



In the Matter of:

EDWARD MOSS,

ARB CASE NO. 2020-0046

COMPLAINANT,

ALJ CASE NO. 2018-FRS-00001

v.

DATE: July 20, 2021

CSX TRANSPORTATION, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Edward Moss; *pro se*; Stanley, North Carolina

For the Respondent:

Thomas R. Chiavetta, Esq.; *Jones Day*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Edward Moss (Complainant), who worked as an engineer for CSX Transportation, Inc. (Respondent), filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent had violated the whistleblower protection provisions of the Federal Railroad Safety Act¹ (FRSA) by failing to allow him to end his duties or offer him support services after a critical

¹ 49 U.S.C. § 20109, as implemented at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A.

incident. After an investigation, OSHA determined that Complainant failed to make a prima facie allegation of an FRSA violation and dismissed the claim. Complainant requested a hearing with an ALJ. After a hearing, the ALJ issued a Decision and Order denying the claim. Complainant appealed the ALJ's decision to the Administrative Review Board (Board).

BACKGROUND

Complainant worked as a locomotive engineer for Respondent out of its Buffalo, New York yard.² Complainant operated trains between Buffalo and Syracuse, New York.³ On March 10, 2017, Complainant was operating a train going from Buffalo to Syracuse when a person walked in front of the train, at which time Complainant applied the train's emergency brakes.⁴ The other crew member, Conductor Dave Wesolowski, notified the dispatcher and the road foreman, Mike Lewandowski, of the fatality.⁵ Lewandowski notified them that he would come to the site of the incident.⁶ When he arrived, Lewandowski informed them that a "recrew" was not available to replace them at the time.⁷ Complainant responded, "This is wrong of the company to be doing this to us, we need to be taken off this train per policies and procedures."⁸ Lewandowski testified that neither crewmember mentioned that they needed medical attention or appeared to be injured.⁹

Lauren Lamp, a field investigative specialist for Respondent, reported to the scene and introduced herself to the crew.¹⁰ She asked them if they were okay, to which Wesolowski said "yes" and Complainant "bobb[ed] his head, kind of nodding

² Decision and Order (D. & O.) at 4.

³ *Id.*

⁴ *Id.* at 3-4.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ Lewandowski testified that a nearby train was blown over eighteen hours before, which caused crew shortages. *Id.* at 8.

⁸ *Id.* at 2.

⁹ *Id.* at 8.

¹⁰ *Id.* at 9.

like.”¹¹ Lamp testified that the crewmembers did not appear to be injured and that Complainant acted similarly to other employees who had been involved in similar incidents.¹² She also testified she was familiar with the company’s policy that prohibits interfering with medical aid and that Complainant never requested medical attention.¹³

Lewandowski informed the crewmembers that they would have to drive the train to the Syracuse yard, where a company cab would transport them back to Buffalo.¹⁴ Lewandowski operated the train until its arrival in Syracuse.¹⁵ A cab then took Complainant and Wesolowski back to the Buffalo yard.¹⁶ After arriving, they informed the trainmaster’s office that they had returned and provided their names and company ID numbers.¹⁷ Respondent did not provide any debriefing, counseling, or support services to Complainant that day.¹⁸ Complainant did not go to the hospital during the weekend after the incident.¹⁹

Respondent’s employee assistance program²⁰ reached out to Complainant twice in the days following the incident, but Complainant did not return their calls.²¹ Complainant began seeing a therapist shortly after the incident.²² Complainant suffered from a misaligned jaw and cracked tooth from the incident, which Complainant was not aware of until after March 10, 2017.²³ Complainant testified that the injuries were not visible either. On March 16, 2017, Respondent’s Chief Medical Officer issued a letter to Complainant informing him that he was

11 *Id.*

12 *Id.* at 10.

13 *Id.*

14 *Id.* at 2.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 6.

20 The employee assistance program provides a 24/7 hotline for counseling. *Id.*

21 *Id.*

22 *Id.* at 16.

