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Issue Date: 07 May 2013

CASE №: 2012-FRS-00042

In the Matter of:

SIDNEY A. WILLIAMS,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances: Sidney A. Williams
For Himself

Jeffrey Davashrayee, Esq.,
For the Respondent

Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint

I. Introduction

The Complainant, Sidney A. Williams, works as a locomotive engineer for Respondent, Union Pacific Railroad Company ("Railroad"). He reported an occupational injury to his shoulder and back that caused him to seek medical evaluation. He alleges that when he returned to work the Railroad twice denied his requests to provide him with an assistant as a job accommodation. Further, he claims that the Railroad lowered his personal efficiency score, instructed him to attend a safety training class, and threatened to prevent him from returning to work if he asked for an assistant again. He says these actions were retaliation for reporting an injury, and for reporting a safety hazard (*viz.*, his inability to work safely as a locomotive engineer without help). He filed this employment protection claim under 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").[1]

The Railroad does not dispute that it has denied him an assistant for his job. Its reason is simple: no medical report says he has any impairment. If he insisted nonetheless that he needed help, the Railroad would have to determine if he had some impairment that precludes work. Further, it dropped the instruction to attend safety training after he objected.

Both parties have moved for summary decision. I find the Railroad is entitled to a final order without a trial, and dismiss the claims.

II. Summary of Agreed Facts

The parties' submissions resolve the following issues:

1. The Complainant works as a locomotive engineer for the Railroad.[2]

2. A conversation between the Complainant and Ms. Arnush, Regional Disability Prevention Manager for the Railroad, took place in early November 2010.[3]

3. In November 2010 the Complainant told Ms. Arnush that he was going to take a slot on the reserve board (a work status described in more detail later) to seek medical evaluation, which he did.[4]

4. In December 2010 and January 2011, the Complainant saw Dr. Morrison and Dr. Batkin to treat his shoulder/back.[5]

5. The reports of these doctors were given to Ms. Arnush. Neither said the Claimant has any limitation in his physical capacities. From them, the Railroad concluded

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[1] 49 U.S.C. § 20109 (2006) (as amended by of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53, § 1521, 121 Stat. 266 (Aug. 3, 2007)).

[2] Respondent's Memorandum of Points and Authorities in Support of Motion for Summary Decision ("Respondent's Motion") at 2; Complainant's Motion for Summary Decision ("Complainant's Motion") at 3.

[3] Respondent's Motion at 2; Complainant's Motion at 5.

[4] Respondent's Motion at 3; Complainant's Motion at 5.

[5] Respondent's Motion at 3; Complainant's Motion at 6.

that the Complainant could return to work without restriction.[6]

6. During a later conversation with Ms. Arnush (on a date neither party identifies), the Complainant requested that a fireman assistant be assigned to help him perform his duties. Mrs. Arnush denied the request.[7]

III. Brief Overview of the Claims

The following is a brief description of the Complainant's allegations.

A. Allegations About Protected Disclosures

Although the Complainant didn't structure his submission as separate claims, he makes three distinct allegations about events during March 2011 and October 2011.[8] All of the facts that follow are reported as the Complainant alleges them; they are not findings that the events occurred as alleged.

The claims are tangentially related to an on-duty injury the Complainant suffered and orally reported in October 2010.[9] The Complainant reported pain in his right shoulder and neck that was aggravated with activity and persisted even when at rest.[10] Bob Moya (Director of Train Operations) and Will Barlow (Manager of Operating Practices) agreed that the Complainant would continue to work unless there were further medical complications. None arose.

The Complainant continued to experience discomfort during November 2010. After reporting this discomfort, he accepted another job assignment. He then received a call from Ms. Arnush who wanted assurances the Complainant would suffer "no injuries," or else she would cancel the assignment and remove him from service. The Complainant told her that he could not promise that, but completed the assignment without incident.[11]

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[6] Respondent's Motion at 3; Complainant's Motion at 6.

[7] Respondent's Motion at 4; Complainant's Motion at 6.

[8] Complainant's Motion at 11.

[9] *Id.* at 5.

[10] *See* Respondent's Motion, R. Ex.-B(1) at 2;-B(2) at 3. This Decision and Order cites to the record this way: citations to the Complainant's exhibits are abbreviated as C. Ex.-[exhibit number] at [page number]; citations to the Respondent's exhibits are abbreviated as R. Ex.-[exhibit number] at [page number].

