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Whistle-Blowers

Union Pacific Employee Awarded \$51,000 After His Suspension for Video of Safety Test



By David Schwartz

Oct. 1 — Union Pacific Railroad must pay an employee \$51,000 in punitive damages and back wages because it violated whistle-blowing provisions by suspending him for video recording a safety test with his cell phone, the Labor Department's Occupational Safety and Health Administration Region 9 announced Sept. 26.

The employee, who worked at Union Pacific's facility in Carson, Calif., had complained to his supervisor in October 2012 that he considered an air compressor aboard a locomotive to be unsafe, according to the OSHA regional office in San Francisco. The supervisor overruled him. The employee then video recorded a test of the compressor using his cell phone.

The employee was suspended after he informed Union Pacific that he had sent the video to the Federal Railroad Administration.

"The Department of Labor really wanted to highlight that employees can record safety inspections at work. We wanted to make sure that Union Pacific couldn't retaliate against workers in the future," Joshua Paul, regional supervisory investigator in OSHA's Region 9 area office, told Bloomberg BNA Oct. 1. "One interesting thing about this case is that while cell phones have been around for a while, not all employees had smart phones. Now, many have cameras."

OSHA's order to pay the employee also included a directive that the railroad amend its policy of prohibiting cell phone recordings of its activities.

Trade Secrets

Baruch Fellner, an industry-side attorney with Gibson Dunn & Crutcher LLP, who wasn't involved in the case, told Bloomberg BNA Oct. 1 that Union Pacific may have had a legitimate reason for banning video recording in its facility that has nothing to do with safety—protection of trade secrets.

"I've represented companies that had very strong and enforceable policies against videotaping because of trade secrets," he said. "I don't know what happened in this case, but it may have been in furtherance of that enforceable policy."

Union Pacific didn't respond to Bloomberg BNA's request for information about the terms of its policy.

"Employees can share this sort of information with anybody," Fellner said. "In this case, the employee may be working for Union Pacific today, and another railroad tomorrow."

As for policies banning video recording, he added: "The employer doesn't know what's being filmed. So, they usually have a blanket policy against it in the workplace."

A spokesman for OSHA's Region 9 area office told Bloomberg BNA by e-mail Oct. 1: "There was no evidence in our case that the employee was suspended for violating any of Union Pacific's trade secrets or non-safety rules when the employee made the video recordings."

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