

**U.S. Department of Labor**

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**Issue Date: 05 June 2019**

Case No.: **2018-FRS-00039**  
OSHA No.: **5-2780-16-002**

*In the Matter of:*

**ANDRE CIESLICKI,**  
*Complainant,*

v.

**SOO LINE RAILROAD COMPANY**  
**d/b/a CANADIAN PACIFIC,**  
*Respondent.*

*Appearances:*

Andre Cieslicki, *Pro Se*  
*For Complainant*

Tracey Holmes Donesky, *Esq.*  
Greta Bauer Reyes, *Esq.*  
Stinson Leonard Street LLP, Minneapolis, MN  
*For Respondent*

*Before:* Larry S. Merck  
Administrative Law Judge

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (October 16, 2008), and the FRSA regulations issued at 29 C.F.R. Part 1982. Section 20109 protects railroad carrier employees from discrimination based on their prior protected activity pertaining to railroad safety or security.

In the above-captioned case, Andre Cieslicki (“Complainant”) alleges, generally, that Soo Line Railroad Company (“Respondent”) terminated his employment in retaliation for his refusal to report to duty after he consumed two glasses of wine over dinner on April 5, 2015. The pertinent facts are discussed in greater detail below.

### **PERTINENT PROCEDURAL HISTORY**

On October 7, 2015, Complainant filed a complaint with OSHA. *See Complainant Statement of Andre Cieslicki* (“FRSA Complaint”) at 1; *OSHA Denial Letter* (Jan. 25, 2018) at 1. OSHA conducted an investigation and, by letter dated January 25, 2018, dismissed Complainant’s FRSA Complaint. On March 8, 2018, Complainant objected to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges. On September 12, 2018, the undersigned issued a *Notice of Assignment, Notice of Hearing, and Pre-Hearing Order*, which, in part, scheduled a formal hearing for May 9, 2019 in or near Madison, Wisconsin. On May 2, 2019, however, the undersigned issued an *Affirmation of Order Cancelling the Hearing* set for May 9, 2019.

On March 8, 2019, Respondent filed *Respondent’s Notice of Motion and Motion to Dismiss* and *Respondent’s Memorandum of Law in Support of its Motion to Dismiss* (collectively, “*Motion to Dismiss*”).<sup>1</sup> Respondent argues, *inter alia*, that Complainant did not engage in protected activity under Section 20109(b) because “(1) the statutory language does not cover the self-reported personal condition Complainant claims here; (2) the purported [hazardous safety] condition occurred outside of [Respondent]’s control; and (3) the alleged condition was not work[-]related.” *Motion to Dismiss* at 4–5. Respondent, therefore, concludes that Complainant’s FRSA complaint must be dismissed as a matter of law because Complainant’s actions “fall outside the scope of the hazardous safety conditions contemplated by [the] FRSA.” *Id.* at 10.

On April 12, 2019, Complainant filed *Claimant[’s] Response to Motion to Dismiss* (“*Complainant’s Response*”). Complainant argues that he was not required to “protect service” because he “was in *training* status as a *qualifying* not *qualified* Locomotive Engineer. . . . Protected service . . . is a requirement of *qualified* Engineers and Conductors only.” *Complainant’s Response* at 5, 9 (emphasis in original). Claimant further alleges that “[a]t no time was [he] working on an alleged ‘first in, first out’ basis.” *Id.* at 6. Claimant asserts that when he was “called [back] to work less than 3 hours after arranging [his] next trip with and thru (sic) CMC, [he] responsibly informed the caller that [he] was unfit for duty.” *Id.* Complainant avers that he “would not have consumed alcohol” if he “understood” that he was required to “expedite [his] re-qualification.” *Id.* Claimant further cites and highlights 49 U.S.C. § 20109 and 49 C.F.R. § 219.105 “for careful consideration.” *Id.* at 1–4. Claimant later states that “telephone transcripts included in the Respondent’s investigation of [April 15, 2015] clearly demonstrate” that he met the requirements of 49 U.S.C. § 20109. *Id.* at 9.

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<sup>1</sup> Respondent moves for dismissal based on Complainant’s alleged failure to state a claim upon which relief can be granted. *Motion to Dismiss* at 4; *see also* 29 C.F.R. § 18.70(c).

