



In the Matter of:

**SCOTT FIGGINS,
COMPLAINANT,**

v.

**GRAND TRUNK WESTERN
RAILROAD CO.,
RESPONDENT.**

**ARB CASE NOS. 2020-0001
2020-0002**

ALJ CASE NO. 2014-FRS-00119

DATE: February 28, 2022

Appearances:

For the Complainant:

Robert B. Thompson, Esq.; *The Law Office of Robert B. Thompson LLC*; Chicago, Illinois

For the Respondent:

Noah G. Lipschultz, Esq.; *Little Mendelson, P.C.*; Minneapolis, Minnesota

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).¹ Complainant Scott Figgins filed complaints² with the United States Department of Labor's Occupational Safety and

¹ 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2021).

² OSHA considered Figgins' May 7, 2013 filing as a complaint and his July 31, 2013 filing as an amendment to that complaint. The ALJ referred to these filings as "complaints."

Health Administration (OSHA) alleging that Respondent Grand Trunk Western Railroad Company (Grand Trunk) violated the FRSA by suspending him and terminating his employment. On September 19, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing the complaints. We affirm.

BACKGROUND

Grand Trunk is a railroad carrier within the meaning of the FRSA. It operates in Michigan, Illinois, Indiana, and Ohio, and its primary mainline serves as a connection between railroad interchanges in Chicago and rail lines in Eastern Canada and the Northeastern United States. Grand Trunk hired Figgins in 1998, and in 2012, he worked for the company as a conductor at its Pontiac Yard in Pontiac, Michigan.³

When Figgins worked for Grand Trunk, he and other employees were required to follow several general and operational rules of the company. Under Rule I, employees were required to work “regularly and without excessive layoffs.”⁴ Those terms were not specifically defined, but management followed unwritten guidelines that required employees to be available for ninety percent of their “workable” days.⁵ Managers would monitor employees for “patterns of absenteeism” and administrative staff would maintain a “Top 10 Report” identifying employees who had the most unexcused absences.

Grand Trunk employees were also subject to Rule G, which prohibited the use of prescription drugs that could “adversely affect safe performance.”⁶ In 2003, Figgins was diagnosed with anxiety neurosis and insomnia, and in 2011, a doctor gave him prescriptions for Zoloft and Xanax. Figgins informed Grand Trunk’s medical personnel of his Zoloft prescription, and after submitting a medical information form, he was approved to take Zoloft while working. He also requested leave pursuant to the Family and Medical Leave Act “to deal with his wife’s mental issues and his own anxiety.”⁷

Between November 20 and December 15, 2012, Figgins was absent on five occasions due to “flu-like symptoms and bronchitis.” Grand Trunk determined that

³ Joint Exhibit (JX) 1.

⁴ D. & O. at 2, citing JX 5 (January 4, 2013 Grand Trunk Investigation Hearing Transcript) at 2915.

⁵ “Workable” days excluded rest days, vacation days, personal days, FMLA leave, and medical leaves of absence. D. & O. at 2-3.

⁶ JX 16 (June 3, 2013 Grand Trunk Investigation Hearing Transcript) at 841.

⁷ JX 8; Hearing Transcript (Tr.) at 331.

Figgins' absences were "excessive and patterned" and scheduled a formal investigative hearing for January 4, 2013.

On December 31, 2012, Figgins was conducting a train when a derailment in another location delayed his train. He was replaced by a relief conductor because he was unable to reach his destination before the end of his shift. Figgins briefed David Foster, the relief conductor, and gave him a stack of paperwork which included the train's track authority for Main No. 2.⁸ Figgins had signed the track authority, which had been voided, but he failed to put a large "X" across the track authority as mandated by General Rule 1009. This oversight could have resulted in the relief crew occupying an unauthorized track. Foster ultimately located the valid track authority, which had been left on a control stand.

The investigative hearing regarding Figgins' absences was held on January 4, 2013. Figgins' representatives argued that Grand Trunk could not discipline Figgins for his absences because he had obtained notes from his doctor after his absences, and discipline would therefore violate the FRSA.⁹ Philip Tassin was the Grand Trunk Superintendent responsible for deciding Figgins' discipline. Tassin received the investigative hearing materials, which included Figgins' counsel's fax label at the top of the pages, and he also noticed Figgins' counsel's business cards in the crew rooms. He admitted that he expected Figgins to file an FRSA claim if he was disciplined.¹⁰

After the hearing concluded on January 4, Figgins received a notice of investigation regarding the December 31, 2012 track authority incident. Upon arriving at work on January 5, he felt both "depressed from the news . . . about the investigation" and "unsafe to work that day."¹¹ Figgins had a conversation with Donald Steele, a locomotive engineer. According to Figgins, he told Steele that "[w]ith all this harassment going on around here, I'm surprised someone hasn't killed someone." According to Steele, Figgins said "he was stressed out about what was going on with him and that he was thinking about killing somebody."¹²

Steele contacted Eric Herbeck, Grand Trunk Division Trainmaster, about Figgins' comment and Figgins spoke to Herbeck by telephone. Figgins explained that he felt ill and needed to go to the hospital. Figgins told Herbeck that he was going to take a dose of Xanax for his anxiety. About one hour later, Roger Frasure, another trainmaster, drove Figgins to a hospital, and Herbeck followed them.

⁸ Track authority authorizes a locomotive to occupy a given area of track.

⁹ JX 5 at 44-45.

¹⁰ Tr. at 173-175, 204-05.

¹¹ *Id.* at 292-93.

¹² JX 16 at 77-78.

Herbeck had requested statements from Steele and Mark Sims, another employee who had observed Figgins' behavior. After arriving at the hospital, Herbeck read Steele's statement, which mentioned "killing someone," and contacted Grand Trunk's police department.

After Figgins was cleared to leave the hospital, Frasure took him to meet with Mark Slaughter, a railroad police officer, on Grand Trunk's premises. David Durfee, a union representative, advised Figgins not to provide a statement while on medication, but Slaughter was able to conduct a brief interview. Slaughter wrote an incident report noting that Figgins said he was "under a lot of stress and remembers saying because of the stress it makes you feel like you want to kill somebody."¹³

After speaking to Slaughter, Figgins was given a drug test, told that he was being held out of service pending a medical evaluation, and sent home. Figgins thereafter requested and received a prolonged leave of absence for medical reasons.

On January 30, 2013, Figgins received a 30-day suspension for his absences in November and December 2012. The suspension started on May 2, 2013, after Figgins returned from medical leave. Figgins filed a complaint with OSHA on May 7, 2013, alleging that the suspension violated the FRSA.

On June 3, 2013, Grand Trunk held separate hearings regarding the December 31, 2012 track authority incident and the events of January 5, 2013. On July 1, 2013, Grand Trunk issued two separate letters, each discharging Figgins. In one letter Peter Bistis, who replaced Tassin as Superintendent, indicated that Figgins' unauthorized use of Xanax violated Rule G and his remark about killing someone violated Rule H (Furnishing Information and Conduct).¹⁴ In the other letter, Bistis discharged Figgins for violating General Rule 1009 (Voiding Mandatory Directives) in connection with the track authority mistake.

On July 31, 2013, Mr. Figgins filed a "Supplemental Complaint" with OSHA alleging Grand Trunk terminated his employment in violation of the FRSA. OSHA investigated the complaints and found that Figgins' 30-day suspension did not violate the FRSA. OSHA also concluded that Grand Trunk "was able to articulate a legitimate non-discriminatory reason" for firing Figgins because he "had communicated to another employee while working, his desire to kill someone."¹⁵

¹³ *Id.* at 834.

¹⁴ JX 21.

¹⁵ JX 3.

Figgins requested a hearing, and the ALJ conducted a hearing on April 25-27, 2017. Following the hearing, the ALJ issued a Decision and Order Dismissing Complaints. The ALJ concluded that Figgins engaged in FRSA-protected activity “because Mr. Tassin expected him to file an FRSA complaint.”¹⁶ The ALJ also assumed “for the sake of argument” that Figgins’ use of Xanax on January 5, 2013, was protected under the FRSA.¹⁷

The ALJ concluded that, while protected activity contributed to the suspension, Grand Trunk demonstrated by clear and convincing evidence that it would have suspended Figgins absent his protected activity.¹⁸ The ALJ also concluded that, assuming Figgins’ use of Xanax was protected under the FRSA, Grand Trunk demonstrated by clear and convincing evidence that it would have discharged Figgins absent his protected activity.¹⁹

Grand Trunk filed a Petition for Review asserting procedural errors and seeking reversal of the ALJ’s rulings on protected activity. Figgins filed a Petition for Review of the ALJ’s ruling on the merits of his claims. We issued separate briefing orders for each appeal and the parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the FRSA as amended.²⁰ The Board will affirm the ALJ’s factual findings if supported by substantial evidence but reviews all conclusions of law de novo.²¹ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²²

¹⁶ D. & O. at 13.

