U.S. Department of Labor

Occupational Safety and Health Administration
San Francisco Federal Building
90 – 7th Street, Suite 18100
San Francisco, CA 94103

August 22, 2011

Rami Hanash, Esq.
Environmental Compliance
Union Pacific Railroad Co.
1400 Douglas St.
Mail Stop 1580
Omaha, NE 68179

Re: Union Pacific Railroad / Harvey / 9-3290-10-023

Mr. Hanash:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by attorneys for Tommy Lee Harvey (Complainant) against Union Pacific Railroad Company (Respondent) on February 8, 2010, under the Federal Railroad 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. L. No. 110-53. In brief, Complainant alleged that Respondent terminated him in retaliation for reporting a work-related personal injury and requesting medical treatment.

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 IX, 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 is engaged in interstate commerce within the meaning of 49 U.S.C. §20109.

Complainant was employed by Respondent as a locomotive engineer, and assigned to Respondent's facility located in Tucson, Arizona. Complainant is an employee within the meaning of 49 U.S.C. §20109.

Complainant was terminated on or about August 14, 2009. On February 8, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse

action, it is deemed timely.

Complainant worked for Respondent for more than 32 years before he was discharged. Complainant has no prior record of discipline for any performance or conduct issues.

On or about April 19, 2009, Complainant was working as the locomotive engineer along with conductor Jack Foster on a train near Bowie, Arizona, when Complainant slipped and fell on the train stairs due to ice and water from a defective icebox/refrigerator. Mr. Foster witnessed Complainant's slip and fall and twice asked Complainant if Complainant was fine. Complainant responded affirmatively to both inquiries and told Mr. Foster that he had only skinned his arm and felt some soreness but had suffered no broken bones and was not really hurt. Complainant and Mr. Foster traced the source of the accident to the water and ice that had apparently leaked from the defective icebox/refrigerator, at which point Complainant tagged the equipment as defective. Mr. Foster witnessed Complainant tagging the equipment.

Over the next 2 months, Complainant began to develop increasingly severe back and hip pain from his April 19, 2009 slip and fall. Complainant's injury worsened to the point that on or about June 17, 2009, he informed Respondent's managers David Nevil (manager of yard operations) and Robert Tovar (manager trainee) about his injury and need for treatment. Complainant told Mr. Nevil that he needed to fill out an injury report because he was hurt. Mr. Nevil became upset and tried to dissuade Complainant from filling out an injury report. Mr. Tovar then took Complainant to the hospital while Mr. Nevil informed Samuel Lopez Sr. (senior manager of terminal operations) about Complainant's report of injury.

After Complainant returned from the hospital, he had a brief conversation with Mr. Lopez, who asked him to fill out an injury report form. Complainant did so and attached a handwritten statement to the form explaining the accident. Mr. Lopez's investigation of the incident that day was brief, focusing on unrelated issues such as temperature in Bowie, Arizona and the number of trips Complainant had made since the accident. On that same day, Mr. Lopez decided to charge Complainant with a serious "Level 5 infraction," subject to dismissal, for violating General Code of Operating Rules (GCOR) 1.6[1] for failing to report the defect on the train and his injury in a timely manner, and 1.2.5[2] for failing to report his injury in a timely manner.

Around mid-June 2009, Mr. Lopez interviewed Mr. Foster, the sole witness, only very briefly regarding Complainant's accident and injury. Mr. Foster corroborated Complainant's account of events.

On June 24, 2009, a Notice of Investigation was sent to Complainant and Mr. Foster. Both employees were charged with serious "Level 5 infractions," subject to dismissal. Complainant was charged with violating General Code of Operating Rules (GCOR) 1.6 and 1.2.5, and Mr. Foster was charged with violating Rule 1.6.

---

[1] Complainant was charged with violating part 1 of Rule 1.6, or "careless[ness] of the safety of themselves or others." The other parts of Rule 1.6 include "2) negligent, 3) insubordination, 4) dishonest, 5) immoral, 6) quarrelsome, or 7) discourteous" conduct.

[2] Rule 1.2.5, requires "reporting of personal injury on duty or on company property."

Respondent's Investigation Hearing was initially scheduled for July 3, 2009, but was postponed and finally held on August 5, 2009. The Complainant and Mr. Foster each were joined by their respective union representatives, and the Hearing was conducted by Lawrence Carpio (conducting officer) with Mr. Lopez acting as the charging officer. No other witnesses were called. Following the Investigation, Complainant was discharged by letter signed by Andy Yedlick (superintendent) on August 14, 2009 for violating Rules 1.6 and 1.2.5. However, Mr. Foster—who had not filed an injury report—was exonerated.

Complainant filed an appeal through his union on October 13, 2009 with Respondent's Labor Relations Department, which was followed by a November 2, 2009 conference with Ken Hunt (regional vice president). On November 29, 2009, Complainant's appeal was "denied in its entirety" by James (Jay) Reilly of Respondent's Labor Relations Department.

