



Issue Date: 29 January 2021

CASE NO: 2019-FRS-00086

In the Matter of:

HAROLD C. HAMRICK,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY CO.,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DECISION and DENYING COMPLAINT**

This case arises under the employee-protection provisions of the Federal Railroad Safety Act, U.S. Code, Title 49, §20109, as amended ("FRSA"), and its implementing regulations at 29 C.F.R., Part 1982. Complainant Harold C. Hamrick alleges that he was removed from service and lost pay¹ because he had engaged in activity that is protected under the FRSA. On January 8, 2021, Respondent Norfolk Southern Railway Company filed a motion for summary decision. Mr. Hamrick has not responded to it, and the time for doing so has passed. I therefore accept Respondent's allegations of fact as uncontested. 29 C.F.R. § 18.72(e)(2). For the reasons set forth below, I find that Norfolk Southern did not violate the FRSA when it took its personnel actions against Complainant.

Applicable Law

Summary Decision

Under 29 C.F.R. § 18.72(a), an administrative law judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." A genuine issue of material fact is one that, if resolved, could establish an element of a claim or defense and therefore affect the outcome of the litigation. *Celotex Corp. v. Catrett*, 477 U.S. 317,

¹ Mr. Hamrick was terminated from employment, but was later reinstated after pursuing his rights under a collective bargaining agreement. His reinstatement, however, was without restoration of lost pay.

323-24 (1986). No genuine issue of material exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party, who “must do more than simply show there is some metaphysical doubt as to the material facts and must come forward with specific facts showing there is a genuine issue for trial.” *Hess v. Union Pac. R.R.*, 898 F.3d 852, 857 (8th Cir. 2018)(internal citations omitted). In reviewing a motion for summary decision, I must view all evidence in the light most favorable to the nonmoving party.

FRSA

To prevail in a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action, and (3) such protected activity was a contributing factor in the unfavorable personnel action. *Acosta v. Union Pacific Railroad Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at p. 4 (ARB Jan. 22, 2020); *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25, slip op. at 3 (ARB Apr. 30, 2013); *see also Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3, slip op. at 2 n. 5 (ARB July 17, 2015).

Undisputed Facts

Respondent Norfolk Southern is a Class I railroad company, operating in 22 states and the District of Columbia. Respondent hired Mr. Hamrick as a conductor in June of 1997, and he worked out of Linwood, North Carolina. About a year and a half after he was hired, Mr. Hamrick was promoted to engineer, and in that capacity was responsible for handling controls of a train and are responsible for its safe and efficient operation. At the start of each shift, he was required to review any bulletins and special instructions that may have been issued since the previous shift.

On June 13, 2016, Complainant was assigned duties as the engineer on Train 17MPA13 (“Train 17M”) from Linwood to Roanoke, Virginia. Train 17M was a time-sensitive, priority (“TOPS”) train, meaning that it was time sensitive and received priority over other trains. As a TOPS train, Train 17M had a deadline for departure from Linwood in order to meet its requirements. On June 13, that deadline was 8:00 p.m., but there was a 30-minute grace period, meaning that a departure by 8:30 p.m. would have been timely.

Complainant’s normal reporting time was 6:00 p.m., but on June 13, 2016, there was an issue with finding a locomotive for Train 17M, so his reporting time was 7:15 p.m. He arrived at the Linwood yard at about 6:50 p.m. and waited in his car until about 7:10 p.m. At that time, he entered the building and went to the crew room. He entered on duty at 7:15 p.m. Although a computer terminal was available

for him to use at that time, he did not log on until 7:24 p.m. Between 7:10 and 7:24 p.m., Mr. Hamrick put his bag “on the bench” and got out his time book, pen, gloves, and vest. Between 7:24 and 7:35 p.m., he reviewed operational bulletins and dispatch bulletins. By 7:35 p.m., he had completed all of the computer work required of him to perform his job. But instead of piloting the train or collecting his gear and reporting to the train, Mr. Hamrick stayed in the crew room until about 8:00 p.m. Between 7:35 and 8:00 p.m., he tried to enter a pay claim for a class he had previously attended. Entering the pay claim was not part of his assigned duties for the night, and he could have done it when he was off duty. When he was unable to complete the pay claim, he contacted a union representative for assistance.

