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Reply to the Attention of EP/WPP

August 22, 2011

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

CERTIFIED MAIL # 7010 0290 0003 5632 1351

Re: Union Pacific Railroad Company/Newman/7-4120-10-046

Dear Mr. Hanash:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Carl Newman (Complainant) against Union Pacific Railroad Company (Respondent) under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleges that Respondent pulled him out of service, charged him with rule violations, and permanently dismissed him from service in retaliation for reporting safety concerns on Respondent's safety hotline.

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 VII, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §20109 and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109 and 49 U.S.C. §20102. Respondent provides railroad transportation, in that it transports goods using the general railroad system.

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

Complainant alleges that he suffered adverse actions on September 10 and 13, 2010. On September 29, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of FRSA.

Complainant was dismissed from service on September 30, 2010. On October 28, 2010, he amended his complaint to include his dismissal from service. As both complaints were filed within 180 days of the alleged adverse actions, they are deemed timely.

Complainant served in the United States Marine Corps from 1997 to 2001. His service included tours in Africa, Afghanistan, and Iraq. Complainant, who was honorably discharged, served in the inactive reserves from 2001 to 2005. A recipient of both the Good Conduct and Navy Achievement Medals, he is considered 40 percent disabled after suffering a service-related injury.

Respondent hired Complainant on August 9, 2004. He was a conductor in Respondent's Kansas City Service Unit (KCSU), stationed out of Neff Yard. The superintendent of the KCSU is Dennis Corcoran. The KCSU maintains a safety hotline. On February 13 and 14, 2010, Complainant submitted 165 concerns to the hotline. His concerns, which pertained to various safety hazards at particular milepost locations, were submitted by computer with his name listed by each concern. His concerns involved fall and trip hazards, missing and obstructed roadway signs, and various right-of-way issues. A witness who often worked with Complainant noted that Complainant took safety very seriously, and that Complainant often took note of safety hazards while working in the field.

On or about February 21, 2010, Complainant received a telephone call from Manager of Operating Practice (MOP) Dave O'Hare, who was instructed by Director of Road Operations Kevin Pratt to call Complainant. According to Complainant, O'Hare told him that his name had come up during a conference call in which Corcoran and Pratt accused him of playing games with the hotline and stated that his job would be in jeopardy if he continued to use it. O'Hare noted that while he called Complainant per Respondent's policy of providing a prompt response to those who file a complaint with the hotline, he never discouraged Complainant from using the hotline. A witness, who said he listened to the conversation on speakerphone, confirmed Complainant's account. In addition, at a safety certification class held on or about March 3, 2010, Complainant asked Pratt why his concerns had not yet been addressed. Witnesses noted that Pratt, who had encouraged those in attendance to use the hotline, was taken aback, and that Complainant was serious about the status of his concerns. Pratt would later state that he suspected that Complainant had been playing games with the hotline.

On March 11, 2010, Complainant submitted 148 concerns to the hotline. Like the previously submitted comments, they involved a number of safety-related issues at various milepost locations. Records show that these concerns, like the previous ones, were not resolved before being removed from the system. Pratt stated that Respondent's Chief Compliance Officer told the KCSU that some of the concerns did not involve safety and therefore should not be addressed.

Complainant has a number of tattoos on his body, one of which is located on his right tricep. The tattoo stems from a comment made during Operation Iraqi Freedom by United States Marine Corps General James Mattis. General Mattis is now the Central Commander of the United States Central Command. The tattoo reads, "I come in peace, I don't bring artillery, but I am pleading with you with tears in my eyes; if you fuck with me, I'll kill you all." According to Complainant, he got the tattoo to commemorate his service, but before he was hired by Respondent.

On September 4, 2010, Complainant was on duty in a locomotive with an engineer. MOP Andy Davis was also present to field test the engineer. Davis, without Complainant's knowledge, used his cell phone while the locomotive was in operation to take a picture of Complainant's above-referenced tattoo. On September 5, at 1:10 p.m., Davis sent an email to Pratt with the picture of the tattoo attached. He wrote, "Attached is a snap shot of Mr. Carl Newman's arm. It is hard to read in the picture, so here is what it says (bottom 3 lines): 'If you f*ck with me, I'll kill you all.' Not sure of the complete context, but some might find offensive."