[11] Complainant's Motion at 5.

The Complainant then chose to be placed on the reserve board[12] for locomotive engineers, a work status established by collective bargaining agreements for the Southern Pacific Western Lines.[13] An engineer attains "reserve" status based on seniority and other eligibility requirements.[14] While occupying a slot on the board, the engineer works no shifts, yet receives substantial compensation (although less than full time pay) for being on-call. An engineer on the reserve board is considered in "active service" and must maintain requisite certifications and proficiencies.[15] While on the reserve board, the Complainant sought medical evaluation and notified Ms. Arnush that if any treatment was required he would report it.[16] In December 2010 and January 2011, he was evaluated by Dr. David Morrison and Dr. Fred Batkin.[17] He provided all the necessary documents from the evaluations to Ms. Arnush.[18] These doctors stated that all tests were normal and the Complainant was released to unrestricted duty.[19]

In early February 2011, the Complainant voluntarily returned to full time duty "unconditionally."[20]

1. First Disclosures and Retaliation

On March 14, 2011, Complainant had a required annual performance review.[21] He says that during his review, he discussed with Mr. James Ellington (Manager of Operating Practices) the earlier requests he made in December 2010 or January 2011 to Ms. Arnush for an assistant to help perform his job duties.[22] The Complainant never heard back from any manager about his requests.[23] They are the first matters that the Complainant asserts are protected disclosures under the Act.

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[12] *Id.*

[13] Respondent's Memorandum in Opposition to Complainant's Motion for Summary Decision ("Respondent's Opposition") at 3.

[14] *Id.*

[15] *See id.*

[16] Complainant's Motion at 5.

[17] *Id.*

[18] *Id.*

[19] *See* Respondent's Motion, R. Ex.-B(1) at 3-4;-B(2) at 2.

[20] Complainant's Motion at 6.

[21] *Id.*

[22] *Id.*

[23] *Id.*

In April 2011, the Complainant voluntarily returned to the reserve board.[24] He claims that shortly thereafter he received a letter to attend a Safety Intervention Training class ("SIT").[25] This prompted him to check his personal efficiency score. [26] Generally, this score records: "train handling, rules compliance, fuel and education/involvement category scores for events performed by [Railroad] engineers."[27] The Complainant saw it had been lowered from 996/1000 while he was on the reserve board to a score below 980.[28] He claims this shouldn't have been possible because his last two proficiency ratings from Mr. Ellington were 100%.[29] He also was not notified of any rules that he violated before returning to the reserve board in April 2011 that would explain his lower score.[30] The Complainant asserts this request to attend a SIT class and alleged downgrade of his personal efficiency score are the first two instances of retaliation against him for requesting an assistant.

2. Second Disclosure and Retaliation

In early September 2011, the Complainant contacted Mr. Carroll to return to regular duty from the reserve board, and reminded him of the unresolved request for an assistant.[31] The Complainant sees this request for an assistant as another protected disclosure.

In early October 2011, the Complainant says he was told at a meeting with Mr. Smith and Mr. Carroll that if he requested an assistant again,[32] he would be withheld from active service pending a physical.[33] In other words, even though the Complainant had already provided documents proving his fitness to return to work, Mr. Carroll would withhold him from service pending another physical and then prevent this physical from being scheduled.[34] The Complainant decided to remain on the reserve board to avoid being subject to any

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Respondent's Opposition at 4.

[28] Complainant's Motion at 6; Complainant's Memorandum of Points and Authorities in Support of Cross Motions for Summary Decision and in Opposition to Respondent's Motion for Summary Decision ("Complainant's Opposition) at 4.

[29] Complainant's Motion at 7.

[30] *Id.*

[31] *Id.* at 9.

[32] *Id.* at 10.

[33] *Id.*

[34] *Id.*

"additional harassment."[35] This threat is the third retaliatory action alleged by the Complainant.

