U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 October 2010

Case No.: **2010-FRS-12**

In the Matter of:
ROBERT HENDERSON,
Complainant

v.

WHEELING & LAKE ERIE RAILWAY CO.,
Respondent

Appearances:
Robert E. Dolan, Esq.
Karl J. Frisinger, Esq.
YAEGER JUNGBAUER & BARCZAK
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For the Complainant

Thomas E. Dover, Esq.
Julie L. Juergens, Esq.
Joseph J. Santoro, Esq.
GALLAGHER SHARP
Cleveland, Ohio
For the Respondent

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER GRANTING THE RESPONDENT'S MOTION FOR SUMMARY DISPOSITION, DISMISSING THE COMPLAINT, AND CANCELLING THE HEARING SET FOR NOVEMBER 16, 2010

This proceeding arises from a claim of whistleblower protection under the Federal Rail Safety Act (FRSA), as amended.[1] The Act and implementing regulations[2] prohibit retaliatory or discriminatory actions by railroad carriers against their employees who: (1) provide information to their employers, a Federal agency, or Congress, alleging violation of any Federal law relating to railroad safety or security, or fraud, waste or abuse of public funds intended to be used for railroad safety or security; (2) report a hazardous safety or security condition, refuse to work when confronted by a

[1] 49 U.S.C. § 20109.
[2] 75 Fed. Reg. 53522 *et seq*. (2010), codified at 29 C.F.R. Part 1982.

hazardous safety or security condition, or refuse to authorize use of any safety-related equipment, track, or structure in a hazardous condition; or (3) request medical or first aid treatment. In this case, the Complainant, Robert Henderson, alleges that the Respondent, Wheeling & Lake Erie Railway Co. ("the Railway"), violated the Act when it discharged him because he reported an injury.

The Railway has filed a Motion for Summary Disposition (the "Motion"), alleging that Mr. Henderson was discharged not because he reported an injury, but rather, because he failed to report injuries in a timely manner, thereby violating the Railway's work rules. Mr. Henderson filed a response opposing the Motion ("Response"). Thereafter, the Respondent filed a reply ("Reply"). The Motion is now ready for ruling.

In reaching my ruling on the Motion, I have considered the entire record, including the complaint filed with the Occupational Safety and Health Administration (OSHA), the findings of OSHA, the objections to the findings, and the materials submitted in connection with the Motion. As no hearing has been held, I have accepted all of Mr. Henderson's factual allegations as true. I conclude that the Motion should be granted, as there are no genuine issues of material fact, and the Railway is entitled to summary judgment as a matter of law.

APPLICABLE LAW

The FRSA provides in pertinent part:

> (a) In general.--A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done--
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> ...
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> (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;[3]

This prohibition is reiterated in the newly promulgated Interim Final Regulations.[4] An employee who believes he has been discharged in violation of this section may file a complaint with OSHA, which conducts an investigation and issues findings. Any party aggrieved by OSHA's findings may appeal to the Office of Administrative Law Judges. Such actions are governed by the rules and procedures set forth in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), including the burdens of proof.[5] In order to prevail on his claim, Mr. Henderson must

[3] 49 U.S.C. § 20109(a)(4).
[4] 29 C.F.R. § 1982.102(b)(iv), 75 Fed. Reg. 53529 (2010).
[5] 49 U.S.C. § 20109(d)(2), referencing 49 U.S.C. § 42121.

demonstrate that (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. If Mr. Henderson proves that the Railway violated the FRSA, he is entitled to relief unless the Railway demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.[6]

PROCEDURAL HISTORY

The Railway discharged Mr. Henderson from employment on May 14, 2009. Mr. Henderson filed a complaint with OSHA on October 29, 2009. The Area Director of OSHA issued Findings on behalf of the Secretary of Labor on January 28, 2010, concluding that the preponderance of the evidence indicated that Mr. Henderson's protected activities were not a contributing factor to his discharge, and there was insufficient evidence demonstrating a violation of the Act. Mr. Henderson filed objections to the Findings with the Office of Administrative Law Judges by facsimile on February 26, 2010. On March 9, 2010, I issued a notice to the parties that the case had been assigned to me, and that I intended to hold a telephone conference to discuss how the case should proceed. During a telephone conference on April 6, 2010, the parties agreed to a schedule for further proceedings, including conducting discovery, filing dispositive motions, and setting a date for the hearing. The Railway timely filed its dispositive motion on September 3, 2010.

STANDARD FOR SUMMARY JUDGMENT

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide that an Administrative Law Judge "may enter summary judgment for either party 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."[7] No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party."[8] The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case."[9] The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist.[10] In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party.[11]

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[6] *See* 29 C.F.R. § 1982.109(a) and (b); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 01-AIR-3 (ARB June 29, 2007), slip op. at 6.
[7] 29 CFR § 18.40(d); *see also,* Fed. R. Civ. P. 56(c), incorporated by reference into the Rules of Practice and Procedure by 29 CFR § 18.1.
[8] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).
[9] *Celotex Corp. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).
[10] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986).
[11] *Darrah v. City of Oak Park,* 255 F.3d 301, 305 (6th Cir. 2001).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Underlying Facts

The facts underlying the claim are essentially undisputed. To the extent that Mr. Henderson disputes any facts alleged by the Railway, I have credited Mr. Henderson's position. Both parties referred to the same or similar exhibits in the Motion, Response, and Reply. Exhibits submitted by the Railway are designated "RX." Exhibits submitted by Mr. Henderson are designated "CX." I have referred extensively to the excerpts from depositions ("Dep.") cited by the parties, including those of Mr. Henderson, found at RX A and CX 1; Al Luckring, his supervisor (Assistant Superintendent of the Mechanical Department), RX I and CX 2; Joseph Burley, the Director of Human Resources, RX F and CX 4; Joseph Marganzo, a supervisor in the Mechanical Department, CX 5; Rick Davies, the General Superintendent of the Mechanical Department, RX C and CX 6; and Kenneth Malone, the hearing officer for an investigative hearing conducted by the Railway, CX 8. The Railway also filed complete copies of the depositions of Messrs. Henderson (with attached exhibits), Luckring, Burley, and Davis. Several of the witnesses also testified at an investigative hearing conducted by the Railway. The testimony was recorded, and the transcript is in the record as RX H.

Mr. Henderson was employed by the Railway as a Carman and Car Inspector in the Mechanical Department, inspecting train cars, making minor repairs, and completing air tests of brakes.[12] He was hired in 2005.[13]

In 2006, Mr. Henderson was disciplined for failing to use proper blue flag protection, a safety violation. The matter was resolved informally, and although he was dismissed from employment, he was reinstated on two years' probation.[14] Mr. Henderson denies that he violated the blue flag rule, which I accept as true for the purpose of this motion.

Mr. Henderson visited a doctor on December 15, 2008, and complained of back pain. At his deposition, he said he believed it was caused by the condition of equipment at work.[15] His doctor's notes said, "Over the past week had hurt his lower back, with some sort of twisting."[16] Mr. Henderson did not complete a personal injury report regarding an injury to his back in December.[17] There is no evidence that the Railway was aware of this doctor's visit when Mr. Henderson was discharged, as it was not mentioned in the transcript of its investigative hearing or correspondence about the Railway's investigation of Mr. Henderson; rather, the Railway appears to have learned of it when it obtained Mr. Henderson's treatment records during discovery.[18]

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[12] Henderson Dep. at 47; job description, RX B; Luckring Dep. at 11.
[13] Henderson Dep. at 48-49 and Dep. Exhibits 4 and 5.
[14] Henderson Dep. at 103-106, 109; Burley Dep. at 16-18, 20-21; letter of dismissal, RX E; letter of reinstatement, RX G.
[15] Henderson Dep. 72-73.
[16] Henderson Dep. Exhibit 10.
[17] Henderson Dep. at 73.
[18] *See* Henderson Dep. at 72-73.

On January 26, 2009, the passenger-side airbag in a Railway-owned truck deployed for no apparent reason, hitting Mr. Henderson on the right side of his head.[19] During his deposition, Mr. Henderson identified this incident as the first of two work-related injuries he suffered during the last months he worked for the Railway.[20] Mr. Henderson called his supervisor, Al Luckring, when the incident happened.[21] During their conversation, Mr. Henderson told Mr. Luckring that he was not injured.[22] In turn, Mr. Luckring told Mr. Davies that no one was injured in the incident, and that the air bag did not hit Mr. Henderson.[23] For the purpose of this motion, I credit Mr. Henderson's testimony that the airbag hit the right side of his head. Mr. Henderson did not remember precisely what he told Mr. Luckring because he was in shock.[24] Mr. Henderson did not think he was injured, but only stunned.[25] Mr. Henderson did not complete a Personal Injury Report before he went off duty.[26] On the day it happened, Mr. Henderson did not think he had an injury.[27] Thereafter, Mr. Henderson had trouble sleeping due to neck pain, and on February 6, he went to a doctor. He had a stiff neck, but never missed any work because of it.[28] He thought the stiff neck would go away.[29] He told the doctor his neck pain was caused by the air bag.[30] On February 17, 2009, the Railway's benefits consultant wrote to Mr. Henderson asking him for information about the accident giving rise to the need for treatment so it could submit a claim for the doctor's services.[31] In response, Mr. Henderson identified the incident with the air bag.[32] Mr. Henderson could not recall whether he told anyone at the Railway that he had neck pain he believed was caused by the air bag before February 26, 2009.[33] Mr. Luckring never told Mr. Henderson that he needed to fill out an injury report about the air bag incident.[34]

Mr. Henderson was also experiencing intermittent pain in his back during January and February 2009.[35] At some point he told Mr. Luckring that the trucks were hurting his back.[36] His last day of work was March 1. On that day, the pain was so bad his son had to tie his shoes so he could go to work.[37] He called Mr. Luckring to let him know he had a sore back but would try to work his shift.[38] Mr. Henderson told Mr.

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[19] Henderson Dep. at 10-11; Henderson testimony, RX H at 28.
[20] Henderson Dep. at 10.
[21] Henderson Dep. at 13, Luckring Dep. at 15.
[22] Henderson Dep. at 14-15, 118; Luckring Dep. at 15-16, 19; Luckring testimony, RX H at 17; Burling Dep. at 123.
[23] Davies Dep. at 24-25.
[24] Henderson testimony, RX H at 28, 29.
[25] Henderson Dep. at 15, 118, 160.
[26] Luckring testimony, RX H at 17; Henderson testimony, RX H at 26, 29.
[27] Henderson Dep. at 161.
[28] Henderson Dep. at 15-17, 71, Dep. Exhibit 10. Henderson Dep. at 30.
[29] Henderson Dep. at 30-31, 128.
[30] Henderson Dep. at 71 and Dep. Exhibit 10.
[31] Query letter, RX L.
[32] Henderson Dep. at 74 and Dep. Exhibit 11.
[33] Henderson Dep. at 30.
[34] Luckring Dep. at 24-25, Henderson Dep. at 160.
[35] Henderson Dep. at 31-33.
[36] Henderson Dep. at 37-38, 39-40, 43.
[37] Henderson Dep. at 157.
[38] Henderson Dep. at 41; Luckring Dep. at 27-28; Luckring testimony, RX H at 14.

Luckring something to the effect that he could not ride in the truck anymore because of the lack of padding in the seat.[39] Mr. Henderson finished his work on March 1, but went home early with permission from Mr. Luckring.[40] On March 2, Mr. Henderson went back to the same doctor he saw for his neck, this time complaining of back pain.[41] Mr. Henderson does not think there was any one incident at work that caused his back pain. Rather, it was due to long-term jamming and jarring in trucks with no seat cushions, bad suspensions, and poor yard conditions.[42] Mr. Luckring never told Mr. Henderson he needed to fill out an injury report about his back.[43] Mr. Henderson said he did not fill out an injury report because he thought his back pain would go away.[44] He agreed that he knew if he got injured at work, he was supposed to fill out a personal injury report form.[45] He later identified February 26, 2009, as the date he injured his back.[46]

Mr. Henderson's wife called the payroll benefits manager on March 2, 2009, to ask about short term disability benefits. Her call was transferred to Mr. Burley, by which time Mr. Henderson was on the line. Mr. Burley understood from their conversation that Mr. Henderson had been feeling pain in his back on February 26, 2009, and that Mr. Henderson reported that he was having back pain to Mr. Luckring on March 1, 2009. During their conversation on March 2, Mr. Henderson told Mr. Burley that his condition was from riding around in the truck with no cushions. Mr. Burley asked Mr. Henderson if he had completed a personal injury report. Mr. Henderson replied that he had not. Mr. Burley told Mr. Henderson that short-term disability was for non-work-related disability, and excluded on-the-job injuries. Mr. Henderson and Mr. Burley spoke again on March 3, 2009, at which time Mr. Burley told Mr. Henderson he wanted to meet with Mr. Henderson and Mr. Davies to make sure he (Mr. Burley) understood what had happened. On March 5, 2009, Mr. Henderson and Mr. Burley spoke a third time. Mr. Burley added Mr. Davies to the call. During that conversation, Mr. Burley told Mr. Henderson that information on sick and short-term disability benefits had been sent, and that the health plan excluded benefits for on-the-job injuries. He advised Mr. Henderson that failing to report a personal injury was a serious matter and would require a formal investigation. Mr. Henderson asked if he could fill out a report then, and Mr. Burley agreed to send a form. Mr. Henderson also told Mr. Burley about the airbag incident. Mr. Henderson maintained that his condition was work-related.[47]

On March 6, 2009, the Railway initiated an investigation of Mr. Henderson for violating work rules requiring him to report personal injuries before leaving the company premises.[48] Mr. Davies, the Superintendant of the Mechanical Department, and Mr. Burley, the head of Human Resources, discussed which rules Mr. Henderson

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[39] Henderson testimony, RX H at 22, 43-44; Luckring Dep. at 33; Luckring testimony, RX H at 15, 18.
[40] Henderson Dep. at 42, 59; Luckring testimony, RX H at 16.
[41] Henderson Dep. at 71, and Dep. Exhibit 10.
[42] Henderson testimony, RX H at 19, 41; Personal Injury Report, RX J, RX K, CX 3.
[43] Henderson Dep. at 43; Luckring Dep. at 34-35.
[44] Henderson Dep. at 44.
[45] Henderson Dep. at 44, 161.
[46] *See* Henderson Dep. Exhibits 7, 25 (also at RX K), 30, 33 (also at RX R), and 35.
[47] Burley Dep. at 66-73; Mr. Burley's record of events, CX 14; Burley testimony, RX H at 8-12.
[48] Marganzo Dep. at 6.

should be investigated on.[49] Mr. Burley decided which rules should be cited in the notice to Mr. Henderson and drafted the notice for Mr. Marganzo's review and signature.[50] According to the letter notifying Mr. Henderson of the investigation, the carrier first learned of the back injury on March 2, and the neck injury on March 5. The notification letter advised Mr. Henderson that he would be investigated on alleged failures to exercise care to prevent injury to himself, to plan his work to avoid injury, to report a personal injury before leaving company premises, and to be familiar with and obey all rules and instructions.[51]

Mr. Henderson submitted a disability claim form and two personal injury reports to the Railway by certified mail received on March 16, 2009.[52] One Personal Injury Report reported the incident involving the air bag on January 26, 2009, resulting in the need for medical attention by Dr. Lach at West Medical, Inc., and medication.[53] The other Personal Injury Report reported medical attention for his back at Timken Mercy Hospital, where he was again seen by Dr. Lach, who took x-rays and gave medication. Mr. Henderson left blank the spaces for reporting the date and time the injury occurred on this report. In the space for describing the circumstances, Mr. Henderson said that his back was constantly jarred from driving through the rail yard due to the condition of the trucks and lack of padding on the seats. On the back side of the form, Mr. Henderson said that on March 1, 2009, he told Mr. Luckring that he was "twisted up" and could not ride in the white truck anymore.[54] The Disability Claim sought weekly income benefits for an injury occurring at work on February 26, 2009.[55] Benefits were denied on March 20, 2009, because the accident was work-related.[56]

The Railway held an investigative hearing on the alleged rule violations on April 9, 2009.[57] Mr. Henderson was represented at the hearing by Troy Vaughn from the Carmen Steering Committee (Mr. Henderson's union[58]). Mr. Henderson testified that he verbally reported his back pain and the airbag incident to Mr. Luckring when they occurred, but admitted that he did not fill out Personal Injury Reports until later.[59] He denied that he failed to exercise care to prevent injury to himself, or to plan his work to avoid injury.[60] For the purpose of the motion, I have taken this assertion as true. The hearing was recessed, and scheduled to reconvene on May 1, 2009.[61] Mr. Henderson did not attend because he had a doctor's appointment that day.[62]

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[49] Davies Dep. at 11, 16.
[50] Burley Dep. at 105.
[51] Notification letter, RX N; Henderson Dep. at 86-87. *See also* Burley Dep. at 79-80.
[52] Burley testimony, RX H at 12; Mr. Burley's record of events, CX 14; Henderson Dep. at 69, 118.
[53] Personal Injury Report (airbag incident), RX M.
[54] Personal Injury Report (back injury), CX 3, RX J, RX K, and RX L.
[55] Disability benefits claim form, Henderson Dep. Exhibit 7.
[56] Letter of denial, Henderson Dep. Exhibit 9.
[57] Transcript, RX H.
[58] *See* Henderson Dep. at 88, 90.
[59] Henderson testimony, RX H at 23, 26, 30-33, 43-49; Henderson Dep. at 127-128.
[60] Henderson testimony, RX H at 42-43; Mr. Henderson's notes on the Railway's notification letter, RX R (*see* Henderson Dep. at 154 and Dep. Exhibit 33).
[61] Notification letter, RX S.
[62] Henderson Dep. at 100.

Mr. Henderson was discharged on May 14, 2009, for alleged violations of Operating Rules I and B, Safety Rules A and R, and the Dismissible Offenses Policy.[63] I have quoted the rules and the policy below. Mr. Luckring was not involved in the decision to terminate Mr. Henderson, who was a good worker.[64] Mr. Davies made the determination to fire Mr. Henderson.[65] He did not attend the investigation hearing, but he read the transcript.[66] Mr. Burley said that Mr. Davies' recommendation would have been reviewed by the President and CEO of the Railway. Mr. Burley did not particularly recall a conversation with Mr. Davies, but he was typically involved in discussion of an employee's disciplinary history, which would be considered in the determination.[67] Mr. Henderson's prior dismissal for the blue flag violation, a serious offense, was not in Mr. Henderson's favor.[68]

Mr. Vaughn appealed the discharge on Mr. Henderson's behalf.[69] Mr. Burley denied the appeal in an eight-page letter detailing the Railway's position on August 18, 2009.[70] Mr. Burley took the position that Mr. Henderson violated the rule requiring prompt reporting of on-the-job injuries when he failed to report either an injury sustained when the airbag deployed, or an injury to his back. After reviewing the evidence in detail, Mr. Burley referred to Mr. Henderson's 2006 dismissal and reinstatement as evidence of repeated failure to comply with safety rules. He went on to address the other rule violations listed in the discharge letter, stating:

> The clear and unambiguous language contained in the policies specifically states the requirements to promptly notify the supervisor of the injury and complete a Personal Injury Report prior to leaving company premises. Mr. Henderson admittedly failed to do so on two occasions. The proper remedy as stated by the policy is dismissal.[71]

Mr. Burley responded to allegations that the Railway was seeking to avoid paying Mr. Henderson's medical bills by stating that "payment of medical bills had no bearing on the discipline issued."[72] He also maintained that the medical information in the record indicated that Mr. Henderson had degenerative conditions unrelated to his work for the Railway.[73]

The parties submitted several policy and operating manuals of the Railway. "Failure to report personal injury before leaving company premises" is one of seven "major offenses which can result in dismissal" of an employee of the Railway.[74] The

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[63] Davies Dep. at 53; letter of discharge, RX T and CX 11.
[64] Luckring Dep. at 38.
[65] Davies Dep. at 11, 16; Burley Dep. at 15.
[66] Davies Dep. at 11, 13, 16.
[67] Burley Dep. at 16, 26-30.
[68] Burley Dep. at 16.
[69] Appeal letter, Henderson Dep. Exhibit 26.
[70] Letter denying appeal, RX U.
[71] RX U at 6-7.
[72] RX U at 8.
[73] RX U at 8.
[74] Exhibit I to the transcript of the investigation, RX H.

Railway's 1995 Employee Policy Manual contains the following policy regarding personal injuries:

> General Policy – All applicants and all employees are subject to the provisions of this policy.
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> 1. When an employee is injured while on duty, he must notify his direct supervisor of such injury and complete an injury report before his end of tour of duty.
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> 2. Supervisors must investigate all personal injuries to determine the cause and gather facts concerning the injury.
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> 3. If it is determined that an employee's injury results from failure to comply with safety or operating rules, a formal hearing or fact finding meeting may be called and discipline may be assessed. If an employee is involved in a personal injury determined to be man error caused or if a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident, said employee with be subject to an Alcohol Test, Drug Urinalysis Test.
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> 4. Failure to report a personal injury or false statements made concerning a personal injury will result in dismissal.[75]

Operating Rule I (effective January 1, 2005) provides:

> Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury. Employees must not enter into altercation, play practical jokes, scuffle or wrestle while on duty or on Company property.
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> Railroad premises must be kept in a clean, orderly and safe condition. Railroad buildings, facilities or equipment must not be marred or defaced. Only such information as is authorized by the Company or required by law may be posted in or upon railroad property.[76]

Operating Rule B (effective January 1, 2005) provides:

> B. Employees whose duties are prescribed by these rules, the Timetable, Emergency Response Guidebook, Safety Book, Train Handling Book, and other required books must keep these books complete and up-to-date. Such books must be kept available for reference while on duty.

[75] 1995 Employee Policy Manual, RX V, CX 12.
[76] Operating Manuals, RX D, CX 9, CX 10.

Employees must be familiar with and obey all rules and instructions, and must attend the required classes. If in doubt as to the meaning of any rule or instruction, employees must apply to their supervisor for an explanation. Rules may be issued, modified or canceled by bulletin order.

Train and Engine crews of foreign railroads, while performing interchange to or from the W&LE, who operate only on W&LE yard tracks or main tracks in yard limits will not be required to carry a W&LE Timetable. This does not relieve such crews from qualifying on the physical characteristics and operating procedures on the tracks they are to operate on.[77]

Safety Rule A (effective January 27, 2006) provides:

A. Safety is of the first importance in the discharge of duty, and working safely is a condition of employment with the W&LE. It is the duty of every employee to use personal judgment and exercise care to avoid injury to themselves or others. This company does not expect, and will not permit, any employee to take any unnecessary risk in the performance of duty. In case of doubt or uncertainty, the safe course of action must always be taken. No job is so urgent that sufficient time cannot be allowed to perform all work safely.[78]

Safety Rule R (effective January 27, 2006) provides:

R. First aid or medical assistance should be afforded to all employees or other persons injured or ill on railroad property. A detailed report of such occurrences must be made promptly to the designated officer, followed by a full written report on the prescribed form, immediately if possible, but not later than the end of tour of duty.

If an employee is injured or becomes ill off duty and may not be able to perform as assignment safely, that employee must report the situation to the proper authority before reporting for work.[79]

Since he was discharged by the Railway, Mr. Henderson has had surgery on his back and his neck.[80] Some of his medical records are found in his deposition exhibits.[81] He has not worked since he was discharged by the Railway. His doctors have not released him for work.[82] He expects to have additional surgery.[83]

[77] Operating Manuals, RX D.
[78] *Id.*
[79] *Id.*
[80] Henderson Dep. at 76-77.
[81] Exhibits 10, 34, and 35 to Henderson Dep.
[82] Henderson Dep. at 77-78.
[83] Henderson Dep. at 156-157.

The Parties' Positions

In its Motion, the Railway maintains that Mr. Henderson sought medical care for what he believed were two work-related injuries which occurred on January 26, 2009, and February 26, 2009, but did not submit injury reports to the Railway until March 16, 2009. The work rules required him to report such injuries immediately. Mr. Henderson had been terminated for a safety violation once before. The Railway contends that it terminated his employment because he was a repeat violator, and due to the serious nature of the rules he violated. The Railway suggests that Mr. Henderson cannot establish a prima facie case because he cannot establish that reporting injuries was a contributing factor to his termination. In addition, the Railway contends that there is clear and convincing evidence that the Railway would have taken the same action in the absence of injury due to Mr. Henderson's violation of the rules.

In his Response to the Motion, Mr. Henderson contends that there is substantial evidence that the Railway fired him, at least in part, for notifying the Railway of a work-related injury. He maintains that there is sufficient evidence to create a genuine issue of material fact. In support of his position, Mr. Henderson contends that he was treated differently than other employees who violated the rules; that he did not violate the rules for which he was charged, because they did not apply to his situation; and that the rule for which he was fired violates the FRSA.

In the Railway's Reply, it contends that the employees whose treatment Mr. Henderson compares to his are not similarly situated; that the rules applied to him, and he violated them; and that the rule requiring employees to report work-related injuries does not violate the FRSA.

Discussion

The Railway has a rule requiring a prompt written report when an employee is injured on the job. Failure to file such a report is cause for dismissal. Mr. Henderson believes that he injured his neck when the airbag deployed on January 26, 2009, although the injury was not immediately apparent to him. He visited a doctor about his neck pain on February 6, 2006. Mr. Henderson believes that he injured his back due to cumulative trauma at work, culminating on February 26, 2009. He visited a doctor about his back pain on March 2, 2009. When the Railway learned that he was claiming that he had work-related injuries, it initiated an investigation whether he had violated its rules, conducted a hearing, and fired him. He admits that he did not file injury reports regarding either injury until March 16, 2009, after the Railway initiated its investigation. Mr. Henderson alleges that by terminating him, the Railway violated the FRSA's prohibition against retaliating against an employee for reporting a work-related injury or illness. The Railway responds that it terminated Mr. Henderson not for reporting his injuries, but for failing to report them in a timely manner. I find that the evidence in the record supports the Railway's position that it did not violate the FRSA when it fired Mr. Henderson. Mr. Henderson has failed to raise a genuine issue of material fact, and the Railway is entitled to summary judgment.

The Claimant contends that the rule requiring employees to file a report when they are injured violates the FRSA, stating,

> If Henderson kept his mouth shut and did not report the injury then he would not be in this current position. It was only after Henderson notified the railroad of his injury that the railroad noticed him for an investigation and fired him. This type of conduct is not what the legislature had in mind when it made a law to encourage employees to report work-related injuries without the fear of being discriminated against.[84]

Mr. Henderson's position that a rule requiring prompt reporting of work-related injuries violates the FRSA is without merit. As Mr. Henderson's own experience with his application for short term disability benefits shows, work-related injuries and non work-related injuries present distinct issues. Work-related injuries in the railroad industry are subject to the Federal Employers Liability Act (FELA).[85] The FRSA's prohibition against discrimination does not vitiate an employer's need to know whether an injury is work-related for the purpose of FELA. Furthermore, the Railway submitted several decisions from the National Railroad Adjustment Board dating from 1972 to 2009, upholding dismissals of railroad workers for failing to timely report work-related injuries in violation of work rules of several different railroad companies.[86] These decisions suggest that rules requiring prompt reporting of work-related injuries under threat of discharge are common in the railroad industry.

Mr. Henderson complains of disparate treatment because two other employees who were late reporting injuries were not fired.[87] Mr. Burley was asked about these employees at his deposition. An injury report for an unidentified employee dated February 8, 2007, indicated that the employee was injured on February 7, 2007.[88] Mr. Burley testified that there was insufficient information in the injury report for him to determine whether the injury was reported late in violation of the rule.[89] Mr. Burley was familiar with the case of another employee who was investigated for late reporting. That employee was terminated but reinstated, as happened to Mr. Henderson in 2006. The other employee was finally terminated when he committed another rule violation.[90]

Even accepting Mr. Henderson's allegations that both employees violated the rule, using them as comparatives does not help his case. One reported his injury one day late and was not disciplined. Another was fired and hired back. But the fact that other employees who reported injuries were not fired undermines Mr. Henderson's allegation that he was fired for reporting the injury. Rather, it suggests that Mr. Henderson was fired for some other reason. Moreover, the employees in the two examples can be distinguished from Mr. Henderson, in the first case, because the

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[84] Response at 2. *See also* Response at 8-9.
[85] 45 U.S.C. § 51 *et seq*.
[86] Board decisions, RX W, RX X, RX Y, RX Z, and RX AA.
[87] Response at 6.
[88] Personal Injury Report, CX 7.
[89] Burley Dep. at 38-44.
[90] Burley Dep. at 97.

employee was only one day late with his report; and in the second case, because when Mr. Henderson violated the reporting rule he had been discharged once before, while the other employee had not. When the other employee committed another rule violation, he, too, was discharged. Mr. Henderson's denial that he committed the blue flag violation which led to his discharge and reinstatement in 2006 is not material, because he has not denied that he had a record of discipline for it. Mr. Henderson's suggestion that the difference in treatment was unfair is also immaterial. The issue before me is whether his termination violated the FRSA, not whether it was unfair.

Mr. Henderson also contends that management employees violated other rules but were not investigated or disciplined. But none of the examples he cited concerned management employees who failed to timely report work-related injuries. Nor were any alleged to have committed any of the other dismissible offenses. Thus none can be considered to be similarly situated to Mr. Henderson for the purpose of establishing a violation of the FRSA.[91]

Mr. Henderson's arguments that he "did not violate the rule and that the rule does not fit this unique fact situation for which there was no training" are equally unavailing. He emphasized in his statement of facts that Mr. Luckring never told him he needed to file a report, a point the Railway did not contest. These arguments, again, go to the fairness of the termination, but not to whether the termination violated the FRSA. I cannot substitute my judgment for the Railway's whether Mr. Henderson should have been fired. I can only decide whether he was fired for a prohibited reason. Moreover, several of the witnesses testified that injuries such as Mr. Henderson's are covered by the rule, and there is no evidence to the contrary. Mr. Luckring said that if an employee thinks he has been hurt, he should fill out an injury report. It was his understanding from his conversation with Mr. Henderson on January 26 that Mr. Henderson was not hurt. Because Mr. Henderson did not feel like he was hurt, he did not need to fill out a personal injury report before leaving work.[92] Mr. Davies agreed that an employee who feels no injury has occurred is not required to file an injury report.[93] He said that the rules require an employee to notify the Railway when he first becomes aware that something has occurred to cause an injury.[94] In Mr. Henderson's case, he waited for months before reported the injury from the airbag incident.[95] He should have reported his back pain as a work-related injury when he told Mr. Luckring that the pain was caused by the truck.[96] Mr. Burley similarly testified that an employee has the duty under the rule to report an injury whenever it manifests itself.[97] Other employees have reported cumulative trauma injuries.[98] He conceded that in the case of cumulative trauma injuries, when the person knows he has an injury is subjective based on the

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[91] *See Douglas v. Skywest Airlines*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, 17 (ARB Sept. 30, 2009) ("'Similarly situated' employees are those involved in or accused of the same or similar conduct but disciplined in different ways.") (Citation omitted.).
[92] Luckring Dep. 16-19.
[93] Davies Dep. at 25-26.
[94] Davies Dep. at 29.
[95] Davies Dep. at 57.
[96] Davies Dep. at 58.
[97] Burley Dep. at 44, 46-47, 76, 77, 101.
[98] Burley Dep. at 98.

individual.[99] He said that late reporting of a work injury is a rare occurrence. Mr. Burley believed that Mr. Henderson should have reported the back injury when he experienced pain on February 26, 2009.[100] The record is undisputed in this case that Mr. Henderson did not report his injuries for weeks or months after they manifested themselves. Mr. Henderson has not raised any genuine issue of material fact as to whether he violated the rule requiring prompt reporting of personal injuries, a major offense which can result in dismissal under the Railway's work rules.

I conclude that Mr. Henderson has not raised any genuine issue of material fact to support his claim that his discharge violated the FRSA. Under these circumstances, the Railway is entitled to summary judgment.

ORDER

IT IS THEREFORE ORDERED that the Respondent's Motion for Summary Disposition filed on September 3, 2010, is GRANTED. The claim is DISMISSED. The hearing set for November 16, 2010, in Canton, Ohio, is CANCELLED.

A

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 10 business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it.[101] Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically.[102]

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health.[103]

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[99] Burley Dep. at 78-79, 101.
[100] Burley Dep. 99-100.
[101] *See* 29 C.F.R. § 1982.110(a).
[102] *See* 29 C.F.R. § 1982.110(a).
[103] *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor.[104] Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days of the date the Petition is filed notifying the parties that it has accepted the case for review.[105]

[104] *See* 29 C.F.R. §§ 1982.109(e) and 1982.110(a).
[105] *See* 29 C.F.R. §§ 1982.110(a) and (b).