



In the Matter of:

DESMOND A. HUNTER,

ARB CASE NOS. 2018-0044  
2018-0045

COMPLAINANT,

ALJ CASE NO. 2017-FRS-00007

v.

DATE: April 25, 2019

CSX TRANSPORTATION, INC.,

RESPONDENT.

Appearances:

*For the Complainant:*

Joseph M. Miller, Esq., Carisa German-Oden, Esq., and Benjamin B. Saunders, Esq.; *Davis, Saunders, Miller & Oden, PLC*; Mandeville, Louisiana

*For the Respondent:*

Jacqueline M. Holmes, Esq., and Nickey L. McArthur, Esq.; *Jones Day*; Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).<sup>1</sup> The Administrative Law Judge (ALJ) found that the Complainant, Desmond Hunter, established that he engaged in protected activity but did not establish that his protected activity was a contributing factor in the Respondent's (CSX Transportation, Inc.) decision to discharge him. The ALJ further found that the Respondent established by clear and convincing evidence that it would have discharged Complainant even in the absence of his protected activity. Thus, the ALJ concluded that Respondent established its affirmative defense to liability and denied the complaint.<sup>2</sup> On appeal, Complainant urges the Administrative Review Board (ARB or Board) to reverse the ALJ's ruling on whether Complainant had established that his protected activity contributed to his termination. Complainant also asks the Board to reverse the ALJ's holding that the Respondent established its affirmative defense. Finally, Complainant asks this Board to remand the case for a new hearing. The Respondent opposes Complainant's appeal. (ARB No. 2018-0044). The Respondent has also petitioned for review, arguing that the ALJ erred in finding that Complainant engaged in protected activity. Complainant opposes Respondent's appeal. (ARB No. 2018-0045).

### JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has authority to hear appeals from ALJ decisions and to issue final agency decisions on behalf of the Secretary of Labor in cases arising out of the FRSA whistleblower protection provisions.<sup>3</sup> The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.<sup>4</sup>

---

<sup>1</sup> 49 U.S.C. § 20109 (2008), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 110-53, and as implemented at 29 C.F.R. Part 1982 (2018).

<sup>2</sup> Decision and Order (May 2, 2018) (D. & O.).

<sup>3</sup> Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 1982.110.

<sup>4</sup> 29 C.F.R. § 1982.110; *Palmer v. Canadian Nat'l Ry. / Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 14-15 (ARB Sept. 30, 2016, reissued Jan. 4, 2017).

## DISCUSSION

Upon review of the ALJ's comprehensive D. & O., we conclude that it is a reasoned ruling supported by the record and consistent with applicable law. The ALJ properly concluded that Complainant had engaged in protected activity when he reported that a wheel slip alarm was sounding, which the ALJ determined established that Complainant made a good faith report of a hazardous safety concern that an engineer is required to report to his supervisor.<sup>5</sup> On appeal, the Respondent merely reiterates two arguments: (1) Complainant did not report an actual hazardous safety condition, and (2) Complainant did not reasonably believe that a hazardous safety condition existed.<sup>6</sup> The ALJ considered and rejected these arguments<sup>7</sup> and we see no reason to disturb his reasoning on appeal.

The ALJ also determined that Complainant did not establish that his protected activity was a contributing factor in the decision to discharge him. In addition, the ALJ found that, even if Complainant had established that it was a contributing factor, the Respondent showed by clear and convincing evidence that it would have discharged him in the absence of his protected activity. On appeal, Complainant asserts that certain witness testimony is credible, certain evidence is significant, and that the Respondent's non-retaliatory reason for the discharge is "bunk." The Board, however, gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable.<sup>8</sup> In this case, we hold that the ALJ's credibility determinations are neither and we defer to them.

---

<sup>5</sup> D. & O. at 27-28.

<sup>6</sup> See Respondent's Opening Brief In Support Of Petition for Review at 5-7.

<sup>7</sup> See D. & O. at 26-28.

<sup>8</sup> See *Knox v. Nat'l Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 4-5 (ARB Apr. 30, 2012).

## CONCLUSION

Accordingly, the ALJ's D. & O. is **AFFIRMED**. We adopt it as our own and attach it. As of the date of this Order, the ALJ's D. & O. shall become the final decision for Secretary of Labor in this matter.

**SO ORDERED.**