



**In the Matter of:**

**MICHAEL A. JACKSON,**

**ARB CASE NO. 13-042**

**COMPLAINANT,**

**ALJ CASE NO. 2012-FRS-017**

**v.**

**DATE: March 20, 2015**

**UNION PACIFIC RAILROAD COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Blake G. Arata, Esq.; Rome, Arata, Baxley & Stelly, L.L.C.; New Orleans, Louisiana**

*For the Respondent:*

**Fred S. Wilson, Esq.; Union Pacific Railroad Company, Houston, Texas**

**Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge. Judge Corchado concurs and dissents.**

### **FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).<sup>1</sup> Michael A. Jackson complained that his employer, Union

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<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2014), as implemented by 29 C.F.R. Part 1982 (2014).

Pacific Railroad Company (Union), violated the FRSA by suspending his employment after he reported a hazardous safety condition to his supervisor. Following an evidentiary hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) determined that Union violated the FRSA and assessed \$500.00 in compensatory damages and \$1,000.00 in punitive damages. Union appealed to the Administrative Review Board (ARB). We affirm the ALJ's determination of liability and modify the damages award.

## BACKGROUND<sup>2</sup>

Jackson worked as a switchman/brakeman at Union's freight yard in Avondale, Louisiana. On August 29, 2011, about two hours into his night shift, he smelled a foul, smoky odor, which he reported to the manager of yard operations, Jimmy Couget. The smell resulted from marsh fires outside New Orleans.

After Jackson raised his safety concern, Couget contacted his supervisor, Ronald Tindall, who advised him to call the Westwego fire department to determine if any health advisories had been issued. None had. Because of possible health concerns, Jackson wanted to be assigned to an area free from the smoke and smell. Unable to accommodate him, Tindall directed Jackson to go home and return to work only after obtaining a medical release. Jackson did not complete his shift that night, and three days later, on September 2, 2011, he returned to work.

Although Jackson subsequently received full back pay for the job assignments he missed during his absence, he filed a complaint with the DOL's Occupational Safety and Health Administration (OSHA) on December 1, 2011, seeking compensatory and punitive damages because he had been temporarily suspended from work after raising health and safety concerns. OSHA dismissed the complaint on January 13, 2012, on the grounds that Jackson had failed to show that Union took an adverse action against him.<sup>3</sup> Jackson requested a hearing, which a DOL ALJ held on October 23 and November 14, 2012.<sup>4</sup>

Concluding that Union violated the FRSA's whistleblower protection provisions, the ALJ awarded nominal compensatory damages of \$500, based on his finding that only minimal evidence showed that Jackson suffered emotional distress due to the temporary suspension.<sup>5</sup> The ALJ also found that because Union "acted with indifference and

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<sup>2</sup> The ALJ's findings of fact are largely undisputed, *see* Decision and Order (D. & O.) at 2-5, and serve as the basis for the Background statement unless otherwise noted.

<sup>3</sup> Administrative Law Judge Exhibit (ALJX) 2.

<sup>4</sup> ALJX 3.

<sup>5</sup> D. & O. at 10.

disregard” for Jackson’s federally-protected rights, he would assess punitive damages of \$1,000.00.<sup>6</sup> On appeal to the ARB, Union challenges the ALJ’s determination of liability and the compensatory and punitive damage awards.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ’s decision pursuant to the FRSA.<sup>7</sup> We review the ALJ’s factual findings to determine whether they are supported by substantial evidence.<sup>8</sup> The ARB reviews the ALJ’s conclusions of law de novo.<sup>9</sup>

### **DISCUSSION**

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good-faith protected activity. The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).<sup>10</sup>

To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity the FRSA defines; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant’s protected behavior.<sup>7</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

<sup>8</sup> 29 C.F.R. § 1982.110(b).

<sup>10</sup> 49 U.S.C.A. § 42121(b)(West 2007).

*Jackson established that Union violated the FRSA*

The ALJ found that Union violated 49 U.S.C.A. § 20109(b)(1)(A) that provides that a railway carrier “shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for . . . reporting, in good faith, a hazardous safety or security condition . . . .” The ALJ concluded that, based on the evidence presented at the hearing, Jackson engaged in protected activity by reporting a perceived safety or health concern to his supervisors, who were aware of his protected activity. As a result, the ALJ found that Tindall’s action sending Jackson home after he raised his concerns “was an adverse personnel action amounting to a constructive discharge.” The ALJ further found that Union offered no evidence that it would have sent Jackson home had he not voiced his concerns.<sup>11</sup>

Substantial evidence of record fully supports the ALJ’s finding that Jackson engaged in FRSA-protected activity by reporting a safety concern about the smoky air to his supervisor, Couget.<sup>12</sup> Jackson testified that about two hours into his midnight shift at the yard on August 29, 2011, a train engineer called on the radio and told him to look outside. Jackson opened the door of the yard’s crew shack and “could immediately see and smell a heavy smoke.” Jackson immediately alerted Couget about what he had seen, stating, “Man, something is going on out here. Something is burning.”<sup>13</sup>

Witness Raymond Blanco testified that he overheard Jackson tell Couget that he was concerned about the smoke outside and whether it would be safe to work in those conditions. Blanco added that other employees in the crew room also complained about the smoke. Even Superintendent Robert D. Lambeth, Jr., confirmed that he would expect an employee to report to a supervisor a safety concern about smoky conditions.<sup>14</sup> The substantial evidence of record thus supports the ALJ’s finding that Jackson engaged in protected activity by reporting in good faith a hazardous condition.

Union also argues that the ALJ erred in finding that Union constructively

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<sup>11</sup> *Id.* at 6.

<sup>12</sup> On appeal, Union argues that Jackson failed to establish that he engaged in protected activity because he did not act in good faith in reporting the smoky conditions. Union’s Brief at 4-5. Union did not raise this issue in its petition for review to the ARB. We thus deem Union to have waived the argument. *Florek v. Eastern Air Cent.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 6 (ARB May 21, 2009).

<sup>13</sup> Hearing transcript (TR) at 70-72.

<sup>14</sup> TR at 105-06.

discharged Jackson when Tindall sent him home after he reported the smoky condition in the yard.<sup>15</sup> Union contends that a constructive discharge occurs only if an employee is forced to resign because of intolerable working conditions; because Jackson did not ask to be taken out of service or quit, there was no adverse action through constructive discharge.<sup>16</sup>

Substantial evidence nevertheless supports the ALJ's finding of adverse employment action. Although the ALJ used the phrase, "constructively discharged," his findings indicate that he fully credited Jackson's testimony over that of Tindall's in concluding that Jackson did not ask to go home, that his only concern was whether it was safe to work given the smoky conditions, and that despite his desire to remain at work (albeit in a smoke-free environment), Tindall sent him home and ordered him not to come back until he got a doctor's note "because evidently something is wrong with you. We work in dust and fumes all the time."<sup>17</sup> Tindall testified that he interpreted Jackson's complaint as a personal health issue but admitted that Jackson told him repeatedly that he was not injured and that Union subsequently paid Jackson for the three days of work he missed.<sup>18</sup>

Finally, on appeal Union does not challenge the ALJ's finding of "contributing factor" causation and whether Union presented clear and convincing evidence that it would have taken the adverse action in the absence of Jackson's protected activity. Thus, there is no issue with either element of Jackson's case. Therefore, we affirm these ALJ findings as uncontested.

### *Compensatory and punitive damages*

Like other whistleblower statutes, the FRSA's remedial purpose is to make the successful complainant whole. The goal is to compensate the wronged whistleblower for losses caused by the unlawful conduct and restore him to the terms, conditions, and privileges of his former position that existed prior to the employer's adverse action.<sup>19</sup>

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<sup>15</sup> The ALJ found that Tindall engaged in adverse action, which he labeled "constructive discharge," because Tindall had sent Jackson home without pay until he returned with medical clearance. "In sum . . . Tindall's exaggerated response to [Jackson's] concerns was an unfavorable personnel action." D. & O. at 8.

<sup>16</sup> Union's Brief at 6-7.

<sup>17</sup> TR at 72-73.

<sup>18</sup> TR at 23-25, 45-48, 52-55.

<sup>19</sup> *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 13 (ARB Jan. 31, 2012).

Accordingly, under the FRSA a complainant is entitled to compensatory and punitive damages.<sup>20</sup>

Union argues that substantial evidence does not support the ALJ's award of compensatory damages because the \$500.00 award "is incongruous" with his finding that Jackson presented no evidence of emotional distress.<sup>21</sup>

The ALJ acknowledged that minimal evidence, consisting of Jackson's testimony, supported a finding of causally related emotional distress and the award of compensatory damages. Nevertheless, the ALJ concluded that the evidence of the emotional impact on Jackson of "being sent home in the face of his peers for expressing health and safety concerns was stressful" enough to support a nominal award of \$500.00 in compensatory damages.<sup>22</sup> Substantial evidence of record supports the ALJ's nominal award, which is in accord with applicable law.

Finally, Union challenges the ALJ's award of punitive damages of \$1,000.00 because Jackson presented no evidence that Union acted with "reckless or callous disregard" for his rights or that Tindall intended to deprive Jackson of his rights.<sup>23</sup> The ALJ found that Union through Tindall's actions had "demonstrated indifference to the legal rights" of Jackson under the FRSA. The ALJ stated that punitive damages were appropriate to "correct and deter this conduct" and assessed a \$1,000.00 award.<sup>24</sup>

The Supreme Court has held that punitive damages are appropriate where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." The Court explained that the purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future."<sup>25</sup> In *Youngerman v. United Parcel Serv., Inc.*, the ARB expounded on the award of punitive damages and the appropriate amount, noting that the terms, "malice," "reckless indifference," and "callous disregard" ultimately focus on the actor's state of mind.<sup>26</sup>

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<sup>20</sup> 49 U.S.C.A. § 20109(e)(2)(3).

<sup>21</sup> Union's Brief at 8-9.

<sup>22</sup> D. & O. at 10.

<sup>23</sup> Union's Brief at 12.

<sup>24</sup> D. & O. at 10.

<sup>25</sup> *Smith v. Wade*, 461 U.S. 30, 51 (1983).

<sup>26</sup> ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013).

We agree with Union's contention that the evidence of record does not support the ALJ's award of punitive damages. The record does not indicate any "reckless or callous indifference" to Jackson's legal rights. Tindall testified consistently that he believed that Jackson was reporting a personal health issue about working in the smoky condition and sent him home because "I wanted a doctor to determine . . . why his condition which no one else seemed to have an issue with was affecting him."<sup>27</sup> The ALJ implicitly disregarded Tindall's assertions in favor of Jackson's testimony about safety concerns but provided no evidence of how Tindall's conduct indicated his "reckless" or "callous" indifference toward Jackson. Tindall's testimony does not support the ALJ's finding that Tindall exhibited "indifference" to Jackson's legal rights. Accordingly, we reverse and vacate the ALJ's punitive damages award.

### CONCLUSION

For the foregoing reasons, the Board **AFFIRMS** the ALJ's decision finding Union Pacific Railroad Company liable for violating the FRSA's whistleblower protection provisions and the ALJ's award of nominal compensatory damages. The Board **VACATES** the ALJ's punitive damages award.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

***Judge Corchado concurs and dissents:***

I concur in the result except as to the issue of punitive damages. The majority recognizes that it must uphold the ALJ's factual determinations if they are supported by substantial evidence. In addressing the punitive damages, the majority states that punitive damages can be awarded for a reckless or callous disregard for the employee's rights but that the record contains no evidence showing such conduct.

The ALJ expressly found that Union Pacific had an "exaggerated" response to Jackson's smoke concerns, in that Jackson did not "quit" his job but was sent home without pay. D. & O. at 8. The ALJ referred to Union Pacific's request for Jackson's medical clearance as a "ruse." *Id.* These findings certainly explain the ALJ's basis for a

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<sup>27</sup> TR at 37.

minimal punitive damage award of \$1,000. The majority does not even discuss these findings, much less discuss why it felt they were not supported by substantial evidence. Given the lack of a proper analysis, I cannot agree to reverse the ALJ's minimal award of \$1,000 in punitive damages.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**