

U.S. Department of Labor

Occupational Safety & Health Administration
1648 Tri-Park Way
Appleton, Wisconsin 54914
(920) 734-4521
(920) 734-2661 (fax)



JUL 15 2011

Constance Valkan, Attorney
CN Law Department
17641 S. Ashland Avenue
Homewood, IL 60430

Re: Wisconsin Central Ltd./Kopplin/5-0170-11-017

Dear Ms. Valkan:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Jeffery A. Kopplin against Wisconsin Central Ltd. (Respondent) initially on February 14, 2011 and amended on February 16, 2011 under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleged that Respondent retaliated against him after he filed a report of injury on January 30, 2011; that Respondent issued Complainant a notice to attend a formal investigation that resulted in discipline (i.e. 10 day suspension); and that Respondent has created a "chilling effect" as Respondent retaliates against employees who file work related injuries.

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 V, issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20102. Respondent is engaged in interstate and foreign commerce within the meaning of 49 U.S.C. §20109.

Complainant is employed by Respondent as a Conductor, and assigned to Respondent's facility located in Fond du Lac, Wisconsin. Complainant is an employee covered under 49 U.S.C. §20109.

On January 30, 2010, Complainant filed an injury report to Respondent Management Officials, an activity protected by 49 U.S.C. §20109 (a) (4). On February 1, 2011, Respondent issued Complainant a Notice to attend a Formal Investigation on February 10, 2011. The notice states; "This Investigation is to be held to develop the facts and to determine your responsibility, if any, and whether or not any company policies, rules or regulations were violated in connection with your personal injury that occurred on January 29, 2010 at approximately 1120 hours while you were the conductor on L55881-29 working on tracks 5 & 6 in Wisconsin Rapids Yard when you injured your left thumb." The Investigation was postponed several times due to Complainant's

medical leave of absence but ultimately occurred on October 20, 2010. On November 3, 2010, Respondent issued Complainant a 10-day disciplinary suspension, asserting that based on Assistant Superintendent James Fuchs' review of the October 20, 2010 transcript; Mr. Fuchs concluded that Complainant violated two company rules when sustaining the injury to his left thumb, "USCR General Rule A "Safety" and USCR General Rule C "Alert & Attentive.""

On February 17, 2011 the Investigator of Record served Respondent Representative Constance Valkan formal written notice of this complaint via Certified Mail, Return Receipt Requested, Article #700 3410 0002 3490 7902. OSHA records confirm that Respondent received the February 17, 2011 certified notice of this complaint on February 22, 2011 at 9:40 a.m.

On March 15 and 17, 2011, May 16 and 20, 2011, and June 17, 2011, the Investigator had various discussions with Respondent Representative Valkan regarding the complaint and that Respondent had not yet provided OSHA with a response to the complaint. During the June 17, 2011 conversation, Representative Valkin told the Investigator of Record that she would get a response to him by the following week.

On July 6, 2011, Respondent provided a position paper, purporting the same or similar accessions set forth in the formal investigative hearing transcript as justification for assessing Complainant a 10-day suspension, violations of Respondent operating rules.

1) ¶ C - ALERT AND ATTENTIVE; Employees must be alert and attentive when performing their duties, taking care to prevent injury to themselves or others . . . and obviously on the date in question Complainant was not alert because he slipped on the ice, fell and injured his thumb.

2) Rule A - SAFETY; "Safety and a commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken . . . the area was icy, he [Complainant] knew it was icy and yet his [Complainant] actions caused an injury to himself. So obviously he [Complainant] did not take the safe course."

3) ¶ B - REPORTING AND COMPLYING WITH INSTRUCTIONS; "Employees will report to and comply with instructions from supervisor who have the proper jurisdiction. Employees will comply with manager-issued instructions applying to their duties." "Life Manual, item #9 – says that employees will use three-point contact when getting on or off equipment, machinery or vehicles." Therefore, "Complainant did not have 3-points of contact when he could not get in the truck, came back down, slipped, and fell. So at that point there was no three points of contact, which obviously caused him to slip and fall." Yet, in the formal hearing transcript, regarding Complainant's entry into the truck when he fell, Respondent management testified that Complainant expressed to him that he had three points of contact at the time of the accident.

Complainant has made a prima facie showing that his protected activity was a contributing factor in the adverse action alleged in the complaint and Respondent has failed to demonstrate by clear and convincing evidence that they would have taken the same adverse action in the absence of the Complainant's protected activity.

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 cease and desist automatic issuance of notice of investigation for employees who report work injuries without reasonable suspicion that the hearing will uncover evidence of a policy violation or misconduct.

Upon receipt of these Findings and Order, Respondent shall pay Complainant ten (10) days lost wages believed to be an amount not less than \$330.00 per day or \$3,300.00.

Respondent shall pay Complainant interest on the lost wages in accordance with 26 USC §6621, which sets forth the interest rate for underpayment of federal taxes.

Respondent shall pay Complainant compensatory damages of \$25,000 for mental pain and emotional distress due to the humiliation and the loss of income from the wrongful suspension.

Respondent shall pay Complainant \$100,000 in punitive damages for its reckless disregard for the law and complete indifference to the United States Congressional authority to enact laws and delegate investigatory authority to the Secretary of Labor and the rights afforded the Complainant by 49 U.S.C. §20109 and 29 CFR 1982.

Respondent shall pay Complainant's attorney fees of \$4359.25.

Respondent shall expunge all files and computerized data systems of references to the disciplinary hearing involving Complainant, announced on November 3, 2010. This includes, but is not limited to, the hearing notice and all subsequent memorandums or letters referencing the scheduling of the disciplinary hearing.

Respondent shall expunge all files and computerized data systems of references related to the 10-day suspension issued on November 3, 2010. This includes, but is not limited to, the Notice to attend a Formal Investigation and all subsequent memorandums or letters referencing the Formal Investigation.

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 this Order.

Respondent shall post for a period of 180 days the Notice to Employees included with this Order in all of its stations in areas where employee notices are customarily posted.

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 to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U. S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
PH: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:


Frank E. Van Bree, Esq
c/o Hoey & Farina, P.C.
542 South Dearborn, Suite 200
Chicago, IL 60605

Michael G. Connors, Regional Administrator
U.S. Department of Labor, OSHA
230 S. Dearborn, RM 3244
Chicago, IL 60604

Sherrill F. Benjamin, Regional Supervisory Investigator
U.S. Department of Labor, OSHA
365 Smoke Tree Plaza
North Aurora, IL 60542

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.

Sincerely,


Sherrill Benjamin
Regional Supervisor Investigator

Enclosures

cc: Frank Van Bree, Complainant's attorney
Chief Administrative Law Judge, USDOL
SOL-FLS Division
Federal Railroad Administration