

U.S. Department of Labor

Occupational Safety and Health Administration
201 Varick Street, Room 670
New York, NY 10014
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May 5, 2010

Stephen Powell, Esq.
Port Authority Trans-Hudson Corporation (PATH)
225 Park Avenue South, 14th Floor
New York, NY 10003

Via Federal Express # 8717 8473 3203

RE: Port Authority Trans-Hudson Corporation (PATH) / Bala / 2-2585-09-016

Dear Mr. Powell:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Christopher Bala (Complainant) against the Port Authority Trans-Hudson Corporation (PATH or Respondent) on June 2, 2009 under the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant has alleged that he was suspended without pay for six days for having followed his physician's orders.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20102. Respondent is engaged in the business of passenger operations between New Jersey and New York and it is connected to the general railroad system of transportation. Respondent therefore is a covered employer within the meaning of 49 U.S.C. §20109.

Complainant has worked at PATH since late 1990. He called in with a back injury on June 23, 2008.¹ Later that same day he reported to PATH's Office of Medical Services (OMS), where he was found not fit for duty. On September 8, 2008 Complainant underwent back surgery and he returned to work on November 3, 2008. During the entire period of his absence from work, Complainant reported to OMS and provided them with information regarding his treatment. At no time between June 23 and November 3, 2008 was Complainant found fit for duty.

¹ This injury was a non-work related aggravation of a previous work-related injury.

On July 14, 2008, the Complainant was ordered to appear for a disciplinary hearing. The reason for this disciplinary hearing was for excessive absence. The letter to Complainant states, “despite an attendance counseling session with you on October 17, 2007, related to your record and pattern of excessive absence... you again notified PATH on June 23, 2008 that you would be on sick-absence from work.”

The disciplinary hearing was held on January 8, 2009 and Complainant was sent a letter informing him of the results on January 26, 2009. Although the hearing addressed Complainant’s absences generally, it was only called because of Complainant's absence on June 23, 2008. As a result of this hearing, PATH suspended Complainant for six days without pay. Three days were to be served starting February 2, 2009, and the remainder was held in abeyance for one year so long as no new disciplinary actions for attendance were assessed against Complainant. Complainant was not assessed any new disciplinary actions for attendance during this time and thus has not had to serve the additional three days of suspension.

The Complainant engaged in protected activity when he followed his physician’s instructions for his back injury. 49 U.S.C. § 20109 (c)(2) states, “[a] railroad carrier ... may not discipline, or threaten discipline to, an employee...for following orders or a treatment plan of a treating physician...” As set forth in its book of rules, PATH determines whether or not an employee has accumulated excessive absences. While time lost due to injuries on duty is not included in the calculation, sick leave is included. The letter sent to Complainant says that he is being charged with excessive absence as a result of calling in a sick-absence on June 23, 2009. After holding a disciplinary hearing PATH suspended the Complainant for excessive absence.

The evidence demonstrates that Complainant was out for a medical condition and that PATH was aware that Complainant was under a physician’s care and was not fit for duty. PATH’s OMS concurred with the treating doctor’s diagnosis that the Complainant was not fit for duty. Respondent took adverse action against Complainant when it disciplined him by calling the hearing and by subsequently suspending him for six days. A preponderance of the evidence indicates that the discipline was for following orders or a treatment plan of a treating physician.

Despite Respondent’s assertion that the discipline was administered for excessive absence and Complainant’s prior absences, which abused the collective bargaining agreement, there is no evidence that Respondent would have taken the adverse action in the absence of Complainant’s protected activity, given that the discipline resulted from following the treating physician’s orders. Absent clear and convincing evidence that Respondent would have taken the same adverse action in the absence of the protected activity, OSHA finds that there is reasonable cause to believe that Respondent violated FRSA. OSHA hereby orders the following to remedy the violation:

Order

Respondent shall expunge all files and computerized data systems of disciplinary actions, and references to disciplinary actions relative to the July 14, 2008 letter and January 8, 2009 hearing. The expunging shall include, but not be limited to, the six-day suspension, the formal disciplinary hearing, and any memorandums or letters referencing the disciplinary action.

Respondent shall make payment to Complainant for back wages for the three-day suspension in January of 2009 as well as interest on the back wages in accordance with 26 U.S.C. 6621.

Respondent shall refrain from violating the Federal Railroad Safety Act and will not in any manner interfere with, restrain, or coerce Complainant or any other employee because such employee has filed any complaint or has instituted or caused to be instituted any proceeding under the jurisdiction of the Occupational Safety and Health Administration, or has testified or is about to testify in any such proceedings or because of the exercise of such employee on behalf of himself or others of any rights afforded by any of these Acts.

Respondent shall permanently post the Notice to Employees included with this Order in all PATH stations in areas where employee notices are customarily posted.

Respondent shall provide to all employees a copy of the FRSA Fact Sheet and the Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry included with the Order.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and 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
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
(202) 693-7542, Facsimile (202) 693-7365

With copies to:

Complainant

OSHA Regional Administrator
201 Varick Street, Room 670
New York, NY 10014


Department of Labor, Associate Solicitor
Division of Fair Labor Standards

200 Constitution Avenue, NW, N2716
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under Federal Rail Safety Act are handled in accordance with the rules and procedures for the handling of AIR-21 cases. These procedures can be found in Title 29, Code of Federal Regulations Part 1979, a copy of which may be obtained at <http://www.osha.gov/dep/oia/whistleblower/index.html>.

Sincerely,

(for) 
Robert Kulick
Regional Administrator

cc: Christopher Bala (Via Federal Express # 8717 8473 3225)
USDOL/OALJ-Chief Administrative Law Judge
USDOL/SOL-FLS
Federal Railroad Administration