IV. Analysis

A. Elements of a Complaint Under the FRSA

The FRSA's whistleblower section incorporates the procedures established by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century and are thus governed by that Act's burdens of proof.[36] To prevail in a FRSA whistleblower action, the Complainant must establish by a preponderance of the evidence that:

1. he engaged in a protected activity, as defined by the statute;
2. he was subject to an unfavorable personnel action; and
3. the protected activity contributed, at least in part, to the unfavorable personnel action.[37]

If a complainant proves these elements, the employer avoids liability if it proves "by clear and convincing evidence" that it would have taken the same unfavorable personnel action even if the complainant hadn't engaged in the protected behavior.[38]

B. Standard for Granting Summary Decision in Whistleblower Proceedings

The standard for granting summary decision in whistleblower proceedings is essentially the same as Federal Rule of Civil Procedure 56, which governs summary judgment in federal courts.[39] According to 29 C.F.R. § 18.40(d), an ALJ may issue 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

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[35] *Id.* at 11.

[36] *Kenneth G. Defranceso v. Union Railroad Co.*, ARB No. 10-114, 2012 WL 694502, at *2 (Feb. 29, 2012); *see* 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv).

[37] 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv); *see Robert Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, 2012 WL 5391422, at *5 (Oct. 26, 2012); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, slip op. at 13, 2006 WL 282113 (Jan. 31, 2006)).

[38] 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv); *Santiago v. Metro-North Commuter Railroad Co.*, ARB No. 10-147, 2012 WL 3164360, at *3 (July 25, 2012).

[39] *Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB Nos. 03-048 and 03-084, ALJ Nos. 2002-CAA-5 and 2003-ERA-10 at 3 (ARB Aug. 31, 2004).

material fact."[40] A "material fact" is one that affects the outcome of the case.[41] A "genuine issue" exists when the fact-finder—in whistleblower cases, the ALJ—could rule for the nonmoving party.[42] Evidence must be reviewed in the light most favorable to the non-moving party.[43]

The Administrative Review Board has described two methods an employer can use to demonstrate the absence of a genuine issue of material fact under § 18.40.[44] First, the employer can argue that the complainant has insufficient evidence to support an essential element of his case.[45] The complainant then must offer by affidavit or declaration, specific facts that, if true, could meet his burden of proof on that element at a trial on the merits.[46] A complete failure of proof on an essential element renders all other facts immaterial.[47]

Second, the employer can attach evidence which purports to show undisputed facts, and call on the complainant to produce admissible, contrary evidence that produces a genuine issue of fact.[48] The non-moving party cannot rest upon his allegations, and must adduce specific facts on each issue he is required to prove.[49]

The Complainant, a pro se party, was specifically instructed that he had to offer proof of his contentions.[50]

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[40] 29 C.F.R. § 18.40(d); *see also Wilson v. Norfolk Southern Railway Co.*, 2010-FRS-16 at 5 (ALJ July 15, 2010) (citing *Flor v. U.S. Dep't of Energy*, 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994)).

[41] *Rockefeller*, ARB Nos. 03-048 and 03-084 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

[42] *Robert Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, 2012 WL 5391422, at *5 (Oct. 26, 2012).

[43] *Id.*

[44] *Id.*

[45] *Id.*; *see also* 29 C.F.R. § 18.40(a).

[46] *Henderson*, 2012 WL 5391422, at *5; *see also Anderson*, 477 U.S. at 256.

[47] *Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB Nos. 03-048 and 03-084, ALJ Nos. 2002-CAA-5 and 2003-ERA-10 at 4 (ARB Aug. 31, 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[48] *Henderson*, 2012 WL 5391422, at *5 (Oct. 26, 2012); *see also* 29 C.F.R. § 18.40(c).

[49] *Rockefeller*, ARB Nos. 03-048 and 03-084, ALJ Nos. 2002-CAA-5 and 2003-ERA-10 (ARB Aug. 31, 2004) at 4 (citing *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998)).

[50] Order Briefing on Cross Motions for Summary Decision at 2 (stating that the Complainant must provide written opposition to the Railroad's motion in the form of declarations or affidavits).

V. Analysis

A. Other Claims Not Relevant to this Case

Many of the complaints are matters the Secretary of Labor cannot remedy. The Complainant has not been disciplined. A belief that the Railroad and his union conspired against him are matters that relate to claims under the collective bargaining agreement, for example for inadequate representation by the union. Claims that the Railroad awarded "negligent promotions" or implemented an "unequal disciplinary policy," compensated union officers as leverage for intimidation, abused Federal grants, and employed felons or others who have violated the Railroad's "immoral conduct policy," are unrelated to the whistleblower claim. If true, they may represent separate, discrete wrongs the Secretary of Labor cannot adjudicate.[51]

Further, any dispute about whether the Railroad denied a reasonable accommodation for a disability under the Americans with Disabilities Act ("ADA")[52] must be addressed elsewhere.

B. The Disclosures Alleged Aren't Protected Under FRSA

1. Complainant Did Not Engage in a Protected Activity When he Requested an Assistant to Help him with his Duties as an Engineer

The FRSA, in relevant part, defines a protected activity as: "(4) notifying or attempting to notify the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee."[53] Additionally, it provides:

> **(b) Hazardous safety or security conditions.--(1)** A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--**(A)** reporting, in good faith, a hazardous safety or security condition.[54]

The Complainant alleges that his request for an assistant was a "protected activity" under the Act. The only plausible definitions of "protected activity" that this action could fall under are: notifying the employer of a work-related injury, or notifying the employer of a hazardous or unsafe workplace condition.[55]

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[51] *See* Complainant's Motion at 8, 12, 13.

[52] 42 U.S.C. § 12101 *et. seq.*

[53] 49 U.S.C. § 20109(a)(1)-(7).

[54] 49 U.S.C. § 20109(b)(1)(A).

[55] 49 U.S.C. § 20109(a)(4).

a. Notifying the Employer of a Work-related Injury

The Complainant's requests for accommodation cannot be considered notification of a work-related injury under the Act. In *Price v. Norfolk Southern Railway Co.*, the complainant alleged that a discussion about injuries he had reported in the past (themselves protected activities) was a protected activity because it would chill the reporting of future injuries.[56] Judge Rae held that a complaint based upon an injury that might happen at some time in the future is too speculative and too subjective to be considered a protected activity under the Act.[57] I agree and apply similar logic to the case at hand.

The Complainant offered no medical evidence that shows a current impairment that requires accommodation. Denying a request for a helper on that basis isn't retaliation. Reframing the request as one made to avoid the possibility of re-injury does not assist the Complainant. Whether he will have any future injury is speculation. I am limited to adjudicating the legal effect of the facts that exist now.

The Complainant did engage in protected activity when he reported an injury in October 2010.[58] He chose to go on the reserve board while he sought voluntary medical evaluations in December 2010 and January 2011.[59] The Railroad does not dispute that it knew he claimed bodily discomfort from this injury.[60] However, the claim resolved when he returned to normal duty in February 2011 with no medical restrictions.

The Complainant concedes that no discipline was assessed when he reported that he was seeking this voluntary medical evaluation.[61] Further, the Complainant does not dispute that the medical evaluations cleared him to return to work without restriction in February 2011.[62] He also does not dispute the validity of these medical reports.[63] The Complainant himself insists that he was retaliated against for asking for an assistant in early 2011, and there is simply no evidence in the record to suggest that his injury report in October 2010 had anything to do with the retaliation he says happened later.

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[56] *See Price v. Norfolk Southern Railway Co.*, Case No. 2010-FRS-00017 at 9, 28 (ALJ Nov. 22, 2011).

[57] *Price*, Case No. 2010-FRS-00017, at 24.

[58] Complainant's Motion at 5.

[59] *Id.*

[60] Respondent's Opposition at 5.

[61] Complainant's Motion at 5-6.

[62] *See id.* at 6.

[63] *See id.*

b. Reporting a Hazardous Safety or Security Condition

Similarly, it stretches the Act's language beyond its limits to characterize the Complainant's request for an assistant as a report of a hazardous safety or security condition.

The Complainant's claim does not resemble the allegations courts have held to be reports of hazardous safety or security conditions. Complaints about hazardous or dangerous equipment fall under this category of protected activity.[64] Dangerous surroundings in the workplace have also been held as hazardous safety or security conditions.[65] If the Complainant had claimed that *all* engineers needed assistants because it was impossible to safely perform their job duties without such help, that might fall within the boundaries of reporting an unsafe work condition, but that is not what he claims, or offers proof about.

The Complainant did not report anything unsafe about the way the railroad operates. Instead, the Complainant requested that he *personally* be provided with a full-time assistant. This is really a request for a workplace accommodation, not a report of an unsafe working *condition* as the statute requires. And with no medical restriction, the Railroad has nothing to accommodate.

c. The Complainant is really alleging a violation of the ADA

Rather than reporting a work-related injury or a hazardous safety or working condition, the Complainant instead is really alleging retaliation for requesting a workplace accommodation. In *Brookman v. Levi Strauss & Co*,[66] the Administrative Review Board addressed a similar attempt to use a disability accommodation request as a statutorily protected whistleblower activity. In *Brookman*, the complainant brought his dog to work and the employer asked him to remove it from company property.[67] The employer stated that if he was disabled and this was a service animal, he needed to provide the necessary documentation before accommodations would be made.[68] The

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[64] *Michael L. Mercier v. Union Pacific Railroad*, Case No. 2008-FRS-00004 at 21 (ALJ Feb. 28, 2013) (holding that both reporting a defective buzzer on an engine and recommending that a switch was in dangerous condition and should be taken out of service were protected activities under § 20109(b)(1)(A)).

[65] *Mercier*, Case No. 2008-FRS-00004 at 19 (holding that reporting dangerous walking conditions was a protected activity under § 20109(b)(1)(A)).

[66] ARB Case No. 07-074, 2008 WL 3521340 (July 23, 2008).

[67] *Brookman*, 2008 WL 3521340, at *1.

[68] *Id.*

complainant wrote a letter to the company's outside counsel, asserting that it was violating the ADA.[69] Counsel replied that no violation of the ADA had occurred, and reiterated that accommodations would be provided if the complainant produced the required documentation.[70]

A month later the complainant was tasked with, and failed at, installing a program, resulting in his dismissal.[71] He then filed a Sarbanes-Oxley Act ("SOX") whistleblower complaint,[72] claiming the employer failed to comply with the ADA, while fraudulently certifying it had, and that his dismissal was retaliation for reporting this alleged fraud.[73] The ALJ granted the respondent's motion to dismiss, holding the complainant's letter alleging an ADA violation was not an activity that SOX protected.[74] The Board affirmed, holding that even if the complainant's letter reported disability discrimination, it did not qualify as a protected activity under SOX because it alleged no violation of the Act's enumerated fraud or securities regulations.[75]

This case isn't identical to *Brookman* because SOX has different enumerated protected activities.[76] But the principle is the same: what is really a claim for a disability accommodation under the ADA is not a protected activity under another whistleblower statute. If the Complainant believes he is entitled to a workplace disability accommodation, he should seek one under the ADA, rather than trying to force his square peg into a round hole by filing a FRSA whistleblower complaint.[77] The Complainant's request for a disability

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[69] *Id.*

[70] *Id.*

[71] *Id.* at *2.

[72] 18 U.S.C. § 1514A. SOX actions are governed by the same burdens of proof that apply in this case, the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. § 1514A(b)(2)(C); *Brookman*, 2008 WL 3521340, at *5. Thus under SOX, a complainant must also prove the same elements involved in a FRSA whistleblower claim described above. *See Brookman*, 2008 WL 3521340, at *5.

[73] *Brookman*, 2008 WL 3521340, at *2.

[74] *Id.* at *3.

[75] *Id.* at *6.

[76] *See* 18 U.S.C. § 1514A.

[77] I do not evaluate the strength of any complaint under the ADA. However, if the Complainant believes he was retaliated against for requesting a disability accommodation, the ADA includes provisions prohibiting such retaliation. *See* 42 U.S.C. § 12203(a); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1264 (9th Cir. 2009) (discussing the ADA's anti-retaliation provision). Further, the Complainant's claim may relate back to the date this claim was filed. *See Spicer v. Villanova University*, 2006 WL 3486465, at *3 (E.D.Pa. Dec. 1, 2006).

accommodation simply does not fit the statutory requirements of the Act.

In conclusion, the Complainant's request for a workplace accommodation is just that: a request for a workplace accommodation. It is neither a report of injury nor a report of an unsafe working condition. It is not a protected activity under the FRSA, and the Complainant cannot make out this necessary element of his case.

2. Alleged Adverse Actions

a. Safety Intervention Training

Although the failure to prove that there was a protected activity renders all other facts immaterial, I address the claim that the Safety Intervention Training class was an adverse action because of its centrality to both parties' claims. Courts have held that "an adverse employment action must actually affect the terms and conditions of a Complainant's employment."[78] The Safety Intervention Training (Safety) class had no actual effect on the Complainant's employment, and therefore was not an adverse action.

