U.S. Department of Labor

Administrative Review Board
200 Constitution Ave
NW Washington, DC 20210-0001

In the Matter of:

SCOTT COLE, **ARB CASE NO. 2019-0029**

COMPLAINANT, **ALJ CASE NO. 2018-FRS-00023**

v. **DATE: July 14, 2020**

NORFOLK SOUTHERN RAILWAY CO.,

RESPONDENT.

Appearances:

For the Complainant:
Eric D. Holland, Esq. and Patrick R. Dowd, Esq.; *Holland Law Firm, LLC*; St. Louis, Missouri

For the Respondent:
Andrew Rolfes, Esq.; *Cozen O'Connor*; Philadelphia, Pennsylvania

BEFORE: James A. Haynes, Heather C. Leslie, and James D. McGinley, *Administrative Appeals Judges*

DECISION AND ORDER

This cases arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Scott Cole (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Norfolk Southern Railway Co. (Respondent) violated the FRSA by discharging him from employment in retaliation for activity protected by the FRSA. For the following reasons, we affirm the Administrative Law Judge's (ALJ) order.

[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).

BACKGROUND

Complainant was a conductor for Respondent in its Dearborn Division in the Detroit, Michigan area as well as the local chairman of his union, the International Association of Sheet Metal, Air, Rail, and Transportation Workers – Transportation Division ("SMART"). In 2016, Respondent entered into an agreement with DTE Energy ("DTE") to provide rail service to coal-fired plants around the Detroit area. In the summer of 2016, Mike Grace, Respondent's Division Superintendent of the Dearborn Division, informed Complainant that Respondent was considering using Ohio-based crews for this service. Complainant objected, partly because he claimed the Ohio-based crews were not qualified to work in the Detroit area.

In early December 2016, Complainant contends Mr. Grace informed SMART and the Brotherhood of Locomotive Engineers and Trainmen ("BLET") that DTE decided to use Ohio-based crews.[2] The unions opposed this as a "major dispute" under the Railway Labor Act and discussed various actions to take. On December 7, 2016, Respondent filed a civil action in the United States District Court for the Eastern District of Michigan against SMART and BLET and named Complainant in his capacity as a general committee union member. Respondent sought declaratory and injunctive relief to require arbitration to resolve the issue of using Ohio-based crews and classify it as a "minor dispute." On December 14, 2016, Respondent dismissed the action against Complainant as an individual.[3]

On December 19, 2016, Complainant contacted DTE's Communications Manager, Brian Corbett, about Respondent's plan to use Ohio-based crews. Complainant stated his attorney advised him to provide witness names for the federal lawsuit by December 30th, and that Complainant called Mr. Corbett as part of his due diligence. Complainant asked Mr. Corbett to "confirm or deny" whether DTE made the decision to use of Ohio-based crews, and Mr. Corbett referred Complainant back to Respondent. Complainant stated he was already aware of Respondent's position.[4]

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[2] ALJ's Order Granting Summary Decision and Denying Complaint ("Order") at 7.

[3] *Id.* at 7.

[4] *Id.* at 8.

During this conversation, Complainant allegedly referenced the use of a billboard. Mr. Corbett asserted that Complainant said the union would "be 'buying billboards' blaming DTE for the job losses."[5] Mr. Corbett further stated he cautioned Complainant that DTE could pursue a libel claim if false information was published and stated Complainant replied, "Oh, we have our lawyers too."[6]

Complainant asserts this was a misunderstanding. He stated he asked Mr. Corbett "[i]f the union was to put it on a billboard that DTE was requiring the Norfolk Southern to move, or to use the base in Toledo would that be true?"[7] He said his only concern was to learn whether DTE required the use of Ohio-based crews and that he used the idea of a billboard to "explain what I was asking him to do."[8] Complainant acknowledged there was talk of involving lawyers.[9] Following this exchange, Complainant informed Corbett he would try another department and ended the conversation. On December 21, 2016, Complainant left Mr. Corbett a voicemail; however, Mr. Corbett did not return his call.[10]

After learning of the phone call, Mr. Grace removed Complainant from service pending an investigation pursuant to his belief that Complainant's conversation with Mr. Corbett was a direct attempt to undermine Respondent's business relationship.[11] On December 21, 2016, Mr. Grace issued a notice of investigation to Complainant.[12]

The investigation hearing was held on December 28, 2016.[13] Complainant said he asked Mr. Corbett to "confirm or deny" whether it was DTE who made the decision to use Ohio-based crews. Complainant further stated he did not blame DTE, but rather asked this question as part of his due diligence pursuant to the

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5 Respondent's Exhibits ("RX") 1-B.

6 *Id.*

7 Complainant's Exhibit ("CX") 7 at 67:5-15, 68:2-7.

8 CX 7 at 68:24-25.

9 *Id.* at 67:5-15.

10 RX 1-B.

11 Order at 2-3.

12 *Id.* at 3.

13 *Id.* at 4.

federal lawsuit in his capacity as a union official to protect his membership and the collective bargaining agreement.[14]

On January 4, 2017, Complainant emailed Mr. Corbett. He stated he did not blame DTE during their prior conversation. Rather, that he "wanted to give DTE a chance to respond," and offered to send Mr. Corbett a copy of the release. He further wrote he was "trying to do [his] due diligence and give DTE the chance to respond to what was said by [Respondent]."[15]

After the investigation concluded, Respondent terminated Complainant's employment.[16] The termination decision was made by Carl Wilson, Norfolk Southern's Division Superintendent, who determined the evidence "clearly proved" Complainant's conduct was unbecoming of an employee and detrimental to the interests of Norfolk Southern. Specifically, Mr. Wilson cited Complainant's material misrepresentations to a Carrier customer, and Complainant's threats to publicly disparage the customer during a telephone conversation with a customer representative during the December 19, 2016 conversation.[17]

Following Complainant's dismissal, he filed a complaint with OSHA on May 23, 2017. OSHA determined his discharge did not violate the FRSA and denied the complaint. Complainant requested a hearing before an ALJ.[18]

On January 16, 2019, the ALJ issued an Order Granting Summary Decision and Denying Complaint, finding that Complainant's conversation with Mr. Corbett was not protected activity.[19] Complainant appealed the ALJ's ruling to the Board on January 29, 2019.

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 agency decisions in these

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14 *Id.* at 4-5; RX 3-B.

15 Order at 6; Supplemental RX 1-A.

16 Order at 8; RX 3-C.

17 RX 3-C.

18 CX 2.

19 Order at 10-11.

matters.[20] The ARB reviews an ALJ's decision granting summary decision using a de novo standard.[21] 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.[22] 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.[23]

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 under the FRSA, a complainant must establish three points by a preponderance of the evidence. They are that: (1) he engaged in protected activity as statutorily defined; (2) he suffered an unfavorable personnel action; and, (3) the protected activity was a contributing factor in the unfavorable personnel action.[24] If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[25]

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[20] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 1982.110(a).

[21] *Mehen v. Delta Air Lines*, ARB No. 2003-0070, ALJ No. 2003-AIR-00004, slip op. at 3 (ARB Feb. 24, 2005).

[22] 29 C.F.R. § 18.72(a); *Franchini v. Argonne Nat'l Lab.*, ARB No. 2013-0081, ALJ No. 2009-ERA-00014, slip op. at 10 (ARB Sept. 28, 2015).

[23] *Franchini*, ARB No. 2013-0081, slip op. at 10-11; *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 9 (ARB Oct. 26, 2012).

[24] *D'Hooge v. BNSF Rys.*, ARB Nos. 2015-0042, -0066, ALJ No. 2014-FRS-00002, slip op. at 6 (ARB Apr. 25, 2017), *appeal dismissed*, *BNSF Ry. Co. v. U.S. Dep't of Labor*, No. 17-71854 (9th Cir. Sept. 5, 2017).

[25] 49 U.S.C. § 20109(d)(2)(A)(i); *see D'Hooge,* ARB Nos. 2015-0042, -0066, slip op. at 6.

The issue on appeal is whether the pleadings, affidavits, and other evidence show there is a genuine issue as to a material fact regarding whether any protected activity contributed to Complainant's dismissal. After reviewing the evidence presented in the light most favorable to Complainant, we agree with the ALJ's conclusion on this issue, because Complainant has proffered no evidence that any alleged protected activity contributed to his discharge.

