U.S. Department of Labor

Occupational Safety and Health Administration
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New York, New York 10014
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June 18, 2009

Carol Sue Barnett, Esq.
Deputy General Counsel
Metro North Commuter Railroad Company
347 Madison Avenue, 19th Floor
New York, NY 10017-3739

Via Federal Express #8696 2181 9319

RE: Metro North Commuter Railroad Company/Ellis/2-4173-08-066

Dear Ms. Barnett:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Larry Ellis (Complainant) against Metro North Commuter Railroad Company (Respondent) on July 9, 2008, under the employee protection provisions of the Federal Rail 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. In brief, Complainant alleged that he was issued and served a 5-day suspension in retaliation for reporting an on the job 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, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

On January 15, 2008, Complainant was assessed a 15-day suspension. On April 8, 2008, the suspension was reduced to 5 days and on April 19-23, 2008, Complainant served the suspension. On July 9, 2008, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the Federal Rail Safety Act (FRSA). As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102. Respondent provides commuter rail service to locations in the states of New York, Connecticut and New Jersey.

Complainant is an employee within the meaning of 49 U.S.C. §20109.

The Metro-North Commuter Railroad Company is a suburban commuter rail service that is a subsidiary of the Metropolitan Transportation Authority (MTA), a public benefit corporation. Metro-North runs service from New York City to its northern suburbs in New York and Connecticut, as well as to other regions, including, in conjunction with New Jersey Transit, to parts of New Jersey. Respondent operates 120 stations. Complainant began working for Respondent approximately nine years ago and holds the

position of coach cleaner assigned to the Grand Central Terminal. As a coach cleaner Complainant is responsible for cleaning the vestibules and interiors of the trains upon their arrival at the station. His direct supervisor is Kecia Davis, Coach Cleaner Foreman. Complainant is a member of the Transportation Workers Union and is covered by a collective bargaining agreement.

On December 10, 2007, Complainant and his partner Paris Coles were given their daily assignment sheet. The sheet contains the number of the train, the time the train is expected in the station, the track the train is scheduled to arrive at, the type of equipment the train is, the number the train will be turned to for its next trip, and the time the train is next scheduled to depart the station. Changes not included in the assignment sheets are posted in specified areas. Very frequently the track is changed at the last minute and when the train doesn't arrive at the specified track on their assignment sheets, the cleaners are required to check the postings for changes. Complainant and Coles were assigned to clean train 1530 due to arrive on track 17 at 8:45AM. No train pulled in on track 17 but there was a train on track 19. According to the schedule, Complainant and Coles had only 10 minutes to clean train 1530 before it would be boarded again. The posted sheets did not have an updated track for train 1530 and so Complainant went to look for his supervisor to get confirmation of whether or not he should clean the train. Davis would normally be standing by track 23 or 25 but she was not there. Complainant checked the monitor and it still showed an arrival at track 17. Complainant and Coles decided to clean the train on track 19 due to the 10 minute window of opportunity before the train would be boarded again.

Complainant entered the train from the north end and Coles from the south end and began cleaning. Complainant worked his way to the fourth car. Soon thereafter an announcement was made warning that the doors would open on the platform side. While he was bending down in the vestibule area facing the opposite, crash-wall side, standing in very close proximity to the doors, the doors opened unexpectedly startling him. Complainant reached behind for the handrail with his right arm and felt a pull in his right shoulder. Complainant had been bending to pick up empty cups. Complainant exited the train to go and look for his supervisor to report the injury to his right shoulder. When he exited Mr. Wayne Foo, Mechanical Foreman, was standing outside the train. Complainant asked Foo if he had opened the doors without making an announcement and Foo replied that he had. Foo asked what happened and Complainant replied that he had hurt his shoulder and almost fell out of the train. Foo told Complainant to go and fill out an incident report. Complainant reported his injury to Kecia Davis and then to Thomas McCormack, District Manager Grand Central Terminal Operations Services. Complainant was escorted by Davis to the Occupational Health Services Department where he was evaluated and placed on light duty. Complainant remained in light duty status from December 10, 2007 until he was approved for full duty on February 7, 2008. During this period of time Complainant was required to remain in the locker room for his entire shift. The windowless locker room is located on the lower level of Grand Central Terminal next to tracks 104 and 105.