On the morning of September 7, 2010, Complainant submitted 123 more concerns to the hotline. One involved Davis. It states, "On Sunday, 09-04-2010, MOP Andy Davis was not only on his cell phone doing whatever before we departed CPK 009 but when the Advance Approach came up he called out 'Flasher' and also opened the back door to dump a bottle of water and never had his right earplug in. Now, if the company is going to send MOP's out to ride with crews and then have the nerve to FTX us then you might want to start sending people who know the rules. LEAD BY EXAMPLE...if I see you on a phone then I guess that means I can just get on mine, if I hear you call out a flasher then I guess it's alright for me to do so, if I see you open a door with no hearing protection then I guess it's ok for me to do so. Why even have a rule book?" That evening, Pratt emailed Corcoran. He wrote, "If this is a go.....would like [Labor Relations] to write the original caption. Please." Corcoran later wrote that Pratt's email was "regarding the decision to send out a notice of investigation for CA Newman."

Respondent's Critical Incident Team, which meets to discuss possible violations of the company's workplace violence policy, met on September 10, 2010, to discuss Complainant's tattoo. Jackie Keenan and Alan Weed, both members of the team, noted that the committee was aware of Complainant's hotline complaints. Weed noted that the complaints were discussed to determine what they might indicate about Complainant's personality. After the meeting, at 4:34 p.m., Keenan sent the following email: "I did talk with Denis Corcoran this afternoon and advised the following: (1) Prepare [Notice of Investigation] for 1.6 violation. (2) Ask [Complainant] for a meeting with Denis and Kevin Pratt: Ask questions to enhance understanding related to the tattoo. Explain the tattoo is an issue and is against company policy, so an investigation is required. (3) Ensure a special agent is nearby during discussion. (4) Have [Complainant] out of service, off property until investigation. (5) Hold investigation off property and ensure it is recorded. Denis was very receptive to this and did not appear uneasy about the informal conversation, he agreed to proceed by this recommendation."

At 4:43 p.m., Davis wrote in an email, "Mr. Newman is to be removed from service immediately. Employee is to report to Superintendent office Monday September 13 at 0700, 6455 Commerce Ave Kansas City, MO. Employee is not to mark up until meeting with Superintendent. Per DRO Pratt."

Pratt followed up with an email on September 12, 2010, writing, "Will meet with Mr. Newman Monday morning to discuss and officially notify of his status. Imperative that we have the caption for notice of investigation completed and sent on the same day. Time constraints. To my knowledge, Mr. Weed (LR) is providing the wording."

On September 13, 2010, Complainant and his union representative arrived at Corcoran's office for the meeting. Complainant, unknown to Corcoran and Pratt, recorded it. Respondent, despite its assertions to the contrary, did not give Complainant the option of keeping the tattoo covered up. At the outset, in accordance with Keenan's above email, Corcoran informed Complainant that he would be escorted off the property, charged with a Level 5 rule violation, and subject to a formal investigation because of his tattoo. Corcoran told Complainant that tattoos "aren't really permanent." Complainant, who told Corcoran that his tattoos were related to his military service, asked Corcoran how he knew about the tattoo. Corcoran informed him that he had a picture of it. Complainant accused Corcoran of retaliating against him for his hotline complaints. Corcoran replied, "That's what you think it is?" Shortly thereafter, the meeting ended. A company police officer then collected Complainant's work belongings and escorted him off the property.

After the meeting, Complainant was issued the Notice of Investigation letter. The charging officer on the letter was Davis. It instructed Complainant to attend an investigation "into the charge that you have allegedly created a potentially threatening work environment by displaying a tattoo bearing highly offensive language." The letter charged Complainant with violating General Code of Operating Rule 1.6, which governs conduct in the workplace, and Respondent's workplace violence policy. Complainant, if found in violation, would be issued Level 5 discipline, which is permanent dismissal from the railroad. Complainant had no prior record of discipline or complaints from co-workers or management related to anything, let alone abusive or threatening behavior in the workplace.

On September 20, 2010, Weed wrote the following email: "Even with the context of the tattoo understood, its presence in the workplace remains (in my view) as unacceptable and I still want to know what extent Newman views the statement as some sort of personal credo. At the end of the day, if we're satisfied that he's not a threat then covering up the tattoo while at work or on company property feels like a reasonable place to land." Complainant's formal investigation was held on September 20, 2010. Respondent had a company police officer present during the proceeding. Pratt and Davis appeared as witnesses. Davis said he took no issue with Complainant's work performance, attire, or behavior on the night that he took a picture of the tattoo. Pratt, who said he never instructed anyone to target Complainant, noted that it would be fine for Complainant to keep the tattoo covered up with a long-sleeve shirt. Complainant, who said he was not given this option before the charges were issued, blamed the whole ordeal on his hotline complaints, citing his conversation with O'Hare back in February. Complainant reiterated that he had no problem with keeping the tattoo covered up at all times while on duty.

