



In the Matter of:

BEN WINCH,

ARB CASE NO. 15-020

COMPLAINANT,

ALJ CASE NO. 2013-FRS-014

v.

DATE: JUL 19 2016

**CSX TRANSPORTATION,
INCORPORATED,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**F. Tucker Burge, Esq. and Courtney B. Brown, Esq.; *Burge & Burge, P.C.*;
Birmingham, Alabama**

For the Respondent:

**James S. Urban, Esq.; *Jones Day*; Pittsburgh, Pennsylvania; and George J. Asimou,
Esq.; *Jones Day*; Cleveland, Ohio**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado,
Administrative Appeals Judge; and Anuj C. Desai, *Administrative Appeals Judge*.**

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ Ben Winch filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, CSX Transportation, Incorporated, (CSX) retaliated against him for engaging in activities protected by the FRSA. After a formal hearing, an Administrative Law Judge (ALJ) found that CSX violated the FRSA and unlawfully

¹ 49 U.S.C.A. § 20109 (Thomson/West Supp. 2015). *See also* 29 C.F.R. Part 1982 (2015).

discriminated against Winch. He awarded damages and other relief. CSX appealed the ALJ's decision to the Board. For the following reasons, we reverse the ALJ's ruling.

FACTUAL AND PROCEDURAL BACKGROUND²

CSX is a railroad carrier within the meaning of the FRSA.³ Winch started working for CSX in 2004,⁴ and worked as a conductor and remote control operator on and around moving trains in CSX train yards in Birmingham and Decatur, Alabama.⁵ The ALJ found that Winch had a history of receiving discipline for failure to comply with CSX work availability policies, as well as for safety violations.⁶ Winch admitted CSX had terminated his employment in 2006 for violating CSX's attendance policy, but CSX reinstated him after he signed a warning that any future violations may result in his dismissal from employment.⁷

CSX's minimum availability requirements are set forth in its System Notice 108 minimum availability policy, which states that a CSX employee who has an uncompensated absence for two or more days in a rolling four week period may be subject to discipline up to dismissal.⁸ According to the CSX policy, an absence due to an illness may count as an uncompensated absence at the discretion of CSX management if it does not require the employee to be hospitalized or require the employee to go to an emergency room or urgent care clinic.⁹ Between March 2009 and January 2010, Winch was charged with four attendance violations, for which he received suspensions. He had progressed to the final step of CSX's progressive discipline absenteeism policy, which stated that any future absenteeism violation could result in his dismissal.¹⁰

² The facts for the Background section are taken from the parties' stipulated facts, the ALJ's findings of fact, and the undisputed facts.

³ Complainant's Pre-Hearing Statement and CSX Pre-Hearing Statement Stipulated Facts (Stipulated Facts) 3.

⁴ ALJ's Dec. 4, 2014 Decision and Order (D. & O.) at 2.

⁵ *Id.* at 2.

⁶ *Id.* at 2; 29, n.60.

⁷ *Id.* at 7.

⁸ Stipulated Facts 6; D. & O. at 29.

⁹ D. & O. at 29.

¹⁰ *Id.* at 7, 29.

At about 8:15 in the evening on January 19, 2012, Winch called in to CSX to say he was ill and was marked off as sick for his next scheduled work day on January 20, 2012.¹¹ According to Winch's own testimony, which was undisputed and which the ALJ credited, when Winch called in to CSX, the only information he provided was his name and identification number and that he would "need to be marked off sick." "He did not say that by coming to work, he would be putting himself and others at risk" or that "it was a safety concern."¹² Nor did he describe any of his symptoms or say anything indicating the nature or severity of his illness.¹³ Winch also testified, as the ALJ noted, that he had marked off sick many times before this.¹⁴ On January 20, 2012, Winch went to his family physician, who provided Winch with a note instructing him not to work on January 20 and January 21, 2012.¹⁵ The note from Winch's physician was provided to CSX before CSX charged or investigated Winch with failing to meet its minimum availability policy requirements.¹⁶ But as the ALJ found, Winch "appears" not to have been scheduled to work on January 21, 2012, in any event, and did not mark off for work that day.¹⁷ Because Winch was not hospitalized and did not go to an emergency room or urgent care clinic, whether CSX would count Winch's mark off for January 20, 2012, as an uncompensated absence in a four-week period was, as the ALJ found, "moot" until and unless Winch had a second uncompensated absence within four weeks of his January 20, 2012 absence.¹⁸

