U.S. Department of Labor

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

In the Matter of:

MICHAEL BROUSIL, **ARB CASE NOS. 2020-0053**
2020-0062

COMPLAINANT, **ALJ CASE NO. 2014-FRS-00163**

v. **DATE: January 27, 2021**

BNSF RAILWAY COMPANY,

RESPONDENT.

Appearances:

For the Complainant:
Kenneth E. Rudd, Esq.; Wildwood, Missouri

For the Respondent:
Paul S. Balanon, Esq.; *BNSF Railway Company*; Fort Worth, Texas

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Michael Brousil (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that BNSF Railway Company (Respondent) violated the FRSA by disciplining him in retaliation for acts protected by the FRSA. OSHA dismissed the complaint. Complainant objected and requested a hearing

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

before an Administrative Law Judge (ALJ), who found Respondent had proven its affirmative defense. Complainant appealed. On July 9, 2018, the Administrative Review Board (ARB or Board) remanded the case back to the ALJ for application of the correct legal standard to Respondent's affirmative defense. The ALJ reassigned to this case ruled in favor of the Respondent. For the following reasons, we affirm the ALJ's order.

BACKGROUND

Respondent hired Complainant in 1988. At the time of the events listed below, Complainant worked as a locomotive engineer. On August 2, 2013, Respondent assessed Complainant with a Standard Formal Reprimand for violating Attendance Guidelines. In March of 2011 and throughout 2013, Complainant raised his concerns to Respondent's managers about plugging into shore power at Chicago Union Station due to his apprehensions of unsafe exposure to diesel exhaust. "Shore power" is power the train station supplies an incoming train by connecting a large electrical cord.

On August 29, 2013, Respondent issued a "Level S 30 Day Record Suspension" with a 3-year probation period against Complainant for a February 5, 2013 incident. A passenger train departed without an illuminated light indicating that all doors were closed. The train traveled at speeds over 65 miles-per-hour for more than 10 minutes with a car door open. Later on the same day, the passenger train departed again without a door indicator light for approximately 40 seconds before doors were shut.

On October 11, 2013, Respondent issued two additional "Level S 30 Day Record Suspensions" with 3-year probation periods to be served concurrently with the first disciplinary review period against Complainant for incidents occurring on July 29, 2013, and August 1, 2013. On July 29, 2013, Complainant refused to follow supervisor's instructions to use an alternative method to ensure all car doors were closed as the door indicator light was not working. On August 1, 2013, Complainant stopped a train 30 feet from the stopping point at Chicago Union Station and refused instructions to pull the train closer to be plugged into shore power. As a result, a disabled passenger was temporarily unable to board the train and approximately 2,500 commuters were delayed more than 20 minutes.

On November 25, 2015, the ALJ assigned to the case dismissed Complainant's claim after finding Respondent had shown it would have taken the

same adverse actions at issue absent any protected activity. The ALJ found that Respondent had probable cause to investigate Complainant's actions and that Respondent showed leniency in its discipline. On July 9, 2018, the Board vacated the ALJ's conclusion that Respondent proved it would have taken the same adverse action against Complainant and remanded the case back to the ALJ for application of the correct legal standard. Specifically, the Board found that the ALJ's findings that Respondent had probable cause to investigate Complainant's actions and that it did not discipline him to the extent that it could have under its rules did not meet the required "clear and convincing" standard.

The ALJ reassigned to the case dismissed Complainant's claim, finding that Respondent proved, by clear and convincing evidence, that it would have taken the same adverse action against Complainant absent any of his protected activity. These appeals followed.[2]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions in cases arising under the FRSA and to issue agency decisions in these matters.[3]

DISCUSSION

The FRSA is governed by the burdens of proof set out under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[4]

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[2] On October 9, 2018, the ALJ issued an order denying Respondent's motion requesting briefing to be filed by the parties addressing the contributing factor and protected activity elements. Respondent appeals this determination. (ARB No. 2020-0053). As the Respondent did not provide a compelling reason to submit briefing on an issue that the Board has previously held was final in this matter, and as the Respondent concedes that it did not timely file an appeal before the ARB on these issues at that time, we affirm the ALJ's order and deny Respondent's petition.

