U.S. Department of Labor

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

IN THE MATTER OF:

NICHOLAS INGRODI,

COMPLAINANT,

v.

CSX TRANSPORTATION INC.,

RESPONDENT.

ARB CASE NO. 2024-0017

ALJ CASE NO. 2019-FRS-00046
ASSOCIATE CHIEF
ALJ PAUL R. ALMANZA

DATE: July 30, 2026

Appearances:

For the Complainant:
Nicholas Thompson, Esq.; Mark E. Thomson, Esq.; *Casey Jones Law*; Minneapolis, Minnesota

***For the Respondent*:**
Joseph C. Devine, Esq.; Ryan Cates, Esq.; *Baker & Hostetler, LLP*; Columbus, Ohio

Before BURRELL and KIKO, Administrative Appeals Judges

DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act (FRSA or Act).[1] On November 5, 2018, Complainant Nicholas Ingrodi (Ingrodi) timely filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that CSX Transportation, Inc. (CSX or Respondent), violated the FRSA by terminating his employment after he refused to work when a non-work-related illness prevented him from being able to

[1] 49 U.S.C. § 20109; 29 C.F.R. Part 1982 (2026).

safely do so. On February 28, 2019, OSHA dismissed the complaint.[2] On March 4, 2019, Complainant objected to OSHA's dismissal and requested a formal hearing before the Office of Administrative Law Judges (OALJ).

OALJ assigned the case to Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza. On November 22, 2019, Respondent filed a Motion for Summary Judgment, which the ALJ granted on January 31, 2020. In his Decision and Order Dismissing Complaint (ALJ D. & O.) the ALJ found that, as a matter of law, Ingrodi's "personal, non-work-related illness does not constitute a hazardous condition under the Act[]" and, therefore, "he did not engage in [FRSA] protected activity when he reported the illness and missed work."[3] Complainant appealed the 2020 Decision to the Administrative Review Board (Board). On March 31, 2021, the Board issued an Order Vacating and Remanding (ARB Remand Order) the case to the ALJ in which we reiterated our earlier conclusion that Section 20109(b)(1) of the FRSA "does not require that a [hazardous] condition be 'work-related' or state that the condition cannot relate to an employee's physical condition."[4] The Board further held that "an employee impaired by an illness can create a hazardous safety or security condition under the FRSA" so as to render a refusal to work when confronted by such a hazardous condition a protected refusal.[5] The Board remanded the case to the ALJ to (i) "further develop the record, as reasonably necessary; (ii) determine whether Ingrodi's non-work-related illness, and concomitant refusal

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[2] Sec'y's Findings, Case #5-2210-19-007, Occupational Safety and Health Admin. (Feb. 28, 2019).

[3] ALJ D. & O. at 9.

[4] ARB Remand Order at 6.

[5] *Id*. The ARB's Remand Order was based on *Cieslicki v. Soo Line R.R. Co*., ARB No. 2019-0065, ALJ No. 2018-FRS-00039 (ARB June 4, 2020). We recognize that several federal courts have required that protected refusals under 20109(b)(1)(B) be "work related." *See, e.g*., *Adkins v. CSX Transp., Inc*., 553 F. Supp. 3d 308, 312 (S.D. W. Va. 2021) (agreeing "with the Defendants and the numerous courts that have held that 'hazardous safety or security conditions' are those that relate to the physical conditions of the workplace and that the protections of subsection (b) do not extend to off-duty infirmities or injuries"). In one case, a district court rejected the argument that the COVID-19 pandemic was a hazardous condition, because it was not related to the performance of an employee's duties. *Union Pac. R.R. Co. v. Bhd. of Maint. of Way Employes Div. of Int'l Bhd. of Teamsters*, 511 F. Supp. 3d 987, 1001 (D. Neb. 2021). Another court held that side effects from medication used to treat severe seasonal allegories was not a hazardous condition as it was "a non-work-related event" and "has no bearing on the operation of a railroad[.]" *Laveing v. Norfolk S. Ry. Co*., 2020 WL 5768730, at *3 (W.D. Pa. Aug. 21, 2020), *report and recommendation adopted* 2020 WL 5760352 (W.D. Pa. Sept. 28, 2020).

