



In the Matter of:

JACEK SAMSON,

ARB CASE NO. 15-065

COMPLAINANT,

ALJ CASE NO. 2014-FRS-091

v.

DATE: JUL 11 2017

**SOO LINE RAILROAD COMPANY
d/b/a CANADIAN PACIFIC,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jacek Samson, *pro se*, Glendale Heights, Illinois

For the Respondent:

Tracey Holmes Donesky, Esq. and Matthew C. Tews, Esq.; *Stinson Leonard Street LLP*; Minneapolis, Minnesota

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Leonard J. Howie, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982, 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. 110-53 (FRSA or Act).¹ Complainant Jacek Samson filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Respondent Soo Line Railroad Company d/b/a Canadian Pacific (Soo Line), violated FRSA's

¹ The FRSA's implementing regulations are found at 29 C.F.R. Part 1982 (2016).

whistleblower protection provisions by retaliating against him, and eventually discharging him, for engaging in activity that the FRSA protects. After conducting an investigation, OSHA dismissed Samson's complaint.

Samson challenged OSHA's determination and requested a hearing before the Office of Administrative Law Judges. Following a two-day formal evidentiary hearing, the assigned Administrative Law Judge (ALJ) issued a Decision and Order on May 29, 2015 (D. & O.), in which the ALJ dismissed the complaint. Samson petitioned the Administrative Review Board (ARB or Board) for review. For the following reasons, the Board summarily affirms the ALJ's decision.

FACTUAL BACKGROUND²

The ALJ made factual findings and credibility determinations in ruling on Samson's claims of retaliation for reporting a hazardous safety condition and refusing to work when confronted with one. On February 20, 2013, trainmaster Nicholas T. Mugavero, Jr., a manager, questioned Samson about the car switching work, which Samson refused to discuss. Mugavero gave Samson the option to continue to work as instructed or to go home. Samson chose to go home. Before leaving, Samson filed a Safety/Hazard report that reads, "Train Master Nick Mugavero came to the east end c-yard and began telling 1399 two men crew how to switch tracks, creating unsafe conditions for the crew, he was constantly interfering and causing confusion. Crew member insisted on being able to do the switching. Trainmaster Mugavero refused." D. & O. at 42-45, 48-54. The ALJ resolved conflicting evidence and found that Samson was confused by Mugavero's instructions and that given the alternatives Mugavero presented him with, Samson believed he had no alternative than to refuse to work as he believed he could not do so safely. The ALJ found, however, that Samson's work refusal and reported hazard were not objectively reasonable as Mugavero had not created a hazard, D. & O. at 49-54, and Samson had not told Mugavero that he had, D & O. at 44-45.

On February 22, 2013, trainmaster Mark A. Lashbrook spoke to Samson about why he had shoved a car instead of kicking it which, he instructed, was preferred. Samson responded that he had felt safer doing so and asked Lashbrook to repeat his instruction over the radio. Lashbrook then told Samson that he had to work smarter to meet switching expectations to which Samson replied that he would work safely. Believing that he had earlier observed Samson riding a tank car all the way into the joint, a safety rule violation, Lashbrook confronted Samson who denied it and later claimed anxiety because of what he believed to be a false accusation. The ALJ was not able to determine whether Samson committed the violation but found that Lashbrook believed that Samson had. D. & O. at 46. The ALJ resolved conflicting evidence and found that Samson then walked off the job against management instruction and without telling anyone that he was doing so because, as he later claimed, Lashbrook had created a hazard by

² The facts for the Factual Background section are taken from the ALJ's findings of fact, factual dispute resolutions, and credibility determinations, and the undisputed evidence of record.

falsely accusing him of a rule violation and he could not continue to work safely. The ALJ found that Samson's work refusal was not objectively reasonable. D. & O. at 42-47, 48-54.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in FRSA cases.³ The ARB reviews the ALJ's factual findings under the substantial evidence standard and the ALJ's conclusions of law de novo.⁴

DISCUSSION

The FRSA, as amended, prohibits a railroad company, a contractor, officer, or employee of a railroad company, from retaliating against an employee because the employee engaged in activity protected under the FRSA.⁵ A successful FRSA complainant must prove: (1) that he or she engaged in protected activity; (2) that the employee suffered an adverse action; and (3) that the protected activity was a contributing factor in the unfavorable employment action. If the employee prevails on the elements of his or her claim, he or she may be entitled to remedies. To avoid liability for remedies, the employer must prove by clear and convincing evidence its affirmative defense that it would have taken the same action absent the employee's protected activity.⁶

The ALJ determined the outcome of this case under two FRSA provisions. Section 49 U.S.C.A. § 20109(b)(1)(A) prohibits a railroad carrier from taking adverse action against an employee for reporting, in good faith, a hazardous safety or security condition. Section 49 U.S.C.A. § 20109(b)(1)(B) prohibits a railroad carrier from taking adverse action against an employee because he refused to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, provided: (a) the refusal was made in good faith with no available reasonable alternative to refusal, (b) a reasonable person in the circumstances then confronting the employee would conclude that, (i) the hazardous condition presented an imminent danger of death or serious injury, and (ii) the urgency of the

³ 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.

