



In the Matter of:

REGGIE SEAY,

COMPLAINANT,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY,**

RESPONDENT.

**ARB CASE NOS. 14-022
14-034**

ALJ CASE NO. 2013-FRS-034

DATE: October 27, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James H. Kaster, Esq.; Nicholas D. Thompson, Esq.; Nichols Kaster, Minneapolis, Minnesota

For the Respondent:

**Mark Goldner, Esq.; Hughes & Goldner, PLLC; Charleston, West Virginia
Andrew Rolfes, Esq.; Buchanan Ingersoll & Rooney, Philadelphia, Pennsylvania**

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge

DECISION AND ORDER OF REMAND

This case arises under the Federal Railroad Safety Act of 1982 (FRSA).¹ Reggie Seay filed a complaint alleging that Norfolk Southern Railway Company retaliated against him for engaging in activities protected by the FRSA. Norfolk Southern filed a motion for summary decision, and on January 13, 2014, an Administrative Law Judge (ALJ) dismissed Seay's

¹ 49 U.S.C.A. § 20109 (Thomson/West Supp. 2015). See also 29 C.F.R. Part 1982 (2014).

complaint. Both parties appealed the ALJ's decision to the Board. For the following reasons, we reverse the ALJ's ruling and remand the case for further proceedings consistent with our decision.

FACTUAL AND PROCEDURAL BACKGROUND²

Norfolk Southern employs Seay as a "maintenance of way employee" and Track Patrol Foreman. His duties include inspecting railway tracks. In carrying out his duties he sometimes travels in a "high-rail" or "on-track" vehicle on Norfolk Southern's tracks. To obtain permission to occupy a section of track, "[t]he operator of an on-track vehicle or piece of on-track equipment, or the Roadway Worker in Charge of a group of employees, obtains a [track authority] pursuant to a strict procedure."³ This ensures that the section is out of service while it is being inspected. According to the company, "[e]very Norfolk Southern employee in an on-track vehicle or on-track equipment is responsible for adherence to the [track authority]."⁴

On December 8, 2011, Seay was riding in the back seat of a hi-rail vehicle driven by Philip Hagan, his supervisor. Along for the ride were a Federal Railroad Administration track inspector and an inspector trainee. The FRA Inspector sat in the front passenger seat, and the FRA Inspector Trainee sat in the back seat behind Hagan. Seay would usually sit in the front passenger seat while Hagan drove; however, on this day, he was required to sit in the back seat to accommodate the FRA Inspector.⁵ Hagan drove the vehicle beyond its track authority, and immediately thereafter contacted a dispatcher. Seay had difficulty seeing the track from the backseat and did not immediately notice the violation.⁶ Hagan eventually stopped the vehicle and waited for a supervisor.

James Erickson, Hagan's and Seay's supervisor, came to the site and interviewed both employees. Seay told Erickson that Hagan had "r[u]n outside of his limits and there was nothing

² The facts for the Background section are taken from the undisputed facts and, for the purposes of determining whether summary decision is proper, they are viewed in the light most favorable to the party opposing summary decision, i.e., Seay. *See* n.16.

³ Respondent Norfolk Southern Railway Company's Memorandum in Support of Motion for Summary Decision (Respondent's Memorandum) at 3, citing Declaration of Lloyd Brewer (Brewer Declaration) ¶ 6.

⁴ Respondent's Memorandum at 4.

⁵ Reggie Seay's Declaration in Opposition to Respondent's Motion for Summary Decision (Seay Declaration), ¶ 2.

⁶ *Id.*

[he] could do to prevent it.”⁷ Erickson then explained the violation to Lloyd Brewer, Assistant Division Engineer for Respondent’s Dearborn Division. Brewer drove to the site and spoke to Seay, who again denied responsibility for the violation. (Brewer concluded) that both Hagan and Seay were responsible for the violation, and the company removed both employees from service.

On December 9, Division Engineer Charles Stine informed Hagan that he was suspended without pay for five days for the December 8, 2011 track authority violation. That same day Norfolk Southern issued a letter to Seay notifying him that he would receive a charge letter. Seay is a member of the Brotherhood of Maintenance Way Employees Division, and his discipline is governed by that union’s collective bargaining agreement with Norfolk Southern. Union rules state that Norfolk Southern could not suspend Seay without holding a disciplinary hearing, unless Seay agreed to waive the hearing.

