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Issue Date: 21 February 2013

CASE NO.: 2012-FRS-00020

IN THE MATTER OF

KENNETH LEDURE,
Complainant

v.

BNSF RAILWAY COMPANY,
Respondent

DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the "whistleblower" protection provisions of the Federal Railroad 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. (Aug. 3, 2007), as further amended by Pub. L. No. 110-452 (Oct.6, 2008). The FRSA prohibits covered employers from discharging, demote, suspend, reprimand, or in any other way discriminate against an employee for engaging in certain protected related to the terms and conditions of his employment.

In this case Complainant alleges that Respondent violated 49 U.S.C. § 20109 (a)(4) by not returning to his former position as a conductor or in the alternative position as an engineer because of activity in filing a FELA law suit in which he alleged an on the job injury and violated 49 U.S.C. § (c)(2) by disciplining him for following the directives of his treating physician.

A formal hearing was held in St. Louis, Missouri on September 25 and 26, 2012 during which time the parties were afforded the opportunity to present testimony, submit documentary evidence and post hearing briefs. Complainant submitted 21 exhibits that were admitted during the hearing. (CX 1-12, 14, 15, 17-19, 28-29, 40, 41). Respondent submitted 43 exhibits that were admitted during the hearing. (RX-A to KK, LL-QQ). The parties submitted post trial briefs. Complainant attached to his brief a functional capacity evaluation (FCE)(taken by Complainant on October 22, 2012, almost one month after the close of the hearing). Respondent filed a motion to strike the post-trial FCE contending Complainant that the FCE did not meet the

requirements of 29 CFR § 18.54 (c) or 29 CFR § 18.55 in that it was (1) readily available prior to close of hearing, (2) not received into evidence by the undersigned, (3) submitted more than 20 days after close of hearing without good cause and not within the days set for submission of briefs. Further, that it was not material to Complainant's three claims, not authenticated, or submitted before the hearing to allow Respondent with a fair opportunity to object. Complainant objected to Respondent's motion but failed to address and overcome Respondent's arguments. Accordingly, I **GRANT** Respondent's motion.

I. BACKGROUND

BNSF is a railroad carrier engaged in interstate or foreign commerce within the meaning of 49 U.S.C §20109. Kenneth LeDure is a covered "employee within the meaning of 49 U.S.C. § 20109. BNSF hired LeDure as a conductor on February 13, 2006. Currently he is employed by BNSF. Throughout his employment with BNSF LeDure has worked as a conductor and brakeman. The job of conductor involves a variety of functions regarding the operations of trains on railroad tracks.

While working as a conductor on September 3, 2008, LeDure injured his back and on April 1, 2009 underwent an anterior lumbar fusion at L5-S1. LeDure reported the injury on the day it happened and has been on a medical leave of absence since that date. On December 14, 2010 LeDure contacted BNSF and asked to "mark-up" as available and ready to work as a conductor. In connection with that request LeDure subsequently provided BNSF with a supplemental medical report and a patient status report from his orthopedic surgeon and treating physician, Dr. Schoedinger, dated January 10, 2011. The field manager of BNSF's Medical and Environmental Department, Benjamin Gillam, reviewed Dr. Schoedinger's reports to see if LeDure had improved to the point where he could obtain a medical clearance and thus be cleared to return to work. Gilliam determined that based upon his review of Complainant's records LeDure had not sufficiently improved to the point where Dr. Clark, medical director of BNSF Medical and Environmental Department after reviewing LeDure's records could medically determine that LeDure was medically fit to perform the heavy work of a conductor and thus did not forward LeDure's medical records to Dr. Clark. As of the hearing Dr. Clark had no involvement in the decision of whether to clear LeDure to return to work as a conductor.

After reporting an on-the-job injury on September 3, 2008, LeDure began a medical leave of absence and has not applied for any other jobs with BNSF. On February 28, 2011 LeDure filed a complaint with OSHA alleging that BNSF had retaliated against him in violation of the Federal Rail Safety Act's anti-retaliation provisions, 49 U.S.C. § 20109. (RX-AA). On December 31, 2011, OSHA dismissed the complaint finding that although LeDure engaged in protected activity such activity was not a contributing factor in BNSF decision not allowing him to continue working as a conductor or in any position within BNSF. Thereafter LeDure timely filed objections to OSHA findings and requested a hearing before an administrative law judge. (RX-BB, CC).