to work, constituted a 'hazardous safety or security condition' that is protected activity under FRSA"; and (iii) to determine whether Ingrodi satisfied the notification requirement of Section 20109(b)(1) of the FRSA.[6]

On remand, the ALJ held a hearing from September 7 to September 8, 2022. After the hearing and an opportunity for both parties to submit post-hearing briefs, the ALJ issued a Decision and Order Dismissing Complaint (ALJ D. & O. on Remand) on August 3, 2023. In this decision, the ALJ found that Complainant did not engage in protected activity under Section 20109(a)(2) of the Act, which protects employees who refuse to violate safety-related laws and regulations.[7] The ALJ further found that Complainant did not engage in protected activity under Section 20109(b)(1)(B) of the Act, which protects employees who refuse to work due to hazardous conditions. Specifically, the ALJ found that (i) Complainant's illness was a hazardous condition;[8] (ii) Complainant's refusal to work was made in good faith and no reasonable alternative to the refusal was available to Complainant;[9] (iii) the hazardous condition presented an imminent danger of death or serious injury;[10] (iv) there was not sufficient time to eliminate the danger posed by the hazardous condition without refusing to work;[11] and (v) Complainant failed to notify the railroad carrier of the existence of the hazardous condition and the intention not to perform further work.[12] Because all five of these conditions must be met for a refusal under Section 20109(b)(1)(B) to be protected, the ALJ determined that Complainant did not engage in protected activity under that provision. Finally, the ALJ concluded that even if Complainant had engaged in protected activity, Respondent established by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of Complainant's assumed protected activity, thus proving its affirmative defense.[13]

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[6] ARB Remand Order at 9.

[7] ALJ D. & O. on Remand at 5-6.

[8] *Id.* at 9.

[9] *Id.* at 8.

[10] *Id.* at 9-10.

[11] *Id.* at 10.

[12] *Id.* at 11-14.

[13] *Id.* at 14.

Complainant filed a Petition for Review with the Board. For the following reasons, we affirm the ALJ's conclusions that Complainant did not engage in protected activity under either Section 20109(a)(2) or (b)(1)(B). We also affirm the ALJ's affirmative defense findings and conclusion.

BACKGROUND

Complainant was employed as a conductor by CSX, a railroad subject to coverage under the FRSA. Complainant had no fixed schedule but rather worked as part of a rotating pool of conductors moving trains between Baltimore and Cumberland, Maryland.[14] When a conductor was needed to complete a trip, CSX would call the conductor whose name was at the top of the list and he or she would have three hours to report to work. Once the trip was completed, CSX would move that conductor's name to the bottom of the list, and they would then be on call until their name cycled back up to the top.[15]

Conductors who missed calls were subject to a progressive discipline policy. When a conductor missed a call, points were assigned depending on the circumstances of the missed call and the day on which the call was missed. A conductor who missed a call due to a documented illness that did not rise to the level of hospitalization or emergency treatment would be assigned three points, regardless of the day the call was missed.[16] If a conductor reached or exceeded 20 points, he or she would be disciplined then have ten points deducted from their total. Should the conductor again reach twenty points, they would be disciplined, but this time at the next discipline level. The discipline began at level one with a "Counseling Letter" and ended at level four with dismissal.[17]

Prior to April 14, 2018, Complainant had been subject to the first three steps in Respondent's progressive discipline policy and had earned 19 attendance points.[18] At this point, any absence other than for emergency treatment or hospitalization would put him over 20 points and result in his dismissal. On April 14, 2018, Complainant began experiencing vomiting and diarrhea and marked off as sick,

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14 *Id*. at 3.

15 *Id*.

16 *Id*.; *see* Nicholas Ingrodi Deposition; Deposition Exhibit 2 at 8.

