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Issue Date: 16 November 2015

CASE NO.: 2015-FRS-00017

In the Matter of:

GILBERT CENICEROS,
Complainant,

vs.

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

APPEARANCES:

DENISE CENICEROS
For the Complainant

JEROME D. RYBARCZYK, ESQ.
For the Respondent

Before Christopher Larsen
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a whistleblower claim under the Federal Rail Safety Act (“FRSA”), 49 U.S.C. §20109, which went to hearing before me in Long Beach, California, on July 14, 2015. The Complainant, Gilbert Cenicerros, appeared at the hearing, represented by his wife, Denise Cenicerros, who is not an attorney. Respondent appeared through its counsel Jerome D. Rybarczyk. The court heard testimony from witness-

es and received in evidence Claimant's Exhibits ("CX") 1-21 and Respondent's Exhibits ("RX") A-L.¹ Additionally, the parties have submitted post-hearing briefs.

Mr. Cenicerros was employed as special agent with Amtrak's Office of Inspector General. Amtrak terminated his employment in 2011, ostensibly as part of a reorganization in the Inspector General's office. Mr. Cenicerros alleges the real reason for his termination was that he had reported an accident, and alleges his termination was accordingly prohibited under 49 U.S.C. §20109, subsection (a)(4), which prohibits a railroad carrier from discharging an employee for notifying it of a work-related personal injury. In this hearing, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") imposes a statutory burden of proof. 49 U.S.C. §20109(d)(2)(A)(i). Under this standard, a complainant must show, by a preponderance of the evidence, that 1) he engaged in "protected activity" under FRSA; 2) the employer knew he engaged in protected activity; 3) the complainant suffered an unfavorable personnel action; and 4) the protected activity was a contributing factor in the unfavorable action. Once the plaintiff shows the protected activity was a contributing factor in the unfavorable personnel action, the burden of proof shifts to the employer to show, by clear and convincing evidence, that it would have taken the same unfavorable personnel action notwithstanding the protected activity. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157-158 (3d Cir. 2013).

I consider each element in turn.

1. Mr. Cenicerros Engaged in Protected Activity

At the hearing, Mr. Cenicerros testified that he was injured on the job one day in November or December, 2010 (TR p. 69, lines 4-15; p. 71, lines 6-20), when he fell while trying to retrieve some records from a storage room (TR p. 27, line 7 – p. 28, line 12). He reported the accident to Wayne Stovall (TR p. 29, lines 10-18). Mr. Stovall, who also testified at the hearing, was Mr. Cenicerros' immediate supervisor at Amtrak (TR p. 13, lines 19-23). According to Mr. Stovall, Mr. Cenicerros had telephoned him at home, when Mr. Stovall himself was on vacation, and reported the accident to him (TR p. 14, lines 4-17). Thereafter, Mr. Stovall reported the accident and injury to his own supervisor, Hamilton Peterson (TR p. 14, line 24 – p. 15, line 3). I find this testimony credible. Under 49 U.S.C. §20109, subsection (a)(4), this report comprised protected activity.

¹ The Notice of Hearing in this matter, dated February 5, 2015, included a Pre-Hearing Order requiring the parties, *inter alia*, to deliver a copy of all exhibits upon which the party intended to rely at the hearing to the opposing party, *but not to the court*, at least ten days before the hearing. Those exhibits were to have been marked according to instructions set forth in the Pre-Hearing Order, with an accompanying Exhibit Index. Both parties served their exhibits on the court before the hearing (TR p. 5, line 8 – p. 7, line 13), although Claimant's Exhibits were not marked in conformance with the Pre-Hearing Order, and included no index.

Mr. Cenicerros also testified that some time after it occurred, he reported the accident to Terry Gilmore (TR p. 34, lines 3-10). Mr. Cenicerros does not know Mr. Gilmore's title or his position at Amtrak (TR p. 32, lines 13-18). He called Mr. Gilmore because another person, whose identity Mr. Cenicerros no longer remembers, identified Mr. Gilmore as the proper person to call (TR p. 34, lines 10-20). Later, Mr. Cenicerros exchanged some e-mail messages with Mr. Gilmore. Copies of various e-mails between Mr. Gilmore and Mr. Cenicerros were presented at the hearing, dated generally from June 19, 2011, until July 13, 2011 (CX 7, 8). In these messages, Mr. Cenicerros requests assistance in obtaining the proper form for reporting his injury, Mr. Gilmore suggests how he can obtain it, and Mr. Cenicerros complains that Mr. Gilmore's suggestions are not panning out. Ultimately, the messages suggest that Mr. Cenicerros has in fact received the form and returned it, and Mr. Cenicerros complains about the delay in processing the claim, while Mr. Gilmore reassures him that it is "under review." I find this testimony credible and the e-mails between Messrs. Cenicerros and Gilmore genuine. These communications, and the submission of the written form, likewise comprise protected activity under 49 U.S.C. §0109, subsection (a)(4).

