



**Issue Date: 13 July 2017**

**CASE NO.: 2017-FRS-00030**

In the Matter of:

**PATRICK R. GRAY,**  
Complainant

v.

**UNION PACIFIC RAILROAD,**  
Respondent

**DECISION AND ORDER GRANTING**  
**RESPONDENT'S MOTION FOR SUMMARY DECISION**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 ("FRS"), Title 49 United States Code Section 20109. Complainant initiated this action when he filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on December 14, 2016. In his OSHA complaint, Complainant alleged that Respondent violated the FRS when it failed to timely pay off track vehicle (OTV) payments as required by the settlement agreement in a prior, separate claim under the FRS. After completing an investigation, OSHA dismissed Complainant's complaint on January 5, 2017. Complainant requested a hearing before the Office of Administrative Law Judges (OALJ).

On May 30, 2017, Respondent filed its Motion for Summary Decision. Respondent argued that the undisputed facts establish (1) there was no adverse personnel action, and (2) any protected activity was not a contributory factor in any adverse personnel action. Complainant filed his Response on June 12, 2017. He argues that OTV benefits were intentionally delayed in an effort to retaliate against him following resolution of his prior FRS claim. He newly alleges he was underpaid retroactive OTV benefits. Respondent filed a Reply on July 10, 2017.

**I. UNDISPUTED FACTS**

1. On June 26, 2014, while employed by Respondent, Complainant was involved in a motor vehicle accident. Complainant was entitled to OTV benefits to assist him while he was on a medical leave of absence. Complainant was required to submit medical documentation to support his continued disability. When Respondent came to believe Complainant had not met his duty to document his disability, his employment was terminated. Complainant then initiated a separate action under the FRS. On June 14, 2016, that prior claim was resolved by a settlement agreement. EX A-1.

2. As it relates to this claim the June 14, 2016 settlement agreement provided that Respondent pay to Complainant “Retroactive OTV benefits in the net payment amount of \$38,080.00” and Respondent agreed “to reinstate Complainant to ‘active’ status for purposes of ensuring COMPLAINANT’s status is not a bar to eligibility for future OTV payments.” EX A-1.

3. Although not part of the settlement agreement, OTV payments are targeted for deposit at or near the 1st and 15th of each month. Complainant’s OTV entitlement was \$1,000.00 per week. EX D.

4. On June 20, 2016, \$38,080.00 in OTV payments were deposited in Complainant’s account. From June 20, 2016 through December 21, 2016 (the week after Complainant filed his OSHA complaint), \$27,000.00 in OTV payments were deposited in Complainant’s account. This was the full amount due up to that date (27 x \$1,000.00 = \$27,000.00). EXs A-6, B, D.

5. OTV payment processing is not merely a ministerial process and is not automatic. Payment of benefits must be documented with supporting medical records and reviewed and validated. Ms. Tubbs, the Union Pacific Risk Management employee who processes OTV claims, followed a set procedure in formalizing payment to Complainant. Since the date of the settlement, 13 of the 18 payments have been made on or before the targeted deposit date, while 5 payments were made after the targeted deposit date. Ms. Tubbs, via affidavit, stated she has not intentionally delayed or withheld authorized payments to Complainant. EXs A-6, B, D.

6. Following the June 14, 2016 settlement agreement, 53 weeks remained until the June 26, 2017 anniversary of the original injury and termination of the requirement for payment of OTV benefits at a maximum of \$1,000.00 per week. Including a final payment of \$4,000.00, \$53,000 has been paid in OTV benefits since the settlement agreement. All sums due have been paid (53 weeks x \$1,000.00 per week = \$53,000.00). EX D.

## II. SUMMARY DECISION STANDARD

Summary decision is appropriate “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.” 29 C.F.R. § 18.72; *see also Williams v. Dallas Indep. Sch. Dist.*, No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). “At the summary decision stage of a STAA case, the ALJ assesses the evidence for the limited purpose of deciding whether it shows a genuine issue as to a material fact.... If Complainant fails to establish an element essential to his case, there can be “no genuine issue as to a material fact since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Coates v. Southeast Milk, Inc.*, No. 05-050, 2007 WL 4107740, \*3-4 (ARB Jul. 31, 2007).

In evaluating if a respondent is entitled to a summary decision in this matter, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving complainant. *Battle v. Seibles Bruce Ins. Co.*, 288 F.3d 596 (4th Cir. 2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). “However, even when all evidence

is viewed in the light most favorable to the nonmoving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting ‘significant probative evidence.’” *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009) (unpub.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading; [the response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When the information submitted for consideration with a motion for summary decision and the response to that motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, a motion for summary decision must be denied.

