U.S. Department of Labor

Occupational Safety and Health Administration
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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/Barati/2-4173-09-007

Dear Ms. Barnett:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Andrew Barati (Complainant) against Metro-North Commuter Railroad Company (Respondent) on October 6, 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. Complainant filed an amendment to his complaint on November 24, 2008, and filed a second amendment to his complaint on February 25, 2009. In brief, Complainant alleged that in retaliation for reporting his on the job injury of April 22, 2008 he was brought up on charges and issued a dismissal which was later reduced to a suspension with time served and a lower seniority standing. Complainant further alleged that he was denied the opportunity to participate in the November 2008 Boom Truck Certification Training Class denying Complainant the opportunity to bid on more desirable positions with a higher rate of pay.

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 May 7, 2008, Complainant was issued a Notice of Disciplinary Trial. On June 17, 2008 Complainant was dismissed in all capacities. In a letter dated July 8, 2008, Complainant's termination was reduced to a suspension with time served with no possibility of expungement of the disciplinary action from his file and Complainant was permitted to return to work on August 5, 2008. On October 6, 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). On November 24, 2008, Complainant filed an amendment to his complaint which was later withdrawn on December 24, 2008. On February 25, 2009, Complainant filed his second amendment to the complaint. As the complaint and amended complaint were filed within 180 days of the alleged adverse action, they are 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 on January 22, 2008 as a Trackworker, in the Track Department, assigned to Stamford, CT. Complainant had a valid CDL. The work performed in the Track Department is physically demanding and considered a starting point for many new hires. Most workers try to advance their careers by transferring out of the Track Department. During the first week and a half of employment Complainant attended orientation class that included approximately two hours of safety instruction specific to the operation of the manual jack, with only a few minutes of actual hands on training. The workers were instructed to lower the manual track jack all at once and not incrementally as the General Safety Instruction 1300.6 requires. In early April Complainant's seniority standing allowed him to be bumped from his position at the Stamford, CT yard to an assignment at Grand Central Terminal. Complainant's probationary period successfully ended on April 21, 2008 and Complainant became a member of the International Brotherhood of Teamsters, Local 808.

On or about April 22, 2008, Complainant was working on the lower level loop of Grand Central Terminal as part of an access project and was proceeding with his gang to change out some block ties and remove some rail. There was no safety briefing prior to the start of work. Part of the process was to jack up the rail with the block ties attached while another employee would knock the block ties with a hammer to loosen them up to remove the leg screws. Prior to April 22, 2008, Complainant had not operated a manual track jack other than the couple of minutes during orientation. Nick Pellegrino was the foreman of Complainant's gang. In the days preceding the accident the gang had complained to the Foreman about the poor lighting in the work area. Pellegrino reported it to the Track Supervisor, Thomas Murphy who told Pellegrino to get extra lighting from the maintenance department and when equipment was available the gang and foreman would be issued spotlights. On April 22, 2008, despite the requests for additional lighting, no flood light was available, only flashlights. Around 11:00 AM Complainant was instructed to jack up the ties and David Carmosino was to use the sledge hammer to loosen the lag bolts. Carmosino was new to the job and had attended the same orientation class with Complainant. Neither Complainant nor Carmosino had operated a jack previously. The two experienced gang members were standing across the rails watching. Complainant jacked up the first section while Pellegrino was standing nearby with the flashlight providing light. After Complainant released the jack, Pellegrino walked away, down the track, to speak with someone and he took the flashlight with him. Complainant jacked up the second tie and when it was time to release the trigger he followed the safety procedures he had been taught, which included giving the all clear notification by yelling, "jack down". The jack wouldn't release. Since the lighting was so poor, Complainant leaned in closer to the jack to try to see if there was a problem with the release and whether or not his fingers were on the release. Complainant believes that in doing so his left foot moved forward but due to the poor lighting conditions was unable to see if his foot was in harm's way. The release was inadvertently activated and the tie came down and landed on Complainant's left foot. Complainant asserts that he wasn't trying to release the lever but rather trying to check to see if he was pressing the proper trigger. No one saw what happened because it was too dark. Complainant immediately jacked the tie back up and removed his foot. Foreman Pellegrino walked back over to the area and Complainant reported his injury. He told Complainant to walk over to an area where he could sit and take his boot off. The two senior gang members warned Complainant to try not to make a big deal out of the injury because Respondent doesn't like it when injuries are reported. Once the boot was off they

