



**Issue Date: 09 November 2015**

Case No.: 2014-FRS-00155

In the Matter of

**CHRISTOPHER MCCULLOUGH,**  
Complainant,

v.

**BNSF RAILWAY CO.,**  
Respondent.

Appearances: William Kvas, Esq.  
Jayson D. Nelson, Esq.  
For the Complainant

Joanne R. Bush, Esq.  
David M. Morrell, Esq.  
For the Respondent

Before: Steven B. Berlin  
Administrative Law Judge

### **DECISION AND ORDER**

This is an action under the whistleblower protection provision of the Federal Rail Safety Act (FRSA or the Act), 49 U.S.C. § 20109. The parties agreed that they do not dispute the material facts; their dispute is one of law. They waived a hearing and asked that I decide the case on written submissions.<sup>1</sup> I have considered the parties' submissions and find the claim without merit.

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<sup>1</sup> In a letter dated July 22, 2015 (filed July 27, 2015), Complainant's counsel characterized the parties as agreeing to dispose of the case through cross-motions for summary decision. Curiously, Complainant filed an opposition to BNSF's motion but referred to it as an opposition and not a cross-motion. He did not request a favorable ruling on the merits. I would not have vacated the hearing to allow BNSF to file a unilateral motion for summary decision: Any such motion would have been due well-before the hearing. I understand from this that Complainant also seeks a decision on the merits in his favor and that the matter is essentially submitted on a written record with agreed facts.

## Introduction and Procedural History

This case concerns BNSF's application of a "no fault" attendance policy. Under the policy, any employee who takes more than three sick leaves in a three-month rolling period is subject to progressive discipline. Complainant took a fourth sick leave in a three-month rolling period, and BNSF imposed a 10-day "record suspension."

Complainant alleges that BNSF violated the Act. He asserts that he called in sick because it would be unsafe for him to work and that he took the time off under his doctor's orders or following his doctor's treatment plan. BNSF disputes that the Act protects Complainant's activity and asserts that, in any event, it would have imposed the discipline regardless of any protected activity because it was simply applying its non-discriminatory attendance policy.

## Facts

The parties do not dispute the facts. BNSF is a covered railroad carrier. At all relevant times, it employed Complainant as a freight conductor in its Ottumwa, Iowa terminal. Dep. 29:6-7, 30:3-6, 47:13-48:6.<sup>2</sup>

On November 15, 2013, Complainant began feeling sick but continued to work. Dep. 114:20-116:7. On either November 16 or 17, 2013, his supervisor, Eric Campbell, noticed that Complainant was having difficulty talking to the dispatcher because he had lost his voice. Dep. 117:12-118:11; R.Ex. O at 11:23-12:1. Complainant told Campbell that if he didn't start to feel better, he would go to the doctor. Dep. 118:14-24.

On November 18, 2013, Complainant was feeling very sick and "couldn't think straight." Dep. 127:8-14. At 11:22 a.m., he went online from home and entered a code at the BNSF site to lay off for the day. Dep. 136: 8-21. Some time that day he texted Campbell, stating: "Going to the doctor, let me know if you want me to bring a doctor's note to you or whatever."<sup>3</sup> Dep. 122:24-123:15. Campbell responded that he should drop the note off later that day. *Id.* at 132.

Complainant drove to a 3:15 p.m. appointment with Dr. Cynthia Barinsky, whom he'd never seen before. Dep. 120:24-121:19, 122, 125:10-15. He testified at his deposition that he felt it was safe for him to drive. *Id.* at 127. Dr. Barinsky diagnosed bronchitis but said that Complainant could go back to work the next morning "without any restrictions." *Id.* at 128:5-12; R.Ex. M. She offered Complainant a note for having taken off the day (November 18, 2013), and he accepted. Dep. at 128:13-17; R.Ex. M. As he was not scheduled to work for the next two days, he returned to work on November 21, 2013. Dep. 133:14-20.

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<sup>2</sup> I cite the deposition of Complainant as "Dep." I cite Respondent's exhibits as "R.Ex."

<sup>3</sup> At his deposition, though uncertain, Complainant said he believed that he texted Campbell around the time he went online to lay off for the day. *Id.* But in a statement to OSHA five months before the deposition, he said he contacted Campbell after he met with the doctor in the afternoon (at a 3:15 p.m. appointment). R.Ex. L at 308.

