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For Big Railroads, a Carload of Whistleblower Complaints

Posted By [Stuart Silverstein and Brian Joseph](#) On October 21, 2015 @ 12:01 am In [FairWarning Investigates](#), [Whistleblowers](#), [Workplace](#), [Workplace Safety and Health](#) | [1 Comment](#)

As both a veteran railroad worker and union official responsible for safety, Mike Elliott became alarmed when he learned of trouble-plagued train signals in his home state of Washington.

Signals, he said, at times would inexplicably switch from red to yellow to green – potentially creating confusion that could lead to a crash. Elliott raised that and other signal issues repeatedly with his managers at BNSF Railway Co. But eventually, Elliott concluded that “these guys are running me around in circles.”

So Elliott, 57, of Tacoma, Wash., pressed his concerns with the Federal Railroad Administration, summarizing the matter in a January 2011 letter. The FRA investigated, and discovered 357 safety violations, including 112 signal system defects.

Speaking up for safety, though, only made matters worse for Elliott at BNSF, where he already had clashed with managers. Within weeks the company fired Elliott from his job as a locomotive engineer – an act that a federal jury this summer ruled was illegal retaliation by BNSF against a whistleblower.

The June 30 decision by the Tacoma jury, which awarded Elliott \$1.25 million but is being appealed, spotlights the unjust punishment that critics say sometimes is meted out to railroad workers who report injuries or safety problems. These critics, including plaintiff lawyers and union officials, along with others who have examined railroad practices, say the harsh treatment reflects old, hard-line management tactics that persist in corners of the industry.

Under the 22 federal whistleblower laws administered by the Occupational Safety and Health



Mike Elliott, a former BNSF employee who sued the railroad for retaliation. (Photo by Michael Dwass)

Administration, American workers who disclose hazards or engage in other “protected activity” are shielded against retaliation by their employers. The protected activities vary by industry, but include reporting injuries, disclosing the misuse of public funds and refusing to perform dangerous tasks that would violate safety rules. OSHA protection covers, among many others, truck drivers, public transit employees, nuclear plant operators and, since 2007, railroad workers. Yet despite the broad safeguards for railroaders – or perhaps partly because of them – complaints of illegal retaliation abound in the industry.

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From October 2007 through June 2015, OSHA figures show, railroad workers filed more than 2,000 retaliation complaints, although the pace has slowed lately. Among the top 10 targets of complaints over the nearly eight-year period, seven were railroads, led by the two largest U.S. railroads, BNSF (409 complaints) and Union Pacific (360).

OSHA investigators and Labor Department administrative law judges repeatedly have upheld complaints against the railroads, more than half of which involve illegal retaliation against workers who report personal injuries.

In one such case an administrative law judge in 2013 [ruled against Union Pacific](#), declaring: “The actions by Union Pacific have been so egregious in this case, and Union Pacific has been so openly blatant in ignoring the provisions of [federal law], that I find punitive damages are necessary to ensure that this reprehensible conduct is not repeated.”

Top Targets of Retaliation Complaints

Federal laws bar employers from retaliating against workers who reveal safety hazards or engage in other “protected activity,” such as reporting injuries or disclosing the misuse of public funds. Workers can file retaliation complaints with the Occupational Safety and Health Administration. Below are the 10 leading targets of retaliation complaints in recent years. Railroad companies, shaded in green, are seven of the top 10. The figures cover the nearly eight-year period from Oct. 1, 2007 through June 30 of this year.

| Company | Total |
|------------------------------|-------|
| United States Postal Service | 578 |
| BNSF | 409 |
| Union Pacific | 360 |
| CSX | 267 |
| Norfolk Southern | 247 |
| Canadian National | 151 |
| United Parcel Service | 139 |
| Amtrak | 119 |
| AT&T | 103 |
| Metro-North | 102 |

Source: Occupational Safety and Health Administration
Credit: Michelle Ziomek & Stuart Silverstein / FairWarning

In January of that year, BNSF, without admitting wrongdoing, signed an unprecedented accord with OSHA after the federal agency alleged that several of the company’s policies discriminated against injured employees. Among other things, the accord eliminated giving demerit points to workers who report injuries.

At the time, OSHA’s chief, David Michaels, said in a statement that the accord “sets the tone for other railroad employers throughout the U.S. to take steps to ensure that their workers are not harassed, intimidated or terminated, in whole or part, for reporting workplace injuries.”