The collective bargaining agreement between Metro-North and the Transportation Communications International Union provides for a three-step procedure for the resolution of disciplinary matters. At the first step, the employing department serves a notice of charges and conducts a disciplinary investigation. The disciplinary investigation is also known as a hearing and/or trial. The reviewer of the hearing transcript, a management official from the employing department, determines if the charges should be affirmed.

On December 21, 2007, Complainant was issued a pretrial and trial notice for Wednesday, January 9, 2008, for violating Metro North's attendance policy. The absences were unrelated to Complainant's injury of December 10, 2007, however, because Complainant's last absence occurred on December 8, 2007 and no discipline had been assessed the attendance review most likely occurred as a result of reporting his injury. Unsatisfactory attendance renders an employee ineligible for craft transfer or

promotion. Respondent's Operating Procedure No. 21-021B for attendance states that employees are permitted to use sick leave for personal illness or injury. The reference to injury includes work related injuries. "Employees whose use of sick leave days exceeds reasonable levels will be considered as having unsatisfactory attendance. Unsatisfactory attendance includes….[t]hree occurrences of absences within any thirty calendar day period or four occurrences of absence within any six month period, with an 'occurrence' being consecutive work days that an employee does not report for work due to illness or injury." Unsatisfactory attendance for purposes of craft transfers or promotions uses a different formula. Employees are allowed 15 occurrences of absence within 30 months; an absence of several successive days counts as only one occurrence. Also within the 30-month period, employees are allowed eight "patterns" of sick absence. Sick absences that occur immediately before or after the employee's rest days, vacation days and holidays are considered patterns. Approved FMLA and bereavement leave are the only two extenuating circumstances in which the absence would not count against an employee.

On December 27, 2008, Complainant was issued a pretrial and trial notice by David Plumb, Assistant Director Highbridge Car Appearance Facility, that provided: "1) failing to properly perform his duties as a coach cleaner on December 10, 2007, when his assigned train 1531 on Track 17 did not arrive, and he failed to go to his supervisor and/or inquire the new location of the assigned train 1531. Complainant boarded the shop train on Track 19 undergoing test and repairs, the incorrect train and location and attempted to clean the incorrect cars; 2) Violation of General Safety Instruction 100.0. Be alert, attentive and aware at all times when on duty; and 3) Violation of General Safety Instruction 1800.1.2F. Single person lifts, lift off the floor. Assume a squatting position, keeping your back straight and upright. Hold in your stomach muscles to stabilize your back, which resulted in your personal injury as a coach cleaner on December 10, 2007, at approximately 8:47 AM in Grand Central Terminal."

On January 7, 2008, a pre-trial meeting was held relative to all charges. Complainant accepted a warning letter pertaining to his unsatisfactory attendance. Complainant was offered and refused to sign a waiver admitting his guilt to the second set of charges relative to December 10th. A waiver is described in Metro North's July 28, 2008 position statement as follows, "At the first step, which takes place in the employing department, Metro-North must first provide the employee with written notice of the exact offense with which he is charged. The employee may be offered the right to waive his right to an investigation, admit his guilt to the offense charged, and agree to a negotiated discipline. If the employee refused to sign the waiver, the charges become the subject of the disciplinary hearing." According to Complainant, the signing of the waiver carried a 15 day suspension. On January 9, 2008, the disciplinary hearing was held.

It was established at the hearing through direct testimony of Janek Kozlowski, District Superintendant, that he and Mechanical Foreman, Wayne Foo, were engineers assigned to conduct an equipment check of train 1225 which had reported a passenger falling in the vestibule of one of the cars. While conducting equipment checks safety rules require the engineers to make an announcement before they open the doors, each time they open the doors, regardless of what side of the train the doors will open.[1] Kozlowski testified that before checking the platform side doors Foo made an announcement but he did not make an announcement prior to opening the crash wall side. Foo was asked to attend the hearing as a witness but he had taken a personal day off. Complainant also wanted Paris Coles to be a witness but he was unable to make the hearing and submitted a signed statement instead corroborating that he worked with Complainant on train 1225. Complainant was not permitted to reschedule the hearing. Complainant was questioned about using proper lifting methods and he responded that he was only bending over to pick up empty paper cups and that regardless of whether he was lifting a heavy item or an empty paper cup, it was the quick reach for the handrail that resulted in an injury. Indeed, it was established at the hearing that

[1] According to Complainant the engineers are also required to engage a blue light on top of the train to alert staff that the train is undergoing a safety inspection, but there was no light on the train at that time.