2. Respondent Knew of the Protected Activity

Mr. Cenicerros has shown that Respondent knew of the protected activity by his own testimony, corroborated by Mr. Stovall's, that he reported the accident and injury to Mr. Stovall, and that Mr. Stovall in turn reported the accident to his own immediate supervisor.² At the hearing, witness Adrian Rish, Amtrak's Assistant Inspector General for Investigations, acknowledged signing a letter which identified Mr. Gilmore as Amtrak's "Principal Officer, Human Capital Management" (TR p. 140, lines 7-22); but in any case, Respondent tacitly acknowledges that Mr. Cenicerros in fact reported the accident (Respondent's Brief and Closing Argument, p. 5, lines 9-13). Accordingly, I conclude Respondent knew of the protected activity before Mr. Cenicerros' termination.

3. Respondent Suffered An Unfavorable Personnel Action

The parties agree Mr. Cenicerros' employment was terminated (TR p. 4, line 23 – p. 5, line 4; Respondent's Brief and Closing Argument, pp. 1-2).

4. The Protected Activity Was Not a Contributing Factor

Adrian Rish became the Assistant Inspector General for Investigations at Amtrak in April, 2010, in which capacity she is responsible for the Inspector General's investigative program (TR p. 126, line 15 – p. 127, line 11). When she was hired, she requested an assessment of the investigative program by an independent

² Respondents suggest this oral report was inconsistent with Amtrak policy requiring a written report of on-the-job accidents (Respondent's Brief and Closing Argument, p. 3, lines 19-27). That may be, but for purposes of the statute, it is protected activity nonetheless.

consultant, Don Hickman (TR p. 127, lines 16-25). In the summer or fall of 2010, Mr. Hickman completed his assessment, and Ms. Rish and her superiors, among other things, decided to reorganize the program, including changing the position descriptions for the organization (TR p. 129, line 10 – p. 130, p. 11). Special agents, including Mr. Cenicerros, were required to watch a video conference originating in Washington, D.C., in 2010, providing information about the reorganization (TR p. 130, line 12 – p. 131, line 14). Mr. Cenicerros acknowledges he watched a video conference, before his accident, during which the reorganization in the Inspector General's office was discussed (TR p. 57, lines 3-19; p. 91, line 10 – p. 92, line 5). According to Ms. Rish, one feature of the reorganization was that its investigators would henceforth be required to complete the Criminal Investigative Training Program or its equivalent (TR p. 131, line 15 – p. 132, line 20). Completion of that course would make the investigators eligible to receive federal statutory law enforcement authority, a delegation of authority they had not previously enjoyed (TR p. 128, lines 3-16; p. 131, line 15 – p. 132, line 20; p. 135, lines 16-25). Mr. Cenicerros' immediate supervisor, Mr. Stovall, also testified that he had learned in 2009 or 2010 of the reorganization within OIG, and that it would require some special agents to undergo additional training in order to keep their jobs (TR p. 19, line 15 – p. 20, line 10).

Ms. Rish further testified that she signed a letter dated April 15, 2011, to Mr. Cenicerros informing him that his special-agent position was being eliminated, and inviting him to apply for a new Amtrak OIG Investigations position, for which completion of the Criminal Investigative Training Program or its equivalent was a prerequisite (TR p. 132, line 25 – p. 135, line 22). Amtrak sent this letter to "several personnel impacted by the reorganization" (TR p. 134, line 24 – p. 135, line 2). Mr. Cenicerros denies that the 2010 video conference included any warning that his own position might be eliminated, but acknowledges receipt of a letter which specifically told him it would be. He does not remember the date of the letter, or when he received it:

JUDGE LARSEN: How did you learn that your position was going to be eliminated – who told you?

THE WITNESS: I think I eventually got a letter, one of the letters that we got.

JUDGE LARSEN: Okay. Did you get the April letter?

THE WITNESS: I don't know. I would have to look at when it came in. I don't remember the dates. I'm not very good with dates.

(TR p. 58, line 14 – p. 59, line 4).³ He applied for the new criminal investigator position, even though he had not completed the Criminal Investigative Training Program (TR p. 94, line 3 – p. 95, line 14).

I find Ms. Rish's testimony credible, all the more so because on certain points Mr. Cenicerros corroborates it. He offers me only two reasons for concluding it is not credible: first, that he does not acknowledge receipt of the April 15, 2011, letter (Claimant's Closing Statement, p. 1); and, second, that someone at Amtrak told him in mid-2011 that he was being fired for "mismanagement" (TR p. 44, lines 8-24).⁴

The testimony I have cited and referenced above demonstrates that the confusion surrounding the receipt, or non-receipt, of the April 15, 2011, letter is attributable entirely to Mr. Cenicerros. Yet he admits, as he must, that some sort of reorganization was going on within OIG, and that he had watched a video conference describing it, even before his 2010 accident occurred (TR p. 57, lines 3-19; p. 91, line 10 – p. 92, line 5).⁵ Mr. Cenicerros also admits that at some time – although he cannot say when – he received a letter from Amtrak telling him his position would be eliminated. These admissions make it virtually impossible for me to conclude that the reorganization was a fabrication created after the accident to justify Mr. Cenicerros' termination. What is more, Mr. Stovall's acknowledgement that he knew, before the accident, that at least some special agents would be required to undergo additional training in order to keep their jobs strongly suggests that the new training requirements were not a pretext, either. Mr. Cenicerros' admissions, and Mr. Stovall's testimony on this point, both are consistent with, and corroborate, Ms. Rish's testimony, which I find credible.

Mr. Cenicerros' testimony about being told he was to be fired for "mismanagement" is quite confusing:

³ At deposition, Mr. Cenicerros acknowledged receiving the April 15, 2011, letter, but did not know when he had received it (TR p. 83, line 5 – p. 85, line 24). At another point during the hearing, he denied ever having received the April 15, 2011, letter at all (TR p. 121, lines 11-22). I find all of this quite consistent with his admission that he is "not very good with dates." Claimant also introduced into evidence a copy of an e-mail dated July 12, 2011, from Michael Ramirez to Mr. Cenicerros, identified as CX6 at the hearing, with attached documents that according to Mr. Ramirez had been sent to Mr. Cenicerros at his home address "via certified mail but returned as unclaimed." This suggests another reason, other than perjury, why Mr. Cenicerros might not have received a letter Amtrak reportedly mailed to him.

⁴ At the hearing, Mr. Cenicerros offered a third reason: that he had been terminated in violation of an Amtrak policy regarding termination of employees on medical leave (TR p. 54, line 24 – p. 55, line 14). But no evidence of such a policy was received in evidence (TR p. 65, line 19 - p. 66, line 20). Whether such a policy would have prohibited Amtrak from eliminating positions in a reorganization of the OIG investigation program is a question that neither party addressed.

⁵ What is more, his immediate supervisor, Mr. Stovall, also testified that he had learned in 2009 or 2010 that the reorganization within OIG would require some special agents to undergo additional training in order to keep their jobs (TR p. 19, line 15 – p. 20, line 10).

Q: Did Amtrak tell you why you were not rehired, when you applied for the job again?

A: Well, if you're asking me when I went – when I returned my things, they said it was – I was let go for mismanagement.

Q: Okay. So it wasn't a reorganization, they told you mismanagement?

A: That's what I was told.

Mr. RYBARCZYK: Objection, Your Honor.

JUDGE LARSEN: What's the objection?

Mr. RYBARCZYK: Leading the witness, again.

JUDGE LARSEN: I'm going to overrule that one.

Who told you, specifically?

THE WITNESS: The gentleman that I can't remember his name, but he came to Los Angeles.

JUDGE LARSEN: All right.

THE WITNESS: Tom – Tom Baran – Tom – Tom Bonner – Tom Barnes, something like that Tom.

JUDGE LARSEN: Okay.

BY MRS. CENICEROS: And what position was he?

A: I don't know. He was up on the – up in the food chain there of supervisors, from Washington.⁶

TR p. 44, line 6 – p. 45, line 3).

⁶ CX 7 includes a July 13, 2011, e-mail from Mr. Cenicerros to Thomas Bonnar, and a July 14, 2011, response from Mr. Bonnar. Mr. Cenicerros refers to a letter from Michael Ramirez and asks “. . . why I am not allowed to ever apply for another Amtrak position again?” Mr. Bonnar replies “I checked into this and my understanding is you may be misinterpreting the letter. *However, because I am not in a position to speak for HR*, I suggest you contact Mr. Ramirez as instructed in the letter. I'm sure he can answer your question” (emphasis added). Assuming this is the same Mr. Bonnar, regardless of his position in the OIG “food chain,” he disavows authority to advise Mr. Cenicerros on personnel matters.

Q: You don't know who actually made the decision to eliminate your special agent position from the OIG, correct?

A: No, other than what Bonner – Bonner told me then at work – I mean at the Amtrak station, that I was being terminated.

Q: That was in July of 2011, correct?

A: Correct – well, I don't know the date. I don't know the date for sure, but it was a summer month, I think, because my kids were off.

Q: Didn't you get a letter, dated June 10th, 2011, indicating that your position was eliminated, effective close of business June 24th, 2011?

A: A letter?

Q: Yes.

A: No. Like I said, there were some letters I never received. I think the first time I heard it is when I heard it from Bonner – Boner – I hope I'm saying his name right.