Safety “a top priority”

Officials of the Association of American Railroads, the leading industry group, declined to be interviewed for this story. Instead, the AAR issued a brief statement saying, “The safety of employees and communities along the nation’s 140,000-mile rail network remains a

top priority for the entire industry and is taken very seriously.”

Union Pacific also refused interview requests. So did BNSF, which was created by the 1995 merger of Burlington Northern Inc. and Santa Fe Pacific Corp., and is now a unit of investor Warren Buffett’s Berkshire Hathaway Inc. However, in a prepared statement after the jury decision in the Elliott case, BNSF said it “is proud of its safety culture and retaliation against safety complaints is contrary to how we operate and the training our people receive.” The company added that Elliott “was dismissed for unrelated rules violations.”

(On Oct. 1, the federal judge who heard Elliott’s case, Ronald B. Leighton, a Republican appointed by George W. Bush, rejected BNSF’s motion for a new trial. He ruled that the

disciplinary proceedings against the former employee were “seriously flawed” and that BNSF executives “displayed personal animosity against Mr. Elliott.”)

The alleged violations defy a key intent of federal whistleblower laws: to encourage employees who discover possible hazards to come forward before an accident happens. The potential value of such an early warning system is underscored by the deadly passenger rail accidents and oil train wrecks in recent years.

Joseph C. Szabo, who headed the FRA from 2009 until this January, said industry supervisors often are under “immense pressure” to curb costs by moving trains quickly out of rail yards. That, in turn, translates into pressure on rank-and-file workers “to ignore safety protocols and to just get the damn train out of town.” That’s why, Szabo said, it’s “critically important” that railroad workers are “very comfortable in doing the right thing without any fear of retribution.”

Award is canceled

Likewise, safety advocates say, the ability of workers to report injuries without jeopardizing their livelihoods is crucial in a field with many hazardous jobs. Railroads have relatively high rates of on-the-job fatalities – although the toll has fallen dramatically over the last three decades. What’s more, injury totals may be substantially higher than reported. In 2012, amid widespread suspicion that railroads were undercounting injuries, in part by pressuring workers not to report them, the industry dropped its 99-year-old annual Harriman safety award, which was largely based on employee injury reports.

Norfolk Southern, which had won Harriman safety “gold award” 23 years in a row before the honor was scrapped, was the target of 247 whistleblower complaints during the nearly eight-year period tracked. That was the fifth-highest total among all U.S. employers.

Railroad whistleblowers under federal law must first file complaints with OSHA; they can pursue their cases through conclusion with the agency or, if their issues haven’t been resolved, after 120 days they can opt out and take their cases to court.



Railroad workers face pressure “to ignore safety protocols and to just get the damn train out of town.”
 – Joseph C. Szabo, former head of the Federal Railroad Administration.



"I don't know why they're so hard on their employees ... I just don't get the railroads at all."

– Mike Koziara, who won a lawsuit claiming that BNSF illegally fired him for reporting an on-the-job injury.

In fact, both OSHA and federal juries over the past year have issued a string of big decisions against railroads in cases brought by whistleblowers, although the companies have appealed many of the rulings. Those whistleblowers include:

–Mike Koziara, 55, who in March won an award of \$425,725 after a federal jury found that BNSF illegally fired him for reporting an on-the-job injury.

In September 2010, Koziara, a 32-year veteran of the company, was a section foreman, a job that put him in charge of track maintenance for a 40-mile stretch of rail along the Mississippi River in Wisconsin. The day he was hurt, Koziara was leading a group of employees tasked with removing large, wooden planks from a road crossing in East Winona, Wis., when he was struck in the left ankle by a 1,200-pound plank.

"It hurt," Koziara said, but he didn't think it was serious.

Three days later, after the 72-hour period allowed for reporting injuries was over, he went to see his doctor for a physical. There, she took one look at his leg and sent him for an X-ray. The results showed Koziara had a cracked tibia, or shinbone.

"I just don't get the railroads"

He reported the injury to BNSF the next day. A few days later, the company charged him with failing to be "alert and attentive." As punishment, he was given a 30-day suspension and a one-year probation. But it didn't stop there.

While the railroad investigated Koziara's injury, it learned that he recently had given about 20 used rail ties to a local farmer. Koziara maintains he had gotten permission to take some ties – and that it otherwise would have cost the railroad money to dispose of used ties – but BNSF charged him with theft. He was fired on Nov. 9, exactly two months after he was injured.

"I don't know why they're so hard on their employees," said Koziara, who is now retired. "They'll get more out of us if they were just better to us. I just don't get the railroads at all."

