

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 July 2014

Case Number: 2013-FRS-00059

In the Matter of

RANDAL F. JOHNSON
Complainant

v.

BNSF RAILWAY COMPANY
Respondent

Appearances:

Randal F. Johnson, *pro se*
Lincoln, Nebraska
For the Complainant

Kimberly B. Garoon, Esq.
Dallas, Texas
For the Respondent

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM

Procedural Background

This matter arises out of a claim filed under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, 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 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008).

Randal F. Johnson's ("Complainant") employment with BNSF Railway Company ("Respondent" or "BNSF") began on May 29, 1973, when he was hired as a Locomotive

Engineer. (JX 1).¹ Respondent suspended and subsequently dismissed Complainant on October 18, 2012 for failing to comply with the terms of his Employee Assistance Program (“EAP”) treatment plan. (JX 1). Complainant then filed a complaint with the Department of Labor on December 11, 2012, alleging Respondent dismissed him in retaliation for requesting medical treatment and reporting that he was too ill to work.

On April 22, 2013, the Secretary of Labor, acting through his agent, the Regional Administrator of the Occupational Safety and Health Administration (“OSHA”), found that Complainant engaged in protected activity when he requested medical treatment and reported it was not safe for him to operate a train and also suffered adverse actions when he was charged with rules violations resulting in the above noted suspension and dismissal. However, OSHA also determined that the protected activity was not a contributing factor in the adverse actions and dismissed the complaint. On May 28, 2013, Complainant filed objections to the Secretary’s Findings and requested a hearing before an administrative law judge (“ALJ”). By Order issued June 26, 2013, a hearing in the above-captioned matter was scheduled for November 7, 2013 in Omaha, Nebraska but continued on Respondent’s motion to March 13, 2014.²

A *de novo* hearing in this matter was held in Omaha, Nebraska on March 12, 2014. All parties were present and the following exhibits were received into evidence: Joint Exhibit 1 (Tr.16); Administrative Law Judge Exhibits 1-7 (Tr. at 16-17); and Respondent’s Exhibits 1-23 (Tr. 293).³ Five witnesses, including Complainant, testified at the hearing. Mr. Johnson represented himself in this matter. (Tr. 9-15).

The parties were granted leave to file post hearing briefs. Complainant submitted his brief on April 28, 2014 and Respondent on May 30, 2014.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, the evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision. While some exhibits are not discussed in their entirety, they have been carefully reviewed so that what is covered below consists of a review of the relevant evidence.

As will be explained in greater detail, I find Complainant has not established that his request for medical treatment constitutes protected activity under the Act. Assuming it does, Complainant has failed to establish that the protected activity was a contributing factor in his suspension and dismissal. Consequently, the claim for damages filed under the employee protection provisions of the FRSA is denied.

¹ As used in this decision, “JX” refers to the Joint Exhibit; “ALJX” refers to Administrative Law Judge Exhibits; and “RX” or “BNSF” refers to Respondent’s Exhibits. “Tr.” followed by a page number refers to the transcript of the hearing in this case.

² On the Court’s motion, the hearing was rescheduled to begin on March 12, 2014.

³ Complainant marked four exhibits (Tr. 18, 25, 188, and 230) and offered one, which the court rejected (Tr. 20).

ISSUES

Whether Complainant has proven by a preponderance of the evidence that he engaged in protected activity that contributed, in part, to Respondent's decision to discipline him, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision?

If so, has Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity?

If so, can Complainant establish by a preponderance of the evidence that Respondent retaliated against him for engaging in protected activity, i.e. that Respondent's stated legitimate reasons were a pretext.

If so, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate.

Positions of the Parties

Complainant

On June 14, 2012, BNSF denied repeated requests for critical medical treatment, placing Complainant's health in jeopardy, which violates Rule S-26.8 which states that "at no time shall any employee be subjected to harassment or intimidation to discourage or prevent such person from receiving proper medical treatment or reporting an accident, injury or illness." As to the EAP sessions, while Complainant admits to missing two scheduled group sessions, Complainant asserts he had permission from the treatment center director to miss them and could make them up at a later date. Complainant submits his subsequent suspension and dismissal from the railroad were in retaliation for reporting his was too ill to work and requesting medical care on June 14, 2012.

Respondent

After his conviction for driving under the influence [of alcohol], ("DUI") Complainant was referred to the BNSF Employee Assistance Program. One of the requirements of the program was to attend all group sessions. Complainant missed two sessions. Complainant was subsequently dismissed because he failed to comply with the requirements of the EAP. Complainant was never denied medical care and Complainant's dismissal had nothing to do with the events arising out of June 14, 2012.