On February 7, 2012, Winch was accused with a third serious safety violation.¹⁹ Subsequently, on February 9, 2012, the ALJ found that Winch reported to his foreman that he was nauseous, nervous, and distracted due to the pending investigation for his safety violation and, therefore, "he didn't feel like he could work safely."²⁰ But Winch further stated to his foreman that he was not sick nor did he need to go to the doctor and, therefore, did not want to be marked off sick but instead be marked off for a personal or vacation day.²¹ Winch's foreman

¹¹ D. & O. at 2 and 29; Stipulated Facts 7-8.

¹² D. & O. at 8.

¹³ D. & O. at 8; Hearing Transcript (HT) at 156, 202-204.

¹⁴ D. & O. at 7; HT at 202, 204.

¹⁵ D. & O. at 2, 29; Stipulated Facts 10-12.

¹⁶ Stipulated Facts 10-12.

¹⁷ D. & O. at 29, n. 61; *see also* HT at 49.

¹⁸ D. & O. at 29.

¹⁹ *Id.* at 2, 29.

²⁰ *Id.* at 2, 25, 29; HT at 237-238; Complainant's Exhibit (CX) 13 (Foreman Terry Rather's deposition) at 31.

²¹ D. & O. at 25; CX 13 at 31.

told him “[n]ot to work around moving equipment” and to go home, but informed Winch he had to mark him off as sick as Winch had already worked for part of the day.²²

Because this resulted in Winch having two uncompensated absences within a four-week period, CSX sent Winch a letter on February 17, 2012, charging Winch with failing to meet the minimum availability requirements as set forth in its System Notice 108 minimum availability policy during the four-week period from January 16, 2012, to February 12, 2012.²³ CSX held an investigation hearing on April 3, 2012, at which CSX determined not to excuse Winch’s mark off and uncompensated absence on January 20, 2012, for purposes of its minimum availability policy, as Winch only had a personal physician’s visit and note, but was not hospitalized and did not go to an emergency room or urgent care clinic.²⁴ After considering Winch’s “entire history” of work attendance violations,²⁵ CSX sent a letter to Winch on May 3, 2012, notifying him that his employment was terminated for violating System Notice 108.²⁶

On June 8, 2012, Winch filed a complaint with OSHA alleging that CSX violated the FRSA under 49 U.S.C. § 20109(c)(2) by disciplining him for following his physician’s orders and not working on January 20, 2012.²⁷ OSHA found no violation, and Winch requested a hearing before a Department of Labor (DOL) ALJ.²⁸

On December 12, 2012, the ALJ issued a Scheduling Order, ordering that Winch “shall file a new complaint detailing each alleged protected activity.” In response, on December 20, 2012, Winch filed a “Federal Rail Safety Act Complaint” with the ALJ alleging that CSX violated the FRSA by taking adverse action, in whole or in part, due to 1) Winch’s “reporting, in good faith, his illness [on January 20, 2012] as a hazardous safety condition and refusing to work [on January 20, 2012] when so ill that it was not safe for him to do so,” *see* 49 U.S.C. § 20109(b)(1)(A)-(B), and 2) Winch’s “seeking medical care and for following his treating physician’s orders and treatment plan by not working on January 20, 2012,” *see* 49 U.S.C. § 20109(c)(2).²⁹ The January 19, 2012 request to be marked off sick is the only conduct to which Winch points as protected activity.

²² D. & O. at 2, 25, 29; HT at 238; CX 13 at 31-32.

²³ Stipulated Facts 6, 10.

²⁴ Stipulated Facts 11-13.

²⁵ D. & O. at 29.

²⁶ Stipulated Facts 14.

