations (MTO) helped Complainant rinse his eyes and asked him if he was able to return to duty. Complainant requested medical attention and was taken to the hospital.

On July 1, 2011, Respondent notified Complainant by certified letter that he needed to attend an investigative hearing on July 11, 2011, to develop the facts and place individual responsibility if any, in connection with the following charge: *“Allegedly failed to follow instructions concerning getting off of a locomotive and taking evasive action to avoid fire and smoke, and promptly relocating to an area that will not subject you to any danger in the event of a locomotive fire. In addition, you allegedly failed to follow instructions concerning not attempting to fight, suppress, or extinguish a fire.”*

The Investigative Hearing was postponed to September 15, 2011. During the Investigative Hearing, Respondent testified that Complainant had violated a local Superintendent Bulletin Rule No. 19 regarding locomotive fires and not attempting to fight, suppress, or extinguish the fire. However, witnesses testified that Respondent has adopted the General Code of Operating Rules (GCOR) as their operating rules. As an operating employee, Complainant must follow the rules spelled out in the GCOR manual. Unless the rules are rescinded, they are in effect. At the time of Complainant's injury, he was following GCOR rule “Fire<sup>1</sup>” when he went back to the locomotive to investigate. During the formal investigation, the Respondent's own witness testified that the Superintendent's bulletin did not trump GCOR.

Respondent notified Complainant on September 23, 2011, informing him that he was found to be in violation of GCOR 1.13 Reporting and Complying with instruction, and Superintendent's

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<sup>1</sup> GCOR 1.28 Employees must take every precaution to prevent loss and damage by fire. Employees must report promptly to the Train Dispatcher any fires seen on or near the right of way, unless the fires are being controlled. If there is danger of the fire spreading to a bridge or other structure, crew members must stop their train and help extinguish the fire.

Bulletin No. 19 and was being assessed a level 3 discipline, which required him to attend a 1-day remedial simulator training without pay, and develop a Corrective Action Plan.

Respondent presented no evidence that Complainant violated any Safety Rules. Complainant has made a prima facie showing that his protected activity was a contributing factor in the adverse actions and Respondent has failed to demonstrate by clear and convincing evidence that they would have taken the same adverse actions in the absence of the Complainant's protected activity.

OSHA finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following Order:

### **ORDER**

1. Preliminary Reinstatement is not a factor, as Complainant is still employed by Respondent. Upon receipt of the Findings and Order, Respondent shall pay Complainant back wages of \$1289.68, less applicable employment taxes.
2. Respondent shall pay Complainant interest on the back pay in accordance with 26 USC §6621, which sets forth the interest rate for underpayment of federal taxes.
3. Respondent shall pay Complainant's reasonable attorney fees accrued solely in association with this complaint.
4. Respondent shall pay Complainant compensatory damages of \$5,000.00 for mental anguish and emotional distress due to the humiliation and the loss of income from attending remedial training.
5. Respondent shall pay Complainant \$5,000.00 in punitive damages in order to discourage Respondent from engaging in this type of conduct in the future.
6. Respondent shall expunge Complainant's personnel records and any other related Respondent records of any adverse references relating to Complainant's discipline or the exercise of his rights under 49 USC §20109 and shall ensure that the facts and circumstances related to this complaint are not used against Complainant in any future promotional opportunities with the Respondent and that no negative references relating to the facts and circumstances related to this complaint are provided to any prospective future employment references.
7. Respondent shall provide to all employees at the Dupo Yard a copy of the FRSA Fact Sheet included with this Order.
8. Respondent shall post for 60 consecutive days the Notice to Employees included with this Order in all areas where employee notices are customarily posted at the Dupo Yard.
9. Respondent shall remove from Complainant's employment records any reference to the exercise of his rights under FRSA.

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  
U.S. Department of Labor  
Suite 400N, Techworld Building  
800 K Street NW  
Washington D.C. 20001-8002  
(202)693-7542, Facsimile (202) 693-7365

with copies to:

Steven L. Groves  
Holland Groves Schneller Stolze  
300 North Tucker Blvd, Suite 800  
St. Louis, MO 63101


Nick A. Walters  
Regional Administrator  
Occupational Safety and Health Administration  
230 South Dearborn Street, Room 3244  
Chicago, IL 60604

Mary Ann Howe, CFE  
Assistant Regional Administrator  
Whistleblower Protection Program  
U.S. Department of Labor, OSHA  
365 Smoke Tree Plaza  
North Aurora, IL 60542

In addition, please be advised that the U.S. Department of Labor does not represent any Complainant or Respondent 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 the 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).

Sincerely,



for

Nick A. Walters  
Regional Administrator

Enclosures: FRSA Fact Sheet  
Notice to Employees

cc: Steven L. Groves, Holland Groves Schneller Stolze  
Chief Administrative Law Judge  
Federal Railroad Administration