Complainant's main allegation is that the Railroad harassed him by directing him to attend the Safety class. The Complainant alleges that the Respondent's "Policy and Procedures for Ensuring Rules Compliance" states that the intent of the Safety class "is to provide a uniform structure to address rule and policy violations in a consistent and fair manner."[79] He alleges that the Safety class letter states that the class is used for "corrective behavior."[80] The Complainant contends that in asking for an assistant, he was addressing medical concerns and should not have been subjected to a class intended to correct behavior.[81]

Even assuming all of these allegations are true about the nature of the Safety class, it had no effect on the Complainant's employment. The Railroad acknowledges that employees are compensated for attending the Safety class, no matter why they are assigned to attend,

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[78] *Wilson v. Norfolk Southern Railway Co.*, 2010-FRS-16 at 5 (ALJ July 15, 2010) (citing *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 v. 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).

[79] Complainant's Motion at 11.

[80] *Id.*

[81] *Id.*

and are not scheduled to work when the Safety class is offered.[82] Additionally, the Railroad showed that the agreements that created the reserve board state that the Railroad may "require engineers placed on the Board to complete any retraining or refresher programs necessary to maintain work proficiencies."[83] Besides these legitimate bases for requiring the Complainant to attend the Safety class, ultimately the Railroad has stated it will not require him to make up the classes he missed on April 19 and 20, 2011 if he chooses to return to active service.[84] The Complainant was not actually disciplined, was cleared to return to work without restriction, and would have suffered no detriment if he had attended Safety class. He did not attend it anyway—and the Railroad withdrew the instruction to attend. The Complainant suffered no adverse consequences as a result of his request for accommodation.

b. Score and other Threats

Although this case can be disposed of due to the absence of a protected activity, the Board prefers that the judge rule on all issues presented.[85] In response to Complainant's claims that he experienced retaliation when his personal score was lowered, the Railroad has shown that the Complainant's Score Supporting Document shows that his score was 992 out of 1000 on April 29, 2010, not 996 out of 1000 as the Complainant contends.[86] The employer contends that these documents also show that he lost nine points for Fuel Conservation on March 30, 2011—lowering his cumulative score from 989 to 980 out of 1000.[87] The Railroad states that 980 is still a good cumulative score that raises no concerns for management.[88]

Additionally, in response to Complainant's claims that he experienced retaliatory threats, the Railroad states that Mr. Smith never told Mr. Carroll or anyone else that the Complainant would be punished if he returned to duty and requested an assistant.[89] They argue that the medical documents cleared the Complainant to return

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[82] Respondent's Opposition at 6.

[83] *Id.*

[84] Respondent's Reply in Support of Motion for Summary Decision at 2.

[85] *See Henderson v. Wheeling & Lake Erie Railway*, ARB Case No. 11-013, 2012 WL 5391422, at *6 (ARB Oct. 26, 2012).

[86] Respondent's Opposition at 4; *see also* Complainant's Motion at 6.

[87] Respondent's Opposition at 4.

[88] *Id.*

[89] *Id.* at 2.

to unrestricted work, and he was not withheld from service for any reason—his choice to remain on the reserve board was his alone.[90]

This raises no dispute that is material to any claim that could go to trial. The Complainant has no medical work restrictions of any sort. The threat he identifies—that the Railroad would not allow him to work if he continues to ask for an assistant when he has no medical restrictions—raises no issue that the Secretary of Labor could remedy. It is not retaliation for the Railroad to tell an employee with no medical limitations, who says he cannot do his job without help, that it will not assign another employee to do his work for him. If such an employee continues to insist he requires an assistant to help him perform his duties, it would not be retaliatory to prevent him from returning to work pending an evaluation to see if he actually has any limitations that would make him unable to safely do his job.

The causation element of the claim therefore need not be addressed.[91] Accordingly, Railroad's Motion for Summary Decision is **GRANTED**, and the complaint of Sidney Williams is **DISMISSED**.

So Ordered.

Digitally signed by William Dorsey
DN: CN=William Dorsey, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

[90] *Id.*

[91] *See Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB Nos. 03-048 and 03-084, ALJ Nos. 2002-CAA-5 and 2003-ERA-10 at 4 (ARB Aug. 31, 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

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).