U.S. Department of Labor

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

In the Matter of:

WAYNE LAIDLER,

COMPLAINANT,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

RESPONDENT.

ARB CASE NO. 2021-0013

ALJ CASE NO. 2014-FRS-00099

DATE: August 31, 2021

Appearances:

For the Complainant:
Robert B. Thompson, Esq.; *The Law Office Of Robert B. Thompson LLC*; Chicago, Illinois; and Robert E. Harrington, III, Esq.; *Dunn Harrington LLC*; Chicago, Illinois

For the Respondent:
Andrew J. Rolfes, Esq.; *Cozen O'Connor*; Philadelphia, Pennsylvania

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] Wayne Laidler (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his former employer, Grand Trunk Western Railroad Company (Respondent), retaliated against him after he refused to

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[1] 49 U.S.C. § 20109, as amended at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A.

work due to a hazardous safety condition. After an investigation, OSHA determined that Respondent violated the FRSA and awarded relief to Complainant. Respondent requested a hearing with the Office of Administrative Law Judges (OALJ), and an Administrative Law Judge (ALJ) also found that Respondent violated the FRSA and awarded relief to Complainant. Respondent appealed the ALJ's decision to the Administrative Review Board (ARB or Board). The ARB affirmed the ALJ's decision in part, vacated it in part, and remanded it to the OALJ for further proceedings. A newly assigned ALJ issued a Decision and Order on Remand (D. & O.) awarding relief and granting the remedies outlined in the prior ALJ's decision. Respondent appealed the D. & O. to the ARB. For the reasons discussed below, we summarily affirm the ALJ's D. & O.

BACKGROUND

Complainant worked as a train conductor for Respondent.[2] Respondent is a railroad carrier within the meaning of the FRSA.[3] Respondent has its own operating rules for its employees, including a "roll-by inspection." Rule 523 provides that:

> When duties and terrain permit, at least two crew members of a standing train . . . must inspect passing trains on the ground on both sides of the track. At locations where trains will meet, the train to arrive second must notify the first train when they pass the approach to the siding, to allow crew members to be in position for inspection.[4]

On December 15, 2012, Complainant and Claude T. Freeman Jr., a train engineer, were transporting a freight train when it stopped in Respondent's railyard in Flint, Michigan.[5] While stopped, an oncoming Respondent train approached their train with its trainmaster, Jacob Hommerding, aboard.[6] The original ALJ found that Complainant and Freeman had not been warned or notified that a moving train would be approaching and passing their train.[7] Rule 523 requires notice of an

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[2] The facts for the Background section are taken from the parties' stipulated facts, the ALJ's findings of fact, and the undisputed facts. *Laidler v. Grand Trunk Western R.R. Co.*, ALJ No. 2014-FRS-00009, slip op. at 3 (ALJ Aug. 13, 2015) (Decision and Order Awarding Benefits).

[3] *Laidler*, ALJ No. 2014-FRS-00009, slip op. at 4 (ALJ Aug. 13, 2015).

[4] Respondent's Exhibit (RX) 1; Joint Exhibit (JX) 2 at 60.

[5] *Laidler*, ALJ No. 2014-FRS-00009, slip op. at 47-48 (ALJ Aug. 13, 2015).

[6] *Id.* at 48.

[7] *Id.* at 48, 56, 62.

oncoming train in order to allow the crew of the stopped train to get into position on the ground, on both sides of the train track, to perform the roll-by inspection.[8] The ALJ also determined that Complainant had no warning of the approaching train and did not notice the train until it was between 500-1,000 feet away, and approaching at track speed in dark and foggy conditions.[9]

Complainant and Freeman did not perform a roll-by inspection of the oncoming train. In addition, neither Complainant nor Freeman notified Respondent's personnel that they could not perform the roll-by inspection from the ground.[10] The following day, Hommerding approached Complainant and asked him why he did not perform a roll-by inspection from the ground. Complainant replied that it was too hazardous to do so due to his train's location on a bridge with dangerous terrain.[11] The exact location of Complainant's train was subject to an evidentiary dispute. However, the original ALJ found that the train's head engine was stopped on the Schwartz Creek Bridge and, therefore, was in an unsafe location to perform a roll-by inspection.[12]

Subsequently, Respondent brought disciplinary charges against Complainant, but not Freeman, Hommerding, or his crew, for failing to perform a roll-by inspection of the passing train in violation of Rule 523.[13] Respondent conducted an investigation hearing, found Complainant guilty of not performing the roll-by inspection, and terminated Complainant's employment.[14] In making the decision to terminate Complainant's employment, Respondent's general manager reviewed and considered the investigation hearing evidence along with additional information, including statements from unidentified employees, reenactments, Google Maps, and Complainant's past drug test history.[15]

On March 7, 2013, Complainant filed a complaint with OSHA alleging that Respondent violated the FRSA by terminating his employment in retaliation for not performing a roll-by inspection due to hazardous conditions.[16] OSHA concluded that

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[8] RX 1; JX 2 at 60.

