

In the Matter of:

GILBERT CENICEROS,

ARB CASE NO. 16-023

COMPLAINANT,

ALJ CASE NO. 2015-FRS-017

v.

DATE: August 9, 2017

**NATIONAL RAILROAD
PASSENGER CORP. (AMTRAK),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Denise Cenicerros, lay representative, Whittier, California

For the Respondent:

Jerome D. Rybarczyk, Esq., Sims Law Firm, LLP, Irvine, California

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Leonard J. Howie, III, Administrative Appeals Judge; and Tanya L. Goldman, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ Complainant Gilbert Cenicerros filed a complaint alleging that Amtrak retaliated against him in violation of FRSA's whistleblower protection provisions for reporting an injury. Cenicerros appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on November 16, 2015, dismissing Cenicerros's complaint after a hearing on the merits. We summarily affirm.

¹ 49 U.S.C.A. § 20109 (Thomson Reuters 2016), as implemented by federal regulations at 29 C.F.R. Part 1982 (2016) and 29 C.F.R. Part 18, Subpart A (2016).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the FRSA.² The Board reviews the ALJ's factual determinations under the substantial evidence standard.³ The Board reviews an ALJ's conclusions of law de novo.⁴

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 protected activity.⁵ 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, at 49 U.S.C.A. § 42121(b) (West 2007).⁶ To prevail, an FRSA complainant must establish by a preponderance of the evidence that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."⁷ If a complainant meets his burden of proof, the employer may 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 activity.⁸

Stated succinctly, the ALJ determined that: (1) Cenicerros engaged in protected activity when he reported an injury in November or December of 2010; (2) Amtrak knew about Cenicerros's protected activity, (3) Amtrak terminated Cenicerros's employment, (4) Cenicerros's protected activity did not contribute to the termination decision; (5) before Cenicerros was injured Amtrak made plans to reorganize the investigative program of which Cenicerros was a part, (6) part of the reorganization included new training requirements such that agents would be required to undergo Criminal Investigative Training, (7) Amtrak notified Cenicerros that he should complete the Criminal Investigative Training Program if he wished to be hired as a special agent,

² 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); see 29 C.F.R. § 1982.110(a).

³ 29 C.F.R. § 1982.110(b).

⁴ *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-AIR-025, slip op. at 2 (ARB Apr. 30, 2013) (*citations omitted*).

⁵ 49 U.S.C.A. § 20109(a), (b), (c).

⁶ 49 U.S.C.A. § 20109(d)(2)(A)(i).

⁷ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

⁸ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

and (8) Cenicerros did not complete the Criminal Investigative Training Program.⁹ The ALJ concluded that Cenicerros failed to show by a preponderance of the evidence that his injury report contributed to his termination and that there was clear and convincing evidence to show that his injury report did not contribute to the termination decision.¹⁰

Substantial evidence supports the ALJ's factual findings. We affirm the ALJ's dismissal of Cenicerros's whistleblower complaint.

CONCLUSION

The ALJ's Decision and Order dismissing Cenicerros's complaint is **AFFIRMED**.

SO ORDERED.

LEONARD J. HOWIE, III
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

TANYA L. GOLDMAN
Administrative Appeals Judge

⁹ D. & O. at 2, 3, 5, 9.

¹⁰ *Id.* at 9-10.