



In the Matter of:

MICHAEL D. FRICKA,

ARB CASE NO. 14-047

COMPLAINANT,

ALJ CASE NO. 2013-FRS-035

v.

DATE: November 24, 2015

**NATIONAL RAILROAD
PASSENGER CORPORATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Edward J. Szewczyk, Esq.; Callis, Papa, Hale & Szewczyk, P.C.; Granite City,
Illinois**

Formerly for the Respondent, R&M Pro Transport, LLC:

**Robert D. Corl, Esq.; National Railroad Passenger Corp., Washington, District of
Columbia**

**Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce,
Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge. Judge
Corchado, concurring.**

DECISION AND REMAND ORDER

On February 9, 2012, Complainant, Michael Fricka, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent, National Railroad Passenger Corp. (Amtrak), had retaliated against him in violation of the whistleblower protection provisions of the Federal Railroad Safety Act of 1982

(FRSA)¹ and its implementing regulations.² OSHA found that Fricka’s protected activity was not a contributing factor to the alleged adverse actions. Fricka requested review of OSHA’s determination before a Department of Labor Administrative Law Judge (ALJ). On March 20, 2014, the ALJ issued a Decision and Order Dismissing Complaint (D. & O.) finding that the evidence did not establish that Fricka suffered any unfavorable personnel actions under FRSA.³ Fricka filed a petition for review with the Administrative Review Board (the Board or ARB).

BACKGROUND

Fricka works as a general foreman in the mechanical department for Amtrak.⁴ On May 31, 2011, Amtrak instructed Fricka to travel from Chicago, Illinois, to Minneapolis, Minnesota, to perform inspections and maintenance on trains.⁵ Prior to his departure, he notified Amtrak that he planned to travel to Minneapolis on his motorcycle.⁶ It is unclear from the record whether Amtrak authorized Fricka to use his personal vehicle or whether Amtrak would have compensated Fricka for his travel time.⁷

The FRA Guide for Preparing Accident/Incident Reports published by the Federal Railroad Administration, which is under the Department of Transportation (DOT),⁸ states:

Note: An employee in deadhead transportation is considered an ‘employee on duty’ regardless of the mode of transportation. Deadhead transportation occurs when an employee is traveling at the direction or authorization of the carrier to or from an

¹ 49 U.S.C.A. § 20109 (Thomson Reuters 2007 & Supp. 2015).

² 29 C.F.R. Part 1982 (2015).

³ *Fricka v. Nat’l R.R. Passenger Corp.*, ALJ No. 2013-FRS-035, slip op. at 24-28 (ALJ Mar. 20, 2014).

⁴ D. & O. at 2.

⁵ *Id.* at 22.

⁶ *Id.* at 10.

⁷ The evidence regarding whether Fricka was authorized to use his motorcycle is contradictory and the ALJ stated only that “Fricka may not have been authorized to use his personal vehicle to travel to Minneapolis” D. & O. at 22. The ALJ made no findings regarding whether Fricka would be paid for his travel time.

⁸ D. & O. at 13; JX 3.

assignment, or the employee is involved with a means of conveyance furnished by the carrier or compensated by the carrier. Exception: If an employee is housed by the carrier in a facility such as a motel, and part of the service provided by the motel is the transportation of the employee to and from the work site, any reportable injury to the employee during such transit is to be recorded as that of a Railroad Employee Not On Duty (Class B). Likewise, if the employee decides upon other means of transportation that is not authorized or provided, and for which he would not have been compensated by the railroad, the injury is not considered work-related.

On his way to Minneapolis on May 31, 2011, Fricka was in a motorcycle accident and sustained several injuries.⁹ He was in the hospital for five days and missed ninety-five days of work due to the accident.¹⁰ Fricka reported the accident to Amtrak as a work-related injury.¹¹ However, Amtrak classified Fricka's injuries as not work related and therefore failed to pay his medical expenses resulting from his May 31, 2011 injuries.¹²

Before the accident, Fricka had a mid-year performance review in 2011, covering the period from October 1, 2010, to March 30, 2011, and was rated an overall score of "2.11 – Competent."¹³ After his May 31, 2011 accident, Fricka was out of work until he returned on September 5, 2011.¹⁴ His annual review covered the period from October 1, 2010, to the end of September 2011, and included the time of his injury and over three months he spent recovering, unable to work. He returned to work only three weeks before the annual review period closed. On his annual review, Fricka was rated an overall score of "1.43 – Needs Development."¹⁵ Amtrak did not offer any performance bonuses to employees for the 2011 performance review period.¹⁶

⁹ *Id.* at 3, 22.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 3, 22.

