U.S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101 - 3212

Telephone No. 206-553-5930
Fax No. 206-553-6499

via certified mail 7009 2250 0004 4003 5874
July 22, 2010

Mr. Rami Hanash
Union Pacific Railroad Co.
Legal Department
1400 Douglas Street
MS 1580
Omaha, Nebraska 68179-1580

RE: Union Pacific Railroad Company/Powers/0-1650-09-003

Dear Mr. Hanash:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mr. Robert Powers (Complainant) against Union Pacific Railroad Company (Respondent) on November 5, 2008, via regular U.S. mail. This whistleblower complaint was filed under 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. L. No. 110-53. In brief, Mr. Powers alleged that Respondent discriminated against him on or about September 3, 2008, when he was discharged in retaliation for notifying and/or attempting to notify Respondent of a work-related personal 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 (OSHA), Region X, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §20109 and issues the following findings and preliminary order:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 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 for 12 years as a track laborer/truck driver/welder and assigned to work at Respondent's facilities in Eugene, Oregon. Complainant is an employee covered under 49 U.S.C. §20109.

On or about September 3, 2008, Complainant was discharged. On November 5, 2008, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Section §20109, also known as the employee protection provisions of the Federal Rail Safety Act, prohibits a railroad carrier from the following actions:

> *"...discriminating, [including] discharging an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done – (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee..."*

Respondent submitted a written position statement to this complaint dated April 17, 2009. Respondent denied that it retaliated against the Complainant when he was discharged. Respondent said the Complainant was fired for violating its operating rules such as its rules about dishonesty and working outside his medical restriction.

Complainant was hired by Respondent on December 9, 1996. Records show that in July 1999 Complainant was notified to attend an internal investigative hearing for allegedly committing theft and being dishonest. However, the investigative hearing was cancelled 10 days after Respondent notified him about it.

Other than the 1999 notice, Complainant maintained a spotless employment record – until he reported a work-related personal injury. Records show that Respondent issued two disciplinary actions to Complainant in May 2007 and in September 2008, when he was fired.

On May 21, 2007, Complainant was repairing a rail when he sustained an injury to his left hand. Complainant was in the process of removing the rail clamp from a saw and was trying to manually detach the clamp that was on the rail. He struck the rail saw with his hand to try and detach the clamp and strained his left hand, wrist and thumb. The injury happened while Complainant was on duty, and on Respondent's property.

It appears that Complainant's injury was work-related. Respondent reported it to the Federal Railroad Administration (FRA) as an accident or incident resulting in a "sprain/strain, thumb/finger" and caused by a "bump."

Evidence indicates that removing the rail clamp by striking it with the hand is not an unusual practice for Respondent's employees.

Respondent acknowledged that there is no rule that prohibits employees from striking the rail saw with their hands just as long as the employee does not strike metal on metal. Nonetheless, on May 25, 2007, Complainant was assessed a Level 1 infraction on his disciplinary record. Respondent's record noted that Complainant's "unsafe act

caused injury 5/21/07." This was considered "coaching" and not a formal disciplinary event, although it was documented on Complainant's disciplinary record.

Complainant verbally reported the injury to Respondent on the same day that it happened. He was told to wait over the weekend and see if he felt better. When Complainant came back to work the following Monday, he told Respondent that his thumb and hand were still bothering him. Complainant completed Respondent's form, "Report of Personal Injury or Occupational Illness." Respondent then took him to an emergency room where he was given a brace and referred to a specialist. Complainant said the specialist restricted him from lifting, pushing or pulling over 10 pounds with his left hand.

Respondent blamed the Complainant for causing the injury when he was given a Level 1 infraction. It is not clear if Respondent considered the FRA "no-fault reporting system" when it reported the injury to the FRA. The FRA's "no-fault reporting system" requires that rail carriers report work-related injuries that are "beyond the employer's control" unless the injury meets other criteria.

Complainant was fitted to a cast on his thumb and wrist to wear for a few weeks. Since Complainant was not able to use a saw, his work duties were modified. Complainant was limited to operating the truck and retrieving tools for his crew. A few weeks later, the weight restriction was lifted to 50 pounds, and Complainant wore a thumb brace.