Complainant contends his phone call with Mr. Corbett was protected activity, regardless of what was stated, because he believed DTE required the use of Ohio-based crews. Based on this, he argues DTE had "the authority to investigate, discover, or terminate the misconduct" pursuant to 49 U.S.C. § 20109(a)(1)(C).[26] Complainant further argues "[t]he statute protects both assisting with an ongoing investigation or providing information to someone with the authority to investigate or terminate the misconduct," which he contends means that an investigation need not be under way "as the information provided may then trigger an investigation into the misconduct."[27] Complainant contends he maintained a good faith belief that DTE had the authority to investigate, discover, or terminate the alleged misconduct because DTE referred him back to Respondent when he asked if DTE required the use of Ohio-based crews rather than denying it.[28]

Complainant also argues the ALJ erred in finding there was a lack of evidence that his safety concerns were mentioned during the phone call. He cites to his deposition, taken on August 29, 2018, as evidence that he tried to tell Mr. Corbett about "the problems that there could be with this and the safety concerns" and that he offered to "send him the information."[29]

However, Respondent contends no Norfolk Southern manager knew Complainant discussed any potential FRSA violations with Mr. Corbett.[30] Specifically, Respondent asserts that Mr. Wilson, who terminated Complainant's employment, stated "[a]t no time during the investigation did Mr. Cole claim that

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[26] Complainant's Brief at 4-6.

[27] *Id.* at 7.

[28] Complainant's Brief at 6-7.

[29] CX 7 at 68:16-20.

[30] Respondent's Brief at 21-27.

he had called DTE to raise a safety issue," but rather Complainant "was acting to enforce SMART-ID's collective bargaining agreement."[31]

The record supports Respondent's argument that Complainant did not allege he conveyed to Respondent at any point prior to his termination any safety concerns he may have raised to Mr. Corbett. In Mr. Corbett's December 22, 2016 email to Mr. Grace, he detailed Complainant's concern about a loss of jobs, and that Complainant said he wanted to give DTE a chance to respond, but did not include any reference to safety concerns.[32] Additionally, during the investigation on December 28, 2016, Complainant confirmed he sought to have Mr. Corbett "confirm or deny" whether DTE required the use of Ohio-based crews, and that he stated he was doing his due diligence pursuant to the federal lawsuit in his capacity as a union official to protect his membership and the collective bargaining agreement.[33] Further, in Complainant's January 4, 2017 email to Mr. Corbett, he re-iterated he was "trying to do [his] due diligence and give DTE the chance to respond to what was said by the [Norfolk Southern]."[34] To the contrary, the first time Complainant indicated that he conveyed his safety concerns to Mr. Corbett was during his deposition on August 29, 2018, more than a year and a half after his employment was terminated.[35]

The Regulations state that "[a] complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint."[36] Here, Complainant has failed to set forth any evidence tending to show that any Norfolk Southern managers involved in the decision to terminate his employment were aware he allegedly raised safety concerns with Mr. Corbett prior to his dismissal. Thus, Complainant cannot establish his safety concerns were a contributing factor to his termination.

Further, Complainant's argument that his phone call with Mr. Corbett is protected activity regardless of what was said because he believed DTE had "the

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31 *Id.*; RX 2-F.

32 RX 1-B.

33 Order at 4-5; RX 3-B.

34 Order at 6; Supplemental RX 1-A.

35 CX 7 at 68:14-21.

36 29 C.F.R. § 1982.104(e)(1).

authority to investigate, discover, or terminate the misconduct" is meritless. On December 7, 2016, Complainant was served with Respondent's complaint in the U.S. District Court for the Eastern District of Michigan. The complaint stated Respondent decided to use Ohio-based crews and that DTE was not involved in this decision.[37] As DTE was not involved in this decision, it could not have investigated or terminated the alleged misconduct. Further, as Complainant was served with this complaint twelve days prior to his phone call with Mr. Corbett, he cannot demonstrate a good faith belief that Mr. Corbett, DTE's Communications Manager, had the authority to investigate, discover, or terminate any alleged misconduct.

Examining this matter in the light most favorable to Complainant, he has not raised any genuine issues of material fact that he engaged in protected activity that contributed to his dismissal. Thus, the ALJ properly granted Respondent's motion for summary decision.

CONCLUSION

Respondent is entitled to summary decision as a matter of law. Accordingly, we summarily **AFFIRM** the ALJ's dismissal of Cole's complaint.

SO ORDERED.

[37] RX 2-E.