



**In the Matter of:**

**ANTHONY W. SMITH,**  
**COMPLAINANT,**

**ARB CASE NO. 15-055**

**ALJ CASE NO. 2013-FRS-071**

**v.**

**DATE: APR 11 2017**

**BNSF RAILWAY COMPANY,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Chiquita Hall-Jackson, Esq.; *Hall-Jackson & Associates, PC*; Chicago, Illinois**

***For the Respondent:***

**Jennifer L. Willingham, Esq. and Kristen Smith, Esq.; *BNSF Railway Company*; Fort Worth, Texas**

**Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA) and its implementing regulations.<sup>1</sup> Anthony W. Smith complained that his employer, BNSF (Burlington Northern and Santa Fe) Railway, fired him in violation of the FRSA's whistleblower protections because he raised safety

<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson/Reuters Supp. 2015), 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 federal regulations at 29 C.F.R. Part 1982 (2015) and 29 C.F.R. Part 18 Subpart A (2015).

concerns. After a hearing, an Administrative Law Judge (ALJ) dismissed Smith's complaint and he appealed to the Administrative Review Board (ARB). We affirm.

### BACKGROUND

The parties generally stipulated to the following facts.<sup>2</sup> Anthony W. Smith worked for BNSF for more than 25 years, mostly as a train engineer. On October 12, 2010, Smith was driving a commuter passenger train and entered a 40-m.p.h. zone at 70 miles an hour. Smith admitted to violating FRA (Federal Railway Administration) regulations, waived an investigatory hearing, and accepted a 15-day suspension of his engineer's license. Under BSNF's Policy for Employee Performance Accountability (PEPA 2000), Smith was subject to a 12-month review period that began on October 12, 2010.<sup>3</sup>

On June 2, 2011, Smith, operating a train with several hundred passengers aboard, ran through an approach signal and then a red light and stopped the train about 90 feet beyond the light.<sup>4</sup> Following FRA regulations on red-light violations, Smith's supervisor, terminal superintendent, Timothy I. Merriweather, suspended Smith's license for six months as of June 2, 2011, and ordered an investigation on June 12, 2011, that Respondent subsequently postponed until November 30, 2011.

Meanwhile, Smith, who Respondent reassigned as a conductor, went to a doctor on June 16, 2011, and was diagnosed with obstructive sleep apnea. He reported his condition to Merriweather on November 28, 2011.<sup>5</sup> Smith took medical leave from December 2, 2011, until January 20, 2012, when he then returned to his job as an

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<sup>2</sup> *Smith v. BNSF RR Co.*, ALJ No. 2013-FRS-071, (Apr. 27, 2015), Decision and Order (D. & O.) at 3-5; Joint Exhibit 1.

<sup>3</sup> The 2000 PEPA provides for 36 months, but that period may be reduced. Respondent's Exhibit (RX) 36.

<sup>4</sup> Smith explained at the hearing that a clear signal meant "make track speed" at 70 mph, a flashing yellow meant reduce speed to 40 mph, and a solid yellow meant be prepared to stop at the next signal. He added that he acknowledged the approach signal but was "in a different state, a déjà vu state, and I'm performing this task, but it's like a remote performance. And I'm looking down the track and I'm not sleeping, but I'm not doing what I know that I'm trained to do when I see an approach medium." Hearing transcript (TR) at 64-65.

<sup>5</sup> RX 2.

engineer.<sup>6</sup> BNSF and union officials had postponed the investigatory hearing several times; it eventually occurred on May 22, 2012.<sup>7</sup>

At the May hearing, Smith stated that he had run the red light because he was sleep-deprived and had apnea. He alleged that BSNF failed to provide a fatigue management program and training. He also complained that his work schedule of 10 hours with a 30-minute rest period violated the regulations, but admitted that on June 2, 2011, the date of the second violation, he had taken the federally-mandated rest of 12 hours and was on a regular on-duty schedule.<sup>8</sup>

BNSF's PEPA policy provided three levels of disciplinary action for employees, culminating in a "Level S" or serious violation, such as speeding or running a red light while operating a train. PEPA 2000 was effective July 1, 2000, and PEPA 2011 became effective March 1, 2011.<sup>9</sup>

PEPA 2011 states that a review period begins when discipline is assessed and that a second serious violation within that period **may** result in dismissal. By contrast, PEPA 2000 does not indicate when a review period begins but states that a second violation within a year **will** result in dismissal. Regardless of the change in PEPA, Smith would have been in the 12-month review period resulting from the October 12, 2010 incident when the June 2, 2011 incident occurred because the review period under the applicable PEPA 2000 routinely ran from the date of the violation.

