U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 December 2020

Case No.: 2014-FRS-00099

In the Matter of:

WAYNE LAIDLER,
Complainant,

v.

GRAND TRUNK WESTERN RAILROAD CO.,
Respondent.

Appearances: Robert B. Thomson, Esq.
Robert E. Harrington, III, Esq.
For the Complainant

Andrew J. Rolfes, Esq.
For the Respondent

Before: Carrie Bland
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (October 16, 2008), and the FRSA regulations issued at 29 C.F.R. Part 1982.

Procedural History

On March 7, 2014, Complainant filed a complaint and alleged illegal discrimination by Respondent, alleging that Respondent terminated his employment in reprisal for refusing to perform an assigned task, that of performing a roll-by inspection of an oncoming train from the ground, due to hazardous conditions. On May 7, 2014, the Regional Administrator, Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"), issued an Order finding that Respondent had violated the FRSA and awarding benefits to Complainant.

Respondent requested a hearing before the Office of Administrative Law Judges ("OALJ") on May 20, 2014. On March 4 – 5, 2015, a hearing was held before Judge Christine Kirby in Detroit, Michigan. On August 13, 2015, Judge Kirby issued a Decision and Order awarding benefits to the Complainant. Respondent requested review by the Administrative Review Board ("ARB" or "Board") on September 1, 2015.

On August 9, 2017, the ARB issued a Decision and Order of Remand ("Board D & O"), remanding the case to the OALJ. The case was assigned to the undersigned[1] on November 9, 2017.[2] On March 29, 2018, I issued a Notice of Assignment and Order for Position Statements. I received position statements from Complainant as well as Respondent on June 15, 2018.

Issue on Remand

The Board vacated Judge Kirby's Decision and Order and remanded the case to OALJ for reconsideration of the following issue:[3]

> Whether or not it was possible for [Complainant] to notify [Respondent] of his intention not to perform an on-the-ground roll-by inspection because of the hazardous terrain, after taking into consideration [Complainant's] and Freeman's testimony seemingly indicating that such notice was possible. The remand decision issued as a result necessarily must provide an explanation of the ALJ's reasoning supporting [her] determination, including an explanation as to what evidence was relied upon, and why, and as to what evidence was not relied upon, and why.

Board D & O at 11. Distilled to its essence, the Board remanded the matter for the sole purpose of reconsideration of whether Complainant engaged in protected activity after analyzing and reconciling the witnesses' testimony regarding whether or not it was possible for Complainant to notify Respondent of his intention not to perform an on-the-ground roll-by inspection because of the hazardous terrain.[4]

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[1] Judge Kirby is no longer an ALJ with the Department of Labor thus the matter was reassigned.

[2] On October 5, 2017, Respondent filed a Motion for Judgement as a Matter of Law on Remand and a Memorandum of Law in support thereof. However, at the March 27, 2018 telephone conference, the parties agreed that the issues on remand should be addressed by formal briefing from the parties and a decision by the undersigned. I therefore deny as moot Respondent's Motion for Judgement as a Matter of Law.

[3] At the March 27, 2018 telephone conference, the parties also raised the issue of the remedies awarded in Judge Kirby's decision and order. Without a ruling on the issue of protected activity, I determined that the issue of remedies was not ripe for discussion, and was more appropriately raised on appeal should the Complainant again prevail in proving his claim.

[4] The Board affirmed Judge Kirby's determination "that there was no reasonable alternative available to [Complainant] to refusing to perform a roll-by inspection from the ground to comply with Rule 523." Board D & O at 9. The Board further noted:

> [Respondent] has not challenged the ALJ's further findings that [Complainant]'s protected activity, if established, was a contributing factor to his termination and that [Respondent] failed to prove by clear and convincing evidence that it would have dismissed [Complainant] in the absence of his protected activity. Thus, those findings are affirmed, and thus are not subject to reconsideration should the ALJ, upon remand, again find that [Complainant] engaged in FRSA-protected activity.

Discussion

Pursuant to 49 U.S.C. § 20109(b)(2) the FRSA requires that the employee refusing to work under hazardous conditions, "*where possible*, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work … unless the condition is corrected immediately …" 49 U.S.C. § 20109(b)(2)(C)(emphasis added).

In its order of remand, the Board noted that Judge Kirby found that Complainant engaged in protected activity, in part, because Judge Kirby found that there was insufficient time for Complainant to notify Respondent of the existence of a hazardous condition and of his intention not to perform the required roll-by inspection. The ARB determined that Judge Kirby made this finding "in apparent disregard of conflicting testimony by [Complainant] and Freeman suggesting that [Complainant] could have notified [Respondent] that they were not conducting the roll-by inspection." Board D & O at 10. Specifically, the Board noted that Complainant testified that "[h]e could have used the radio to contact the yardmaster or crew of the passing train to let them know they were not going to do a roll-by because of unsafe conditions." Board D & O at 4. The Board found that Judge Kirby's "failure here to reconcile [Complainant's] and Freeman's seemingly conflicting testimony with ALJ's finding that it was not possible for [Complainant] to notify [Respondent] that he was not conducting the roll-by inspection raises serious evidentiary questions in need of reconciliation upon remand."[5] Board D & O at 11. Without this analysis, "[t]he Board is currently unable to determine whether the ALJ's finding that [Respondent] engaged in FRSA-protected activity satisfied the requirements of 49 U.S.C.A. § 20109(b)(1)(B)."

Whether Notice to Respondent of the Hazardous Condition was Possible

In his Position Statement, Complainant argues that notification was not possible due to insufficient time. Complainant stated that although both he and Freeman testified that they could have contacted the yardmaster with their radios, there was neither a question asked, nor testimony at the hearing, that the notification requirement could be accomplished in the mere seconds before the other train was passing Complainant's train.

Respondent, in its Position Statement, argues that the evidence presented at the hearing, specifically Laidler and Freeman's testimony, clearly and unequivocally demonstrates that it was indeed possible for Laidler to have provided notice of his intention not to perform a roll-by inspection. "Both of them readily acknowledged that it would have been possible to use the radio to notify [Respondent] that they were not going to do a roll-by inspection of the passing train, and they simply did not do so." Respondent's Position Statement at 7.

Board D & O at 11.

[5] The Board noted, "We say 'seemingly conflicting' because Laidler's testimony (at HT 191) and that of Freeman's (HT 101) is not at all clear, given the brevity of their respective answers in response to the cross-examination questions posed." Board D & O at 11, fn 48.

Judge Kirby noted in her Decision and Order that she "had the opportunity to observe the demeanor of Complainant and Freeman," that she "found their testimony to be consistent, straightforward and complete, without any equivocation, avoidance, or vagueness," and ultimately "found both witnesses to be credible." D & O at 49. I have reviewed the record and find nothing to contradict her credibility determination.

During cross-examination Complainant testified to the following:

Q: Okay. In the early morning of December 15th, 2012, Mr. Laidler, you had a radio that night, right?

A: Yes.

Q: It was in good working order?

A: Yes.

Q: You had no problems with it, no glitches communicating with anybody?

A: No.

Q: Kept in contact with the engineer, Mr. Freeman?

A: Yes.

Q: And you also communicated with the yardmaster, right?

A: Yes.

[…]

Q: Okay. So you see when you get back out on the thoroughfare, and you see the train approach, your testimony was about 500 to 1,000 feet, right?

A: Yes.

Q: Could you have used your radio at that time to contact the yardmaster to say that conditions on the ground were unsafe for you to get down to do a roll-by?

A: I could have used it, yes.

Q: And could you have used the radio to contact the yardmaster to let him know that you were not doing a roll-by because conditions were unsafe?

A: Yes.

Q: But you didn't do that, did you?

A: No.

Q: Could you have used the radio to contact the crew of the passing train to let them know that you had done an inspection from the cab of the locomotive?

A: Yes.

Q: And you didn't do that, did you?

A: No.

Q: And after that train passed, you didn't contact anyone to tell them that you had not done the roll-by because condition on the ground were unsafe, did you?

A: I didn't initially contact anyone, no. No.

Q: In fact, you had no intention of telling anyone that you had not done the roll-by because conditions were unsafe until Mr. Hommerding confronted you about it?

A: Correct.

Q: And if Mr. Hommerding hadn't approached you and asked you why you didn't do it, you weren't going to tell anybody, right?

A: Yeah, I didn't think that I needed to.

Hearing Transcript at 190 - 192.

During cross-examination, Mr. Freeman testified:

Q: Now, your radio was working that night, right?

A: Yes, sir.

