



Issue Date: 16 August 2018

CASE NO. 2018-FRS-00057

In the Matter of:

MICHAEL BULLOCK,
Complainant,

v.

BNSF RAILWAY CO.,
Respondent.

**NOTICE OF ASSIGNMENT AND DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS**

NOTICE OF ASSIGNMENT

This matter has been assigned to **William T. Barto, Administrative Law Judge** (ALJ) of the U.S. Department of Labor, for hearing and decision. All filings in this matter should be sent to me at the address shown in the letterhead above. Telephone inquiries should be directed to Ms. Kerriann Laubach, Senior Law Clerk, at 202-693-7400.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Procedural History

On April 3, 2018, Complainant filed with the Occupational Safety and Health Administration (OSHA) complaints of retaliation by Respondent arising under the employee protection provisions of the Federal Railroad Safety Act (FRSA).¹ On April 4, 2018, OSHA dismissed the complaint because Complainant had not provided sufficient evidence that he engaged in a protected activity under the FRSA. Complainant requested a hearing on April 19, 2018.

¹ 49 U.S.C. § 20109.

On July 17, 2018, Respondent filed a Motion and Incorporated Memorandum to Dismiss for Failure to State a Claim [hereinafter Resp. Mot.], averring that Complainant's request for hearing should be dismissed for the basis cited by OSHA. Respondent provided Complainant's Complaint and its four exhibits as Exhibit 1 [hereinafter RX 1] to the Motion. On August 3, 2018, Complainant filed a Response in Opposition to Respondent's Motion to Dismiss and Memorandum of Points and Authorities in Support Thereof [hereinafter Compl. Resp.], contending that he engaged in protected activity and disputing Respondent's allegations.

Background

It is uncontroverted that at all times relevant herein, Complainant was employed by Respondent as a conductor.² It is also uncontroverted that Complainant sought medical treatment for an illness unrelated to his employment with Respondent.³

On July 26, 2017, Complainant had a surgical biopsy and was diagnosed with melanoma/cancer in his left foot.⁴ On August 8, 2017, Complainant experienced significant pain and swelling around the biopsy site and could not report to work.⁵ Complainant decided to "lay off sick" and called Respondent to report his illness.⁶

Complainant had a "critical medical appointment with his surgeon concerning surgery for his cancerous left foot scheduled for 1:00 PM on the afternoon" of August 15, 2017.⁷ On that day, Complainant was working for Respondent and a train was running behind schedule.⁸ Complainant was distraught at the thought of missing his appointment.⁹ While Complainant was in charge of a train "shoving movement," the train derailed.¹⁰

On August 25, 2017, "Respondent took Complainant out of service, placing him on medical hold."¹¹ Complainant had surgery on his left foot on September 1, 2017, and

² RX 1 at 1.

³ Compl. Resp. at 3.

⁴ *Id.* at 2; Resp. Mot. At 1.

⁵ RX 1 at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ RX 1 at 3-4; Resp. Mot. at 2.

¹¹ *Id.*

was cleared to return to work on October 23, 2017.¹² Investigation hearings regarding the incidents on August 8, 2017, and August 15, 2017, were held on November 2, 2017.¹³ Complainant was fired on November 15, 2017, allegedly for his failure to “stop short of a red flag and derail protecting MOW personnel, subsequently derailing a portion of your train.”¹⁴

Discussion and Analysis

In evaluating Respondent’s Motion to Dismiss, I “assume the truth of the facts asserted in the complaint and draw all reasonable inferences in favor of” Complainant.¹⁵ In order to survive a motion to dismiss, a complainant must provide “(1) some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.”¹⁶ Because Complainant resides in Wisconsin, the precedent of the United States Court of Appeals for the Seventh Circuit applies to this matter.¹⁷

The FRSA prohibits a railroad carrier or covered person from denying, delaying, or interfering “with the medical or first aid treatment of an employee who is injured during the course of employment.”¹⁸ Furthermore, the FRSA prohibits a railroad carrier or covered person from disciplining, or threatening to discipline, “an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.”¹⁹

Complainant avers that he was “terminated for attempting to keep a medical appointment related to cancer treatment,” and he does not allege that his cancer treatment was related to his employment.²⁰ Complainant instead argues that statutory construction “results in the inescapable conclusion that 49 U.S.C. § 20109(c)(2) is not

¹² *Id.* at 4-5.