As Complainant has been not been cleared by his doctor to return to work since his injury report in June 2009, to date he has not been able to perform this type of work.

Pursuant to 49 U.S.C. §20109(a)(4), FRSA protected activity includes an employee's efforts "to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee." Moreover, pursuant to 49 U.S.C §20109(c)(2), an employee is also protected "for requesting medical or first aid treatment." Complainant engaged in protected activity when he reported his occupational injury and requested medical treatment. Complainant did not report his injury immediately because he did not feel that he was hurt so badly as to risk potentially being retaliated against if he reported the injury; it was only when the injury became so painful that he needed medical treatment that he reported the injury, putting himself at risk of retaliation, in order to receive medical treatment.

There is no dispute that Respondent had actual knowledge of Complainant's protected activities. Complainant reported his injury to at least three different managers (Mr. Nevil, Mr. Tovar, and Mr. Lopez), and there is evidence that others in management were also informed of his injury report, both around the time Complainant reported it and afterwards, including Mr. Reilly, Mr. Yedlick, Mr. Hunt, and Director of Labor Relations F. A. Tamisiea. Furthermore, management provided the injury report form to Complainant and directed him to complete it. Several managers had knowledge that Complainant filled out the injury report and included a written statement of the incident, including Mr. Nevil, Mr. Lopez, and Mr. Yedlick. Management also had knowledge that Complainant requested medical treatment.

Complainant suffered an adverse action on June 24, 2010, when he was notified that he would be investigated for a Level 5 infraction, subject to termination. Complainant suffered a further adverse action on August 14, 2009 when he was assessed a Level 5 penalty and discharged following a perfunctory investigation. The preponderance of evidence supports a nexus between Complainant's protected activities and the adverse actions taken against him by Respondent. First, there is strong evidence of temporal proximity. The timing of the adverse actions closely followed Respondent's learning of Complainant's protected activities. Mr. Lopez indicated that he decided to charge Complainant with a Level 5 offense—the most serious type of discipline, subject to dismissal—*on the same day*, June 17, that Complainant reported his injury and requested medical treatment. Lopez formally charged Complainant

with a Level 5 offense one week later, on June 24, after Lopez's cursory interview with Mr. Foster.

Second, there is evidence of animus. Complainant claimed that Mr. Nevil became very aggressive when Complainant told him he needed to fill out an accident report.

Third, there is evidence of disparate treatment. Although Mr. Foster was also charged with a Level 5 offense regarding the same incident as Complainant, Mr. Foster was quickly exonerated after the Investigation Hearing. Furthermore, Respondent has not offered any explanation of why Mr. Foster was exonerated but Complainant was discharged. It is therefore reasonable to infer that Mr. Foster was not subject to discipline because he did not report the injury to management or seek medical treatment, as opposed to Complainant.

Fourth, Respondent's investigatory efforts lacked thoroughness. Mr. Lopez's initial investigation of Complainant—which led Respondent to charge Complainant with a Level 5 offense and subject him to an Investigation Hearing where he was subsequently terminated—was perfunctory. Mr. Lopez only spoke with Complainant briefly prior to charging him with a Level 5 offense and asked largely irrelevant questions, as discussed above. When Mr. Lopez questioned Mr. Foster, the sole witness, their discussion was similarly very brief. Mr. Foster corroborated Complainant's account of events. Moreover, although Respondent had an extra month to prepare for the Investigation Hearing (due to the hearing being postponed), there is no evidence that Respondent interviewed any other witnesses or gathered additional information to support its charges against Complainant and Mr. Foster. No new evidence came out of the actual Investigation Hearing, a large portion of which focused on whether a letter requesting witnesses' presence at the Hearing was addressed to Mr. Lopez or Mr. Yedlick, even though there was no question or dispute that they were properly sent to and received by Respondent's El Paso regional headquarters. Despite Complainant and Mr. Foster testifying at the hearing that Complainant properly tagged a malfunctioning icebox/refrigerator and did not initially feel that he was injured, Respondent nonetheless terminated Complainant's employment.

Fifth, although Respondent claimed that Complainant's penalty was particularly severe because of an alleged prior disciplinary record that compounded or "upgraded" his Level 5 dismissal, Respondent failed to provide any evidence of any alleged prior discipline at the investigation hearing. Rather, the evidence shows that Complainant was a dedicated 32-year employee of Respondent who had no history of prior poor performance or misconduct. Respondent's sudden termination of Complainant after he engaged in protected activity thus appears retaliatory.