Nevertheless, on September 30, 2010, Complainant was found in violation of the charged rules and permanently dismissed from the railroad. Complainant was offered a leniency agreement on October 8, 2010, which would have allowed him to return to work at Level 3 discipline as long as he agreed to keep the tattoo covered up while on duty. Complainant, unwilling to accept discipline, rejected the offer.

Complainant, based on the foregoing, engaged in protected activity when he reported safety concerns to Respondent's safety hotline on February 13, March 11, and September 7. Most notably, the last set included an allegation that Davis, the charging manager in the charges brought against Complainant, committed safety violations during his ride along with Complainant and his engineer. As stated above, witness testimony indicates that Complainant cared deeply about safety in the workplace.

Management in the KCSU had direct knowledge of Complainant's protected activity. Complainant's hotline complaints were submitted by computer under his own name. Moreover, the ten-member Critical Incident Team had direct knowledge of the complaints. Testimony from two of the members indicates that the complaints came up during the team's discussions, even though Complainant had no prior history of abusive or violent behavior in the workplace.

Complainant experienced three adverse actions. The first took place on September 10 when Respondent removed him from service pending a meeting with Corcoran. The second took place on September 13 when Respondent issued him a charging letter, alleging that Complainant's tattoo was in violation of Rule 1.6 and the workplace violence policy, both of which are Level 5 offenses. The third took place on September 30 when Respondent permanently removed Complainant from service after finding him in violation of the charged rules.

A preponderance of the evidence indicates that Complainant's protected activities were a contributing factor in the adverse actions. There is close temporal proximity between the protected activities and the adverse actions. Complainant, for example, submitted his last set of hotline complaints, which included the complaint about Davis, some time during the morning of September 7. That evening, Pratt emailed Corcoran about issuing Complainant a Notice of Investigation letter. Three days later, Complainant was removed from service. Shortly thereafter, Respondent issued Complainant a Notice of Investigation letter with Davis listed as the charging manager. These charges resulted in Complainant's permanent removal from service.

There is also evidence of animus on the part of Respondent toward Complainant's protected activities. Complainant, for example, had no prior discipline before Respondent charged him with Level 5 rule violations on September 13. A Level 5 rule violation, which is the equivalent of permanent dismissal, is the most severe form of discipline under Respondent's progressive discipline policy. It was not until after Complainant started to use the hotline that Complainant was charged with rule violations.

In addition, a witness confirmed Complainant's account of his telephone conversation with O'Hare, in which Complainant and the witness stated that O'Hare told Complainant that Corcoran and Pratt were not pleased with his hotline complaints, and that Complainant's job would be in peril if he continued to use the hotline. The lack of resolution on Complainant's hotline complaints is more evidence of animus toward Complainant's protected activities, as is Pratt accusing Complainant of playing games with the hotline.

Moreover, Complainant's tattoo- which he said he had before he was hired- did not become an issue until after he engaged in protected activity. Complainant was field tested by various managers throughout his career. Some of these tests took place during the summer months, when many of the crew members working inside the locomotives wear t-shirts and other clothing suitable for the warm weather. It is likely that during one of those tests Complainant's tattoo was visible to a manager. No one, however, said anything about it. Further, Corcoran, Pratt, nor Davis talked to Complainant about the tattoo, or sought to find out the context behind it, before placing the disciplinary process in motion.

Respondent claims that Complainant could have avoided discipline had he agreed to cover up the tattoo while on duty. Emails, cited above, indicate otherwise, showing that Respondent did not give Complainant this option before charging and assessing him with discipline. Right at the outset of Complainant's meeting with Corcoran, Corcoran told Complainant that he would be brought up on disciplinary charges, and did not give Complainant the option of keeping the tattoo covered up while on duty. Complainant was not given this option until Respondent presented him with the leniency agreement, even though Weed's email from the day of the investigation noted that covering up the tattoo "feels like a reasonable place to land."