Q: So you could have called the yardmaster and told him that you weren't doing the inspection from the ground, right?

A: Why would we tell him – why would call the yardmaster and tell him anything?

Q: I'm asking if you could?

A: Oh, we could, yeah, but we don't need to.

Q: Okay.

A: It's not a rule.

Q: Well, you didn't call anybody and tell them that you weren't doing a roll-by from the ground, right?

A: No, sir. We just didn't do the roll-by.

Hearing Transcript at 101.

After taking into consideration the above testimony, I do not find the above quoted testimony fatal to Complainant's case. Although standing alone the above testimony may seem contradictory, Complainant and Freeman's testimony must be considered in context, taking into consideration all of the testimony elicited. I find the following facts, as found in the prior Decision and Order and affirmed by the ARB to be important when reconciling Complainant and Freeman's testimony:

- Complainant had no warning of an approaching train and did not notice it until it was at most 500 – 1,000 feet away, approaching at track speed.

- Judge Kirby considered Complainant's testimony regarding the approaching train and his inability to hear any train whistle or radio communication warning of an approaching train and noted that Mr. Freeman testified to his estimation of the speed of the train and distance from them when it was first spotted. Based on the evidence, she made the following findings of fact, which I adopt:

  > Accordingly, I find that Complainant had no warning of an approaching train and did not notice it until it was at most 500 to 1,000 feet away, approaching at track speed. [Mr. Phillip] Tassin testified that a train traveling at 40 miles per hour would travel approximately 3,500 feet in one minute. Based on this, I conclude that a train would travel 1,750 feet in 30 seconds, 875 feet in 15 seconds, and 437 feet in 8 seconds. Clearly, if the train was noticed at 500-1,000 feet, as I have found, [Complainant] would not have had sufficient time to eliminate the danger without refusal to perform the work.

  D & O at 56.

I find Judge Kirby's time calculations to be particularly compelling when considering Complainant's and Freeman's testimony regarding the dangerous conditions a roll by on the ground presented due to the terrain, presence of fog, and speed of the unexpected train. Complainant testified on direct examination that because he did not do a roll-by on the ground due to the dangerous conditions and terrain, he did not report anything to the yardmaster at that time.

Hearing Transcript at 147-152. On cross-examination, while acknowledging his radio was in working order and that he could have contacted the yardmaster to notify him that a roll by on the ground was not possible because of the dangerous terrain, it still does not negate the testimony and evidence that because of the speed of the unexpected train, it was not possible to radio the yardmaster in sufficient time, safely. Stated another way, while it is correct that Complainant's radio was in working order and that he could have called the yardmaster on the night in question as testified in cross-examination, Complainant would not have had time to call the yardmaster before the train passed to inform him that a roll by was not possible because of the dangerous terrain. Any call would have been futile as it would have been after the train had already passed.

I find Freeman's testimony on cross-examination similar to Complainant testimony. On cross-examination, after agreeing that his radio was in working order, Freeman indicated that he did not call the yardmaster as they did not do the roll-by. This is further explained by his testimony on direct examination where, consistent with Complainant's testimony, Freeman testified that it was not possible to do a roll by on the ground safely because of the dangerous conditions and lack of time due to the unexpected on-coming train. Hearing Transcript at 48-59. As they did not do a roll by as it was not possible due to these safety concerns, they did not call the yardmaster.

Simply put, as Complainant and Freeman did not do a roll by because of the dangerous terrain and the speed of the train, he did not call the yardmaster even though he had the capability to do so. Any communication would have been futile at that point in time as the train would have already passed before Complainant could have called the yardmaster.

CONCLUSION

For the foregoing reasons, I conclude that it was not possible for Complainant to notify Respondent of the existence of the hazardous condition and his intention not to perform the work unless the condition was corrected immediately.

ORDER

Accordingly, it is hereby **ORDERED** that the relief sought by Complainant, and the remedies[6] outlined in the prior Decision and Order issued by Judge Kirby are **GRANTED.**

SO ORDERED.

CARRIE BLAND
District Chief Administrative Law Judge

Washington, D.C.

[6] Pursuant to the ARB remand order, any back pay award in this case be made in accordance with 29 C.F.R. § 1982.110(d), to be compounded daily.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fourteen (14) days** of the date of issuance of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. §§ 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).

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Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then

have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf and the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

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