Evidence indicates that Respondent's superintendent talked freely about Complainant's injury during a conference call with other employees after Complainant's work duties were modified. The Complainant was not present during this conference call; however, the superintendent implied that Complainant was to blame for getting injured. The superintendent also asked other employees on the call about their injury, and how they could have prevented it. This discussion was heard by all employees on the call, and it was later relayed to the Complainant.

In October 2007, Complainant said that he was forced to take a welder position on another work gang. However, Complainant was still on light duty.

Respondent denies that Complainant was on light duty and said there was no paperwork to show that he had any restrictions. However, Respondent acknowledges that Complainant insisted he still needed to wear his brace, and he said he should remain on light duty with weight and work restrictions. Respondent then required Complainant to produce medical documentation showing his restrictions.

On November 30, 2007, Complainant's physician completed a document entitled, "Occupational Health Injury Treatment." This document indicated that Complainant's left thumb and wrist were injured; however, he was available for "modified" work as long as it did not involve "lifting, pushing, or pulling over 50 pounds." The document also noted that Respondent's contact was notified about the work restriction.

Respondent did not accept Complainant's work restrictions after receiving the November 2007 medical document. Complainant then went on medical leave status and did not work. Complainant stated that as a welder he was earning $22 per hour, 40 hours per week. After going out on disability, he received about 50% to 75% of his salary.

Subsequently, Complainant filed a claim under the Federal Employers Liability Act (or, FELA)[1]. The FEL Act allows employees to be compensated if they were injured on the job.

On April 29, 2008, Complainant was examined by his doctor, who released Complainant to return to work, but to avoid repetitive wrist motion of his left hand and no lifting more than 50 pounds.

On May 13, 2008, Complainant was again examined by his doctor. Complainant received an "Occupational Health Injury Treatment" form which stated "no lifting, pushing or pulling over 50 pounds." The doctor also wrote that Complainant "seems to be approaching the point of maximum improvement."

After receiving Complainant's FELA claim, Respondent hired a private investigator. From approximately May 15, 2008, through May 18, 2008, the private investigator videotaped Complainant at his home and at a gun show. The video showed Complainant taking lumber out of a truck, including 6" x 6" posts with the help of his wife, shoveling dirt into a wheel barrel, using a drill in his right hand, pushing and pulling a cart full of ammunition on wheels with his right arm on the handle, and lifting boxes. There was nothing in the video to confirm that Complainant lifted more than 50 pounds, or that he used repetitive wrist motion contrary to his doctor's orders.

On or about May 29, 2008, one of Respondent's supervisors spoke to him about accommodating his injury. The supervisor had no knowledge of the surveillance video at that time. The supervisor asked Complainant about things he felt he could do and what tools he could use. The supervisor asked Complainant if he was able to stay within his restrictions while he was on disability leave. Complainant told the supervisor that he was "*hardly doing anything...just a little bit of gardening.*"

The supervisor noted that almost all of the tools used by the crew were hydraulic, vibrated a lot, or were big and heavy requiring two hands. Most likely use of these tools would have been outside Complainant's work restrictions.

[1] "FELA requires the injured railroader to prove that the railroad was "legally negligent," at least in part, in causing the injury. After proving negligence, the injured railroader is entitled to full compensation." Source: http://en.wikipedia.org/wiki/Federal_Employers_Liability_Act

On July 15, 2008, the supervisor was informed about the video of Complainant. The supervisor viewed it, and determined that Complainant "had been going outside of his restrictions quite a bit with vibrating tools, repetitive motion in his wrists, his weight restrictions, and telling me that he had been staying within his restrictions."

The supervisor said Complainant used a compactor when he was building his deck, patio, and rock wall. The supervisor claimed the compactor weighed over 200 pounds and was vibrating the whole time. The supervisor said he observed Complainant doing "what I felt was repetitive motion in his wrists." The supervisor also said that Complainant lifted items which were "within ounces of 50 pounds."

The supervisor showed the video to the director of track maintenance. The director agreed that Complainant had been working outside his medical restrictions. Neither Respondent official confirmed that they had a medical or a science background.

Respondent's supervisor accused Complainant of being dishonest. The supervisor said that termination from employment was the only appropriate action for "dishonesty" and did not consider the doctor's comment that Complainant "seems to be approaching the point of maximum improvement..." Nor did Respondent apply progressive discipline considering Complainant's lengthy and satisfactory employment record.