Respondent proffered three defenses. Respondent first asserted a lack of nexus between Complainant's reporting of his injury and his discharge. Respondent claimed that it had a legitimate reason to take adverse action against Complainant because Complainant failed to report his injury in a timely fashion. Respondent next asserted that Complainant's discipline was elevated because of his prior disciplinary record. Third, Respondent claimed that Complainant's claim was not properly before OSHA because Complainant had "elected a remedy" by initially appealing his termination through his union under the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et. seq.*

Respondent's arguments lack merit. As discussed above, there is ample evidence of a nexus between Complainant's reporting of his injury and his summary termination. Respondent did not offer any concrete evidence that it would have taken the same adverse action against Complainant in the absence of his protected activities. Although Respondent claims it had a legitimate reason for taking adverse actions against Complainant due to Complainant's delay in reporting his injury, Complainant was reasonable in delaying reporting his injury because he initially did not believe he had been so severely injured as to warrant putting himself at risk of retaliation for reporting the injury. Complainant ultimately made the difficult decision to report his injury after he could no longer perform his job duties and had no other option. Moreover, as discussed above, Respondent provided no evidence at the investigation hearing or to OSHA that Complainant had a prior disciplinary record.

Respondent's final defense is also without merit. The "election of remedies" provision in FRSA states in relevant part that "an employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. §20109(f). Because Complainant had initially appealed his termination through his union under the RLA, which governs union grievance procedures for the railroad carriers, among other issues, Respondent argues that Complainant's actions constitute the use of "another provision of law" prohibited under FRSA's election of remedies clause. However, OSHA does not consider Complainant's initial decision to appeal his termination internally to be an "election of remedies" covered under 49 U.S.C. §20109(f).

A preponderance of the evidence indicates that Complainant's protected activity was a contributing factor in the adverse action taken against him. Absent clear and convincing evidence that Respondent would have taken the same action in the absence of the protected activity, OSHA finds that there is reasonable cause to believe that Respondent violated the FRSA.

Moreover, Respondent's retaliation against Complainant warrants compensatory damages for emotional distress. Complainant was told that he would be subject to a disciplinary hearing— which Respondent employees commonly know is simply an administrative proceeding which often leads to termination— at the same time he learned that his wife had a brain tumor which could lead to blindness or a premature death and would require expensive and long-term medical coverage to treat. Complainant told of the emotional toll in feeling "distraught," "hopeless," and in "horror" that Respondent would cut off his insurance 60 to 90 days after his termination, thereby depriving his wife of her life-giving medical treatment. Complainant's fears were compounded by the fact that his insurance also covered medical expenses for his mentally-challenged step-daughter. Although Complainant's emotional losses may have been lessened when Respondent offered Complainant his job back several months after his termination and later reimbursed Complainant's out-of-pocket medical expenses, it did not make Complainant whole emotionally.

In addition, Respondent's retaliation against Complainant for reporting the April 19, 2009 injury exhibited reckless disregard for the law and indifference to complainant's statutorily-protected rights. Complainant was a 32-year employee of Respondent with no history of prior discipline. When Complainant approached his manager to report the injury, his manager became

aggressive and tried to dissuade him from exercising his statutorily protected rights. Once Complainant reported the injury, Respondent brought disciplinary proceedings against Complainant based solely on perfunctory interviews with Complainant and one other witness. Respondent then terminated Complainant after a disciplinary hearing that focused largely on issues having no bearing on whether Complainant properly reported his April 9, 2009 injury. Such conduct by Respondent has, as a general matter, a "chilling effect" on the workplace. This case is not the first one where OSHA has found reasonable cause to believe that Respondent retaliated against employees in violation of FRSA by instituting disciplinary proceedings and terminating them for reporting a workplace injury.[3] Respondent's disregard for the rights of its employees under FRSA warrants punitive damages.

OSHA hereby orders the following to remedy the violation:

Order

1. Respondent shall pay Complainant compensatory damages in the amount of $75,000.00, which comprises undue pain and suffering Respondent subjected Complainant to as a result of his termination.

2. Respondent shall pay Complainant attorney fees in the amount of $12,250.00.

3. Respondent shall pay Complainant punitive damages in the amount of $150,000.00 for its egregious and willful behavior toward Complainant and disregard for the rights of its employees under FRSA.

4. Respondent shall post immediately the attached "Notice to Employees" in a conspicuous place in its office(s), including all places where notices for employees are customarily posted and on the company's internal website, and maintain for a period of at least 180 consecutive days from the date of posting, said Notice to Employees to be signed by a responsible Respondent official and the date of actual posting to be shown thereon.

5. Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to FRSA.

6. Respondent shall expunge Complainant's employment records of any reference to the exercise of his rights under the whistleblower provisions of FRSA.

7. Respondent shall grant Complainant any and all additional make-whole relief, including but not limited to back wages, as a result of violating the whistleblower provisions of FRSA.

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

[3] See OSHA's Secretary's Findings in Union Pacific Railroad Company / 0-1650-09-003 and Union Pacific / 7-3620-10-008.