17 ALJ D. & O. on Remand at 3-4.

18 *Id*. at 4.

either by calling the Crew Management Center, or using the CrewLife App, both of which were permissible ways for employees to mark off as sick under Respondent's attendance policy.[19] Complainant testified that he did not provide Respondent with information about the nature of his illness at the time he called off.[20] Complainant then sought treatment at a local hospital's emergency department and was treated by a doctor, who provided Complainant with a "School/Work Release" form, which stated that Complainant was seen on April 14, 2018, for "Illness" and that he would be able to return to work on April 16, 2018. Complainant faxed this form to Respondent on April 16, 2018.[21] On April 15, 2018, Complainant was called into work but failed to report (due to the aforementioned illness) and was assessed three additional points pursuant to Respondent's attendance policy.[22] This brought Complainant's point total to 22 and triggered his dismissal.

Pursuant to a collective bargaining agreement between Respondent and Complainant's union, Complainant was entitled to a hearing prior to being terminated. This hearing was initially scheduled for April 26, 2018, but was thrice postponed and took place approximately two months later on June 27, 2018.[23] During the hearing, Complainant testified that he believed his symptoms on April 14, 2018, would have affected his work and would have constituted a danger to himself and/or coworkers.[24] However, he did not describe his symptoms during this hearing. Complainant's then-girlfriend also testified at this hearing and stated that she had to drive Complainant to the hospital since he was unable to drive himself.[25] Following the hearing, Respondent terminated Complainant's employment on July 26, 2018.[26]

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19 *Id.*

20 Ingrodi Deposition at 46-47.

21 ALJ D. & O. on Remand at 4. Complainant did not include any other details in the communication to Respondent demonstrating the severity of the illness or how the illness would qualify for exemption under Respondent's policy. Respondent determined Complainant's simple declaration of "illness" did not rise to the level of hospitalization or require emergency treatment and, therefore, assessed him three points. *See id.* at 4.

22 *Id.*

23 ALJ D. & O. at 4.

24 *Id.* at 5.

25 Hearing Transcript (Tr.) at 228.

26 ALJ D. & O. at 5.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to hear appeals from ALJ decisions and to issue agency decisions in cases arising under the FRSA.[27] In FRSA cases, the Board reviews questions of law presented on appeal de novo and is bound by the ALJ's factual findings that are supported by substantial evidence.[28] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[29]

DISCUSSION

Congress enacted the FRSA in order to "promote safety in every area of railroad operations[.]"[30] The current form of the FRSA's employee protection provisions were enacted in 2007 to "enhance[] administrative and civil remedies for employees" and "ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers."[31]

To prevail under a whistleblower burden-shifting framework, an 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, to the unfavorable personnel action. 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

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27 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

28 *Gourneau v. BNSF Ry. Co.*, ARB No. 2023-0034, ALJ No. 2021-FRS-00018, slip op. at 13 (ARB May 21, 2025) (quoting *Klinger v. BNSF Ry. Co.*, ARB No. 2023-0003, ALJ No. 2016-FRS-00062, slip op. at 5 (ARB July 23, 2024)).

29 *See, e.g., Jones v. Exclusive Jets*, *LLC*, ARB No. 2023-0034, ALJ No. 2022-AIR-00003, slip op. at 9 (ARB Dec. 31, 2024) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)) (citation omitted).

30 49 U.S.C. § 20101.

31 H.R. CONF. REP. 110-259 at 348, 2007 U.S.C.C.A.N. 119, 180-81*; see also Lee v. Norfolk S. Ry. Co*., 802 F.3d 626, 630 (4th Cir. 2015) (recognizing Congress's purpose in adding anti-retaliation provisions to the FRSA).

action absent the complainant's protected activity.[32]

1. Complainant's Alleged Protected Activity under Section 20109(a)(2)

Under Section 20109(a)(2), a railroad carrier is prohibited from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee on the basis of the employee's lawful and good faith act done "to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security[.]"[33]