On July 24, 2008, Complainant was issued a disciplinary charge letter that alleged that Complainant violated the Rules of Conduct section 1.6. Respondent's disciplinary letter does not specify what Complainant did to violate its rules of conduct.

On July 31 and August 13, 2008, Complainant's disciplinary investigation was held. Respondent clarified that the charge against Complainant was dishonesty. The investigation was recessed until August 13th so that Complainant and the union could prepare a defense.

Respondent's internal investigative hearing was chaired by one individual, the "conducting manager." The conducting manager is employed by Respondent as a senior director of terminal operations. It is not clear whether the conducting manager supervised Complainant in the past. The investigative hearing was transcribed. Based on the transcription, Respondent stated the following during the hearing:

- Complainant was dishonest by "misrepresenting to us about staying within his medical restrictions."
- Respondent did not show the video to Complainant's doctor to get his opinion if Complainant was staying within his medical restrictions.
- Twenty seconds of the video showing Complainant *winding up string* was considered by Respondent to be a repetitive motion and outside of Complainant's medical restrictions.

- Respondent also accused Complainant of working outside his medical restrictions when the video showed Complainant lifting a post with his right hand and with a brace on his left hand, while his wife lifted the other end. Respondent's supervisor acknowledged that he did not know what the post weighed and finally conceded that he didn't know whether Complainant went outside his medical restrictions when he lifted the post.

The union submitted into evidence the following information:

- A doctor's instruction dated March 4, 2008, telling Complainant to exercise in a gym on a regular basis.

- Wrist exercises that Complainant was supposed to do several times a day on a daily basis.

- A doctor's letter dated August 5, 2008, stating that Complainant was released to full duty on July 8, 2008, with the only restriction being to use a splint on his left thumb.

On September 3, 2008, Complainant's employment was terminated in a letter written by Respondent's conducting manager. The conducting manager wrote that "I have found more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you for this violation." Complainant was also notified that (1) "[Y]ou failed to stay within your medical restrictions," and (2) "Your actions indicate a violation of Rule 1.6 (Conduct)..." Complainant was then fired.

On October 22, 2008, Complainant appealed his dismissal to the National Mediation Board. The nature of his appeal was that his discharge was "based on unproven charges, unwarranted and in violation of the Agreement."

In his appeal, Complainant asked for an award of "reinstatement to his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him since his removal from service and that the alleged charge(s) be expunged from his personal record."

On May 2, 2009, the 3-member National Mediation Board heard Complainant's claim. The Board concluded that Respondent "failed to prove by substantial evidence that" Complainant "was...dishonest, by working outside his then current medical restrictions." One member of the board, a carrier member, dissented.

The Board viewed Respondent's surveillance video and determined that it did not prove Complainant's activities consisted of repetitive wrist motion or going beyond his lifting restrictions. Rather, the Board noted that Respondent "could only speculate that (Complainant) was outside his restriction because (Respondent) testified that he had no idea what the timber weighed and only if it weighed more than 100 pounds would (Complainant) violate his lifting restriction. There must be more than speculation to prove substantial evidence upon which to dismiss" the Complainant. The Board also wrote,

"Moreover, concerning loading of ammunition boxes, the (Respondent's) contract investigator testified that he bought and subsequently weighted the (Complainant's) heaviest ammunition box and found it to weigh 49.4 pounds, less than (Complainant's) lifting restriction. The Board, having determined that an Award...be made, hereby orders (Respondent) to make the Award effective within thirty (30) days following the date two members of the Board affix their signatures hereto."

In order to comply with the National Mediation Board's order, Respondent was to reinstate the Complainant to his former position by September 24, 2009. However, Complainant did not return to work until February 22, 2010. Complainant said he did not receive any correspondence from Respondent for "months after the fact." After he returned to work, he received partial back pay, but not full back pay, nor were his medical bills paid.

According to Respondent, Complainant was notified by certified mail on November 18, 2009, that he was to return to work within seven days, but by February 2010, Respondent had not heard from Complainant. Respondent also said that Complainant had been compensated for back pay.