Foo and Kozlowski violated safety rules when they failed to make the proper announcements warning that the crash wall side doors would be opening.

It was also established at the hearing that Complainant and Coles were not assigned to clean train 1225. However, Complainant testified and it was not refuted, that it frequently happens where the change in track is not on the assignment sheet or posted at the start of the shift and that if coach cleaners are unable to locate their foreman or supervisor in a short period of time they will clean another train without confirmation of assignment. Moreover, Coles, Complainant's partner, who was working on the wrong train with Complainant was not brought up on disciplinary charges. Nor was disciplinary action initiated against Foo and Kozlowski for violating safety rules in the incident.

On January 25, 2008, Complainant was notified that the charges were upheld from the January 9th hearing and that he was issued a 15 day suspension without pay. After two years the disciplinary action would be removed from Complainant's file as long as no new discipline was assessed. So long as the disciplinary action remains on Complainant's record he is ineligible for promotion or craft transfer. Additionally, the Chief Safety and Security Officer, Mark Campbell, reviews all applications for craft transfers and promotions. Campbell considers the Injury Frequency Index No.[2], how the employee's injury record compares to his/her peers, whether the injury was preventable, the severity of the injury and the elapsed time from date of injury(s) to the date of application. Campbell is provided with a summary of the injuries as reported through the IR1 and IR2, Campbell assigns each applicant to a category: good, concern and serious concern. The categories of concern and serious concern are meant to act as a red flag to the Human Resources Department when determining an applicant's eligibility and worthiness for the job they are applying to.

Complainant appealed the 15 day suspension and on March 7, 2008, the second step of the three-step procedure for resolution of disciplinary charges was held. Complainant's appeal was heard by the Labor Relations Department. Complainant understood at the end of his meeting that the charges were to be dropped completely. In a letter dated April 8, 2008, Respondent maintained that Complainant was guilty of the charges but that the circumstances surrounding the case lead them to reduce the disciplinary action from 15 days to a 5 day suspension. Complainant served his 5 day suspension without pay on April 19-23rd at a loss in wages of $946.11.

On July 9, 2008, Complainant filed his FRSA complaint. DOL/OSHA mailed to Respondent the notice of complaint which was received by Respondent on July 17, 2008 and an investigation was initiated. Requests for interviews of the relevant witnesses were made to in-house counsel on several occasions. The requests were not honored. In a letter dated April 9, 2009, Sue Barnett, Respondent's counsel, advised that Respondent had voluntarily expunged from Complainant's record the five-day suspension and planned to restore his back pay in the gross amount of $946.11 plus interest. The back wages were paid to Complainant in his regular pay check dated April 16, 2009. He has also received interest on the back wages. As of April 29, 2009, Complainant withdrew an appeal pending before the Special Board of Adjustment.

Respondent argues that it did not retaliate against Complainant and states that such retaliation is prohibited under its ICP, which provides for a policy against harassment and intimidation in order for there to be complete and accurate reporting of accidents, incidents, injuries, and occupational illnesses and to prevent employees from being discouraged from obtaining proper medical treatment or the

[2] The Injury Frequency Index No. is an index developed by Metro-North that relates an employee's number of injuries to the number of years in service. The higher the index number, the greater number of injuries an employee suffered.

reporting of an accident, incident, injury or illness. They are required by the FRA to disseminate the policy to its employees. Respondent usually distributes its General Safety Instructions during orientation. Rule 200.5 of the General Safety Instructions is the Policy Against Harassment. Unlike in the ICP, this also states that certain practices of Respondent's are not violations of the policy against harassment, including taking steps to enhance a sense of personal responsibility for safe work practices, such as employee training, coaching, and counseling for those engaging in unsafe work practices or rules violations. Additionally, Respondent will hold employees accountable through a reasonable discipline program for rules violations.

Respondent's defense asserts that Respondent treated Complainant in accordance with its policies and that the evidence at the hearing supported a finding of guilt, and that Complainant was treated no differently from his co-workers. Respondent's defense is not supported by the evidence. Complainant was singled out from the other three employees who were on train 1225, track 19. The two engineers received no disciplinary action for infractions of safety rules and Complainant's partner received no disciplinary action for working on the wrong train with Complainant. After Complainant was placed on light duty on December 10, 2007 by OHS, he was forced to sit in the locker room until approved for full duty on February 7, 2008. Although Respondent voluntarily expunged Complainant's record and paid back wages with interest, this action was not taken until OSHA requested the disciplinary records of Foo, Kozlowski and Coles. While Complainant has been reimbursed for the lost wages associated with his 5-day suspension, he has also been deprived of consideration for craft transfers or promotions since December of 2007.

