U.S. Department of Labor

Occupational Safety and Health Administration
450 Main Street Room 613
Hartford, CT 06103
Telephone (860) 240-3154
Fax (860) 240-3155

January 4, 2011

Sofia C. Hubscher, Deputy General Counsel
Metro-North Commuter Railroad Co.
347 Madison Avenue, 19th Floor
New York, NY 10017-3739

Via U.P.S. # 1ZX104980194671831

RE: Metro-North Commuter Railroad Co./Blocker/1-0080-09-003

Dear Ms. Hubscher:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Terrence Blocker (Complainant) against Metro-North Commuter Railroad Company (Respondent) on November 13, 2008, and amended on January 7, 2009, under the employee protection provisions of 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. Law No. 110-53. In brief, Complainant claims that Respondent retaliated against him for reporting an on the job injury which occurred on July 27, 2008, and that Respondent retaliated against him again for making a FRSA complaint to OSHA on November 13, 2008.

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 I, finds that there is reasonable cause to believe that Respondent violated FRSA by retaliating against Complainant for making the November 13, 2008 complaint to OSHA and issues the following findings:

Secretary's Findings

Respondent is a suburban commuter rail service that is a subsidiary of the Metropolitan Transportation Authority (MTA), an authority of New York State. Respondent runs service between 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, parts of New Jersey. Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102.

Complainant began working for Respondent as a track worker in 2003 and is a member of the National Conference of Firemen and Oilers. During the relevant period of time, Complainant was assigned to the New Haven, Connecticut yard and provided laborer services working the 4:00 p.m. to midnight shift in the Maintenance Shop (also referred to as the MU Shop). John Hogan and Frank Schweithelm are the facilities directors for this location. Complainant's supervisor is John Rienzo, a tool shop superintendent,

and his foreman is Sean Garvey. Complainant is an employee within the meaning of 49 U.S.C. § 20109.

On August 25, 2008, Respondent served a notice of disciplinary charges on Complainant. On November 4, 2008, Respondent assessed a 10-day suspension against Complainant arising from those charges. On November 13, 2008, Complainant filed his FRSA complaint with OSHA alleging that the suspension was unlawful retaliation. Respondent then served a second notice of disciplinary charges on Complainant. On January 7, 2009, Complainant filed an amendment to his FRSA complaint with OSHA alleging that Respondent further retaliated against him for filing the initial complaint. As the complaint and amendment to the complaint were filed within 180 days of the alleged adverse actions, they are deemed timely.

Complainant was injured on the job on July 27, 2008, when he was operating a shuttle wagon machine in the New Haven Metro-North Shop. The shuttle wagon is a piece of equipment which can operate on rubber tires or on rails, and is used to move rail cars in and out of the shop building. Complainant stated that he lined up the vehicle with the rails as he was trained and then, using four inspection mirrors in the cab which cover each of the four steel rail wheels, engaged the steel wheels on the tracks and got four green contact lights in the cab showing that the wheels were in contact with the rails. Complainant also performed his own safety check which entailed driving the vehicle forward for about 10 feet and backward about 10 feet prior to going forward to ensure it was on the track correctly. Complainant was observed placing the shuttle wagon on the rails of track #3 by Foremen Garvey and Ed Dudek, who both believed the vehicle was placed on the rail correctly, but both were approximately 80 feet away from the vehicle inside the building watching it come inside.

Complainant moved the vehicle approximately 50 feet with the high rail trolley wheels engaged on the flange on the track. When Complainant moved the vehicle approximately 20 feet inside the shop, the right front high rail wheel of the shuttle wagon started rising up from the rail and the machine started to tip to the left. Garvey observed the wheel come off the track and yelled over his radio for Complainant to stop the vehicle, which he did, but it was too late, and the vehicle tipped over into a repair pit with Complainant inside.