¹² *Id.* at 3, 26. If Amtrak had classified Fricka's injury as work related, it would have paid his medical bills. As it was, it expected Fricka to submit his medical bills to his private insurer. *Id.* at 26.

¹³ *Id.* at 24.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4, 24.

¹⁶ *Id.* at 24.

For the 2012 performance review period, the rating scale changed from a four-point scale at the beginning of the year to a three-point scale by the end of the year, and Fricka received an overall score of “2 – Met Goals.”¹⁷ No one in the department scored higher than a “2” for the year.¹⁸ Fricka had demonstrated substantial improvement in his performance during 2012, after his transfer to a different work station.¹⁹ However, as Fricka only “met” expectations, like everyone else in his department for 2012, he was not entitled to a bonus.²⁰

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to issue final agency decisions in FRSA cases.²¹ The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ’s factual determinations if they are supported by substantial evidence.²² We uphold an ALJ’s credibility findings unless they are “inherently incredible or patently unreasonable.”²³

¹⁷ *Id.* at 25.

¹⁸ *Id.* Fricka claims that his 2012 performance score was reduced—that he was originally rated a “3” or “4” and that Edward Witham, Fricka’s supervisor and Amtrak superintendent, rejected that rating and later approved a reduced rating for Fricka. As more fully explained in the “Discussion,” the ALJ on remand must make additional findings regarding this performance evaluation as is it unclear from the ALJ’s fact findings whether a reduction in Fricka’s score occurred.

¹⁹ *Id.* at 25-26.

²⁰ *Id.* at 26.

²¹ See Secretary’s Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

²² 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk S. Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

²³ *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 2 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

DISCUSSION

The FRSA provides that a railroad carrier “may not discharge . . . or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act” involving one of various statutorily protected activities.²⁴ The protected activities include “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.”²⁵ The FRSA further provides: “A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for . . . following orders or a treatment plan of a treating physician.”²⁶ For purposes of subsection (c), “[t]he term ‘discipline’ means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.”²⁷ “An employee who alleges discharge, discipline, or other discrimination in violation of [section 20109](a) or (c) . . . may seek relief . . . with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.”²⁸

The legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) govern FRSA complaints.²⁹ Thus, to prevail on a FRSA complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.³⁰ Once the complainant has established that the protected activity was a contributing factor in the employer’s decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.³¹

²⁴ 49 U.S.C.A. § 20109(a); 29 C.F.R. § 1982.102(b). We note that neither the FRSA statute nor the regulations limit the proscribed action to “compensation, terms, privileges, and conditions of employment,” like many of the whistleblower statutes under our delegation of authority do. Thus, the FRSA statute and regulations appear to be very broad in their conception of what “adverse action” is.

²⁵ 49 U.S.C.A. § 20109(a)(4); see also 29 C.F.R. § 1982.102(b)(1)(iv).

²⁶ 49 U.S.C.A. § 20109(c).

²⁷ *Id.*

²⁸ 49 U.S.C.A. § 20109(d)(1); 29 C.F.R. § 1982.103(a).

²⁹ See 49 U.S.C.A. § 20901(d)(2), referencing 49 U.S.C.A. § 42121(b)(2)(B).

³⁰ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

³¹ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

The ALJ concluded that Amtrak did not engage in any adverse action against Fricka due, in whole or in part, to Fricka's protected activity (reporting that he sustained a work-related injury). We affirm in part, reverse in part, and remand for proceedings consistent with this decision.

We affirm the ALJ finding that Fricka engaged in protected activity as unopposed on appeal and his conclusion that Fricka's transfer was not adverse action.³² Further, substantial evidence supports the ALJ finding that Fricka's injury was work related. The ALJ did not explicitly decide whether the FRA Guide's exception applied to render Fricka's travel non-work-related. Nevertheless, substantial evidence exists in the record to support a finding that the exception does not apply. Fricka testified that Robert Herdegen, Amtrak's master mechanic, knew that Fricka was going to take his motorcycle and simply told him that his mileage would not be reimbursed, not that he would not be compensated for his time traveling.³³ Herdegen confirmed at the hearing that he told Fricka that Amtrak would not reimburse Fricka's mileage for the trip.³⁴ We thus affirm the ALJ's finding that Fricka's injury was work related.

On appeal, Fricka has asserted that Amtrak's refusal to pay his medical bills, and his 2011 and 2012 performance appraisals were all unfavorable personnel actions under FRSA.³⁵ We discuss these three alleged adverse actions separately.

