



**Issue Date: 15 July 2010**

**Case No.: 2010-FRS-00016**

*In the Matter of*

**BRAD WILSON,**

*Complainant,*

**v.**

**NORFOLK SOUTHERN RAILWAY CO.**

*Respondent.*

**RECOMMENDED DECISION AND ORDER**  
**GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**  
**AND DISMISSING 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 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008).

Complainant filed his complaint with the Secretary of Labor on August 14, 2009, alleging that Respondent harassed and intimidated him in questioning about his prior work attendance record and previous work-related injuries during a meeting that occurred with a Superintendent on February 20, 2009. Following an investigation, the Secretary, acting through her agent, the Area Director for the Occupational Safety and Health Administration (OSHA), found that there was no reasonable cause to believe that Respondent violated the FRSA. Specifically, the Secretary found that the evidence failed to support that Complainant suffered from an adverse employment action, nor did it support the existence of a connection between any alleged adverse employment action and any prior or prospective protected activity.

Complainant timely appealed this finding and the case was assigned to the undersigned on March 29, 2010. A formal hearing has been scheduled in this matter for August 18, 2010. On June 17, 2010, Respondent filed a Motion and Memorandum in Support of Summary

Decision dismissing the complaint for failure to show adverse employment action and, in the alternative, failure to show protected activity as required under FRSA. Respondent attached to its Motion a deposition of the Complainant taken on May 5, 2010.<sup>1</sup> After a brief continuance, Complainant filed a Response to Respondent's Motion for Summary Judgment on July 6, 2010, attaching additional exhibits including an email written by Terry Chapman on the topic of "One on One Contacts with ML Employees" (CX-2), a policy describing yearly meetings with supervisors (CX-3), and excerpts from the deposition of Henry Price (CX-4).

### **UNDISPUTED FINDINGS OF FACT**

Complainant, Brad Wilson, is a 37-year employee of Respondent, Norfolk Southern Railway Co., and a member of the union, the Brotherhood of Locomotive Engineers and Trainmen, or BLET. JX-1 at 6-7. Over the course of his tenure with Respondent, Complainant has changed his reporting location many times, having worked at Kalamazoo, Grand Rapids, Elkhart, Burns Harbor, and Ft. Wayne. *Id.* at 10. He currently holds a degree of seniority within the company that he believes would enable him to take any employment position within his District upon the exercise of his seniority rights. *Id.* at 13-14. Prior to his most recent job site transfer, Complainant worked in Kalamazoo as a brakeman or conductor, which was primarily in "yard limits," meaning he was not required to travel overnight. *Id.* at 14-16.

In November 2008, Respondent announced the sale of its lines out of Kalamazoo and Grand Rapids. JX-1 at 31. The announcement came just after the end Complainant's FMLA leave that he took for knee surgery from April or May of 2008 through October 2008. *Id.* When Complainant returned to work, he reported to Kalamazoo and by February of 2009, Complainant began to seek out another location for his employment with Respondent based on the exercise of his seniority. *Id.* at 33, 36-37. One of the places he was interested in was Elkhart, Indiana, a "mother terminal" with "hundreds of jobs" that Complainant viewed as a default location "to go back [to] if you can't hold anything else." *Id.* at 37-38.

In February 2009, Complainant worked at Elkhart for about a week to determine whether to select the position on a permanent basis. JX-1 at 47. Prior to that week of work Complainant attended a meeting with the Elkhart supervisor, Terry Chapman. *Id.* at 49. During the meeting with Mr. Chapman, Complainant got the impression that Mr. Chapman did not want him to work at Elkhart. Mr. Chapman intimated that Complainant's transfer to Elkhart would interrupt the

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<sup>1</sup> Because Complainant also refers to this Exhibit, I shall refer to it as Joint Exhibit ("JX") 1. Complainant's additional offered exhibits shall be referred to as Complainant's Exhibits ("CX") 2 through 4.

“family” there and cause trouble. He also discussed Complainant’s work record and work injury history. *Id.* Complainant was aware during the meeting that Mr. Chapman could not prevent him from transferring to Elkhart if he elected to because he had already discussed the transfer with the local union chairman, Randy Wilcox, and had obtained an appointment to qualify for the position. *Id.* at 49.

Complainant is familiar with Respondent’s rule that it has a “once a year [safety] rules examination” in addition to sporadic meetings with a superintendent to review an employee’s personal safety records. *Id.* at 23. *See also* CX-3. Complainant had attended many of these one-on-one meetings with supervisors on previous occasions. JX-1 at 81-82. The meeting that Complainant had with Mr. Chapman was documented as a “one on one safety contact” meeting. CX-2. Complainant and Mr. Chapman discussed Complainant’s attendance record, including his leaves of absence for a work injury Complainant sustained to his knee in 1985 and a subsequent leave of absence for arthroscopic surgery to Complainant’s knee in 2008, as well as Complainant’s dual use of his sick leave for other obligations, such as taking his dog to the vet, helping a girlfriend after her back surgery, and attending the meeting with Mr. Chapman during which this discussion was held. JX-1 at 50-58; 70-72.

During their discussion, Mr. Chapman held a “riding crop” – an object described as looking similar to a small golf club – and pounded it against his hand while he talked. While Complainant believed it was Mr. Chapman’s intention to intimidate him during the meeting, he did not feel physically threatened by Mr. Chapman, though he did feel “aghast” and believed the manner of treatment he received was shocking and unexpected. *Id.* at 74-75. Complainant also engaged in small talk with Mr. Chapman, discussing Shar-Peis and a common interest in Cuban cigars. *Id.* at 56-57; 87. Complainant did not, to his knowledge, experience any kind of “discipline” from Mr. Chapman. *Id.* at 89.

Complainant ultimately exercised his seniority to take a job with his other choice location in Jackson, MI, because of his reaction to a meeting he had with the Superintendent at Elkhart, Mr. Chapman. JX-1 at 38. He believed that Jackson was the “best option possible” of the two choices. *Id.* at 76. Complainant worked various jobs at the Jackson site for eleven months from March 2009 through February 2010. His jobs varied based on the exercise of his seniority relative to the other employees on the site. *Id.* at 43-44. Complainant could take any job if he exercised his seniority and he qualified for the job; no one could prevent him from doing so. *Id.* However, his supervisor still retained the ability to move the line locations around and alter work

conditions of the assignment. *Id.* at 46. Jackson may be a slightly farther commute from Complainant's home than Elkhart, though the drives are of comparable length depending on route and traffic. Comparing the Jackson job to the Elkhart job, Complainant stated that the base wage available to him would be the same, though Elkhart might offer better jobs options that are "a little less treacherous . . . less physical." While Complainant is currently the most senior conductor brakeman at Jackson, he "would probably be number ten in Elkhart," but he would have more job options. *Id.* at 90-92, 94.

Complainant was unaware that he had filed a complaint with the Department of Labor, but believed that his complaint was with the EEO.<sup>2</sup> JX-1 at 64-65, 67. At the behest of the union, Complainant wrote a letter that he believed formed the basis of a complaint with EEO, briefly memorializing his meeting with Mr. Chapman. Complainant had heard from a fellow worker – who he could not name – that the union wanted him and two other men who met with Mr. Chapman to write a letter to form the basis of a formal complaint for the way Mr. Chapman treated them. To his knowledge, the union took his letter and the letters of the two coworkers and carried them further for his protection. *Id.* at 68, 77-78. At the time of his deposition, Complainant was unable to characterize the nature of his complaint pending with the Department of Labor. *Id.* at 67.

### **CONCLUSIONS OF LAW**

The FRSA provides, in relevant part, that an officer or employee of a railroad carrier engaged in interstate commerce

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 . . . 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.

49 U.S.C. § 20109(a)(4).

The 2008 amendments now further provide that

A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician . . . for purposes of this paragraph, the term "discipline" means charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

*Id.* at § 20109(c)(2).

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<sup>2</sup> "Equal Employment Opportunity" Commission.

The standard for granting summary decision in whistleblower cases is identical to the standard 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, then no genuine issue of material fact exists because a complete failure to prove 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)).

FRSA investigatory proceedings are governed by the Wendel H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C. § 20109(d)(2). Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” motivating the respondent to take an adverse employment action against him. Thereafter a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant’s protected action. *See Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 13 (ARB Jan. 31, 2006).

Respondent challenges that Complainant has failed to establish an adverse employment action and the protected activity that would cause it. I agree that even if Complainant can make out a case for protected activity,<sup>3</sup> he has failed to show that he suffered any adverse employment action whatsoever. An adverse employment action must actually affect the terms and conditions of a Complainant’s employment. *Johnson v. Nat’l Railroad Passenger Corp (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

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<sup>3</sup> Viewing the facts in the light most favorable to Complainant, I shall construe his notification to Respondent of his 1985 knee injury and 2008 knee surgery as work-related injuries for which he presumably requested treatment. However, I note that these incidents are merely present in the record, and that a grave paucity of evidence exists that could possibly establish a nexus between even Mr. Chapman’s untoward behavior and these incidents.

Complainant could articulate no colorable difference between his employment conditions in Jackson and Elkhart. Complainant does not make less money, travel further, or suffer from a demotion in seniority or position at Jackson. In describing his decision to choose to work at Jackson, he regarded Jackson as the overall “best option.” Furthermore, Complainant indisputably did not suffer from any “discipline” – which is narrowly defined within the FRSA – as a result of the meeting with Mr. Chapman that catalyzed the instant complaint. Mr. Chapman did not bring charges against Complainant in a disciplinary proceeding, nor did he suspend, terminate, place Complainant on probation, or make note of reprimand on his record. Mr. Chapman did not – and could not – prevent Complainant from going to Elkhart. Regardless of Mr. Chapman’s evident displeasure with the prospect of “outside” employees transferring to Elkhart, his actions with respect to Complainant did not amount to any conduct that would be actionable under FRSA.<sup>4</sup>

### **RECOMMENDED ORDER**

Accordingly, it is recommended that Respondent’s Motion for Summary Decision be **GRANTED**, and the complaint of Brad Wilson be **DISMISSED**.

**IT IS SO ORDERED.**

**A**  
**ROBERT B. RAE**  
**Administrative Law Judge**

**NOTICE OF REVIEW:** Review of this Decision and Order is by the Administrative Review Board pursuant to paragraph 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 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.

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<sup>4</sup> Moreover, Complainant was and remains relatively nonplussed by the meeting with Mr. Chapman. It appears based on the record that the party most incensed and aggrieved by the meeting (and the most informed about the nature of this complaint) was the union representative.