II. ISSUES

1. Does this court have jurisdiction to hear LeDure's whistleblower claims?

2. Are LeDure's whistleblower claims barred by judicial or equitable estoppel?

3. Did BNSF violate the whistleblower provisions of FRSA by refusing to reinstate LeDure to the position of conductor because he filed an FELA lawsuit or followed the directions of his treating physician?

4. The Appropriate Remedy.

III. JURISDICTION AND ESTOPPEL

BNSF contends that the undersigned has no jurisdiction to consider LeDure's whistleblower claims because they come under the Railway Labor Act. According to BNSF the Railway Labor Act has exclusive jurisdiction over LeDure's claims which relate to seniority and mark up under the parties' collective bargaining agreement. If the parties fail to resolve these issues either party may initiate arbitration proceedings before the National Railroad Adjustment Board which is the mandatory, and exclusive system for resolving grievance disputes. *Bhd. Of Locomotive Eng'rs v. Louisville & Nashville R.R. Co., 3*73 U.S.33, 38 (1963).

BNSF ignores the fact that the 2007 Amendments to the FRSA transferred authority for rail employees whistleblower claims from the Adjustment Board to OSHA and created new rights, remedies and procedure thus stripping the authority of the Adjustment Board to resolve whistleblower complaints under 49 U.S.C.A.§ 20109 and transferring that authority to the Labor Department. *Mercier v. Union Pacific Railroad Co.* and *Kroger v. Norfolk Southern Railway Co.*, ARB Case Nos. 09-121 and 09-101 (Sept. 29, 2011). Thus I find OSHA has the authority to hear and referred the matter to me on appeal from their initial decision.

Concerning the judicial and estoppel arguments BNSF contends that LeDure is barred under the principal of judicial estoppel from asserting a position inconsistent with that he asserted in the same or previous proceeding wherein the FELA trial he asserted for over two years of being permanently disabled from working as a conductor and in this proceeding contending that he was able to work as a conductor. In like manner BNSF contends that the principle of equitable estoppel applies whereby a party who makes a representation that misleads another person, who then reasonably relies on that representation to his detriment, may not deny the representation. In the present case I find that neither principal applies for the whistleblower case has unique issues of fact and law which are distinct from the FELA proceeding. Further I find no evidence of deception by LeDure or detrimental reliance by BNSF to warrant application of either principle in this case. Further, if the estoppel arguments were applied with equal force to all parties BNSF would be precluded from arguing that LeDure was not able to perform his

work as a conductor because of Dr. Mirkin's (BNSF's expert in the FELA trial) testimony that LeDure could do his former work as a conductor.

IV. STATEMENT OF THE CASE

A. TESTIMONY OF JOE HENDRIX AND KENNETH LEDURE

Joe Hendrix, is an engineer for BNSF presently working outside of Chaffe, Missouri Before becoming an engineer he work for BNSF as a conductor from 1997 to 2003 at which time he was promoted to engineer after he marked up or submitted his bid for the position on the company's bulletin board computer TSS system.(Tr. 74,75). Besides working as an engineer he serves as the chairman for United Transportation Union representing employee including LeDure.

Hendrix testified that he assisted LeDure in trying to get back to work following his injury on September 3, 2008. Hendrix sent an e-mail to Brandon Odgen, Director of Administration for the Springfield Division on Thursday, January 27, 2011 in which he informed Odgen that LeDure had been cleared by his doctor on January 11, 2011 to return to service but had not been marked up for a return. Hendrix asked Odgen if he had the necessary paper work and if so to return LeDure to work immediately or be subject to a time claim for each day LeDure missed because of BNSF delay in marking him up.

