U.S. Department of Labor Occupational Safety and Health Administration
Two Pershing Square
2300 Main Street, Suite 1010
Kansas City, Missouri 64108
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Reply to the Attention of EP/WPP

April 8, 2011

Mr. Rami S. Hanash
Regional Counsel
Union Pacific Railroad Company
Law Department – MS 1580
1400 Douglas Street
Omaha, Nebraska 68179

CERTIFIED MAIL # 7010 0290 0003 5632 1290

Re: Union Pacific Railroad Company/Petersen/7-3620-10-008

Dear Mr. Hanash:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Brian Petersen (Complainant) against Union Pacific Railroad Company (Respondent) under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleges that Respondent removed him from service, charged him with rule violations, placed him on probation for 18 months at Level 3 discipline, and terminated his employment in retaliation for reporting an on-the-job personal injury.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VII, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §20109 and issues the following findings:

Secretary's Findings

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 goods using the general railroad system.

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

Complainant found out on September 17, 2009 that his employment was terminated. On February 4, 2010, 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 actions, it is deemed timely.

On November 1, 2005, Respondent hired Complainant as a machinist helper. Complainant worked at Respondent's Bailey Yard, located in North Platte, NE. (General Electric (GE) is a contractor at Bailey Yard and uses Respondent's employees to perform its work.) Shortly thereafter, Complainant became an apprentice in the machinist department.

On August 28, 2009, Complainant was on duty. His shift was set to end at midnight. At around 11:45 p.m., Complainant was standing next to his vehicle in the parking lot of the GE Run Through Shop. An electrician ran over Complainant's feet while parking his vehicle. Complainant said he had gone out to his vehicle to put up a crockpot he had brought for a dinner that night, and was checking his cell phone to see if he had missed any calls for overtime when the incident took place. Other employees were standing in the parking lot at the time of the incident. One witness described the electrician's attitude after the incident as "callous." Another wrote, "Was surprised that [the electrician] did not apologize. [Complainant] was standing next to his car and [the electrician] parked so close that [Complainant] could not open his door." Another witness noted that the electrician had been driving through the parking lot too fast, and would have avoided Complainant's feet had he been driving more carefully. Complainant reported the incident to his foreman, James Gray, who reported it to Craig Gribble, a technical director for GE. Complainant complained of soreness and was taken to the nurse's station, where the nurse applied RICE, or Rest, Ice, Compression, and Elevation to the affected areas.

Gribble called Jeff Smith, GE's shop director at the time, to let him know what had occurred. Smith, who was not on duty, drove to the shop, where he met with Complainant and the electrician. Complainant filled out one of Respondent's personal injury reports. On the report, he wrote that he had injured his feet, leg, and back, and that the driver of the vehicle had caused the injury. Because Complainant worked for Respondent, Respondent, not GE, was responsible for classifying the injury for Federal Railroad Administration (FRA) purposes. Respondent classified the injury as non-reportable.

On August 29, Respondent pulled from service both Complainant and the electrician. Complainant was placed on suspension on August 30. On September 9, both were issued Notice of Investigation letters. Complainant's letter states the following: "You were allegedly checking messages on your cell phone in the GE Parking Lot and may have failed to be alert and attentive and may have failed to take precaution to avoid having your feet run over by [the electrician] as he was attempting to park his automobile, resulting in you sustaining a possible injury to your feet and back." Complainant was charged with five rule violations, including Rule 1.6: Conduct: Part 1, Careless of Safety and Part 2, Negligent. A violation of this rule would result in Level 5 discipline, or permanent dismissal from the railroad. The electrician was also charged with Rule 1.6. A formal hearing into Complainant's charges was scheduled for September 17.

In lieu of the hearing, Complainant, with the assistance of his union, entered into a leniency agreement with Respondent. Complainant agreed to the following:

1. He agreed to accept dismissal for violation of the above-referenced rules.
2. He agreed to be returned to service on a probationary period for 18 months, with seniority and vacation rights restored, but without compensation for the period of time that he was suspended.
3. He agreed that his personnel file would reflect a Level 3 discipline throughout the 18-month probationary period.
4. He agreed that he could be removed from service without a formal investigation at any time during the 18-month probationary period if he violated Rule 1.6 again.