There is also evidence of disparate treatment on the part of Respondent toward Complainant. No one else in the KCSU has been disciplined for having a tattoo, although witnesses noted that there are a number of employees in the KCSU with multiple tattoos, some of which could be deemed inappropriate for the workplace. These witnesses also noted that there are a number of managers in the KCSU with tattoos. Respondent failed to produce evidence that would show that Complainant was ever a threat to his co-workers or supervisors. Witnesses noted that Complainant did not show off his tattoo, or even talk about it. Moreover, Davis, according to Corcoran, could have been disciplined for using his cell phone on the locomotive to take a picture of Complainant's tattoo. Cell phone use on a locomotive is a serious rule violation under Respondent's discipline policy. Davis, however, received no discipline.

In addition, Respondent has failed to establish by clear and convincing evidence that it would have taken the same adverse actions in the absence of the protected activities. Complainant's tattoo, as stated above, was not an issue until after he started to use the hotline. Respondent, according to the evidence, took a dismissive posture toward the concerns, ultimately charging Complainant with the most severe form of discipline under its progressive discipline policy, even though Complainant had no prior discipline and no one had ever raised concerns about his behavior in the workplace. Further, no other employee has been disciplined over a tattoo, even though, as stated above, witness testimony indicates that they are rampant throughout the service unit.

Respondent's defense that this complaint is barred by FRSA's election of remedies provision has no merit. The "election of remedies" provision in FRSA states in relevant part that "an employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. §20109(f). That Complainant's union pursued a grievance regarding Complainant's termination does not bar Complainant from seeking protection under FRSA's employee protection provision. First, the union, not Complainant, grieved Complainant's termination and thus that grievance did not trigger the election of remedies provision, which prohibits an "employee" from seeking protection under FRSA and another provision of law. Second, pursuit of a grievance under a CBA does not constitute the use of "another provision of law" to address "the same allegedly unlawful act" prohibited under FRSA's election of remedies clause.

This whole situation has impacted Complainant and his family in a number of ways. Complainant, who said he had aspirations of becoming a manager for Respondent and of retiring at Respondent, is now jobless and without a career. He said he worries daily about being able to pay his bills, having fallen behind on his child support, which has prompted "Notice of Delinquency" letters from the State of Missouri and made it much more difficult for him to maintain a relationship with his son. He is also afraid that this will negatively impact his credit rating.

According to Complainant, the financial stress has been difficult on his marriage, resulting in frequent disagreements- leading to separation at one point- and the decision to postpone their dream of having a child together. Complainant's self-esteem has also suffered. He described his job as a source of pride, but now finds it difficult to spend time with family, friends, and former co-workers.

Respondent's outrageous behavior and callous disregard for the rights of its employees warrant punitive damages. More than one witness noted that the chilling effect is real, noting that they will not report safety issues to the hotline out of fear that they will suffer the same fate as Complainant. As shown above, Respondent threatened Complainant's job at one point, and then escalated its retaliation to include removal from service and termination of employment without regard for Complainant's impeccable job history. Respondent overlooked Davis' cell phone use on a moving locomotive- a serious rule violation- to set in motion the disciplinary process, even though Complainant already had the tattoo when he was hired and no one had ever raised any concerns about it or Complainant's conduct. Respondent also acted with discriminatory animus when it had a company police officer collect Complainant's work belongings and escort him from the facility, resulting in more humiliation for Complainant.

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

ORDER

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

(2) Respondent shall pay Complainant back wages in the amount of $3,437.10 biweekly for the period from September 15, 2010, through January 1, 2011, and $3,527.02 biweekly from January 1, 2011, until Respondent makes Complainant a bona fide offer of reinstatement.

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

(4) Respondent shall pay Complainant punitive damages in the amount of $150,000.00.

(5) Respondent shall pay Complainant attorney's fees in the amount of $11,925.00.

(6) Respondent shall pay Complainant compensatory damages in the amount of $10,258.51, for the following:

- Pain and suffering in the amount of $10,000.00.
- Attorney's expenses in the amount of $258.51.

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

(8) Respondent shall provide to all employees in the KCSU a copy of the FRSA Fact Sheet included with this Order.

(9) Respondent shall post for 60 consecutive days the Notice to Employees included with this Order in all areas where employee notices are customarily posted in the KCSU.

(10) Respondent shall remove from Complainant's employment records any reference to the exercise of his rights under FRSA and expunge his employment records of any and all discipline stemming from the investigative hearing held on September 20, 2010.

Respondent has thirty 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with: