Engineer's Suspension for Untimely Reporting of a Personal Injury is not Retaliation: Recent U.S. 8th Circuit Court of Appeals decision

A recent decision handed down by the 8th Circuit Court of Appeals on January 30, 2020, concluded that the U.S. Department of Labor wrongly decided that Canadian Pacific Railway unlawfully retaliated against its employee. Railroad engineer Mark Riley was suspended by the carrier after waiting less than 24 hours to make a formal complaint regarding an altercation with a co-worker.

In the case of *Dakota, Minnesota & Eastern Railroad Corporation d/b/a/ Canadian Pacific v. U.S. Department of Labor Administrative Review Board*, Canadian Pacific requested a review of the final decision of the Department of Labor Administrative Review Board ["ARB"] which ruled that Canadian Pacific violated the whistleblower retaliation provisions of the Federal Railroad Safety Act ["FRSA"]. Canadian Pacific suspended its employee, locomotive engineer Mark Riley, when he reported an altercation with his assistant locomotive engineer, John Bollman.

On June 5, 2012, a unit train consisting of three locomotives and 81 cars loaded with ethanol arrived at Canadian Pacific's terminal in Bensenville, Illinois. Bollman was riding on the front of the locomotive to line up switches, and at one point, Riley yelled to Bollman to determine whether he was in track four or track five. Bollman did not answer, or Riley could not hear him, so Riley leaned out the window and yelled at Bollman repeatedly. According to Riley, Bollman then entered the locomotive, hit Riley in the chest with his lantern, punched him on top of his head and screamed at him. Riley and Bollman calmed down and finished yarding the train, heading to their hotel rooms at 4:25 a.m.

When Riley went to his hotel room at 4:25 a.m. he attempted to call his immediate supervisor and sent a text regarding the altercation. The next day, Riley reported the incident over the phone to his supervisor at 12:20 p.m. and then made a formal complaint at 2:38 p.m. After Riley reported the incident, CN charged both Riley and Bollman with multiple rule violations, including late reporting of the incident and engaging in physical and verbal altercations.

After the investigation, Canadian Pacific terminated Bollman and assessed Riley 47 days suspension, which was later reduced by the Public Law Board to 15 days. Riley filed a Complaint with OSHA stating that Canadian Pacific retaliated against him for filing a personal injury and unsafe condition report. As outlined by the ARB in its favorable decision to Riley, there are certain elements an employee must show to prove retaliation by the carrier.

To establish a case of unlawful retaliation, an employee must show:

1. The employee engaged in a protected activity;
2. The rail carrier knew or suspected, actually or constructively, that the employee engaged in the protected activity;
3. The employee suffered an adverse action; and
4. The circumstances raise an inference that the protected activity was a contributing factor in the adverse action.

At his OSHA hearing, the Administrative Law Judge ruled in Riley's favor noting that:

> "…Canadian Pacific became aware of the injury when Riley came forward, albeit several hours later. In other words, Mr. Riley's report of the attack and resulting injury influenced Canadian Pacific's decision to investigate the timeliness of Mr. Riley's reporting of the underlying facts of how the injury occurred. Where such a report sets the subsequent investigation and disciplinary process in motion, *this chain of events is sufficient evidence of a contributing factor*. Therefore, I find the protected activity was a contributing factor in the adverse personnel action in this case."

Canadian Pacific appealed this ruling and again lost when the ARB agreed with the Administrative Law Judge. Once more, Canadian Pacific appealed the ARB's final agency decision to the 8th Circuit Court of Appeals for review and was able to get a favorable ruling.

The unanimous three-judge panel said that Canadian Pacific reasonably suspended Riley because of his delay in reporting the altercation incident, and not in retaliation for the reporting itself, and reversed the ARB's decision. The 8th Circuit panel concluded that the ARB failed to use the appropriate 8th Circuit legal standard which requires, unlike other Circuit courts, that an FRSA plaintiff must

show that intentional retaliation prompted by a protected activity was a contributing factor.

In Mr. Riley's case, the 8th Circuit panel concluded that the law is well settled that an employee cannot shelter themselves against wrongdoing by disclosing it in a protected-activity report. In other words, according to the Court, the protected activity was the untimely filing of a report that Canadian Pacific's operating rules require employees to promptly file, consistent with railroad safety. A suspension of an employee for violating the reporting rule does not show discrimination against an employee without more evidence of a retaliatory motive by Canadian Pacific.

The Court went on to distinguish Riley's case from other cases where the employee testified that a supervisor discouraged "him from filing a safety report and hinted darkly of unfavorable consequences if he did so." The Court noted that this type of scenario, where an employee is discouraged from filing a personal injury report, was a major concern when Congress enacted the whistleblower protections for railroaders. However, in Riley's case, he was urged by his supervisor to make an immediate complaint and he initially declined to do so. The Court concluded:

> "Discipline is hardly surprising when a railroad was not promptly notified of a physical altercation between the members of a crew operating a locomotive pulling some eighty cars of flammable material near one of the world's busiest airports."

Railroaders around the country need to be aware of these types of decisions being handed down by the Courts. It is important to be fully familiar with your carrier's reporting requirements on unsafe conditions and personal injuries. The carriers across the country will attempt to use this decision, and others like it, to extend bad laws for employees who report personal injuries and unsafe conditions. Because retaliation by the railroad has many different faces, as a railroader, make sure that you document the railroad's actions, and speak with your Union for the next steps to follow to protect yourself.

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