Summary of the Evidence⁴

Joint Stipulation (JX 1)

The parties agree to the following facts:

1. Randal Johnson began working for BNSF on May 29, 1973.
2. Throughout his employment, Mr. Johnson worked out of various BNSF train yards in Nebraska and Iowa.
3. At the time of his dismissal, Mr. Johnson was working as an Engineer out of BNSF's Lincoln, Nebraska yard.
4. Mr. Johnson was a member of the Brotherhood of Locomotive Engineers and Trainmen ("BLET") from approximately 1996 until the time of his dismissal.
5. Mr. Johnson had fourteen separate instances of discipline between 1990 and 2012 before his ultimate dismissal on October 18, 2012.
6. Mr. Johnson had three active serious rules violations on his employment record from June 14, 2012 through October 18, 2012.
7. When Mr. Johnson reported for duty on or about June 14, 2012, he fully intended to accept his assignment and operate a locomotive.
8. He reported for duty on or about June 14, 2012 at approximately 5:00 p.m. Subsequently, Mr. Johnson began shaking and sweating and his eyes were bloodshot and watery.
9. Mr. Johnson agreed that his return to service and continued employment [at BNSF] were conditional and dependent upon his full compliance with his EAP treatment plan.
10. Mr. Johnson did not attend a group counseling session during the week of August 20, 2012.
11. Mr. Johnson did not attend a group counseling session during the week of September 3, 2012.
12. On or about October 18, 2012, Mr. Johnson was dismissed from employment for failing to comply with the terms of his EAP treatment plan.
13. BNSF is a "railroad carrier" within the meaning of 49 U.S.C. § 20109(a).
14. Mr. Johnson is a covered "employee" within the meaning of 49 U.S.C. § 20109(a).
15. Mr. Johnson timely filed a complaint with OSHA challenging his dismissal from employment.
16. On April 22, 2013, following an investigation by a duly authorized investigator, the OSHA Regional Administrator found there was no "reasonable cause" to believe that BNSF violated the FRSA and issued findings in favor of BNSF.
17. Mr. Johnson timely appealed and requested a hearing before an administrative law judge.
18. Under federal mandate, a certified engineer who is determined to have an active substance abuse disorder shall be suspended from certification.
19. Under federal mandate, an engineer whose certification has been suspended shall not be eligible for reinstatement of the certificate unless and until he has successfully completed any program of counseling or treatment determined to be necessary by an EAP Counselor prior to return to service.

⁴ The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

Testimony

Complainant - Randal F. Johnson (Tr. 30-157).

I was working outside in my yard the afternoon of June 14, 2012. The temperature was around 100 degrees. I had just finished working when I was called on-duty at 5 p.m. Upon arriving at the train yard, I was getting hot and cold sweats, my skin was clammy and I was shaking. At 5:20 p.m., I was called into Trainmaster Athey's office to sign a paper. I was shaking so hard I could hardly sign it. Mr. Athey asked if I was ok and I said I was ok to work. I was then asked whether I was on drugs or alcohol -- and I said no. A few minutes passed and I was taken out of service -- medical at about 5:43 p.m. I asked to go to the hospital but was told I needed to wait for the drug tester and Breathalyzer lady. She arrived about 6:20 p.m. and administered a breath test, which was negative. However, I was too dehydrated to give a urine sample. Yardmaster Peters then entered the office and told them to take me to the hospital. After arriving at the hospital, they gave me an ECG and three bags of intravenous saline solution and then drew some blood. I blew three zeroes and had a clean drug screen.