Complainant's absence from work on November 18, 2013, was his fourth absence in a three-month running period. R.Ex. K. It violated BNSF's attendance policy, which allows up to three absences (of 0 to 25 hours each) within a three-month timeframe. R.Ex. C at 191-92. Under the policy, additional absences subject the employee to progressive discipline. *Id.* at 193.

Consistent with its policy, BNSF issued a notice of investigation and held a formal investigation hearing on January 3, 2014. R.Ex. N, P. Complainant did not dispute the violation. R.Ex. O at 16:20-24. On January 8, Respondent issued Complainant a 10-day record suspension and a one-year review period. R.Ex. P. It appears that a "record suspension" means that the suspension is recorded in Complainant's personnel file and could affect later progressive discipline, but the workers serves no actual suspension and loses no wages.

Complainant filed a timely complaint with OSHA, alleging that BNSF retaliated when he was following a medical treatment plan. R.Ex. F. at 2.

### Discussion

To show a *prima facie* case, a complainant must show that he: (1) engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.<sup>4</sup> *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008). If he meets this burden, he is entitled to relief unless the employer shows by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); *see also Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 5 (Dec. 31, 2007); *Hafer v. United Airlines, Inc.*, ARB No. 06-017, slip op. at 4 (Jan. 31, 2008). I consider the evidence *de novo*. *See* 29 C.F.R. § 1982.107(b).

Complainant's claim fails because he did not engage in activity the Act protects. He argues that the Act protected him in two ways. First, it prohibits a covered railroad from suspending an employee for "refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties." 49 U.S.C. § 20109(b)(1)(B). Second, the Act prohibits discipline of an employee "for following orders or a treatment plan of a treating physician." 49 U.S.C. § 20109(c)(2). Neither applies to the facts here.

#### I. Complainant Did Not Engage in Protected Activity.

##### A. Complainant Failed to Show that a Hazardous Safety or Security Condition Confronted Him.

To come within the Act's protection for a refusal to work when confronted by a hazardous condition, the worker must show that:

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<sup>4</sup> The Federal Rail Safety Act incorporates by reference the rules and procedures applicable to whistleblower cases under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). 49 U.S.C. § 20109(d)(2)(A).

- (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
- (B) a reasonable individual in the circumstances then confronting the employee would conclude that-
  - (i) the hazardous condition presents an imminent danger of death or serious injury; and
  - (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
- (C) the employee, 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 or the equipment, track, or structures are repaired properly or replaced.

49 U.S.C. § 20109(b)(1)(B), (b)(2).

It appears that this provision is addressed to the condition of the railroad and its equipment, not the illness of the worker claiming privileged activity. But more to the point, the record here shows no more than that Complainant's supervisor saw that Complainant was having difficulty talking because he'd lost his voice; Complainant told the supervisor that, if his health did not improve, he'd go to the doctor; and the next day, he said he was going (or went) to the doctor. He saw the doctor that afternoon, and she advised him that he could go right back to work the next morning. Nothing about this includes Complainant's notifying BNSF of a hazardous condition that "presents an imminent danger of death or serious injury." *See* 49 U.S.C. § 20109(b)(2)(B)(i), (b)(2)(C). To the contrary, Complainant himself apparently didn't believe his condition presented such a hazard: He felt that it was safe for him to drive a motor vehicle on the public roads when he went to the doctor that afternoon. And he offers no argument that a reasonable person in the circumstances would conclude that there was an imminent danger of death or serious injury. Complainant has failed to show protected activity under this provision.<sup>5</sup>

## II. Complainant Was Not Following a Treating Physician's Orders or Treatment Plan.

The Federal Rail Safety Act provides:

### (c) Prompt medical attention.--

(1) Prohibition.--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.

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<sup>5</sup> Respondent also asserts that Complainant failed to raise this theory in his OSHA complaint and never mentioned it during the litigation until he filed his opposition to Respondent's closing brief. As I have reached the merits, I do not rule on the pleading argument.

(2) Discipline.--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).

Complainant relies on subsection (2) of this provision and asserts that BNSF gave him the record suspension for following the orders or treatment plan of his treating physician. His argument fails for two reasons.

First, Complainant took off the day in question when he did not go to work and then went online at 11:22 a.m. to lay off for the day based on illness. He did not see his doctor until 3:15 p.m. that afternoon at the earliest and had never seen her before. He thus was not following her orders or treatment plan when he took the day off. Had he worked until after seeing the doctor, the result could differ, but that is not what happened.

Second, Complainant's argument fails because the protection in subsection (2) applies only to doctor's orders or treatment plans for work-related injuries. *See Port Authority Trans-Hudson Corp. v. Bala*, 776 F.3d 157 (3d Cir. 2015).<sup>6</sup> As the Third Circuit observed, the requirement that the doctor's orders or treatment plan be for a work-related injury is not expressly stated in subsection (2) but instead is taken from the overall context of the statute as well as the particular language in subsection (1). *See* 49 U.S.C. § 20109(c)(1).

The Federal Rail Safety Act is aimed at protecting the public and rail workers' safety and security. Congress recognized that rail workers often are the only people who are likely to observe safety or security risks. Protecting workers who report these conditions from an employer's retaliation is crucial to achieving Congress' purpose.

Some of the safety risks appear when a worker suffers an injury. Informed of the injury, the railroad can investigate and determine if an unsafe condition needs to be remedied. But if the worker will be subjected to discipline for reporting the injury, there will be a chilling effect, and an unsafe condition might be allowed to persist. Thus, Congress protected against retaliation workers who report injuries. The protection extends to the report of the injury, the

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<sup>6</sup> The conduct involved here was in Iowa, and Complainant lives in Iowa. In the absence of Supreme Court authority, the Eighth Circuit and the Administrative Review Board supply controlling authority.

need for immediate treatment, and the need for continuing treatment. The treatment-related protections are the subject of 49 U.S.C. § 20109(c).

What Complainant seeks to do here is to extend these protections to illnesses that bear no relationship to the conditions and operation of the railroad – that is, to go beyond workplace injuries. While it is correct that the subsection on ongoing treatment plans does not expressly limit itself to treatment for workplace injuries, I find persuasive the Third Circuit’s extensive analysis in *Bala*. If Congress had intended to mandate a revamping of all railroad sick leave policies for illnesses not related to work, it would have discussed this question in the legislative history and stated something explicitly about it in the statute. As the court observed, Congress does not hide elephants in mouse holes.

Three ALJs deciding cases outside the Third Circuit have recently found *Bala* persuasive and applied it as I do here. *See Stokes v. CSX Transp., Inc.*, ALJ No. 2014-FRS-51 (ALJ Apr. 9, 2015) (finding *Bala* persuasive and holding that section 20109(c)(2) is “limited to treatment for injuries and illnesses occurring while an employee is on duty”; complainant’s seeking treatment for non-work related injuries is unprotected); *Hunter v. CSX Transp., Inc.*, ALJ No. 2014-FRS-128 (ALJ Mar. 24, 2015) (granting respondent’s motion to dismiss complaint – which did not allege any on-duty injuries – after finding the Third Circuit’s reasoning in *Bala* to be persuasive and “correct”); *Wager v. CSX Transp., Inc.*, ALJ No. 2014-FRS-30 (ALJ Mar. 9, 2015) (applying *Bala* and holding the complainant’s claim “must fail under (c)(2)” because he could not establish that his cough was work-related). Complainant has cited no authority to the contrary, and I am aware of none.<sup>7</sup>

Accordingly, Complainant failed to show protected activity under 49 U.S.C. § 20109(c).

## II. BNSF Might Need to Modify Its Practices under Its Attendance Policy.

I do not reach BNSF’s argument that, absent protected activity, it would have still suspended Complainant. But BNSF needs to examine its no-fault attendance policy. The policy expressly lists many exceptions. Some are legally mandated, such as the exclusion for workers who are required to take time off time for jury duty. It does not appear, however, that workers protected under 49 U.S.C. § 20109(c) or otherwise protected under the Federal Rail Safety Act are on the list of those excluded from discipline.

To the extent the policy is a product of collective bargaining, the Railroad and Union should modify the policy promptly; if the policy is unilateral, BNSF should modify it. The policy will not insulate BNSF from liability if it imposes discipline on an employee who is engaging in activity the Act protects. As BNSF should now be aware of this if it was not before,

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<sup>7</sup> Of course, the ARB’s decision is *Bala*, having been reversed, is not controlling.

discipline of a protected worker in the future could result in punitive damages. *See* 49 U.S.C. § 20109(e)(3).

### Conclusion and Order

For the foregoing reasons, Complainant's claim is DENIED and his case DISMISSED.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge

**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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

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, 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 filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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. If you e-File your reply brief, only one copy need be uploaded.

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).