In the Matter of:

TODD PRZYTULA, **ARB CASE NO. 2017-0007**

COMPLAINANT, **ALJ CASE NO. 2014-FRS-00117**

v. **DATE: September 26, 2019**

GRAND TRUNK WESTERN RAILROAD CO.,

RESPONDENT.

Appearances:

***For the Complainant*:**
Robert B. Thompson, Esq.; Laurence C. Acker, Esq.; and Robert E. Harrington III, Esq.; *Harrington, Thompson, Acker & Harrington, Ltd.*; Chicago, Illinois

For the Respondent:
Noah G. Lipschultz, Esq., Joseph D. Weiner, Esq., *Littler Mendelson, P.C.*, Minneapolis, Minnesota

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*.

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Complainant Todd Przytula filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent Grand Trunk Western Railroad Company (GTW) violated the FRSA by discharging him from employment in retaliation for activity protected by the FRSA. For the following reasons, we deny the complaint.

BACKGROUND

GTW hired Przytula in 2003, and in 2011 he began working as a locomotive engineer. As an engineer he was responsible for operating engines on tracks that crossed public roads. Under GTW's attendance policy and a collective bargaining agreement, employees such as Przytula were entitled to an established number of personal leave days. Absences beyond the established maximum would result in discipline unless they fell into an exception to the attendance policy.[2]

Between July 24, 2003 and May 21, 2013, Przytula was disciplined sixteen times for absences from work.[3] His employment was terminated on June 9, 2012, and April 22, 2013, but on each of those occasions he was allowed to return to work under "last chance" agreements. The latter of these agreements, issued on May 21, 2013, informed Przytula that further absences would result in discharge.[4]

On July 13, 2013, Przytula was nauseous and disoriented, so he went to his family doctor, who told him not to go to work. Przytula did not work on either July 13th or 14th, and he returned to work on July 15th. Przytula was also absent from work with a headache and stomach ache on August 4 and 5, 2013. It is undisputed that these illnesses were not caused by or related to his employment, and Przytula

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[1] 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2018).

[2] Deposition of Todd W. Przytula (Przytula Dep.), Exhibits 3-4.

[3] Respondent's Memorandum in Support of Its Motion for Summary Decision (Resp. Mem.) at 4-5, citing Przytula Dep., Exhibits 5-23.

[4] Resp. Mem. at 6, citing Affidavit of Phillip Tassin in Support of Respondent's Motion for Summary Decision, ¶ 4.

does not assert that, when he took those days off, he informed GTW that he was following the orders or treatment plan of a doctor.

Przytula's absences in July and August 2013 violated his employer's attendance policy as well as his May 2013 last chance agreement. As a result, GTW conducted an investigative hearing to determine if the absences warranted dismissal. At the hearing Przytula presented two notes from his doctor, but neither note indicated that the doctor ordered Przytula to refrain from working.[5] After the hearing GTW General Manager Phillip Tassin determined that Przytula's absenteeism violated GTW work rules and the terms of his most recent last chance agreement. GTW fired Przytula on August 30, 2013.

Przytula filed a three-page complaint with OSHA on October 10, 2013. In the complaint Przytula asserted that he was absent from work "for various days in the May 24 through August 9 [2013] time period as a result of a medical condition which interfered with his ability to safely perform his job duties," and that his "decision to report himself as sick to Respondent GTW is because he was following the orders and treatment plan of his treating physician."[6]

OSHA determined that Przytula's discharge did not violate the FRSA and denied the complaint. Przytula requested a hearing on his complaint before an Administrative Law Judge (ALJ). Prior to a hearing GTW filed a Motion for Summary Decision, and on November 14, 2016, the ALJ issued a Decision and Order Granting Respondent's Motion for Summary Decision (D. & O.). Przytula appealed the ALJ's ruling to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions in cases arising under the FRSA and to issue final agency decisions in

[5] Resp. Mem. at 7-8

[6] Complaint at 1.

these matters.[7] The ARB reviews an ALJ's decision granting summary decision using a de novo standard.[8] Summary decision is appropriate if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.[9] In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party; the Board may not weigh the evidence or determine the truth of the matter; our only task is to determine whether there is a genuine conflict as to any material fact for hearing.[10]

DISCUSSION

The FRSA prohibits a railroad company, a contractor, officer, or employee of a railroad company from retaliating against an employee because the employee engaged in activity protected by the FRSA.[11] A successful FRSA complainant must prove that she or he suffered an adverse employment action that was caused, wholly or in part, by complainant's protected activity.[12]

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[7] *See* Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. § 1982.110(a).