49 U.S.C. § 20109 (a) (1) (C) (4) protects employees who notify the railroad carrier or the Secretary of Transportation of a work-related personal injury. Complainant notified both the Secretary of Transportation and Metro-North. As recognized by the Federal Railroad Administration and the House of Representatives, railroad employees are harassed and intimidated making them reluctant to report accidents and injuries and then upon their reporting they are subject to disciplinary actions. A recognized form of intimidation and harassment is the placement of an injured worker on light duty where the employee is instructed to report for duty and not assigned any work, which allows the railroad to avoid reporting the lost work days. Complainant was instructed to report to the locker-room from December 10, 2007 to February 7, 2008 where he remained for his entire shift and was not assigned any work. Additionally, Respondent attempts to intimidate and harass the employees by presenting them with waivers before the disciplinary hearings. If the employee admits their guilt they will be issued a known form of discipline. If they refuse to sign the waiver they face the hearing and the consequences that will be imposed. The charges are either approved or recommended by the same person who will be reviewing the hearing transcript, and are a foregone conclusion. This is not an impartial review and is viewed as a formality required by the collective bargaining agreement.

Respondent's Operating Procedure for attendance and policy for determining whether an employee is eligible for consideration for promotion and craft transfers are on their face a violation of the FRSA and it is recognized that such practices produce a chilling effect on reporting injuries in the workplace, jeopardizing employee safety. Respondent's reckless disregard for the rights of its employees calls for punitive damages.

A preponderance of the evidence supports a finding that Complainant's reporting of his injury was a contributing factor in the disciplinary action taken against him. Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated FRSA. OSHA hereby orders the following to remedy the violation.

Order

Respondent shall demonstrate to DOL that it has expunged all files and computerized data systems of disciplinary actions and references to disciplinary actions related to the December 10, 2007 incident.

Respondent shall demonstrate that it has made payment to Complainant for back wages in the gross amount of $946.11.

Respondent shall demonstrate that it has made payment to Complainant for interest at the rate of 6% on the gross amount of back wages.

Respondent shall amend and/or expunge statements on the IR1 & IR2 to reflect that no violation of policy and/or procedure contributed to Complainant's injury.

Respondent shall amend its Attendance Policy so that sick leave taken pursuant to an occupational injury or illness shall not be considered when assessing unsatisfactory attendance, requests for craft transfers or requests for promotion.

Respondent shall amend its eligibility policy for craft transfers and promotions so that the reporting of an occupational injury or illness shall not be considered when assessing requests for craft transfers or promotions.

Respondent shall permanently post the Notice to Employees, included with this Order, in all of its 120 stations in areas where employee notices are customarily posted.

Respondent shall provide to all employees a copy of OSHA's FRSA Fact Sheet and the Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry, which are included with this Order.

Respondent shall pay reasonable attorney's fees.

Respondent shall pay compensatory damages in the amount of $5,000 for the lost opportunity for transfer or promotion and $5,000 for the inconvenience of and the mental anguish arising from Complainant's two- month virtual detention in the locker room.

Respondent shall pay Complainant punitive damages in the amount of $ 75,000.

Respondent shall within 30 days inform the Regional Administrator in writing of the steps it has taken to comply with the above order.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and 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:

Complainant

OSHA Regional Administrator
201 Varick Street, Room 670
New York, NY 10014

Department of Labor, Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, D.C. 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 the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under Federal Rail Safety Act are handled in accordance with the rules and procedures for the handling of AIR-21 cases. These procedures can be found in Title 29, Code of Federal Regulations Part 1979, a copy of which may be obtained at http://www.osha.gov/dep/oia/whistleblower/index.html.

Sincerely,

Robert D. Kulick

Robert D. Kulick
Regional Administrator

cc: Charles C. Goetsch, Esq. (Via Federal Express #8696 2181 9320)
USDOL/OALJ-Chief Administrative Law Judge
USDOL/SOL-FLS
US DOL/SOL-Regional Solicitor, Region II
Federal Railroad Administration