After the May 22, 2012 hearing, BNSF fired Smith on June 6, 2012, for committing a second serious violation within a year of a previous serious violation.<sup>10</sup>

Smith filed a complaint with the Occupational Safety and Health Administration (OSHA) on August 10, 2012. On June 10, 2013, OSHA dismissed the complaint and Smith requested a hearing, which the ALJ held on April 22 and 24, 2014.<sup>11</sup> The ALJ dismissed Smith's complaint on April 27, 2015, and he appealed to the ARB.

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<sup>6</sup> RX 21-22.

<sup>7</sup> BNSF set the hearing for March 22, 2012, but postponed it again upon the request of both parties. The ALJ noted that the issue of the delay between the red-light violation on June 2, 2011, and the investigatory hearing in May 2012 was before another forum. D. & O. at 8 n 10. See RX 5; TR at 198-200, 265.

<sup>8</sup> TR at 149-50, 166-67. See RX 6 at 67, 79-80.

<sup>9</sup> RX 36, 23.

<sup>10</sup> RX 9-10.

<sup>11</sup> RX 33-34.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review an ALJ's decision on appeal pursuant to the FRSA.<sup>12</sup> We review the ALJ's factual findings to determine whether they are supported by substantial evidence.<sup>13</sup> The ARB reviews the ALJ's conclusions of law de novo.<sup>14</sup>

## DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee because the employee engages in any of the protected activities identified under 49 U.S.C.A. § 20109(a), including “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; . . . .”<sup>15</sup>

To prevail under the FRSA, a 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; (3) and the protected activity was a contributing factor in the unfavorable personnel action. 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 absent the complainant's protected activity.<sup>16</sup>

The ALJ found that Smith's November 28, 2011 report to Merriweather of sleep apnea and his complaints at the May 22, 2012 hearing that BNSF was responsible for his

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<sup>12</sup> 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); 29 C.F.R. § 1982.110(a)(2016).

<sup>13</sup> 29 C.F.R. § 1982.110.

<sup>14</sup> *Kruse v. Norfolk S. Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS- 022, slip op. at 3 (ARB Jan. 28, 2014).

<sup>15</sup> 49 U.S.C.A. § 20109(a)(4).

<sup>16</sup> 49 U.S.C.A. § 20109(d)(2)(A)(i). See *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (explaining the three factors to be considered in assessing clear and convincing evidence); see also *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 7 (ARB Feb. 29, 2012) (clear and convincing evidence indicates “that the thing to be proved is highly probable or reasonably certain”).

sleep apnea constituted protected activity under the FRSA. Further, the temporal proximity between his protected activity and his discharge was sufficient to establish by a preponderance of the evidence that Smith's protected activity was a contributing factor to his discharge based on temporal proximity. These findings are affirmed as undisputed.<sup>17</sup>

After reviewing the record evidence and crediting the testimony of both Smith and BNSF managers, the ALJ concluded that "the overwhelming evidence establishes that [Smith's] commission of a second Level S violation within the probationary period of a prior Level S violation merited termination under BNSF's practice and the applicable PEPA" even absent any protected activity.<sup>18</sup>

Smith's arguments on appeal focus on the word "may" in the 2011 PEPA, which permitted a lesser penalty than termination for the second Level S violation. Smith argued that a fellow engineer, George Davis, was similarly situated and received a 30-day suspension rather than dismissal for committing a second serious rules violation. Smith also argued that BNSF had the flexibility to impose lesser punishment under the 2011 PEPA and would have approved a penalty short of termination, absent his protected activity questioning the railroad's lack of fatigue management training and its policy on rest periods.<sup>19</sup>

A whistleblower who argues disparate treatment to show that an employer's reason for termination was pretext, and thus not clear-and-convincing evidence, must prove that similarly-situated employees were treated more favorably.<sup>20</sup> To meet this requirement, the whistleblower must establish that employees involved in or accused of the same or similar conduct were disciplined differently. The critical factors are the nature of the offense and the degree of punishment imposed.<sup>21</sup>

The ALJ found that Davis was not an appropriate comparator because his second Level-S violation did not occur during a review period for a previous Level-S violation while Smith's did. Davis' first serious violation occurred on September 22, 2009, and resulted in a 12-month probationary period, which ended on September 22, 2010.<sup>22</sup> His

<sup>17</sup> D. & O. at 13; see *Maddin v. Transam Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-020, slip op. at 9 n.42 (ARB Nov. 24, 2014).

<sup>18</sup> D. & O. at 15.

<sup>19</sup> Complainant's Brief at 5-8.

<sup>20</sup> *Speegle*, ARB No. 13-074, slip op. at 13. *Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, -078, 03-044; ALJ No. 1998-CAA-007, slip op. at 21 (ARB Jan. 30, 2004).

<sup>21</sup> *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1311 (11th Cir. 1998). See *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) (the law requires similar misconduct from a similarly-situated comparator).

