U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ROBERT K. BRUCKER,

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NOS. 2018-0067
2018-0068

ALJ CASE NO. 2013-FRS-00070

DATE: November 5, 2020

Appearances:

For the Complainant:
Joseph L. Bauer, Esq.; *The Bauer Law Firm, LLC*; Saint Louis, Missouri

For the Respondent:
Jacqueline M. Holmes, Esq.; Nikki L. McArthur, Esq.; *Jones Day*; Washington, District of Columbia

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Robert K. Brucker (Complainant) filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA)[1] with the Occupational Safety and Health Administration (OSHA) on January 9, 2013. Complainant alleged that his employer, BNSF Railway Company (BNSF or

[1] 49 U.S.C. § 20109 (2008), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 100-53, and as implemented by 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

Respondent), violated the FRSA by terminating his employment because he reported a work-related injury. OSHA investigated and dismissed Complainant's complaint. Complainant filed objections to OSHA's findings and requested a hearing before the Office of Administrative Law Judges (OALJ).

Prior to the hearing, the Administrative Law Judge (ALJ) granted Respondent's Motion for Summary Decision on May 1, 2014. Complainant moved to reconsider and supplement the record. The ALJ denied Complainant's Motion on June 20, 2014. Complainant filed a timely petition with the Administrative Review Board (ARB or Board).

The Board determined that Complainant raised genuine issues of material facts regarding whether his protected injury report contributed to Respondent's decision to fire him. As a result, the Board vacated the ALJ's decision and remanded the case to the ALJ for further proceedings on July 29, 2016.

On remand, the ALJ held a hearing in this matter and issued a Decision and Order Denying Complaint (D. & O.) on August 15, 2018. For the reasons below, we consolidate the appeals and affirm the ALJ's D. & O.

BACKGROUND

1. Work History and Injury Report

On June 24, 1993, Complainant applied for employment with Respondent's predecessor, Atchison, Topeka Santa Fe Railway Company (ATSF).[2] On his employment application, he checked the box "no" in response to the question, "Other than traffic violations, have you ever been convicted of a crime?" The end of the application contained an "Applicant Statement" that the applicant must sign certifying, "I have answered all questions to the best of my ability. If employed, I realize false information will be grounds for dismissal at any time, regardless when such information is discovered."[3] Complainant alleged that he answered "no" because Mr. David Underwood, Respondent's assistant superintendent at the time, told him that the railroad was only interested in felony convictions.[4] Complainant began working for ATSF shortly after submitting his employment application.[5]

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2 D. & O. at 62; CX 118; RX 2.

3 *Id*.

4 D. & O. at 69.

5 D. & O. at 6; Hearing Transcript (TR) at 60.

In a letter dated December 10, 2009, Complainant, through his attorney, informed Respondent that that he had sustained a work-related shoulder injury.[6] On January 26, 2010, Complainant filed an injury report with Respondent.[7] Complainant filed a Federal Employer's Liability Act (FELA) lawsuit against Respondent on October 14, 2011.[8]

Complainant testified that after he filed his injury report, his supervisors changed their behavior towards him.[9] Complainant stated that they intensified their scrutiny of his work, but not other employees' work, on every shift until Respondent terminated his employment.[10]

2. Respondent's PEPA Policy and Complainant's Disciplinary Issues

Shortly after reporting his injury and during the period that followed, Respondent cited Complainant for violating employer safety and absenteeism policies. On May 4, 2010, two co-workers allegedly observed Complainant driving, and then approximately thirty minutes later, riding as a passenger in a yard truck without a seat belt.[11] Complainant was cited for failing to follow the vehicle operations rule. Respondent investigated the matter and assessed Complainant a Level S 30-day record suspension and three years of probation.[12]

On June 15, 2011, Complainant and three co-workers were servicing three locomotive units that were attached together.[13] The locomotive units were under "blue flag protection" which signifies that "workers are on, under, or between equipment and therefore that equipment may not be moved unless and until" an employee receives permission to operate the engine from the employee in charge, the blue signal has been removed, and all workers have been warned that the

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6 D. & O. at 85; CX 2.

7 D. & O. at 6.

8 *Id.* at 86.

9 D. & O. at 6; TR at 70.

10 *Id*.

11 D. & O. at 80.

12 *Id.* Under Respondent's Policy for Employee Performance Accountability (PEPA) policy there are three severity levels of discipline. The first is a standard violation, the second is a serious "Level S" violation, and the third is a stand-alone dismissible violation. D. & O. at 21. The policy states that a second serious violation "committed within the applicable review period may result in dismissal." D. & O. at 90; RX 117-4.