On June 16, 2010, OSHA sent a letter to Respondent asking for information about Complainant's return to work status. Respondent did not provide the requested information to OSHA.

In June 2008, the Committee on Education and Labor of the U.S. House of Representatives, issued a report entitled *Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses*. The committee included a section for rail carriers entitled, "Underreporting Problems in the Railroad Industry" and made the following comments:

> Today's railroad regulatory environment is more oriented toward assigning blame to a single individual, without a thorough examination of the underlying causes that led that single individual to commit an error. This approach is apparent in both railroad internal investigations of injury accidents, as well as FRA regulatory reports.

Complainant was involved in activity protected under the FRS Act when he reported a work-related injury in May 2007 and when he followed his doctor's treatment plan until he was released to work without restrictions in August 2008. Respondent had knowledge of Complainant's protected activity because Complainant reported the injury to his supervisor and completed Respondent's report of personal injury form. Complainant was subjected to an unfavorable personnel action when he was discharged on September 3, 2008.

Complainant was discharged 15 months after he notified Respondent of his work-related personal injury. Complainant worked for five months under medical restrictions before his restrictions were no longer accommodated and he went out on disability. On the surface, such a long time between Complainant's protected activity and adverse

action makes it more difficult to show a nexus between the two. Nonetheless, temporal proximity is not dispositive of nexus.

When Complainant first reported his injury, his supervisor asked Complainant to wait over the weekend to see how serious it was before filing an injury report on Respondent's form. When he returned to work after the weekend Complainant informed his supervisor that his injury was still bothering him. Delaying medical treatment is prohibited under FRSA, but Complainant did not file his complaint on this basis, and even if he had, it would not have been timely filed. However, it is noteworthy that Respondent's first concern when notified of a possible injury was to not seek help for Complainant, but to wait so that the injury would not have to be reported to the authorities.

Evidence shows that there was animus concerning Complainant's injury report. Respondent disciplined the Complainant although the FRA applies a "no-fault reporting system" for work-related personal injuries. Nonetheless, Respondent blamed the Complainant for causing the injury even though the Complainant did not violate any safety rule. Respondent then discussed Complainant's injury on a conference call with other employees and indicated it was his fault for being injured.

Respondent also hired a private investigator who videotaped the Complainant for several days at home. This activity was done during a time period when Respondent would not allow the Complainant to come to work and Complainant was required to use disability leave. Respondent videotaped the Complainant in response to his FELA claim, but because the FELA claim was filed because Complainant reported a work-related personal injury, the videotaping is related to Complainant's protected activity.

There was no evidence submitted by Respondent that Complainant did not follow his doctor's orders or the medical treatment plan. Yet, Respondent accused Complainant of being dishonest and used the videotape as evidence. Therefore, Complainant's protected activity of reporting a work-related personal injury contributed to his discharge, and a prima facie showing has been made, raising an inference of retaliation.

Respondent articulated a legitimate, non-discriminatory reason for discharging the Complainant. Respondent said Complainant violated its Operating Rule 1.6.

Although Respondent provided a non-discriminatory reason for firing the Complainant, its reason is not credible. Rather, Respondent's reason is a pretext for reprisal.

Respondent was not very clear about what Complainant had specifically done to justify his discharge. It wasn't until the day of its internal investigation that Respondent finally revealed that Complainant was being brought up on charges for dishonesty. Respondent did not consult Complainant's doctor to get a professional medical opinion as to whether Complainant went outside his medical restrictions.

Respondent also failed to clarify the extent of Complainant's medical restrictions. For instance, Complainant injured the thumb on his left hand. It is not clear why Respondent considered the medical restrictions to apply to Complainant's body instead of limiting it to his left thumb.

Respondent's use of the videotape simply does not substantiate its charges that Complainant was working outside of his medical restrictions.

It is also important to note that Complainant had an unblemished disciplinary record since 1999 until he reported an injury in May 2007. The only other disciplinary action taken against Complainant aside from his discharge was a reprimand for not being safe when he sustained his injury. The reporting of the protected activity lead directly to his reprimand.

Complainant asserted that he was following his doctor's orders when he engaged in physical activity, including the activities recorded by Respondent. Since the Act forbids rail carriers from disciplining employees for following doctor's orders, or a treatment plan, Respondent must show that Complainant was not following his doctor's orders. Respondent failed to show this.

