**U.S. Department of Labor**

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**Issue Date: 24 May 2018**

**CASE NO.: 2012-FRS-63**

In the Matter of:

**PHILLIP TUCKER,**
Pro-Se Complainant
v.

**CSX TRANSPORTATION, INC.**
Respondent

## RULING ON MOTION FOR SUMMARY DECISION

### Procedural Status

This case comes under the Federal Rail Safety Act (FRSA),[1] as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

The case is once again being actively litigated, after having been dormant for an extended period of time. Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA) though his then counsel on 10 May 12. OSHA dismissed his complaint on 2 Aug 12 and Claimant's Counsel filed his objections and requested a de novo hearing a week later. After an initial scheduling conference call, a discovery and motion timeline was established and hearing was set for 27 Feb 13. The parties then agreed to continue the hearing to 3 Jun 13. During another conference call on 24 Apr 13, Complainant's attorney stated that he had recently been unable to contact his client and the case was continued to 12 Sep 13.

Although there is no documentation in the administrative file, it appears that settlement discussions took place and although no order was issued, the hearing date was vacated to allow those discussions and when no further communication was received from the parties, the case was presumed settled. Eventually, the parties were contacted to determine why the settlement was never submitted for approval as required. They responded that there had been no settlement and the parties had essentially forgotten about the case.

[1] 49 U.S.C. § 20109.
[2] Pub. L. No. 110-53 (Aug. 3, 2007).

Following a conference call on 20 Oct 17, Complainant's Counsel consulted with his client and then withdrew from the case by way of a 3 Nov 17 letter. On 5 Dec 17, I conducted a conference call with now pro-se Complainant and Respondent's Counsel and issued a new scheduling order, setting the hearing for 12 Jun 18 and directing Complainant to file a Bill of Particulars, specifying the details of his protected activity and Respondent's adverse action.

Complainant subsequently filed that document, which alleges that:[3]

> He was injured while working as a conductor for Respondent on 8 Mar 12, at Banks, Alabama. He was afraid that he would be fired for reporting the injury and hoped it would resolve on its own. However, that night he did tell his engineer, Eric Miles and his contract van driver about the injury. His condition worsened and prevented him from performing daily acts of living. He realized he needed to see a doctor and would be unable to do his job on Sunday, 12 Mar 12. He lives in a rural location and marked off from work for 12 Mar 12 with the intention of seeing the doctor that day or at least be in place to see a doctor on Monday.
>
> He was called to work on Monday, 13 Mar 12 and even though he had wanted to go to the doctor that day, since his pain had slightly improved, he felt he should try to work. His engineer, Mike Thompson, saw him limping and asked what had happened. He told Thompson about his injury.
>
> On Tuesday, 13 Mar 12, trainmaster Tom Marchese called him and demanded to know why he had marked off on Sunday, 12 Mar 12. When he explained he had been injured at work, Marchese started screaming and intimidating him. He was pulled from service that day. The same day, he went to a doctor and obtained an excuse from work for Sunday, which he turned into Respondent.
>
> On 15 Mar 12, he was charged with falsely marking off. After an investigation on 22 Mar 12, he was fired on 20 Apr 12. He had knee surgery for the injury on 8 May 12.

On, 5 Apr 18, Respondent filed a Motion for Summary Decision, arguing that there was no genuine issue of material fact that would allow a finding that Complainant had engaged in any protected activity or that any protected activity played any factor in his termination. Complainant filed an answer, Respondent filed a reply and Complainant filed a sur reply.

## Applicable Law

The Federal Rail Safety Act makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition,[4] for reporting a work related illness or injury,[5] "for requesting medical or first aid treatment, for refusing to work when confronted by a

[3] Complainant's dates were internally inconsistent and mostly incorrect. 12 Mar 12 was a Monday.
[4] 49 U.S.C. § 20109(b)(1)(a).
[5] 49 U.S.C. § 20109(a)(4).

hazardous safety or security condition,[6] or for following orders or a treatment plan of a treating physician."[7]

The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).[8] AIR 21 requires a complainant to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the 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 action.[9] If he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.[10]

Parties are allowed to seek a summary decision without a full hearing. They are entitled to a summary decision 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."[11] A "party may not manufacture a dispute of fact merely to defeat a motion for summary judgment."[12] Allowing a party who has been examined at length on deposition to raise an issue of fact simply by submitting an affidavit contrary to his testimony would eviscerate the utility of summary judgment.[13]

## Discussion

Complainant initially alleged he had been fired for reporting a work injury. Respondent maintains that the record provides insufficient evidence to create a genuine issue of material fact that Complainant engaged in any protected activity. It argues that Complainant did not report any work injury until 19 Apr 12 and was fired for making a false statement when marking off. It offered a number of documents with its motion and relies heavily upon Complainant's deposition testimony.