Odgen replied within 2 hours the same day indicating that he had not received a medical release from their medical department and would check with the medical department on his status. About an hour later Odgen by e-mailed informed Hendrix that he had spoken with the medical department and "it was working its way through the process" and had not issued a release." (CX-1). As DOA Odgen had the responsibility of handling employees who return to work following medical leaves of absence. Hendrix received no further response from his request and testified that he was never informed that any additional medical was necessary. (Tr.81-82)

Hendrix testified that he knew of other persons including one conductor that had back and hip surgery and had returned to work as a conductor but did not know what the surgery entailed or the documentation he provided (Tr. 83, 91). Further, LeDure came from a family of railroad workers and never heard LeDure not want to work for BNSF. LeDure's name does not appear on BNSF seniority roster but it appears on the TSS system (Tr.86|.

LeDure testified that on January 10, 2011 he sent to John Neal, train master for BNSF and LeDure manager in Chaffe, Missouri a medical release from his orthopedic surgeon, Dr. Schoedinger indicating LeDure was able to return to work without restriction. On that date Dr. Schoedinger indicated that LeDure came into his office and indicated no significant change in his lumbar spine stating he had pain in his back after standing on hard surfaces In excess of 5 to 10 minute with no lower limb pain. On examination he was obese weighing 264 pounds and had a

well healed surgical with 0 to 1+ deep tendon knee and ankle reflexes bilaterally and no sensory loss or motor weakness, pathologic reflex or vascular insufficiency of either lower limb. LeDure asked if he could return to at his usual duties as a locomotive conductor where Dr. Schoedinger advise him of the hazards and complications attendant with a return to unrestricted heavy duty as a railroad conductor. (CX-2, p. 1; Tr. 98).

Following the presentation of these documents, LeDure testified that no one from BNSF responded why he had not been marked up despite a subsequent request by Hendrix for Odgen to mark him up in January 2011 and LeDure's subsequent request in September 6, 2011 to Odgen for mark up. (CX-15, Tr. 100). LeDure testified that no one from a responded to this request.[1] In fact the only response he received from the health department was from medical manager, Ben Gillam, who became manager after LeDure's FELA trial. Gilliam told LeDure he could not help him to get into the engineer program because he had not been cleared to return to work. (Tr. 103). LeDure testified that Gillam's predecessor, Brett Ouellette, told him he could apply for jobs through the vocational program so as to work his way back to the heavy work of a conductor. LeDure had declined because all required travel. (Tr. 104-5; CX-7-15). Further, no one including Gilliam told him he needed additional medical information from his treating physician, Dr. Schoedinger, so he could be cleared by BNSF medical department for eventual mark up. (Tr. 105-6). Rather, Ouellete by letter on December 22, 2009 told him that all he needed to return to work was a release from his doctor and an indication of an appropriate level of work activity which LeDure stated he provided in January 2011. (CX-8).

LeDure testified that during the FELA trial BNSF physician Dr. Mirkin testified that LeDure was able to return to conducting work and that since September 2011 he had been working for another employer, Prairie Farms and had passed a DOT physical and was working without restrictions. (Tr.111-14). LeDure testified that he was able to do the job of conductor and that his current work was more strenuous than that of a conductor or an engineer which was a very light duty job. (Tr. 120-21).

On cross, LeDure admitted the conductor job involved occasional lifting between 30 to 80 pounds, bending and squatting to the ground to throw switches and attach air hoses, frequent standing, walking and sitting. (Tr. 122-24). Concerning his injury BNSF brought no disciplinary action against him. (Tr. 125). LeDure in the FELA action alleged he sustained as a result of the injury "permanent, painful and bodily injuries resulting in a permanent weakened of his body strength, use, and function of his low back. (Tr. 127; RX-H). Further at the time of trial he never made any attempt to return to work as a conductor or to obtain clearance through BNSF medical department. (Tr. 128-29). In fact he told the FELA jury that as a result of the accident he was limited in his ability to bend and move side to side and that sitting and standing in one place caused him the most pain .(Tr. 135-140). Moreover, Dr. Schoedinger told him that he was not

[1] On December 22, 2010 LeDure requested to know from Ralph E. Hundley why he had not been marked up and Hundley was told by Bob Novelli, Director of Claims to refer him to an attorney.

physically able to do the work of a conductor and that for his safety and health he should not return to the job of conductor and that he trusted his doctors. (Tr. 141).

LeDure testified that he always wanted to return to work as a conductor yet from September 4, 2008 to December, 2010 he never made any attempt to return as a conductor. (Tr. 150-51). LeDure never responded to Ouellette numerous (13) letters in which BNSF offered job retraining until he was able to return to full duty. The only attempt he made to return to work was one attempt to get a front line supervisor position which he failed. (Tr. 154-55). LeDure admittedly never told Ouellette he planned to work as a conductor. (Tr. 155).

About 4 months after the FELA suit LeDure admittedly had a change of heart and decided he wanted to return to work as a conductor. On December 14, 2010 LeDure e-mailed Ralph Huntley requesting mark up. (Tr. 156). Prior to this time Huntley had no contact with LeDure and was not in the medical department. (Tr. 157). Huntley responded telling LeDure to see his attorney. (Tr. 188).

From August, 2010 to January 2011, LeDure had no additional surgery, physical therapy, rehabilitation, MRIs, myleograms, or FCEs. When Dr. Schoedinger released him without restriction, Dr. Schoedinger never explained how he arrived at that conclusion nor did he prescribe any rehabilitation plan LeDure was to follow. (Tr. 165-66).

B. TESTIMONY OF BRET OUELLETTE, BRANDON ODGEN, RALPH HUNTLEY, BENJAMIN GILLAM, AND ROBERT MCCONAUGHEY

Ouellette is a field manager of BNSF medical environmental health department having worked for BNSF as a train master in 2005 followed by his appointment as field manager of BNSF environmental health department in 2006. As medical manager Ouellette provides vocational assistance to injured workers finding them jobs within BNSF's system while they are recovering. Employees are treated the same whether injured on or off the job and whether they have a FELA suit or not. (Tr.197). Ouellette possess a bachelor's degree in psychology and a master's in vocational rehabilitation counseling. (Tr. 199). In performing this job Ouellette work with medical professionals gathering information to present to them. He became the field manager for BNSF in the medical department in Springfield Missouri in 2008 and worked with medical case manager concerning LeDure's on the job injury in September, 2008.

On February 6, 2009 Ouellette sent LeDure a letter telling him of BNSF services and requesting a response. (Tr. 200; EX-E). LeDure never responded to Ouellette's letter. (Tr. 201-2). On July 23, 2009, Ouellette sent LeDure a second letter telling him of BNSF services including vocational counseling, testing, training, and skills enhancement and job placement and again requesting a response. LeDure never responded. (EX-I; Tr. 204). Ouellette sent additional letters to LeDure on November 2, December 22, 2009; February 5, 11, 2010 with no response from LeDure (Tr. 205-10). On July 20, 2010 LeDure sent a letter indicating that he had

interest in taking the First Line supervisor's exam which LeDure took on July 28, 2009 and failed. (Tr. 211, RX-R). Regarding LeDure's ability to do his former job of conductor, Ouellette testified that Dr. Schoedinger indicated that LeDure could not do it. (Tr. 214). Ouellette closed LeDure file in August 2010 after the FELA trial at which time Ouellette transferred to Montana. (Tr. 215). In order for LeDure to return to his former job of conductor Ouellette testified he would need to provide the medical department with an FC , plus treatment notes from a physical therapist plus treatment notes from Dr. Schoedinger for Dr. Clark to evaluate.

Brandon Odgen is the Director of Administration (DOA) of the Springfield Division of BNSF. Before this he served as a trainmaster. As DOA he oversees the administrative functions of the Springfield Division including invoice processing, ordering of supplies and interacting with administrative assistants who process mark ups following an employee's return from a medical leave of absence and medical clearance by the medical department. (Tr. 259). Whether an employee gets a medical clearance is determined by the medical department. In this case Mr. Hendrix asked him to mark up LeDure for work. Odgen replied he would contact the medical department to find out where LeDure was in that process. Odgen found out that the medical clearance was working its way through the medical department and had not issued. He informed Hendrix the same day on January 27, 2011 what he learned (Tr. 263-4).

On Tuesday, September 6, 2011 LeDure e-mailed Odgen asking why he was still waiting months later for a markup or tell him who he needed to talk to in the medical department. On the same day he referred LeDure to manager Ben Gillam. (Tr. 264-65; CX-FF). Odgen confirmed BSNF code of conduct of non-retaliation for good faith reporting of apparent or actual violations of law. (Tr. 266, RX-GG). Odgen testified that his actions were not influenced by any lawsuit.