The electrician entered into a similar agreement. Complainant returned to work on September 11, resuming his normal duties. This time, Complainant bid back into a non-GE work area of Respondent's Bailey Yard facility. On September 15, Complainant was working with two certified machinists. Complainant stood on two Timken Bearings to be able to read the serial numbers off of the traction motors. Mike Halverson, a Manager of Locomotive Maintenance for Respondent, saw Complainant on the bearings. Halverson reported what he saw to senior management. Complainant was taken to a conference room, where management requested that Complainant provide a written statement. Complainant wrote up his statement and was then sent home.

On September 17, David Thalken, Respondent's Shop Director at Bailey Yard, notified Complainant by letter that his actions on September 15 were in violation of his leniency agreement, and that Complainant would be returned to dismissal status effective September 11.

Based on the foregoing, Complainant engaged in protected activity when he reported his injuries to Foreman Gray on August 28 and when he subsequently filled out a personal injury report based on this incident.

Respondent had knowledge of Complainant's protected activity because Complainant submitted his injury report to Respondent's officials.

Complainant experienced adverse actions when Respondent removed him from service on August 29, when Respondent issued him an investigation letter on September 9 for alleged rule violations, when Respondent placed him on an 18-month probation on September 11 at Level 3 discipline and did not compensate him for the time missed while out of service, and when Respondent terminated his employment effective September 11.

A preponderance of the evidence shows that Complainant's protected activity was a contributing factor in the adverse actions. There is strong temporal proximity between the protected activity and adverse actions. Complainant was pulled out of service and suspended the day after he reported his injuries. Shortly thereafter, Complainant was charged with violating several rules for his involvement in the incident. There is also evidence that Respondent acted with discriminatory animus toward Complainant's protected activity. For example, even though Complainant had never been disciplined before, Respondent charged him with a Level 5 violation, which is the most severe charge under Respondent's progressive discipline policy, based on the August 28 incident. Complainant had worked for Respondent for nearly four years without ever having been disciplined, but then was charged with numerous safety violations within the two week period after filing his personal injury report.

Moreover, there is evidence of disparate treatment in this case. Although witnesses indicated that the electrician had been driving through the parking lot too quickly and that Complainant was not at fault, both Complainant and the electrician were charged with Level 5 violations. Both entered into leniency agreements and accepted Level 3 discipline for an 18-month probationary period. The electrician, however, was already at a Level 3 under Respondent's discipline policy, whereas Complainant had no record of prior discipline. Therefore, only Complainant actually saw an increase in his discipline level. With respect to the rules violations charged against Complainant based on the August 28 incident, the evidence indicates that Respondent held Complainant to a higher standard and subjected him to greater discipline under its cell phone and electronic device usage policy. Witnesses indicated that cell phone use was commonplace as long as it was used for business or union purposes. Foreman Gray, for example, said cell phone use was "more or less permitted" in the parking lot when Complainant suffered his injuries.

Nevertheless, Respondent used Complainant's cell phone use as the reason for charging Complainant with rule violations. Only one other employee has been disciplined for violating Respondent's policy on electronic devices. That employee, whose incident occurred after Complainant's, was caught playing a portable video game device in the locker room while still on duty. The employee, who was already on a Level 3, was charged with a Level 4, not a Level 5. These employees who received lesser forms of discipline than Complainant did not report work-related injuries.

In addition, the evidence indicates that other employees were in the parking lot when Complainant got injured. The evidence indicates that it was not until after the incident that Respondent implemented a policy where employees had to notify their supervisors before going to the parking lot before the end of a shift.

There is evidence that Respondent's stated reason for terminating Complainant (that he committed an admitted safety violation justifying termination under the terms of the leniency agreement) was actually motivated in part by impermissible retaliation. As noted above, there is temporal proximity between Complainant's protected activity (August 28) and the final decision to terminate his employment (September 17). There is also evidence indicating that Respondent engaged in disparate treatment when it charged Complainant with safety violations for standing on the Timken Bearings. No one else has been written up for standing on Timken Bearings, although the evidence indicates that other employees did so, and one witness noted that Respondent put more of an emphasis on the use of ladders in the drop pit area *after* Complainant was caught standing on the bearings. Complainant also asserts that two other employees were standing on the Timken Bearings with him, but neither of them was charged with a safety violation. According to Complainant, when he asked Halverson whether he noticed the other two employees on the bearings, Halverson said that he only cared about Complainant.

Respondent fired Complainant even though other employees, such as the electrician and the employee caught with the portable video game device, had been subject to discipline more often than Complainant and were allowed to stay employed. This evidence supports the inference that Respondent's decision to fire Complainant on September 17 was retaliatory.