¹⁷ *Id.* at 13-15, 25.

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 25. The ALJ concluded that Grand Trunk prevailed in its same-action defense for Figgins’ remarks on January 5, 2013, but failed to prove by clear and convincing evidence that it would have terminated Figgins for neglecting to void the track authority with an “X” on December 31, 2012, or for taking the Xanax on January 5, 2013. *Id.* at 20, 23, 25.

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. 13186 (Mar. 6, 2020).

²¹ 29 C.F.R. § 1982.110(b); *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

²² *McCarty v. Union Pac. R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

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.²³ The FRSA also protects employees at work when they are following the medical plan of a treating physician.²⁴

To prevail on an FRSA retaliation complaint, a complainant must prove by preponderance of the evidence that: 1) he engaged in protected activity; 2) his employer took an adverse employment action against him; and 3) the protected activity was a contributing factor in the unfavorable personnel action.²⁵ If the complainant successfully proves that the protected conduct was a contributing factor, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.²⁶

The record supports the ALJ's conclusions that Grand Trunk subjected Figgins to adverse employment actions by suspending him for 30 days and terminating his employment. We do not need to address the parties' appeals of the ALJ's rulings on protected activity, and whether those activities contributed to any adverse actions, because the record supports the ALJ's conclusion that Grand Trunk proved by clear and convincing evidence that it would have suspended and discharged Figgins in the absence of any FRSA-protected activity.²⁷

In suspending Figgins for thirty days, Grand Trunk reviewed his personal record, which showed a history of disciplinary infractions and suspensions from 2003-2011, including two deferred suspensions of ten and fifteen days in 2011.²⁸

²³ 49 U.S.C. § 20109(a).

²⁴ 49 U.S.C. § 20109(c)

²⁵ *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

²⁶ *Id.* at 5 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

²⁷ Grand Trunk also argues on appeal that the ALJ erred by (1) allowing Figgins to amend his complaint to assert a claim under § 20109(a)(3) of the FRSA without first raising this theory in the OSHA investigation, and (2) excluding decisions of the Public Law Board that "were probative of the issues in this matter." Respondent's Opening Brief at 31, 34. Because we dismiss on other grounds, we decline to address these issues.

²⁸ JX 10 at 2902.

Grand Trunk submitted into evidence a chart showing that Figgins was only one of many individuals suspended around the same time. The ALJ concluded that Figgins' suspension was "nothing more than ordinary practice in the course of business at Grand Trunk."²⁹ Figgins does not challenge the suspension on appeal.³⁰

With respect to the discharge, the ALJ found that Figgins made a remark about "killing someone." Steel took the remark "very seriously" and felt that Figgins would be "un-safe to work with."³¹ Bistis relied on Officer Slaughter's incident report and took Figgins's remark very seriously.³² And Durfee testified that Grand Trunk rules prohibit employees from making such remarks.³³ The record supports the ALJ's conclusion that Bistis decided to discharge Figgins pursuant to Rule H because: "(1) Mr. Figgins's remark in the workplace about 'killing someone' was unprecedented, and (2) when evaluating the potential threat posed by Mr. Figgins to the workplace, [Bistis] 'just didn't have the luxury to get that one wrong.'"³⁴

We affirm the ALJ's conclusions as supported by substantial evidence and in accordance with the law.

CONCLUSION

For the reasons stated above, we affirm the ALJ's conclusion that Grand Trunk did not violate the FRSA by suspending Figgins and terminating his employment. Accordingly, Figgins' complaints are **DENIED**.³⁵

SO ORDERED.

²⁹ D. & O. at 19; RX 4 ("Rule I Discipline from January 2011 through April 2013.").

³⁰ See Complainant-Appellant's Opening Brief at 38 ("[T]he ALJ determined and explained why the 30 day suspension was justified in this case. Therefore, Mr. Figgins does not challenge the ALJ's finding that a 30 day suspension would have been entered even if Figgins had not been engaged in a protected activity.").

³¹ JX 16 at 828.

³² Tr. at 532.

³³ *Id.* at 437.

³⁴ D. & O. at 22-23.

³⁵ In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).