March 18, 2014

TO: Teri M. Wigger
Assistant Regional Administrator
Whistleblower Protection Programs
US DOL OSHA
201 Varick Street, Rm 670
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Jeremiah J. Giuliano,

Complainant,

v.

CSX Transportation, Timothy Woodall, and Eric Datri,

Respondents.

FEDERAL RAIL SAFETY ACT
SECTION 20109 COMPLAINT

"Sometimes things that are appearing to be as they are, are not."
CSX Manager Eric Datri

"This has been a sham ... you know Stevie Wonder could even see through what's going on here."
Union Representative Glen Heinz

My name is Jeremiah J. Giuliano and I live at 34 Winslow Drive in Schenectady, New York, 12309. My cell number is 518-221-6645. I am employed as an electrician by the CSX Transportation Railroad at its Shop facilities in Selkirk, New York.

As a CSX electrician, I have safety sensitive job. My work in the Railroad's Selkirk Facility on and among railroad locomotives directly and indirectly affects the safety of me, my co-workers, and members of the public exposed to the Railroad's operations.

Under Section 20109 of the Federal Rail Safety Act (FRSA), it is a protected activity for railroad employees to report a hazardous safety condition, 49 USC 20109(b)(1)(A), or to refuse to assist in the violation any federal safety rule or

regulation, 49 U.S.C. 20109(a)(2). The FRSA prohibits railroads from taking any adverse action in response to such protected activities.

On September 6, 2013, I engaged in the FRSA protected activity of reporting safety hazards and refusing to assist in the violation of federal safety rules and regulations when I delivered a letter addressed to the manager of CSX's Diesel Shop at Selkirk, Plant Superintendent Daniel Lisowski, attached as Exhibit 1. In that letter, I listed numerous safety hazards and violations illustrating CSX "management's daily ritual of placing production over all else, such as shop cleanliness, locomotive quality, safety of its employees, and safety of the communities its trains pass through." *Id*.

Those hazards included: managers signing off on FRA mandated Quarterly Inspection items rather than having them repaired or the necessary work performed; out-shopping locomotives with known FRA defects rather than having them repaired; managers "performing" Periodic Inspections of Cab Signal equipment while the locomotive's brake was removed; mangers working on locomotives without FRA mandated Blue Signal Protection and failing to investigate after it was reported; and refusing to provide employees with the necessary Personal Protective Equipment while working in discharged toilet fluids and hazardous oil and grease. *Id*.

September 6th was a Friday. I spoke to Superintendent Lisowski and Assistant Plant Superintendent Timothy Woodall about the letter, and then after my rest days and theirs, on the morning of Wednesday September 11th I became the retaliatory focus of attention by management. Woodall and Manager of Service Center Eric Datri positioned themselves on the Shop floor to observe me (which is unusual, Exhibit 2 Trs. at p. 52), and claimed I had crossed over a locomotive without using a cross walk board. Normally this would be a minor offense with no disciplinary action taken, just counseling, especially since I had a clean record. No other employee has been subjected to disciplinary charges at that Shop for doing what those managers claimed I did.

An "O Test failure" is a minor offense, and refers to an "Operational Test" in which managers observe an employee in order to counsel them for any minor infractions. On September 11th Manager Datri told me that how I allegedly walked onto the locomotive was an "O Test failure." Exhibit 2 Trs. at 53; 31-32. This was confirmed by eyewitness Bryan Riley. Exhibit 2 at 37. Superintendent Lisowski also told me it was an O Test failure. *Id*. at 54. In the past 11 years I have served as the IBEW Local Chairman at the Shop, no other employee has been subjected to a disciplinary charge for an O Test failure. *Id*. at 55. Manager Datri admitted that no other employee has been cited for a disciplinary investigation for an O Test failure. *Id*. 30-31

The morning of September 11th there were two other CSX employees working on the same locomotive, Kerry Foster and Jess Bushie. They confirmed due to the positioning of the locomotive, it was not possible to put cross walk boards on the rear of the engine, and they accessed the locomotive without using any board. *Id*. at 41-43, and 45-47; 50-52. Yet management did not question either one of them, much less

charge them with a disciplinary offense. *Id.* at 72-75. To top it off, despite their professed concern for safety, Woodall and Datri did nothing to place a cross walk board on the train or warn the other employees working on that locomotive. *Id*. at 86-89, 91. And Manager Datri has ordered employees to access locomotives knowing that there were no cross walk boards available on that locomotive. Exhibit 6.