I worked at BNSF for 39 years and was assessed discipline 14 times during my tenure as an engineer. My first level S violation was in 2007, and I was assessed a 36 month review period. (RX 1). While I was still on probation, I received another level S violation on November 19, 2009, again with a 36 month review period. While still on probation, I received another level S violation on July 28, 2010, with a 36 month review period. (Tr. 46-47). I have been medically diagnosed with chronic alcoholism.⁵ But it never affected my ability to work as I would drink when I was off duty. I was arrested for DUI on May 31, 2011. I was required to report the DUI to BNSF and I told Mr. Kyle James, the terminal manager, after I was convicted. I don't remember the exact day of the conviction, but I received 10 days in jail. (Tr. 50-51). As an engineer, there are ramifications for being convicted for a DUI as it relates to certification. I have to attend alcohol related classes. When I reported for work on June 14, 2012, I felt that I was fit to operate a locomotive. (Tr. 57-8). About 10 minutes after I arrived, I started getting symptoms. I went to the trainmaster's office to sign my certification on the DUI. The document instructed me to coordinate with an EAP manager. (Tr. 60). I didn't really read the letter because I was shaking so profusely by this time. I just wanted to go to the hospital. But I felt that I couldn't leave because they would call that insubordination. I asked several times for them to take me to the hospital but they said I had to wait for the breath and urinalysis test. Before I was pulled out of service, I thought I could have safely operated a train on June 14, 2012. (Tr. 76). We went to the hospital at about 7:37 p.m. I was ultimately diagnosed with dehydration and hyperglycemia. (Tr. 81). By not immediately taking me to the hospital, I believe BNSF put my life in danger. I was told that I was being mandatorily referred to the EAP and that I have to be cleared to return to active service after being removed from service, pending medical evaluation. (Tr. 98).

⁵ Mr. Johnson testified that he has struck and killed four people. The first was a woman who tried to pass a car stopped at a railroad crossing. He was a 22 year old engineer at the time. Mr. Johnson later struck and killed a man who had stepped in front of the train. The third death was a woman who fell on the tracks and the final fatality was a man who was laying on the tracks drinking beer. All of these incidents were thoroughly investigated and none found Mr. Johnson negligent. However, alcohol apparently became one of Mr. Johnson's coping mechanisms.

Beginning in June 2012, I participated in the BNSF EAP. I knew I had to participate “because of my certification and because of my driving record” and the EAP had nothing to do with the events of June 14, 2012. (Tr. 99-100). I knew when I began treatment that my return to active service was dependent on compliance with the BNSF client agreement. (Tr. 106). The first paragraph of the agreement states that “I understand that my potential return to work and continued service are dependent upon my ongoing compliance with all elements of this program. I understand that non-compliance may result in my removal from service.” (BNSF 10). I signed and dated the agreement. But while I missed sessions, I had permission from Jerrid Ray, the First Step Recovery and Wellness Center director, so I believed I was in compliance with the agreement. If I was out of town or missed a day, I could see the Director and then everything was supposed to be fine. But I agree that it was the BNSF medical department that was responsible for determining whether I was fit to return to active service, not the counselors, directors and other employees of the treatment program. (Tr. 113). The agreement I had with Jerrid Ray, the clinic director, was not outlined in the BNSF client agreement. My client agreement provided that I had to attend four group sessions a month. Both the contract and client agreement state that if I was going to miss a week of group sessions, due to work schedule, I was to have the absences excused by my assigned counselor, in advance. My substance abuse counselor was Christina Thomas. I missed a group session the week of August 20, 2012, because I was called to work. (Tr. 123, 125). I did not attend a group session on September 3, 2012 because I was home sick on FMLA leave. (Tr. 124, 127). I did not contact Christina Thomas and request permission to miss the sessions. I talked to the director. He testified at my hearing that I was in complete compliance. So I don’t know why I was dismissed from employment. BNSF pays out its retirement benefits at age 60. I was born on October 5, 1955 so I have and year and a half before I am eligible. I have not made an effort to find alternate work, because if I work, then I would lose the retirement benefits. (Tr. 152-3).

Robert Mark Athey (Tr. 159-199).

I was the Superintendent for the Lincoln Terminal in June 2012. I was the one who withheld Mr. Johnson from service, pending medical review. Mr. Johnson last received rules training on March 27, 2012. Mr. Johnson had 14 incidents of discipline assessed over his career with BNSF, 11 standard and 3 Level S events. A “Level S” violation is a serious rules violation. (Tr. 166). If an employee has two of these, within a probationary period, it makes him subject to dismissal. When Mr. Johnson got his second and third violation, he was still within the probationary period of the previous level S violations.

I was on duty on June 14, 2012. When Mr. Johnson reported to work, he was prepared to accept his assignment. When he came on duty, Mr. Johnson had to sign a letter waiting for him in the terminal manager’s office, which I later learned was from our certification department instructing him to contact our Employee Assistance counselor. I know that federal regulations require that our engineers go through a certification process every three years and part of that is a review of their driving record. When Mr. Johnson’s record was reviewed, we found a DUI and that drove the requirement for him to seek employee assistance counseling. (Tr. 168). It is BNSF policy that no engineer can work with an active certification if he has a substance abuse problem and may be subject to employee assistance. Failure to comply with employee assistance programs may also subject the employee to discipline and possible dismissal. (BNSF 5).

