



**In the Matter of:**

**MICHAEL L. MERCIER,**

**ARB CASE NO. 13-048**

**COMPLAINANT,**

**ALJ CASE NO. 2008-FRS-004**

**v.**

**DATE: August 26, 2015**

**UNION PACIFIC RAILROAD CO.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Richard A. Williams, Jr., Esq. and Megan A. Spriggs, Esq.; R.A. Williams Law Firm, P.A.; St. Paul, Minnesota**

***For the Respondent:***

**Rebecca B. Gregory, Esq.; Union Pacific Railroad Co.; Omaha, Nebraska**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge. Deputy Chief Judge Brown concurs.**

**FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2015) as implemented by 29 C.F.R. Part 1982 (2014) and 29 C.F.R. Part 18, Subpart A (2014). Mercier filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his former employer, Union Pacific Railroad (Union Pacific), violated the FRSA by disciplining him, including discharging him, for engaging in activity that the FRSA protects. OSHA found no reasonable cause to believe that Union Pacific had violated the FRSA. Mercier requested a hearing.

Subsequent to a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) found that Mercier failed to meet his burden to show that his protected activity was a contributing factor in Union Pacific's decision to discharge him. The ALJ thus denied Mercier's complaint. Decision and Order (Feb. 28, 2013)(D. & O.). Mercier appealed, and Union Pacific responded to the appeal.<sup>1</sup> We affirm the ALJ's decision denying Mercier's complaint and summarily explain.

## DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity. *See* 49 U.S.C.A. § 20109(a), (b). The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, *see* 49 U.S.C.A. § 20109(d)(2), referencing 49 U.S.C.A. § 42121(b)(Thomson Reuters Supp. 2015). To prevail, an FRSA complainant must establish by a preponderance of the evidence, three specific elements: (1) that he engaged in a protected activity, as statutorily defined; (2) that he suffered an unfavorable personnel action; and (3) that the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(a). If a complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see also* 29 C.F.R. § 1982.109.

After considering all the evidence as a whole, the ALJ found that there was no "contributing factor" between Mercier's protected activity and the unfavorable personnel action. D. & O. at 21-28. Upon examination of the record and consideration and analysis of the parties' arguments on appeal, we determine that the ALJ properly denied Mercier's complaint. For the reasons cited by the ALJ, we affirm, as supported by substantial evidence, the ALJ's conclusion that Mercier failed to meet his burden to show by a preponderance of the evidence that his protected activity contributed to Union Pacific's decision to discharge him. The ALJ's ruling is dispositive of the claim before us. *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Sept. 18, 2014); *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). Therefore, we affirm the ALJ's decision denying relief.

---

<sup>1</sup> The Secretary of Labor has delegated to the Administrative Review Board the authority to act for the Secretary and issue final decisions and orders under the FRSA. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

## CONCLUSION

Accordingly, the ALJ's Decision and Order is **AFFIRMED**.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

### *Deputy Chief Judge Brown concurring.*

I concur with the majority's affirmation of the ALJ's Decision and Order. I write separately out of concern that a sufficient explanation of the Board's affirmance is lacking. Given the obvious time and effort expended by the parties, through their respective counsel, in litigating this case, which on appeal has resulted in considerable thought and analysis by the Board that is not reflected in our decision, I believe this modest additional explanation is in order.

In the present case there is no dispute but that Mr. Mercier is a covered "employee" under the FRSA and that Respondent Union Pacific Railroad is a covered "railroad carrier." Nor is there any dispute but that Mercier engaged in FRSA-protected activity, and that he was subjected by Respondent to adverse personnel action. At issue is whether Mercier proved by a preponderance of the evidence that his protected activity was a contributing factor in his discharge from employment.

"Contributing factor" causation may be proven "by direct evidence or indirectly by circumstantial evidence." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012). "Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *Id.* at 6.

Mercier sought to prove a "contributing factor" causal relationship between his protected activity and the adverse personnel action at issue through circumstantial evidence. Specifically, Mercier sought to establish causation by relying upon and/or proving temporal proximity to

protected activity; that the Respondent's stated reason for its action was pretext;<sup>2</sup> and that the adverse action taken against him constituted disparate treatment. The ALJ, in evaluating Mercier's evidence offered in support of each of these contentions, concluded that his evidence was insufficient to establish by a preponderance of the evidence the required causal relationship between Mercier's protected activity and the adverse action taken against him. Careful review of the record on appeal leads inescapably to the correctness of the ALJ's conclusion. The ALJ's determination that Mercier failed to meet the required burden of proof for establishing "contributing factor" causation is supported by the substantial evidence of record. Thus, as the majority has held, the ALJ's decision is necessarily affirmed.

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

---

<sup>2</sup> "To prevail on a complaint, the employee need not necessarily prove that the employer's reason[ ] for the adverse action was pretext." *Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 12 (ARB Mar. 28, 2012) (citing *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011)). While doing so does provide "circumstantial evidence of the mindset of the employer, which may be sufficient to establish by a preponderance of the evidence that his or her protected activity" contributed to the adverse action, such a showing is not required for a complainant to prevail. *Zinn*, ARB No. 10-029, at 12 (citing *Bechtel*, ARB No. 09-052, at 13).