1. Refusal to pay medical bills

The ALJ concluded that Amtrak's reclassification of Fricka's injury as not work related was not an unfavorable personnel action because this action was not one which "would dissuade a reasonable employee from reporting an injury as 'work-related,'" citing *Menendez v. Halliburton, Inc.*, ARB No. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 20 (ARB Sept. 13, 2011).³⁶ The test the ALJ applied is one of several tests or factors used to determine what

³² Fricka included this transfer as an alleged adverse personnel action in his petition for review but did not discuss it in his brief. We therefore conclude that Fricka has abandoned this argument, and the ALJ's conclusion that the transfer was not adverse personnel action stands.

³³ D. & O. at 3; Hearing Transcript (Tr.) at 22. *See also* D. & O. at 17 (summary of Fricka's deposition testimony relating to his belief that he was authorized to take his motorcycle) and JX2, a notification e-mail sent on May 31, 2011 to Fricka which states: "8:35 AM Tuesday, May 31, 2011: Kathleen King – Turning trains in MSP due to flooding further West. Mike will take personal transportation from CHI to MSP. Hotel will be arranged by MSP Supt. Rick Johnson and direct billed."

³⁴ D. & O. at 10; Tr. at 119.

³⁵ Complainant's Brief at 2.

³⁶ D. & O. at 26.

constitutes adverse action, but it is not the exclusive test and is not determinative in this case. In *Menendez*, the Board stated that the definition the ALJ employed in this case, which comes from *Burlington Northern v. White*, 548 U.S. 53 (2006), “while persuasive, is not controlling in AIR 21 cases.”³⁷ We noted that under SOX, while *Burlington* was “a particularly helpful interpretive tool, . . . the plain language of” SOX controlled.³⁸ We stated that SOX’s prohibition of discharging, demoting, suspending, threatening, harassing, or *in any other manner* discriminating against an employee in the terms and conditions of employment, bespoke “a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers.”³⁹ This was because the language explicitly proscribed non-tangible activity. Noting the difference between the relevant SOX statutory language and that of Title VII, we found that “adverse action under SOX Section 806 must be more expansively construed than that under Title VII.”⁴⁰ Ultimately, we “adopt[ed] the *Williams* standard of actionable adverse actions as likewise applicable to” SOX cases.⁴¹ In *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010), we held that “‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.”⁴²

Evaluating the respective statutory language of SOX, AIR 21, and FRSA, we conclude that the *Williams* definition of adverse personnel action also applies to FRSA claims. FRSA, which prohibits “discharg[ing], demote[ing], suspend[ing], reprimand[ing], or *in any other way discriminat[ing]*” is virtually identical to the relevant broad statutory language in SOX (“*in any other manner discriminat[ing]*”) and even broader than that of AIR 21.⁴³ Further, in *Vernace v.*

³⁷ *Menendez*, ARB No. 09-002, slip op. at 15 (The Board stated that *Burlington’s* reasoning addressing adverse action under Title VII was compelling and a helpful guide for the analysis of adverse action under SOX. *Menendez*, ARB Nos. 09-002, -003, slip op. at 10. The Board described *Burlington’s* test as a useful starting place for reviewing SOX adverse actions. *Menendez*, ARB Nos. 09-002, -003, slip op. at 13. In *Burlington*, the Supreme Court decided that under Title VII, a plaintiff must show that a reasonable employee would have found the alleged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Burlington*, 548 U.S. at 68).

³⁸ *Menendez*, ARB No. 09-002, slip op. at 15.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 10.

⁴² *Williams*, ARB No. 09-018, slip op. at 7.

⁴³ 49 U.S.C.A. § 20109 (a); 49 U.S.C.A. § 42121 (a); 18 U.S.C.A. § 1514A(a).

Port Auth. Trans-Hudson Corp., ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012), we agreed with the ALJ’s reliance on *Williams*, ARB No. 09-018, in a FRSA case. We noted that “Congress re-emphasized the broad reach of FRSA when it expressly added ‘threatening discipline’ as prohibited discrimination in section 20109(c) of the FRSA statute.”⁴⁴

Using the *Williams* definition of adverse action, we conclude that Amtrak did engage in “discrimination” against Fricka when it misclassified his injury as non-work related. Fricka originally reported his injury as work related.⁴⁵ Respondent later reclassified the injury as not work related and admitted that the reason it did not pay Fricka’s medical bills was because the injury was not work related.⁴⁶ We conclude as a matter of law that Amtrak’s reclassification of Fricka’s injury as non-work related was unfavorable and more than trivial—it led to Amtrak not paying Fricka’s medical bills totaling \$297,797.21.⁴⁷

2. 2011 performance appraisal

The ALJ concluded that Fricka’s 2011 performance rating was not an adverse personnel action because there was “no evidence of any material impact on Fricka’s employment,” and because Fricka did not prove that he would have received a bonus.⁴⁸ However, as we explained above, a tangible or “material impact” on an employee’s terms or conditions of employment is no longer required given the very broad statutory language prohibiting discrimination “*in any [] way.*” Instead, an adverse employment action under FRSA is an “unfavorable employment

⁴⁴ *Vernace*, ARB No. 12-003, slip op. at 1.