[9] *Id*. at 48-49, 56.

[10] *Id*. at 48, 56; ALJ Hearing Transcript (Tr.) at 191-192.

[11] *Laidler*, ALJ No. 2014-FRS-00009, slip op. at 11 (ALJ Aug. 13, 2015).

[12] *Id*. at 47-54.

[13] *Id*. at 63.

[14] *Id*. at 18-19, 33, 62-64; JX 3.

[15] *Laidler*, ALJ No. 2014-FRS-00009, slip op. at 20, 62-64 (ALJ Aug. 13, 2015).

[16] *Id*. at 2.

Respondent violated the FRSA and awarded relief to Complainant.[17] Respondent subsequently filed objections to OSHA's findings and requested a hearing with an ALJ.[18] During the OALJ hearing, Complainant and Freeman testified that their radios were in working condition and that they could have contacted the yardmaster to let him know that they were not doing a roll-by inspection because the conditions were unsafe.[19] The ALJ subsequently issued a D. &. O., finding that Complainant's refusal was protected and awarded relief to Complainant.

Respondent appealed this decision to the Board. The Board vacated the prior decision and remanded the case for reconsideration on the following issue:

> Whether or not it was possible for [Complainant] to notify [Respondent] of his intention not to perform an on-the-ground roll-by inspection because of the hazardous terrain, after taking into consideration [Complainant's] and Freeman's testimony seemingly indicating that such notice was possible. The remand decision issued as a result necessarily must provide an explanation of the ALJ's reasoning supporting [her] determination, including an explanation as to what evidence was relied upon, and why, and as to what evidence was not relied upon, and why.[20]

The newly assigned ALJ reconsidered whether Complainant engaged in protected activity after analyzing and reconciling the witnesses' testimony, and issued a D. & O. awarding relief to Complainant on December 9, 2020.[21] On December 23, 2020, the ARB received Respondent's Petition for Review. For the reasons discussed below, we affirm the ALJ's D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[22] In FRSA cases, the ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as

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17 *Id.*

18 *Id.*

19 *Id.* at 12, 56. Tr. at 48-59, 101, 191-192.

20 *Laidler v. Grand Trunk Western R.R. Co.*, ARB No. 2015-0087, ALJ No. 2014-FRS-00099, slip op. at 11 (ARB August 9, 2017).

21 *Laidler v. Grand Trunk Western R.R. Co.*, ALJ No. 2014-FRS-00099 (ALJ Dec. 9, 2020) (D. & O.).

22 29 C.F.R. Part 1982; *see also* 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).

they are supported by substantial evidence.[23] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[24] The standard for reviewing the amount of a punitive damages award is abuse of discretion.[25]

DISCUSSION

Pursuant to 49 U.S.C. § 20109(b)(2), the FRSA protects an employee's refusal to work under hazardous conditions, "*where possible*, [the employee] has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work . . . unless the condition is corrected immediately[.]"[26]

A successful complainant is entitled to be made whole under the FRSA. The FRSA provides for "compensatory damages, including compensation for any special damages sustained as a result of discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."[27] Punitive damages up to $250,000 are also authorized under the Act.[28] The Board has held that punitive damages are warranted where there has been reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.[29]

Respondent alleged that the evidence presented at the hearing, specifically Complainant and Freeman's cross-examination testimony, clearly and unequivocally demonstrates that it was possible for Complainant to have provided notice of his intention not to perform the roll-by inspection.[30] The ALJ on remand

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

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

[25] *D'Hooge v. BNSF Rys.*, ARB Nos. 2015-0042, -0066, ALJ No. 2014-FRS-00002, slip op. at 5 (ARB Apr. 25, 2017); *see Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) (stating "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system is merely to review the trial court's 'determination under an abuse-of-discretion'" regarding the amount of a punitive damage award (in a common-law claim of unfair competition)).

[26] 49 U.S.C. § 20109(b)(2)(C) (emphasis added).

[27] 49 U.S.C. § 20109(e)(2)(c).

