**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: 17 January 2012**

*In the Matter of:*

PAUL GUNDERSON,
*Complainant,*

Case No. 2011-FRS-00001

*v.*

BNSF RAILWAY COMPANY,
*Respondent.*

and

DAVID PETERSON,
*Complainant,*

Case No. 2010-FRS-00029

*v.*

BNSF RAILWAY COMPANY,
*Respondent.*

## ORDER DENYING MOTION FOR SUMMARY DECISION

This matter arises under the employee protection provisions of the Federal Railroad Safety Act, 49 U.S.C. §20109, as amended ("FRSA" or "the Act"). In separate complaints filed with the Occupational Safety and Health Administration, Complainants Paul Gunderson and David Peterson alleged that they had been terminated from employment with Respondent BNSF Railway Company after, and because, they raised numerous safety concerns with their employer. OSHA dismissed their complaints, and both Gunderson and Peterson timely objected to the OSHA findings.

A hearing on the above-captioned consolidated cases is scheduled to begin on January 30, 2012 in St. Paul, Minnesota. On December 9, 2011, Respondent filed a motion for summary decision with respect to both Complainants. Under my Scheduling Order of October 28, 2011, Complainants' opposition to Respondent's motion was due on December 30, 2011. Due to the holiday period and the participation of Complainants' lead counsel in a trial, Complainants requested and were orally granted an extension of time until January 6, 2012. Their combined opposition brief was mailed on that date, and was received in this Office on January 10, 2012.

## Procedural History

*Complainant David Peterson*

Complainant David Peterson was an employee of Respondent from 1997 until his termination effective July 28, 2009. On September 25, 2009, he filed his complaint under the Act with OSHA; the complaint was investigated and dismissed on July 25, 2010 after the OSHA Area Administrator determined that Peterson's termination was unrelated to his claimed protected activities. Peterson timely objected to the OSHA determination and requested a hearing before an administrative law judge.

*Complainant Paul Gunderson*

Complainant Paul Gunderson was an employee of Respondent from 1989 until his termination effective August 25, 2009. On November 25, 2009, he filed his complaint with OSHA; the complaint was investigated and dismissed on September 9, 2010, after the OSHA Area Administrator determined that Gunderson's termination was unrelated to his claimed protected activities. Gunderson timely objected to the OSHA determination and requested a hearing before an administrative law judge.

## Motion for Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett, supra.*

Under the Act, it is unlawful for a railroad carrier to "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" if its action is due "in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done to provide information ... regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation

relating to railroad safety or security...." 49 U.S.C. § 20109(a)(1). The burdens of proof set forth at 49 U.S.C. § 42121(b), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") apply to actions under the Act. To be successful in a claim brought under the Act, the complainant is must establish show:

1) The complainant engaged in protected activity;
2) The employer knew or suspected that the complainant engaged in protected activity;
3) The complainant suffered an adverse action from the employer; and
4) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in receiving the adverse action.

*See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc.*, ARB No. 05-048, ALJ No. 2004-AIR-011, Slip op. at 3 (ARB June 29, 2007). Complainants bear the burden of proving all elements of their claims by a preponderance of the evidence. *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004). If Complainants do so, Respondent may avoid liability by showing by clear and convincing evidence that it would have taken the adverse action in the absence of Complainants' protected activities. 29 C.F.R. § 1982.109(b).

As relevant to this motion, "protected activity" includes both (1) providing information regarding a safety or security violation to a supervisor or other employee of the railroad carrier with responsibility for investigating or correcting the violation, 29 C.F.R. § 1982.104(b)(1)(i)(C), and reporting work-related injury or illness, 29 C.F.R. § 1982.102(b)(1)(iv). There is no dispute that Complainants provided information to Respondent regarding safety issues many times over the years of their employment, or that they reported personal injuries to Respondent. There is also no dispute that Respondent knew of both types of protected activities by Complainants, or that both Complainants suffered adverse action in the form of termination. Respondents base their motion on the alleged un timeliness of Peterson's complaint to OSHA and on the grounds that Complainants' protected activities played no part in the decision to terminate them.

A. David Peterson

Respondent moves for summary decision with respect to Peterson on two grounds: (1) that Peterson's complaint was untimely with respect to some of the allegedly several grounds, and (2) that Peterson's protected activity was not a contributing factor to the decision to terminate him.

*Timeliness*

Respondent first argues that many of Peterson's claims are barred, as he did not file his OSHA complaint within 180 days of the alleged retaliatory actions. Specifically, Respondent argues that the following acts of alleged retaliation cannot form the basis of any award because they occurred more than 180 days before Peterson filed his OSHA complaint:

- Respondent's denials of Peterson's requests to work as a yardmaster after he was injured, because the last such denial occurred before February of 2009; and

- Respondent's issuance of investigation notices, because such notices were issued before May of 2008.