After the accident, Garvey, Dudek, and Rienzo ran over and assisted in removing Complainant from the vehicle. All three supervisors stated that they asked Complainant if he was injured and he stated, "No, but I'm a little shook up." Rienzo then took Complainant to his office and had him sit down as he was still shaken from the accident. Rienzo again asked Complainant if he was injured and needed to go the hospital, and Complainant again stated that he didn't think he was injured. Rienzo allowed Complainant to stay in his office to settle down, and Rienzo went to the accident area and taped off the area with caution tape to keep other employees out of the area until the machine could be safely righted. Rienzo then called Schweithelm, his supervisor and the Assistant Facilities Director of the Tool Shop, and informed him of the accident. Schweithelm asked if Complainant had been injured, and Rienzo told him "No." Schweithelm told Rienzo to keep employees out of the area and they would handle the problem in the morning. Schweithelm then called Hogan, the Facilities Director of the Tool Shop, and relayed the information given to him. Hogan also asked if Complainant had been injured and was told "No." Hogan agreed there was nothing else that needed to done and the problem could be handled in the morning.

The next morning, Monday, July 28, 2008, Mike Gagliardi, a tool shop superintendent, and Rienzo conducted an investigation into the accident. They did not complete a formal, written accident report

because they contend that it was not considered a reportable accident under Respondent's accident reporting rules, as no injury had occurred, and since the shuttle wagon is considered a piece of work equipment and the accident occurred off of the main railway line. Rienzo and Gagliardi inspected the tracks leading to the MU Shop and found no debris or track defects that they felt could have caused the shuttle wagon to derail. Gagliardi took digital photos of the accident scene, the shuttle wagon and the condition of the tracks. Gagliardi also arranged for a company crane to come up from White Plains, New York to right the shuttle wagon, and called the shuttle wagon vendor (Dependable Service) to come out after it was righted to inspect the damage and repair the machine. The machine suffered about $12,000 in damages as a result of the accident. Gagliardi also called Respondent's rail department and had the rail lines leading into the building inspected for defects or damage. None were found.

After completing the initial inspection, confirming through the vendor that the shuttle wagon did not have any defects that could have caused the accident, and finding that the tracks were not defective and had no debris on them that could have derailed the vehicle, Gagliardi and Rienzo determined that the vehicle was not initially placed on the rail tracks correctly. This was determined by damage to the concrete next to the rail tracks where Complainant lowered the steel wheels onto the rails. The concrete was marked where the rail wheels were initially lowered; they cut into the concrete on the right side of the train tracks. Gagliardi and Rienzo stated that had they been placed properly on the rails they would not have touched the concrete as a flange on the tracks would have locked them in place and not allowed them to leave the rails. It was also noted that the shuttle wagon was brand new and had been delivered approximately two weeks prior to the accident. As it was still new, the paint from the rail wheels transferred onto the concrete along the tracks showing that the wheels were not placed on the tracks correctly. The photos taken by Gagliardi confirmed this determination. Hogan and Schweithelm also inspected the tracks and the machine and also saw the photos taken by Gagliardi and agreed with the conclusion that the vehicle had not been placed on the tracks correctly when Complainant initially engaged the wheels, and as the shuttle wagon proceeded down the tracks toward the MU Shop, the right front steel wheel gradually rode off of the rail, causing the left front wheel to move off of its rail and the vehicle tipped to the left as it entered the building and the inspection pit.

On July 28, 2008, Complainant reported for work and claims that he told Foreman Garvey that he was feeling stiff and sore from the accident and that he had a small cut on his forehead. Garvey testified in both of Complainant's later trials and denied that Complainant ever mentioned any injury of any type.

On July 30, 2008, Complainant was still feeling stiff and sore and went to an orthopedist, Dr. Phillip Luchini. After examining Complainant, Dr. Luchini completed an initial examination/evaluation letter which stated in part that Complainant had been injured on July 27, 2008 when a piece of equipment he was operating derailed and fell into a pit. Complainant was diagnosed with a sprain of the cervical spine and the lumbar spine and a sprain in the right shoulder. He was prescribed Motrin for pain.