At 8:12 p.m., 12 minutes after the scheduled departure time for Train 17M, Mr. Hamrick proceeded to the train. As he was leaving the crew room, a management representative called to see where the 17M crew was. Another employee answered the phone and told the management representative that he had not seen the crew. Mr. Hamrick asked whether management was looking for the crew; when the other employee told him that they were, Mr. Hamrick did not get on the phone with management, and did not call them back, to clarify where the crew was.

By the time of the phone call, management had been looking for the 17M crew since 8:00 p.m. Trainmaster Gregory Tatum spoke with the train’s conductor, Mark Cannell, at about 7:20 p.m. and told him that the train would be ready within 30 minutes. The train was ready 15 minutes later, at 7:35 p.m. At about 8:00, the mechanical department called Mr. Tatum looking for the 17M crew because the train had been ready for 25 minutes. At 8:20 p.m., Mr. Tatum called another trainmaster, Keith Fitzhugh, and told Mr. Fitzhugh what was happening, and told Mr. Fitzhugh that the train would not make its 8:30 departure time. At about 8:30, Mr. Cannell radioed Mr. Tatum asking whether they could take the train out. Mr. Tatum told Mr. Cannell that the train had been ready since 7:35, and asked if they had had any delays. Mr. Cannell told him that Mr. Hamrick had been on the phone with an official, which Mr. Tatum assumed meant an officer of Norfolk Southern. Mr. Cannell then told Mr. Tatum that Mr. Hamrick had spoken with Wayne Hege, the local chair of the union, and not a Norfolk Southern official. When Mr. Cannell passed that information by radio, Mr. Fitzhugh was on the telephone with Mr. Tatum and overheard what Mr. Cannell said. Mr. Fitzhugh instructed Mr. Tatum to get a statement about the delay. He also confirmed with Mr. Hege that Mr. Hege had spoken with Complainant at about 8:00 p.m.

Mr. Tatum then boarded Train 17M and asked about the delay. Mr. Hamrick told him that the power was not ready. Mr. Tatum tried to discuss the matter with Mr. Hamrick, but Mr. Hamrick cut him off at least six times and would not let him speak. Mr. Tatum asked Mr. Hamrick if he would let him speak, and Mr. Hamrick said that he would not. Mr. Hamrick became heated during this discussion, and ultimately told Mr. Tatum that he might have to call a relief because Mr. Hamrick was “really upset.” Mr. Tatum granted the request for relief, told Mr. Cannell and Mr. Hamrick to secure the train, and told them that they were going to meet with Mr. Fitzhugh.

At the subsequent meeting, Mr. Fitzhugh discussed the delay with the crew and said that in his opinion, Mr. Hamrick “went off” on Mr. Tatum. He informed Mr. Hamrick that he was being removed from service while Norfolk Southern determined how to handle his behavior that evening.

Respondent charged Mr. Hamrick with delaying his train, and held an investigation pursuant to the collective bargaining agreement. The investigating officer determined that Complainant had delayed his assignment unnecessarily and had engaged in conduct unbecoming a Norfolk Southern employee in his behavior toward management.

Respondent terminated Mr. Hamrick on August 4, 2016. Under the collective bargaining agreement, Complainant had the right to appeal his termination to a neutral arbitration board, and he did so. The board found that substantial evidence supported the charges against Mr. Hamrick, but mitigated the penalty. Mr. Hamrick was reinstated to his position with Respondent, but without back pay for the time between his termination and reinstatement.