The ALJ concluded that Complainant failed to establish that he engaged in protected activity under Section 20109(a)(2).[34] To prove an (a)(2) violation, Complainant must demonstrate that he was discharged or otherwise discriminated against due to his "refus[al] to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security[.]"[35] On appeal, Complainant attempts to satisfy this burden by arguing that the federal regulation he refused to violate was 49 C.F.R. § 217.1, a Federal Railroad Administration regulation that requires all railroads to maintain operating practices, and instruct employees in their operating practices.[36] Complainant argues that this provision has the effect of giving CSX's internal safety policies and procedures the force of federal law. Since Respondent has a policy that requires employees to remain alert and attentive at all times, Complainant argues that working in a physically impaired state where he could not remain alert would have required him to violate this rule.[37]

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32 49 U.S.C. § 20109(d)(2)(A)(i), incorporating the burdens found in 49 U.S.C. § 42121(b)(2)(B)(i).

33 49 U.S.C. § 20109(a)(2).

34 ALJ D. & O. on Remand at 5-6.

35 49 U.S.C. § 20109(a)(2).

36 49 C.F.R. § 217.1 provides that "[t]hrough the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices."

37 Complainant's Brief (Comp. Br.) at 22. This argument was not raised below and is arguably waived. Complainant urges us to look past the argument's waiver and take judicial notice of the regulation. *Id.* 23 n.4

This argument is unpersuasive. The provision of the Federal Railroad Administration regulations that Complainant cites is a general "purpose" provision that explains the rationale behind the regulatory requirement that all railroads maintain operating practices. Although it requires that each railroad "instruct its employees in operating practices," it does not provide that such operating practices have the force of law, or that a violation of a railroad's operating practices constitutes a violation of federal railroad safety regulations.[38] Congress could have drafted Section 20109(a)(2) so that it protected an employee who refused to violate any Federal law, rule, or regulation, *or any employer's rule or operating practice*, relating to railroad safety or security. Congress did not do so and it is not for the Board to rewrite the statute and expand the scope of (a)(2)'s protection.[39]

To buttress his argument regarding an (a)(2) violation, Complainant points to various mandatory safety practices that he would not have been able to engage in had he tried to work while ill.[40] These include rules about coupling an air hose or adjusting a coupling device, as well as procedures relating to shoving or pushing movements.[41] Complainant does not, however, suggest that at the time he marked off sick he had been asked to do any task requiring those specific safety practices. Our analysis may have been different had Complainant, already at work, refused to perform a specific task that due to his illness he would be unable to do in the manner required by federal safety regulations. As it stands, however, Complainant's argument attempts to cross the bridge well before he gets to it. For these reasons, we affirm the ALJ's conclusion that Complainant has not established that he engaged in protected activity under Section 20109(a)(2).

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[38] 49 C.F.R. § 217.1.

[39] At least one federal court has rejected the argument "that the very fact that railroad companies must train their employees regarding the companies' operating rules means that any of the companies' rules are Federal rules." *See Berberich v. Kansas City S. Ry. Co.*, No. 2:22-CV-02426-EFM-TJJ, 2024 WL 521373, at *4 n.19 (D. Kan. Feb. 9, 2024), *aff'd on other grounds*, 162 F.4th 1045 (10th Cir. 2025).

[40] Comp. Br. at 24.

[41] Specifically, Complainant points to 49 C.F.R. § 218.39, which describes the safety requirements for coupling an air hose or adjusting a coupling device, and 49 C.F.R. § 218.99, which describes the safety requirements for shoving and pushing movements.

2. Complainant's Protected Activity Under Section 20109(b)(1)(B)

Having considered and rejected Complainant's argument that he engaged in protected activity under Section 20109(a)(2), we must now turn to his argument that he engaged in protected activity under Section 20109(b)(1)(B). Under Section 20109(b)(1)(B), a railroad carrier is prohibited from retaliating against an employee for "refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties."[42]

Importantly, refusals under Section 20109(b)(1)(B) are protected only if certain statutory conditions are met.[43] The FRSA statute provides that for a refusal under Section 20109(b)(1)(B) to be protected, the following conditions must be satisfied:

> (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
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> (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
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> (i) the hazardous condition presents an imminent danger of death or serious injury; and
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> (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
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> (C) 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.[44]

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42 49 U.S.C. § 20109(b)(1)(B).

