U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 24 June 2008

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In the Matter of:

RICHARD PURCELL,
Complainant,

v. *Case No.*: **2008-FRS-00002**

UNION PACIFIC RAILROAD,
Respondent.

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DECISION AND ORDER DISMISSING COMPLAINT

On October 9, 2007, Richard Purcell ("Complainant") filed a complaint ("*Complaint*") pursuant to the Federal Railroad Safety Act, 49 U.S.C. § 20109, *amended by* 9/11 Act of 2007, Pub. L. No. 110-053 § 1521 (2007) ("FRSA"). The complaint was a diffuse narrative, in which Complainant alleged that he was wrongfully barred from Respondent's premises as a result of his disclosure of his intention to report obscene remarks made by one of Respondent's employees. He asserted that he "would be in the category of a rail worker-contractor," and he requested whistleblower protection pursuant to laws designed "[t]o provide for the security and safety of rail and rail transit transportation systems . . . ." (*Complaint* at 1, 6). Although Complainant provided a citation to a bill that is pending before a committee of the United States House of Representatives, the essence of the facts alleged in his initial complaint reasonably relate to the FRSA, which is an analogue to the bill cited by Complainant. *See* H.R. 534, 110th Cong. (2007).

The Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL") initially investigated the complaint. On January 4, 2008, OSHA issued a statement of the "Secretary's Findings," in which it made the following determinations: (1) Respondent is a railroad carrier engaged in interstate commerce; (2) Complainant was an employee covered by the Act; and (3) Complainant was denied access to Respondent's property and subsequently filed a timely complaint. OSHA dismissed the claim after determining that reporting offensive comments made by an employer's agent does not qualify as "protected activity" within the contemplation of the FRSA. On January 25, 2008, Complainant submitted a filing of indeterminate nature, which this tribunal has treated as a timely objection to OSHA's findings, appeal, and request for hearing. ("*Request for Hearing*").

Section 1521 of the 9/11 Act amends the FRSA and modifies the railroad carrier employee whistleblower provision by expanding what constitutes "protected activity" and enhancing administrative and civil remedies for employees. Because the alleged protected activity and alleged adverse employment action occurred prior to the date of the amendments giving this office jurisdiction over FRSA whistleblower claims, on March 20, 2008, this tribunal issued an Order to Show Cause why the claim should not be dismissed for lack of jurisdiction. Complainant filed a response on April 1, 2008 ("*Complainant's Response*"); Employer filed "Union Pacific's Reply to Show Cause Order" ("*Respondent's Reply*") on May 19, 2008, pursuant to its Motion for an Extension of Time.[1]

In his response, Complainant alleged that Respondent engaged in various instances of unlawful activity, and he cited to several previously unmentioned sources of supporting law, including the Iowa Code, United States Department of Transportation regulations, the FRSA, and the Surface Transportation Assistance Act ("STAA").[2] (*See Complainant's Response* at 1-2). Without more, this tribunal does not have jurisdiction to provide relief relating to Complainant's allegation that Respondent violated Iowa law and U.S. Department of Transportation regulations.

In Complainant's Response, he asserted for the first time that: "Even if I am not protected by the [FRSA] I think I would still be protected by other federal laws involving [whistleblower] protection such as Section 405 of the Surface Transportation Assistance Act . . . ." (*Complainant's Response* at 1). The applicable version of the STAA provides, in relevant part, that:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding . . . .

49 U.S.C. § 31105(a).[3] Complainant's suggestion that he is protected under the STAA is without merit in several respects. Complainant brought his initial complaint pursuant to the FRSA, alleging that he suffered adverse employment action as a result of engaging in protected activity. (*Complaint* at 1). The STAA requires that a complaint be brought within 180 days of the date of the alleged violation. In this case, Respondent first denied Complainant access to its properties on June 27, 2007. 49 U.S.C. § 31105(b). Even assuming the facts are as Complainant alleges, the time in which he could have properly alleged a violation of the STAA has expired. Any attempt now to claim a violation of the STAA resulting from the alleged June 2007 adverse action is time-barred.

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[1] As detailed in this tribunal's April 11, 2008, Memorandum to Parties, the Order to Show cause was delayed due to an error in service, and the parties were given additional time to respond. Pursuant to an Order Extending Time for Filing Reply to Show Cause Order, Respondent was permitted to file its reply on or before May 19, 2008.