Discussion

Complainant Did Not Engage in Protected Activity

As applicable in this matter, the FRSA provides:

(a) IN GENERAL - A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer 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 a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

- (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;
- (3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;
- (4) 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;
- (5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;
- (6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or
- (7) to accurately report hours on duty pursuant to chapter 211.

(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;
- (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or
- (C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

49 U.S.C. § 20109, 29 C.F.R. § 1982.102(b). Mr. Hamrick's conduct and statements on June 13, 2016 do not fall into any of those categories.

Under subsection (a)(1), there is no evidence of an investigation being conducted by any government agency at the time of the events.

Under subsection (a)(2), there is no evidence of a violation of any Federal law, rule, or regulation relating to railroad safety or security.

Under subsection (a)(3), there is no evidence that Mr. Hamrick filed a complaint related to railroad safety. The closest thing to such a complaint is Mr. Hamrick's statement that he was "really upset" and should be relieved. His request,

however, was a right under the collective bargaining agreement, and was immediately granted. But more fundamentally, there is nothing to indicate that his state of mind was related in any way to railroad safety.

Under subsection (a)(4), the evidence fails to show that Mr. Hamrick reported a work-related personal injury or illness to Respondent. Again, he told Mr. Tatum that he was “really upset”; but he was willing and able to continue working on June 13, 2016. His state of mind did not rise to the level of an injury or illness related to his work.

Under subsection (a)(5), there is no evidence of an investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board, and therefore Mr. Hamrick could not have cooperated with such an investigation.

Under subsection (a)(6), there is no evidence of an accident or incident resulting in personal injury, death, or property damage, or of any investigation into such an accident or incident. There was therefore no federal, state, or local regulatory or law enforcement agency to whom Mr. Hamrick could have furnished information regarding such an accident or incident.

Under subsection (a)(7), there is no evidence concerning Mr. Hamrick’s hours on duty or how he reported it.

Under subsection (b)(1)(A), there is no evidence that Complainant reported any hazardous safety or security condition, other than saying that he was “really upset.” But again, because he could have continued his run on June 13, 2016, his state of mind did not constitute a hazardous safety or security condition.

Under subsection (b)(1)(B), the question is whether, when Mr. Hamrick informed Mr. Tatum that he was “really upset,” he was refusing to work because of a hazardous safety or security condition related to the performance of his duties. But subsection (b)(1)(B) requires that the conditions in subsection (b)(2) be satisfied for his refusal to be protected under the FRSA. Those conditions require (1) that the refusal to work be made in good faith, and with no reasonable alternative available to the complainant, and (2) that a reasonable employee would conclude that the hazardous condition presents an imminent danger of death or serious injury and the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal. The circumstances of this case do not satisfy either condition under subsection (b)(2). First, there was a reasonable alternative available: Mr. Hamrick, as he admitted, could have performed his duties on June 13, 2016 in spite of his state of mind. Second, there is nothing to show that the hazardous condition – Complainant’s state of mind – presented an imminent danger of death or serious injury. This is particularly true in light of his admission that he could have performed his engineer duties in spite of his state of mind.

Given Mr. Hamrick's status as an engineer, subsection (b)(1)(C) is not applicable here; there is no evidence that he was responsible for the inspection or repair of the equipment, track, or structures involved in operating his assigned train.

In light of the foregoing discussion, I find and conclude that Mr. Hamrick did not engage in protected activity. Because showing that he did is an essential element of his complaint, the complaint must be denied.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. Respondent Norfolk Southern's motion for summary decision is GRANTED;
2. The complaint under FRSA filed by Mr. Hamrick is DENIED; and
3. The hearing scheduled to commence on March 10, 2021 is CANCELED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

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 the administrative law judge's decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system ("EFS") which is available at <https://efile.dol.gov/>. If you use the Board's prior website link, dol-appeals.entellitrak.com ("EFSR"), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Filing Your Appeal Online

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210-0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.