43 *Id.* § 20109(b)(1)(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* . . . ." (emphasis added).

44 49 U.S.C. § 20109(b)(2).

On remand, the ALJ determined that: (i) Complainant's illness was a hazardous condition;[45] (ii) Complainant's refusal was made in good faith and no reasonable alternative was available to him;[46] (iii) the hazardous condition presented an imminent danger of death or serious injury;[47] and (iv) the urgency of the situation did not allow sufficient time to eliminate the danger without refusing to work.[48] However, the ALJ also found that Complainant did not satisfy the requirement that an employee, where possible, notify the railroad carrier of the existence of the hazardous condition and his intention not to perform further work.[49] In other words, Complainant satisfied many of the required conditions but did not notify Respondent of the hazardous condition and his intention not perform further work, as required by (b)(2)(C). Accordingly, the ALJ concluded that Complainant did not engage in protected activity under Section 20109(b)(1)(B).

Complainant makes two arguments as to how he satisfied (b)(2)(C)'s requirement. Complainant points to the emergency department paperwork he faxed to Respondent on April 16, 2018, as evidence that he "provided notice as soon as practical[.]"[50] The bulk of Complainant's argument, however, is focused on the notification he purportedly provided during the June 27, 2018 pre-termination hearing. For different reasons, neither of these satisfy (b)(2)(C)'s requirement that an employee notify the railroad carrier of the hazardous condition and his refusal to perform further work.

i. Notification on April 14 and April 16, 2018

Although Complainant does not straightforwardly assert that marking off sick on April 14 or faxing in the "School/Work Release" form on April 16 satisfy (b)(2)(C)'s notification requirement, he obliquely references it in his briefing and it is worth briefly addressing.[51]

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45 ALJ D. & O. on Remand at 9.

46 *Id*. at 8.

47 *Id*. at 9-10.

48 *Id*. at 10.

49 *Id*. at 11-14.

50 Comp. Br. at 20.

51 *See, e.g., id.* at 14 (noting that during the pre-termination hearing "Ingrodi *again* provided CSX with the doctor's note from his emergency room visit that he had previously faxed to CSX.") (emphasis added).

When Complainant marked off sick on April 14, 2018, he did not provide Respondent with *any* information about the nature or severity of his illness.[52] The release form Complainant faxed on April 16, 2018, was similarly bereft of detail. It stated only that Complainant "was seen in [the] emergency room on 4/14/18" with the reason given as "illness."[53] The form did not specify any of Complainant's symptoms, nor did it state the nature or severity of his illness. It did not mention that he was experiencing (or had recently experienced) vomiting, did not mention that he was experiencing (or had recently experienced) diarrhea, and did not say anything about his physical condition. In short, it provided Respondent with absolutely no meaningful information about Complainant's illness. In this regard, the facts are very similar to those in *Winch v. CSX Transportation*, *Inc.*, a previous case dealing with a (b)(1)(B) refusal in which personal illness was the hazardous condition the employee was confronted by.[54]

In *Winch*, we concluded that an employee who called in to say that he was ill and needed to be marked off as sick but did not provide any further information, did not satisfy the notification requirement of Section 20109(b)(1)(A).[55] As we put it then:

> [Winch] 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."[56]

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[52] ALJ D. & O. on Remand at 4.

[53] Nicholas Ingrodi Deposition; Deposition Exhibit 2.

[54] *Winch v. CSX Transp., Inc.*, ARB No. 2015-0020, ALJ No. 2013-FRS-00014 (ARB July 19, 2016).

[55] *Winch*, ARB No. 2015-0020, slip op. at 8.

[56] *Id*.

Complainant attempts to distinguish his actions from those of *Winch* by arguing that he "provided notice as soon as practical by providing his paperwork from the ER to CSX."[57] This attempt fails because the paperwork he provided did not contain any detail whatsoever about the nature or severity of his illness. We have not held, nor does either party argue, that every possible illness or ailment constitutes a hazardous condition. It necessarily follows that alerting the railroad that you are being treated for an illness—without providing *any* additional information—is insufficient to satisfy section 20109(b)(2)(C)'s notification requirement.[58]

ii. Notification on June 27, 2018

The ALJ also rejected Complainant's arguments that the information he provided during the pre-termination hearing on June 27, 2018, satisfied (b)(2)(C)'s notification requirement. The ALJ found that Complainant's statements at the hearing were not descriptive enough to "allow the Respondent to consider the extent of Complainant's illness and symptoms,"[59] *and* that the "where possible" phrasing in (b)(2)(C) requires that notification be made "with some sense of urgency, but a sense of urgency lesser than 'as soon as possible' or 'immediately.'"[60]

On appeal, Complainant argues that the "FRSA does not require an employee to urgently report the hazardous condition for the refusal to be protected" and that "[w]hen the railroad safety issue cannot be remedied with notice, no such urgency is required."[61] This argument disregards the text of Section 20109(b)(2)(C) and cannot be squared with our precedent.

As an initial matter, we note that Section 20109(b)(2)(C) requires the employee to notify the carrier not only of "the existence of the hazardous condition,"

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57 Comp. Br. at 20.

58 The exception to this general rule is when the illness is so severe or of a type that would make notification impossible. Under such circumstances—which the ALJ did not find in this case—notification would not be required before refusal because Section 20109(b)(2)(C) only requires an employee to notify the railroad carrier "where possible." This is a fact-based inquiry and the ALJ's conclusion that it was possible for Ingrodi to notify CSX is supported by substantial evidence in the record.

59 ALJ D. & O. on Remand at 12.

60 *Id.* at 13.

61 Comp. Br. at 16, 18.

but also the employee's "intention not to perform further work."[62] This construction plainly contemplates that the notification will be provided at the time of or immediately prior to the protected refusal, otherwise the employee would no longer have an intention not to perform further work. Even though we have recognized that the FRSA's refusal provisions are broad—understandably so given the important safety objectives they seek to advance—we cannot stretch the protections of those provisions to such a degree as to render the notification requirement a nullity.[63] This aligns with Congress's objective to balance the protection with the employer's business concerns. The FRSA's additional requirements for refusal provisions, including the notification provision, exist because "Congress weighed the higher cost of an employee's refusal to work—which results in staffing issues and disruption of the work day—against the benefit of such refusal, ultimately deciding to provide anti-retaliation protection only in limited, serious, and time-sensitive circumstances."[64] Thus, Congress emphasized promptly notifying the employer of the hazardous safety condition to allow the employer to quickly address hazardous safety concerns to make adjustments to preclude the loss of work.

We need not and do not decide how delayed an after-the-fact notification can be while still satisfying the requirement of (b)(2)(C). Whether an employee has satisfied (b)(2)(C)'s notification requirement is fact-intensive and dependent on the specific hazardous condition that prompts the employee's refusal.[65] In the instant case it is enough to say that Complainant's purported notification at his pre-termination hearing—held more than two months after his refusal to work—was insufficient. In his briefing, Complainant argues that notification prior to the pre-termination hearing was not required because "this is not a case in which the time at which CSX was notified of the hazardous condition affected railroad safety[.]"[66] This argument is unsupported by the text of the statute which conditions the

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[62] 49 U.S.C. § 20109(b)(2)(C).

[63] *See Cieslicki*, ARB No. 2019-0065, slip op. at 6-7 (recognizing that the Act's hazardous conditions language is broad).

[64] *Monohon v. BNSF Ry. Co.*, 17 F.4th 773, 782 (8th Cir. 2021); *see also Fresquez v. BNSF Ry. Co.,* 52 F.4th 1280, 1304 (10th Cir. 2022) (recognizing the higher standard Congress imposed on railroad employees seeking protection for refusing work due to hazardous conditions under (b)(1)(C) than refusing work under (a)(2) due to violations of federal law).