### **III. WHISTLEBLOWER PROTECTION UNDER THE FRS**

Congress enacted the FRS to “promote safety in every area of railroad operations....” 49 U.S.C. § 20101. The FRS states in pertinent part:

(a) In General.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an office 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--

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes any violation of any Federal law, rule, or regulation relating to railroad safety or security...

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security...

(b) Hazardous Safety or Security Conditions.—

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, a hazardous safety or security condition....

49 U.S.C. § 20109(a), (b).

The whistleblower provision incorporates procedures established by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C.A. §42121(b); 49 U.S.C.A. §20109(d)(2)(A); *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). Thus, an FRS complainant must establish by a

preponderance of the evidence that: 1) he engaged in protected activity; 2) the employee knew of the protected activity; 3) he suffered an unfavorable personnel action; and 4) the protected activity was a contributing factor in the personnel action. §42121(B)(2)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op at 3 (ARB June 29, 2007); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012). If the complainant meets his burden of proof, the employer may avoid liability by proving, through clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv); *DeFrancesco*, ARB No. 10-114, slip op. at 5.

### **Unfavorable personnel action**

In the December 14, 2016 complaint, Complainant alleged that Respondent (through Ms. Tubbs) intentionally delayed OTV payments. However, the facts show that most payments were paid either before or on the targeted date, and the others were only a few days late according to the informal agreement to make OTV payment twice monthly. As of December 21, 2016 (the date of the next payment following the filing of the complaint), Respondent had made \$27,000.00 in weekly OTV payments for the 27 weeks since the approval of the settlement agreement. Through this period, Complainant had been paid 100% of the owed OTV benefits.

Complainant alleged that he was underpaid in months that had five weeks. No month has five full weeks. Part of the confusion may have arisen because the informal agreement provided that payments would be made twice monthly, while OTV benefits are accrued weekly. Further, as noted above, during the relevant period, Complainant had been paid 100% of the owed OTV benefit.

In his affidavit filed with the Response, Complainant alleges "my June payment of \$4,000.00 was due unto me.... I am missing \$1,000.00 due to Mrs. Tubbs only paying me \$3,000.00 in the month of July 2016 for the previous month." However, in the June 14, 2016 settlement agreement Respondent agreed to reinstate Complainant to "active" status for purposes of ensuring Complainant's status is not a bar to eligibility for **future** OTV payments. The undisputed facts show Complainant was not entitled to future OTV payments until after June 14, 2016, and thus was not due \$4,000.00 for the month of June 2016.

Complainant also alleges in his affidavit that the "backpay awarded unto me of \$38,080.00 was inaccurate. The correct amount that I should have received is \$39,840.00." However, the June 14, 2016 settlement agreement specifically settled the OTV back payments for \$38,080.00. Pursuant to the settlement agreement, Respondent had until June 24, 2016, to make this payment. It is undisputed that \$38,080.00 was deposited in Complainant's account on June 20, 2016, four days before it was due under the terms of the settlement agreement.

Based on the foregoing undisputed material facts, I find Complainant has not suffered an unfavorable personnel action. To be actionable, the alleged retaliatory act must be materially adverse. None of the alleged retaliatory actions meet this standard. "Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms,

conditions, or privileges of employment” and are not therefore material. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052 (Sept. 20, 2008).

### **Causation**

Having found that no adverse action was taken against Complainant, the issue of causation need not be addressed. However, I note that Complainant presented very little evidence to show Ms. Tubbs had any retaliatory motive in her handling of his OTV payments. In fact, most payments were on time or earlier than the informal target date. Further, the back OTV benefits were paid four days earlier than required by the settlement agreement. All this would tend to show a lack of retaliatory motive or animus on Ms. Tubbs’ part.

However, case law recognizes that it may be difficult to present direct evidence on issues such as motive, animus, or contribution. It disfavors use of summary decision to dismiss cases for failing to establish a genuine issue of material fact based on those issues. Respondent may ultimately prevail in its argument that the evidence shows protected activity play no role whatsoever in the handling of Complainant’s OTV payment. I find the record, however minimal and based on inference and conjecture, would have been sufficient to require a full hearing on the issue of causation if the case was not otherwise dismissed.

### **IV. ORDER**

Based upon the foregoing and upon the entire record, Respondent’s Motion for Summary Decision is hereby **GRANTED**, and the complaint is hereby **DISMISSED WITH PREJUDICE**.

**So ORDERED.**

**LARRY W. PRICE**  
Administrative Law Judge