23 *Id.* at 6.

medically unqualified for all service.²⁴ Complainant has received regular medical treatment and therapy and has not returned to work since the incident.²⁵

On June 6, 2017, Complainant filed a complaint with OSHA, alleging that Respondent violated the FRSA.²⁶ Without alleging a violation of a specific provision of the FRSA, Complainant alleged that Respondent did not comply with the company's critical incident stress plan as mandated by the Federal Railroad Administration (FRA)²⁷ and that Respondent either unlawfully prevented him from ending his shift or failed to offer support services after the incident.²⁸ On August 30, 2017, OSHA notified Complainant that it had completed its investigation. OSHA concluded that Complainant had not suffered a materially adverse action by Respondent, and, therefore, there was no prima facie allegation of an FRSA violation.²⁹ Complainant subsequently filed objections to the OSHA findings and requested a hearing with an ALJ.³⁰

The ALJ held a hearing on August 29, 2019, and issued a decision on May 29, 2020.³¹ The ALJ noted that the Board had described a railroad carrier's duties regarding the medical treatment of its employees under the FRSA. The ALJ found a carrier must "take the employee to the nearest hospital after a work injury if such a request is made" and "stay out of the way of the medical providers" who are treating an employee injured during the course of employment.³²

The ALJ found the record did not contain any evidence establishing that Complainant made a request for medical treatment after the incident on March 10,

²⁴ *Id.* at 3.

²⁵ *Id.* at 3, 5-6.

²⁶ *Id.* at 2.

²⁷ In a separate investigation, the FRA found that Respondent violated U.S. Department of Transportation regulations (49 C.F.R. §§ 272.5, 272.101) by failing to follow critical incident stress plan requirements. Complainant's Exhibit U.

²⁸ D. & O. at 2.

²⁹ *Id.*

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 12.

2017.³³ In response to Lewandowski informing him that no recrews were available, Complainant testified that he replied that “[w]e need to be taken off this train per policy and procedures,” which Complainant argued was the equivalent of asking for medical treatment.³⁴ The ALJ noted Complainant never told anyone that he was injured, requested an ambulance, or explained why he believed that he should be taken off the train.³⁵ Complainant admitted that his physical injuries were not visible on the day of the incident and that he did not discover them until days later.³⁶ The ALJ therefore concluded that Respondent’s employees could not have interfered with Complainant’s medical treatment because they were unaware of his alleged injuries.³⁷

The ALJ further noted Lewandowski testified that both crewmembers were quiet and did not appear injured when he arrived to the scene.³⁸ Lewandowski also testified that Complainant did not ask for medical attention, a therapist or counselor, or that he specifically be allowed to get off the train.³⁹ When Lamp met the crewmembers, both answered affirmatively to her question if they were okay.⁴⁰ The ALJ therefore found that Complainant did not make a request for medical treatment or transportation to medical treatment on the day of the incident.⁴¹ The ALJ concluded that Lewandowski and Lamp would not reasonably have known that Complainant needed immediate medical treatment at the time or that he needed transportation to a hospital.⁴²

The ALJ rejected Complainant’s assertion he told Lewandowski that he needed to be taken off the train per company policy and that this was the equivalent

³³ *Id.*
³⁴ *Id.*
³⁵ *Id.* at 13.
³⁶ *Id.*
³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.* at 14.
⁴⁰ *Id.*
⁴¹ *Id.* at 15.
⁴² *Id.*

of asking for medical attention.⁴³ The ALJ noted that his jurisdiction was limited to whether Respondent had violated the FRSA’s whistleblower provisions of the Act. The ALJ also noted that he would not comment on matters not currently before him, such as whether Respondent had appropriate policies in place to respond to these types of critical incidents or whether those policies were not covered by the FRSA.⁴⁴

The ALJ concluded (1) that Complainant did not show by a preponderance of the evidence that he engaged in protected activity and (2) that Respondent did not violate the FRSA whistleblower protection statute.⁴⁵ The ALJ therefore denied Complainant’s claim for relief under the FRSA.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review appeals of ALJ’s decisions pursuant to the FRSA.⁴⁶ The ARB will affirm the ALJ’s factual findings if supported by substantial evidence but reviews all conclusions of law de novo.⁴⁷ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴⁸

DISCUSSION

Subsection (c) of the FRSA whistleblower statute provides that a railroad carrier “may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment” and that “[i]f

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 16-17.

⁴⁶ 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).