Complainant does not dispute Respondent's position, but states explicitly that the retaliatory action on which he has based his claim is his termination from employment. [Complainant's Opposition, p. 25.] Because Respondent has shown, and Complainant does not dispute, that the possibly retaliatory actions in February 2009 and May 2008 occurred more than 180 days before Peterson filed his OSHA complaint, any claim based on those actions is untimely. Evidence of those actions, however, is (as Complainant argues) relevant to Respondent's motive in discharging Peterson, and such evidence is not precluded by this Order.

As Peterson's OSHA complaint was filed on September 25, 2009, and his termination was effective July 28, 2009, his complaint to the extent that it is based on termination clearly was timely filed. Further, based on Peterson's express disavowal of any adverse action other than termination, termination will be the sole retaliatory action at issue.

*Motive for Termination*

Respondent's argument regarding its reason for terminating Peterson's employment is two-fold: first, that Peterson cannot show that his engaging in protected activities was a contributing factor in his termination, and second, that it would have terminated Peterson even in the absence of his protected activities.

Respondent maintains that it terminated Peterson's employment because he improperly accessed certain personal information relating to other of Respondent's employees. Peterson had been injured in an on-the-job accident, and as a result was unable to perform his assigned duties. He believed he was capable of working as a yardmaster in spite of his injuries, but Respondent declined to place him in a yardmaster position for a period of time. Certain employees who were junior in service to Peterson were assigned as yardmasters, and under the collective bargaining agreement between Respondent and the United Transportation Union, Peterson was permitted to submit claims for the time he believed he should have been assigned to yardmaster duties. In order to do so, Peterson accessed the records of the junior employees. According to Respondent, Peterson accessed personal information that was unrelated to his time claims and was unnecessary for him to access. Additionally, according to Respondent, Peterson left the personal information in a place where other railroad employees could look through them, thus violating the junior employees' privacy rights. Peterson does not dispute that he accessed the information Respondent says he did, but argues that he accessed only the same type of information that he had accessed in the past in order to submit time claims.

Respondent maintains that it terminated Peterson for improperly accessing personal information of other employees. Peterson maintains that as he had previously accessed the same information without receiving disciplinary action, Respondent's explanation for his dismissal is pretextual. Peterson further maintains that the evidence shows affirmatively that Respondent at least partially terminated his employment because he engaged in the protected activities of raising safety concerns and reporting a work-related injury. Each party has supported its position with evidence, and there is clearly a dispute of material fact over Respondent's motive for

terminating Peterson's employment. Accordingly, Respondent's motion for summary decision on the grounds that Peterson cannot make out a case of retaliation will be denied.

Likewise, Respondent has not shown by clear and convincing evidence that it would have taken the same action even in the absence of Peterson's engaging in protected activities. If Peterson is to be believed, he accessed the same information relating to other employees on other occasion, and suffered no disciplinary action for doing so. This fact alone is enough to create a dispute of fact over Respondent's motives. In addition, however, Respondent has presented no evidence that it has terminated other employees for similar behavior, or of a policy or practice of doing so. Accordingly, Respondent's motion for summary decision on the grounds that it has shown by clear and convincing evidence that it would have terminated Peterson in the absence of protected activities will be denied.

B. Paul Gunderson

Gunderson became involved in Peterson's case as the local chair and vice general chair of the UTU. According to Respondent, while Gunderson was representing Peterson in Peterson's disciplinary proceedings, Gunderson attempted to influence a witness (one of the employees whose information was accessed by Peterson) to change his testimony. In addition, Respondent claims that Gunderson threatened a supervisor by reminding the supervisor that Gunderson was a vice general chair of the UTU and that "things have a way of coming back on you," or words to that effect. Gunderson denies attempting to influence a witness. Although he admits saying something to the supervisor similar to the words alleged by Respondent, he denies that his words were a threat and maintains that "rough language" is common in union-management relations.

As was the case with Peterson, there is a dispute of fact over Respondent's reasons for terminating Gunderson's employment. Whether Gunderson's actions with respect to the witness amounted to tampering, or were taken in good faith, as Gunderson maintains, cannot be resolved without assessing the credibility of the individuals involved. Likewise, determining whether Gunderson's statement to the supervisory employee constituted a threat turns on witness credibility. Furthermore, as Gunderson points out, there is evidence that the terminal manager considered Gunderson a "thorn in his side," and Gunderson is entitled to present evidence that the manager's attitude was based on his history of raising safety concerns; if so, the manager's animus against Gunderson may be considered in determining Respondent's motive for terminating him. *See, e.g., Staub v. Proctor Hospital*, ___ U.S. ___, 131 S. Ct. 1186, 1191-1192 (2011). Accordingly, Respondent's motion for summary decision on the basis that Gunderson cannot make out a case of retaliation under the Act will be denied.