In his deposition, Complainant testified that:

> While working for Respondent near Banks, Alabama on 8 Mar 12, his foot slipped and his right knee popped. It was like he pulled a muscle in his left calf. He thought it was minor. No one saw him slip. He finished his shift and casually mentioned to Eric Mills and the contract van driver that he was hurt. He did not see a doctor that day or mention it to anyone else. He didn't think he was hurt that bad, but was just a little sore.

[6] 49 U.S.C. § 20109(b)(1)(b).
[7] 49 U.S.C. § 20109(c)(2).
[8] 49 U.S.C. § 42121.
[9] *See* 49 U.S.C. § 42121(b)(2)(B).
[10] 29 C.F.R. § 1979.109(a); *see also Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.
[11] 29 C.F.R. § 18.72.
[12] *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000).
[13] *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969).

The next day, 9 Mar 12, he was at home and reached down to get something when his knee gave way and he collapsed. That's when he realized the work injury was bad.

At 0411 hours on Sunday, 11 Mar 12, he called Respondent and marked off that day for a doctor's appointment. Respondent confirmed he was marked off for a doctor's appointment and reminded him to mark back up. He didn't see a doctor that day, didn't have an appointment to see a doctor that day, and didn't try to make an appointment to see a doctor that day, but he wanted to be in place for a doctor's appointment. At the time, his knee and his calf hurt. He was hoping to get better so he could mark back up and go to work. He didn't mention anything about being hurt at work.

He marked back up for and worked on Monday, 12 Mar 12. He had not mentioned being hurt at work to anyone or tried to see a doctor. He had taken 24 hours off and thought he was alright to work. He worked with Mike Thompson, who saw him limping. He can't remember exactly what he said, but he told Thompson what happened, but that he was fine.

On 13 Mar 12, Tom Marchese called him to ask why he marked off on 11 Mar 12. He explained that he was hurt and couldn't walk, but Marchese was screaming and hung up on him before he could explain that he was hurt at work. He doesn't recall being pulled from service then. After that happened, he went to see a doctor, and told him about bending over. He doesn't remember if he said anything about hurting it at work, but he thought he did. The doctor diagnosed him with a mild left calf sprain from an injury on 10 Mar 12.

The first time he told Marchese he had been hurt at work was on 19 Apr 12, when he called to asked Respondent to pay for an MRI, since he had been hurt on the job. Marchese refused, saying they had no record of a work injury.

<u>At the discipline investigation, Complainant stated:</u>

When Marchese called him to ask why he had marked off, Marchese was yelling at him so and wouldn't listen to him, so he hung up.

<u>Tom Marchese stated in his affidavit that:</u>

On Tuesday, 13 Mar 12, he was reviewing records and noticed that Complainant had marked off for a doctor's appointment on a Sunday. Given Complainant's extensive disciplinary history of attendance problems, he was suspicious and called Complainant, who said he neither had an appointment with, nor saw a doctor that day, but had injured his leg while folding laundry on 11 Mar 12. He decided Complainant had falsely marked off and initiated an investigation. As part of the investigation, he received Complainant's doctor's note, which indicated Complainant had been seen on 13 Mar 12 for a mild calf sprain sustained on 10 Mar 12. On 19 Apr 12, Complainant called him and asked if Respondent would pay for an MRI on a work injury he had suffered on 8 Mar 12.

An email from Michael Thompson on 19 Apr 12 states:

> While at work on 12 Mar 12, he noticed Complainant limping and asked if he was ok. Complainant said he was and it was just from a pulled muscle. He later asked Complainant how he hurt the leg and Complainant told him he had pulled a muscle bending over to pick up some clothes.

Complainant's doctor's note states:

> Complainant could not be seen until 13 Mar 12 and has a mild left calf sprain with a date of injury of 10 Mar 12 and should be excused from work for 10 Mar 12 – 14 Mar 12.

Respondent's records state:

> An investigation into the allegation of falsely marking off was held on 22 Mar 12. On 17 Apr 12, Rod Logan made the decision to dismiss Complainant.

In his Response in Opposition, Complainant states that his protected activity was during the phone call on 13 Mar 12, when he attempted to tell Marchese what had happened. He then raised new protected activities by suggesting that he was (1) following doctor's orders and (2) refusing to work when it would be unsafe. He further argues that he did not lie when he marked off, because he only had three choices: sick, doctor appointment, or family illness. He maintains that he was hurt, not sick so he could not mark off sick and he choose doctor appointment as more accurate.