⁴⁷ *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

⁴⁸ *McCarty v. Union Pacific R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.”⁴⁹ The Board has interpreted this provision to mean that the “only affirmative duty created in section 20109(c) is for the railroad carrier to take the employee to the nearest hospital after a work injury if such a request is made” and “to stay out of the way of the medical providers.”⁵⁰ The purpose of the subsection “is to ensure employees receive prompt medical attention if they are injured on the job.”⁵¹

Complainant contests the ALJ’s denial of his claim. Though Complainant does not raise the specific issue, Respondent demonstrates that the ALJ properly found that Complainant did not request medical assistance that would require Respondent to act. When Lewandowski informed him that no recrews were available, Complainant stated that he and Wesolowski “need[ed] to be taken off this train *per policy and procedures*.” The ALJ found that that this reference to whether a crew should come to relieve Complainant and Wesolowski did not constitute a legal request for medical assistance of any kind. The ALJ noted that Complainant did not indicate why he should be taken off. Though Complainant later learned that he had been injured, no one, including Complainant, knew of the injuries on the day of the incident. Complainant also did not show any signs of psychological distress and indicated to Lamp that he was okay when asked. The ALJ’s finding that Complainant did not request medical assistance and that Lewandowski or Lamp could not have known Complainant required medical attention, therefore, is supported by substantial evidence. Because Complainant did not express any need for medical assistance, the ALJ also properly concluded that Respondent did not need to arrange for prompt transportation to a hospital, nor was there any medical

⁴⁹ 49 U.S.C. § 20109(c).

⁵⁰ *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 2010-0147, ALJ No. 2009-FRS-00011, slip op. at 16 (ARB July 25, 2012). The duty imposed by subsection (c) applies “only during the time period immediately following a workplace injury.” *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 18 (ARB June 17, 2019).

⁵¹ *Metro-North Commuter R.R. Co. v. U.S. Dep’t of Labor*, 886 F.3d 97, 108 (2d Cir. 2018).

treatment that Respondent could have interfered with. Therefore, the ALJ properly denied Complainant's claim under section 20109(c) (1).

Complainant seems to argue that Respondent failed to make available alleged additional evidence that would demonstrate that re crews and members of the critical incident response team were in fact available that day to relieve and provide counseling to Complainant. The Board's review "is generally limited to the record that was before the ALJ when he or she decided the case" but "may consider remanding a case to an ALJ to re-open a record where a party establishes that the party has submitted new and material evidence that was not readily available prior to the closing of the record."⁵² Here, Complainant failed to produce or identify any such evidence in his brief. Further, whether re crews or critical incident response team members were available that day is not relevant to Complainant's claim because the record establishes that Respondent did not interfere with any medical treatment and that Complainant never requested transportation to a hospital.

Complainant also argues that an FRA investigator's findings that Respondent committed three violations of U.S. Department of Transportation regulations⁵³ by failing to follow critical incident stress plan requirements on the day of the incident demonstrate that Respondent violated the FRSA. Complainant argues that Respondent's failure to offer timely relief from duty, failure to inform about relief options, and failure to offer timely transportation to the home terminal in violation of the regulations effectively denied and interfered with Complainant's

⁵² *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 4 (ARB Dec. 10, 2012); 29 C.F.R. § 18.54(c).

⁵³ "A railroad subject to this part shall adopt a written critical incident stress plan approved by the Federal Railroad Administration . . . and shall comply with that plan." 49 C.F.R. § 272.5. "Each critical incident stress plan under this part shall include, at a minimum, provisions for - (a) Informing each directly-involved employee as soon as practicable of the relief options available in accordance with the railroad's critical incident stress plan; (b) Offering timely relief from the balance of the duty tour for each directly-involved employee, after the employee has performed any actions necessary for the safety of persons and contemporaneous documentation of the incident; (c) Offering timely transportation to each directly-involved employee's home terminal, if necessary." § 272.101.

medical treatment. However, these allegations do not implicate Complainant's medical treatment, but focus on whether Complainant had a legal right to be relieved from duty after a critical incident.⁵⁴ Moreover, none of those violations demonstrate that Respondent interfered with Complainant's medical treatment or failed to provide transportation to a hospital when requested.

Accordingly, we **AFFIRM** the ALJ's decision and order denying Complainant's claim.

SO ORDERED.

⁵⁴ See 49 C.F.R. § 272.1(a).