[2] Specifically, Complainant has alleged a violation of 49 C.F.R. § 392.3 (2007)("Ill or fatigued operator") and Iowa Code § 708.7 (2007)("Harassment").

[3] The most recent amendments to the STAA took effect on August 3, 2007. *See* 49 U.S.C. §3110, *amended by* 9/11 Act of 2007, Pub. L. No. 110-053 § 1536 (2007). The previous version of the statute was in effect at the time of the alleged adverse action.

Assuming *arguendo* that Complainant is not time-barred from amending his complaint to include an allegation of a violation of the STAA, his activity, as alleged, would not be protected under its statutory terms.[4] In his Request for Hearing, Complainant stated that the railway transport drivers abide by a "safety/security rule that there is (sic) to be no more than 5 [passengers] in a vehicle at one time [, or six] persons total if you count the driver . . . . This is something that driving contractors are taught over and over again." (*Request for Hearing* at 3). The STAA protects drivers of certain commercial passenger vehicles "used in the highways in commerce" only if the vehicles are "designed to transport more than 10 passengers including the driver."[5] 49 U.S.C. § 31101(1)(B). Claimant has stated that he and the other drivers would allow no more than six passengers in a van at one time, which suggests that the vehicle's capacity falls well short of the minimum required for STAA protection.

Although his later correspondence with this tribunal – specifically his Request for Hearing and his Response – alleges numerous safety and regulatory violations, Complainant's original intention to report verbal harassment that he alleges resulted in his termination is not protected. The STAA prohibits retaliation against employees who file a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," and those who refuse to operate a vehicle because doing so would either violate a safety standard or cause the employee's reasonable apprehension of serious injury. By Claimant's own account, the activity for which he was allegedly terminated was an expressed intention to report the malicious comments made by one of Respondent's employees (*Complaint* at 8-9, "Statement #2"). However unnecessary and distasteful the employee's conduct may have been, a verbalized intention to report such a matter to the employee's superiors does not constitute protected conduct under the STAA.

Before the merits of Complainant's allegations under the FRSA may be addressed, this tribunal must determine whether it has jurisdiction over the case. A complainant alleging a violation of the FRSA occurring prior to August 3, 2007, was required to initiate proceedings before the National Railroad Adjustment Board or its delegate. 49 U.S.C. § 20109(c)(2000); 45 U.S.C. § 153 (2000). The Department of Labor has no jurisdiction over a complaint filed under the amended FRSA if the alleged protected activity and adverse employment actions occurred prior to the August 3, 2007, effective date of the amendments. *See Hamilton v. CSX Transportation*, 2008-FRS-00001 (ALJ February 26, 2008). Because both the alleged protected activity and the alleged adverse employment action occurred prior to August 3, 2007, a ruling by this tribunal would amount to retroactive application of the amendments to the FRSA, which is neither appropriate nor permissible in this case. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Hamilton*, *supra*.

This tribunal does not have jurisdiction to rule on the merits of Complainant's FRSA case. The alleged protected activity and alleged adverse employment action both occurred prior to the date on which this office obtained jurisdiction over FRSA whistleblower claims. The applicable version of the FRSA provides that, for a complaint of activity occurring prior to the

[4] Although not binding on this tribunal, it is noteworthy that the OSHA investigator gratuitously raised and denied the applicability of the STAA to the complaint. (*OSHA Final Investigative Report* at 1).

[5] Additionally, the STAA covers vehicles that are used to transport hazardous material and vehicles that weigh in excess of 10,001 pounds. 49 U.S.C. §§ 31101(1)(A), (C).

effective date of the amendments, the appropriate forum is the National Railroad Adjustment Board. 49 U.S.C. § 20109(c)(2000).

ORDER

Complainant Richard Purcell's complaint under the Federal Railroad Safety Act is dismissed for lack of jurisdiction.

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Edward Terhune Miller
Administrative Law Judge

APPEAL NOTICE: Review of this Decision and Order shall be conducted by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (October 17, 2002). The Department of Labor has not yet established regulations detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges pursuant to the employee protection provisions of the Federal Railroad Safety Act. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded to the Administrative Review Board for review. In light of the absence of procedural regulations, however, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board:

Administrative Review Board
United States Department of Labor
Suite S-5220
200 Constitution Ave., NW
Washington, DC 20210