U.S. Department of Labor

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Issue Date: 22 July 2009

CASE NO..: 2009-FRS-00007

IN THE MATTER OF

JOSEPH DUGAS,
Complainant

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING THE COMPLAINT

This matter arises out of a claim filed by Complainant under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53. Complainant filed his complaint with the Secretary of Labor on February 11, 2009, alleging Respondent retaliated against him on October 28, 2008. Following an investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), found there was no reasonable cause to believe Respondent violated FRSA. Complainant timely appealed this finding and the case was assigned to the undersigned. On June 9, 2009, Respondent filed a Motion for Summary Disposition, alleging Complaint was engaged in flagrant misconduct and that he failed to show he was engaged in a "protected activity," as required under the FRSA. Alternatively, Respondent argues that Complainant has offered no proof to dispute Respondent's proffered legitimate, non-discriminatory reason for discipline. Complainant filed a response on June 23, 2009.

FINDINGS OF UNDISPUTED FACT

1. Complainant was a conductor on a train stopped at a road crossing in Houston, Texas, on October 23, 2008. [CB p. 2; RB p. 2].
2. A Houston Police Department Officer approached the train and asked Complainant and the train's engineer to leave the train. Complainant informed the officer that he could not leave the train and gave the officer his railroad identification. [CB p. 2; RB p. 2, Exhibit C].

3. Complainant's statement of the event and the audio transcript of the conversation between Complainant and the Corridor Manager/Dispatcher show that there was no legitimate safety or security related concern. Specifically, Claimant stated that although the officer was trying to flag the train down, they kept on going because the crossing was blocked and the officer was "really mad." [RB, Exhibit C].
4. When Complainant asked the Corridor Manager what to do about the officer, he was told to explain to the officer that there was a mechanical difficulty. [RB, Exhibit D]. In a later conversation, the Corridor Manager stated that "if you've got an official telling you to do something, you've got to do what they're telling you. . . . I don't override the police," to which Complainant responded, "I know you don't override the police." The Corridor Manager reiterated that he only recommended Complainant inform the officer of the problem, but Complainant stated that the officer was irate and was not "going to hear any of it." [RB, Exhibit E].
5. The statement and audio transcript are clear that no one directed Complainant to ignore the officer and reveal no expressed safety or security related concern.
6. The officer walked to his vehicle, but before he could return Complainant's train received a green signal from the dispatcher and departed. [CB p. 3; RB p. 2, Exhibit C].
7. Complainant was not in charge of the operation or movement of the train. The locomotive engineer was in total control of the train when it left the crossing. [CB p. 2-5, Exhibit 2].
8. Although Complainant alleges that the removal of the conductor from an active train would have created a public safety hazard which would be in direct violation of federal laws, rules and regulations, no such laws, rules or regulations have been cited.
9. Respondent's *Special Security Alert Instruction, Item 24*, is the only company provision that instructs its employees to not leave a train unattended, but *Item 24* applies only to operation of trains carrying specified hazardous materials during heightened security alert status, *i.e.*, Alert Level 4. This provision did not apply to Complainant or his train as the train did not carry hazardous materials and the entire company was operating at Alert Level 2. (Exhibit B).
10. Complainant was thereafter dismissed without pay from October 23, 2008 until November 4, 2008. Complainant was arrested on November 3, 2008, with a misdemeanor charge of evading detention. [RB, Exhibit A].

CONTENTION OF THE PARTIES AND LAW

In pertinent part, Section 20109(a) of the FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging or in any other way discriminating against an employee due to the employee's lawful, good faith act done (1) to provide information regarding any conduct reasonably believed to constitute a violation of an federal law, rule, or regulation relating to railroad safety or security provided to a person with supervisory authority over the employee or (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security. 49 U.S.C. § 20109(a)(1)(C)-(2). Section 20109(b) of the FRSA, in pertinent part, prohibits a railroad carrier engaged in interstate or foreign commerce from discharging or in any other way discriminating against an employee because the employee reported, in good faith, a hazardous safety or security condition. 49 U.S.C. § 20109(b)(1)(A). Enforcement of this provision of the FRSA was transferred from the

National Railroad Adjustment Board to the U.S. Department of Labor when Section 20109 of the FRSA was amended in 2007 with the signing of the 9/11 Act by President Bush.

The 9/11 Act, which significantly changed the employee protection provisions for railway employees, was the result of a Conference Report H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amended the FRSA by modifying the railroad carrier employee whistleblower provision – both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121. The amended FRSA Section 20109 shifts the responsibility for investigating and adjudicating retaliation claims to the U.S. Department of Labor. It also provides that any enforcement of the new employee protection provisions shall be governed by the rules and procedures set forth in 49 U.S.C. § 42121(b), where enforcement of the whistleblower protection provisions under the AIR 21 are found. However, the definitions under the FRSA remain unchanged by the 9/11 Act.

The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Federal Rule of Civil Procedure 56(e). Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision" as a matter of law. 29 C.F.R. § 18.40; Flor v. U.S. Dep't of Energy, 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994). If the non-moving party fails to "show an element essential to his case, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Rockefeller v. U.S. Dep't of Energy, ARB No. 03-048, ALJ No. 2002-CAA-00005, slip op. at 4 (ARB Aug. 31, 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986)).

Section 20109(a) of the FRSA defines protected activity as: (1) providing information or assisting in an investigation regarding conduct reasonably believed to violate Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste or abuse of Federal grants or other public funds intended to be used for railroad safety or security; (2) refusing to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security; (3) filing a complaint under the FRSA; (4) notifying or attempting to notify the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee; (5) cooperating with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board (NTSB); (6) furnishing information to the Secretary of Transportation, the Secretary of Homeland Security, the NTSB, or any Federal, state, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death, or damage to property, occurring in connection with railroad transportation; or (7) accurately reporting hours on duty. 49 U.S.C. § 20109(a)(1)-(7).

The FRSA further protects employees, under Section 20109(b)(1), who: (A) report in good faith hazardous safety or security conditions; (B) refuse to work when confronted by hazardous safety or security conditions under certain conditions; (C) refuse to authorize the use of any safety-related equipment, track, or structures, when it is believed that such equipment,

track, or structure is in a hazardous safety or security condition, under certain conditions. 49 U.S.C. § 20109(b)(1)(A). A refusal made under (B) or (C) is protected under certain conditions listed in Section 20109(b)(2)(A)-(C).

Respondent filed its motion arguing that Complainant was not engaged in protected activity. Specifically, Respondent argues that Complainant was neither prohibited from leaving the train by any rule, regulation, or policy nor prohibited from complying with any order given by the officer. [RB p. 3]. Complainant lists Section 20109(a)(1) and Section 20109(b)(1)(A), as grounds for his complaint, arguing that the protected activity he was performing was the safe operation of his train, "although he was not in control of the movement nor in control of the locomotive since the dispatcher was in control of the movement and the locomotive engineer was in control of the train." [CB p. 1-2, 4].

I agree with Respondent and find that summary decision is appropriate as Complainant has failed to show that he was engaged in any protected activity. Complainant's statement of the event and the audio transcript of the conversation between Complainant and the Corridor Manager/Dispatcher show that there was no legitimate safety or security related concern. Specifically, Claimant stated that although the officer was trying to flag the train down, they kept on going because the crossing was blocked and the officer was "really mad." [RB, Exhibit C]. When Complainant asked the Corridor Manager what to do about the officer, he was told to explain to the officer that there was a mechanical difficulty. [RB, Exhibit D]. In a later conversation, the Corridor Manager stated that "if you've got an official telling you to do something, you've got to do what they're telling you. . . . I don't override the police," to which Complainant responded, "I know you don't override the police." The Corridor Manager reiterated that he only recommended Complainant inform the officer of the problem, but Complainant stated that the officer was irate and was not "going to hear any of it." [RB, Exhibit E]. The statement and audio transcript are clear that no one directed Complainant to ignore the officer and reveal no expressed safety or security related concern. Thus, Complainant's complaint does not fall within Section 20109(a)(1), as Complainant did not inform a supervisor of any information reasonably believed to constitute a violation of Federal law, rule, or regulation relating to railroad safety or security, or Section 20109(b)(1)(A), as Complainant was not discriminated against for reporting a hazardous safety or security condition.

Complainant also argues that neither he nor the engineer could leave the train because "it would create a public safety hazard to leave a full train, in operation, on the mainline, blocking several crossings without specific authority from the train dispatcher or corridor manager." Thus, according to Complainant, the action by the officer "requesting both the engineer and conductor to leave the train clearly falls within the protective activity of rail safety under Section 20109(a)(1)." [CB p. 3]. However, it is undisputed that the only company provision instructing employees not to leave a train unattended applies to the operation of trains carrying specified hazardous materials during heightened security alert status. Likewise, no federal law, rule or regulation has been cited that would prohibit same. Complainant's train was a rock train and therefore this provision did not apply. [RB p. 3, Exhibit B, E]. Thus, as stated above, Complainant's complaint does not fall within Section 20109(a)(1), as Complainant did not inform a supervisor of any information reasonably believed to constitute a violation of Federal law, rule, or regulation relating to railroad safety or security.

Moreover, while Complainant argues that if he "would have been arrested while operating the locomotive it would have created a '***Public Safety Hazard***,'" it is undisputed that Complainant "was not the engineer who operated the train to leave the scene where the Houston Police Officer was nor was . . . [he] in charge of the move since the dispatcher authorizes . . . [the train] to leave . . ." [CB p. 1-2, 4]. Thus, by his own admission, Complainant was not in charge of the movement or operation of the train, further supporting Respondent's argument that Complainant was not engaged in any protected activity.

Based on the foregoing, I find that summary decision is appropriate as Complainant has not articulated a viable factual basis for his claim that he engaged in protected activity and has therefore failed to adequately respond to Respondent's argument.

RECOMMENDED ORDER

It is recommended that Respondent's motion for summary decision be **GRANTED**, and the complaint of Joseph Dugas be **DISMISSED**.

So ORDERED.

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LARRY W. PRICE
Administrative Law Judge

NOTICE OF REVIEW: Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.