## FACTUAL BACKGROUND

Complainant was hired by Respondent in 1997 at its Portage, Wisconsin location and has held several titles while working for Respondent. FRSA Complaint at 1. At the time of the incident, Claimant was undergoing “re-familiarization training” to transfer back to locomotive engineer service, which required him to travel with a qualified locomotive engineer. *Id.* Complainant arranged this trip through Respondent’s “Crew Management Center” (“CMC”). *Id.* Claimant alleges that, on April 5, 2015, he returned to Portage, Wisconsin at 3:00 a.m. from Chicago, Illinois. *Id.* Between 5:00 p.m. and 6:00 p.m. on April 5, Complainant contacted the CMC, and arranged for his next re-familiarization trip for April 6, 2015. *Id.* Claimant alleges that he was ineligible for “any other work” until he arranged another trip after completing the April 6, 2015 trip, and “was under no further duty to remain in contact with the CMC or to be available for work before” his scheduled April 6, 2015 trip. *Id.* During dinner on the evening of April 5, 2015, Complainant alleges that he consumed two glasses of wine, which made him “ineligible to work within the next few hours.” *Id.*

At approximately 8:20 p.m. on April 5, the CMC called Complainant, informing him that he was to immediately report to work “on the first train out.” *Id.* Claimant refused, stating that he would be in violation of Respondent’s rule to “Operate Safely” until at least a few hours passed. *Id.* Complainant alleges that, after his refusal to report to work due to his alcohol consumption, he received a call from a CMC manager, who informed him that Complainant’s “refusal to accept the call for safety reasons” would be administratively recoded as a “lay-off, on call” violation. *Id.* at 1–2. The CMC manager further stated that Complainant was aware that he was to depart as quickly as possible, which he referred to as “operating on a ‘first-in, first-out’ basis” because Nick Quade, a road foreman for Respondent, informed him as such. *Id.* at 2. Claimant alleges that he received another call later the same evening from Mr. Quade, who informed Complainant that he would face “possible disciplinary action as a result of not taking the call with CMC earlier” that evening, and that this incident would be “marked on [Complainant’s] record as a ‘missed call’ for ‘failure to protect,’ and that administrative action would ensue.” *Id.* Claimant departed on his scheduled re-familiarization trip on April 6, 2015.

On April 15, 2015, Respondent held a hearing regarding Complainant’s alleged rule violations. *Id.* On April 24, Respondent informed Claimant that he violated Respondent’s General Code of Operating Rule (“GCOR”) 1.13—Reporting and Complying with Instructions and GCOR 1.15—Duty – Reporting or Absence, and terminated Complainant.<sup>2</sup> *Id.*

## LEGAL STANDARDS

### **I. Motion to Dismiss**

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<sup>2</sup> Claimant states that he did not have any violations on his employee record during the previous 14 years working for Respondent. *FRSA Complaint* at 2.

Twenty-nine C.F.R. § 18.70(c) provides, in pertinent part, that “[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as . . . failure to state a claim upon which relief can be granted . . . .” While this regulation is in many ways analogous to Federal Rule of Civil Procedure 12(b), complainants in whistleblower cases before the U.S. Department of Labor (“DOL”) have a “low[er] threshold for surviving a motion to dismiss” because their complaints need not meet the pleading requirements of federal district court. *Gallas v. Med. Cent. Of Aurora*, ARB Nos. 16-012; 15-076, ALJ No. 2015-SOX-00013; 2015-ACA-00005, slip op. at 6 (ARB Apr. 28, 2017); *see also Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-00003, slip op. at 6 (ARB July 31, 2012) (“federal litigation materially differs from administrative whistleblower litigation within the Department of Labor. These differences require a different legal standard for stating a claim”).

Whistleblower complaints before DOL “that give ‘fair notice’ of the . . . adverse action can withstand a motion to dismiss for failure to state a claim.” *Evans*, slip op. at 9. A complaint provides fair notice when it includes “some facts about the adverse action.” *Id.* Furthermore, I must accept Complainant’s factual allegations as true and draw all reasonable inferences in his favor when ruling on this motion. *Gallas*, slip op. at 2 (citing *Tyndall v. U.S. EPA*, ARB No. 96-195, ALJ Nos. 1993-CAA-00006; 1995-CAA-005, slip op. at 2 (ARB June 14, 1996)).