observed a bloody sock. Pellegrino escorted Complainant back to the office and reported Complainant's injury to Track Supervisor Thomas Murphy. Murphy instructed Pellegrino to take Complainant to the Occupational Health Services Department (OHS). OHS sent Complainant to a podiatrist, where it was confirmed that Complainant had broken his left big toe and required stitches. Complainant was deemed not qualified to work.

Metro-North's attendance policy, Operating Procedure No. 21-021B, 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." Complainant's consecutive days off of work were considered one occurrence. Employees with unsatisfactory attendance are subject to progressive discipline and the unsatisfactory attendance record renders an employee ineligible for craft transfers and promotions.

Thomas Murphy, Track Supervisor, conducted the investigation following the injury and completed the initial Incident Report (IR1) and the more involved follow-up Incident Report (IR2). The IR2 stated that Complainant had called "jack down" but had to adjust the jack and must have moved his foot forward not realizing it. The cause of the incident was that Complainant had failed to check if he was clear before dropping the jack. Murphy noted that the sight conditions included poor artificial light. Murphy concluded that Complainant had released the jack all at once instead of one notch at a time. Included in the investigation were the interviews of Complainant, two of the three gang members who witnessed the accident and the Foreman. The interviews of the witnesses, except for Carmosino, were conducted by Murphy and the written statements provided very little information. The witnesses reported that Complainant had given the all clear prior to releasing the jack. Foreman Pellegrino confirmed that he had walked about 200 feet down the track and was not present when Complainant was injured.

A few weeks later Complainant was directed back to OHS for a follow-up visit. Complainant remained out of work recovering from his injury. While at Grand Central Terminal en route to OHS Complainant ran into a fellow track worker. The track worker commented that he was surprised to see Complainant. Complainant asked why and was told he was surprised that he still had a job because the "office" doesn't take kindly to people who are injured especially since Complainant was new to the job. The follow-up visit determined that Complainant's injury kept him out of work.

The collective bargaining agreement between Metro-North and the Transportation Communications International Union provides for a three-step procedure for the determination of disciplinary matters. At the first step, the employing department serves a notice of charges and conducts a disciplinary investigation, and, where warranted, assesses discipline. 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. At the second step, if the employee or union representative on the employee's behalf wishes to contest the discipline, the procedure provides for an internal appeal to the Labor Relations Department, which may uphold, modify, or overturn the discipline. At the third step, the procedure provides for an appeal to the Special Board of Adjustment.

On May 7, 2008, Complainant was mailed his Notice of Disciplinary Trial signed by B.A. Koch, Deputy Director Track. Complainant was charged with;

> *"Failure to properly operate a jack lowering a rail and block tie in an unsafe manner on Tuesday 4/22/08 on Track 125 in Grand Central Terminal at approximately 1115 hours, in that you*

lowered the rail and block tie without checking your foot clearance, causing your left foot to become trapped under the block tie resulting in the injuring of your left foot.

"Metro-North General Safety Instructions § 100.0(1), (9), 200.1; 1300.1 and 1300.6 may be involved."

The hearing was postponed and held on May 30, 2008. The hearing was conducted by the hearing officer, James Walker, with Union Representative Chris Silvera, and the Principal, Complainant, present.