Dr. Luchini sent a copy of his initial examination/evaluation letter to Dr. Robert Reddon, M.D. (Complainant's primary physician) and Respondent. Luchini later stated in a letter dated January 22, 2009, that he mailed the letter to Respondent's Claims Department located at 341 Madison Avenue, 11th Floor, New York, NY 10017, and that he routinely mails reports to Respondent when he sees an injured employee.

Complainant stated that he had never had an on the job injury while working for Respondent, and stated

that at the time of the accident he did not know what Respondent's accident reporting procedures were, and that he assumed that an accident report had been completed after the accident by one of the supervisors on duty that day. Near the end of July or early August 2008 he spoke with another Foreman, Jimmy Solomine, and asked him for a copy of the accident report form regarding the July 27 accident because he had hurt his shoulder and back during the accident. Solomine told Complainant that he didn't know where the report was or if one was done, and told Complainant that he would ask Rienzo (who was on vacation) when he returned. During Complainant's second trial Solomine testified that he recalled Complainant asking about getting a copy of the report and stating that his back and toe were hurting him but denied that Complainant told him it was due to the shuttle wagon accident. Solomine stated that he asked Rienzo, and Rienzo told him there was no accident report as no injury had been reported. Complainant claimed that after Rienzo returned from vacation he asked him about getting a copy of the accident report and that Rienzo was busy and said he'd look into it later. Rienzo denied ever having such a conversation with Complainant.

Complainant went back to Dr. Luchini on August 25, 2008 for his scheduled follow up appointment. After the exam Dr. Luchini completed another letter, and he mailed a copy of that letter to Respondent's claims department. Luchini recommended physical therapy, and Complainant was scheduled for physical therapy on September 10, 2008, September 11, 2008, and October 7, 2008. He was given appointment cards. Complainant went to the initial appointment on September 10, 2008. He had an ultrasound conducted on September 25, 2008 and then did not show up for the appointment scheduled for October 7, 2008; this was due to the fact that he discovered that Respondent would not pay for the medical expenses as no accident report was filed, and he would have to use his private insurance to pay for the treatment of the injury.

On August 25, 2008, Hogan discussed the results of the shuttle wagon accident investigation with Gagliardi, Rienzo and Schweithelm and based on the evidence collected he decided that Complainant had improperly operated the shuttle wagon and caused the accident. Respondent sent a notice of intent to conduct a trial on disciplinary charges to Complainant in accordance with the union collective bargaining agreement (CBA). The trial date was set for August 26, 2008. The purpose of the trial was to determine Complainant's responsibility, if any, in connection with the charge of: "Failure to properly operate shuttle wagon in a safe manner on Sunday, July 27, 2008 at approximately 10:00 p.m. in the MU Shop, New Haven, CT, by not ensuring the high-rail wheels were properly placed on the rail of track #3 west, New Haven M.U. shop, resulting in a derailment of the shuttle wagon and causing damage to same." The trial was later postponed to October 20, 2008. Hogan later stated during his OSHA interview that he determined that Complainant was at fault for the accident because he had failed to get out of the vehicle and do a walk around of the vehicle to physically check to see if the wheels were engaged as described in Respondent's shuttle Wagon operating procedure. A copy of that procedure dated May 30, 2008 clearly states on page 3, "*Before operating the Shuttle wagon do walk around inspection verifying unit and equipment is safe to move.*" Gagliardi stated during his OSHA interview that he was trained to put the shuttle wagon on the track using only the mirrors as Complainant had done. The manufacturer's operators' manual states that the vehicle is to be placed on the track using the mirrors and does not mention a walk around. Respondent initiated its own enhanced procedure after several shuttle wagon derailments and implemented the requirement to do a visual walk around inspection in order to prevent further accidents.

Complainant was given an opportunity to accept a reduced charge if he pleaded guilty to the charges.