## II. FRSA Claims

The FRSA, under which Complainant brings this complaint, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109.

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). *See* 49 U.S.C. § 20109(d)(2). AIR 21, which prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of the complainant’s protected action. *See Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007) (holding that a complainant must prove by a preponderance of evidence that he engaged in protected activity; the respondent knew of the protected activity, the complainant suffered an adverse employment action, and the protected activity was a contributing factor in the adverse action, provided that the complainant is not entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

The FRSA protects an employee who engages in three categories of protected activities. First, 49 U.S.C. § 20109(a) protects an employee who: (1) provides information to Federal, State, or local regulatory and enforcement agencies, a member of Congress, or a supervisory authority

regarding any conduct which he reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security; (2) refuses to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security; (3) files an FRSA complaint or participates in an FRSA proceeding; (4) notifies the railroad carrier or Secretary of Transportation of a work-related personal injury or illness; (5) cooperates with a safety or security investigation; (6) furnishes information to Federal, State, or local authorities relating to any railroad transportation accident resulting in injury or death, or damage to property; and (7) accurately reports hours on duty.

Second, 49 U.S.C. § 20109(b) provides protection for an employee who reasonably refuses to work when confronted with hazardous safety or security conditions related to the performance of his duties or refuses to authorize use of equipment, track or structures in hazardous safety or security conditions. Under this provision, railroad security personnel are also protected when reporting a hazardous safety or security condition.

Third, 49 U.S.C. § 20109(c)(2) protects an employee who requests medical or first aid treatment or follows orders or a treatment plan of a treating physician. However, a railroad carrier's refusal to permit an employee to return to work following medical treatment is not considered a violation of this provision if the refusal is pursuant to Federal Railroad Administration medical standards for fitness-of-duty or a railroad carrier's medical standards for fitness-for-duty. *Id.*

The regulatory definition of adverse action encompasses a broad range of activity, "including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment . . . ." 20 C.F.R. § 1980.102(a). The Administrative Review Board has held that "the term 'adverse action[]' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Menendez* at 17 (quoting *Williams v. Am. Airlines, Inc.* ARB No. 09-018, ALJ No. 2007-AIR-00004, slip op. at 15 (ARB Dec. 29, 2010)). An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-00006, slip op. at 3-4 (ARB Oct. 16, 2009); see also *Simpson United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-00031 (ARB Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-00034, slip op. at 4 (ARB Nov. 30, 2005).

The Administrative Review Board ("ARB") has articulated the following applicable standards for a complaint under the whistleblower protection provisions of the FRSA:

The AIR-21 burden-of-proof provision requires the factfinder – here, the ALJ – to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant,

admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

*Palmer v. Canadian Nat'l Ry.*, ARB Case No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 31 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017).

Consequently, in order for Complainant to meet his burden of proving a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) Complainant engaged in protected activity, (2) Respondent knew of the protected activity, (3) Complainant suffered an adverse employment action, and (4) such protected activity was a contributing factor in the adverse employment action.<sup>3</sup> See, e.g., *Thompson*, ALJ No. 2005-AIR-00032; *Lockhart v. Long Island R.R. Co.*, 266 F. Supp. 3d 659, 663 (S.D.N.Y. 2017); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013); *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).<sup>4</sup> As the ARB said in *Palmer*, "The protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." Slip op. at 53.

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<sup>3</sup> Although I list the knowledge requirement as a separate element, I note that the ARB has said repeatedly that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action, and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. See *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-00025 (ARB Apr. 30, 2013); see also *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-00003 (ARB July 17, 2015) (opining that knowledge is not a separate element but instead forms part of the causation analysis).

<sup>4</sup> In *Araujo*, the court held that the employee "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." 708 F.3d at 158. In addition, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit); see also *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-00005 (ARB Sept. 13, 2011), at 31–32; *Kudak v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) ("[A] prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity").

