U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
300 Fifth Avenue, Suite 1280
Seattle, Washington 98104

Via UPS Mail
June 16, 2015

Mr. Paul Balanon
Assistant General Attorney
BNSF Law Department, AOB-3
2500 Lou Menk Drive
Fort Worth, TX 76131-2828

RE: BNSF Railway Company/Thorstenson/0-1960-11-023
Secretary's Findings

Dear Mr. Balanon:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Stephen Thorstenson (Complainant) against BNSF Railway Company (Respondent) on February 7, 2011, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109. In brief, Complainant alleged that he reported a work-related injury on November 22, 2010, and beginning on that date he was assigned points per Respondent's "points policy," placed in Respondent's Employee Review Program ("ERP"), subjected to additional operations testing and monthly meetings with managers, and subjected to a disciplinary investigation in retaliation for notifying Respondent of his work-related personal injury. On or about January 21, 2011, he was suspended for 30 days without pay in retaliation for reporting the November 22, 2010 injury, requesting medical treatment, and following the orders of a treating physician.

On August 31, 2011, Complainant amended his complaint to include an allegation that Respondent terminated his employment on August 30, 2011.

Following an investigation by a duly authorized OSHA investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region 10, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. § 20109 and issues the following findings and preliminary order.

Secretary's Findings

On February 7, 2011, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the FRSA. On August, 31, 2011, the Complainant amended his complaint to include the allegation of a retaliatory discharge

contending that on or about August 30, 2011, he was fired in retaliation for exercising his rights under the FRSA. The complaint and amended complaint were filed timely or within 180 days of the alleged adverse actions.

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

Respondent formally responded to the FRSA complaint on April 27, 2011, and to the amended complaint on September 19, 2011. Respondent denied that it retaliated against Complainant. Respondent said Complainant was suspended or received a Level S or Serious Violation when he allegedly reported a work-related injury more than 72 hours after the injury occurred. Respondent further stated that on August 30, 2011, Complainant was discharged after receiving a second Level S violation within 12 months of the first Level S violation, because he allegedly was working on a speeding train and failed to sound a whistle when the train went through a crossing grade.

In sum, Complainant alleged in his OSHA complaint and OSHA interviews that Respondent subjected Complainant to the following adverse actions in retaliation for following a physician's orders and filing a work-related injury report:

1. 40 points on his record
2. Two internal investigative hearings
3. Level S 30-Day Suspension
4. Placement in the ERP
5. Additional operations testing
6. Monthly meetings with managers
7. Termination from employment

OSHA's investigation indicates that there is reasonable cause to believe that Respondent has violated the whistleblower provisions of FRSA.

Complainant worked as a conductor for Respondent for over two decades. His route was between Vancouver and Pasco, Washington. Prior to the incidents described below, Complaint had a near clean disciplinary record for 22 years as an employee of Respondent. He passed 41 out of 42 administered operations tests.

On February 2, 2009, Complainant suffered a work-related injury: a left tibial plateau fracture. Complainant reported a work-related injury to Respondent. As a result, Complainant experienced ongoing intermittent pain in his left knee.

On October 20, 2010, Complainant went to Rebound Orthopedics for an evaluation of his left lateral tibial plateau fracture.

On November 17, 2010, Complainant was working as a conductor when he turned and bumped his left knee on a metal desk in a car. Complainant believed he had aggravated his existing work-related injury but was able to continue working.

On November 19, 2010, after Complainant realized that his left knee was still hurting him, he went to Rebound Orthopedics for an evaluation. This is the clinic where Complainant had been treated while recovering from his tibial plateau fracture. The Physician Assistant said in his notes of this visit, "Stephen Thorstenson comes in today complaining of pain and difficulty with his left knee. He was turning in a chair a couple days ago when he twisted and struck his previously injured left knee on the corner of the desk. He has some increased pain directly over the lateral patella. He states that pain has been more intense than he would have expected and it has not subsided. He is frustrated with ongoing left knee discomfort. He's here today for orthopedic evaluation. He's afraid that he has aggravated his left knee injury, which was work injury that occurred 02/02/200[9]."

On November 20 and 21, 2010, Complainant worked and the pain in his left knee worsened.