[8] *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005).

[9] 29 C.F.R. § 18.72(a) (2018); *Franchini v. Argonne Nat'l Lab*., ARB No. 2013-0081, ALJ No. 2009-ERA-00014, slip op. at 6 (ARB Sept. 28, 2015) (citations omitted).

[10] *Franchini*, slip op. at 6; *Henderson v. Wheeling & Lake Erie Ry*., ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 9 (ARB Oct. 26, 2012).

[11] 49 U.S.C. § 20109. The FRSA incorporates the procedures found in the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly known as "AIR 21." *See* 49 U.S.C. § 20109(d)(2)(A) ("Any [enforcement] action [under the substantive prohibitions on retaliation for whistleblowing] shall be governed under the rules and procedures set forth in [the AIR-21 whistleblower protection provision].").

[12] *See* 49 U.S.C. § 42121(b)(2)(B)(iii) (2000); 29 C.F.R. § 1982.109(a); *Luder v. Cont'l Airlines, Inc*., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op at 6-7 (ARB Jan. 31, 2012).

Section 20109(c) of the FRSA prohibits employers from denying prompt medical treatment and disciplining employees for following the treatment plan of a treating physician:

> (c) Prompt Medical Attention.—
>
> (1) Prohibition.—
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> A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.
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> (2) Discipline.—
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> A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

The Board recently discussed the extent of employee protection provided by Section 20109(c) in *Wevers v. Montana Rail Link, Inc.*[13] In that case we concluded

[13] ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019).

that "subsection 20109(c)(1) prohibits an employer from denying, delaying, or interfering with medical treatment or first aid only in the temporal period immediately following a *workplace* injury."[14] We also noted that the purpose of subsection (c)(2) is to ensure that an injured employee can follow an ongoing treatment plan for the injury suffered in subsection (c)(1).[15] Several federal courts have also concluded that subsection (c)(2) applies only to injuries suffered at the workplace.[16]

In this case, there is no dispute that the illnesses and absences that were the cause of Przytula's discharge were not related to any injuries suffered during the course of employment. Przytula asserts his claim solely on the argument that the FRSA does not allow GTW to discharge him for following *any* treatment ordered by a physician. This is an incorrect interpretation of the statute. Przytula did not engage in FRSA-protected activity when he informed GTW that he was following the instruction of a physician for an illness not related to the performance of his duties. He has therefore failed to show that there is a genuine issue of material fact requiring a hearing on the merits of his claim.

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[14] *Wevers*, slip op. at 13 (emphasis added).

[15] *Id*. at 12-13.

[16] *See, e.g., Grand Trunk Western R.R. Co. v. U.S. Dep't of Labor*, 875 F.3d 821, 823 (6th Cir. 2017) ("[S]ubsection (c)(2), just like its preceding subsection (c)(1), applies only to on-duty injuries."); *Stokes v. Se. Penn. Transp. Auth.*, 657 Fed.Appx. 79, 80-82 (3d Cir. 2016) (medical instruction to stay on bed rest "was unconnected to railroad safety, and thus [plaintiff's] refusal to appear due to a non-work-related risk to her was not covered by the FRSA"); *Port Authority Trans-Hudson Corp. v. Secretary, U.S. Dept. of Labor*, 776 F.3d 157, 162 (3d Cir. 2015) ("Since, under subsection (c)(2), a physician's order could include a direction that an employee not work (as the physician's order did in this case), and because there is no temporal limitation in the statute, the DOL's interpretation would functionally confer indefinite sick leave on all railroad employees who can obtain a physician's note."); *Murdock v. CSX Transp., Inc.*, No. 3:15-cv-1242, 2017 WL 1165995, at *3 (N.D. Ohio 2017) (medical treatment described in subsection (c)(2) "is limited to injuries that occur 'during the course of employment'").

CONCLUSION

GTW is entitled to summary decision as a matter of law. Accordingly, we **AFFIRM** the ALJ's Order Granting Respondent's Motion for Summary Decision and **DENY** Przytula's complaint.

SO ORDERED.