



In the Matter of:

JONATHAN WALLS,

ARB CASE NO. 2018-0015

COMPLAINANT,

ALJ CASE NO. 2016-FRS-00069

v.

DATE: March 17, 2020

**UNION PACIFIC
RAILROAD, CO.,**

RESPONDENT.

Appearances:

For the Complainant:

Jerry Easley, Esq.; *Rome, Arata & Baxley, L.L.C.*; Pearland, Texas

For the Complainant:

Doris A. Beutel-Guthrie, Esq. and Ryan D. Wilkins, Esq.; *Union Pacific Railroad*; Houston, Texas

**Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*,
James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*.**

DECISION AND ORDER

PER CURIAM. This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ Complainant Jonathan Walls filed a complaint alleging that Respondent Union Pacific Railroad retaliated against him in violation of FRSA's whistleblower

¹ 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

protection provisions for reporting an injury. Complainant appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on December 12, 2017, dismissing Walls' complaint because Walls failed to carry his burden to prove by a preponderance of the evidence that Respondent engaged in an unfavorable personnel action against him. We affirm.

BACKGROUND

Complainant works for Respondent as a brakeman-conductor and has done so since November 2011. *Walls v. Union Pac. R.R. Co.*, ALJ No. 2016-FRS-00069, slip op. at 8 (ALJ Dec. 12, 2017) ("D. & O."). On September 9, 2015, Complainant reported that he had been injured in a derailment that occurred on September 3, 2015, and on September 9, he requested transportation to the hospital. He followed his physician's treatment plan from September 9, 2015, to October 20, 2015, which restricted him from full-time work for Respondent. Finally, he filed an OSHA complaint on September 11, 2019. *Id.* Based on the parties' joint stipulations of fact, the ALJ concluded that Complainant engaged in FRSA-protected activity. *Id.*

Briefly, Complainant alleged that Respondent violated FRSA by delaying and interfering with his medical treatment on September 9, 2015. Complainant further alleged that Respondent's periodic surveillance of him while he was off work was stressful and rose to the level of adverse action.

To determine whether there was adverse action in the form of an interference, denial, or delay in medical treatment, the ALJ analyzed the events of September 9, 2015. *Id.* at 24. On that day, Complainant called his supervisor, Steffen Storbeck, and reported that he was having pain in his ankle that was becoming worse. *Id.* At the time of the call, Complainant was working aboard a moving train. Storbeck arranged an unscheduled stop and drove to meet Complainant in Waco. *Id.* Upon first meeting in person that day, Complainant at first told Storbeck that he was not injured and refused medical treatment. *Id.* at 25. Thereafter, Complainant told Storbeck that he wanted to get checked by medical professionals. *Id.* Storbeck immediately decided to take Complainant to the closest hospital emergency room in his vehicle. *Id.* However, before they began driving, Storbeck offered Complainant his phone so that he could speak to nurse Guadalupe Koch. Complainant agreed to talk to her and took the phone. *Id.* at 26. The call continued and concluded while Storbeck was driving Complainant to the hospital. *Id.* Storbeck and Complainant arrived at the hospital and Complainant received treatment, which included the use of crutches for two weeks. *Id.* at 10.

The ALJ found "Complainant's testimony unpersuasive due to the equivocal nature of his reports following the September 3, 2015 derailment." Specifically he

found that Complainant's "equivocation, lack of specificity, and inconsistent reports regarding the extent of his claimed injuries make his testimony about the version of the events occurring on the evening of September 9, 2015 unpersuasive, including the timing and content of the telephone conversations with Nurse Koch." *Id.* at 17-18. In contrast, the ALJ found the testimony of Storbeck and Koch largely credible, straightforward and forthright. *Id.* at 18, 19. Indeed, the ALJ found with respect to Storbeck that

Mr. Storbeck's testimony concerning the phone calls with Nurse Koch is more persuasive and credible than Complainant's testimony. The undersigned finds the most reasonable interpretation of the evidence is [that] the telephone calls with Nurse Koch were placed or received shortly before Complainant and Mr. Storbeck began driving to the hospital and concluded during the drive to the hospital. The undersigned specifically rejects Complainant's testimony that the entire duration of his telephone conversation with Nurse Koch occurred prior to leaving for the hospital. This finding of fact is further supported by the Mr. Storbeck's cellular telephone records.

Id. at 19. Further, the ALJ found that nurse Koch's testimony contained no apparent inconsistencies. Her testimony was corroborated as to the length of her telephone call with Complainant by Storbeck's testimony and independently by cell phone records, and the ALJ found her persuasive concerning the details and purpose of the conversation. *Id.* at 19.

To determine whether there was adverse action in the form of private surveillance of Complainant by Respondent, the ALJ considered the record evidence including witness testimony and the private investigator's report. Respondent had engaged a private investigator to conduct surveillance of Complainant that Complainant asserts was stressful. *Id.* at 22. The surveillance was conducted on four days and occurred during daytime hours only. *Id.* at 23.

Based on the ALJ's findings of fact, she concluded that Complainant failed to prove by a preponderance of the evidence that Respondent took any unfavorable personnel action against him and dismissed the complaint. Complainant appealed to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue agency decisions under the FRSA.² The Board reviews the ALJ's factual determinations under the substantial evidence standard.³ The Board reviews an ALJ's conclusions of law de novo.⁴

DISCUSSION

FRSA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 20109; *see* 49 U.S.C. § 42121(b) (2000). To prevail on a FRSA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii). In light of our disposition of this matter, we limit our discussion to the issue of whether the ALJ correctly decided that Complainant failed to prove that Respondent engaged in any unfavorable action against him.

Having considered the evidence of unfavorable personnel action as a whole and collectively weighing all of the evidence of record, the ALJ found that Complainant failed to prove that Respondent took any unfavorable personnel action against him in this matter. *Id.* at 15. Initially, the ALJ found that while Storbeck handed Complainant a cell phone with which to speak to nurse Koch, Complainant voluntarily spoke with the nurse and that speaking with her did not cause a denial, delay, or interference in transporting Complainant to the hospital and securing medical treatment.⁵ *Id.* at 25, 26. The ALJ found that while the call began before Storbeck and Complainant left for the hospital, it concluded while Storbeck was driving Complainant to the hospital. *Id.* at 26. Further, the ALJ found specifically that nurse Koch did not attempt to dissuade or interfere with Complainant

² Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (March 6, 2020); *see* 29 C.F.R. § 1982.110(a).

³ 29 C.F.R. § 1982.110(b).

⁴ *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-AIR-025, slip op. at 2 (ARB Apr. 30, 2013) (*citations omitted*).

⁵ *See Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 18 (ARB Jun. 17, 2019) (The FRSA at 49 U.S.C. 20109(c)(1) (2008) prohibits a railroad from denying, delaying or interfering with prompt medical treatment or first aid during the time period immediately following a workplace injury.).

obtaining medical treatment, a finding supported by her testimony and a clinical consultation record that she completed on September 9, 2015.⁶ *Id.* at 27.

Additionally, the ALJ found that there was no adverse personnel action with respect to Respondent's surveillance of Complainant.⁷ *Id.* at 23. The ALJ analyzed factors including the length, duration, and time of day in which the surveillance took place to come to this conclusion and appropriately concluded that while surveillance of a complainant by a respondent may in some cases rise to the level of adverse action, in this case, it did not.⁸ We affirm this conclusion as supported by substantial evidence and in accordance with law.

To summarize, the ALJ concluded that while Complainant engaged in protected activity, Respondent did not take any unfavorable employment action against him. Substantial evidence supports the ALJ's findings of fact and her conclusions are in accordance with law.

CONCLUSION

As substantial evidence supports the ALJ's factual determination that Respondent did not take any adverse action against Complainant, we **AFFIRM** the ALJ's conclusion of law that Respondent did not violate the STAA. Accordingly, the complaint in this matter is **DENIED**.

SO ORDERED.

⁶ Indeed, the ALJ found that nurse Koch provided general comfort to Complainant while in transport in a non-emergency vehicle to a medical provider and concluded this was consistent with Respondent's policies. D. & O. at 27. Her role here facilitated rather than interfered with Complainant's medical care.

⁷ While the ALJ referenced an "expansive view" of adverse action by the Board, we make clear that both the ALJ and the Board must apply the statute and regulations as they are found. The ALJ appropriately applied the law to the facts in this case to find that the surveillance in this case did not constitute an adverse personnel action.

⁸ The ALJ found that: "The report makes clear that the private investigator followed Complainant to his doctor's appointments and parked outside his home during the daytime hours only. There is no indication the private surveillance caused Complainant to alter his daily living activities in any manner or resulted in Complainant or any of his family members having any personal encounters with unknown persons. Consequently, the undersigned concludes that, based on the facts presented in this case, the private surveillance of Complainant was not an adverse action and would not dissuade a reasonable worker from bringing a charge of discrimination." D. & O. at 23.