



In the Matter of:

MARK BAILEY,

COMPLAINANT,

v.

CONCOLIDATED RAIL CORPORATION,

RESPONDENT.

**ARB CASE NO. 13-030
13-033**

ALJ CASE NO. 2012-FRS-012

DATE: March 27, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Brian Reddy, Esq.; *The Reddy Law Firm*, Maumee, Ohio

For the Respondent:

Robert S. Hawkins, Esq., Joseph P. Sirbak, II, Esq.; *Buchanan, Ingersoll & Rooney, P.C.*; Philadelphia, Pennsylvania

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

**ORDER DENYING MOTION FOR STAY OF
REINSTATEMENT PENDING REVIEW**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Mark Bailey filed a complaint with the United States

¹ 49 U.S.C.A. § 20109 (Thomson/West 2012), 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, and as implemented by 29 C.F.R. Part 1982 (2012) and 29 C.F.R. Part 18, Subpart A (2012).

Department of Labor alleging that Consolidated Rail Corporation (Conrail) violated the FRSA when it discharged him from employment. After an evidentiary hearing, an Administrative Law Judge (ALJ) determined that Bailey engaged in FRSA-protected activity that contributed to his discharge, and that Conrail's actions violated the FRSA. The ALJ ordered relief for Bailey, including reinstatement. Bailey petitioned for review of the ALJ's remedy. Conrail petitioned for review on January 15, 2013, and moved to stay the ALJ's order requiring reinstatement pending review. For reasons set out below, the motion for stay is denied.

BACKGROUND

A. Facts

Conrail hired Bailey as a conductor on December 21, 1998. Among his responsibilities was ensuring the safe and efficient operation of Conrail's trains. Between June 29, 2010, and February 8, 2011, he submitted approximately 35 formal written safety complaints to Conrail. On February 11, 2011, Bailey and his supervisor, Conrail Trainmaster Robert Conley, had an exchange during which both men raised their voices to one another. ALJ's Decision and Order (D. & O.) at 29. Conrail removed Bailey from service later that day. *Id.* at 6. After a company investigation, Conrail fired Bailey on February 29, 2011, for violating the company's workplace violence policy. *Id.* at 21, citing RX 21.

B. Proceedings below

The ALJ held an administrative hearing on Bailey's complaint on May 8, 2012. On December 31, 2012, the ALJ entered an order and determined that the safety reports that Bailey submitted between June 29, 2010, and February 8, 2011, were protected under the FRSA, and that this protected activity contributed to the company's decision to suspend, and then fire Bailey. *Id.* at 23, 30. The ALJ further determined that Conrail failed to prove by clear and convincing evidence that it would have taken the same action against Bailey absent the protected activity. *Id.* at 31-32. The ALJ ordered Conrail to reinstate Bailey, expunge from his personnel file any disciplinary references related to the February 11, 2011, incident, and to pay back wages, compensatory damages, attorney's fees and costs. *Id.* at 35-36. Conrail petitioned for review and moved to stay Bailey's reinstatement pending review.

DISCUSSION

An employee prevailing in a Federal Railroad Safety Act complaint is entitled to make whole relief, including reinstatement. 49 U.S.C.A. § 20109(e)(1), (2). An ALJ's grant of reinstatement is effective immediately upon the respondent's receipt of the decision. 29 C.F.R. § 1982.109(e); see also 29 C.F.R. § 1982.105(c) ("any preliminary

order requiring reinstatement will be effectively immediately . . . regardless of any objections to the findings and/or order.”). “[A] preliminary order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances.” 29 C.F.R. § 1982.110(b). In comments accompanying the promulgation of section 1982.110, the Department made clear that only “in the exceptional case” may the ARB grant a motion to stay a preliminary order of reinstatement and that it “would only be appropriate where the [moving party] can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favors a stay.” Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act, Interim Final Rule, 75 Fed. Reg. 53,522, 53,526 (Aug. 31, 2010); see also *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2008-SOX-15, slip op. at 3-4 (ARB June 9, 2006) (Order Denying Stay).²

With those principles in mind, the ARB considers four factors in determining whether to grant a stay: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants the stay; and (4) the public interest in granting a stay. *Welch*, ARB No. 06-062, slip op. at 4; see also *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161; ALJ No. 2003-STA-055, slip op. at 2 (ARB May 12, 2006); *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 1990-ERA-030 (ARB Apr. 20, 2001). Conrail fails to meet these criteria.