## DISCUSSION

Respondent argues that the statutory language contemplated by the FRSA compels dismissal. *Motion to Dismiss* at 5. Specifically, Respondent states that Complainant did not engage in protected activity under Section 20109 because a “self-reported, non-work-related physical state (that of having consumed alcohol while off work)” is not a “hazardous safety condition” under the FRSA. *Id.* Respondent argues that “nothing in the statute’s language . . . suggest[s the term ‘condition’] expands to cover an employee’s self-reported physical state – either due to illness or, as in this case, due to alcohol consumption.” *Id.* Respondent further contends that Complainant’s purported “hazardous safety condition . . . was outside of [Respondent’s] control” because it occurred while Complainant was off-duty. *Id.* at 6. Similarly, Respondent contends that Complainant’s “alcohol consumption does not convert his non-work-related alcohol consumption into a work-related condition.” *Id.* at 9. Respondent, therefore, requests Complainant’s complaint be dismissed with prejudice. *Id.* at 10.

Complainant asserts that this claim must survive a motion to dismiss because he engaged in protected activity under 49 U.S.C. § 20901. *See Complainant’s Response* at 9 (stating that he “clearly” met the requirements of Section 20901). Complainant, however, states that he, “an unqualified person[,] cannot be called upon to protect any kind of service.” *Id.* at 5–6, 9.

Under the FRSA, a complainant must establish retaliation by demonstrating, in part, that he engaged in protected activity by a preponderance of the evidence. *Lockhart*, 266 F. Supp. 3d at 663. Only after a complainant satisfies these requirements does the burden shift to the employer to demonstrate, by clear and convincing evidence, that it “would have taken the same personnel action in the absence of the protected activity.” *Id.* (quoting *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016)). Applying the foregoing FRSA standards and contentions of the parties, Complainant’s complaint must be dismissed as a matter of law.

Here, Complainant concedes that he was not working when he consumed two glasses of wine over dinner on April 5, 2015. FRSA Complaint at 1. Courts have routinely held that subsection (b)(1)(A) is limited to work-related conditions or injuries. *See Lockhart*, 266 F. Supp. 3d at 663 (citing numerous cases supporting the proposition that subsection (b)(1)(A) and (c)(2) contemplates “‘work-related’ conditions and injuries”). Courts have similarly interpreted subsection (b) regarding a “hazardous safety or security condition” to contemplate a work-related, rather than personal, condition within the employer’s control. *See Murdock v. CSX Transp., Inc.*, 2017 WL 1165995, at \*5 (N.D. Ohio Mar. 29, 2017) (finding that “Congress did not contemplate ‘condition’ to include personal illnesses . . . [because t]he word ‘condition’ . . . throughout subsection (b) . . . is used relative to ‘equipment, track[s], or structures’); ; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (“A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.”); *Clark v. Rameker*, 537 U.S. 122, 131 (2014) (“[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.”) (citing *Corley v. U.S.*, 556 U.S. 303 (2009)). Similarly, subsection (b)(1)(B) explicitly applies to an employee who “refus[es] to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties.” 49

U.S.C. § 20109(b)(1)(B). Simply put, a “self-reported infirmity [is] absent from subsection (b).” *Williams v. Ill. Cent. R.R. Co.*, 2017 WL 2602996, at \*2 (S.D. Miss. June 15, 2017).

Although Complainant cites and highlights subsection (a)(2), which does not appear to be limited to work-related conditions, cases addressing this subsection have interpreted it to be limited as such. See *Lockhart*, 266 F. Supp. 3d at 663–64. Furthermore, Complainant presents no legal argument or support as to why this provision entitles him to relief under the FRSA for personal alcohol consumption while off-duty, nor has Complainant identified “any Federal law, rule, or regulation related to railroad safety or security” that he reasonably believes this subsection addresses. See *Complainant’s Response* at 1–2; FRSA Complaint; 49 U.S.C. 20109(a)(2). Courts have rejected claims under subsection (a)(2) when a complainant fails to identify any controlling law contemplated by that subsection. See *Lockhart*, 266 F. Supp. 3d at 664 (dismissing the complainant’s claim under subsection (a)(2) because the complainant cited “no authority for the proposition that subsection (a)(2) covers non-railroad equipment-related conditions such as an employee’s inability to report to work due to his use of prescribed narcotics”); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 n.3 (8th Cir. 2014) (rejecting a complainant’s claim under subsection (a)(2) that he engaged in protected activity because the complainant did not identify “any Federal law, rule, or regulation related to railroad safety or security” that he reasonably believed to be implicated by his complaints about [a] banner test or [a] derail handle”). Thus, any claim that Complainant asserts under subsection (a)(2) fails for the same reasons identified above regarding subsection (b)—that subsection (a)(2) is limited to work-related conditions. The court’s reasoning in *Lockhart* is instructive:

Although no court appears to have addressed whether subsection (a)(2) is also limited to work-related conditions, the logic of the foregoing decisions—particularly the Third Circuit’s leading decision in *PATH*—suggests that it is. See 776 F.3d at 166 (citing “[t]he purpose of the entirety of the FRSA” as a reason that “subsection (b)(1)(A) must be read as having at least some work-related limitation, even though no such limitation appears on the face of the statute”). *At a minimum, there is no authority, or basis, to conclude that the statute extends to the situation presented here: an employee’s inability to report to work due to his self-reported use of narcotics for non-work-related reasons. For one thing, every case analyzing subsection (a)(2) has concerned an employee’s refusal to violate laws related to the condition of the railroad or its equipment, not to the personal health of the employee. See Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 628 (4th Cir. 2015) (identification cap for defective rail cars); *Rookaird v. BNSF Ry. Co.*, No. 14-CV-176 (RSL), 2015 WL 6626069, at \*3 (W.D. Wash. Oct. 29, 2015) (rule or regulation related to air testing cars); *Morgan v. Norfolk S. Ry. Co.*, No. 13-CV-0257 (WMA), 2014 WL 3891984, at \*1 (N.D. Ala. Aug. 8, 2014) (fabrication of safety violations); *Worcester v. Springfield Terminal Ry. Co.*, No. 12-CV-00328 (NT), 2014 WL 1321114, at \*1 (D. Me. Mar. 31, 2014) (leaked hydraulic oil on a railroad bed). *For another, if the Court were to conclude that the statute applies in such situations, it would prevent a railroad carrier from disciplining an employee who declined to report to work because he or she was drunk or high on drugs (insofar as doing so would violate a railroad safety regulation). The statute must be “interpreted in a way that*

*avoids” such “absurd results.” S.E.C. v. Rosenthal, 650 F.3d 156, 162 (2d Cir. 2011) . . . .*

266 F. Supp. 3d at 663–64 (emphases added).

Any potential claim under subsections (c) and (d) fail for the same reason. *See Port Auth. Trans-Hudson Corp. v. Secretary, United States Department of Labor, 776 F.3d 157, 169 (3d Cir. 2015)* (dismissing the DOL’s assumption that Congress intended subsection (c)(2) to extend beyond work-related injuries because subsection (c) was modeled after two similar state statutes that contained an “injured during the course of employment limitation” while subsection (c)(2) did not); *Lockhart, 266 F. Supp. 3d at 663*. Claimant was not engaged in protected activity while off-duty on April 5, 2015, and any alleged “discipline” that Complainant received was unrelated to his work for Respondent. *See 49 U.S.C. § 20109(c)–(d)*. Complainant’s contentions that he was not working on a “first in, first out” basis, but was a “qualifying” locomotive engineer that was not required to “protect service,” therefore, do not support his FRSA claim. *Complainant’s Response* at 6.

### **CONCLUSION**

Accepting Complainant’s factual allegations as true and drawing all reasonable inference in his favor, Complainant has nonetheless failed to demonstrate that he engaged in protected activity. *Gallas*, slip op. at 2 (citing *Tyndall v. U.S. EPA*, ARB No. 96-195, ALJ Nos. 1993-CAA-00006; 1995-CAA-005, slip op. at 2 (ARB June 14, 1996)); *see also Lockhart, 266 F. Supp. 3d at 663; Bechtel, 710 F.3d at 447; Conrad, 824 F.3d at 107; Araujo, 708 F.3d at 157*. Accordingly, the remaining issue of whether Complainant’s purported protected activity was a contributing factor to any adverse employment action against Complainant is **MOOT**, and will not be addressed.

### **ORDER**

Based on the foregoing, **IT IS HEREBY ORDERED** that Respondent’s *Motion to Dismiss* is **GRANTED** and Complainant’s complaint is **DISMISSED**.

**LARRY S. MERCK**  
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 twenty-four 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](mailto: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 id.*

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 600-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 id.*

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 **thirty (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, then only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within **thirty (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, then 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, then 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).