



Issue Date: 10 December 2014

CASE NO.: 2013-FRS-14

IN THE MATTER OF

BEN WINCH,
Complainant,

vs.

CSX TRANSPORTATION INC.,
Respondent

DECISION and ORDER

Procedural History

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.

On 8 Jun 12, Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA). In the complaint, Complainant alleged that Respondent retaliated against him by firing him for reporting that he would be missing work in compliance with his doctor’s orders. OSHA issued its decision on 17 Oct 12, dismissing the complaint. Complainant filed a timely objection, the case was referred to the Office of Administrative Law Judges and assigned to me. On 6 May 14, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits. The record was closed and after the preparation of the transcript the parties submitted post-hearing briefs. Complainant filed his final brief on 26 Sep 14.

On 28 Nov 14, Respondent moved to supplement the record. However, by that date I had already completed my decision, finding that Respondent had violated the provision of the Act and ordering various forms of relief. The decision was administratively released on 4 Dec 14, but I was out of the office and did not see Respondent’s motion until 8 Dec 14.

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

DISCUSSION

In the motion, Respondent offers evidence that Complainant's dismissal was considered by the Public Law Board under the Railway Labor Act. It notes that on 13 Nov 14, the Board dismissed Complainant's appeal of his termination. It found that he had a history of absenteeism, had been nonetheless "treated generously" by Respondent in the past and that his termination was neither unfair nor an abuse of discretion.

I elected not to invite a response from Complainant to the motion. The information was clearly not available at the time the record closed. In fairness and in order to ensure a complete record for reviewing authorities, I grant the motion and have reconsidered my decision based on the new information.

However, nothing in the Public Law Board's opinion changes my original decision. I agree with the Board that the record shows Claimant had a significant background of absenteeism and termination may have been well within the limits of the applicable collective bargaining agreement (CBA). However, the CBA cannot trump the Act and the record is equally clear that but for the 19 Jan 12 mark off, there would have been no incident prompting Respondent to review his entire history and decide to terminate him (albeit justifiably so within the terms of the CBA). In short, the 19 Jan 12 mark off was a protected activity and the precipitating factor that resulted in what was otherwise a fair and legitimate decision to fire him. While Respondent may argue that sooner or later there would have been another incident justifying termination, it is impossible for Respondent to establish that it would have fired him at this time in the absence of this mark off.

ORDER

Respondent's motion to supplement the record is granted, but the decision remains the same in all other respects.

ORDERED this 10th day of December, 2014, 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 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).

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, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. *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.

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).