



In the Matter of:

**KENNETH LEDURE,**

**ARB CASE NO. 13-044**

**COMPLAINANT,**

**ALJ CASE NO. 2012-FRS-020**

**v.**

**DATE: June 2, 2015**

**BNSF RAILWAY COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**TK Smith, Esq. and Kenneth E. Barnes, Esq.; *Barnes Law Firm, LLC*; Kansas City, Missouri**

*For the Respondent:*

**Andrea Hyatt, Esq. and Jennifer I. Willingham, Esq.; *BNSF Railway Company*; Fort Worth, Texas and Bryan Neal, Esq. and Micah R. Prude, Esq.; *Thompson & Knight LLP*; Dallas, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Brown, concurring.**

### **FINAL DECISION AND ORDER**

This case arises under the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2014), as implemented by 29 C.F.R. Part 1982 (2014) and 29 C.F.R. Part 18, Subpart A (2014). Kenneth LeDure filed a complaint alleging that his employer, BNSF Railway Company (BNSF), violated the FRSA by not allowing him to return to his duties as a conductor following release by his treating physician. On February 21, 2013, following an evidentiary hearing, an Administrative Law Judge (ALJ) found that LeDure failed to prove that Respondent discriminated against him in violation of the Act, and thus the ALJ dismissed the

claim.<sup>1</sup> LeDure petitions the Administrative Review Board (ARB) for review. For the following reasons, we affirm.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the FRSA.<sup>2</sup> The ARB reviews the ALJ's factual findings for substantial evidence and conclusions of law de novo.<sup>3</sup>

## INTRODUCTION

At the risk of oversimplification, the crux of this appeal can be summarized in a few sentences. After suffering a work injury, serious spine surgery, and an unsuccessful jury trial against BNSF related to the work injury, LeDure presented to BNSF an "unrestricted release to return to work" from his treating physician (Dr. George R. Schoendinger). Despite the fact that LeDure interacted with several BNSF managers for many months, the ALJ found that only one BNSF person (Benjamin Gillam) decided that the treating doctor's "unrestricted release" was insufficient to permit LeDure to return to work or to even forward the treating doctor's release to the Medical Department for consideration. This lone decision-maker, Gillam, was a field manager in the BNSF's Medical and Environmental (M & E) Department, but he was not a medical staff person. Gillam chose not to forward LeDure's release to Dr. Clark, the medical director of BNSF's M & E Department. Per the ALJ, Gillam made his decision in January 2011 without knowing anything about the one-year FELA litigation that ended with a jury trial in August 2010. Gillam found LeDure's unrestricted release ambiguous and insufficient. Despite some ambiguous language in the ALJ's decision, we affirm based on the decision as a whole.

## BACKGROUND

LeDure began work with BNSF as a conductor in February 2006. On September 3, 2008, LeDure reported to BNSF that he injured his back while performing his duties as a Conductor due to an allegedly defective piece of equipment. He began a medical leave of absence and sought medical treatment. On April 1, 2009, he underwent an anterior lumbar fusion at L5-S1

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<sup>1</sup> *LeDure v. BNSF Ry. Co.*, ALJ No. 2012-FRS-020 (Feb. 21, 2013)(D. & O.).

<sup>2</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

<sup>3</sup> *Benjamin v. CitationShares Mgmt., LLC*, ARB No. 14-039, ALJ No. 2010-AIR-001 (ARB July 28, 2014).

performed by Dr. Schoedinger. LeDure continued to be treated by Dr. Schoedinger as he recovered and filed a claim for his injury against BNSF under the Federal Employer's Liability Act (FELA) on June 17, 2009. A trial was held for the FELA claim in August 2010, which resulted in a denial of the claim on August 25, 2010. Subsequently, in December 2010, LeDure asked his crew manager to mark him as available for work. He was not allowed to "mark up" at that time. In January 2011, LeDure submitted a full medical release for return to work from his treating physician accompanied by a medical report and again requested to be marked as available for work.<sup>4</sup> But the medical release included ambiguous language that the treating physician "advised [LeDure] of the hazards and complications attendant to returning to unrestricted heavy industrial activity of the sort to which he has been accustomed." BNSF did not respond to this request. On January 27, 2011, Hendrix e-mailed Brandon Ogden, the Director of Administration of BNSF's Springfield Division, asking why LeDure had not been "marked up." Ogden replied that the matter was with the medical department, and he would look into the status of the <sup>5</sup>request. Later that day, Ogden informed Hendrix that the request was "working its way through the process." There is no further contact until in response to an e-mail from LeDure on September 6, 2011, Ogden advised LeDure to contact Ben Gillam, the medical manager for the Springfield division. As BNSF had not allowed him to return to work after the January 2011 medical release, LeDure filed a claim under the FRSA on February 28, 2011.

## DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity listed and defined at 49 U.S.C.A. § 20109(a)(1) through (7).<sup>6</sup> More specifically, the ALJ and the parties focus on the protected activity described in subsection 20109(a)(4): "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee."

Additionally, the statute specifically contains a subsection addressing medical attention. That provision, 49 U.S.C.A. § 20109(c), states:

(c) Prompt medical attention.—

(1) Prohibition.—A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first

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<sup>4</sup> LeDure submitted this information through his union representative, Joe Hendrix.

<sup>5</sup> Resp. Ex X.

<sup>6</sup> 49 U.S.C.A. § 20109(a)(b); see *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Sept. 18, 2014).

aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline.—A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for 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, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty.**

For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

49 U.S.C.A § 20109 (emphasis added). Section 20109 incorporates the procedures enacted under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which contains whistleblower protections for employees in the aviation industry.<sup>7</sup> To prevail, a complainant must establish by a preponderance of the evidence that he or she: (1) engaged in protected activity, (2) suffered an unfavorable personnel action, and (3) the protected activity was a contributing factor in the unfavorable action.<sup>8</sup> If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected activity.<sup>9</sup>

We note that the parties do not contest on appeal the ALJ’s finding that BNSF’s refusal to allow LeDure to return to work is an unfavorable employment action. For that reason, we treat

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<sup>7</sup> 49 U.S.C.A. § 20109(d)(2)(A); *see also* AIR 21, 49 U.S.C.A. § 42121(b)(2)(B)(iii) (Thomson/West 2007); *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 6 (ARB July 25, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii).

the ALJ's findings on this element of the complaint as final for purposes of this appeal. We turn next to the question of protected activity.

### *Protected activity*

The ALJ and the parties focus on Section 20109(a) of the Act, which provides that protected activity includes "to notify, or attempt to notify, the railroad carrier of a work-related personal injury or work-related illness of an employee." 49 U.S.C.A. § 20109(a)(4). The ALJ found that the plain language of the Act protects the filing and pursuit of a FELA suit as it satisfies the notification requirements of Section 20109(a)(4). D. & O. at 10.

In one aspect, the parties expressly or implicitly agree that some of the FELA litigation involves protected activity. In addition, they agree that the September 2008 report was protected. It is undisputed that the FELA litigation involved that 2008 injury. To that extent, if BNSF retaliated against LeDure for discussing his 2008 work injuries in the FELA case, we see no reason why the 2008 protected activity would lose its protected status when it is also discussed in a FELA case. Retaliation for later notifications of the same injury is just as unlawful as retaliation for the initial notice. But we understand LeDure to also argue that his pursuit of damages in FELA litigation for the extent of his personal injury is protected activity. This would mean that, if LeDure's medical evidence influenced BNSF's refusal to permit his return to work, then protected activity contributed to the unfavorable employment action.

We have not previously determined whether seeking damages under FELA for a work injury is protected. The FRSA whistleblower statute does not expressly protect FELA litigation. Under FELA, a statutorily covered employee may sue a covered railway carrier for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."<sup>10</sup> The FELA litigation in this case expanded the notice provided to the employer, by providing more information about the extent of the employee's work-related injury through medical examinations, discovery, and expert testimony. In this case, LeDure obtained and presented more detailed medical evidence about the severity of his injury. BNSF argued that a field manager (Brett Oullette) in its medical department "did not discover that LeDure claimed to be permanently disabled until the FELA litigation." Response Brief at 4. BNSF's admission confirms that the FELA litigation constituted more specific notification of the nature and extent of LeDure's work-related injury. Consequently, we affirm the ALJ's finding that the more specific notification provided during the FELA claim in this case is protected activity.

### *Contributing Factor*

The ALJ found that protected activity did not contribute to the unfavorable employment action. He stated that the release was ambiguous and caused Gillam to be concerned. He

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<sup>10</sup> 45 U.S.C. § 51

concluded that Gillam was concerned about LeDure’s fitness for duty as a conductor. But we cannot determine whether the ALJ analyzed the refusal to “mark up” LeDure as a refusal permitted by Section 20109(c)(2) or a non-retaliatory reason as counter-evidence on the issue of contributing factor. Given the express requirements of Section 20109(c)(2), and that the parties’ focus on this provision, we first determine whether the ALJ properly applied that section.

In Section 20109(c)(2), the act expressly carves out an “exception” for some unfavorable employment actions and provides that the employer does not violate the Act when it refuses to permit an employee to return to work following medical treatment if the refusal occurs pursuant to Federal Railroad Administration (FRA), or the carrier’s, medical standards for fitness of duty. 49 U.S.C.A. § 20109(c)(2). The provision literally exempts fitness for duty situations from coverage.

The legislative history of this section reveals the importance of this exception. On May 1, 2007, Representative Oberstar introduced the Federal Railroad Safety Improvement Act of 2007 (House Rep. No. 2095), which contained a stand-alone section (Section 606) titled “Prompt medical attention.”<sup>11</sup> Section 606 set out two distinct protections afforded railroad employees needing medical attention: a prohibition against railroad employers interfering with the medical needs of employees who are injured in the course of employment and a prohibition against disciplining railroad employees who request medical aid or follow a treating physician’s orders or treatment plan. This stand-alone section did not include the language regarding an employee’s return to work following medical treatment. Section 606 was reported by the House

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Sec. 606. Prompt medical attention.

Amendment – Subchapter II of chapter 201 of Title 49, United States Code, as amended by this Act, is further amended by adding at the end of the following new section:

Sec. 20162. Prompt medical attention

(a) Prohibition – A railroad or person covered under this title shall not deny, delay or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest medically appropriate hospital.

(b) Discipline – A railroad or person covered under this title shall not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician. For purposes of this subsection, discipline means to bring charges against any person in a disciplinary proceeding, suspend, terminate, place on probation, or make not of reprimand on an employee’s record.

Committee on Transportation and Infrastructure (See H. Rep. No. 110-336 (Sept. 19, 2007)), and passed on October 17, 2007.

The Senate rejected this stand-alone provision and instead amended HB2095 to add the following language to the whistleblower list of protected activity in subsection (a):

(5) to request that a railroad carrier provide first aid, prompt medical treatment, or transportation to an appropriate medical facility or hospital after being injured during the course of employment or to comply with treatment prescribed by a physician or licensed health care professional, **except that a railroad carrier's refusal to permit an employee to return to work upon that employee's release by his or her physician or licensed health care professional shall not be considered discrimination if the refusal is in compliance with the carrier's medical standards for fitness for duty.**

H.R. 2095, 110th Cong. § 20109(a)(5) (2008)(emphasis added). The House, in turn, rejected the Senate amendment to the list of protected activities, returned to the original House language with the stand-alone prohibition, and added the Senate's fitness for duty exception squarely within the whistleblower provisions at 49 U.S.C.A. § 20109(c). This hybrid version of the original House proposal with the Senate's fitness for duty exception became law.

We hold that subsection (c)(2) creates a carve-out "safe harbor." Black's Law Dictionary defines a safe harbor as "the provision in a law or agreement that will protect from any liability or penalty as long as set conditions have been met."<sup>12</sup> Safe harbor provisions are generally held to not preclude or foreclose any other defense.<sup>13</sup>

As the specific language of subsection (c)(2) provides that an employer's refusal to allow an employee to return to work will not be a violation of the Act if it is pursuant to the FRA or the carrier's standards for fitness for duty, for expediency's sake, the ALJ can first decide any claim based on subsection (c)(2) prior to any other analysis. Moreover, as the safe harbor provides employer a limited exemption from coverage under FRSA whistleblower prohibitions, we hold that the employer bears the burden of persuasion that the elements of the subsection have been met. Those elements include establishing the relevant standards for fitness for duty and how the employee has failed to meet them.<sup>14</sup> Thus, where the employer has not established the requisite evidence to establish the safe harbor provided by subsection (c)(2), the ALJ must: (1) determine

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<sup>12</sup> **BLACK'S LAW DICTIONARY** (9th ed. 2009).

<sup>13</sup> *See, e.g., American Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, \_\_ U.S. \_\_ (2014).

<sup>14</sup> 49 U.S.C.A. § 20109(c)(2).

whether the complainant proved its claim of unlawful whistleblower retaliation on the record as a whole and (2) if so, determine whether the employer proved by clear and convincing evidence that it would have taken the same adverse action absent LeDure's protected activity.

In this case, neither the FRA nor BNSF's medical standards for fitness for duty were offered into evidence. Therefore, we hold as a matter of law that BNSF is not entitled to the carve-out exception to finding a violation afforded by subsection (c)(2) under the facts of this case.

Finding that subsection (c)(2) does not apply, we must review the ALJ's finding that LeDure failed to prove that his protected activity was a contributing factor to an adverse employment action.<sup>15</sup> In deciding this question, an ALJ must look at the entire record as a whole and keep in mind that there "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor as long as the evidence is relevant to that element of proof."<sup>16</sup> If LeDure's protected activity contributed to BNSF's refusal to permit him to return to work, based on the record as a whole, BNSF may still be entitled to the affirmative defense that it would have taken the same adverse action absent the protected activity.

When considering the evidence of whether LeDure's protected activity was a contributing factor to the adverse employment action, the ALJ rejects complainant's evidence of a contributing factor. As the ALJ notes, under the FRSA whistleblower statute, the causation question is whether the protected activity was a contributing factor which, alone or in connection with other factors, tends to affect in any way the decision to take an adverse action. Causation or "contributing factor" in a FRSA whistleblower case is not a demanding standard.<sup>17</sup> The ALJ expressly acknowledges examples of LeDure's proffered circumstantial evidence, including that his employer: (1) refused to allow him to return on a mistaken belief; (2) changed its position at trial; (3) did not consult with the BNSF physician about the information needed; (4) did not ask LeDure to undergo an FCE; (5) refused to accept his doctor's unrestricted medical release; and (6) did not tell LeDure what documents he needed to produce. This evidence is in addition to the undisputed fact that about four months separated the FELA trial verdict (August 25, 2010) from LeDure's request to be marked up for work (December 14, 2010) and unrestricted medical

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<sup>15</sup> See *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Mar. 20, 2015)(reissued with full dissent Apr. 21, 2015).

<sup>16</sup> *Powers*, slip op. at 16-17, 19, n.6 (ARB Mar. 20, 2014). For guidance on the issue of relevancy, *Powers* approvingly cited to *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012); and *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012).

<sup>17</sup> *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012).



release he submitted to BNSF (January, 10, 2011). Resp. Exh. T and X. Standing alone, the totality of LeDure's evidence might be sufficient for some triers of fact to suspect that something other than "fitness for duty" was influencing BNSF's decision, for example, protected activity.

But, in this case, the ALJ makes clear that BNSF's non-retaliatory explanations for its actions persuaded him that protected activity did not contribute to BNSF's refusal to allow LeDure to return to his job. The ALJ has the right to consider any evidence that is relevant to the question of causation, including the employer's explanation for why it did what it did.<sup>18</sup> The ALJ specifically found that (1) the treating physician's warning in the medical release about returning to full duty would make "any prudent medical manager" ask for more information but the information was not timely submitted and (2) there was "no reason to believe there was any contributing factor between protected activity and the failure to be reinstated to the conductor's position or to be allowed to qualify for the engineer position." D. & O. at 11-12. In the end, taking the ALJ's decision as a whole, we infer that the ALJ believed that the employer's non-retaliatory reasons were the reasons it refused to return LeDure to work and rejected protected activity as a contributing factor.

#### CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order is **AFFIRMED**, and this matter is **DISMISSED**.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring:**

I concur in the result only.

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

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<sup>18</sup> *Powers*, ARB No. 13-034, slip. op. 22, 33-34 (the Board unanimously agreed there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*)(emphasis original).