Respondent has not shown by clear and convincing evidence that it would have taken the same adverse actions in the absence of Complainant's protected activities. As discussed above, Complainant was charged with safety violations based on the August 28 incident despite witness statements indicating that he was not at fault. Moreover, Complainant was charged with a Level 5 violation, the most severe charge under Respondent's progressive discipline policy, even though he had no history of prior discipline. Under the terms of the leniency agreements signed by Complainant and the electrician, only Complainant's discipline level was increased. Finally, even if Complainant's standing on Timken Bearings in violation of his leniency agreement could be viewed in isolation as a legitimate, non-retaliatory basis for discipline, the evidence demonstrates that Respondent's prior retaliatory animus impermissibly tainted the termination decision, *viz.*, Complainant would not have been placed on probation and been subject to a high level of discipline under the leniency agreement if Respondent had not been motivated by retaliatory animus when it disciplined him based on his August 28 filing of an injury report.

Complainant has suffered physically, emotionally, and financially from Respondent's decision to terminate his employment. Complainant and his wife might lose their home in North Platte to foreclosure. They have been receiving telephone calls and written correspondence from their lender about foreclosure since December 2010. They have had to deplete their savings and maximize the debt on their credit cards to stay afloat financially. In order to find work, Complainant had to move his family to Lincoln, NE, where they have had to move in with his father-in-law. Complainant has taken a job as an auto mechanic, making much less than he was as a railroad employee. Complainant's wife, who used to stay at home with their children, has had to go back to work in an effort to make up for Complainant's loss in income. In addition, Complainant has experienced such intense stress over the situation that he had to go to the emergency room in the middle of the night at one point, believing he was having a heart attack. Complainant was monitored for at least 12 hours in the emergency room. Complainant's stress has been compounded by the effect of the situation on his wife, who has suffered two miscarriages since Complainant's employment was terminated. Complainant's pride and self-worth have been adversely affected, with Complainant carrying the weight of not being able to support his family as he had before he was fired. Complainant's efforts to find other railroad employment have been unsuccessful.

Respondent's outrageous behavior and callous disregard for the rights of its employees warrant punitive damages. More than one employee during this investigation noted that Respondent intimidates those who report on-duty personal injuries. One employee even noted that he has heard management officials at Bailey Yard say that an employee who suffers a work-related injury should not be working for the railroad. Complainant, who had no prior discipline, was not charged with rule violations or issued discipline until after he reported his on-duty personal injuries.

OSHA finds reasonable cause to believe that Respondent has violated FRSA and issues the following order.

ORDER

(1) Upon receipt of these Findings and Preliminary Order, Respondent shall immediately reinstate Complainant to his former position with all the pay, benefits, and rights he had before his discharge.

(2) Respondent shall pay Complainant back wages in the amount of $2,688.85 biweekly for the period from September 15, 2009 through January 3, 2011 and $1,588.83 biweekly for the period from January 3, 2011 until Respondent makes Complainant a bona fide offer of reinstatement.

(3) Respondent shall pay interest at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code.

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

(5) Respondent shall pay Complainant attorney's fees in the amount of $16,776.

(6) Respondent shall pay Complainant compensatory damages in the amount of $17,166.43, for the following:

- Pain and suffering in the amount of $10,000.
- Out-of-pocket medical expenses in the amount of $5,000.
- Travel expenses for job interviews in the amount of $1,120.93.
- Reasonable moving expenses from North Platte to Lincoln in the amount of $1,045.50
- Reasonable moving expenses from Lincoln to North Platte in an amount to be determined in order for Complainant to resume his employment with Respondent.

(7) Respondent shall refrain from retaliating or discriminating against Complainant in any manner for exercising his rights under FRSA.

(8) Respondent shall provide to all employees at Bailey Yard in North Platte, NE, a copy of the FRSA Fact Sheet included with this Order.

(9) 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 Bailey Yard.

(10) Respondent shall remove from Complainant's employment records any reference to the exercise of his rights under FRSA.

Respondent has thirty 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:

Louis E. Jungbauer
Complainant's Attorney
Yaeger, Jungbauer & Barczak, PLC
2550 University Avenue W, Suite 345N
St. Paul, MN 55114

Charles E. Adkins, CIH
Regional Administrator
U.S. Department of Labor, OSHA
2300 Main Street, Suite 1010
Kansas City, MO 64108

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 decision under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint.

Sincerely,

Charles E. Adkins, CIH
Regional Administrator