Ralph Huntley is crew manager for BNSF Springfield Division having worked for that division in various capacities since May 1964. Concerning a markup following an employee's extended medical leave of absence Huntley has no role in the process but rather must wait upon the medical department for their approval before an employee is allowed to mark up and return to work. (Tr. 281-82). When contacted by LeDure, Huntley contacted the DOA to see if he had any information concerning LeDure's medical release. (Tr. 283-86). In response to LeDure who asked him for a mark-up, Huntley told him he could not allow him to mark up because he had not received a medical release from the medical department. When LeDure disagreed Huntley told him to see his attorney. (Tr. 287). Huntley contacted Bob McConaughy, general manager of the Springfield Division and Bob Novelli, Claims Director to advise them of LeDure's contact and how to proceed. When LeDure went on medical leave BNSF placed his name of board 5 according to the union contract to allow BNSF to fill the position with another employee. (Tr. 293). To get off board 5, he had to have a medical release and then could have exercised his seniority without fear of being furlough. (Tr. 296). Huntley denied any retaliation against LeDure (Tr. 303).

Ben Gillam is the current field manager of medical and environmental health for BNSF Springfield Division. He replaced Brett Ouellette in this role on September 1, 2010. Before assuming this position Gillam was a policeman in Claremont, Oklahoma and a deputy sheriff in Tulsa, Oklahoma of seven years. As field manager he performed the same duties as Ouellette helping injured workers return to work with on the job, field, EMT and paramedic training. In addition he has work as medical officer in a jail facility. As part of this training Gillam knows what is entailed in most of BNSF jobs duties. (Tr. 331-33).

Gillam testified that when a BNSF employee is absent from work for an extended period due to an on or off- duty injury, he must obtain a medical clearance before allowed to mark up and return to work in order to identify any restrictions that would inhibit them from performing their job in a safe manner. In order to obtain this release the employee must provide clinical notes, test results, surgical reports, and medical documentation to provide a complete understanding of medical procedures and treatment processes the employee went through before returning to work. (Tr. 334-36). Each job has physical requirements that the employee has to accomplish to hold that position. The medical department before they can issues a release has to make sure an employee can meet the standards of the position in question. In making that determination the medical department relies upon the treating physician(s) notes to see what the employee has gone through including tests, reports and clinical notes. Once this is received the medical manager turns it over to Dr. Clark in Fort Worth for discussion and evaluation. In certain simple cases the manager can make the determination. In more complicated surgical case Gillam always refers the matter to Dr. Clark once the necessary information is received. Since Gillam has been manager he has assisted 90% of the employees who went out on-the-job injuries to return to work without restrictions. One of those employees had a FELA lawsuit against BNSF. (Tr. 336-40).

Gillam testified that he treats injured employees the same regardless of whether they have filed a FELA suit or not. Gillam requires all employees who return from a medical leave to have some sort of medical leave before returning to work. (Tr. 341) Gillam had no involvement with LeDure from 2008 to 2010 during which time he was assigned to BNSF in Arizona. Before 2011 when LeDure contacted him Gillam knew nothing of LeDure. When he pulled up his file Gillam learned that LeDure had a lumbar fusion and that Dr. Schoedinger had provided a return to work without restrictions and a short one page report. (RX-X, Y). Gillam did not believe this was sufficient for Dr.Clark to approve his return to work. Rather, after reading these exhibits he believed LeDure's status was the same and that Dr. Schoedinger had warned him of the danger of attempting such work. (Tr. 347-51) After seeing the release, Gillam informed LeDure that he needed Dr. Schoedinger's clinical notes before he could proceed with a medical release. (Tr. 351, 465-66). LeDure never provided this information to Gillam and never indicated to him he did not understand what he was requesting. (Tr. 356-57). Gillam told LeDure he needed the additional information from him after LeDure called him. (Tr. 383, 397-99). In regard to being

marked up for an engineer's position, Gillam testified he told LeDure he was not eligible because he did not have any medical clearance to return to work. (T. 358).

Robert McConaughey is BNSF General Superintendent of Transportation for its southern operations and was a general manager of its Springfield Division for five years from 2007 to 2011. (Tr. 407-08). McConaughey testified about the process that an employee follows when returning from a medical leave as previously described followed by a proper mark up in accord with the applicable collective bargaining agreement. McConaughey sits on a review panel consisting of the Claimant's proagent, medical department, local supervisor and medical care provider to periodically discuss the employee's diagnosis, rehab progress and expected date of return. After the FELA trial McConaughey learned that LeDure was permanently disabled and not able to return as a conductor according to LeDure's doctor and representatives. At that point McConaughey told Hendrix that he had to go through the medical department because it was the only way the company could precede. (Tr. 415).

V. DISCUSSION

In order to promote safety in railroad operations and reduce railroad related accidents Congress enacted the FRSA prohibiting a railroad carrier from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee due to said employee lawful and good faith action in doing any one of 7 activities including notifying or attempting to notify a railroad carrier of a work related personal injury. 49 U.S.C.A. §20109 (a)(4). A railroad carrier under the FRSA is also prohibited from disciplining an employee from following orders or a treatment plan of a treating physician "…except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty…" or absent these a carrier's medical standards for fitness for duty. 49 U.S.C.A. §20109 (c)(2).

The whistleblower provisions incorporates procedures established by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121(b); 49 U.S.C.A.§ 20109 (d)(2)(A); *DeFrancesco'.v. Union Railroad Co.*, ARB N0.10-114 (Feb. 29, 2012). Thus a FRSA complainant as LeDure must establish by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the personnel action. *Clemmons v. Ameristar Airways, Inc. et al.* ARB 05-048, (June 29, 2007); *Luder v. Continental Airlines, Inc.,* ARB No.10-026 (Jan.31, 2012). If complainant meets this burden of proof, the employer may avoid liability by proving through clear and convincing evidence that it would have taken the same unfavorable action in the absence of a complainant's protected activity. *DeFrancesco,* ARB No 10-114, slip op at 5.

Regarding protected activity the FRSA in Section 20109 (a)(4) clearly protects from discrimination an employee that notifies or attempts to notify a railroad carrier of a work-related personal injury or work-related illness. Section 20109 (c)(2) also protected an employee from discipline for following orders or a treatment plan of a treating physician who is involved in a work-related injury. LeDure presented no evidence of any such treatment plan by Dr. Schoedinger or discipline for following such a plan. Rather the evidence shows that BNSF did not put him back in his former job and thereby allow him to qualify for even lighter engineer work because LeDure did not provide documentation that he met BNSF fitness for duty standards. Thus the only issue I need to address is whether the filing and pursuit of a FELA suit satisfies the requirements of Section 20109 (a)(4). While BNSF argues to the contrary by citing two regional administrator decisions (*Deveny v. BNSF* and *Harrison v. BNSF*) at page 14 of its brief, these decisions have no binding authority or precedential value and fly in the face of the plain language which protects an employee's right to notify a railroad carrier of a personal on-the-job injury by filing such a suit. In fact by filing such a suit BNSF is required to respond to this notification or face significant damages for not so doing. Thus by filing a FELA law suit in good faith, as LeDure apparently did, I find he engaged in protected activity.

However, I find that Gilliam who is the decision maker and charged with the alleged discrimination had no knowledge of the FELA law suit when he requested additional information from LeDure whether he requested it in January or September, 2011. In fact he did not learn of the FELA suit until shortly before the instant litigation (Tr. 342-43, 352-53). For a complainant to be successful he must go beyond establishing that the employer, as an entity, was aware of the protected activity. Rather he must show that the decision maker who carried out the alleged adverse action was aware of the protected activity. *See Bala v. Port Authority Trans Hudson Corp.*, 2010-FRS-00026 (ALJ Feb. 10, 2012); *Jensen v. BNSF Railroad Co.*, 2010-FRS-00022 (ALJ).

The ARB has consistently applied the "materially adverse" standard articulated in *Burlington Northern & Santa Fe Ry. Co. v. White*[2] to the employee protection statutes adjudicated by the Department of Labor when determining whether a complainant has suffered some adverse action. *Melton v. Yellow Transp.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 14 (ARB Sept. 30, 2008) (JJ Douglass, Transue, concurring). Under this standard a complainant must show that a reasonable employee or job applicant would find the employer's action "materially adverse" in that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 57, 67-68. The adoption of this standard is preferred in order to exclude trivial harms that often occur in the workplace as well as offer necessary objectivity to the "judicial effort to determine a [complainant's] unusual subjective feelings." As applied to the employee protection statutes adjudicated by the DOL, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. *Melton*, 2005-STA-002 at 19-20.