<sup>22</sup> RX 35.

second serious violation occurred on October 7, 2010, and resulted in a 30-day suspension imposed on January 27, 2011, and a 36-month review period. Also, the ALJ found significant differences in the two employees' records with BNSF. Davis worked almost two years longer than Smith and had not served any suspensions since 1994, while Smith had served two suspensions, one each in 2004 and 2005, and had also received a formal reprimand in 2002.<sup>23</sup>

The ALJ noted the differences in the 2000 PEPA, which governed Smith's first serious violation since it occurred in 2010, and the 2011 PEPA. The 2000 version provides that a second serious violation within 36 months of the first violation will subject the employee to dismissal, with one exception. The 36-month period will be reduced to 12 months if the employee has been injury free and discipline free for five years prior to the first violation.<sup>24</sup>

The ALJ found that, while Smith had been injury-and-sick free for five years prior to his first violation in October 2010, his second violation occurred within one year.<sup>25</sup> In addition, the ALJ found the evidence of other comparators "convincing" because it established that BNSF treated Smith under a "consistently-applied, serious-violation policy which Smith had not disputed."<sup>26</sup> The ALJ concluded that BNSF established through clear and convincing evidence that it would have fired Smith absent his protected activity.<sup>27</sup> Substantial evidence in the record supports the ALJ's determination that BNSF proved that it would have fired Smith for a second Level S violation within his probationary period even if he had never complained about his sleep apnea or fatigue issues.

Additional evidence in the record that the ALJ did not explicitly cite in his analysis also supports his conclusion that BNSF proved its affirmative defense by clear and convincing evidence. Andrea Smith, labor relations department director, testified that she had reviewed 150 to 200 cases of employee dismissal, including Smith's. After considering the hearing transcript and exhibits, Smith's years of service, and his

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<sup>23</sup> D. & O. at 16; RX 15, 35. Smith faults Ms. Smith and Merriweather for not explaining in detail why leniency was not granted but "accepts" the ALJ's ruling that Davis was not a comparator. Complainant's Brief at 6.

<sup>24</sup> RX 36.

<sup>25</sup> D. & O. at 17-18.

<sup>26</sup> RX 10-14. Merriweather explained that BNSF dismissed other employees for second serious violations within their probationary periods, RX 11, and issued 30-day license suspensions to three others not on probation. RX 12, TR at 291-92.

<sup>27</sup> D. & O. at 19.

disciplinary record, she recommended dismissal based on a second serious violation within his 12-month probationary period.<sup>28</sup>

Superintendent Merriweather testified that after the October 2010 speeding violation, BNSF suspended Smith's engineer license for 15 days instead of the maximum 30 days and after the June 2, 2011 red light violation, the FRA suspended Smith's license for six months, after which he returned to his position.<sup>29</sup> Merriweather stated that Smith, who had been reassigned as a conductor, did not report his sleep apnea until November 28, 2010; Merriweather then informed the BNSF medical department, which put Smith on medical leave because the conductor position was also safety-sensitive. Merriweather noted that Smith returned to his engineer's position in January 2011 after being treated for sleep apnea and cleared for duty.<sup>30</sup>

While Smith testified that he had suffered from "short sleep" for 19 years because he was on call and had to work 12 hours with only four hours sleep,<sup>31</sup> Merriweather explained that Smith's on-duty hours were 4:40 a.m. to 6:01 p.m. but he had a six-and-a-half hour respite during that time, and he had never had to work 14 consecutive days as he had claimed.<sup>32</sup> Finally, Merriweather stated that Smith admitted that on June 2, 2011, that he was on a regular, on-duty schedule and did not feel he was too tired to work. Merriweather commented: "It was pretty much a cut-and-dried case" in that Smith offered no extenuating circumstances that would have supported a lesser penalty than discharge and his record was "not as clean" as he thought it was in relation to his peers.<sup>33</sup>

In sum, substantial evidence in the record supports the ALJ's findings of fact, including the ALJ's credibility determinations, and his Decision and Order is otherwise in accordance with applicable law.

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<sup>28</sup> TR at 191-95, 203-06, 212-13.

<sup>29</sup> RX 18-19, TR at 246-48. Merriweather added that Smith's license was also suspended on March 3, 2012, for another red light violation, but that BNSF was still investigating that matter after Smith's discharge in June 2012. RX 20, TR at 248-50.

<sup>30</sup> TR at 251-53, 267-71.

<sup>31</sup> RX 6 at 67, TR at 148-58.

<sup>32</sup> TR at 276-80.

<sup>33</sup> TR at 288-89.

**CONCLUSION**

Based on the above analysis, the Board affirms the ALJ's determination that BNSF proved by clear and convincing evidence that it would have fired Smith absent his protected activity. Accordingly, Smith's complaint is **DISMISSED**.

**SO ORDERED.**

[REDACTED]

**JOANNE ROYCE**  
**Administrative Appeals Judge**

[REDACTED]

[REDACTED]

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

[REDACTED]

**LEONARD J. HOWIE III**  
**Administrative Appeals Judge**