



**Issue Date: 11 January 2019**

**CASE NO. 2017-FRS-00011**

*In the Matter of:*

**KENNETH HENIN,**  
*Complainant,*

v.

**SOO LINE RAILROAD,**  
*Respondent.*

### **DECISION AND ORDER GRANTING SUMMARY DECISION FOR RESPONDENT**

This matter involves a complaint under the employee protection provisions of the Federal Railroad Safety Act [hereinafter the “Act” or “FRSA”], 49 U.S.C. § 20109, as implemented by regulations set forth at 29 C.F.R. Part 1982. After extensive prehearing litigation concerning discovery and other matters, Respondent requested summary decision in its favor, and Complainant opposed the request. For the reasons stated below, I grant summary decision in favor of Respondent.

### **FACTUAL BACKGROUND**

On June 5, 2015, Complainant Kenneth Henin was terminated by Respondent Soo Line Railroad, d/b/a Canadian Pacific. Among the stated bases for termination was that Complainant did, on May 18, 2015, violate Respondent’s “Train and Engine Safety Rules” (hereinafter “Train Rules”) by failing to separate two train cars by at least 50 feet and failing to properly secure the cars before going between them to adjust a drawbar. Employer’s Exhibit (hereinafter “EX”) H.<sup>1</sup> Complainant alleges that his termination was unlawful retaliation for protected activity by Complainant that occurred at various points in March and May 2015. Specifically, Complainant alleges that he reported safety concerns about radio-telephone procedures to his supervisor on at least two occasions, including May 8, 2015, and reported a workplace injury on May 10, 2015. EX E.

---

<sup>1</sup> Complainant was also terminated for his actions on May 10, 2015, to wit, failing to use his lantern and failing to accurately report the details of an incident in which he stated he had been injured. See EX F. For reasons stated below, it is not necessary to address this basis for termination to resolve this motion.

## PROCEDURAL HISTORY

On April 14, 2017, Respondent filed a Motion for Summary Decision along with supporting exhibits. On April 28, 2017, Complainant filed a Response in Opposition to Respondent's Motion for Summary Judgement. After a series of discovery disputes were resolved, Respondent again renewed its Motion for Summary Decision on October 5, 2017. Complainant responded to Respondent's renewed Motion on October 16, 2017. Finally, Respondent by letter dated November 13, 2017, provided the undersigned with a new decision from the United States Court of Appeals for the Eighth Circuit regarding FRSA retaliation claims.

## POSITIONS OF THE PARTIES

Respondent argues that it is entitled to summary decision because Complainant cannot establish a prima facie case of retaliation. In relevant part,<sup>2</sup> Respondent contends that Complainant's alleged protected activity was not a contributing factor in his termination. Respondent's Motion at 20. Specifically, Respondent points to the absence of any evidence of retaliatory or discriminatory motive for the termination at issue and notes that "an employer's belief that the employee committed misconduct is a legitimate, non-discriminatory reason for an adverse action." *Id.* at 23 (citation omitted). Complainant asserts that the rule violation is a pretextual basis for retaliatory discharge and notes the temporal proximity and chain of events between the allegedly protected activity and Complainant's termination. Complainant's Response at 17. Complainant also argues that summary decision is inappropriate in a situation such as this one in which credibility is at issue. *Id.* at 8-10.

## FINDINGS OF FACT

Viewing the evidence submitted in a light most favorable to Complainant, I make the following findings of fact for the limited purpose of resolving this motion.

1. Complainant was employed by Respondent at all points in time relevant to this matter.
2. Starting in March 2015, Complainant reported safety concerns about radio-telephone procedures to his supervisor on at least two occasions, including May 8, 2015, and reported a workplace injury on May 10, 2015. EX E.

---

<sup>2</sup> Respondent also contends that Complainant has not engaged in protected activity. In light of the disposition of this matter, it is not necessary to address this issue.