Respondent declined the request for management interviews and therefore, the only management testimony considered in this investigation was that of Track Supervisor Thomas Murphy, whose testimony at the hearing was transcribed by the court reporter. Murphy testified that under normal conditions the sodium vapor lighting is sufficient. However, during the relevant time period the transformer in the light fixture was failing and Complainant was getting only intermittent light. Murphy stated that he didn't know if the light was on or off at the time of the injury but that if it was off he wasn't sure if Complainant would have been able to see his foot. Murphy stated that a more seasoned employee would have known where his foot was located and whether or not it was too close to where the tie would land. Murphy was asked why a more seasoned employee in the gang was not given the assignment and Murphy agreed the assignment to Complainant was questionable. Two gang members testified and they stated that the lighting was poor and that although the foreman had attempted to get a spotlight for extra lighting there was none available. David Carmosino testified that while Complainant operated the jack, he did not observe Complainant take any actions that were contradictory to what they had learned in the orientation class, in violation of any safety rules, or dangerous. There was conflicting testimony on how many flashlights were given out but it was clear that no flashlight was available at the time of the accident because the foreman had walked away with it after observing Complainant perform the task only once.

On June 17, 2008 B.A. Koch, Deputy Director Track, issued the Notice of Discipline to Complainant dismissing Complainant in all capacities. Koch approved the bringing of the charges and then also affirmed the charges. Respondent declined the request for an interview with B.A. Koch. The offense was:

"Failure to properly operate a jack lowering a rail and block tie in an unsafe manner on Tuesday 4/22/08 on Track 125 in Grand Central Terminal at approximately 1115 hours, in that you lowered the rail and block tie without checking your foot clearance, causing your left foot to become trapped under the block tie resulting in the injuring of your left foot."

Respondent did not affirm that Complainant had violated any safety rules as alleged in the original charges. Complainant, through his union, appealed the dismissal to the Labor Relations Department in accordance with the steps detailed in the collective bargaining agreement. A meeting was held between the union and the department resulting in an offer by Respondent to reduce the termination to a suspension, time served without pay or benefit entitlement of any form and the discipline would not be expunged. Before being permitted to return to work Complainant had to undergo a return to duty physical examination. Complainant and his union representative signed the agreement on July 24, 2008. Respondent did not schedule Complainant's return to work physical until August 4, 2008 at which time he was cleared to return to work on August 5th. Complainant's treating physician for his foot injury had cleared him to work on July 15, 2008. While at Grand Central Terminal on August 4th Complainant went to pick up his belongings from his locker since he would be reporting to his new bid job in Stamford, CT starting the next day. Complainant found that all of his belongings were missing. They included work boots, a new work jacket that had been given to him by his family for Christmas with a purchase price of approximately $200, a couple of pairs of winter gloves, safety glasses and a bag to hold his items.

Complainant began his assignment working out of the Stamford, CT yard on August 5, 2008. On or about August 15, 2008, Complainant successfully bid for the higher paying position of fuel truck driver within the Track and Structures Department. The position was not considered a craft transfer or promotion. On October 3, 2008, Complainant attended the Early Intervention Course required for employees who have been employed with Respondent for two years or less. During the class the employees were given a folder that contained information on their injuries. The employees were told that the record of injury would remain in their file and would be taken into consideration when applying for a promotion or craft transfer. Employees who wish to be considered for a promotion or craft transfer are "subjected to an internal investigation, which includes an evaluation of their safety and discipline records, their performance assessments, and of their time and attendance records". Chief Safety and Security Officer Mark Campbell reviews all applications for craft transfers and promotions. Campbell considers the Injury Frequency Index No.[1], 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. Unsatisfactory attendance for purposes of craft transfers or promotions allows for 15 occurrences of absence within 30 months and 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.

Respondent argues that it did not retaliate against Complainant and states that such retaliation is prohibited under its Internal Control Plan (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 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.

In a memo dated August 18, 2008, employees of the Track & Structures Department were advised that if they wanted to be able to operate a boom truck now or in the future they had to submit an application to their supervisor by COB September 30, 2008 and that it was the last opportunity to take the certification class in the near future. Complainant was qualified because he had a current CDL and current medical card. As required Complainant submitted his paperwork to his new supervisor. His supervisor confirmed that the paperwork had been submitted. On November 11, 2008 the class began without Complainant. Complainant was not provided with a reason as to why he was left off the class roster. Complainant filed an amendment to his FRSA complaint on November 24, 2008, alleging that he was not permitted to attend the class in retaliation for his FRSA protected activities. He further alleged that in January of 2009, he would be bumped from his current truck driver job and would have to go back as a trackman at a lower

[1] 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.

rate of pay.[2] Failure to allow Complainant to attend the boom truck certification class prevented Complainant from bidding for a better paying position. Complainant also notified his union representative, Chris Silvera, who approached management about the matter. Respondent does not dispute that Complainant submitted the required paperwork. Respondent asserts that Complainant had been inadvertently left off the roster but that he would be included in the next class. Complainant was informed by Silvera that no one from that class would be given a boom truck assignment before Complainant attended the next class. The union and Complainant were satisfied with the response and so on December 24, 2008 Complainant withdrew his amendment to the complaint.

On or about February 18, 2009, it came to the attention of Complainant, that effective that same date, employees who had attended the November certification class had been awarded bids to operate boom trucks. Complainant has alleged that those employees have less seniority than him, but due to Complainant's termination, he lost his true seniority ranking. That is, if Complainant hadn't been assessed disciplinary action in June of 2008 he would have been able to successfully bid for a truck driving position earlier than August 15, 2008 and his ranking would have been significantly higher on the roster. Respondent asserts that no employee junior to Complainant has been awarded a boom truck job. However, it appears that Respondent is basing that on a seniority date of August 15, 2008, which Complainant contends is wrong. Had interviews with management been allowed by Respondent, OSHA would have been able to discern how the seniority date was calculated for Complainant and whether or not the disciplinary action caused the lower ranking.

On March 23-26, 2009, Complainant attended the Boom Truck Certification Class. According to Respondent 25 workers attended the class and 10 of the 25, including Complainant, did not pass the exam. A retest was scheduled for May 6, 2009 and the workers were to receive some retraining beforehand. On May 5th Complainant was informed that only a very brief review would be conducted prior to the start of the exam. The results are unknown.

In a letter dated April 2, 2009, Respondent sent notification to Complainant that they were voluntarily expunging his record of the suspension served from June 17, 2008 to August 5, 2008. Complainant was to be issued back wages for the same time frame in the gross amount of $5,253.96 plus interest. Complainant has confirmed receipt of both. In a letter dated April 9, 2009, Sue Barnett, Respondent's counsel, notified OSHA of their intention to expunge Complainant's record of the suspension assessed and restore back pay with interest. Respondent considers their actions to constitute a make whole remedy with the exception of reasonable attorney's fees.

There is no dispute that Complainant engaged in FRSA protected behavior when his injury was reported first to Foreman Pellegrino and then to Track Supervisor Murphy. Following the reporting of his injury Complainant was subjected to numerous adverse employment actions.

- Complainant was initially discharged in all capacities on June 17, 2008. Although Respondent agreed to reinstate Complainant with a suspension, time served, Respondent didn't actually permit Complainant to return to work until August 5, 2008.
- Complainant's seniority was affected and caused a lower ranking on job bids. Absent the disciplinary action, Complainant would most likely have enjoyed a higher ranking on the vehicle operator roster for the Track Department.
- Complainant's record shows his termination was reduced to a suspension without pay. The disciplinary record prevents craft transfers and promotions.

[2] In January of 2009, Complainant was bumped back to the Trackman position at a lower rate of pay.

- According to Respondent's attendance policy the absences associated with the on the job injury will be counted against Complainant when assessing Complainant's attendance record. Unsatisfactory attendance renders an employee ineligible for job transfers and/or promotions.
- Respondent considers a reported injury when determining if an employee is eligible for a transfer or promotion. In reporting his injury, Complainant has become ineligible for job transfers and/or promotions.
- Respondent failed to include Complainant in the November 2008 Boom Truck Certification Training Class affecting his rate of pay and seniority.
- Respondent's failure to include Complainant in the November 2008 Boom Truck Certification Training Class caused Complainant to be bumped back to trackman in January of 2009 affecting his rate of pay.

Respondent has asserted that 1) Complainant was disciplined for violating company policy when he failed to see to it that his feet were in a safe place prior to releasing the trigger on the jack; 2) Complainant failed to use the jack properly and in a safe manner; 3) Complainant was mistakenly left off the roster for the November 2008 Boom Truck Certification Training Class and that no less senior employee was awarded a bid for a boom truck position; 4) Complainant elected his remedy under the RLA when he appealed his discipline to the Labor Relations Department which resulted in the discipline being reduced to a suspension with time served. Furthermore, Respondent contends that in voluntarily making payment to Complainant for lost wages from June 17, 2008 through August 5, 2008 plus interest, it made Complainant whole.

Respondent asserts that Complainant was disciplined for violating company policy when he failed to see to it that his feet were in a safe place prior to releasing the trigger on the jack despite the fact that all witnesses testified at the hearing that the lighting was malfunctioning and may not have been working at the time of injury. It was further established at the hearing that Pellegrino had observed Complainant operate the jack and perform the task only once before he walked away with the flashlight, demonstrating very poor judgment in light of Complainant and Carmosino's lack of experience. Carmosino affirmed that Complainant operated the jack in the same manner as they had been taught at their orientation class. During Pellegrino's observation, when Complainant lowered the jack all at once, he never pointed out that the method was unsafe or violated a safety rule. Pellegrino's actions confirm that the employees are instructed to release the jack all at once rather than notch by notch. Pelligrino was not assessed discipline for permitting Complainant to work in an unsafe manner. Additionally, Respondent did not affirm any violations of safety rules when they issued the Notice of Discipline.

Respondent asserts that Complainant was mistakenly left out of the November 2008 boom truck class and was later included in the March 2009 class. Respondent does not dispute that Complainant and his foreman in Stamford, CT filed the application for the class in a timely fashion and that Complainant was eligible to attend the class. But Respondent's actions delayed Complainant's eligibility for boom truck jobs by four months, further hampering Complainant's seniority ranking and wage potential. Although it is impossible to discern if Complainant would have passed the exam in November since he did not pass the exam in March, Respondent must have viewed the 10 out of 25 failures as skewed in some way because they scheduled a retake. The results are unknown. Respondent's initial dismissal of Complainant in June of 2008 triggered a series of events including the adverse effect on Complainant's seniority ranking. Absent the discriminatory dismissal it appears the cumulative consequences would have been significantly less or possibly none at all.

Finally, Respondent asserts that Complainant elected his remedy under the RLA when he appealed his discipline to the Labor Relations Department. Complainant did not appeal the decision reached by the

Labor Relations Department and therefore, did not pursue the full election of remedy afforded him by Federal law.

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. 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 actions 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 April 22, 2008 incident.

Respondent shall demonstrate that it made payment to Complainant for back wages in the gross amount of $5,253.96.

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

Respondent shall adjust Complainant's seniority on all rosters to reflect uninterrupted time in service and give Complainant the ranking of other employee's who started their employment on or about January 22, 2008, and successfully bid for truck operator positions between December 22, 2008 and August 15, 2008.

Respondent shall restore all lost sick days resulting from the June 17, 2008 dismissal.

Respondent shall make payment to Complainant for two unpaid sick days on October 7, 2008 and October 14, 2008.

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

Respondent shall amend its Attendance Policy so that sick leave attributed 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 promotion so that the reporting of an occupational injury or illness shall not be considered when assessing requests for craft transfers or requests for promotion.

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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 the "FRSA Fact Sheet" and the "Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry" included with the Order.

Respondent shall pay Complainant's reasonable attorney's fees.

Respondent shall pay compensatory damages to Complainant 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 Respondent's intimidation and harassment of Complainant following the reporting of his occupational injury.

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
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