[2] 548 U.S. 53 (2006).

Regarding the issue of whether BNSF's failure to reinstate LeDure to the position of conductor constituted an adverse personnel action, BNSF made no reply. In like manner BNSF did not address whether its refusal to allow LeDure to qualify for the position of engineer constituted an adverse action. In answering either question one must ask if such action, engaged in by a railroad carrier, would dissuade a reasonable worker from engaging in the protected activity. If the answer is answered affirmatively then the action must be deemed adverse. In both cases I find that the failure to reinstate and the refusal to allow LeDure to qualify for the engineer position to constitute adverse personnel action. However in so finding I have not addressed the equal if not more pressing question of whether LeDure's protected activity was a contributing factor in either the decision not to reinstate him to his former position of conductor or to allow him to qualify for the engineer's position.

In considering whether LeDure's action in filing the FELA law suit or informing BNSF of his injury was a contributing factor a complainant like LeDure does not have to show retaliatory animus (motivation or intent). Rather all he has to show by a preponderance of the evidence is that the protected activity was a factor which, in connection with other factors, tended in any way to affect the outcome of the decision. It may be established by direct evidence or indirectly by circumstantial evidence including temporal proximity, indications of pretext, inconsistent applications of employer's policy, shifting explanations for the adverse action, antagonism or hostility toward a complainant's protected activity, falsity of an employer's explanation for adverse action and a change in employer's attitude toward the complaint after he or she engages in the protected activity. *DeFrancesco*, *supra* at 6-8.

LeDure argues that he proved contributing factor (1) by showing BNSF's refusal to allow him to return on the mistaken belief that he had testified at the FELA trial he could not do any work; (2) by changing their position at trial by stating the reason for not reinstating LeDure was his failure to produce additional medical documentation without being able to specify what information they needed; (3) by not consulting with BNSF physician (Dr. Clark) on what info was needed; (4) by not asking LeDure to undergo an FCE; (5) by refusing to accept the fact that LeDure's physician said he could work without restrictions; and (6) by not telling LeDure orally or in writing what documents he had to produce.

I find no merit in any of LeDure's arguments because when Dr. Schoedinger stated that LeDure could perform his past work without restrictions he also stated that he had not undergone any changes from the time when he found Claimant with permanent restrictions and that he should not, for his own safety and health, return to work as a conductor. Dr. Schoedinger's release was in fact a warning that if LeDure returned to his former work he was assuming a risk of further damage. In requesting additional information Gillam was doing what one would expect of any prudent medical manager before he could even submit his release to BNSF's Dr. Clark for her approval. Gillam told LeDure that he would need information such as clinical notes which would confirm a change in his condition. LeDure never timely submitted this information to Gillam.

Thus, I find that BNSF had no reason to reinstate LeDure to his former position, which was necessary before he could qualify as an engineer, and no reason to believe there was any contributing factor between the protected activity and his failure to be reinstated to the conductor's position or to be allowed to qualify for the engineer position. In so doing Gillam treated LeDure the same as it would any other similar injured worker. The fact that Huntley told LeDure to see his attorney was evidence of nothing more than Huntley advising LeDure that if he disagreed with his inability to reinstate him, which Huntley could not do without medical clearance from the medical department, LeDure should see his attorney.

VI. SUMMARY

I find that LeDure failed to prove by a preponderance of the evidence that BNSF's agent Gillam knew of LeDure's protected activities or that his protected activities was a factor in the decision by BNSF not to medically clear and thus reinstate LeDure to his previous conductor position or to allow him to qualify for the engineer position.

VII. ORDER

In as much as LeDure has failed to prove he was discriminated against in violation of the Federal Railway Safety Act, his complaint is **DISMISSED**.

SO ORDERED this 20th day of February, 2013, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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. *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 pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). 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 thirty (30) days of the date the Petition is filed

notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).