[28] 49 U.S.C. § 20109(e)(3).

[29] *D'Hooge*, ARB Nos. 2015-0042, -0066, ALJ No. 2014-FRS-00002, slip op. at 10 (ARB Apr. 25, 2017) (citing *Smith v. Wade*, 461 U.S. 30 (1983); *Kolstad v. Am. Dental*, 527 U.S. 526 (1999)).

[30] D. & O. at 3.

found that it was not possible for Complainant under the circumstances to notify the railroad carrier of the existence of the hazardous condition and his intention not to perform the roll-by.[31] In finding that it was not possible for Complainant to notify the railroad carrier of the existence of the hazardous condition, the ALJ rejected Respondent's contentions after comprehensively reviewing the extensive evidence of the record. In sum, the ALJ relied upon Complainant and Freeman's cross-examination testimony, the original ALJ's credibility determinations, and the original ALJ's findings that Complainant had no warning of the approaching train and did not notice it until it was at most 500 to 1,000 feet away. Other considerations include the speed of the approaching train, the terrain outside of Complainant's train, and the presence of fog.[32] The ALJ on remand adopted the original ALJ's remedies, which included an 18.6% increase upon any lost wages by Complainant and $100,000 in punitive damages.[33]

Respondent argues on appeal that the ALJ erred by focusing entirely on whether the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, rather than whether the employee, where possible, notified the railroad carrier of the existence of the hazard—thereby conflating two separate, but independent elements of the FRSA.[34] Respondent also avers that the ALJ erred by requiring an 18.6% increase to Complainant's lost wages,[35] and by awarding Complainant $100,000 in punitive damages because Respondent's general manager "honestly believed that [Complainant] was lying" and that the ALJ did not have jurisdiction to interpret Respondent's collective bargaining agreement.[36]

Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude that the ALJ's D. & O. is supported by substantial evidence. First, while we recognize that Complainant and Freeman testified that their radios were in working order and that they could have contacted the yardmaster, when considered in context with the ongoing events at that time—an approaching, unexpected train, 500-1,000 feet away, traveling at "track speed," in dark and foggy conditions, and on a bridge with dangerous terrain—substantial evidence supports that it was not possible for Complainant to notify the railroad carrier of the existence of the hazardous condition.

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[31] *Id*. at 7.

[32] *Id*. at 4-7.

[33] *Id*. at 7.

[34] Brief in Support of Respondent's Petition for Review (Resp. Br.) at 11.

[35] Resp. Br. at 20.

[36] *Id*. at 12-19.

Second, the only evidence in the record concerning Complainant's back pay determination was the union official's testimony, which stated that a new labor wage agreement was passed between Respondent and Complainant's union, that it was ratified and retroactive to 2010, and that it called for an 18.6% pay increase for all employees.[37] Respondent provided no rebuttal witnesses or documents to dispute the annual percentage wage increase.

Third, in awarding punitive damages to Complainant, the ALJ relied upon several factors, including but not limited to: (1) that Complainant was singled out for disciplinary action while Freeman, who engaged in the same conduct, and Hommerding, who failed to provide Complainant a warning of the approaching train, were not disciplined for their actions;[38] (2) Respondent's general manager ignored objective evidence, including testimony from key witnesses concerning Complainant's train location and the visibility conditions, and instead, relied upon personal assumptions that could not be verified;[39] and (3) although Complainant's dismissal letter stated he was terminated based on the record and transcript of the formal investigation, the ALJ found that Respondent's general manager relied upon witnesses and information that were never presented at the formal investigation or revealed to Complainant.[40]

After determining that punitive damages were warranted, the ALJ found that $100,000 was appropriate based on comparing punitive damages in other FRSA cases, the manner in which Complainant was treated as the result of his protected behavior, and mitigating factors present in this case.[41] Ultimately, the ALJ determined that Respondent "creat[ed] a work environment in which employees put themselves in danger out of fear of losing their livelihoods, creating an issue of safety and striking at the heart of the FRSA's protections."[42] As such, we find none of the arguments posed by Respondent demonstrate that the ALJ abused her discretion or committed reversible error. Accordingly, we summarily **AFFIRM** the ALJ's D. & O.

SO ORDERED.

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37 Tr. at 252.

38 *Laidler*, ALJ No. 2014-FRS-00009, slip op. at 63 (ALJ Aug. 13, 2015).

39 *Id*. at 62.

40 *Id*. at 62-63.

41 *Id*. at 64.

42 *Id*.