Federal regulations state that an engineer cannot hold a certification license if he has an active substance abuse problem. (BNSF 6).

When Mr. Johnson came into my office on June 14, 2012, he was trembling, pale and grey skinned and his eyes were bloodshot. I asked if he felt that he could work safely and he said "I think I can." (Tr. 172). I thought he felt forced to go to work because he said he just finished a divorce and he had to make the trip to make his mortgage payment. I asked Mr. Johnson if he needed any medical attention and he declined. I then suggested he get something to eat so he left my office. About 30 minutes later, he came back and said he had a hamburger from the vending machine. But Mr. Johnson's symptoms had not diminished so I asked again if he needed medical attention and he declined a second time. I told him I was concerned for his safety and I told him at this point I was withholding him from service pending medical review. I explained that we would do a drug and alcohol screen and would call the drug and alcohol tester to come in. While we were waiting for her, we went back to my office and that is where Mr. Johnson admitted that he had no business being on a train. Mr. Johnson was able to take the breathalyzer but unable to provide a urine sample. The collector expressed concerns about Mr. Johnson's condition – he was complaining of cramps. While I cannot require an employee to seek medical attention, at that point Mr. Johnson said ok to the medical treatment and the trainmaster took him to the hospital. I eventually learned that Mr. Johnson was diagnosed with dehydration. I never refused Mr. Johnson's requests to seek medical attention or prevented him from getting medical treatment. In fact, it was us who encouraged him several times to seek medical attention and he declined. (Tr. 184).

I believe Mr. Johnson was declared fit for duty in July 2012. But once he was found to be in non-compliance with the EAP, he was withheld from service. (Tr. 197-98). Regardless of the outcome of the June 14, 2012 drug and alcohol screen, Mr. Johnson would have been referred to EAP because of the prior DUI; there was a letter requiring him to go through EAP even before the events of June 14, 2012.

Eileen Marie Warner (Tr. 199-230).

I am the field manager of medical environmental health for the Nebraska Division of BNSF and it is my responsibility to make sure employees are able to return to work safely. Mr. Johnson was mandatorily referred to the EAP by me and when he was no longer in compliance, I could no longer vouch for his safety. The EAP provides assistance for substance abuse, gambling issues, any issues that might cause an employee problems. EAP is a federal requirement. It is free to employees. On June 14, 2012, Mr. Athey contacted me and said he was withholding Mr. Johnson from service so we could determine his fitness for duty and safe return to work. Mr. Athey told me that Mr. Johnson was trembling, had bloodshot eyes, had difficulty concentrating, was sweating profusely, and eventually admitted that he was not fit to work and drive a train. I gave Mr. Johnson a letter on June 15, 2012 removing him from service and instructing him on the steps that he needed to take to be returned to service. (BNSF 7). Mr. Johnson did not comment to me about any delay in being taken to the hospital the day before or that he was following the orders of a physician. (Tr. 206). I memorialized that meeting in a letter and referred Mr. Johnson to EAP. (BNSF 8). At the time I referred Mr. Johnson to EAP, I

was not aware that Mr. Johnson was already required to participate in EAP because of the certification issue related to his DUI.

BNSF Exhibit 9 is a contract between Mr. Johnson and First Step. One of the requirements is that Mr. Johnson participate in a substance abuse program through an intensive outpatient and aftercare program and First Step is a substance abuse program that Mr. Johnson was referred to. The contract required Mr. Johnson to not miss group sessions unless excused in advance by Ms. Thomas, his substance abuse counselor. Mr. Johnson signed the contract. (Tr. 210).⁶ BNSF Exhibit 10 is a client agreement between Mr. Johnson and the EAP outlining the expectations he had to meet to remain in compliance with the EAP; that included completing the intensive outpatient program and continuing with the aftercare program. The aftercare program involves four weekly group sessions for three months. If Mr. Johnson was unable to make the weekly meetings, he had to make a personal session with his substance abuse counselor, Ms. Thomas. (Tr. 211). On July 17, 2012, Mr. Johnson was declared fit to return to duty. (BNSF 12). But Mr. Johnson had to continue attending group sessions. I eventually got an email from Tom Reimers, the Employee Assistance Manager, informing me that Mr. Johnson had missed two of the group sessions and that they had not been excused by his substance abuse provider, Ms. Thomas, and he had not scheduled any individual sessions with her. (BNSF 13, 14). At that point, I contacted the General Manager and told him I could no longer vouch for Mr. Johnson's safety to perform his job duties, who then withheld Mr. Johnson from service. BNSF Exhibit 17 is a document reflecting Mr. Johnson's non-compliance with his treatment program when he missed the two group sessions on August 20th and September 3rd and did not schedule any individual sessions with his substance abuse counselor. Mr. Johnson did attend group sessions on September 10. (BNSF 18) I am aware that Mr. Johnson was eventually dismissed. (BNSF 20).