[65] *Winch v. Dir., OWCP, U.S. Dep't of Lab.*, 725 F. App'x 768, 771 (11th Cir. 2018) (recognizing that this issue is fact specific).

[66] Comp. Br. at 15.

notification requirement on whether or not notification is possible, not whether notification would permit the carrier to remedy the hazardous condition.[67]

Complainant's final argument—that it was not possible to notify Respondent of the hazardous condition—is unpersuasive. Accepting as true Complainant's assertion that employees who call to mark off as ill speak to an operator and are only able to provide their names and identification numbers (and that an employee marking off using the CrewLife App is similarly restricted in what information they can provide), Complainant has not explained why it was not possible for him to provide notification via fax, which is the method he used to provide his "School/Work Release" form to Respondent, or for him to contact a manager through any other method. It may very well be the case that CSX's policy does not require an employee who is ill to call a supervisor, but the notification requirement of Section 20109(b)(2)(C) is separate from and independent of an employer's attendance policies.[68] It is the statute's requirements which Complainant's actions are measured against and it is the statute's requirements against which Complainant's actions fall short.

A crew attendance app or hotline that is not configured to accept certain information is a far cry from the scenarios where the Board has found that notice was not possible under the circumstances. Take for instance *Laidler v. Grand Trunk Western Railroad,* a case both parties cite. In *Laidler*, the Board affirmed an ALJ's finding that because there was an oncoming train only 500-1000 feet away and approaching in dark and foggy conditions, it was not possible for the employee to notify the carrier of the hazardous condition and his intention not to perform a roll-by inspection.[69] Further, the complainant in *Laidler* notified the trainmaster the very next day that he did not perform the inspection due to hazardous conditions. Complainant's claim in this case that immediate notification is not required "where such notification would be futile" misstates the Board's holding in

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67 One federal court has accepted the argument Complainant makes, holding that "a reasonable jury could find [(b)(2)(C)] inapplicable because it was not possible for the hazardous condition—the threat of Plaintiff working on the railroad while intoxicated—to be corrected immediately." *See Kurec v. CSX Transp., Inc.*, 2020 WL 6484056, at *13 (N.D.N.Y. Nov. 4, 2020) (cleaned up).

68 Comp. Br. at 9 ("But there is no CSX policy requiring an employee in Ingrodi's position to call a supervisor.").

69 *Laidler v. Grand Trunk W. R.R. Co.*, ARB No. 2021-0013, ALJ No. 2014-FRS-00099, slip op. at 6 (ARB Aug. 31, 2021) ("[S]ubstantial evidence supports that it was not possible for Complainant to notify the railroad carrier of the existence of the hazardous condition.").

Laidler.[70] Because the ALJ's conclusion that Complainant did not engage in protected activity under Section 20109(b)(1)(B) correctly applied the law and our precedent, and is supported by substantial evidence, we affirm.

3. Respondent's Affirmative Defense

After determining that Complainant did not engage in protected activity, the ALJ proceeded to analyze Respondent's affirmative defense. Under the FRSA, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action even in the absence of any protected activity.[71] Under Board precedent, it is not enough for an employer to show that it *could* have taken the same adverse action; it must show that it *would* have done so even in the absence of protected activity.[72] By its very nature, the affirmative defense assumes that "contributing factor" has been found but continues the analysis by comparing the employer's retaliatory reasons with its non-retaliatory reasons and asks the fact-finder to make a finding in a counterfactual or hypothetical situation and evaluate the evidence supporting the employer's disciplinary decision as if the protected conduct *had not occurred*. This is important to note in those cases where the protected activity was an initiating event to the adverse action as we have here. The employer is not precluded from an affirmative defense simply because protected activity was an initiating event or has been found to be a contributing factor to the adverse action.[73]

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70 Comp. Br. at 16 ("Lack of immediate notification does not doom a Section 20109(b) claim, particularly where such notification would be futile.").