Assistant Superintendent Woodall confirmed that under CSX's Mechanical Department's Individual Development and Accountability Policy, minor offenses are to be handled through the Local Chairman with a focus on corrective action rather than on punishment. Exhibit 3 at p.1; Exhibit 2 at 60-62. Woodall admitted the September 11th incident was not repetitive behavior by me. *Id*. at 63. He was forced to admit I had a clean disciplinary record. *Id*. at 65-66. And he admitted management did not conduct any meeting with me and my union representative to discuss corrective action. *Id*. at 63-64. Manager Datri admitted CSX's Policy regarding minor offenses was not followed regarding me. *Id*. at 77. And Datri also admitted CSX violated its own Policy mandating that IRCs "will not be referred to in any future discipline handling." *Id*. at 79.

When pressed to explain discrepancies in the photographs he took of the locomotive, Manager Datri could not, and evaded an answer by stating: "Sometimes things that are appearing to be as they are, are not." *Id*. at 76.

Nevertheless, CSX served me with a disciplinary charge letter ordering me to attend a disciplinary hearing. Exhibit 4. Assistant Superintendent Woodall confirmed that before deciding to charge me for a serious disciplinary violation, the Selkirk Shop managers consulted with CSX's Human Resources Department, Labor Relations Department, and "higher senior" managers. Exhibit 2 at 63. This confirms the decision to retaliate against me in violation of the FRSA and CSX's own policies was deliberate and decided at the highest level of the Railroad.

My September 5th letter was posted in the Shop's Bulletin Board reserved for IBEW worker matters. However, prior to the Hearing, on Monday October 7th at 6:35 p.m. Shop employees saw Selkirk Manager of Facilities Brian McCann forcibly open that Bulletin Board and remove the letter. When confronted with this at the November 20th disciplinary Hearing, McCann did not deny it but refused to recuse himself as the "Hearing Officer" (i.e. judge and prosecutor). Exhibit 2 at 7-9.

Such railroad Hearings utilize a "presumption of guilt" standard. They are precipitated by a statement of guilt in a charge letter, and the Hearing then is manipulated by management so as to justify that foreordained guilt.

For example, my "Hearing" was conducted by the Railroad without giving me the benefit of any discovery; there were no rules of evidence or procedure observed; I was not allowed representation by an attorney; the Railroad Manager served both as prosecutor and judge, presenting the evidence against me while also deciding whether to bar the testimony of witnesses and the introduction of exhibits; and the decision to find me guilty was not made by an impartial fact finder but by a Railroad manager based

on the record of that unfair and biased "Hearing." Not surprisingly, our federal courts do not recognize such kangaroo railroad hearings as fair and impartial or worthy of any weight: *see, e.g.*, the Seventh Circuit's decision in *Grimes v. BNSF Railway Company*, __ F.3d __ , 2014 WL 593600 at pgs.*4-*5 (7th Cir. 2014).

During the Hearing Manager McCann repeatedly exercised his power as Hearing Officer to bar the introduction of evidence showing why the Hearing was in violation of my statutory rights under Section 20109 of the Federal Rail Safety Act. For example, McCann blocked Assistant Superintendent Woodall from answering where in CSX Policy it says an employee is automatically charged for a minor offense (there is no such Policy), Exhibit 2 at 69-70, and refused to allow my co-worker Jody Linart to testify. *Id*. at 39-40. McCann also "corrected" the transcript after the fact without any input or approval by me or my union representative. *Id*. at 97.

Based on this unfair and biased "Hearing," on December 18, 2013, CSX declared me "guilty of all charges as stated" and imposed discipline consisting of a five day suspension without pay along with another five day suspension held over my head. Exhibit 5. CSX did this deliberately, despite being warned that its actions were in violation of my statutory rights under Section 20109 of the Federal Rail Safety Act. At the Hearing my Union Representative Glen Heinz entered into evidence the text of Section 20109 along with OSHA's Whistleblower Fact Sheet, pointing out the disciplinary charge "is in retaliation [for] Mr. Giuliano's letter of September 5th." Exhibit 2 at 10-12.