TR p. 97, line 28 – p. 98, line 14.

Q: So, you're saying that you don't believe you ever received this June 10th, 2011, letter from Mr. Ramirez?

A: I'm trying to remember everything that happened in order. I did receive one letter, but I don't know, exactly, when I received it, and which letter it was.

Q: Because I'm going to tell you that your complaint, filed with OSHA, indicates – right there in the body of that complaint – that you received this June 10th, 2011, letter on July 6th. Is that accurate?

A: I don't remember when. I'm not trying –

Q: You put that in your complaint –

A: – I'm not trying –

Q: – you wouldn't put anything in your complaint that was inaccurate, would you?

A: – well – I don't have all my records in front of me. I mean I would have to go – just like you do – you would have something, a folder, to look through.

Q: But the time you went to the Amtrak station, Union Station, to pick up your personal possessions, that was after July 6th, 2011, right?

A: When I picked up my items, that was after July 6th?

Q: Yes.

A: Okay.

Q: Correct?

A: If that's what you're saying. Yes, I don't recall the date, but I went to Amtrak, yeah, to pick up my things.

Q: So, before you ever got there, you already knew that your position was eliminated?

A: I don't recall. I'm assuming maybe I – I'm getting a little flustered right now, so –

MRS. CENICEROS: Your Honor, can we take a break?

TR p. 99, line 11 – p. 100, line 16.

And finally:

Q: So, Mr. Cenicerros, when you – you had no idea, when you went into the office that day, that your position was eliminated. You just figured they were – did they tell you why they needed your keys and your stuff, did they tell you why you needed to get your belongings – Mr. Bonner, did he tell you anything about that?

A: No. I know some of the offices were getting, you know, furniture and carpeting, and that's what I assumed.

Q: So, you were under the assumption that they wanted you to get your belongings out, because they were redoing the offices, is that correct?

A: Yes. I know some of the offices were getting new furniture, so.

Q: Okay. So – all right.

A: I had no idea.

TR p. 117, lines 5-19.

Thus, Mr. Cenicerros contradicts himself, testifying in one place that Mr. “Bonner” told him he was being fired for mismanagement, and in another that Mr. “Bonner” offered no explanation as to why Mr. Cenicerros needed to remove his personal belongings from the workplace, leaving Mr. Cenicerros to assume it had something to do with new furniture. Even apart from this contradiction, CX 7 indicates that Thomas Bonnar did not consider himself authorized, on July 14, 2011, to speak for the Human Resources department. If the man who spoke of “mismanagement” was a *different* Mr. Bonnar, there is nothing in the record to tell me who he was or what authority he had to make the statement. If it is the *same* Mr. Bonnar, the record includes a statement from him indicating he had no authority to make such a statement. Either way, Mr. Cenicerros’ self-contradictory testimony about being told he was to be fired for “mismanagement” does not detract in any way from Mr. Rish’s credibility.

The uncontradicted evidence shows that before Mr. Cenicerros had an accident at work, plans were underway at OIG to reorganize the investigative program. Ms. Rish, Mr. Stovall, and Mr. Cenicerros himself all testified to that effect. Ms. Rish and Mr. Stovall also testified that one feature of the reorganization was to require some special agents to undergo additional training in order to keep their jobs. Specifically, according to Ms. Rish, agents would be required to complete the Criminal Investigative Training Program so that the Inspector General could delegate federal statutory law enforcement authority to them. Likewise, according to Ms. Rish, Amtrak notified Mr. Cenicerros that he should complete the Criminal Investigative Training Program if he wished to be hired for the new special agent position. Mr. Cenicerros gives me no good reason to question any of this, other than to suggest he might not have received that written notification. But his testimony on this point is so uncertain that it is very difficult for me to conclude he never received it; and even if I did, that conclusion does not contradict the evidence showing that Amtrak sent it, and that it had a legitimate reason for eliminating his position. What is more, Mr. Cenicerros himself admits he did not complete the Criminal Investigative Training Program (TR p. 92, line 6 – p. 94, line 2).⁷ Accordingly, not only does Mr. Cenicerros fail to show, by a preponderance of the evidence, that his report of injury con-

⁷ Both at the hearing (TR p. 45, line 14 – p.48, line 1; CX 17-19) and in his post-hearing brief (Claimant’s Closing Statement, p. 3), Mr. Cenicerros argues he was qualified for the new special agent position, even without having completed the Criminal Investigative Training Program, because he had equivalent experience. But the only opinion he offers on this question is his own. There is no evidence in the record to suggest that Amtrak did, or ought to have, agreed with Mr. Cenicerros on this point.

tributed to his termination; but there is clear and convincing evidence to show it did not.

ORDER

Complainant is not entitled to relief under the Federal Rail Safety Act.

CHRISTOPHER LARSEN
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 (e-File) 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 copies.

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

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).