[3] 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); see 29 C.F.R. § 1982.110(a). In its response brief, Respondent argues that the Board lacks subject-matter jurisdiction over ARB Case No. 2020-0062 because the Board failed to timely accept Complainant's petition for review. However, the Board denies the Respondent's argument because the ALJ's order could not be considered final once the Board timely accepted the Respondent's petition for review.

[4] 49 U.S.C. § 20109(d)(2)(A)(i), citing 49 U.S.C. § 42121(b).

Accordingly, 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 whole or in part, in the unfavorable personnel action.[5] If a complainant meets this 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 absent the complainant's protected activity.[6]

The issue before us is whether substantial evidence supports the ALJ's finding that Respondent proved, by clear and convincing evidence, it would have taken the same adverse action absent any of Complainant's protected activity. The Board has held that an ALJ's factual finding will be upheld where supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us *de novo*."[7] As the United States Supreme Court has stated, "[t]he threshold for such evidentiary sufficiency is not high."[8] Substantial evidence is "'more than a mere scintilla.' It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[9]

In deciding this case, the ALJ found that Respondent acted appropriately in accordance with its safety and operating rules and within its "zero tolerance" policy for workplace retaliation. The ALJ found "[a]lthough Complainant was involved in several disciplinary proceedings over a short time period, the disciplinary proceedings were consistent with BNSF safety rules and clearly resulted from Complainant's conduct over a short time period rather than any motive to harass or intimidate Complainant."[10] Upon review of BNSF's safety and operating rules, we find that they support the ALJ's findings that Respondent's discipline was based on Complainant's own behavior throughout the three incidents and would have occurred in the absence of protected activity.

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5 49 U.S.C. § 42121(b)(2)(B)(iii).

6 *Id.* at § 42121(b)(2)(B)(iv).

7 *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

8 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

9 *Id.* (citing and quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

10 D. & O. at 17-18.

Additionally, the ALJ found that Respondent demonstrated no retaliatory motive in its discipline. The ALJ analyzed factors including whether Respondent's operating and safety rules were rational, unambiguous, and retaliatory; whether Complainant failed to act in accordance with those rules and instructions from his supervisors; and the import of Complainant's own admissions, including conceding at his deposition that he departed without an illuminated door indicator light the second time on February 5, 2013. The ALJ also noted that Respondent had given greater discipline and terminated 15 other employees in 2013 for violating the same rules with which Complainant was charged.[11] The ALJ found that the basis and the managerial leniency of the Respondent's disciplinary decisions were so powerful that it is clear the discipline would have occurred apart from his protected activity, and that "[g]iven the justification for the lenient treatment of Complainant due to his position and tenure with Respondent, I thus find that Respondent has shown by clear and convincing evidence that it would have disciplined Complainant in the same way in the absence of Complainant's protected activity."[12] We affirm this conclusion as supported by substantial evidence and in accordance with law.[13]

Accordingly, we find the record supports the ALJ's factual determination that Respondent proved, by clear and convincing evidence, that it would have taken the same adverse actions against Complainant absent any of his protected activity.

CONCLUSION

The ALJ's Decision and Order is supported by the substantial evidence in the record. Accordingly, we **AFFIRM** the ALJ's conclusion of law that Respondent proved its affirmative defense and the complaint in this matter is **DENIED**.

SO ORDERED.

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11 *Id.* at 19.

12 *Id.* at 25.

13 Complainant argues that the ALJ's opinion is not supported by substantial evidence because the ALJ failed to adequately address his argument that Respondent tampered with the download evidence presented at the August 14 disciplinary hearing. However, as there is no showing of tampered evidence in the record, we conclude that the ALJ's factual determination is supported by substantial evidence.