⁴ 29 C.F.R. § 1982.110(b); *Winch v. CXS Transp., Inc.*, ARB No. 15-020, ALJ No. 2013-FRS-014 (ARB July 19, 2016); *Santiago v. Metro-North*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 4 (ARB July 25, 2012).

⁵ See 49 U.S.C.A. § 20109(a), (b).

⁶ The FRSA, as amended in 2007, incorporates the procedures and burden of proof requirements of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C.A. § 42121(b). See 49 U.S.C.A. § 20109(d)(2)(A).

situation did not allow sufficient time to eliminate the danger without refusal, and (c) the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or reported. Furthermore, section 20109(b)(1)(A) of the FRSA protects an employee's good faith reporting of a hazardous safety condition.

The ALJ made two separate determinations regarding Samson's claims of protected activity. Considering Samson's work refusals first, the ALJ found that the evidence did not show that a reasonable person in the circumstances then confronting Samson would have concluded both that a hazardous condition existed presenting an imminent danger of death or serious injury, or that the urgency of the situation did not allow sufficient time to eliminate the danger without refusing to work. D. & O. at 48-54. The ALJ also found that Samson did not provide the requisite notification for any alleged protected activity on February 22, 2013. *Id.* at 54.

Considering Samson's claim that he made a protected report of a hazardous safety or security condition, the ALJ found that Samson did not notify his employer of the existence of any such condition. The ALJ also found that even if Sampson had notified his employer of what he believed was a hazardous condition, that belief was not objectively reasonable, as it must be to invoke the employee protection provisions at Sections 20109(b)(1)(A) and (B) of the Act. The ALJ specifically determined that the conduct of, and instructions that Mugavero gave and that Samson had complained of in the Safety/Hazard report he filed, did not create a hazardous or unsafe working condition at the railroad, and Samson's belief otherwise was not objectively reasonable. D. & O. at 53-54.

Based on his findings of no protected work refusal and no protected report of a hazardous safety or security condition, the ALJ concluded that Samson had not met his burden to demonstrate by a preponderance of the evidence that he engaged in protected activity.

Upon review of the ALJ's comprehensive 56-page Decision and Order, the Board finds that substantial evidence of record supports the ALJ's factual findings upon which he based his conclusion that Samson did not engage in activity protected under the FRSA. Additionally, the Board finds that the ALJ's Decision and Order is consistent with applicable law. Samson's arguments based on his own rendition of the facts are unavailing where the ALJ considered and weighed all the evidence in determining that Samson did not report a hazardous safety or security condition then existing at the railroad that related to the performance of his duties and did not refuse to work in light of any such condition. To the extent that Samson believed that any such condition existed, the ALJ's determination that Samson's belief was not reasonable is further supported by the substantial evidence of record.⁷


⁷ See *Winch*, ARB No. 15-020, slip op. at 3, 4.

One additional argument Samson raised concerning the ALJ's credibility determinations merits comment. In analyzing the evidence developed in conjunction with the hearing, the ALJ determined the credibility of the witness testimony, as the ALJ is required to do, resolving conflicts where they existed. Samson contends that the ALJ erred in crediting the testimonies of other witnesses over his in certain instances, and in relying on these credibility determinations to make certain findings of fact. Complainant's Supporting Legal Brief at 2-7. In rejecting Samson's challenge to the ALJ's credibility determinations, it is noted that the Board gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable.⁸ The Board finds the ALJ's credibility determinations neither inherently incredible nor patently unreasonable.


CONCLUSION

Based on the foregoing, the Board **AFFIRMS** the ALJ's dismissal of Samson's FRSA complaint based on his conclusion that Samson did not engage in FRSA-protected activity. Accordingly, the ALJ's May 29, 2015 Decision and Order is **AFFIRMED**.

SO ORDERED.


E. COOPER BROWN
Administrative Appeals Judge


PAUL M. IGASAKI
Chief Administrative Appeals Judge


LEONARD J. HOWIE
Administrative Appeals Judge

⁸ See, e.g., *Knox v. National Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002 (ARB Apr. 30, 2012).