13 *Id*. at 80.

engine was being moved.[14] While servicing the locomotives, Complainant's co-worker failed to set the hand brake.[15] "Complainant tried to 'train line a consist' meaning that he was taking the electrical and air between two locomotives and putting them together to make a 'consist.'"[16] In doing so, a locomotive went into an emergency state and dumped its air. Complainant then released the air brakes which caused the locomotive units to roll.[17] The rolling units caused a fuel stanchion being used by an employee to "snap off."[18]

Respondent investigated the incident and determined that the locomotives' movement was caused by a combination of Complainant's co-worker's failure to set the hand brake and Complainant's actions.[19] Respondent assessed Complainant a Level S 30-day record suspension and three years of probation for violating several Mechanical Safety Rules (MSR).[20]

In 2012, Complainant received counseling for unauthorized absenteeism ten times between February 2005 and February 2012.[21] Prior to this, the only formal discipline Complainant had received in connection with his absenteeism was a record suspension on December 16, 2005, for being absent without authority and failure to follow instructions between November 30, 2005, and December 15, 2005.[22] Complainant signed the counseling notice under protest because he thought that he was entitled to leave under the Family Medical Leave Act; he asked for but was not permitted to have union representation at the counseling session; and because he was told to sign the counseling notice or be charged with insubordination.[23]

3. Termination

Through discovery accompanying Complainant's FELA suit, Respondent learned on or about July 10, 2012, that Complainant had been convicted of a

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14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*. at 80-81.

19 *Id*. at 81.

20 *Id*.

21 D. & O. at 67; CX 16; RX 23.

22 D. & O. at 7, 34, 67.

23 *Id*. at 34.

crime.[24] On August 8, 2012, Respondent investigated to determine whether Complainant had been dishonest and failed to furnish information on his employment application.[25] Complainant admitted during the investigation that he lied on the employment application.[26] On August 16, 2012, Respondent sent Complainant a letter notifying him that he was being dismissed for violation of MSR Rules 28.2.7 and 28.6.[27] Mr. Bossolono, Mr. Cargill, Mr. Harris, and Ms. Hyatt, Respondent's general attorney, all participated in the decision to terminate Complainant's employment.[28] Complainant filed a complaint with OSHA claiming that his termination from employment violated the FRSA. On remand from the ARB, the ALJ held hearing and determined that Respondent did not violate the Act. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue agency decisions in review or on appeal of matters arising under the FRSA.[29] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[30] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[31]

DISCUSSION

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[24] *Id*. at 81. On January 25, 1985, Complainant was arrested and charged with assault in the first degree. *Id*. at 81; RX 9. On May 7, 1985, Complainant pled guilty to misdemeanor assault and was sentenced to one year in jail which was suspended during two years of supervised probation. *Id*.

[25] *Id*. at 63.

[26] *Id*. at 82; RX 24-30.

[27] D. & O. at 82; CX 25; MSR 28.2.7 prohibits employees from withholding information or failing to provide all the facts to those authorized to receive such information "regarding unusual prevents, accidents, personal injuries, or rule violations." Conversely, MSR 28.6 prohibits employees from being dishonest. CX 122-123.

[28] D. & O. at 82.

[29] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. Part 1982.

[30] 29 C.F.R. § 1982.110(b); *Jacobs v. Liberty Logistics, Inc*., ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019).

[31] *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

The FRSA prohibits a rail carrier engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness.[32] To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[33] If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.[34]

The ALJ determined that Complainant's December 10, 2009 attorney letter, January 26, 2010 injury report, and FELA lawsuit constituted protected activity and that Respondent's actions of walking Complainant on and off the property in front of his co-workers, conducting an investigation under Collective Bargaining Agreement (CBA), and terminating Complainant's employment were adverse actions.[35] However, the ALJ found that Complainant's protected activity did not contribute to the adverse actions Respondent took against him.[36] Both parties petitioned the ARB for review of these determinations.[37] Accordingly, we turn to the ALJ's determination whether Complainant's protected activity contributed to the adverse actions Respondent took against him.

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[32] 49 U.S.C. § 20109(a)(4).

[33] *Seay v. Norfolk S. Ry. Co.*, ARB Nos. 2014-0022, -0034; ALJ No. 2013-FRS-00034, slip op. at 6 (ARB Oct. 27, 2015).

[34] *Id*.

[35] D. & O. at 86-89.

[36] *Id*. at 89-91.

[37] In its cross-petition, Respondent also challenges the following: (1) that Complainant's FELA lawsuit was not protected activity; (2) that Complainant's attorney's letter to Respondent was not protected activity; (3) that Respondent's compliance with the CBA's procedures and investigation was not an adverse action; and (4) that the Railway Labor Act (RLA) precludes Complainant's claim. Respondent's Opening Brief in Support of Petition for Review at 7-12. As we are affirming the ALJ's finding of fact that Complainant failed to prove that his alleged activity was a contributing factor in the termination of his employment, all other arguments rendered are moot and we make no further determinations on the ALJ's protected activity, adverse action, and RLA preclusion analyses.

On appeal, Complainant asserts that the ALJ ignored or downplayed Respondent's actions taken against him which began shortly after he reported his injury in January 2010 and continued until his dismissal in August 2012; that Respondent's two intervening investigations were far from fair and impartial; that the ALJ erred in finding that Complainant lied on his employment application; and that the ALJ ignored ARB precedent regarding contributing factor causation.[38]

Conversely, Respondent argues that substantial evidence supports the ALJ's conclusion that it sincerely believed Complainant was dishonest; that the two-and-a-half year gap between Complainant's alleged protected conduct and his dismissal undermines any causal inference; and that Complainant did not prove contributing factor causation by showing Respondent discovered his dishonesty in connection with his FELA lawsuit.[39]

To establish a violation under the FRSA, a complainant must show that the protected activity was a "contributing factor" in the adverse employment action.[40] "A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'"[41] The Board has held that while close temporal proximity alone does not compel a finding of contributing factor causation, an ALJ's finding of causation may be affirmed when the ALJ relies on a large variety of both direct and indirect evidence in making his causation determination and does not rely on temporal proximity alone.[42] When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, "in general, employees are likely to be at a severe disadvantage in access to relevant evidence."[43] "Thus, an employee

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[38] Complainant's Brief in Support of His Petition for Review by the Administrative Review Board at 22-25.

[39] Respondent's Response Brief in Opposition to Complainant's Petition for Review at 11-19.

[40] 49 U.S.C. § 20109(d)(2)(A).

[41] *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 2014-0019, ALJ No. 2013-FRS-00003, slip op. at 3 (ARB July 17, 2015) (quotation marks and citations omitted).

[42] *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020).

[43] *Powers v. Union Pacific R.R. Co.*, ARB No. 2013-0034, ALJ No. 2010-FRS-00030, slip op at. 9 (ARB Jan. 6, 2017) (citing *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0025, ALJ No. 2014-FRS-00154, slip op. at 59 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017)).

'may' meet his burden with circumstantial evidence."[44] As such, a contributing factor in a whistleblower case is "not a demanding standard."[45]

Upon our review of the evidence, we agree with the ALJ that Complainant failed to meet his burden to show that his alleged protected activity was a contributing factor to the decision to terminate his employment. The ALJ correctly relied on several factors to support his determination. First, Complainant admitted during the 2012 investigation that he lied on his employment application. Although Complainant argues that the ALJ erred making this finding and believes his testimony regarding Mr. Underwood's application instructions should be entitled to more weight, his argument is not supported by the record. Complainant testified at the August 8, 2012 hearing that he did not inform Human Resources that he had been convicted of a crime prior to Respondent's discovery, that he understood the application statement and what his signature indicated on the application statement, and that he agreed to the application's terms.[46] Additionally, Mr. Suttles and Mr. Cargill, two employees familiar with Respondent's hiring practices, testified that they did not find Complainant's story regarding Mr. Underwood's instructions plausible. Mr. Suttles testified that as a hiring manager, he has sat in on hiring sessions and "could not imagine hearing a hiring manager say to check the 'no' box" especially after they knew the circumstances surrounding Complainant's criminal conviction.[47] Similarly, Mr. Cargill testified, "HR would want to know about a criminal conviction for a violent incident during the hiring process. Respondent does not tolerate workplace violence and it is taken very seriously."[48]

Second, Respondent's PEPA policy states that a second serious violation committed within the applicable review period may result in dismissal.[49] The ALJ found that Respondent administered the discipline that followed the 2010 seat belt and 2011 locomotive incidents in accordance with its policies and procedures and the CBA.[50] As such, the ALJ also correctly noted that Complainant's two serious violations within the applicable review period, taken in combination with the

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44 *Id*.

45 *Menendez v. Halliburton, Inc.*, ARB No. 2012-0026, ALJ No. 2007-SOX-00045, slip op. at 13 (ARB Mar. 15, 2013).

46 RX 27.

47 D. & O. at 27; TR at 643-644.

48 D. & O. at 22; TR at 521-523.

49 D. & O. at 90; RX 117-4.

50 D & O. at 90.

application dishonesty, was highly probative to the decision to terminate his employment.[51]

Third, the decision to terminate Complainant's employment with Respondent was made by multiple individuals both inside and outside Complainant's supervisory chain, the mechanical department, and the Kansas City area.[52]

Fourth, Complainant's protected activity occurred two years before Respondent's termination decision.[53] The Board has held that the probative value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable action.[54] In this case, Complainant's supervisors had the opportunity to terminate his employment because of protected activity after the 2010 and 2011 incidents, yet exercised leniency. As the ALJ found, this leniency weighs against a finding that Complainant's alleged protected activity beginning in late 2009 was contributing factor in Respondent's decision to terminate his employment in 2012.[55]

Accordingly, we agree with the ALJ's conclusion that Complainant failed to meet his burden to show that his alleged protected activity was a contributing factor to the decision to terminate his employment. We **AFFIRM** the ALJ's D. & O. and **DISMISS** the complaint.

SO ORDERED.

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[51] *Id.*; TR at 521.

[52] D. & O. at 90.

[53] *Id.*

[54] *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 18 (ARB June 29, 2006).

[55] Even if we conclude that the FELA lawsuit constitutes protected activity throughout the time in question, we would affirm the ALJ's finding of no contributing factor causation because of Respondent's discovery of Complainant's criminal history and dishonesty on his employment application and termination shortly thereafter.