The process by which an employee waives an investigatory hearing is described in Norfolk Southern’s Investigation and Discipline Policy Manual. The Manual describes a “waiver procedure,” which consists of an informal exchange between employee and supervisor:

The holding of an investigation in certain cases where guilt appears evident may often seem to be a big waste of time. In addition, there is the expense required to make the transcript, handle the appeal and, in many cases, handle the arbitration. The entire procedure probably causes as much frustration for the employee as it does for management. Some agreements contain a specific procedure by which a charged employee may waive his right to an investigation. This procedure offers both parties substantial relief from the burden of unnecessary investigations. It permits an employee charged with an offense to discuss the matter with his supervisory officer on an informal basis before any formal investigation. If an understanding is reached as to responsibility and the amount of any discipline to be imposed, the employee may waive his right to the investigation and accept the discipline without an investigation, transcript, appeal or arbitration.^[8]

The Manual also states that “[t]he Company is not permitted to use anything learned in the waiver procedure at an investigation So, if the waiver procedure doesn’t work out, simply forget what was learned.”

On or about December 10, Brewer contacted Seay and offered him a waiver. Norfolk Southern originally offered him a 15-day suspension if he agreed to a waiver. Seay declined, and his investigative hearing was held on December 22, 2011, before Hearing Officer Dustin Lange.

⁷ Respondent’s Memorandum, Exhibit (RX) 2 at 109.

⁸ Complaint, Exhibit B at 2-3.

Michael D. Flowers, Second Vice Chairman of Seay's union, represented him at the hearing. At the hearing Seay again asserted that he was not responsible for the track authority violation, but he provided "details . . . about the track violation by Hagan."⁹

After the hearing but prior to a determination, Norfolk Southern offered Seay a 25-day suspension and forfeiture of his foreman seniority. The parties dispute exactly how and why this new agreement was presented. On January 3, 2012, Seay met with Erickson and signed a waiver letter but wrote on the waiver the words "under protest." Erickson destroyed the document and directed Seay to sign it without qualification. Seay signed the new waiver without the "under protest" notation. The waiver states that Seay (1) accepts responsibility for the December 8, 2011 incident; (2) understands that he will be assessed a suspension beginning December 9, 2011, and ending January 2, 2012, and (3) will forfeit all Foreman and Assistant Foreman seniority. Norfolk Southern asserts that the discipline imposed upon Seay took into account the seriousness of the offense and prior discipline.¹⁰

Seay filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Norfolk Southern violated the FRSA "when it committed multiple adverse acts against [him] in retaliation for his role in reporting a violation of federal safety regulations."¹¹ OSHA denied the complaint, and Seay requested a hearing before an ALJ. Prior to any hearing Norfolk Southern filed a Motion for Summary Decision and a memorandum in support of the motion. Norfolk Southern argued that "Seay cannot meet his burden of showing by the preponderance of evidence that he engaged in activity protected by the whistleblower provisions of the FRSA, or that his alleged protected activity contributed to his discipline for the [track authority] violation."¹² Seay responded to the Motion for Summary Decision with a memorandum and exhibits. He asserted that he was not responsible for the track authority violation and that Norfolk Southern coerced him into signing a waiver accepting responsibility for the violation.

On January 13, 2014, the ALJ granted Norfolk Southern's Motion for Summary Decision. The ALJ stated that "the punishment imposed on Seay under these circumstances was commensurate with the offense, Seay's prior disciplinary record, the added expense born by Respondent in conducting a formal hearing, and Seay's reluctance to fully accept responsibility for his conduct. Respondent's actions were thus in accordance with its policy and do not evince disparate treatment."¹³

⁹ ALJ's Order Granting Respondent's Motion for Summary Decision (D & O.) at 9.

¹⁰ *See, e.g.*, Brewer Declaration ¶ 23.

¹¹ Complaint at 1.

¹² Respondent's Memorandum at 25-26.

¹³ D. & O. at 13.