Complainant was offered a five day suspension "off the books," meaning that if he had no other disciplinary actions within the next year the suspension would be expunged, and he would not be suspended without pay for five days. Complainant refused to plead guilty and requested a trial in accordance with the CBA. There had been two recent derailments involving shuttle wagons prior to Complainant's accident, and one accident after Complainant's accident. In January 2008, an employee derailed a shuttle wagon and tipped it into the pit in a fashion similar to Complainant's accident, but it was determined that ice had formed over the tracks and caused the derailment. In February 2008, another shuttle wagon had one wheel derail prior to entering the MU Shop, and the error was corrected and the equipment was placed back on the rail without any damage. In November 2008, another operator derailed a shuttle wagon and tipped it into the pit. The first two operators did not receive any disciplinary actions because one accident was caused by ice and the other incident was corrected prior to any damage being done. The operator involved in the November accident was notified of Respondent's intent to charge him with unsafe operation of the shuttle wagon, and he elected to plead guilty in lieu of going to trial and was given a five day unpaid suspension by Respondent. None of the other operators involved suffered or reported any injuries.

On October 20, 2008, Complainant's trial was conducted. Complainant was represented by Vinnie Ruffolo, his union representative. Complainant, Rienzo, Gagliardi and Garvey testified in that trial which was conducted by Ms. Lisa Schieferstein, who is the designated hearing officer for the New Haven line. According to the trial transcript, during this trial nothing was mentioned regarding non-reporting of any injury by Complainant to Respondent or its managers. Complainant testified that he did not mention that he had been injured as a result of the accident.

After the trial, Hogan, Schweithelm and Gagliardi reviewed the transcript and mutually decided that Complainant was guilty of unsafely operating the shuttle wagon, and determined that a 10-day suspension was the proper discipline to be imposed for the offense, as someone could have gotten severely hurt due to Complainant's carelessness. A notification letter was sent to Complainant dated November 4, 2008 stating that Complainant was found guilty and given a 10-day suspension without pay.

On November 12, 2008, Complainant's attorney Charles Goetsch sent Respondent a letter notifying it of the legal need to hold documents as he was representing Complainant in his "claim for damages arising out of his accident of July 27, 2008 in M2 Shop in New Haven, while employed by the Metro North as a laborer." Attorney Goetsch requested that someone from Respondent's claims department contact him to arrange for the exchange of relevant information and documents. The letter was sent to Dean LoGiudice, the Director of Respondent's claims department, at 347 Madison Ave, 15th Floor, New York NY, 10017.

On November 13, 2008, Attorney Goetsch filed the instant complaint on behalf of Complainant. Respondent received the certified notice of the FRSA complaint on November 24, 2008.

On December 1, 2008, Hogan was notified of the FRSA complaint by his supervisor, Bill Duke, who was the Vice President of Mechanical Operations at that time. Hogan stated that it was the first time he had heard of an injury involving Complainant and he began looking for Complainant's accident report. Hogan checked with the Medical and Claims departments and both stated they had no record of any reported injury by Complainant. Hogan stated that the claims department had a copy of the letter sent by Attorney Goetsch on November 12, 2008 and nothing else. Hogan checked with Garvey, Dudek, Rienzo

and Gagliardi, and all stated that Complainant had not reported an injury to them.

On December 19, 2008, Respondent prepared a notice of intent to conduct another trial ("trial notice") against Complainant on the following charges: "Your actions are considered Conduct Unbecoming a Metro-North employee in that you filed a false statement in your complaint to U.S. Department of Labor, Occupational Safety and Health Administration claiming violations of the Federal Rail Safety Act in November 2008. The complainant alleges retaliatory employment practices for disciplinary actions initiated by Metro-North pertaining to your unsafe operation of a shuttle wagon. You failed to report any injuries as alleged in the complaint. Furthermore, you failed to submit any medical evidence to substantiate such alleged injury to Metro-North. Therefore, you are charged with the following: 1) Conduct Unbecoming a Metro-North employee 2) Violation of Rule 200.4 of the General Safety Instructions (Reporting and Investigation of Employee and Non-Employee Injuries)." Complainant did not receive the notice until January 6, 2009.[1]