3. On May 18, 2015, Complainant was performing his duties as a conductor at the Cottage Grove Automotive Facility when he went between two train cars that were less than 50 feet apart to adjust a drawbar. EX I at 21. Complainant acknowledged this action during a hearing about the incident. *Id.*
4. On the same day at approximately 7:45 pm, Trainmaster Michael Strahlman observed Complainant go between two train cars and stopped all movement in the area. He approached Complainant to investigate and discovered that the cars were nine feet, five inches apart. EX I at 14-15. Complainant asserted to Strahlman that the two cars were properly secured and that he had done nothing wrong. *Id.* Trainmaster Strahlman observed that both cars were free-standing, unattached to a locomotive, and neither had handbrakes applied. EX I at 17.
5. On May 28, 2015, at a hearing concerning this incident, Complainant told the Hearing Officer that the applicable rules were “very unclear,” EX I at 28, and that “it’s hard to interpret rules these days because everybody’s telling the story differently.” *Id.* at 30. He asserted that he thought that he was performing the procedure correctly. *Id.*
6. The Train Rules in effect at the time of the incident and those previously in effect both specify that equipment must be separated by 50 feet. EX J at 8; Declaration of Michael Strahlman, dated April 13, 2017, at Exhibit A, page 2.
7. Complainant was previously disciplined in 2013 for failing to protect shove movement into a stub track that resulted in one car derailling, for which he was suspended without pay for five days. EX D.
8. On June 5, 2015, Mr. Mark Redd, then the General Manager Operations, US West Region, with responsibility for the area in which Complainant worked, terminated Complainant based upon these facts. Declaration of Mark Redd, dated April 11, 2017, at 1. In making his decision, Mr. Redd considered the facts and evidence in the hearing record, the severity of the incident, and Complainant’s past disciplinary history with Respondent. *See id.* at 2. Mr. Redd did not consider any report by Complainant of a hazardous safety or security condition in making his decision to terminate Complainant. *Id.* Mr. Redd was aware of Complainant’s May 10<sup>th</sup> workplace injury when he decided to terminate Complainant for his actions on May 18, 2015.

## CONCLUSIONS OF LAW

1. Complainant and Respondent are covered by the Act.
2. I must grant summary decision if there is no genuine dispute as to any material fact and the party moving for summary decision is entitled to the decision as a matter of law. 29 C.F.R. § 18.72(a).
3. I must view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. See *Helmig v. Fowler*, 828 F.3d 755, 760 (8<sup>th</sup> Cir. 2016).
4. A railroad carrier engaged in interstate commerce 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, to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee. See 49 U.S.C. § 20109(a)(4).
5. Similarly, a railroad carrier engaged in interstate commerce may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting, in good faith, a hazardous safety or security condition. See 49 U.S.C. § 20109(b)(1)(A).
6. To establish a prima facie case of retaliation, an employee must show that “(i) he engaged in a protected activity; (ii) [employer] knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8<sup>th</sup> Cir. 2014).
7. Complainant must establish by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint. 29 C.F.R. § 1982.109(a).
8. In the context of a retaliation claim under the Federal Rail Safety Act, turning to the other element of a prima facie case, a contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Kuduk*, 768 F.3d at 791.

9. But “more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation.” *Id.* at 792 (citation omitted).

9.1. In this case, it is particularly significant that Complainant’s purportedly protected activities, i.e., the complaint about radio-telephone procedures and a workplace injury, are completely unrelated to the unsafe incident described above that led to his termination. *See id.*

10. Complainant’s confusion about the applicable standard is not availing because I “do not sit as a super-personnel department that re-examines an employer’s disciplinary decisions.” *Kuduk*, 768 F.3d at 792. This is especially true when the only evidence linking the relevant events is temporal proximity; Complainant’s unsafe action on May 18, 2015, is “an intervening event that independently justified adverse disciplinary action.” *See id.*

11. What is lacking here is any evidence of intentional retaliation prompted by Complainant’s safety complaint and workplace injury; in the absence of any evidence of improper retaliatory intent, no reasonable factfinder could conclude that Complainant’s supervisors intentionally retaliated against him. While I must view the evidence in the light most favorable to Complainant, I am not required to view the law from such a perspective.<sup>3</sup>

## ORDER

Accordingly, Respondent’s Motion for Summary Decision is hereby **GRANTED** in its entirety and in all respects, and Complainant’s Objection/Request for Hearing to the Department of Labor’s Dismissal of Complainant’s OSHA Complaint is **DISMISSED WITH PREJUDICE** in its entirety.

~ SIGNATURE ON NEXT PAGE ~

---

<sup>3</sup> Because I have concluded that Respondent’s termination of Complainant’s employment based upon the events of May 18, 2015 defeats his prima facie case of retaliation, it is unnecessary for me to address the sufficiency of the termination based upon the alleged events of May 10, 2015.

**SO ORDERED:**

**WILLIAM T. BARTO**  
Administrative Law Judge

Washington, DC