Finally, a neutral arbitrator determined that Respondent could not substantiate its reasons for firing the Complainant. This evidence confirms that an objective third party agreed that Respondent was not reasonable in discharging Complainant.

The arbitrator ordered Respondent to reinstate Complainant within 30 days after its ruling. However, Complainant did not return to work until approximately five months later. When recently asked by OSHA about Complainant's return-to-work date, Respondent did not provide any information.

In its written position statement, Respondent objected to and refused to provide many relevant documents requested by OSHA, some of which might possibly have helped Respondent in its defense. For example, Respondent would not provide information to show that it has fired other employees for the same reasons as it fired the Complainant. Respondent claimed this request was not relevant to the FRSA complaint.

OSHA also requested from Respondent "a log of injuries sustained by employees in Oregon in 2006, 2007 and 2008, including the date of the injury, each employee's name and job title, information about the injury, the cause of the injury, and whether the employee was disciplined or discharged in connection with the injury."

Respondent refused to provide this information, too, claiming OSHA's request was "overly broad, unduly burdensome and seeks information that is irrelevant and reasonably calculated to lead to the discovery of admissible evidence."[2]

[2] 49 CFR '225.35, *Access to records and reports*, states that a rail carrier must provide copies of medical and claims records when requested by "any representative of the FRA...or any other authorized representative... within four (4) business hours after the request."

In summary, Respondent's justification for discharging Complainant is not credible. Rather, Respondent's reason is a pretext for retaliating against Complainant for exercising his rights under the FRS Act by reporting a work-related injury and following his doctor's treatment plan. A preponderance of the evidence indicates that Complainant's protected activity was a contributing factor in the discharge. Consequently, these Findings, concluding that there is reasonable cause to believe Respondent violated the Act, are accompanied by a Preliminary Order.

The following is a Preliminary Order which provides relief in accordance with the 49 U.S.C. §20109 of the Federal Rail Safety Act.

Preliminary Order

1. Confirm that Complainant Robert Powers was reinstated as a welding foreman effective February 22, 2010, and if not, immediately place him in his former position that he occupied in May 2007 when he was injured, and continuing in his former duties[3].

2. Respondent shall pay Complainant back wages, at the hourly rate of $25.50 per hour, including overtime pay and per diem, for the period of unemployment when Complainant was medically released to return to work plus interest and minus interim earnings. Said back pay wages shall include $1.00 per hour, known as "stabilization pay," for a six-month period of time. Respondent shall pay Complainant interest in accordance with 26 U.S.C. §6621, which sets forth the interest rate for underpayment of federal taxes.

3. Respondent shall pay Complainant compensatory damages in the amounts of $75,000 for mental pain, suffering and financial strain placed on his family due to the discharge. Complainant has since divorced because of problems experienced in his marriage as a result of Respondent's discharge[4]. Additional compensatory damages include $285.50 for medical and dental expenses, and $1,275 for attorney fees.

4. Respondent shall pay Complainant punitive damages in the amount of $75,000 based on its reckless and callous indifference to the legally protected rights afforded to Complainant under the Act.

5. Respondent shall expunge any adverse references from Complainant's personnel records relating to the discharge and not make any negative references relating to the discharge in any future requests for employment references.

---

[3] On August 5, 2008, Complainant's physician said that he was released to full duty with the only restriction at that time of wearing a thumb splint.

[4] It should be noted that Respondent's videotape included Complainant's wife indicating that he was married in May 2008.

6. Respondent shall permanently place the poster the OSHA Fact Sheet entitled, *Whistleblower Protection for Railroad Employees,* in a conspicuous place in or about its facility, including all places where notices for employees are customarily posted. Said fact sheet is attached.

7. Respondent shall post the enclosed Notice to Employees to all its employees acknowledging its obligations under the whistleblower provisions of the Federal Rail Safety Act. Said Notice is attached.

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
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:

Patrick Cowan, Complainant's Attorney
Jones, Granger, Tramuto, Christy & Halstead
801 Louisiana
Little Rock, AR 72201

Dean Y. Ikeda, Acting Regional Administrator
U.S. Department of Labor – OSHA
1111 Third Avenue, Suite 715
Seattle, WA 98101-3212

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 the complaint.