On January 7, 2009, Complainant amended his initial FRSA complaint filed with OSHA to include the further allegation of retaliation by Respondent with respect to the "trial notice" he received on January 6, 2009. Complainant claimed in his amended complaint that Respondent was retaliating against him for exercising his rights and filing a complaint under FRSA. The amended complaint was sent via certified mail to Respondent's General Counsel. It was received at the General Counsel's office on January 26, 2009.

On January 27, 2009, Respondent gave Complainant a letter notifying him that the charge of filing a false statement to the USDOL/OSHA claiming a violation of FRSA was dropped from the trial notice dated December 19, 2008. The letter was signed on behalf of John Hogan by Kathy Oles. The charges were changed to read, "You failed to report to any Metro-North Officer any injuries as alleged in your complaint to the U.S. Department of Labor, Occupational Safety and Health Administration. You further failed to submit any medical evidence to substantiate such a claim to Metro-North. Therefore you are charged with the following: 1) Conduct Unbecoming a Metro-North employee. 2) Violation of rule 200.4 of the General Safety Instructions (Reporting and Investigation of Employee and Non-Employee injuries)." The removal of those charges occurred one day after Complainant's amended FRSA complaint was received by Respondent's General Counsel.

During Hogan's OSHA interview, he was asked why he decided to drop the charge of making a false statement to the USDOL/OSHA, and he stated: "After reflecting on what the trial charges said and as far as the issue with the Department of Labor and the false claim, it was felt that that was not for us to decide, that doesn't rest in our realm and what we shouldn't do was we tell the Department of Labor how to do their business, that would be part of their investigation since this was a formal investigation, to pursue, so it was to be stricken from it, because we had no. I didn't feel at that point that after reflecting on it we had any grounds to do that." Hogan was asked what the difference was between the wording of the new charge as compared to the old charge. He stated, "The only difference is we dropped the whole first, we deleted that whole first paragraph about the reference to the Department of Labor and that, as far as we were concerned his filing a complaint of injury or our first knowledge of his injury was something we needed to pursue or at least look into and have a trial on that to determine if there was one

[1] A January 2, 2009 letter from Respondent to Complainant postponing his trial contained the same iteration of the charges against him. Complainant received this letter on January 6, 2009.

that we weren't made aware of and to follow up on our policies that say if you are injured you have an obligation to tell us you are injured."

Respondent conducted the trial on February 3, 2009. At the beginning of the trial, the hearing officer, Lisa Schieferstein, entered the original charges into the record as well as the letter from Hogan dismissing the charge of filing a false complaint with the U.S. Department of Labor/OSHA, and the revised charges issued by Hogan. Complainant's union representative, James Farrigan, informed Schieferstein that he objected to the trial and informed her that the charges were inaccurate at best, and he asked to enter into evidence the letters from Dr. Luchini and the letter from Attorney Goetsch that were sent to Respondent's claims department. Farrigan also argued that Respondent violated the thirty day time limit rule of imposing discipline under the CBA, as the charges were filed on December 19, 2008 and the accident in question happened in July 2008, well over thirty days prior to the charges being filed. Farrigan also stated that the current disciplinary charges against Complainant resulted from Respondent receiving the FRSA whistleblower complaint, and that but for the filing of that FRSA whistleblower complaint, the current discipline would not be happening. Schieferstein noted Farrigan's objections and admitted his evidence and informed him that due to the severity of the charge she was going forward with the trial and that the appropriate reviewing officer would make a decision in the case.

According to Hogan, he called Schieferstein prior to the start of the trial to ensure that she did not investigate the charge of making a false statement to the USDOL/OSHA and told her that she should concentrate her investigation on whether or not Complainant had reported any injuries.

During the trial Hogan, Complainant, Rienzo, Dudek, Garvey, Solomine and Mary Walsh from Respondent's claims department testified. Hogan testified first, and he recounted the events surrounding the July shuttle wagon accident. He then described his conversation with Bill Duke in December 2008 after Complainant's FRSA complaint had been received by Respondent and testified that it was the first time he had become aware of an injury or an alleged injury from the July accident. Hogan recalled checking with the claims and medical departments, and stated that Respondent's legal department had provided him with a copy of the letter sent to the claims department by Attorney Goetsch on November 12, 2008. Hogan also stated that he was provided with copies of the letters from Dr. Luchini regarding treatment of Complainant (and Hogan acknowledged that Respondent was copied at the bottom of the letters) and the DOL/OSHA FRSA complaint. Hogan stated that he received copies of the letters approximately two weeks prior to the date of the trial[2]. Hogan stated that in his past experience he had received letters from employees' personal physicians regarding workers compensation claims, and he stated that when he read the letter from Dr. Luchini he noted that he saw the initials WC, which to him indicated possible workers compensation, which was why he called the medical and claims departments looking for a copy of the letter and/or an injury report, and was told by both that none existed.

On February 12, 2009, Complainant received a letter from Respondent that contained a G-32 Notice of Discipline dated February 12, 2009 and issued in connection with the February 3 trial. The cover letter had Schweithelm's signature on it – which signature was annotated with the initials "CC" next to it, indicating that his Secretary Carmella Cofrancesco signed it on his behalf. The Notice of Discipline stated:

[2] The FRSA complaint received by Respondent on January 26, 2009, included copies of the Luchini and Goetsch letters.

> **OUTLINE OF OFFENSE:** Your actions are considered Conduct unbecoming a Metro-North employee in that you filed a false statement in your complaint to the U.S. Department of Labor, Occupational Safety and Health Administration claiming violations of the Federal Rail Safety Act in November 2008. The complainant alleges retaliatory employment practices for disciplinary actions initiated by Metro-North pertaining to your unsafe operation of a shuttle wagon. You failed to report any injuries as alleged in the complaint, Furthermore you failed to submit any medical evidence to substantiate such alleged injury to Metro-North, therefore you are charged with the following. 1) Conduct Unbecoming a Metro-North employee 2) Violation of rule 200.4 of the General Safety Instructions (Reporting and Investigation of Employee and Non-Employee Injuries).

The Notice of Discipline provided that Complainant would receive an actual suspension of 30 days as discipline for the offense. The Notice of Discipline also had Schweithelm's signature and had been signed on his behalf by his secretary.

When interviewed by OSHA and asked why the charge of making a false statement to the USDOL/OSHA was included in the Notice of Discipline after both had been aware that the charge was to be dropped, both Hogan and Schweithelm stated that it was the result of a clerical error by their respective secretarial staff, that they had no knowledge at the time the Notice of Discipline was issued that the charge was included, and that a secretary had signed the Notice of Discipline for Schweithelm. However, OSHA's investigation indicates that Respondent's procedure was for the superintendent (in this case Schweithelm) to specify to the secretarial staff the charges to be included in the Notice of Discipline and that Schweithelm would have had the opportunity and responsibility to review the document before personally delivering it to the Complainant.

On March 23, 2009, Respondent sent Complainant a letter dismissing the 30-day suspension. The letter was signed by George Walker, the Senior Vice President of Operations. The letter stated in its entirety: "This is to notify you that I am directing the 30-day suspension assessed on February 12, 2009 be expunged from your record. Sincerely Yours, George Walker." Complainant never served the suspension.

Hogan was interviewed and asked if he was involved in the decision to dismiss the 30-day suspension, and he stated that Mr. Walker had made the decision. He added, "I know we did have discussion about the charges as far as that paragraph getting put back into the you know assessment of discipline and stuff, knew it was an error, and it probably not in our best interest and that may have you know caused him to, you know, do that" (dismiss the charges).