Janssen Thompson (Tr. 231-279).

I am the General Manager for the Nebraska Division for BNSF and responsible for safety and efficiency of operations. I became involved in this case in September 2012 after becoming aware that Mr. Johnson was potentially in noncompliance with his EAP contract. After Ms. Warner contacted me, I ordered an investigation into the matter. The fact that Mr. Johnson was taken to the hospital or received medical treatment on June 14, 2012 did not affect my decision to order an investigation into a potential violation of General Code of Operating Rules ("GCOR") 1.13, which provides that employees must comply with instructions, whether from their supervisors or managers or other departments. (Tr. 240). After the hearing, I reviewed the transcript and supporting exhibits and determined Mr. Johnson had violated Rule 1.13 by not attending meetings as required by the EAP contract. Because this was his third serious rules violation within the probationary period, I recommended Mr. Johnson be dismissed. (BNSF 20). Yes, I am aware that Mr. Johnson believed he was in compliance because he had permission from Mr. Ray, the First Step substance abuse program director, to miss the group sessions.

⁶ Goal #1C of the contract provides that the client will "attend and document two AA/NA meetings per week or as directed by your counselor." Goal #1E provides that the client "do[es] not miss group unless excused. You must call or talk with your counselor in advance. Two no calls or no shows results in immediate discharge from the program." (BNSF 9).

Andrea N. Smith (Tr. 279-292)(telephonically).

I am the director of labor relations for BNSF. We review all dismissals. Because Mr. Johnson had two active serious rules violations on his record before the current incident, he qualified for dismissal. (BNSF 19). Mr. Johnson was charged with failing to comply with instructions from the EAP client agreement, a violation of Rule 1.13. Even if he had a leniency agreement with First Step, the EAP client agreement was very specific on what he was required to do and he did not comply with the terms of the agreement. (Tr. 286). In the past three years, BNSF dismissed eleven other employees, not counting Mr. Johnson, for not complying with their EAP requirements. (Tr. 288). Ten had active discipline on their records.

FINDINGS OF FACT

Because of a pending DUI, Complainant was required to participate in an EAP to be recertified as a train engineer. A letter notifying him of those requirements was waiting for his signature in the yardmaster's office on June 14, 2012. On June 14, 2012, Complainant was called to come into work. After laboring in his yard in 100 degree weather, Complainant reported to the train yard about 5 p.m., believing he was able to work. However, the terminal superintendent, Mark Athey, noticed Complainant was trembling, pale and grey skinned and his eyes were bloodshot. Athey asked Complainant if he felt that he could work safely and Complainant responded "I think I can." Complainant then declined Athey's offer of medical attention. Complainant then departed the office and returned about 30 minutes later after getting something to eat. Athey noticed that Complainant's symptoms had not diminished so he asked again if he needed medical attention and, again, Complainant declined. At this point, Athey pulled Complainant out of service pending medical review and explained that Complainant would have to do a drug and alcohol screen. While waiting for the drug and alcohol tester, Complainant admitted that he had no business being on a train. After passing the Breathalyzer, Complainant asked for medical treatment and he was taken to the hospital. No BNSF employee ever refused or denied Mr. Johnson's requests to seek medical attention or prevented him from getting medical treatment.

The DUI leading to Complainant's required participation in the BNSF Employee Assistance Program occurred before June 14, 2012. One of the program requirements is to attend group sessions. If unable to attend, Complainant knew he was to notify his substance abuse counselor, and schedule alternate sessions. Complainant missed sessions on August 20 and September 3, 2012. While Complainant may have told the program director he would be absent, he did not notify his substance abuse counselor, Christina Thomas, and did not schedule individual sessions with her, which violated the terms of both his EAP contract and the substance abuse program, First Step. Respondent then initiated a disciplinary investigation and Complainant was subsequently found guilty of violating BNSF GCOR Rule 1.13 for not complying with instructions issued by the Employee Assistance program and the BNSF medical director, a Level "S" violation and a dischargeable offense. Given this was Complainant's third level S violation within his third probationary period; he was dismissed from service on October 18, 2012.

DISCUSSION AND ANALYSIS

The Federal Railway Safety Act (“FRSA”), under which Mr. Johnson brings his claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting a work-related injury or illness and requesting medical treatment. *See* 49 U.S.C. § 20109(a). The FRSA provides, in relevant part, that:

A railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor or 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 ...

(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...

49 U.S.C. § 20109(a)(4). The 2008 amendments to the FRSA further provide that:

(1) A railroad carrier or person covered under this section may 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 hospital where the employee can receive safe and appropriate medical care.

(2) 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. §§ 20109 (c)(1)-(2).

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. At the adjudicatory stage:

The Secretary may determine that a violation ... has occurred only if the complainant demonstrates that any [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint [and] Relief may not be ordered ... if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant’s protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,⁷ and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event). In order to meet his burden under the FRSA, Mr. Johnson must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) BNSF Railway Company knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action. *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007).⁸

As noted above, to prevail, a complainant must demonstrate that: (1) his employer is subject to the Act and he is a covered employee under the Act; (2) he engaged in protected activity, as statutorily defined;⁹ (3) he suffered an unfavorable personnel action;¹⁰ and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No.

⁷ An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009); *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008), *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

⁸ Although I list the knowledge requirement as a separate element, I note the ARB recently reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

⁹ By its terms, FRSA defines protected activities to include acts done “to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee.”

¹⁰ The term “unfavorable personnel action” includes making charges against an employee in a disciplinary proceeding and suspending, terminating, placing on probation or making notes of reprimand on an employee’s record.

2004-AIR-11 (ARB June 29, 2007). The term “demonstrate,” as used in AIR 21 and FRSA, means to prove by a preponderance of the evidence.” Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by “clear and convincing evidence” that it would have taken the same unfavorable personnel action in the absence of Complainant’s behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv).

The parties have stipulated that Respondent is a “railroad carrier” and Complainant is a covered “employee” within the meaning of 49 U.S.C. 20109(a). Respondent also concedes Complainant’s dismissal from employment on October 18, 2012 qualifies as an “adverse employment action.” The issue, then, is whether Complainant engaged in protected activity and, if so, is there a causal link between the protected activity and the adverse employment action.

Protected Activity

In order to prevail on his claim under the FRSA, Complainant must initially make a *prima facie* showing that (1) his reporting that he was too ill to work and asking to go to the hospital constituted protected activity; (2) that Respondent was aware of his protected activity; (3) that Respondent took an adverse employment action against him by terminating his employment; and (4) that his protected activity was a contributing factor in Respondent’s decision to terminate his employment. If Complainant satisfies his *prima facie* case by a “preponderance of the evidence,” the burden shifts to Respondent to demonstrate by “clear and convincing evidence” that it would have laid off Complainant even absent the protected activity. 49 U.S.C. §§ 20109(2)(A)(i); 42121(b)(2)(B)(iii)(iv). To constitute protected activity under AIR21, a complainant’s complaints must relate to a regulation or order, must be specific, and must be reasonably believed by the complainant. *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 (ARB July 2, 2009). The ARB has further instructed ALJs that the governing law for determining whether an activity is protected under AIR21 requires findings on whether: (1) the complainant genuinely believed that there was or would be a violation or alleged violation of an order, regulation or standard, or a Federal law; (2) the concern was objectively reasonable in the circumstances; and (3) the complainant expressed his concern “in a manner that was ‘specific’ with respect to the ‘practice, condition, directive or event’ giving rise to the concern. *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14. (ARB July 31, 2006).

Complainant essentially submits that he engaged in protected activity on June 14, 2012 by telling his supervisor he was too ill to work and asking that he be taken to the hospital for treatment, which he further argues was delayed. The FRSA defines protected activity to include acts done to notify, or attempt to notify, the railroad carrier of a work-related illness and requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician. 49 U.S.C. § 20109(a)(4), 20109(c)(2). The FRSA further prohibits employers from delaying or interfering with medical treatment of an employee who is injured during the course of employment. 49 U.S.C. § 20109(c)(1). The evidence establishes neither.