–Steven Annucci, a coach cleaner for Metro-North Commuter Railroad. Last December OSHA found that he should receive \$250,000 in punitive damages, the maximum permitted in a railroad retaliation case.

Annucci hurt his knee in November 2011, when he tripped on a wooden board sticking up about six inches above a paved walkway in a train yard in Stamford, Conn. General Foreman Prena Beliveau drove Annucci to the hospital. On the way there, Annucci secretly recorded their conversation.

According to OSHA, Beliveau told Annucci that if you have an injury on your record at Metro-North you're not going to move up — you're going to be a car cleaner for the rest of your career. Beliveau also said everybody at Metro-North who gets hurt is written up for safety.

Animus is clear

Annucci reported the injury anyway. A couple weeks later, Metro-North formally reprimanded him for safety violations, although he kept his job. A year later Annucci was charged with failing to properly clean vomit from a train car, and was reprimanded again. In its December ruling, OSHA found that "animus is clear in this case" and ordered Metro-North to pay Annucci attorney's fees and \$10,000 in compensatory damages, along with the punitive damages.

–Union Pacific apprentice machinist Brian Petersen, 31, who was fired after a co-worker drove over his feet in the parking lot of a train yard in North Platte, Neb.. In a pair of rulings last November and February, the railroad was ordered to pay Petersen more than \$400,000 in back pay, attorney fees and damages. In the spring, the two sides reached a confidential settlement.

The case stemmed from a 2009 accident. Petersen claimed he was leaning against his car, checking his cell phone for messages, when a colleague roared into the space next to him.



"In many cases, the [employee's] argument is simply, 'Well, the railroad managers didn't like the fact that I reported my injury so they were looking for an excuse to get me.'"
 – James Whitehead, a management lawyer who has represented railroads.

Union Pacific concluded that Petersen was inattentive and careless, then fired him a few days later when he was seen standing on some motors to write down their serial numbers when he should have been using a ladder.

Key Laws Protecting Railroad Workers

Rail Safety Improvement Act of 2008

Bars railroads from denying or delaying medical treatment of injured employees.

2007 Amendment to Railroad Safety Act

Protects workers from retaliation for reporting injuries and safety or security problems. Transferred oversight of whistleblower complaints from the Federal Railroad Administration to the Occupational Safety and Health Administration.

Federal Railroad Safety Act of 1970

Permits Secretary of Transportation, through the Federal Railroad Administration, to write safety regulations for the industry.

Department of Transportation Act of 1966

Created the Federal Railroad Administration to oversee train safety.

Railway Labor Act of 1926

Guarantees workers the right to organize and join unions.

Federal Employers' Liability Act

1908 statute allows railroad employees to sue for compensation for on-the-job injuries. Unlike "no fault" workers' compensation, the law requires claimants to prove that employer negligence caused their injuries.

Brian Joseph and Michelle Ziomek / FairWarning

The administrative law judge who considered the case in 2013 – the one who condemned Union Pacific for “egregious” actions – said the rules the company charged Petersen with breaking “are written in such a manner that anyone who is injured and reports it will have violated at least a part of one or more of them.”

Experts often trace railroad managers' behavior to the way the industry emerged in the mid-19th century. Back then, many railroad officials came from the officer ranks of the Civil War armies. “It was traditionally an industry in which the boss is the absolute boss ... all the way up the hierarchy. You don't question the boss' authority,” said historian Maury Klein, the author of a half-dozen books on railroads.

Paramilitary structure

Szabo, the former FRA chief, said railroads have embraced more enlightened practices over the past decade or so, but management still has elements of “a paramilitary structure, very much command and control.”

To this day, railroads remain discipline-minded. Operating and safety manuals run hundreds of pages. Suspected violators, including workers who get hurt, face internal investigations.

Critics still echo Congressional investigators who in 2007 found that railroad companies, along

with federal regulators, are “more oriented toward assigning blame to a single individual, without a thorough examination of the underlying causes that led that single individual to commit an error.”

In part, the hard-nosed culture reflects an effort to cope with the inherent dangers of rail transportation. “Small screw-ups can sometimes lead to somebody getting killed,” said Mark Aldrich, author of the 2006 book, “Death Rode the Rails.”

Safety has improved substantially in recent decades, Aldrich and other experts say, but the pressure on middle-managers to move as quickly as possible while also holding injuries to a minimum still creates incentives to ignore or conceal mishaps. “I don’t think this is a problem that’s going to go away,” Aldrich said.