¹³ *Id.* at 5.

¹⁴ *Id.* at 201.

¹⁵ *Neuer v. Bessellieu*, ARB No. 07-036, ALJ No. 2006-SOX-132, slip op. at 4 (ARB Aug. 31, 2009); see, e.g., *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ No. 2002-CAA-012, -14; slip op. at 8 (ARB Feb. 27, 2004).

¹⁶ *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-3 (ARB July 31, 2012).

¹⁷ *Id.* § 1982.112(a).

¹⁸ 49 U.S.C. § 20109(c)(1).

¹⁹ *Id.* § 20109(c)(2).

²⁰ Compl. Resp. at 3.

limited to work related injuries or conditions,” citing to *Russello v. United States*, 464 U.S. 16, 23 (1983).²¹ Furthermore, Complainant avers that the two cases which held otherwise arose out of the Third and Sixth Circuits and are therefore not controlling authority in this matter.²²

However, I note that both cases cited by Respondent discuss *Russello* in detail and conclude that it is inapplicable to these provisions of the FRSA.²³ Furthermore, I find the cases cited by Respondent to be persuasive authority, even if not controlling in this matter.²⁴ For the reasons stated in those cases, I conclude that the two provisions at issue apply only to work-related injuries.²⁵

Accordingly, I find that Complainant failed to provide any facts about a protected activity because his injury or illness was neither on-duty nor work-related.²⁶ Drawing all reasonable inferences in favor of Complainant, I find that he fails to allege facts about a protected activity under the FRSA.²⁷ Therefore, Respondent’s Motion to Dismiss for Failure to State a Claim under the FRSA is hereby **GRANTED** and the Complaint in this matter is hereby **DISMISSED**.

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²¹ *Id.*

²² *Id.* at 4.

²³ See *PATH*, 776 F.3d at 164 (“[A]pplying *Russello*, the ARB concluded that Congress clearly intended subsection (c)(2) to apply without [limitation to on-duty injuries]. We disagree.”); *Grand Trunk W. R.R. Co.*, 875 F.3d at 825 (“While the Board’s reliance on the *Russello* structural canon has some traction, its interpretation ultimately goes off the rails, effectively stranding the caboose from its engine.”).

²⁴ See *Grand Trunk W. R.R. Co.*, 875 F.3d at 835-36 (“Every other federal court since the *PATH* decision has followed the Third Circuit’s lead.”).

²⁵ See *Port Auth. Trans-Hudson Corp. [PATH] v. Sec’y, U.S. Dep’t of Labor*, 776 F.3d 157, 161-69 (3d Cir. 2015) (analyzing 49 U.S.C. §§ 20109(c)(1)-(2) in detail, and concluding that both provisions only apply to on-duty injuries); *Grand Trunk W. R.R. Co. v. U.S. Dep’t of Labor*, 875 F.3d 821, 823 (6th Cir. 2017) (same).

²⁶ See, e.g., *Lockhart v. Long Island R.R. Co.*, 266 F. Supp. 3d 659, 663 (S.D.N.Y. 2017) (“[T]o the extent that Lockhart’s toothache and toothache-related treatment were not work-related, he cannot show that he engaged in protected activity as defined in the FRSA.”); *Green v. Grand Trunk W. R.R.*, No. 16-11587, 2017 U.S. Dist. LEXIS 100653, at *5-6 (E.D. Mich. June 29, 2017) (“However, as recognized by the Secretary of Labor, the section applies only to requests for medical treatment associated with work-related illnesses or injuries and does not apply to his allegation that he requested medical treatment for his non-work-related atrial fibrillation.”).

²⁷ See *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-3 (ARB July 31, 2012) (noting that “a facial challenge to a complaint points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim”).

SO ORDERED.

WILLIAM T. BARTO
Administrative Law Judge

WTB/keI

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).