For more information about OSHA's Whistleblower Protection Program, please visit our Web site at: https://www.osha.gov/ and go to the link marked "Enforcement" and "Whistleblower Protection."

Sincerely,

for Dean Y. Ikeda
Acting Regional Administrator

Enclosures: (1) OSHA Fact Sheet entitled, Whistleblower Protection for Railroad Employees
(2) Notice to Employees

cc: ✓Patrick Cowan, Complainant's Attorney, via certified mail 7009 2250 0004 4003 5881
Robert Powers, Complainant, via certified mail 7009 2250 0004 4003 5898
Chief Administrative Law Judge, USDOL
Federal Railroad Administration, Washington D.C.
Federal Railroad Administration, Vancouver, WA

NOTICE TO EMPLOYEES

PURSUANT TO A PRELIMINARY ORDER ISSUED BY THE U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, THE EMPLOYER AGREES:

In Re the Matter of: Union Pacific Railroad Co./Powers/0-1650-09-003

THE EMPLOYER HAS BEEN ORDERED TO PROVIDE ALL APPROPRIATE RELIEF FOR AN EMPLOYEE WHO WAS RETALIATED AGAINST FOR EXERCISING HIS RIGHTS UNDER 49 U.S.C. §20109 OF THE FEDERAL RAIL SAFETY ACT (FRSA).

THE EMPLOYER AGREES THAT IT WILL NOT DISCHARGE OR IN ANY MANNER DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS FILED ANY COMPLAINT OR INSTITUTED OR CAUSED TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THE EMPLOYEE PROTECTION PROVISIONS OF THE FRSA, OR HAS TESTIFIED OR IS ABOUT TO TESTIFY IN ANY PROCEEDING OR BECAUSE OF THE EXERCISE BY SUCH EMPLOYEE ON BEHALF OF HIMSELF, HERSELF OR OTHERS OF ANY RIGHT AFFORDED BY THIS ACT.

THE EMPLOYER AGREES THAT IT WILL NOT DISCHARGE OR IN ANY MANNER DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS NOTIFIED OR ATTEMPTED TO NOTIFY THE RAIL CARRIER OF A PERSONAL WORK-RELATED INJURY.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST EXERCISING RIGHTS GUARANTEED UNDER THE FRSA, INCLUDING THE RIGHT TO REPORT A WORK-RELATED PERSONAL INJURY, AND THE RIGHT TO SEEK MEDICAL TREATMENT, AND/OR FOLLOW A MEDICAL TREATMENT PLAN, WHEN INJURED DURING THE COURSE OF EMPLOYMENT.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST CONTACTING, SPEAKING WITH, OR COOPERATING WITH FEDERAL RAILROAD ADMINISTRATION OFFICIALS, AND/OR WITH OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) OFFICIALS EITHER DURING THE CONDUCT OF A SAFETY-HEALTH INSPECTION OR DURING THE COURSE OF AN INVESTIGATION.

THE EMPLOYER AGREES THAT IT WILL PROVIDE TRAINING ABOUT THE WHISTLEBLOWER PROVISIONS OF THE FEDERAL RAIL SAFETY ACT TO ITS MANAGERS, SUPERVISORS AND EMPLOYEES AT ITS PORTLAND FACILIITES WITHIN 30 DAYS OF THE SIGNING OF THIS NOTICE. THE EMPLOYER AGREES TO NOTIFY OSHA WITHIN 30 DAYS AFTER SAID TRAINING IS COMPLETED, AND INCLUDE THE NAME AND JOB TITLE OF EACH EMPLOYEE WHO RECEIVED SAID TRAINING.

THE EMPLOYER FURTHER AGREES TO PERMANENTLY POST THE OSHA FACT SHEET ENTITLED, *WHISTLEBLOWER PROTECTION FOR RAILROAD EMPLOYEES,* IN A CONSPICUOUS PLACE IN OR ABOUT ITS FACILITY, INCLUDING ALL PLACES WHERE NOTICES FOR EMPLOYEES ARE CUSTOMARILY POSTED. SAID FACT SHEET IS ATTACHED.