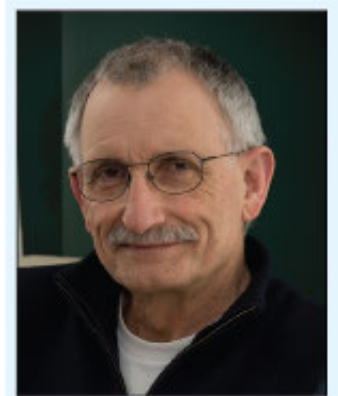
Defenders of the industry say the volume of whistleblower cases isn’t a good barometer of actual wrongdoing because the discipline in dispute often stems from violations by the employees that are completely unrelated to their injuries.

“In many cases, the [employee’s] argument is simply, ‘Well, the railroad managers didn’t like the fact that I reported my injury so they were looking for an excuse to get me,’” said James Whitehead, a management lawyer who has represented railroads and who teaches employment law at the University of Chicago.

Experts say much of the worker litigiousness stems from a 1908 law that excluded railroad employees from state workers compensation systems. Instead, it required them to go to court if they wanted to seek compensation for on-the-job injuries. That created a strong market for personal injury attorneys who specialize in railroad litigation. And those lawyers were quick to file whistleblower complaints after Congress in 2007 and 2008 modified the Federal Railroad Safety Act, adding anti-retaliation measures for rail workers.

As a result of those measures, railroad employees often have a lighter burden of proof when they pursue retaliation claims than do workers in other fields. Likewise, railroad employees often have rights other workers lack, such as the ability to file complaints over alleged retaliation due to reporting personal injuries. They also can take claims to federal court if their cases aren’t resolved within 210 days – a prospect that railroads often dread. “There can be a lot of emotion in these cases, and they can be challenging cases to defend” when they go before a jury, Whitehead said.

Tensions smolder



“It was traditionally an industry in which the boss is the absolute boss ... all the way up the hierarchy. You don’t question the boss’ authority.”
 --Maury Klein, a historian who has written about railroads.

Mike Elliott's case reflects the workplace tensions that sometimes smolder in the railroad industry. The beginning of the end for Elliott at BNSF came in March 2011, when he was chairman of the Washington legislative board of his union, the Brotherhood of Locomotive Engineers and Trainmen.

Elliott, an ex-Marine, got into a parking lot scuffle with Dennis Kautzmann, a supervisor who Elliott claimed harassed him for several years due to his safety advocacy. The parking lot incident, Elliott's lawyers argued in their successful federal lawsuit, was instigated as part of a scheme by BNSF managers to get Elliott fired because he triggered the federal safety investigation. They said Kautzmann had no other reason, after Elliott had clocked out for the day, for pursuing him from a BNSF building into the parking lot. (In his Oct. 1 ruling rejecting a new trial, Judge Leighton agreed that Kautzmann "staged" the conflict.)

Kautzmann, in a memo describing the March 2011 confrontation, said he followed Elliott into the parking lot simply to make sure Elliott understood the details about an upcoming engineer recertification evaluation. He said he brought along another BNSF employee "to assist me in having Mr. Elliott stop." Kautzmann said he then stepped in front of Elliott's car, but Elliott didn't stop and ran into him, throwing Kautzmann onto the car's hood. After that, Kautzmann said, Elliott angrily got out of the car and punched him in the mouth.

Kautzmann pressed charges after the parking lot incident, and Elliott was criminally prosecuted, but a jury acquitted him. Yet BNSF conducted two internal investigations, and issued decisions both times calling for Elliott's firing. A federal arbitration board upheld the findings.

At the federal trial challenging the firing, BNSF argued that Elliott's firing couldn't have been retaliation for reporting safety problems because it had little knowledge of Elliott's recent contacts with federal regulators.

But Elliott's lawyers presented evidence that BNSF was well aware that their client was in touch with regulators in the months before his firing. For instance, the lawyers pointed to an email about train signal problems that Elliott sent to a government official, and "cc-d" to company officials, in September 2010, several months before the federal inspections.

Despite winning the federal suit, Elliott expects a drawn-out appeals process, and he has decided against seeking reinstatement to his job at BNSF. Instead, he is working these days as a lobbyist and spokesman for the union. The role is crucial, he says, because his former co-workers at BNSF need someone to speak out about safety issues.

"The culture and the workplace fear of reporting injuries or safety problems hasn't changed," Elliott said. "Our members are still afraid."

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