Complainant attached to his response a number of documents, most significantly, two emails. The first was on 15 Aug 12 from Richard Harris to Carla Sweet, stating that Complainant told him during a phone call that he had been injured at work. The second was on 13 Aug 12 from Christopher Bolin to Carla Sweet stating that he and Complainant had a discussion during approximately the third week of March 2012 about a work injury Complainant suffered in Banks, Alabama.

Respondent objected to the consideration of the Harris and Bolin emails, pointing out that Carla Sweet was Complainant's former counsel's secretary and at best can merely establish what Complainant may have told them at some point. It also objected to the new protected activities raised by Complainant and revisited its argument that the earliest Complainant communicated his allegation of a work injury was 19 Apr 12, by which date the decision to fire Complainant had already been made. In a sur-reply, Complainant suggested that Marchese is lying.[14]

[14] Complainant also complained that he was not provided access to the phone and personnel records of Marchese and Thompson, but never raised that issue or sought assistance in that regard.

The central question raised by the motion is if and when Complainant engaged in protected activity and if so, did it play any role in his termination. The procedural setting requires me to take the evidence in the light most favorable to Complainant. In that regard I turn primarily to Complainant's deposition testimony, in which he conceded that the first time he told Marchese he had been hurt at work was on 19 Apr 12. Given that the decision to fire him was made on 17 Apr 12, there is no genuine issue of material fact that would allow a finding that the 19 Apr 12 request for an MRI contributed in any way to his termination.

That raises Complainant's second argument, that he engaged in protected activity during the phone call on 13 Mar 12, when he attempted to report his work injury. Marchese and Complainant have different versions of what happened during that call. However, turning again to Complainant's deposition testimony, the record at best shows that Complainant told Marchese that he was hurt and couldn't walk, but Marchese was screaming and hung up on him before he could explain that he was hurt at work. There is nothing to indicate that Respondent was systemically attempting to prevent Complainant from reporting a work injury. It is significant to note that he did not call anyone else or make another attempt until he called Marchese on 19 Apr 12 about having Respondent pay for an MRI, at which point the decision to terminate had already been made. There is no genuine issue of material fact that would allow a finding that Complainant engaged in protected activity by attempting to report a work injury to Marchese or that the 19 Apr 12 request for an MRI contributed in any way to his termination.

Complainant also submits that it is possible that he told Mike Thompson he had been injured at work and Thompson passed that along to Marchese. However, Thompson reported that Complainant said he had a pulled muscle from bending over to pick up some clothes. Again, Complainant's deposition testimony was that he could not remember exactly what he said to Thompson, except that he told Thompson what happened, but also that he was fine. The record fails to raise a genuine issue of material fact that Complainant told Thompson he was hurt at work and Thompson told Marchese.

Complainant's last two theories are that he engaged in protected activity by following doctor's orders and by refusing to work when it would be unsafe. Although the legal theories were added, they do encompass the same general facts. However, since Complainant did not see a doctor until 13 Mar 12, he cannot argue that his actions marking off on 11 Mar 12 were a consequence of following his doctor's orders.

Even assuming, consistent with the inferences taken in favor of the non-moving party, that Complainant could not have worked safely, the question remains whether marking off for a doctor's appointment is a protected activity. Complainant testified at deposition that although he told Respondent he was marking off for a doctor's appointment, he didn't see a doctor that day, didn't have an appointment to see a doctor that day, and didn't try to make an appointment to see a doctor that day. He explained at deposition that he wanted to be in place for a doctor's appointment, but he was hoping to get better so he could mark back up and go to work. However, in his response to the motion he argues that he couldn't mark off sick, because he was

not sick, but injured, so he marked off for a doctor's appointment.[15] In any event, there is no genuine issue of material fact to allow a finding other than that Complainant indicated to Respondent that he had a doctor's appointment when he did not and did not communicate to Respondent that he was unable to safely work.

The complaint is **Dismissed**.

**ORDERED** this 24th day of May, 2018 at Covington, Louisiana

**PATRICK M. ROSENOW**
**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS**: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file

[15] Since Complainant's new justification for marking off for a doctor's appointment is inconsistent with his deposition testimony and in response to the motion to dismiss, it may not be used to create a genuine issue of material fact. However, even if it could, it would fail to do so, as he still failed to create a genuine issue of material fact that he communicated his inability to work to Respondent, which he could have easily done during the phone call.

any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

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, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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. If you e-File your reply brief, only one copy need be uploaded.

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).