71 29 C.F.R. § 1982.109(b).

72 *See, e.g., Palmer v. Canadian Nat'l Ry*., ARB No. 2016-0035, ALJ No. 2014-FRS-000154, slip op. at 57 (ARB Sept. 30, 2016, reissued with full dissent Jan. 4, 2017) (citing *Speegle v. Stone & Webster Constr., Inc*., ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014)). For example, the Board has recognized that an employer cannot carry its burden by showing that it might have taken the same adverse action against an employee. *Douglas v. Skywest Airlines, Inc*., ARB Nos. 2008-0070, -0074, ALJ No. 2006-AIR-00014, slip op. at 17 n.108 (ARB Sept. 30, 2009).

73 *Yowell v. Fort Worth & W. R.R.,* ARB No. 2019-0039, ALJ No. 2018-FRS-00009 (ARB Feb. 5, 2020), *aff'd sub nom*., 933 F.3d 418 (5th Cir. 2021) (finding the ALJ erred in concluding that Respondent could not meet its affirmative defense as a matter of law because, depending on the facts of individual cases, an employer may be able to prove that it disciplined an employee for an untimely report notwithstanding that the report was also protected activity); *Clem v. Comput. Scis. Corp.*, ARB No. 2016-0096, ALJ No. 2015-ERA-00003, -00004, slip op. at 15-16 (ARB Sept. 17, 2019) (concluding the ALJ erred in his same-

An employer can satisfy its affirmative defense by circumstantial evidence including the temporal proximity between the adverse action and the violation of workplace policies. An employer may also show a track record of consistent discipline of similar violations by other employees who did not engage in protected activity. In his analysis, the ALJ noted that a Labor Relations Specialist working for Respondent credibly explained that in every case she handled dealing with an employee who had reached the point limit while on the final stage of the attendance policy's progressive discipline program, the Labor Relations department recommended dismissal.[74] Similarly, another Labor Relations Specialist stated that every such case that went to hearing in 2017 and 2018 resulted in termination.[75] The ALJ also found that Respondent's attendance policy was uniformly applied.[76] Accordingly, the ALJ concluded that "Respondent has established by clear and convincing evidence that in this case it would have taken the same unfavorable personnel action in the absence of Complainant's assumed protected activity."[77]

On appeal, Complainant argues that the ALJ erred and should have focused his analysis on whether Respondent would have terminated Complainant had he not marked off from work at all, not whether Respondent would have taken the same action had Complainant not engaged in protected activity. Respondent, on the other hand, argues that the ALJ correctly applied the law and the Board's precedent, including our decision in *Yowell v. Fort Worth & Western Railroad*.[78] We agree with Respondent and conclude that under the facts in this case, the ALJ's affirmative defense findings are supported by substantial evidence. In *Yowell*, the Board held that the employer fired the employee for untimely reporting in violation of workplace policies. In this case, the Respondent fired Complainant for violating attendance policies. That a portion of the attendance violation could have involved

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action defense findings by double crediting "contributing factor" to conclude that employer could not meet its same-action defense because protected activity was a contributing factor).

74 ALJ D. & O. on Remand at 15-16.

75 *Id*. at 16.

76 *Id*.

77 *Id*.

78 *Yowell,* ARB No. 2019-0039. In *Yowell*, the Board found that a rail carrier proved its affirmative defense by showing that it would have terminated the complainant for late reporting in the absence of his protected activity. *Supra* note 73.

protected activity does not preclude Respondent from demonstrating its affirmative defense.

Further, the ALJ discussed Respondent's comparator evidence supporting uniform application of the policies to employees.[79] The ALJ observed that Complainant does not challenge Respondent's position that it uniformly applied the policy.

CONCLUSION

The ALJ's findings that Complainant failed to establish that he engaged in protected activity under either Section 20109(a)(2) or (b)(1)(B) of the FRSA and that Respondent proved its affirmative defense are supported by substantial evidence and legally sound. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** the case.

SO ORDERED.

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

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79 ALJ D. & O. on Remand at 15-16.