At the end of the Hearing, Union Representative Heinz stressed:

> What is really appalling to me is that when an employee speaks up . . . regarding serious safety issues, and also serious violations of federal laws . . . Within 2 1/2 hours of returning to work after the letter was posted some 3 days earlier he winds up being charged for a minor violation, which . . . clearly violates the Federal Rail Safety Act, and also it violates the Carrier's own policy . . . Mr. Giuliano attempted to call to not only the attention of local management, but to the working people here who probably recognized and know all this goes on, but stood up for his rights under the Federal Rail Safety Act . . And to be put through something like this over what the Carrier calls a minor offense. . . .because he speaks the truth and unfortunately it appears that from the movie I guess with Jack Nicholson and that other guy some people just can't handle the truth. This has been a sham completely and like I said, not to be disrespectful, but you know Stevie Wonder could even see through what's going on here.

Exhibit 2 at 94-95. Despite being confronted with the text of Section 20109 and being warned it was violating the FRSA, CSX consciously chose to move forward with the Hearing and to then impose discipline on me.

In *Griebel v. Union Pacific Railroad*, Case No. 2011-FRS-11 at pgs. 24-25 (January 31, 2013), Administrative Law Judge Sellers gives a good summary of the types of circumstantial evidence justifying an inference that a railroad's "proffered reason was not the true reason, but instead a pretext." Such circumstantial evidence includes:

1) temporal proximity between the protected activity and adverse action: that is, the timing of the unfavorable personnel action in relation to the protected activity;

2) disparate treatment of the whistleblowing employee: that is, treating the complainant differently from other similarly situated employees (such as only scrutinizing and disciplining the complainant);

3) deviation from the usual application of policies: that is, violating its own policies and practices; and

4) shifting explanations: such as changing the incident from an O Test failure to not an O Test failure.

All of this circumstantial evidence is present here. Manager Datri admitted he told me on September 11th it was an O Test failure, but then at the Hearing on November 20th Hearing Officer McCann had Datri change it to not an O Test failure. Exhibit 2 at 30-32. Moreover, the action of Manager of Facilities McCann forcibly removing my September 5th letter from the IBEW Bulletin Board is direct evidence that "conclusively links the protected activity and the adverse action and does not rely on inference."

Moreover, under the FRSA an employee can prevail even when the railroad's reason is not a pretext. That is, an employee "can alternatively prevail by showing that the railroad's reason, while true, is only one of the reasons for its conduct and that another reason was the employee's protected activity." *Griebel, supra*, at p.24. So even assuming I violated the rule regarding cross walk boards, CSX nevertheless violated the FRSA by treating me disparately and contrary to its usual policy and practice.

CSX's conduct is in violation of my rights under the FRSA, 49 U.S.C. 20109(a)(2) and (b)(1)(A), and exercises an improper chilling effect on the willingness of employees to raise safety hazards and concerns, thus undercutting the overriding purpose of the FRSA to improve all aspects of rail safety. This is especially true in this case, as I spoke out on behalf of all my fellow workers, and the resulting retaliation against me sent a profoundly chilling message to all the employees in the Shop. Unless remedied, the discipline imposed on me will remain on my record and set the stage for more serious discipline up to and including dismissal.

CSX was put on explicit notice that its conduct was in violation of my statutory rights under the FRSA, and yet CSX's most senior level of managers acted in reckless disregard of my rights under the Federal Railroad Safety Act. Accordingly I am filing

this Complaint under the provisions and protections of the FRSA so your office can conduct a thorough investigation of the Railroads conduct in this case. Under the Federal Railroad Safety Act, 49 USC Section 20109(d)(4), OSHA has the power to investigate the Railroad in order to impose punitive damages of up to $250,000 against CSX and the individual Respondents. The purpose of filing this Complaint is not only to make me whole and to protect me from any future retaliation, but also to have OSHA conduct such an investigation and to order such punitive damages in order to discourage CSX from continuing its retaliatory course of conduct against employees who raise safety hazards.

Jeremiah J. Giuliano

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