



Issue Date: 28 June 2016

CASE NO. 2016-FRS-36

IN THE MATTER OF

MATTHEW DUGGER
Complainant

v.

UNION PACIFIC RAILROAD COMPANY
Respondent

RULING ON MOTION FOR SUMMARY DECISION

Procedural Status

This case comes under the Federal Rail Safety Act (FRSA),¹ as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

Complainant filed his whistleblower claim against Respondent with the Occupational Safety and Health Administration (OSHA) on 1 Mar 16. In that complaint, Complainant gave a history of multiple years of alleged protected activities. He also alleged that he had been fired by Respondent and was told it was because he had wrongfully used five UPS labels. He alleged that on 8 Sep 16, he had been prevented from exercising his seniority and marking up in a non-management “agreement” position.

OSHA dismissed the complaint as untimely and Complainant objected and requested a hearing before an administrative law judge. The case was referred to me and after a conference call, I issued a scheduling order.

Complainant then filed his allegations that he had engaged in protected activity and in retaliation Respondent engaged and continues to engage in ongoing adverse actions against him. Complainant alleged that from 2013 through 2015, Respondent denied him 13 promotions. Specifically, Complainant alleged that on 12 Aug 15, he resigned from his management position

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

and that on 9 Sep 16, Complainant was not allowed to exercise his seniority and mark up in a non-management “agreement” position.

Respondent then filed a motion for summary decision and dismissal of the complaint. Respondent argues that there is no genuine issue of material fact that would allow a finding that the initial complaint to OSHA was timely. It submits that the letter it gave to Complainant on 18 Aug 15 was the adverse action that started the 180 day deadline and his 1 Mar 16 complaint to OSHA was untimely. Complainant answered the motion by arguing that the letter was a mere threat and the relevant adverse action for the purpose of timeliness took place when Respondent acted in accordance with the letter and refused to take him back.

I then conducted a conference call with counsel and determined that they essentially agreed on the relevant facts.

Applicable Law

The Federal Rail Safety Act makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition,³ for reporting a work related illness or injury,⁴ “for requesting medical or first aid treatment, for refusing to work when confronted by a hazardous safety or security condition,⁵ or for following orders or a treatment plan of a treating physician.”⁶

The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).⁷ AIR 21 requires a complainant to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (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.⁸ If he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.⁹ A complaint must be filed within 180 days of the alleged retaliatory action.¹⁰

In whistleblower cases, the violation occurs when the employer communicates to the employee its intent to implement an adverse employment decision, rather than the date the employee experiences the consequences.¹¹ However, the employee must have received “final,

³ 49 U.S.C. §20109(b)(1)(a).

⁴ 49 U.S.C. §20109(a)(4).

⁵ 49 U.S.C. §20109(b)(1)(b).

⁶ 49 U.S.C. §20109(c)(2).

⁷ 49 U.S.C. §42121.

⁸ See 49 U.S.C. §42121(b)(2)(B).

⁹ 29 C.F.R. § 1979.109(a); see also *Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

¹⁰ 49 U.S.C. §20109(d)(2)(A)(ii).

¹¹ *Peters v. American Eagle Airlines*, ARB Case No. 08-126 ARB: September 28, 2010); *Sassman v. United Airlines*, 2005-AIR-4 (ARB Sept. 28, 2007); *Halpern v. XL Capital, LTD.*, 2004 SOX 54 (ARB) (Aug. 31, 2005), (citing *Overall v. Tennessee Valley Auth.*, 97-ERA-53 (ARB) (Apr. 30, 2001);

definitive, and unequivocal notice” of an adverse employment decision. “Final” and “definitive” notice denotes communication that is decisive or conclusive, i.e. leaving no further chance for action, discussion, or change. “Unequivocal” notice means communication that is not ambiguous, i.e. free of misleading possibilities.¹²

Parties are allowed to seek a summary decision without a full hearing.¹³ They are entitled to a summary decision if: “the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”¹⁴

Discussion

The only issue is the timeliness of Complainant’s initial OSHA filing, which took place on 1 Mar 16. Therefore, the critical date for the qualifying adverse actions would be 3 Sep 15. Complainant does not contend that his complaint was timely as to the 18 Aug 15 letter, but instead argues that Respondent’s refusal on 9 Sep 15 to allow him to mark up and be rehired constituted a new adverse action and his complaint is timely as to that retaliatory act.

There is no dispute that on 18 Aug 15, Respondent gave Complainant a letter stating in pertinent part:

Your employment relationship with Union Pacific Railroad Company (“Union Pacific”) is formally terminated as of August 18, 2015. You are no longer required or permitted to report to work, to access Union Pacific property, or to perform any job duties on Union Pacific’s behalf. You are disqualified from returning to any agreement craft where you may retain seniority and will not be considered for any future employment with the Union Pacific Railroad Company or any related companies.

The letter is neither ambiguous nor equivocal and Complainant does not suggest he did not understand it. Instead, he argues that until he attempted to return to work by exercising his union seniority rights, the letter from Respondent was a “mere paper tiger.” He maintains that until he actually made the attempt and was denied, the letter was no more than a threat which would not constitute an adverse action and start his filing period.

Chardon v. Fernandez, 454 U.S. 6, 8 (1981); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). See also *Brown v. Unified School District 501, Topeka Public Schools*, 465 F.3d 1184, 1186 (10th Cir. 2006)(refusing to rehire after previously telling employee he would not be allowed to return is not a new adverse action).

¹² *Id.* (citing *Jenkins v. United States Env'tl. Prot. Agency*, 1988-SWD-2 (ARB) (Feb. 28, 2003); *Larry v. The Detroit Edison Co.*, 86-ERA-32 (Sec’y) (Jun 28, 1991)).

¹³ 29 C.F.R. § 18.40(2011).

¹⁴ 29 C.F.R. §§ 18.40(d), 18.41(a)(2011).

On 18 Aug 15, Respondent told Complainant he was no longer an employee and would not be allowed to come back to work notwithstanding any craft seniority. That was the last adverse action taken by Respondent. Respondent's refusal to allow him to "mark up" was absolutely consistent with what it had told Complainant weeks earlier and was a consequence of the 18 Aug 15 adverse action, rather than a new one. His complaint to OSHA was untimely and is dismissed.

In view of the foregoing, the hearing scheduled on **25 Oct 16** in **Houston, Texas** is hereby **CANCELLED**.

ORDERED this 28th day of June, 2016, at Covington, Louisiana

PATRICK M. ROSENOW
Administrative Law Judge

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. 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

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).