Likewise, as was the case with Peterson, Respondent has not shown by clear and convincing evidence that it would have terminated Gunderson even in the absence of his engaging in protected activities. Whether Gunderson's actions with respect to the witness in Peterson's case constituted witness tampering, or were construed as witness tampering on a pretext, cannot be determined without assessing the credibility of the witnesses. The same is true as to whether Gunderson actually threatened a supervisor, or Respondent construed his behavior as a threat on a pretext. Furthermore, Respondent has provided no evidence that it has terminated other employees for similar behavior, or that it has a policy or practice of doing so.

Accordingly, Respondent's motion for summary decision on the grounds that it has shown by clear and convincing evidence that it would have terminated Gunderson in the absence of his engaging in protected activities will be denied.

## ORDER

For the reasons set forth above, IT IS ORDERED:

1. Respondent's motion for summary decision is DENIED with respect to both Complainants;
2. The sole adverse employment action at issue with respect to Complainant Peterson is his termination from employment; and
3. As many issues are not in dispute, the parties shall, prior to the hearing, meet and confer and attempt to stipulate to as many facts as possible, and shall present any such stipulation at the hearing either in writing or orally on the record.

**SO ORDERED.**

Paul C. Johnson, Jr.

**PAUL C. JOHNSON, JR.**
Associate Chief Administrative Law Judge

## SERVICE SHEET

Case Name: **GUNDERSON_PAUL_v_BNSF_RAILWAY_COMPANY_**

Case Numbers: **2011FRS00001, 2010FRS00029**

Document Title: **ORDER DENYING MOTION FOR SUMMARY DECISION**

I hereby certify that a copy of the above-referenced document was sent to the following this 17th day of January, 2012:

Brenda D. Williams

**BRENDA D. WILLIAMS**
LEGAL ASSISTANT

Amanda Todd, Esq.
Jones Day Law Firm
2727 North Harwood Street
Dallas, TX 75201
*{Hard Copy - Regular Mail}*

Assistant Secretary for OSHA
c/o Directorate of Enforcement Programs
U. S. Department of Labor, OSHA
Room N-3119, FPB
200 Constitution Ave., N.W.
Washington, DC 20210
*{Hard Copy - Regular Mail}*

Regional Administrator
Region 5
U. S. Department of Labor, OSHA
Room 3244
230 South Dearborn Street
Chicago, IL 60604
*{Hard Copy - Regular Mail}*

Amanda Todd, Esq.
2727 North Harwood Street
Dallas, TX 75201-1515
*{Hard Copy - Regular Mail}*

BNSF Railway Company
325 Cedar S., Suite 620
St. Paul, MN 55101-1012
*{Hard Copy - Regular Mail}*

Dane Freshour
Regional Director HR
BNSF Railway Company
2454 Occidental Ave. South #2D
Seattle, WA 98134
*{Hard Copy - Regular Mail}*

David Peterson
1800-127th Ave., SE
Svea, MN 56216
*{Hard Copy - Regular Mail}*

Fred Bremseth, Esq.
Breseth Law Firm
601 Carlson Parkway, Suite 995
Minnetonka, MN 55305
*{Hard Copy - Regular Mail}*

Jacqueline M. Holmes, Esq.
JONES DAY
51 Louisiana Avenue N.W.
Washington, DC 20001
*{Hard Copy - Regular Mail}*

Thomas Schroeter, Esq.
Jones Day Law Firm
2727 North Harwood Street
Dallas, TX 75201
*{Hard Copy - Regular Mail}*

Joanne Bush
JONES DAY
2727 North Harwood Street
Dallas, TX 75201-1515
*{Hard Copy - Regular Mail}*

Mark Hysell, Area Dir.
U.S. Dept. of Labor - Occupational Safety and He
1310 W. Clairemont Avenue
Eau Claire, WI 54701
*{Hard Copy - Regular Mail}*

Michael Tello, Esq.
2150 Third Ave. N, Suie 10
Anoka, MN 55303
*{Hard Copy - Regular Mail}*

Michael Tello, Esq.
Tello Law Firm
2150 Third Avenue North
Suite 10
Anoka, MN 55303
*{Hard Copy - Regular Mail}*

Mr. Paul Gunderson
4830 22nd Street, NE
Willmar, MN 56201
*{Hard Copy - Regular Mail}*

Mr. Terry Morgan, HR Dir
BNSF Railway Company
80 44th Avenue NE
Minneapolis, MN 55421
*{Hard Copy - Regular Mail}*