²⁷ D. & O. at 1; Stipulated Facts 4; Winch’s June 8, 2012 OSHA Complaint.

²⁸ Oct. 17, 2012 OSHA determination; Stipulated Facts 5.

²⁹ *See* D. & O. at 30; Dec. 20, 2012 “Federal Rail Safety Act Complaint” ¶¶ 5-6, 17, 20.

In regard to Winch's other absence on February 9, 2012, Winch's complaint further states that "Winch was not sick on February 9, 2012" and "did not mark himself off as sick on that date," but that CSX officials marked him off as 'sick' on that date even though Mr. Winch told them he was not sick."³⁰ So Winch states in his complaint that "[i]f the CSX officials had marked Mr. Winch off" instead for personal or vacation leave, he "would not have had two or more non-compensated absences during the rolling four-week period."³¹

After a formal hearing, the ALJ found that CSX violated the FRSA and unlawfully discriminated against Winch and awarded damages and other relief in two separate orders.³²

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ's decision pursuant to the FRSA.³³ The ARB reviews the ALJ's factual findings under the substantial evidence standard and the ALJ's conclusions of law de novo.³⁴

DISCUSSION

A. Governing Law

The FRSA is intended "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."³⁵ The FRSA prohibits a railroad carrier engaged in

³⁰ Dec. 20, 2012 "Federal Rail Safety Act Complaint" ¶ 14.

³¹ *Id.*

³² *Winch v. CSX Transp., Inc.*, ALJ No. 2013-FRS-014 (Dec. 4, 2014) (D. & O.); *Winch v. CSX Transp., Inc.*, ALJ No. 2013-FRS-014 (Dec. 10, 2014) (D. & O. after Motion to Supplement the Record). The ALJ noted that on November 28, 2014, CSX moved to supplement the record, offering evidence that on November 13, 2014, the Public Law Board considered Winch's dismissal under the Railway Labor Act and dismissed Winch's appeal of his termination. The ALJ, however, issued her December 4, 2014 decision and order without having seen CSX's motion. Consequently, the ALJ issued a second decision and order on December 10, 2014, in which she granted CSX's motion to supplement the record, but holding that her December 4, 2014 decision remained the same in all other aspects.

³³ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

³⁴ 29 C.F.R. § 1982.110(b); *Santiago v. Metro-North*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip. op. at 4 (ARB July 25, 2012).

³⁵ 49 U.S.C. § 20101.

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, including in relevant part:

(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;

(2) A refusal is protected under paragraph (1)(B) and (C) if—

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

49 U.S.C. § 20109(b) (in relevant part). The “hazardous safety or security conditions” subsection of the provision thus includes two different types of protected activity, one for “reporting” a hazardous condition and one for “refusing to work when confronted by” a hazardous safety condition. For the second type of protected activity, the statute also requires that an employee's refusal to work satisfy certain requirements to constitute protected activity.

The FRSA incorporates the procedures and burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(2012). Under those procedures, the complainant bears the burden of proving a causal link between protected activity and an unfavorable employment action. More specifically, the FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 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.³⁶

B. Protected Activity Not Established

On appeal, section 20109(b) is the sole legal basis for Winch's claim that he engaged in FRSA-protected activity when he called in sick on January 19, 2012. Winch argues that this was protected activity because he was "reporting, in good faith, his illness as a hazardous safety condition and was refusing to work when so ill that it was not safe for him to do so"³⁷ and, thereby, was confronted by a hazardous safety condition related to the performance of his work duties. Although the ALJ noted that CSX questioned whether Winch had a reasonable belief that he was reporting a hazardous safety condition or that it would be unsafe for him to go to work when he called in sick, the ALJ found "no one suggested that [Winch] was malingering or that . . . it would have been safe to go to work."³⁸ Thus, the ALJ found that "[t]he weight of the evidence shows that it was reasonable for [Winch] to conclude that it would have been unsafe to go to work," and, therefore, held that calling in sick was a protected activity under section 20109(b).³⁹

