

U.S. Department of Labor

Occupational Safety and Health Administration
Denver Regional Office
César E. Chávez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, CO 80204
Main: (720) 264-6550 Fax: (720) 264-6585
www.OSHA.gov



CERTIFIED MAIL: 7015 0640 0006 9024 3018

April 27, 2016

YAEGER & JUNGBAUER BARRISTERS, PLC
c/o Christopher Bowman
4601 Weston Woods Way
Saint Paul, MN 55127

RE: BNSF Railway Company / Wooten / 8-0100-16-024

Dear Mr. Bowman;

This is to advise you that we have completed our investigation of the above-referenced complaint filed by you on behalf of your client, Zachary Wooten (“Complainant”), against BNSF Railway Company (“Respondent”), on January 27, 2016, under the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. §20109 as amended by The Implementing Recommendations of the 9/11 Commission Act (Public Law 1110-53). In brief, Complainant alleged his employment was terminated in retaliation for reporting a work-related injury.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VIII, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §20109 (c)(4), and issues the following findings:

Secretary’s Findings

Jurisdiction:

Respondent is a railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad and therefore is considered a railroad carrier under the definition set forth in 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. Respondent maintains a place of business in Whitefish, Montana.

Complainant was an employee within the meaning of 49 U.S.C. §20109. Respondent hired Complainant on November 8, 2010. Complainant’s job title was conductor and his duties included the movement and switching of trains along rail lines. Complainant and Respondent are, therefore, covered under the provisions of the above-mentioned Act.

On September 29, 2015, Respondent terminated Complainant’s employment. On January 27, 2016, Complainant filed a whistleblower complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Investigative Findings:

On July 31, 2015, at approximately 2:00 a.m., Complainant heard his wrist pop when he attempted to open the outside door to the locomotive cab. Complainant subsequently exited the

locomotive to conduct a roll-by inspection. Complainant alleged he attempted to pull himself back onto the locomotive and his wrist gave way and he fell backwards landing on his wrist. Complainant believed that he injured his wrist further as a result of the fall.

Complainant reported the injury to the engineer, who was working on-board the locomotive. Complainant alleged he informed the engineer that his wrist popped when he opened an outside door, then his wrist gave way and he fell to the ground when trying to re-board the locomotive. The engineer acknowledged that Complainant informed him of the popping of his wrist, but denied that he reported falling from the locomotive. The engineer contacted the dispatcher who called for medical assistance. Once medical assistance arrived, Complainant was transported to the hospital.

After arriving at the hospital, the superintendent of operations took a statement from Complainant about how the injury occurred.

On August 1, 2015, Complainant underwent surgery to repair his fractured wrist.

On August 2, 2015, Complainant completed a personal injury report. After completing the report, a manager called Complainant and requested a meeting to take place August 3, 2015.

On August 3, 2015, Complainant and his union representative attended the meeting with an employee of Respondent's claims department. Complainant was directed to explain what took place and how he was injured. After the meeting, Complainant signed a notice of investigation scheduled to take place September 11, 2015.

On September 11, 2015, Complainant attended the investigation related to his wrist injury.

On September 29, 2015, Respondent terminated Complainant's employment in accordance with BNSF's policy for conduct.¹ Respondent's decision was based on what it believed was dishonesty when Complainant reported a work related injury, which it allegedly believed took place off-duty.

Analysis:

Complainant engaged in protected activity on July 31, 2015, when he reported a work-related injury to his supervisor. Respondent had knowledge of Complainant's protected activity. Complainant experienced an adverse employment action when his employment was terminated on September 29, 2015. Timing was present since the protected activity was within two months of the adverse action; however, there was insufficient evidence to establish animus. These circumstances establish a causal link between the protected activity and the adverse employment action.

A discriminatory nexus connected the Complainant's protected activity and the adverse action as demonstrated by temporal proximity. Respondent's explanation for firing Complainant was not credible because there was no evidence of any kind that he was injured off-the-job. Additionally, the injury date of July 31, 2015, was sufficiently in close proximity of the termination of Complainant's employment on September 29, 2015. Therefore, reasonable cause exists that Respondent discharged Complainant in violation of 49 U.S.C. §20109(c)(4).

¹ BNSF's policy for conduct 1.6.4 states that any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

Respondent contends that it did not retaliate against Complainant for reporting a workplace injury. Rather, Respondent claims to have terminated Complainant's employment because it believed that he lied when he reported his injury, which Respondent believed to have occurred off-duty. Respondent investigated Complainant's injury and reviewed video surveillance footage. Upon review of that footage, Respondent believes the video showed that Complainant had a swollen wrist and that he favored the wrist before he reported the injury. However, witness statements gathered by Respondent during its investigation do not corroborate its position.

A preponderance of the evidence demonstrates that Complainant's protected activity was a contributing factor in the termination of his employment. Respondent contends video surveillance showed that Complainant was injured prior to his shift. However, the written statements from co-workers and contracted employees who worked near Complainant did not support Respondent's position. These statements establish that Complainant's wrist was not swollen and that he was not favoring his wrist before July 31, 2015, as Respondent asserts. Moreover, Complainant's employment would not have been terminated but for reporting an injury. OSHA finds there was reasonable cause to believe that Respondent violated FRSA and hereby orders the following to remedy the violation.

Secretary's Order

Respondent shall immediately reinstate Complainant to the same or equivalent job, including restoration of seniority and all rights and benefits that Complainant would have earned but for the retaliation.

Respondent shall pay Complainant back pay, minus interim earnings, at the rate of \$1,953.98 per week for the period September 29, 2015, until Respondent makes Complainant a bona fide offer of reinstatement. Respondent shall also pay any weekly bonuses associated to Complainant's position.

Respondent shall pay interest at the rate determined under Section 6621 of the IRS.

Respondent shall pay Complainant compensatory damages in the amount of \$6,000.00.

Respondent shall pay reasonable attorney fees.

Respondent shall expunge all of Complainant's records of any reference to Complainant's termination and any derogatory reference related to exercising his rights under FRSA.

Respondent shall provide all employees at its facilities in White Fish, Montana, a copy of the FRSA Fact Sheet informing them of their rights and post notice to employees at its facilities in Whitefish, Montana informing them of their rights.

Objections:

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
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
Phone (202) 693-7542; Fax (202) 693-7365

With copies to:

CERTIFIED MAIL: 7015 0640 0006 9024 3025

BNSF Railway Company
Paul Balanon
2600 Lou Menk NOC-2
FT Worth, TX 76131
Phone (870) 495-3181

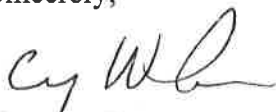
Gregory J. Baxter, OSHA Regional Administrator, VIII
1244 Speer Blvd., Suite 551
Denver, CO 80204
Phone (720) 264-6550; Fax (720) 264-6585

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 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. The rules and procedures for the handling of FRSA cases can be found in Title 29, Code of Federal Regulations Part 1982, a copy of which was sent to you earlier, and may be obtained at www.osha.gov.

Sincerely,



FOR Gregory Baxter
Regional Administrator, VIII

cc:
Chief Administrative Law Judge, USDOL
Director, U.S. Department of Transportation Federal Railroad Administration
Paul Balanon, Counsel for BNSF Railway

U.S. DEPARTMENT OF LABOR/OSHA
REGIONAL OFFICE, REGION VIII
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Yaeger & Jungbauer, Barristers, PLC

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