No Reasonable Cause to Believe that Respondent Retaliated against Complainant for Reporting Injury

The first trial found Complainant guilty of failing to operate the Shuttle Wagon correctly (resulting in an accident), and he was issued a 10-day suspension as a result of the trial. No injuries or failure to report any injuries were discussed during the first trial. The physical evidence and the witness testimony supported Respondent's decision. Complainant failed to follow Respondent's written procedures for operation of the shuttle wagon, which included exiting the vehicle prior to operating it on the tracks to ensure the steel wheels are properly connected to the track. Regardless of past practice by himself and

other employees where they used only mirrors to align the vehicle on the tracks, Respondent had a written procedure in effect prior to that accident, and Complainant violated that procedure. The shuttle wagon was brand new and was not defective as Complainant claimed, and its condition did not contribute to the accident.

Respondent's Operating Procedure states "Employees must report all injuries to their immediate supervisors promptly after they occur and before seeking medical evaluation and treatment." Complainant followed both the Operating Procedure and the General Safety Instructions. Once he believed he was injured Complainant notified his foreman and then sought to get a report filed or get a copy of the accident report that he thought existed. Complainant could not report an injury until he had perceived that he was injured.

49 U.S.C. § 20109(a)(4) protects employees who notify the railroad carrier or the Secretary of Transportation of a work-related personal injury. A preponderance of evidence indicates that Complainant notified Foreman Jimmy Solomine of his injury in late July or early august of 2008. Furthermore, a preponderance of evidence indicates that Complainant's doctor mailed information to Respondent regarding Complainant's injury. However, there is no evidence that Complainant's supervisors considered this information in their decision to bring disciplinary charges against Complainant on August 25, 2008. Further, it appears that in one recent instance, a similarly situated employee was disciplined for a similar incident in which no injury was reported. Therefore, OSHA finds that Respondent did not violate FRSA when it issued the November 4, 2008 discipline against Complainant.

Reasonable Cause to Believe that Respondent Retaliated against Complainant for FRSA Complaint

Complainant engaged in protected activity when he filed the FRSA complaint, and Respondent was made aware of this protected activity on November 24, 2008. On December 19, 2008, Respondent took adverse action against Complainant by bringing disciplinary charges against him, including the charge of "Conduct Unbecoming a Metro-North employee in that you filed a false statement in your complaint to U.S. Department of Labor, Occupational Safety and Health Administration claiming violations of the Federal Rail Safety Act in November 2008." Thus, Complainant's filing of the FRSA complaint was at least a contributing factor to this adverse action and the adverse action that followed (the trial on the charges, the guilty finding, and the 30-day suspension).

OSHA finds that the charges brought on December 19, 2008, the February 3, 2009 trial on those charges, and the guilty finding and the 30-day suspension issued on February 12, 2009 were adverse actions against Complainant, notwithstanding subsequent efforts to drop the charge of filing a false statement with OSHA and to expunge the suspension. The acts of bringing disciplinary charges and instituting trial proceedings against an employee for filing a complaint with OSHA and accusing the employee of lying to OSHA in those charges and proceedings have a chilling effect on Respondent's employees and would tend to dissuade others from asserting their rights under FRSA. Even if the charge is later dropped, that does not remedy this chilling effect, as the act of bringing the charge against an employee undermines all of Respondent's employees' willingness and ability to exercise their most basic rights under FRSA. Moreover, the evidence shows that the dropped charge was nonetheless read into the record at Complainant's trial and included in the Notice of Discipline to him following the trial. The charge was not, in fact, dropped. Respondent's effort to blame its secretaries for this is not persuasive.

Respondent's supervisors are responsible for the content of notices of discipline, put their names on the notices, are supposed to review them after they are prepared by the secretaries, and personally deliver the notices (giving supervisors every opportunity to review them). And the fact that the 30-day suspension imposed was never served by Complainant does not demonstrate that there was no adverse action. Again, instituting disciplinary proceedings for filing a complaint with OSHA, accusing the employee of lying to OSHA, conducting a trial on the charges, and imposing a suspension all have a chilling effect on Respondent's employees and would tend to dissuade others from asserting their rights under FRSA.

The evidence supports a finding that there was a causal connection between Complainant's FRSA complaint and the subsequent adverse action. First, Respondent instituted the adverse action against Complainant a mere few weeks after learning of his protected activity. The brief time between the protected activity and the adverse action raises an inference of causation. Second, Hogan testified that, when he was informed of Complainant's FRSA complaint on December 1, 2008, he began investigating Complainant as a result – which investigation directly led to the adverse action. And third, the written disciplinary charges specifically mentioned Complainant's FRSA complaint and specifically stated that he would be subject to discipline because he "filed a false statement in your complaint to the U.S. Department of Labor, Occupational Safety and Health Administration claiming violations of the Federal Rail Safety Act in November 2008." The disciplinary charges, on their face, connect Complainant's discipline to his filing the FRSA complaint. Therefore, had Complainant not filed an FRSA complaint with OSHA, he would not have been brought up on charges.

OSHA finds that a preponderance of the available evidence indicates that Complainant's filing a FRSA complaint with OSHA was a contributing factor in the adverse actions taken against him. Respondent retaliated against Complainant when it brought disciplinary charges against him in December 2008, subjected him to a trial on the charges, found him guilty, and imposed a suspension.

In addition, Respondent's outrageous behavior and callous disregard for the rights of its employees warrants punitive damages. Respondent's conduct in retaliation against an employee for filing a FRSA complaint with OSHA exhibited reckless disregard for the law and complete indifference to Complainant's rights and the rights of Respondent's other employees. Bringing disciplinary charges against an employee that on their face threaten discipline for claiming violations of FRSA (regardless of whether the charges are later dropped) functions to chill employees from exercising their most basic rights under FRSA. In the present case, not only were charges brought against Complainant and wrongly read into the record at his disciplinary hearing, but also, despite the fact that all involved management officials knew that the charges were to be dropped, Complainant was found guilty. All of the evidence indicates that this was no "administrative error" but that John Hogan and Frank Schweithelm – the management officials most involved in the trial and decision – knew that the charges and subsequent discipline were retaliatory but they allowed it to happen anyway.

Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated FRSA by imposing punishment on an employee because he filed an FRSA complaint.[3] OSHA hereby orders the following to remedy the violation.

---

[3] 49 U.S.C. §20109(a)(3)

Order

Respondent shall expunge all files and computerized data systems of disciplinary actions, and references to disciplinary actions, related to the December 19, 2008 trial notice, the February 3, 2009 trial, and the February 12, 2009 judgment and Notice of Discipline. The expunging shall include, but not be limited to, the 30-day suspension, the notice of formal disciplinary hearing, and any memoranda or letters referencing the disciplinary action.

Respondent shall post the Notice to Employees included with this Order in all locations in Connecticut and New York where notices to employees are customarily posted, as well as on its internal Website.

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 reasonable attorney's fees in the amount of $5,500.

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

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:

All Parties to this Case

Marthe B. Kent
Regional Administrator
U.S. Department of Labor, OSHA
JFK Federal Building, Room E-340
Boston, MA 02203

Michael Mabee
Supervisory Investigator
U.S. Department of Labor, OSHA
450 Main Street, Room 613
Hartford, Connecticut 06103

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 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 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 Title 29, Code of Federal Regulations Part 1982, a copy of which may be obtained at http://www.whistleblowers.gov.

Sincerely,

Michael Mabee
Supervisory Investigator

cc: Charlie Goetsch, Esq. (Via U.P.S. #1ZX104980194982648)
USDOL/OALJ-Chief Administrative Law Judge,
USDOL/SOL-FLS
Federal Railroad Administration