U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 29 April 2011

CASE NO: 2010-FRS-32

IN THE MATTER OF

MARCUS E. HARDY
Complainant

v.

UNION PACIFIC RAILROAD COMPANY
Respondent

APPEARANCES:

FREDRIC A. BREMSETH, ESQ.
On behalf of the Complainant

TORRY GARLAND, ESQ.
RAMI S. HANASH, ESQ.
On behalf of the Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Railroad Safety Act ("the Act") 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. The employee protection provisions of the Act are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

A formal hearing was held in Cheyenne, Wyoming, on January 11 and 12, 2011. The following exhibits were received into evidence: ALJ 1-5; Complainant's 1-18 and 39-45; and Respondent's A-N. Aside from evidence and testimony received at trial, each party filed post-hearing briefs. My decision is based upon consideration of all evidence received.

UNCONTESTED FACTS

(Tr. pp. 389-390)

1. Marcus E. Hardy (Complainant) is an employee within the meaning of the Act.

2. Union Pacific Railroad (UP or Respondent) is a railroad carrier within the meaning of the Act.

3. On July 14, 2010, Complainant timely filed a complaint with OSHA alleging that he was forced to retire before receiving a Level 5 disciplinary action for using a racial slur and that Respondent's action was in retaliation for reporting safety concerns about Respondent's locomotive cab seats.

4. On August 5, 2010, OSHA dismissed Complainant's complaint.

5. Complainant timely appealed from OSHA's dismissal by filing an appeal with the OALJ on August 31, 2010.

6. Complainant engaged in a protected activity within the meaning of the Act in January 2010 when he submitted a survey and report concerning Respondent's locomotive cab seats to Respondent's local and executive management officials in Cheyenne, Wyoming, Denver, Colorado, and Omaha, Nebraska.

7. On May 18, 2010, Complainant sustained an on-the-job injury while operating a defective switch and Complainant was also engaged in a protected activity within the meaning of the Act on May 20, 2010, when he completed accident injury reports and submitted to an interview with Respondent's managers about the circumstances of his on-the-job injury.

8. Complainant suffered an adverse employment action on May 25 and 26, 2010, when he received Respondent's Level 5 notice of investigation for using a racial slur and was withheld from service pending a resolution.

ISSUES FOR DETERMINATION

(Tr. pp. 389-390)

Did Complainant prove by a preponderance of the evidence that his protected activities caused Respondent to retaliate against him in violation of the Act? Or, said another way, did Complainant prove by a preponderance of the evidence that Respondent constructively discharged him by forcing Complainant to resign his employment on June 17, 2010?

SUMMARY OF RELEVENT EVIDENCE

Complainant is 60 years old. He began his employment with Respondent ("UP") on June 12, 1975, first as a section worker, then a foreman, next to switchman and brakeman until he passed the conductor exam in July 1980 and later worked as a conductor full or part-time. During his early training, Complainant testified that the common slang term for actuator or signal box was "nigger head switch" (hereinafter "NH"). The switch is pictured at UP's exhibit "K."

In the late 90's Complainant became interested in improving the seats on the locomotives because they were hard and could potentially cause harm. According to Complainant, management initially ignored his concerns despite the fact the safety committee found them meritorious. In May of 2007, Complainant took the opportunity to express the issue to Dennis Duffey, the Executive Vice President of Operations, but to no avail. Finally, however, after experiencing back pain and leg cramps and riding aboard another railroad's locomotive with better seats, Complainant said he "got mad as hell and decided he was not going to take it anymore."

With managements' permission, Complainant then conducted a survey and in 2009 presented the results in a safety meeting after Assistant Vice President Kelley challenged Complainant's assertion about the seats. There were over 300 responses, and Complainant presented his findings to management concluding the seats could cause injuries. A "seat committee" was created, and a critical report was presented in January of 2010 and distributed widely to managers, unions and employees. (Complainant's Exhibit 3). Safety Director, Robie Brown, seemed responsive, and in April of 2010, a test ride was performed on a moving locomotive to determine the vibration. Following that, a seat committee meeting was scheduled for May 27, 2010; however, on May 26, 2010 Complainant was pulled from service for his use of the words "NH" on May 20, 2010.

Complainant testified that on May 18, 2010, while switching a track he felt a pop in his back. He reported both the malfunctioning switch as well as the feeling in his back to manager, Dan Pederson, who told him to complete an accident report. The next day Complainant went to his personal physician following which, on May 20, 2010, Complainant went to UP's office and there saw Carl Garrison, manager of terminal operations and Bryan Harris, the terminal manger.

According to Complainant he was required to fill out forms about the event on May 18, 2010 as well as his claimed injuries. (CX-4 and CX-5). However, a disagreement developed when Complainant was told he must go the next day to a company doctor for a fitness for duty examination. The disagreement apparently was not over Complainant's willingness to see the doctor, it was over the timing since he already had another scheduled appointment at the same time with his doctor. In any event, while this meeting was taking place, Garrison and/or Harris asked Complainant for a description of the switch Complainant was pulling on when his back popped. Complainant replied it was a "NH" switch, but immediately explained that was not a racial slur but a slang term used in the past to describe that type switch box. Garrison told Complainant to never use the term, left the room, called Kurt Zaler and the EEO hot line to report use of a racial slur. RX-D is the report of the hotline call.

Complainant vowed that he had not used the term in 20 years or so and did recently only because he could not remember the technical name of the switch. On May 22, 2010, Complainant was interviewed by phone by an investigator from EEO, Ferrie Bailey, following which he received a letter dated May 25, 2010, that a level 5 disciplinary hearing was to be conducted on June 2, 2010. (CX-12). The next day, on May 26, 2010, Complainant received a call from Brian Harris who advised him he was not to come on the property until the matter was resolved. No hearing was conducted, however, and the charges were withdrawn (CX-14) because Complainant elected to resign, which he formally did on June 17, 2010 back-dated to May 24, 2007, due to "injury". (RX-F).

Complainant was earning approximately $100,000.00 annually at the time and said he had hoped to work until age 65, but after talking with union representatives Pat Wade and Robert Turner, Complainant decided he best retire. Had he not, Complainant was advised his risk of fighting the charges was not good and even at best could take up to 14 months. Therefore, Complainant said he retired to avoid these possibilities (RX-F), and what he seeks now is reinstatement for "constructive discharge," loss of wages, additional medical expenses no longer covered, punitive damages and cost of litigation. However, on cross examination Complainant did concede, following an adverse ruling, had he elected to fight the charges he could have gone to arbitration.

In addition to Complainant's testimony, he offered seven other witnesses. Raymond Hall, a retired conductor with 41 years' service agreed "NH" was a term taught in training years ago. He said it was railroad slang and not a racial slur, and he also expressed the belief trouble makers are singled out and investigated. Levy Braman, with 43 years experience, agreed with Mr. Hall as did Randy Irwin who has 35 years of service. Despite never hearing the term, Dudley Pendleton, an African American, testified he did not view "NH" as a racial slur and added Complainant was knowledgeable and his "go to guy" when he first started working in 1997.

Dan Peterson is presently disabled but has 13 years with UP. He was manager of operations and safety practices. He had heard the term "NH", but not in 10 years. He knew it was not a racial slur, nor has he ever known of anyone disciplined for its usage in describing the switch box.

Mr. Peterson remembered the call he received from Complainant on May 18, 2010 advising of his injury and knew Complainant ultimately saw Mr. Garrison. As to a level 5 investigation, he described it as severe but pointed out the accused is not fired without an investigation. According to the collective bargaining agreement, he said, after the alleged violation a charge letter is sent and an investigation follows and then a hearing is held from which an appeal can be taken to an arbitrator.

Complainant's last witness was Patrick Wade. He has been with UP for 38 years and for the past 12 years has been the local union chairman. He does "on property" investigations.

Mr. Wade said that level 5 investigations are the most severe, and usually come from upper management and often result in discharge. He said he had never seen anything as excessive as this situation, and though he had heard the term "NH" used before, he knew it to be only used to describe a signal box. He also knew of no one who had been charged for its usage and thought that the seat issue had put a target on Complainant's back.

Because of his experience with level 5 investigations, he recommended Complainant retire rather than face a long fight and/or poor results which would have jeopardized Complainant's retirement.[1]

[1] Another union representative, Mr. Robert Turner, was not present, but Complainant's Counsel proffered his testimony would be the same as Mr. Wade's.

Respondent called five witnesses, the first being Carl Garrison, senior manager of terminal operations. He identified EEO's policy which is set out in RX-B. In brief, the policy states that a demeaning remark referring to race is prohibited and not tolerated and any person aware of such prohibited conduct has the obligation to report the matter at once.

Mr. Garrison said he first met Complainant in September of 2009, was aware of the survey he conducted and that he also provided the locomotive used for the vibration testing. On May 20, 2010, he said Complainant came to his office to fill out forms concerning his May 18, 2010 accident. During that visit, when asked to describe the switch Complainant was using at time of injury, Complainant called it a "NH" switch, but immediately explained it was not a racial slur, just an old slang term used to describe the particular switch.

Regardless of what Complainant meant, Mr. Garrison said he believed himself duty bound by EEO policy to report the usage to EEO or risk termination himself. Therefore, he said after reporting the accident report and the "NH" incident to Kurt Zalar, he called the EEO's hot line and told of the usage of the word, but made no recommendation nor took no part in the level 5 charge. (RX-D).

Terminal Manager, Bryan Harris, said he first met Complainant in 2008, and it was he who gave Complainant permission to conduct his seat survey. Mr. Harris testified Complainant came to the office on May 20, 2010, where he was asked to complete an accident report and declined medical treatment. He did not think the discussion was "heated", but when asked to describe the switch in question, Complainant called it a "NH". Mr. Harris said he had never heard the term and agreed Mr. Garrison, who was also present, had no policy choice but to report the usage of the term to EEO. He acknowledged Complainant returned a day or two later to again explain the term and deny that it was in any way a racial slur. Subsequently, because of the level 5 charge Complainant was advised he was to stay off property and he was being withheld from service pending investigation.

Ferrie Bailey has been with UP for 13 years. As part of her job, she investigates EEO complaints, and Complainant's use of a "racial term" was assigned to her. Her investigation involved brief telephone interviews with Mr. Harris, Mr. Garrison and Complainant, after which her report issued (RX- E). Ms. Bailey said she had no role in the discipline administered, but simply sent her notes to home office in Omaha, Nebraska. However, she added that historical usage of the term had no affect on zero tolerance for the term referred to a potential class. In other words, the context in which the term was used is no exception to the zero tolerance policy.

Melisa Schop, an attorney, has been with UP for 5 years, is in Human Resources and as a senior EEO associate oversees EEO complaints. She received Mr. Garrison's hot line report of the incident (RX-D), Ms. Bailey's report (RX-E) and an e-mail from Complainant to Mr. Zalar (RX-11). She then called Ms. Bailey, who informed Ms. Schop she did not perceive Complainant to be apologetic about the term he used.

Based on this information, Ms. Schop called Mr. Zalar and recommended a level 5 charge which he instituted. She explained a level 5 was the appropriate initial charge for use of such a racial term and cited a previous case where an employee was charged at level 5 and ultimately terminated for saying "nigger rigged." Ms. Schop explained, however, that a level 5 is sometimes settled, but in this instance Complainant retired before any compromise could take place. As with Ms. Bailey, Ms. Schop testified that historical usage is irrelevant, and in cross examination she acknowledged she made no independent investigation of the event.

Kurt Zalar is the Superintendent of the Denver Service Unit which covers five states and involves 1,800 employees. He was aware of Complainant's involvement with seat safety and had agreed for Complainant to do his survey and over saw the vibration testing. According to Mr. Zalar, the seat committee is still in existence and is considering seat replacement with several vendors.

He learned of Complainant's alleged injury of May 18, 2010, from Dan Petersen and knew Complainant was told to fill out an accident report. He knew of Mr. Garrison's hot line call and had told Mr. Garrison to do whatever he felt he was required to do. Mr. Zalar also testified he simply followed EEO's recommendation when he instituted a level 5 charge and pointed out that this was not Complainant's first level 5 charge. Another level 5 charge had been brought in 2001 and compromised to a level 4 with a 30 day suspension without pay. (RX- I, page 13). As far as a compromise in this instance, he explained Complainant retired before any such discussion could be held.

FINDINGS

1. Complainant voluntarily reported an accident/injury of May 18, 2010.

2. Complainant voluntarily presented himself at the UP's Office of Garrison and Harris on May 20, 2010.

3. Complainant voluntarily described his accident and in doing so voluntarily used the "NH" term.

4. Garrison, following policy, reported Complainant's use of the "NH" term to an EEO hotline, but made no recommendation.

5. Ms. Bailey was assigned the hotline call.

6. There is no evidence Ms. Bailey knew anything about Complainant's protected activities.

7. Ms. Bailey applied the "zero tolerance" policy to Complainant's speech and passed her conclusions to Ms. Schop, an attorney and senior EEO associate.

8. In reliance upon Ms. Bailey's conclusion, Ms. Schop recommended a level 5 investigation.

9. There is no evidence Ms. Schop knew anything about Complainant's protected activities.

10. By a May 25, 2010 letter Complainant was notified of the charge against him and given a June 2, 2010 hearing date.

11. Claimant voluntarily chose to retire rather than contest the charges.

12. The level 5 charge does not appear related to Complainant's protected activities nor were those activities a contributing factor leading to the level 5 charge.

DISCUSSION

I do not believe that Complainant intended a racial slur when he used the term "NH" to describe a switch whose technical name he could not recall. Though no longer routinely used, the term was once apparently freely used in railroad speech to describe this type switch, and it was in this context Complainant uttered the words. Having so found, however, I do not find that the level 5 charge brought for use of the term to be a discipline for Complainant's protected activities in reporting safety concerns for the type seats used in the locomotives nor for his reported injury on May 18, 2010. In the strictest sense, Complainant did violate policy regardless of his intended use of the word.

The parties agree Complainant was a covered employee under the Act and likewise UP was a covered employer under the Act. Also, they agree Complainant engaged in protected activity when expressing his seat safety concerns as he did with the report of his accident and injury. All of which UP had actual knowledge of. Likewise, there is no issue over the fact that the level 5 charge was arguably an adverse action which Complainant suffered. The issue is whether or not Complainant's protected activities were a contributing factor in the adverse action, and as previously stated I find it was not. I do not find Complainant has made a *prima facie* case, but I find UP has demonstrated by convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity. In other words, there is no link to

connect a scheme to retaliate against Complainant for his seat concerns and/or his reporting a back injury. There is nothing in the record to suggest EEO's knowing participation in any such retaliatory conspiracy. Nor is there evidence that when Mr. Garrison reported Complainant's use of the term "NH" that he then knew the outcome such a call would produce.

According to Complainant's own testimony, he had been actively involved in improving the locomotive seats since the late 90's and in 2007 had taken his concerns passed the safety committee to the vice-president of operations, Mr. Duffey. In 2009 Complainant was permitted to perform a survey of employees to see if they shared his concerns and results were presented to management. A vibration test was also performed, all of which culminated in a "seat committee," which, according to Mr. Zalar's testimony, is still meeting and considering new seats which vendors have demonstrated. Thus, it appears from the testimony offered that the concerns Complainant raised about the seating are still ongoing despite Complainant's absence. As far as Complainant's reporting of his May 18, 2010 accident and alleged injury, the controversy that arose in that regard was as to when Complainant was going to UP's doctor. He was not refused medical treatment, nor did he refuse a fitness for duty examination. The issue, which was resolved, was what day he was going to UP's doctor since he had previously scheduled an appointment with his own physician at the same time.

While the adverse action took place shortly after Complainant's May 18th accident, and before the scheduled May 27, 2010 meeting of the seat safety committee, in this instance I do not find an inference that the Complainant's protected activity over seating gave rise to or was a contributing factor in the level 5 adverse action. No, in this instance I find the reporting to EEO of Complainant's usage of "NH" was, whether over zealous or not, the sole cause of the adverse action taken against him by UP. It was coincidental that Complainant's visit with Garrison and his use of the term "NH" occurred in close proximity to the safety meeting. It was not and could not "have been preordained" as Complainant's brief suggest. It was Complainant who was injured on May 18, 2010, and it was Complainant who went to Garrison and Harris on May 20, 2010 to report his accident and on that occasion used the term "NH". Simply put, I cannot connect the dots. According to Ms. Schop others have too been disciplined for racial slurs, and had Complainant not retired the charge might have been reduced following the investigation or he might have prevailed at arbitration. Complainant's brief acknowledges that had he been a younger man he may have "rolled the dice" and proceeded to a hearing and/or arbitration, but because of his age elected to retire. (p. 6).

There is no issue over whether or not Complainant used the term "NH" and while an argument can be made Mr. Garrison might have taken another approach, he apparently perceived himself bound by EEO's zero tolerance policy to phone the incident into EEO's hot line. That call put in motion something that took on a life of its own and tumbled through the system growing as it moved along. Unfortunately, for Complainant

the task of investigating the incident fell upon Ms. Bailey, who, it appears, might have had an agenda of her own unrelated to any protected activities on Complainant's part. Ms. Bailey did not find Complainant, in her 5 minute interview, to be apologetic enough, and at the hearing accused Complainant's attorney of being suspect himself when she told him "based upon my historical background" he had probably used "NH" himself. (Tr. p. 323).

Following her brief interviews with Mr. Harrison, Mr. Garrison and Complainant Ms. Bailey sent her report to Ms. Schop who conducted no independent investigation, but simply reviewed Ms. Bailey's report, had a phone conversation with Ms. Bailey and made her recommendation to Mr. Zalar that a level 5 charge be issued. Mr. Zalar who oversees 1,800 employees in five states accepted the recommendation, and thereafter, Complainant chose to retire rather than contest the charges.

ORDER

In sum, Complainant has not shown a nexus between his protected behavior and the level 5 charge brought against him and Respondent has shown by convincing evidence that it would have taken the same action in absence of Complainant's protected activities. Consequently, Complainant's complaint is **DISMISSED**.

So ORDERED this 29th day of April, 2011, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must

specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).