UNION PACIFIC RAILROAD COMPANY _____ Date _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL. ANY QUESTION CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE APPROVING OFFICIAL

OSHA FactSheet

Whistleblower Protection for Railroad Employees

Employees working for railroad carriers are protected from retaliation for reporting certain safety or security violations to their employers or the government.

On August 3, 2007, the *Federal Rail Safety Act (FRSA)*, 49 U.S.C. Section 20109, was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to transfer authority for rail carrier employee whistleblower protections to OSHA, and to include new rights and remedies.

Covered Employees

Under FRSA an employee of a railroad carrier and its contractors and subcontractors are protected from retaliation for reporting certain safety and security violations.

In general, under FRSA a railroad carrier is covered if it provides any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area, certain commuter railroad services, and high-speed ground transportation systems that connect metropolitan areas. However, rapid transit operations in an urban area that are not connected to the general railroad system of transportation are not covered.

Protected Activity

If your employer is covered under FRSA, it may not discharge or in any other manner retaliate against you because you provided information to, caused information to be provided to, or assisted in an investigation by a federal regulatory or law enforcement agency, a Member or committee of Congress, or your company about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste or abuse of funds intended for railroad safety or security. Your employer may not discharge or in any manner retaliate against you because you filed, caused to be filed, participated in, or assisted in a proceeding under one of these laws or regulations. In addition, employees of railroad carriers are protected from retaliation for reporting hazardous safety or security conditions, refusing to work under certain conditions, or refusing to authorize the use of any safety- or security-related equipment, track or structures.

Unfavorable Personnel Actions

Your employer may be found to have violated this statute if your protected activity was a contributing factor in its decision to take unfavorable personnel action against you. Such actions may include:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Reassignment affecting promotion prospects
- Reducing pay or hours

Deadline for Filing a Complaint

Complaints must be filed within 180 days after the alleged unfavorable personnel action occurs (that is, when you become aware of the retaliatory action).

How to File a Complaint

An employee, or representative of an employee who believes that he or she has been retaliated against in violation of this statute may file a complaint with OSHA. It is important to note that FRSA prohibits complainants from filing multiple discrimination complaints under other laws for the same allegedly unlawful act of the employer.

The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. For more information, call your closest OSHA Regional Office:

- *Boston* *(617) 565-9860*
- *New York* *(212) 337-2378*
- *Philadelphia* *(215) 861-4900*
- *Atlanta* *(404) 562-2300*

- *Chicago* *(312) 353-2220*
- *Dallas* *(972) 850-4145*
- *Kansas City* *(816) 283-8745*
- *Denver* *(720) 264-6550*
- *San Francisco* *(415) 625-2547*
- *Seattle* *(206) 553-5930*

Addresses, fax numbers and other contact information for these offices can be found on OSHA's website, www.osha.gov, and in local directories.

Complaints may be filed orally or in writing, by mail (we recommend certified mail), fax, or hand-delivered during business hours. The date postmarked, faxed or hand-delivered is considered the date filed.

Results of the Investigation

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue an order requiring your employer to reinstate you, pay back wages, restore benefits, and other possible relief to make you whole, including:

- Reinstatement with the same seniority and benefits.
- Payment of back pay with interest.
- Compensatory damages, including compensation for special damages, expert witness fees, and reasonable attorney's fees.
- Punitive damages not to exceed $250,000, in certain cases.

OSHA's findings and order become the final order of the Secretary of Labor, unless they are objected to within 30 days.

Hearings and Review

After OSHA issues its findings and order, either party may request an evidentiary hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision and order may be appealed to the Department's Administrative Review Board for review.

If a final agency order is not issued within 210 days from the date your complaint is filed, then you have the option to file a civil action in the appropriate U.S. district court.

To Get Further Information

For more information on FRSA and other employee whistleblower protection provisions, including copies of the statutes and regulations, go to www.osha.gov and click on the link for "Whistleblower Protection."

For information on the Office of Administrative Law Judges procedures, decisions and research materials, go to www.oalj.dol.gov and click on the link for "Whistleblower."

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For more complete information:

OSHA Occupational Safety and Health Administration

U.S. Department of Labor

www.osha.gov

(800) 321-OSHA

DEP 11/2007