U.S. Department of Labor

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

In the Matter of:

GERALD CORBIN and CHRISTOPHER KOPF,

COMPLAINANTS,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 2020-0023

ALJ CASE NOS. 2019-FRS-00018
2019-FRS-00019

DATE: May 28, 2021

Appearances:

For the Complainant:
Brian Reddy, Esq.; *The Reddy Law Firm*; Maumee, Ohio

For the Respondent:
Barry L. Loftus, Esq. and Tyler L. Jones, Esq.; *Stuart & Branigin LLP*; Lafayette, Indiana

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Randel K. Johnson and Thomas H. Burrell, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Gerald Corbin and Christopher Kopf (Complainants) filed complaints under the Federal Railroad Safety Act[1] (FRSA), alleging that their former employer, Norfolk Southern Railway Company (Respondent), had violated

[1] 49 U.S.C. § 20109 (2008), as implemented at 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18 (2020), Subpart A.

the FRSA's whistleblower protection provisions. After a hearing, an Administrative Law Judge (ALJ) found that Complainants failed to prove Respondent unlawfully retaliated against them and dismissed their cases. Complainants appealed the ALJ's decision. We affirm.

BACKGROUND

Kopf and Corbin worked for Respondent's Dearborn Division in Toledo, Ohio.[2] Complainants were responsible for moving trains throughout Respondent's rail system.[3] In the early summer of 2017, Complainants each had a conversation with Trainmaster Courtney Siffre about the operation of a locomotive they had been instructed to move from Detroit to Toledo.[4] Complainants expressed their concerns regarding instructions to operate the locomotive in "long hood forward mode," which they thought was unsafe because it decreased vision of the road and the excessive diesel exhaust from the locomotive could cause the crew's eyes to water.[5] The exact date of these conversations are unknown.[6]

On August 4, 2017, Respondent issued notices of an investigation charging Complainants with violating Respondent's Operating Rules.[7] Respondent alleged that Complainants failed to follow the instructions of their supervisor, Trainmaster Gerald Simon, to call the Dispatcher's Office before leaving work prior to the scheduled end of their shift on August 1.[8] Respondent suspended Complainants without pay pending the investigation.[9] Siffre conducted an investigation of the incident.[10]

Respondent held a disciplinary hearing for the investigation on September 20, 2017.[11] Siffre was the Charging Officer and Terminal Superintendent Stephen

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2 D. & O. at 2, 3. Kopf, an engineer, had worked for Respondent since 1996. *Id.* at 3. Corbin, a conductor, had worked for Respondent since 1998. *Id.*

3 *Id.*

4 *Id.* at 7.

5 *Id.* at 7-8.

6 *Id.* at 8.

7 *Id.* at 3.

8 *Id.* at 3, 8.

9 *Id.*

10 *Id.* at 8.

11 *Id.*

Myrick was the Hearing Officer.[12] On October 3, 2017, Myrick dismissed Corbin from service and allowed Kopf to return to work.[13]

On December 7, 2017, Kopf arrived to work at Respondent's Detroit Edison facility.[14] At the facility's entrance, Kopf refused to comply with security's request to provide his driver's license as required by the facility's rules.[15] After the incident, a trainmaster contacted Kopf and instructed him to comply with the facility's rules.[16] On December 13, Respondent issued a Superintendent's Notice stating the need to present a valid license when entering the facility.[17] On the same day, Kopf attempted to enter the facility but again refused to furnish his license.[18] Kopf would only allow security to inspect his license through the window of the car.[19] Security would not let him enter and asked him to leave.[20]

On December 18, 2017, Kopf received notice of investigation from Superintendent John Turpie for committing conduct unbecoming of an employee by failing to follow the trainmaster's instructions.[21] Respondent held a hearing on January 4, 2018, with Turpie serving as Charging Officer and Myrick serving as Hearing Officer.[22] On January 12, Myrick dismissed Kopf from service.[23]

On April 2, 2018, Kopf and Corbin each filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent had violated the whistleblower protections of the FRSA.[24] Following an investigation, OSHA dismissed their complaints, and Complainants submitted objections and a request for a hearing on November 8, 2018.[25]

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12 *Id.*

13 *Id.* at 3, 8.

14 *Id.* at 3.

15 *Id.*

16 *Id.*; Joint Exhibit 4.

17 D. & O. at 3-4.

18 *Id.* at 4, 8-9.

19 *Id.* at 4.

20 *Id.*

21 *Id.* at 4, 9.

22 *Id.*

23 *Id.*

24 *Id.* at 2.

25 *Id.*

After consolidating the cases, an ALJ held a hearing on September 10 and 11, 2019.[26] The ALJ issued his decision on December 27, 2019. The ALJ made credibility assessments for Complainants' and Respondent's witnesses. The ALJ found Complainants' testimonies to be generally consistent and truthful, but found that their failure to suggest that their discipline was motivated by discriminatory animus in their disciplinary hearings undercut their credibility.[27] The ALJ found Respondent's witnesses to be generally credible because they were consistent and largely unimpeached.[28] The ALJ noted, however, that his decision was not controlled by his credibility assessments.[29]

The ALJ found that Complainants had expressed safety concerns about operating the locomotive in long hood forward mode and, therefore, had engaged in activity protected under the FRSA.[30] The ALJ also found that Complainants had suffered adverse employment actions by being suspended and then dismissed.[31]

The ALJ next found that Siffre had been aware of the protected activity when charging Complainants because they had made the safety complaints to him approximately two months before the discipline.[32] However, the ALJ found that no evidence in the record permitted a finding that the safety complaints contributed in any way to Siffre's decision to discipline Complainants.[33] The ALJ noted that Siffre's testimony that he did not retaliate against Complainants was not contradicted by any documentary evidence, and that his cross-examination did not cause the ALJ to doubt his truthfulness.[34] The ALJ found that the temporal proximity of at least two months between the safety complaints and Siffre's disciplinary action did not support an inference that Siffre was motivated to retaliate against Complainants.[35]

The ALJ then found that no evidence suggested that Myrick or Turpie had knowledge of Complainants' protected activity prior to disciplining them or were

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26 *Id.*

27 *Id.* at 10-11.

28 *Id.* at 11.

29 *Id.*

30 *Id.*

31 *Id.* at 11, 13.

32 *Id.* at 12.

33 *Id.*

34 *Id.*

35 *Id.* The ALJ remarked that there was "no evidence that Siffre spent those two months looking for an opportunity to take disciplinary action against Complainants." *Id.*

motivated by a desire to retaliate against Complainants.[36] Further, Myrick's decision to discharge Corbin but allow Kopf to return to work undercut Complainants' claim that he retaliated against them.[37] Based on the evidence in the record, the ALJ found that the "cat's paw" theory of liability did not apply to Myrick and Turpie's disciplinary actions.[38] Therefore, the ALJ found that Complainants had failed to prove by preponderance of the evidence that Respondent unlawfully retaliated against them under the FRSA.[39]

Last, the ALJ found that Norfolk had proven by clear and convincing evidence that Complainants' suspensions and terminations only occurred because of their violations of Respondent's rules and were the results of events or decisions wholly independent of their protected activity.[40] The ALJ then dismissed Complainants' cases.[41] Complainants petitioned the Administrative Review Board (Board) to review the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review appeals of ALJ's decisions pursuant to the FRSA.[42] The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[43]

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discriminating against an employee because the employee engaged in a protected activity.[44] The FRSA protects, among other acts,

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36 *Id.* at 13.

37 *Id.* at 12. The ALJ suggested that Myrick would have discharged both of them if Respondent had been motivated to retaliate against them. *Id.*

38 *Id.* at 13.

39 *Id.*

40 *Id.* at 14.

41 *Id.* at 17. At the end of his decision, the ALJ numerically listed all factual findings he had made in the discussion section. *Id.* at 14-17.

42 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).

43 *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

44 49 U.S.C. § 20109(b).

employees who report, in good faith, a hazardous safety condition.[45] To prevail on an FRSA retaliation complaint, the complainants must prove by preponderance of the evidence that (1) they engaged in protected activity, (2) that their employer took an adverse employment action against them, and (3) that the protected activity was a contributing factor in the unfavorable personnel action.[46] If the complainants successfully proves their claims, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[47]

Complainants present several arguments on appeal. First, Complainants claim that the ALJ erroneously required them to prove that Siffre had motivation to retaliate against them. Complainants are correct that the complainants do not need to prove retaliatory motivation in FRSA whistleblower cases.[48] Rather, "the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity."[49] To satisfy this standard, "a complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action."[50]

However, the ALJ did not hold that Complainants must show retaliatory animus to successfully prove their claims against Respondent. The ALJ made findings that Complainants had failed to prove by a preponderance of the evidence that Siffre "was motivated in any way to retaliate against [them] because of the safety complaint made in the summer of 2017."[51] Motivation, however, is relevant circumstantial evidence that may be "consider[ed] when determining whether a

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45 § 20109(b)(1)(A).

46 *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015).

47 *Id.*

48 *Acosta v. Union Pacific R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 6 (ARB Jan. 22, 2020) ("[A] complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action. If an employer asserts a legitimate, nondiscriminatory reason for its actions, a complainant can point to specific facts or evidence that . . . show that the protected activity was also a contributing factor even if the employer's reasons were nonretaliatory.") (citation omitted); *see also Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 2013-0039, ALJ Nos. 2008-STA-00020, -00021, slip op. at 8 (ARB May 13, 2014).

49 *Acosta*, ARB No. 2018-0020, slip op. at 6.

50 *Id.*; *see also Brough v. BNSF Ry. Co.*, ARB No. 2016-0089, ALJ No. 2014-FRS-00103, slip op. at 10 (ARB June 12, 2019) ("Proof of the causal relationship between the protected activity and the adverse action is sufficient to establish any discriminatory intent that the statutory text implicitly requires.").

51 D. & O. at 15, 16 (making specific findings for each complainant in points 9 and 19).

complainant has demonstrated that protected activity was a contributing factor in the adverse action."[52] We interpret the ALJ's findings as support for its overall findings that Complainants failed to prove their protected activity contributed to Siffre's disciplinary actions. Therefore, the ALJ did not err in finding that Siffre was not motivated to retaliate against Complainants.

Second, Complainants contest the ALJ's findings that they failed to prove that their protected activities were contributory factors in Siffre's disciplinary actions. A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[53] We will affirm these findings if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[54]

Complainants point to several pieces of evidence in support of reversing the ALJ's findings. Complainants cite the temporal proximity of two months between the protected activity and the notices of investigation and highlight their testimony that Siffre was dismissive of their safety concerns.[55] They further claim that evidence demonstrated that Siffre did not inform Complainants of available disciplinary waivers that would allow them to admit their fault and return to work.[56] Complainants also question Siffre's charges against them for failing to abide by Simon's instruction to call the Dispatcher's Officer before marking off duty at the end of their shift, claiming that the charges lacked proof that Complainants engaged in wrongful conduct, and that Siffre used the instruction issue as "an opportunity to find something to 'pin on' the Complainants."[57]

The evidence Complainants present is unpersuasive. Complainants' temporal proximity evidence is weak because they failed to establish the length of time between the protected activity and disciplinary action. The approximate temporal proximity is also not particularly close, as the safety complaints occurred in the

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[52] *Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 2011-0037, ALJ No. 2009-FRS-00015, slip op. at 28 n.85 (ARB Mar. 29, 2013); *Palmer v. Canadian Nat'l Ry.*, ARB 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 14, 55 (ARB Jan. 4, 2017) ("[A]n employee may meet her burden with circumstantial evidence.").

[53] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013).

[54] *McCarty v. Union Pacific R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

[55] Complainants' Brief (Comp. Br.) at 22.

[56] Comp. Br. at 22-23; Hearing Transcript (Tr.) at 303, 309, 311.

[57] Comp. Br. 23-26. Complainants point to Siffre's testimony that he personally wanted to notify Complainants of the charges and that he was not even aware of Simon's verbal instructions until after starting the investigation. Comp. Br. at 23.

early summer and the discipline occurred in August.[58] Further, nothing in the record indicates that Siffre was aware of the disciplinary waivers.[59] Respondent also notes that Complainants failed to introduce any evidence supporting their testimony that Siffre was hostile to their safety concerns, and highlights the considerable evidence of their wrongdoing, including testimony from supervisors and other employees, phone records, and emails.[60]

We hold that the ALJ's findings of no contribution is supported by substantial evidence. A reasonable person could conclude from the evidence in the record that Complainants failed to prove that their safety concerns were contributing factors in Siffre's disciplinary actions. Complainants do not present persuasive evidence of retaliation, and instead, rely on their own uncorroborated testimony. Further, the evidence demonstrates that Complainants violated instructions from their superiors and that an investigation was warranted. We therefore affirm the ALJ's findings.

Last, Complainants argue that the ALJ erred by finding that Respondent proved its affirmative defense that it would have imposed the same discipline absent their protected activity. We need not address this argument because we affirm the ALJ's finding that Complainants failed to prove that their protected activity contributed to the disciplinary actions against them.[61]

CONCLUSION

Because substantial evidence supports the ALJ's finding that Complainants failed to prove by a preponderance of evidence that their protected activity contributed to the disciplinary actions against them, we **AFFIRM** the ALJ's order dismissing the cases.

SO ORDERED.

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[58] Temporal proximity has "limited causal value," and "[p]roof of retaliation for engaging in protected activity under the FRSA generally requires more than the mere temporal relationship that an adverse action followed an instance of protected activity." *Acosta*, ARB No. 2018-0020, slip op. at 8.

[59] Siffre testified that he was unaware of the waivers at the time. Tr. at 310.

[60] *See* Respondent's Brief at 45; Joint Exhibits 3, 4, 8.

[61] Complainants also claim that the ALJ incorrectly required them to prove that Myrick and Turpie had retaliatory animus and that Myrick had knowledge of the protected activity to successfully prove "cat's paw" liability. Because we affirm the ALJ's finding that Complainants failed to prove their protected activity contributed to Siffre's disciplinary actions, we also do not need to address this argument.