On appeal, CSX contends that Winch did not report a hazardous safety condition when he called in sick on January 19, 2012, as he did not indicate or state that he would put his and other workers' safety at risk if he came to work, nor did he describe his illness or symptoms so that CSX could reasonably perceive or have notice that someone with a history of attendance violations was reporting a hazardous safety condition. Similarly, CSX argues that the ALJ erred in not determining whether Winch was reporting "in good faith," both subjectively and objectively, a hazardous safety condition when he called in sick on January 19, 2012. CSX asserts that Winch's history of safety violations weighs against any finding that he subjectively believed that he was concerned with safety when he called in sick. Finally, CSX also contends that calling in sick for a non-work related illness is not sufficient for reporting a hazardous safety condition, as CSX argues that the FRSA only protects the reporting of work-related illness.

³⁶ *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). See 49 U.S.C. § 42121(b)(2)(B)(iii).

³⁷ Dec. 20, 2012 "Federal Rail Safety Act Complaint" ¶ 17.

³⁸ D. & O. at 31.

³⁹ *Id.*

Although Winch testified that he believed working when sick to be a safety issue,⁴⁰ he explicitly stated that the only information he reported on January 19, 2012, was his name, identification number, and his request that he be marked off as sick. This limited information raises the question as to whether Winch reported a “hazardous . . . condition” under section 20109(b)(1)(A). Even the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the “hazardous condition” at the railroad. As a matter of law, the extremely limited information Winch reported falls short of “reporting . . . a hazardous . . . condition.” Because “reporting a hazardous condition” is essential to a claim of protected “refusal” under section 20109(b)(2), Winch’s remaining legal basis for asserting protected activity also fails as a matter of law. Failing to prove the essential element of protected activity, requires dismissal of Winch’s claim as a matter of law.

Similarly, the FRSA also “clearly does not protect every refusal to work” under section 20109(b)(1)(B).⁴¹ A refusal to work when confronted by a “hazardous safety” condition related to the performance of the employee’s duties under section 20109(b)(1)(B) is only protected if the hazardous condition is such that a reasonable individual would conclude there is an imminent danger of death or serious injury, *see* 49 U.S.C. § 20109(b)(2)(B)(i). The ALJ made no finding, and we see no evidence in the record, showing that Winch reported to or notified CSX that his condition presented an imminent danger of death or serious injury. A refusal to work when confronted by a hazardous safety condition under section 20109(b)(1)(B) is also only protected if the “employee, where possible, has *notified* the railroad carrier of the existence of the hazardous condition and the intention not to perform further work,” *see* 49 U.S.C. § 20109(b)(2)(C) (emphasis added). Again, there is no ALJ finding nor record evidence showing, that he “notified” CSX of the existence of a “hazardous” condition when Winch called in sick on January 19, 2012. Thus, as a matter of law, Winch failed to establish FRSA-protected activity under section 20109(b)(1)(B).

We note, however, that our ruling is limited to the narrow facts of this case and does not address whether a railroad employee “reporting” being sick might satisfy the requirements under section 20109(b) to establish protected activity under the FRSA in a different case where more sufficient details are reported to the railroad employer.

CONCLUSION

The ALJ erred as a matter of law in concluding that Winch engaged in protected activity under FRSA section 20109(b) when calling in sick on January 19, 2012, where he merely provided his name and identification number and requested that he be marked off as sick. Therefore, the ALJ’s order is **REVERSED**. Consequently, the ALJ’s finding that CSX violated

⁴⁰ D. & O. at 8; HT at 156, 158.

⁴¹ *Stokes v. Se. Pa. Transp. Auth.*, Civil Action No. 15-2719, 2015 WL 7273469, slip op. at 3 (E.D. Pa., Nov. 18, 2015).

the FRSA and unlawfully discriminated against Winch and the ALJ's award of damages and other relief is **REVERSED**.

SO ORDERED.



LUIS A. CORCHADO
Administrative Appeals Judge



PAUL M. IGASAKI
Chief Administrative Appeals Judge



ANUJ C. DESAI
Administrative Appeals Judge