First, Complainant's illness was not work-related as required under the statute. 49 U.S.C. § 20109(a)(4), 20109(c)(1). Complainant admits that he arrived to work on June 14, 2012 after working in his yard in the excessive, 100 degree, heat. While he did not initially appear in distress, the symptoms he subsequently experienced, including hot and cold sweats, clammy skin and the shakes, were the result of dehydration caused by working in his yard, and not a work-related illness. In this case, Complainant reported to work, and honestly believed he was able to work after working in his yard at home and becoming dehydrated. In other words, while Mr. Johnson believed he was capable of performing his duties when he reported for work on June 14, 2012, the fact is he was in a state of extremis shortly after arriving at the train yard, the result of overexertion in the heat at his home earlier in the day and nothing related to or occurring on his job.¹¹

Regardless, even if the physical manifestation of Complainant's illness began after reporting for work, Respondent's agents were already aware of Complainant's physical condition after he arrived at the train yard and before Complainant said anything, noting he was trembling, pale, grey-skinned and bloodshot eyes. Complainant did not initially notify, or attempt to notify, Respondent of any work-related illness, understandable given that he believed he was capable of performing his duties as a train engineer. It was not until Respondent asked about his well-being a third time and requested a drug test, did Complainant seek medical treatment.

Additionally, Complainant declined offers of medical treatment on two separate occasions, indicating he [Complainant] believed he was capable of working. It was only after the test collector expressed concerns about Mr. Johnson's condition, that Complainant agreed to the medical treatment and the trainmaster took him to the hospital. Respondent did not refuse Complainant's requests to seek medical attention or deny or prevent him from getting medical treatment.

Consequently, I find Complainant has not proven by a preponderance of evidence that he engaged in protected activity i.e. that (1) he genuinely believed that there was or would be a violation or alleged violation of an order, regulation or standard, or a Federal law; (2) the concern was objectively reasonable in the circumstances; and (3) the complainant expressed his concern "in a manner that was 'specific' with respect to the 'practice, condition, directive or event' giving rise to the concern. *See Rougas*, slip op. at 14.

Contributing Factor Analysis

Even assuming Complainant engaged in protected activity on June 14, 2012 by reporting a work related illness and requesting medical treatment, I find no connection to his subsequent dismissal from the railroad. To establish causation, Complainant need only show that his report

¹¹ This is not to say that the injury or illness itself must occur while on-duty to constitute protected activity. In *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013), the court noted that "[h]ad Congress intended to limit railroad employee protection from discipline for following doctor's orders only in circumstances stemming from injuries that occurred during the 'course of employment' or on-duty injuries, 'it presumably would have done so expressly as it did in the immediately [preceding] subsection [(c)(1)].'" Therefore, while a complainant's excused absences from work under doctors' orders for a non-work related injury may be protected, that is not the case here, as complainant was not under doctor's orders as outlined in § 20109(c)(1).

of illness and request for medical treatment was a contributing factor in the unfavorable personnel action, “not a substantial, significant or even predominant one.” *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, ___ F.3d ___, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). In other words, whether or not the protected activity is a “contributing factor” in a FRSA whistleblower case is not a demanding standard. A “contributing factor” means “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of a decision.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed.Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989)). Complainant need not demonstrate the existence of a retaliatory motive on the part of Respondent in order to establish that his disclosure of the work place injury was a contributing factor to his dismissal. *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (“A prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive.”). Additionally, the question is not whether BNSF had a good reason for its adverse action, but whether the prohibited discrimination 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. *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013).

The evidence demonstrates that BNSF’s decision to terminate Mr. Johnson on October 18, 2012 was not based in any part on the events of June 14, 2012. Complainant was already required to participate in the EAP because of his prior DUI, which occurred well before the events of June 14, 2012. The requirement that Complainant participate in EAP, and the letter acknowledging such, including the requirement to attend group sessions and notify his substance abuse counselor of any absences, existed before the events of June 14, 2012 and Complainant would have been required to attend EAP group sessions whether or not he requested medical treatment or reported a work related illness on June 14, 2012. Complainant thereafter missed group sessions the week of August 20th and September 3th and did not notify his substance abuse counselor of the absences. The first time Complainant rescheduled was the group session the week of September 10 when he scheduled an individual session for the same day. However, that effort, albeit commendatory, does not excuse the missed group sessions and Complainant’s failure to notify his substance abuse counselor of the absences.

Simply put, Complainant’s reporting of a work related illness or requesting medical treatment on June 14, 2012 did not set in motion the chain of events eventually resulting in the allegation of rules violation and is not inextricably intertwined with the eventual adverse employment action. *See DeFrancesco v. Union Pacific Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). *See also Ray v. Union Pacific R.R. Co.*, 2013 WL 5297172, ___F.Supp.2d ___ (D. Iowa 2013)(“If [Complainant] had not reported the alleged work-related injury, [Respondent] would not have undertaken an investigation into either the honesty of [Complainant’s] statement . . . or the timeliness of [his] injury report, and Complainant would not have been terminated.”) The requirement for Complainant to participate in the EAP came from his prior DUI, not suspicions of alcohol or drug abuse on June 14, 2012.

The evidence does not support a finding that Employer’s decision to terminate Complainant was based, even in part, on the reporting of any June 14, 2012 work-related illness and requesting medical treatment. Rather, the evidence shows that BNSF dismissed Complainant

because he missed two required group sessions as part of his mandated EAP, unrelated to the events of June 14, 2012.

BNSF honestly and reasonably believed at the time of the decision to terminate Complainant that he had missed two group sessions without permission from his substance abuse counselor, which violated Rule 1.13. Given that this was Complainant's third level S violation while on probation, it was a dischargeable offense. It was not a report of illness or request for medical treatment that caused or contributed to Complainant's dismissal but that BNSF had a good faith belief that Mr. Johnson did not satisfy the requirements of the EAP contracts with BNSF and First Take.

The Federal Railway Safety Act protects employees from adverse personnel action who report illnesses and request medical treatment. The FRSA does not protect employees from poor personnel decisions. The issue in this case is not whether Complainant should have been dismissed at all but whether the dismissal was in retaliation for reporting a work related illness and requested medical treatment. While Complainant did suffer an adverse employment action when he was discharged from BNSF, any "protected activity" was not a contributing factor to it.

Missing EAP mandated group sessions is a legitimate non-discriminatory reason for terminating Complainant. I find no competent evidence that BNSF used the report of illness and requested medical treatment as a pretext to his discharge. Complainant was an otherwise good employee that the company invested much to train. But missing group sessions as part of a substance abuse program is a dischargeable offense. There is no evidence BNSF harbored some animus against Complainant or that this case establishes a pattern of retaliation and continuing conduct.

When setting aside hyperbole and indignation, this case basically requires me to answer a single question – at the time the decision was made, why did BNSF fire Randal Johnson? If it was, even in part, for reporting a work-related illness and asking for medical treatment, then BNSF violated the FRSA and Mr. Johnson is entitled to relief. If not, then Mr. Johnson may have a claim, just not under the FRSA. I find the latter.

The evidence demonstrably shows that BNSF fired Complainant for missing two required group sessions mandated as part of his EAP contract and not contacting his substance abuse counselor to notify her of the absences and scheduling individual sessions. Even if Complainant honestly believed he had permission from the program director to miss the two sessions, that arrangement violated the specific terms of the contract and does not change the fact that the reason why he was terminated was for unapproved absences from mandatory group sessions and not receiving permission from his designated substance abuse counselor. That may seem unfair to Complainant but the issue before me in this case is not whether Complainant's termination was unfair but whether it violated the FRSA.¹² While Complainant may reasonably argue that dismissal was not an appropriate remedy given his, albeit unreasonable, belief that he had permission to miss group sessions from the program director, the fact remains that Complainant

¹² The [FRSA] does not forbid sloppy, mistaken, or unfair terminations; it forbids retaliatory ones." *Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013). *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012).

violated the terms of his EAP contract and “an Employer can fire an employee for a good reason, a bad reason, or for a reason based on erroneous facts” as long as that reason is not in retaliation for reporting a work-place illness or requesting medical treatment. *Malacara v. City of Madison*, 224 F.3d 727, 731 (7th Cir. 2000).¹³ Such is the case here.

CONCLUSION

Complainant has not demonstrated by a preponderance of the evidence a prima facie case under the FRSA, that is: he engaged in protected activity, or, assuming so, that his engagement in the protected activity contributed to his dismissal. Consequently, I find that Respondent did not violate the employee protection provisions of the Federal Railway Safety Act.

ORDER

Accordingly, it is hereby **ORDERED** that the Complainant’s complaint against Respondent is hereby **DISMISSED**.

SO ORDERED:

STEPHEN R. HENLEY
Administrative Law Judge

¹³ See also *Clement v. Milwaukee Transp. Servs. Inc.*, ARB Case No. 02-025 (ARB Aug. 29, 2003)(“[a]n employer’s discharge decision is not unlawful if it is based on a mistaken conclusion about the facts; the decision must be motivated by retaliation”).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).