On November 22, 2010, Complainant returned for another evaluation at Rebound Orthopedics. The doctor treated Complainant for his knee pain. The doctor's plan states, "We are going to keep the patient off work at this time." After this appointment, Complainant contacted the BNSF claims department and medical department and was told by claims and medical staff that the injury would be treated as a continuation of his February 2, 2009 injury case. Complainant then called his work and spoke with Trainmaster John Caravan. Complainant and Caravan discussed whether Complainant needed to complete a new injury claim or whether his old, open claim was sufficient. Complainant thought that there was no need to complete a new report, because he already completed an injury report when he first broke his leg. Caravan said that he would call Complainant back when he found out whether a new report was necessary. Caravan called Complainant back and told him to come in and fill out a new injury complaint form sometime before the end of Caravan's shift. Caravan did not mention the 72 hour rule to Complainant and did not seem concerned about the new injury report being completed immediately. Complainant went into work that day and completed a new work-related injury report at Caravan's request. Complainant did not think he needed to complete a new claim but still followed Caravan's instructions.

On November 22, 2010, Respondent issued 40 Personal Performance Index ("PPI") points to Complainant. Complainant's Employee ERP Overview and PPI show that Complainant had 75 points as of January 2011. Respondent admits in its written response to the complaint that Complainant was issued 40 points for the November 22, 2010, injury report.

Sometime between November 22, 2010, and December 6, 2010, Complainant had an MRI of his left knee. On December 12, 2010, Complainant returned to Rebound Orthopedics. The doctor's notes indicate that Complainant's MRI showed large medial meniscal tear and bone contusion of the patella and recommended surgery. The doctor stated that Complainant would continue to be off work until he recovered from his surgical treatment of his medial meniscal tear. This is the date – December 12, 2010 – that Complainant first learned of his new injury to his left knee.

Between December 2, 2010, and January 6, 2011, Alice Ard, BNSF Director of Administration, sent Complainant a notice and four postponements to appear at an investigative hearing in connection with his alleged late reporting of his injury or for violating Respondent's Policy for Employee Performance ("PEPA") while working as a conductor on November 17, 2010, and not reporting his injury to his immediate supervisor until November 22, 2010.

On January 21, 2011, an investigative hearing was held in connection with Complainant's alleged late reporting of a work-related injury. At the hearing, Complainant testified that he was not aware that he had a new injury and at the time thought that he didn't need to complete a new injury report as he already had one open regarding his left knee injury. Complainant testified that when he called BNSF's medical and claims departments on November 22, 2010, after learning of his doctor's instructions to stay home from work, both medical and claims staff informed him that the claim would be treated as a continuation of his existing 2009 injury case.

Complainant also testified that Respondent's Trainmaster Caravan told Complainant that he was not sure whether Complainant needed to complete a new injury report when Complainant called to inform him about the medical provider's instructions for Complainant to lay off work. Caravan told Complainant that he would call him back as to whether he needed to come into work to complete a new injury report. Caravan, who also testified at the hearing, did not dispute that he made these statements to Complainant on November 22, 2010.

GCOR 1.2.5 states that, ". . . all cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the described form completed....If an employee receives a medical diagnosis of occupational illness, the employee must report immediately to the proper manager." "Immediately" is not defined in the GCOR. On November 22, 2010, the day that he visited the doctor and was instructed to stay home from work, Complainant reported that he needed to be off work as instructed by his medical provider, but Complainant did not yet have a medical diagnosis to report to Trainmaster Caravan. Only later did Complainant learn that he had a meniscus tear in his left knee.

Respondent's 72 hour reporting policy ("the 72 hour rule"), contained within the PEPA, effective date July 1, 2000, states that, "employees will not be disciplined for 'late reporting' of muscular-skeletal injuries, as long as the injury is reported within 72 hours of the probable triggering event, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the events specified."

On January 21, 2011, Complainant was suspended for late reporting. Respondent found that Complainant violated Respondent's "72 hour rule" because he reported his work-related injury five days after the initial injury occurred. Complainant was placed into Respondent's ERP and was subject to additional operations testing and monthly manager counseling meetings. As a result, Complainant was subject to termination if he received another Level S Suspension in the next three years. Subsequently, as discussed below, Complainant did receive another Level S Suspension that resulted in the termination of his employment.

On June 26, 2011, Complainant was accused of speeding and failing to sound the whistle at a crossing and Respondent brought disciplinary charges against him. Complainant had been a conductor on a train that operated at five mph over the 60 mph maximum speed limit. Complainant testified, and the engineer corroborated Complainant's testimony, in the disciplinary hearing that when Complainant noticed the train's engineer was speeding he pulled the emergency brake and that the engineer had failed to sound the whistle at a grade crossing. The relevant operating rules make clear that the engineer is responsible for the operation of the train within the speed limit, but that when the conductor notices a train is not operating at the posted speed limit, the conductor must take immediate action, such as using the emergency brake to stop the train.

On August 30, 2011, Complainant was discharged from employment with Respondent for receiving two Level S Violations within a 3-year period. Respondent's termination letter states that Complainant's personnel record, which included the first Level S from the "late reporting," was taken into consideration when deciding to discharge Complainant.

On August 31, 2011, Complainant filed an amendment to this OSHA complaint informing OSHA that on August 30, 2011, Complainant was discharged following discipline for allegedly speeding and failing to sound the whistle at a crossing. The amendment alleges that Complainant would not have been terminated had he not been previously disciplined for alleged late filing of an injury report, because the August 30 termination was a result of combining the penalty from the earlier discipline for filing an injury report with the penalty for the more recent alleged speeding and failure to sound violation.

The evidence indicates that Complainant engaged in FRSA-protected activities when he reported a work-related injury on November 22, 2010, and when he sought medical treatment for that injury. Complainant suffered adverse actions when he was assigned 40 points for a work-related injury, placed in the ERP and subject to additional operations tests and monthly meetings with managers as part of that program, when he was brought up on disciplinary charges and suspended in connection with "late-reporting" of the November 22, 2010, injury, and when he was terminated in August 2011.

Complainant's protected injury report and treatment for the work-related injury were contributing factors to these adverse employment actions. Respondent concedes that Complainant received 40 points because of the injury report and that he was placed in the ERP based on his points total.[1]

[1] In January 2013, Respondent and OSHA entered into an Accord regarding Respondent's policies in which Respondent stated that it ceased using PPI points for placement in the ERP or any other purpose on August 31, 2012 and agreed that in the future, employees would not be placed in the ERP based on a history of work-related injuries. Thus, while OSHA believes these two actions are technical violations of FRSA, Complainant suffered no monetary losses because of them, and OSHA is not considering these actions in determining whether punitive damages are warranted in this case.

With regard to the disciplinary charges and suspension for "late-reporting," the evidence shows that the injury report contributed to Respondent's decision to bring the charge, and Respondent has not shown by clear and convincing evidence that it would have brought the "late-reporting" charge against Complainant absent the injury report. The decision to bring disciplinary charges against Complainant was made approximately ten days after the injury report and references the injury report as the basis for the charges. Complaint's variation from the 72-hour reporting rule was minor, as he reported the injury five days after it occurred and immediately upon receiving confirmation that his pain was due to a work-related injury. Additionally, Respondent made the decision to suspend Complainant for late reporting even though Complainant's immediate supervisor was unaware at the time Complainant told him about the injury that a new injury report was required and had to make inquiries within the company to find out whether Complainant needed to complete a new injury report.

The evidence also indicates that if Complainant had not reported his work-related injury, he would not have been discharged from employment with Respondent on August 30, 2011. The termination notice makes clear that Respondent chose the penalty based on Complainant's disciplinary record, including the prior level-S penalty for "late-reporting" of the November 2010 injury. Respondent has not provided clear and convincing evidence that Complainant would not have been fired absent his protected activity.

Damages

Emotional distress damages are justified for Complainant. The evidence shows that after the Complainant was fired, he suffered duress. Complainant provided OSHA with a statement of his emotional distress. In part, Complainant told OSHA that after he reported his knee injury in 2010, he worried about being able to support his children and to care for his sick mother and sick sister. Complainant said that being fired was one of the worst things that ever happened to him. Without his job, he couldn't support his kids and had no place to find work. Complainant said he had to empty his retirement account to support himself and his kids. He has felt shame in that he cannot support his family members. He feels so worried and stressed and his temper is much worse than it was before. He doesn't sleep well and his stomach is often upset. He is embarrassed by his weight gain. He was better when he was returned to work, but then he was discharged. As a result of losing his job, Complainant has lost his health insurance and can't treat his high blood pressure, acid reflux, or gout. He lost a crown and cannot afford to go to the dentist. Complainant says he doesn't see friends, because he does not work or have money. He is ashamed of not having money or a job, and he feels depressed and very isolated and fearful for his future and the future of his children. Complainant is currently homeless.

Complainant provided OSHA with evidence of other compensatory damages and attorney's fees incurred.

Punitive damages are also warranted in this matter. The purpose of awarding such damages is to punish the employer for outrageous conduct and to deter the employer and others from similar conduct in the future. Respondent's actions show a reckless and callous indifference to Complainant's right to report a work-related injury.

OSHA has made clear that while employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries, those procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report.[2] Here, Respondent applied its 72 hour rule to penalize an employee who reported his injury as soon as he was confirmed to have had a work-related injury, a mere 48 hours after Respondent's reporting period elapsed. In this case, the facts suggest that the charge of "late-reporting" was a pretext to discipline Complainant for the injury report itself, and punishing an employee for such minor violations of Respondent's reporting rule is likely to discourage employees who do not immediately realize the extent of their injuries from reporting their injuries at all. The facts of this case are analogous to the facts of *Cain v. BNSF Railway Co.*, ARB Case No. 13-006 (Sept. 18, 2014), *appeal pending* 14-9602 (10th Cir.), in which the Administrative Review Board awarded the complainant $125,000 in punitive damages after Respondent placed the complainant on retroactive probation in connection with violating a safety rule and then terminated the complainant in connection with a "late" injury report that the complainant made as soon as he learned that his lung condition was due to a work-related injury. The similarity of these two cases suggests a need for additional deterrence and OSHA accordingly awards the Complainant $150,000 in punitive damages.

The following is a Preliminary Order that provides relief in accordance with the FRSA:

Preliminary Order

1. Complainant shall be reinstated to his former position with the same pay and same benefits;
2. Respondent shall post on its employee intranet a link to the OSHA Fact Sheet entitled, *Whistleblower Protection for Railroad Employees.* (Fact Sheet is attached);
3. Respondent shall pay back pay at the rate of $1,661.20 per week until the date that Complaint is reinstated. As of May 30, 2015, the amount of back pay owed is $344,385.82 (including interest accrued in accordance with 26 U.S.C. 6621) for wages lost while Complainant was suspended from work without pay and as a result of his termination;
4. Respondent shall pay Complainant compensatory damages in the amount of $25,000 for emotional distress and $4,287.43 for out-of-pocket expenses incurred;
5. Respondent will file with the Railroad Retirement Board all forms necessary to ensure that the Complainant is properly credited for the months of service that he would have earned absent Respondent's adverse action. Respondent's report will allocate the back pay award to the appropriate calendar month in which Complainant would have earned the compensation;
6. Respondent shall pay $150,000 in punitive damages to Complainant;

---

[2] See Memorandum from Richard E. Fairfax, Deputy Assistant Secretary, U.S. Dep't of Labor, for Regional Administrators, Whistleblower Program Managers, Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012), available at https://www.osha.gov/as/opa/whistleblowermemo.htm

7. Respondent shall pay the Complainant reasonable attorney's fees in the amount of $12,390.00 as of April 30, 2015;
8. Respondent shall expunge the Complainant's employment records of any reference to the exercise of his rights under Section 20109 of the FRSA. Respondent shall remove and destroy the 30-day suspension dated on or around January 21, 2011, and the termination dated on or around August 30, 2011, from Complainant's personnel file;
9. Respondent shall provide all employees with a copy of the attached OSHA Fact Sheet entitled *Whistleblower Protection for Railroad Workers.* All employees who work in the Pasco and Vancouver, Washington, locations where Complainant worked, shall receive this Fact Sheet;
10. Respondent shall immediately post for no less than 60 consecutive days the attached *Notice to Employees*. The posting will be done in conspicuous places in or about Respondent's Pasco and Vancouver facilities where Complainant worked, including in all places where notices for employees are customarily posted, including Respondent's internal Web site for employees or by e-mails. The Notice is to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon; and
11. Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to FRSA.

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:

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
Phone: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:

Complainant Stephen Thorstenson/Paul Bovarnick
Rose, Senders & Bovarnick
1205 NW 25th Ave
Portland, OR 97210

Jeff Funke
Acting Assistant Regional Administrator
U.S. Department of Labor, OSHA
300 Fifth Avenue, Suite 1280
Seattle, WA 98104-2397
Phone: (206) 757-6680; Facsimile: (206) 757-6705

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, D.C. 20210

Please be advised that the U.S. Department of Labor generally does not represent any complainant or respondent 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 for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments 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 ALJ 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, and may be obtained at http://www.whistleblowers.gov.

Sincerely,

Jeff Funke

Jeff Funke
Acting Assistant Regional Administrator

Enclosures: Notice to Employees
OSHA Fact Sheet, *Whistleblower Protection for Railroad Employees*
OSHA memo dated 3/12/12, Employer Safety Incentive and Disincentive Policies and Practices

cc: Stephen Thorstenson/Paul Bovarnick
Chief Administrative Law Judge, USDOL
DWPP Regional Liaison
(FRSA) Federal Railroad Administration

NOTICE TO EMPLOYEES

PURSUANT TO A PRELIMINARY ORDER ISSUED BY THE U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION:

In Re the Matter of: BNSF Railway Company/Thorstenson/0-1960-11-023

THE EMPLOYER HAS BEEN ORDERED TO PROVIDE ALL RELIEF NECESSARY TO MAKE THE EMPLOYEE WHOLE WHO WAS RETALIATED AGAINST FOR EXERCISING HIS RIGHTS UNDER 49 U.S.C. §20109 OF THE FEDERAL RAIL SAFETY ACT (FRSA).

THE EMPLOYER AGREES THAT IT WILL NOT DISCHARGE OR IN ANY MANNER DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS FILED ANY COMPLAINT OR INSTITUTED OR CAUSED TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THE EMPLOYEE PROTECTION PROVISIONS OF THE FRSA, OR HAS TESTIFIED OR IS ABOUT TO TESTIFY IN ANY PROCEEDING OR BECAUSE OF THE EXERCISE BY SUCH EMPLOYEE ON BEHALF OF HIMSELF, HERSELF OR OTHERS OF ANY RIGHT AFFORDED BY THIS ACT.

THE EMPLOYER AGREES THAT IT WILL NOT DISCHARGE OR IN ANY MANNER DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS NOTIFIED OR ATTEMPTED TO NOTIFY THE RAIL CARRIER OF A PERSONAL WORK-RELATED INJURY.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST EXERCISING RIGHTS GUARANTEED UNDER THE FRSA, INCLUDING THE RIGHT TO REPORT A WORK-RELATED PERSONAL INJURY, AND THE RIGHT TO SEEK MEDICAL TREATMENT, AND/OR FOLLOW A MEDICAL TREATMENT PLAN, WHEN INJURED DURING THE COURSE OF EMPLOYMENT.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST CONTACTING, SPEAKING WITH, OR COOPERATING WITH FEDERAL RAILROAD ADMINISTRATION OFFICIALS, AND/OR WITH OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) OFFICIALS EITHER DURING THE CONDUCT OF A SAFETY-HEALTH INSPECTION OR DURING THE COURSE OF AN INVESTIGATION.

THE EMPLOYER AGREES THAT IT WILL PROVIDE TRAINING ABOUT THE WHISTLEBLOWER PROVISIONS OF THE FEDERAL RAIL SAFETY ACT TO ITS MANAGERS, SUPERVISORS AND EMPLOYEES AT ITS PASCO AND VANCOUVER FACILIITES WITHIN 30 DAYS OF THE SIGNING OF THIS NOTICE. THE EMPLOYER AGREES TO NOTIFY OSHA WITHIN 30 DAYS AFTER SAID TRAINING IS COMPLETED, AND INCLUDE THE NAME AND JOB TITLE OF EACH EMPLOYEE WHO RECEIVED SAID TRAINING.

THE EMPLOYER AGREES TO ABIDE BY THE PROVISIONS IN THE ACCORD IT ENTERED INTO WITH OSHA, INCLUDING POSTING ON ITS EMPLOYEE INTRANET LINK TO THE OSHA FACT SHEET ENTITLED, *WHISTLEBLOWER PROTECTION FOR RAILROAD EMPLOYEES,* SAID FACT SHEET AND ACCORD ARE ATTACHED.

_____ _____

BNSF RAILWAY COMPANY **Date**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL. ANY QUESTION CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE APPROVING OFFICIAL. www.whistleblowers.gov

OSHA® FactSheet

Whistleblower Protection for Railroad Workers

Individuals working for railroad carriers are protected from retaliation for reporting potential safety or security violations to their employers or to the government.

On August 3, 2007, the *Federal Railroad Safety Act* (FRSA), 49 U.S.C. §20109, was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to transfer authority for railroad carrier worker whistleblower protections to OSHA and to include new rights, remedies and procedures. On October 16, 2008, the *Rail Safety Improvement Act* (Public Law 110-432) again amended FRSA, to specifically prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

Covered Employees

Under FRSA, an employee of a railroad carrier or a contractor or subcontractor is protected from retaliation for reporting certain safety and security violations.

Protected Activity

If your employer is covered under FRSA, it may not discharge you or in any other manner retaliate against you because you provided information to, caused information to be provided to, or assisted in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or your company about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste or abuse of funds intended for railroad safety or security. Your employer may not discharge or in any other manner retaliate against you because you filed, caused to be filed, participated in, or assisted in a proceeding under one of these laws or regulations. In addition, you are protected from retaliation for reporting hazardous safety or security conditions, reporting a work-related injury or illness, refusing to work under certain conditions, or refusing to authorize the use of any safety- or security-related equipment, track or structures. You may also be covered if you were perceived as having engaged in the activities described above.

In addition, you are also protected from retaliation (including being brought up on charges in a disciplinary proceeding) or threatened retaliation for requesting medical or first-aid treatment, or for following orders or a treatment plan of a treating physician.

Adverse Actions

Your employer may be found to have violated FRSA if your protected activity was a contributing factor in its decision to take adverse action against you. Such actions may include:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Making threats
- Reassignment affecting promotion prospects
- Reducing pay or hours
- Disciplining an employee for requesting medical or first-aid treatment
- Disciplining an employee for following orders or a treatment plan of a treating physician
- Forcing an employee to work against medical advice

Deadline for Filing a Complaint

Complaints must be filed within 180 days after the alleged adverse action occurred.

How to File a Complaint

A worker, or his or her representative, who believes that he or she has been retaliated against in violation of this statute may file a complaint with OSHA. The complaint should be filed with the OSHA office responsible for enforcement activities in the geographic area where the worker lives or was employed, but may be filed with any OSHA officer or employee. For more information, call your nearest OSHA Regional Office:

- *Boston* *(617) 565-9860*
- *New York* *(212) 337-2378*
- *Philadelphia* *(215) 861-4900*
- *Atlanta* *(404) 562-2300*
- *Chicago* *(312) 353-2220*
- *Dallas* *(972) 850-4145*
- *Kansas City* *(816) 283-8745*
- *Denver* *(720) 264-6550*
- *San Francisco* *(415) 625-2547*
- *Seattle* *(206) 553-5930*

Addresses, fax numbers and other contact information for these offices can be found on the Whistleblower Protection Program's website, www.whistleblowers.gov, and in local directories. Complaints may be filed orally or in writing, by mail (we recommend certified mail), e-mail, fax, or hand-delivery during business hours. The date of postmark, delivery to a third party carrier, fax, e-mail, phone call, or hand-delivery is considered the date filed. If the worker or his or her representative is unable to file the complaint in English, OSHA will accept the complaint in any language.

Results of the Investigation

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue a preliminary order requiring the appropriate relief to make you whole. Ordered relief may include:

- Reinstatement with the same seniority and benefits.
- Payment of backpay with interest.
- Compensatory damages, including compensation for special damages, expert witness fees and reasonable attorney's fees.
- Punitive damages of up to $250,000.

OSHA's findings and preliminary order become a final order of the Secretary of Labor, unless a party objects within 30 days.

Hearings and Review

After OSHA issues its findings and preliminary order, either party may request a hearing before an administrative law judge of the U.S. Department of Labor. A party may seek review of the administrative law judge's decision and order before the Department's Administrative Review Board. Under FRSA, if there is no final order issued by the Secretary of Labor within 210 days after the filing of the complaint, then you may be able to file a civil action in the appropriate U.S. district court.

To Get Further Information

For a copy of the statutes, the regulations and other whistleblower information, go to www.whistleblowers.gov. For information on the Office of Administrative Law Judges procedures, decisions and research materials, go to www.oalj.dol.gov and click on the link for "Whistleblower."

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For more complete information:

OSHA® Occupational Safety and Health Administration

U.S. Department of Labor

www.osha.gov

(800) 321-OSHA

DEP 8/2010

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

MAR 12 2012

MEMORANDUM FOR: REGIONAL ADMINISTRATORS, WHISTLEBLOWER PROGRAM MANAGERS

FROM: RICHARD E. FAIRFAX
Deputy Assistant Secretary

SUBJECT: Employer Safety Incentive and Disincentive Policies and Practices

Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36. This memorandum is intended to provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes.

Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c). Other whistleblower statutes enforced by OSHA also may protect employees who report workplace injuries. In particular, the Federal Railroad Safety Act (FRSA) prohibits railroad carriers, their contractors and subcontractors from discriminating against employees for reporting injuries. 49 U.S.C. 20109(a)(4).

If employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk. Employers do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention, or the workers' compensation benefits to which they are entitled. Ensuring that employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting worker safety and health.

There are several types of workplace policies and practices that could discourage reporting and could constitute unlawful discrimination and a violation of section 11(c) and other whistleblower protection statutes. Some of these policies and practices may also violate OSHA's recordkeeping regulations, particularly the requirement to ensure that employees have a way to report work-related injuries and illnesses. 29 C.F.R. 1904.35(b)(1). I list the most common potentially discriminatory policies below. OSHA has also observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates. While OSHA appreciates employers using safety as a key management metric, we cannot condone a program that encourages discrimination against workers who report injuries.

1. OSHA has received reports of employers who have a policy of taking disciplinary action against employees who are injured on the job, regardless of the circumstances surrounding the injury. Reporting an injury is always a protected activity. OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of section 11(c) or FRSA. In other words, an employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury. In addition, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and where it is encountered, a referral for a recordkeeping investigation should be made. Where OSHA encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.

2. In another situation, an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such cases deserve careful scrutiny. Because the act of reporting the injury directly results in discipline, there is a clear potential for violating section 11(c) or FRSA. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination. In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, and a referral for a recordkeeping investigation should be made.

3. In a third situation, an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee. OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. In some cases, however, an employer may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury. A careful investigation is needed. Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than noninjured employees may suggest that the rule is a pretext for discrimination against an injured employee in violation of section 11(c) or FRSA.

4. Finally, some employers establish programs that unintentionally or intentionally provide employees an incentive to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of

employees might be awarded a bonus if no one from the team is injured over some period of time. Such programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, there are better ways to encourage safe work practices, such as incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses". OSHA's VPP Guidance materials refer to a number of positive incentives, including providing tee shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training. *See Revised Policy Memo #5 - Further Improvements to VPP* (June 29, 2011).

Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury. FRSA similarly prohibits a railroad carrier, contractor or subcontractor from discriminating against an employee who notifies, or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury. If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination. One important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it "might have dissuaded reasonable workers from" reporting injuries. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

In addition, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904. In this case, the employer is violating that rule, and a referral for a recordkeeping investigation should be made. If the employer is a railroad carrier, contractor or subcontractor, a violation of FRA injury-reporting regulations may have occurred and a referral to the FRA may be appropriate. This may be more likely in cases where an entire workgroup is disqualified because of a reported injury to one member, because the injured worker in such a case may feel reluctant to disadvantage the other workgroup members.

Please contact the Office of Whistleblower Protection Programs at (202) 693-2199 if you have further questions.