1. Conrail fails to establish a likelihood of success on the merits

Conrail contends (Motion at 8) that it is likely to succeed on the merits because the “the ALJ applied an improper burden of proof” requiring Conrail to “prove beyond any reasonable doubt that it would have discharged Bailey even in the absence of protected activity.” This contention, however, lacks merit. After determining that protected activity contributed to Conrail’s decision to fire Bailey, the ALJ considered whether Conrail “would have taken the same action absent the protected activity.” D. & O. at 31. In reviewing that element, the ALJ correctly stated that the company “is liable unless it can prove by clear and convincing evidence that it would have taken the same action even absent the protected activity,” and cited to the statute and relevant case law as support for that standard. *Id.* at 31, citing 49 U.S.C.A. § 42121(b)(2)(B)(iv), *Patino v. Birken Mfg Co.*, ARB No. 06-125, ALJ No. 2005-AIR-023 (ARB July 7, 2008).

² See also 69 Fed. Reg. 52109, 52111 (Aug. 24, 2004) (Comments accompanying the promulgation of 29 C.F.R. § 1980.105, regarding the issuance of preliminary orders, state that “Congress intended that employees be temporarily reinstated to their positions” and that “the purpose of interim relief, to provide a meritorious complainant with a speedy remedy and avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed.”).

Conrail argues (Motion at 9-11) that Bailey's protected activity was not a contributing factor in his discharge, and that the ALJ's findings are not supported by substantial evidence. These are contentions on which Conrail petitions for review, and that the ARB will address in its decision on the merits. Although subject to further review and possible reversal, the ALJ's decision weighed disputed facts in light of the totality of circumstances after an apparently thorough evidentiary hearing. Conrail challenges the ALJ's fact findings, but ultimately fails to show in its motion a likelihood of success on the merits.

2. Conrail fails to show irreparable harm absent a stay

Conrail's contention (Motion at 11-12) that Bailey's reinstatement would present irreparable harm because of a threat of workplace violence that Bailey allegedly presents also lacks merit. The ALJ found that even though Conley testified that he felt threatened by Bailey during the February 11 incident, Conley's "actions are not consistent with an alleged fear for his physical safety." D. & O. at 29. The ALJ stated that "[t]he fact that Conley instigated the confrontation on February 11 . . . with [Bailey] further diminishes [Conley's] credibility regarding his alleged fear of [Bailey]." *Id.* at 29. The ALJ's finding that "profane language and heated conversations among employees and between employees and supervisors were tolerated as part and parcel of the nature of the work environment and a common occurrence at the Railroad" further undermines Conrail's claim of irreparable harm. *Id.* at 30; see also D. & O. at 32 n.21 (ALJ stating that "McBain testified to a physical altercation between two co-workers that resulted in only a ten-day suspension. Tr. 66. In comparison, [Bailey], who never came close to actually making physical contact with [Conley], was terminated."). Based on the record below, the ALJ reasonably concluded that, given the totality of the circumstance, Bailey posed no threat to the workplace on February 11. See D. & O. at 28-30 & n.19 ("the focus here is on Mr. Conley's perception of the events that occurred, and based on the totality of the record, I do not find his perceived threat to be reasonable or credible."). The ALJ found that "[t]here is an abundance of evidence that contradicts Conrail's contention that management perceived [Bailey's] words to be a threat." *Id.* at 30. Moreover, the ALJ stated that "[i]t is more likely that management had had enough of [Bailey's] frequent safety reports, his instances of impatience and annoyance shown at the workplace, and his refusal to talk to supervisors unless the topic was work-related." *Id.*

On the contrary, Bailey would be harmed by a stay of reinstatement. The record shows that Bailey has suffered emotional and financial hardship as a result of his discharge. *Id.* at 32. Bailey's reinstatement is appropriate to prevent further hardship.

3. Public interest militates against a stay of reinstatement

Finally, contrary to Conrail's contention (Motion at 13), the public interest does not favor a stay in this case.

The ARB has made clear that, with respect to reinstatement in whistleblower cases, “[t]he public interest militates against a stay.” *Welch*, ARB No. 06-062, slip op. at 7, quoting *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034, slip op. at 3-4 (ARB Sept. 23, 1997) (both Congress and the Department of Labor have determined that reinstatement should have immediate effect). Conrail presented insufficient support for its claim that Bailey would present a threat of violence in the workplace.

CONCLUSION

The motion to stay reinstatement pending review is **DENIED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge