

U.S. Department of Labor

Occupational Safety and Health Administration
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December 15, 2014

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

VIA UPS # 1ZX104980199017922

Re: Metro-North Commuter Railroad Co. /Annucci /1-0280-12-037

Dear Ms. Hubscher:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Steven Annucci (“Complainant”), against Metro-North Railroad Company (“Respondent”), on April 19, 2012, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant alleged he was disciplined in retaliation for reporting a workplace injury on November 17, 2011.

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

Secretary’s Findings

Metro-North Commuter Railroad Company is a suburban commuter rail service and a subsidiary of the Metropolitan Transportation Authority (MTA), a public benefit corporation. Metro-North runs service to its northern suburbs in New York and Connecticut, as well as to other regions. Respondent is a railroad carrier covered under 49 U.S.C. §20109.

Complainant is an employee within the meaning of 49 U.S.C. §20109. Respondent hired Complainant on April 27, 2011 as a coach cleaner. Complainant is a member of the Transport Workers Union and is covered by a collective bargaining agreement

Complainant and Respondent are covered under the provisions of the above-mentioned Act.

Respondent issued Complainant disciplinary charges on December 6, 2011. On April 19, 2012, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the FRSA. On April 9, 2013, Complainant filed an amended complaint alleging further retaliatory discipline on November 29, 2012. As these complaints were filed within 180 days of the alleged adverse action, they are timely.

Underlying Facts:

On November 17, 2011 Complainant suffered a work related injury to his knee when he tripped on a wooden board that protruded about six inches from the paved pathway. Complainant reported the injury to his supervisors, including General Foreman Prena Beliveau, his supervisor. Beliveau drove Complainant to the hospital and on the way, Complainant covertly recorded their conversation. On the drive to the hospital, Beliveau told Complainant the following:

- a. Every employee at Metro-North who gets hurt gets written up for safety and having an accident;
- b. If someone falls at Metro-North or cuts their finger, Metro-North will automatically conclude the employee failed to do something;
- c. If someone has a lost time injury at Metro-North it is a big thing and the employee gets watched all the time, and gets nailed;
- d. If you have an injury on your record at Metro-North you are not going to go anywhere. You will stay a car cleaner the rest of your life;
- e. An on-the-job injury at Metro-North stays on your record and Metro-North is going to take someone who had no injuries instead of someone with an injury;
- f. At Metro-North you don't want to take days off after an injury because you want to have a clean record and if you have a clean record they will grab you like one, two, three [referring to advancement at Metro-North];
- g. A co-worker smashed her foot with a barrel and she showed up every day on crutches and did not fill out an accident report because, according to her, Metro-North would have written her up and destroyed her record;
- h. On another occasion a door fell off the hinges and Beliveau injured her hand when it got caught in the door. Beliveau informed Complainant that she did not make out an accident report for this door incident because she wanted to keep her record clean.-;
- i. According to Beliveau, the reason why she was promoted to Foreman and General Foreman was because she had a clean record and no accident reports.

On November 18, 2011, Complainant's treating physician, Dr. Aggarwal, instructed him not to travel nor return to work until Tuesday, November 22, 2011. Complainant immediately faxed that report to Respondent at 2:21 p.m.

On December 6, 2011, Respondent charged Complainant with a variety of rules violations for the incident in which he sustained the injury, including:

1. Failure to Properly Perform Duties
2. Violation of General Safety Instructions 2100.1.1 by failing to "keep a safe distance from passing cars and trains to avoid being struck by falling or protruding objects"
3. Violation of General Safety Instructions 300.5 by failing to "use established routes, paths, crosswalks, and walkways when possible by crossing over Track 18"

4. Conduct Unbecoming of a Metro-North Employee (for not appearing at OHS¹ against his physician's instructions to remain out of work)

In order to avoid the 30-day suspension that the railroad was seeking at a disciplinary trial, Complainant signed a waiver and received a lesser penalty.

Complainant "bid out" of his position in Stamford, CT in or around September of 2012 and worked in Bridgeport, CT, then New Haven, CT. Still, Beliveau would appear at the Bridgeport and New Haven stations to walk the trains and inspect Complainant's work. Complainant was under targeted scrutiny by Beliveau and subjected to fear of losing his job because of further unwarranted discipline. As a result of Beliveau's increased scrutiny, Metro-North issued further charges against Complainant on November 29, 2012.

The November 29, 2012 charges were for "failure to properly perform duties" when Beliveau alleged that Complainant did not properly clean vomit from a train car – which Complainant disputes. Relying partly on Complainant's past disciplinary record (which included the retaliatory December 6, 2011 charges), Metro-North initially wanted to suspend Complainant for 20 days without pay. Complainant again signed a waiver and received a lesser penalty. Both the retaliatory December 6, 2011 charges and Beliveau's retaliatory increased scrutiny of Complainant were contributing factors in the November 29, 2012 charges and subsequent discipline.

Complainant filed FRSA complaints on April 19, 2012 and on April 9, 2013, alleging he was disciplined in violation of the Federal Railroad Safety Act, 49 U.S.C. 20109(a)(4); 49 U.S.C. 20109(b)(1)(A) and 49 U.S.C. 20109(c)(2).

Complainant engaged in protected activity on November 17, 2011, when he reported a work-related injury to his supervisor. Respondent had knowledge of Complainant's protected activity. Complainant engaged in protected activity on November 18, 2011 when he followed his treating physician's orders not to travel until Tuesday, November 22, 2011. Complainant also engaged in FRSA protected activity when he filed his initial FRSA whistleblower complaint on April 19, 2012. Respondent knew of each of Complainant's protected activities. Complainant was subjected to adverse employment actions when he was brought up on disciplinary charges on December 6, 2011, and again on November 29, 2012. The evidence shows that Complainant's protected activities were a contributing factor in the disciplinary charges and subsequent discipline. Significantly, there is direct evidence that Complainant's supervisor threatened that the reporting of an injury would result in discipline and increased scrutiny and this is precisely what happened.

Animus is clear in this case, as evidenced by Foreman Beliveau's recorded conversation with Complainant on their drive to the hospital on the day of his injury. Her statements to Complainant show outright disregard for the law and the employees' rights. She sought to intimidate Complainant with her suggestions that Complainant would get "nailed" for reporting a lost time injury.

These circumstances are sufficient to establish a causal link between the protected activity and the adverse employment action.

¹ OHS refers to Metro North's Occupational Health Services Department.

Respondent vigorously disputed that Beliveau made such comments to Complainant until OSHA confronted Respondent with the recording. When OSHA asked what action Respondent took when it learned of the recording, Respondent asserted that management “met with Ms. Beliveau on September 15, 2014, to discuss the statements Ms. Beliveau made in the audiotape, and to remind Ms. Beliveau of her obligations and responsibilities as a supervisor with regard to handling workplace safety concerns and employee workplace injuries.”

A Complainant’s credible testimony alone is sufficient to establish emotional distress. Here, Complainant testified that “the Railroad’s conduct has the effect of intimidating me and my fellow workers from notifying the Railroad of safety concerns and reporting injuries, and as such exercises an improper chilling effect.”

The National Transportation Safety Board (NTSB) published a preliminary Special Investigation Report dated November 19, 2014, regarding several recent accidents, including fatalities, involving Metro-North. The NTSB noted in their findings that “Metro-North Railroad did not have an effective program that encouraged all employees to report safety issues and observations.” OSHA’s findings here provide another example of this: if employees are discouraged from reporting injuries, the employees and the public are endangered as Metro-North cannot correct the conditions which caused the injuries.

In sum, the evidence shows that Complainant, who reported an injury to Respondent, was harassed and subject to disciplinary charges while his supervisor, who harassed and threatened him with discipline for reporting the injury, got a slap on the wrist in a meeting with management. Respondent’s failure to take meaningful action upon being confronted with direct evidence of Ms. Beliveau’s animus towards Complainant’s injury report shows a lack of commitment to employee rights under FRSA and a culture that permits retaliation against employees who report work-related injuries. Respondent’s conduct warrants punitive damages.

The evidence indicates that Complainant’s protected activity was a contributing factor in his discipline. Respondent did not establish by clear and convincing evidence that it would have disciplined Complainant in the absence of his protected activity. Therefore, OSHA finds there is reasonable cause to believe Respondent violated FRSA and orders the following to remedy the violation.

ORDER

1. Respondent shall expunge Complainant’s record of all charges and discipline resulting from the December 6, 2011 and November 29, 2012 charge notices.
2. Respondent shall post the attached Notice To Employees for a minimum of 1 year in a place accessible to its employees.
3. Respondent shall conduct training for all supervisors and managers on employee whistleblower rights under FRSA within one year of this order
4. Respondent shall pay Complainant reasonable attorney’s fees.
5. Respondent shall pay Complainant \$10,000 compensatory damages for mental anguish.
6. Respondent shall pay Complainant \$250,000 in punitive damages.

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
Telephone: (202) 693-7300
Fax: (202) 693-7365

With copies to:

All parties to this case

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

In addition, please be advised that the U.S. Department of Labor 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 Administrative Law Judge (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 Administrative Law Judge along with a copy of the 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 www.whistleblowers.gov.

Sincerely,



Michael Mabee
Supervisory Investigator

cc: Scott Perry, Esq. (VIA UPS # 1ZX104980196659735)
USDOL-Chief Administrative Law Judge,
USDOT-FRA



NOTICE TO EMPLOYEES

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

METRO-NORTH COMMUTER RAILROAD COMPANY (METRO-NORTH) has been ordered to make whole an employee who was found to have been retaliated against for exercising his rights under the Federal Rail Safety Act (FRSA). Metro-North has also taken affirmative action to ensure the rights of its employees under employee whistleblower protection statutes including the FRSA.

PURSUANT TO THAT ORDER, METRO-NORTH AGREES THAT IT WILL NOT:

1. Discharge or in any manner discriminate against any employee because such employee has engaged in any activity, filed any complaint or instituted or caused to be instituted any proceeding under or related to the employee protection provisions of the Federal Rail 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., or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself/herself or others of any right afforded by the FRSA.
2. Discharge, demote, suspend, threaten, harass, intimidate or in any other manner discriminate against an employee because such employee has reported a workplace injury or illness.
3. Deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.
4. Discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

Metro-North Commuter Railroad Company

Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE
MUST REMAIN POSTED AND MUST BE NOT ALTERED, DEFACED, OR COVERED BY
OTHER MATERIAL.**

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:



U.S. Department of Labor

www.osha.gov

(800) 321-OSHA