Seay filed a Petition for Review of the ALJ's Order, arguing that he met his burden of showing that there were genuine issues of material fact requiring a hearing. Seay also filed a memorandum requesting that we reopen the record to allow him to submit new evidence. Norfolk Southern filed its own Petition for Review, arguing that the ALJ erred by concluding that Seay engaged in any FRSA-protected activities. Norfolk Southern also filed a Motion to Strike certain exhibits from the appendix Seay filed in conjunction with this Petition for Review. We now address the issues the parties raised on appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ's decision pursuant to the FRSA.¹⁴ We review a grant of summary decision de novo under the same standard that ALJ's must employ.¹⁵ Under 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, 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." 29 C.F.R. § 18.40(d) (2012).¹⁶

When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party. The moving party must come forward with an initial showing that it is entitled to summary decision.¹⁷ In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.¹⁸ Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

¹⁴ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

¹⁵ *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5 (ARB Sept. 26, 2012).

¹⁶ See *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (discussing summary judgment principles in federal courts). We have previously stated that 29 C.F.R. § 18.40 generally incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure. See *Trammell v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. 4-5 (ARB Mar. 27, 2009).

¹⁷ 29 C.F.R. § 18.40(d); see, e.g., *Siemaszko*, ARB No. 09-123, slip op. at 3.

¹⁸ *Siemaszko*, ARB No. 09-123, slip op. at 3. See also *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted).

DISCUSSION

A. Governing Law

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:

(a) In General. A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct...

49 U.S.C.A. § 20109(a).

The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b) (West 2007). To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel

action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.¹⁹

B. Protected Activity

Norfolk Southern argues that the ALJ erred by concluding that Seay engaged in any FRSA-protected activities.²⁰ We disagree. The FRSA protects employees who provide information regarding railroad safety violations.²¹ The record indicates that Seay provided information to Norfolk Southern about what he considered to be safety violations Hagan committed on December 8. For example, on the day of the violation, Seay told Erickson that Hagan had “[u]n outside of his limits and there was nothing [he] could do to prevent it.”²² And Seay provided details about the track authority violation during the December 22, 2011 hearing, including his assertion that he was not responsible for the violation because of his location in the vehicle during the inspection.²³ We therefore agree with the ALJ that the undisputed facts indicate that Seay provided information to Norfolk Southern about a safety violation.²⁴

¹⁹ *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).

²⁰ Respondent's Petition for Review at 4-6. Norfolk Southern contends that “[t]he ALJ overstepped the bounds of his role as a neutral decision maker by advocating a different theory of protected activity than the one advanced by Seay, and then finding that Seay had engaged in protected activity,” presumably that Seay provided information about safety issues as opposed to merely refusing to waive his right to a hearing. *Id.* at 4. Norfolk Southern overlooks that Seay said numerous times that his reported activity included accusing Hagan of violating a safety rule and that his refusal to forego a hearing led him to provide information about safety. *See, e.g.*, Complaint at 13; Seay's Memorandum of Law in Opposition to Defendant's Motion for Summary Decision at 11; Seay Declaration ¶ 2; Complainant Reggie Seay's Brief in Support of His Petition for Review at 9-10; Complainant Reggie Seay's Reply Brief in Further Support of His Petition for Review at 3. This record provides undisputed support for the ALJ's ruling that Seay engaged in protected activity. *See, e.g., Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011). (“As long as an issue is adequately litigated below and part of the record, we are not necessarily bound by the legal theory of any party in determining” a question of law.). We therefore need not address the issue of whether the sole act of refusing to waive the right to a hearing under Norfolk Southern's policy constitutes FRSA-protected activity.

²¹ 49 U.S.C.A. § 20109(a)(1).

²² RX 2 at 109.

²³ RX 11 at 33.

C. Unfavorable Personnel Actions

There is no dispute that Seay suffered adverse personnel actions following the track authority violation. Norfolk Southern suspended Seay on December 8, which “caused a loss of income and health benefits, while concurrently depriving [him] of required service time for Railroad Retirement benefits.”²⁵ And there is no dispute that Norfolk Southern originally offered Seay a fifteen-day suspension but increased it to twenty-five days (along with a forfeit of his seniority) after Seay testified at a Norfolk Southern investigative hearing.

But the facts developed in this case indicate a genuine issue exists as to whether Norfolk Southern subjected Seay to an unfavorable personnel action by coercing him into signing the waiver. Under the regulations implementing the FRSA:

A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, **coercing**, blacklisting, or disciplining an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done^[26]

In his complaint Seay alleges that “on the very same day he was charged, [Norfolk Southern] attempted to coerce [him] into admitting guilt and waiving his rights to a formal investigation.”²⁷ He also alleges that on December 28, 2011, Brewer and Stine told him that he would be fired if he refused a new waiver and allowed the disciplinary process to run its course.²⁸ And he asserts that he signed the second waiver under protest:

²⁴ Norfolk Southern also argues that the scope of protected activity Seay can assert is subject to a Motion in Limine Seay filed with the ALJ on the same day the ALJ issued his Order Granting Respondent’s Motion for Summary Decision. *See, e.g.*, Brief in Support of Respondent’s Petition for Review at 3-4, 15, 17. Because we remand this matter to the ALJ, we need not address the status or significance of the Motion in Limine.

²⁵ Seay Declaration ¶ 3.

²⁶ 29 C.F.R. § 1982.102(b)(1) (emphasis added).

²⁷ Complaint at 7.

²⁸ *Id.* at 10

After Lloyd Brewer and Charles Stine told me that I would be fired, I accepted [Norfolk Southern's] offer, but added the notation "under protest" to the waiver I signed. Upon seeing the notation I added to the signed waiver, James Erickson destroyed the waiver, produced a new one, and ordered me to sign it without qualification. Feeling powerless, I signed the waiver.^[29]

Therefore, the issue of coercion cannot be resolved without an evidentiary hearing.

D. Contributing Factor

The ALJ held that the undisputed material facts establish that Seay's protected activity was not a contributing factor in the punishment levied against him. We cannot agree this issue is undisputed given that the ALJ found that Seay's protected accusations against his supervisor constituted protected activity.

Summary decisions are difficult in "employment discrimination cases, where intent, motivation and credibility are crucial issues."³⁰ Summary decision on the issue of causation is even more difficult in cases arising under laws where the complainant need only prove that his protected activity was "a contributory factor" rather than the more demanding causation standards like "motivating factor," "substantial factor," or "but for" (determinative factor) causation.³¹ Contributory factor means any factor which, alone or in connection with other factors, "tends to affect in any way the outcome of the [employment] decision."³² Even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent's reasons or (2) show that the protected activity was also a contributing factor even if the respondent's reasons are true.³³

²⁹ Seay Declaration ¶ 4.

³⁰ *Franchini*, ARB No. 11-006, slip op. at 8 (and cases cited therein).

³¹ *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999).

³² *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). *See also Addis v. Dep't of Labor*, 575 F.3d 688 (7th Cir. 2009).

³³ *See Trimmer*, 174 F.3d at 1101 (1992 amendments to the ERA changed the causation requirement to "contributory factor" and thereby eliminated the requirement of showing pretext prove unlawful discrimination).

In this case, the ALJ held that the undisputed facts “establish that Seay committed the December 8, 2011 safety violation.” But Seay’s FRSA-retaliation claim does not (hinge) on whether he was actually responsible for the December 8 incident. The question in this case is whether any of Seay’s protected activities between December 8, 2011, and January 3, 2012, (the date Seay finally signed a waiver) contributed to the unfavorable personnel actions Seay alleges he suffered, particularly the increase in his period of suspension.

Norfolk Southern offered declarations from its supervisors explaining how they decided upon the level of Seay’s discipline. But, at the summary decision stage, their assertions do not negate the possibility that Seay’s protected activity contributed to the methodology NSRC employed when it calculated the discipline appropriate for Seay’s violation. In a motion for summary decision, an employer cannot nullify the complainant’s evidence of contributory factor by simply presenting a different independent and lawful reason for the unfavorable employment action. This is why the ALJ erred by concluding that “Respondent’s change in the level of discipline offered Seay was justified and consistent with established Norfolk Southern policy and procedures.”

In the end, viewing the evidence in the light most favorable to the nonmoving party, the unresolved issues of Seay’s protected activities, Norfolk Southern’s adverse personnel actions, and the role the protected activities played in the imposition of those personnel actions prevent us from affirming dismissal by summary decision. Stated more clearly, the question of contributory factor cannot be decided by summary decision in this case. Because we remand this matter to the ALJ, Seay’s Motion to Reopen the Record and Norfolk Southern’s Motion to Strike are denied as moot.

CONCLUSION

For the reasons discussed above, the ALJ’s Order Granting Respondent’s Motion for Summary Decision is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge