



**In the Matter of:**

**JEROME YELDER,**

**ARB CASE NO. 2020-0041**

**COMPLAINANT,**

**ALJ CASE NO. 2018-FRS-00069**

**v.**

**DATE: August 24, 2021**

**NORFOLK SOUTHERN RAILWAY  
COMPANY,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Jerome Yelder; *pro se*; Grosse Pointe Farms, Michigan**

***For the Respondent:***

**Joseph C. Devine, Esq. and Samuel E. Endicott, Esq.; *Baker & Hostetler, LLP*; Columbus, Ohio**

**Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek,  
*Administrative Appeals Judges***

**DECISION AND ORDER**

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA).<sup>1</sup> Jerome Yelder (Complainant) filed a timely complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Norfolk Southern Railway Company (Respondent) violated the FRSA by terminating his employment after he reported

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<sup>1</sup> 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 (2020).

hazardous safety or security conditions and injuries. OSHA dismissed the complaint. Complainant requested a formal hearing. An Administrative Law Judge (ALJ) dismissed the complaint after a hearing, finding that Complainant failed to prove by a preponderance of the evidence that his protected activity was a contributing factor to the adverse action Respondent took against him. On appeal, we summarily affirm the ALJ's Decision and Order (D. & O.).

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) to review appeals of ALJ's decisions pursuant to the FRSA.<sup>2</sup> The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.<sup>3</sup>

### DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discriminating against an employee because the employee engaged in a protected activity.<sup>4</sup> To prevail on an FRSA retaliation complaint, complainants must prove by preponderance of the evidence that (1) they engaged in protected activity, (2) that their employer took an adverse employment action against them, and (3) that the protected activity was a contributing factor in the unfavorable personnel action.<sup>5</sup>

The FRSA protects, among other acts, employees who report, in good faith, a hazardous safety or security condition.<sup>6</sup> In this case, the ALJ found that Complainant engaged in protected activity when he reported a transport driver's verbal unresponsiveness to his repeated requests, made before and after contacting the Maumee Bridge Operator, to be told where they were going and to stop the

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<sup>2</sup> 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).

<sup>3</sup> *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

<sup>4</sup> 49 U.S.C. § 20109(b).

<sup>5</sup> *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).

<sup>6</sup> § 20109(b)(1)(A).

vehicle to let him out.<sup>7</sup> The ALJ also found that protected activity was not a contributing factor to Complainant's termination from employment.

Substantial evidence supports the ALJ's finding that protected activity was not a contributing factor to Complainant's employment termination. A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."<sup>8</sup> We will affirm ALJ findings if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>9</sup> A reasonable person could conclude that Complainant's report of a hazardous safety or security condition was not a contributing factor in Respondent's disciplinary action. Substantial evidence also supports the ALJ finding that Complainant's actions in engaging in a physical altercation with the transport driver and his attempt to take over the steering wheel and brakes of a moving vehicle led to the disciplinary action in this case. Accordingly, we affirm the ALJ's findings.<sup>10</sup>

### CONCLUSION

As substantial evidence supports the ALJ's factual determination that Complainant's protected activity was not a contributing factor in the adverse actions taken against him by Respondent, we **AFFIRM** the ALJ's conclusion that Respondent did not violate the FRSA and the complaint in this matter is **DENIED**.

**SO ORDERED.**

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<sup>7</sup> On appeal, Complainant argues the ALJ erred in finding that his report of a psychological injury was not protected activity. However, substantial evidence supports the ALJ's finding that Complainant's report or attempted report of a personal injury at the investigative hearing was not made in good faith. D. & O. at 11-12.

<sup>8</sup> *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013).

<sup>9</sup> *McCarty v. Union Pacific R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

<sup>10</sup> "[Norfolk Southern] did not take Yelder out of service or terminate his employment because of Yelder's protected activity. Stated another way, Yelder's protected activity played no part in NS's decision to take adverse employment actions against him." D. & O. at 25.