⁴⁵ D. & O. at 3.

⁴⁶ *Id.* at 26

⁴⁷ *Id.* While not dispositive, we note that in *Flener v. H.K. Cupp, Inc.*, No. 1990-STA-042 (Sec’y Oct. 10, 1991), the Secretary found that a respondent’s opposition to a complainant’s request for workers’ compensation benefits, also worded as the respondent’s “refusal to pay the claimed medical expenses,” was an adverse employment action under the Surface Transportation Assistance Act (STAA) because it was unfavorable to the employee’s compensation, terms, conditions, or privileges of employment. See also *Flener v. H.K. Cupp, Inc.*, No. 1990-STA-042 (Sec’y Apr. 9, 1991), in which the Secretary reversed the ALJ’s finding that the only violation the complainant alleged pertained to his discharge (and dismissal of the complaint) because the Secretary determined that the complainant also alleged that the respondent unlawfully contested the complainant’s request for workers’ compensation (also stated as the respondent refused to pay a medical bill resulting from a work-related injury). The Secretary remanded the case for an evidentiary hearing on this allegation.

⁴⁸ *Id.* at 25.

action[] that [is] more than trivial, either as a single event or in combination with other deliberate employer actions alleged.”⁴⁹

Viewing the facts as found on this issue, Fricka received a “2.11,” “Competent” rating on a mid-year performance review that occurred at some point after March 31, 2011, but before Fricka’s accident. Fricka’s accident occurred on May 31, and he was unable to work until September 5, 2011. Fricka’s annual performance review period ended when Fricka had only been back at work for about three weeks and Amtrak gave Fricka an end-of-year performance review of “1.43, Needs Development.” According to Fricka, this was the lowest rating he had ever received. In any case, a performance rating drop of this magnitude from “competent” to “needs development” is more than trivial, and is adverse action as a matter of law. Whether Fricka would have gotten a bonus is not determinative because the lowering of the rating is significant of itself and need not effect a tangible or material impact on his salary to be considered adverse.

3. 2012 performance appraisal

The ALJ concluded that Fricka failed to prove that he sustained an unfavorable personnel action regarding his 2012 performance review because the rating scale changed from 1-4 to 1-3, no one got higher than a 2 that year, and Fricka had improved that year (to get a score of “2” met goals as opposed to the prior year’s 1.43 “needs development.”).⁵⁰ However, in light of our explanation of the proper analysis of adverse action, we find there are insufficient fact findings about the 2012 performance review(s) to determine whether Fricka’s rating was an adverse personnel action.⁵¹

It is unclear whether the ALJ agreed with Fricka’s assertions that his performance review for year end 2012 was reduced from 3’s and 4’s to a 2 in this time period.⁵² Giving some credence to Fricka’s assertion that his rating was lowered in 2012 are the fact findings that Witham had rejected an original rating for Fricka as “too high” for 2012, and that he accepted a resubmitted, lower rating for Fricka.⁵³ On remand, we direct the ALJ to clarify his findings as to whether Fricka’s performance rating was reduced and to reanalyze the action to determine whether it is adverse action under the definition of adverse action as explained above.

⁴⁹ *Williams*, ARB No. 09-018, slip op. at 7.

⁵⁰ D. & O. at 25.

⁵¹ While the ALJ summarized Witham’s testimony about this 2012 mid-year review, he made no findings about it in the analysis and Fricka’s claims seem to have to do with the end of year 2012 review, not the mid-year review.

⁵² D. & O. at 25 (in which the ALJ described Fricka’s assertion that it was reduced).

⁵³ *Id.* at 7.

Resolution of Fricka's complaint upon remand

Because the ALJ did not find adverse action, he did not consider whether any protected activity was a contributing factor to any adverse actions alleged in this case. On remand, the ALJ shall determine whether Fricka's protected activity contributed to the adverse actions taken against him and, if so, address any asserted affirmative defense Respondent may have, and appropriate remedies.⁵⁴

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's finding that Fricka engaged in protected activity and his conclusion that Fricka's transfer was not adverse action, we **REVERSE** the ALJ's conclusions that the 2011 performance appraisal and Amtrak's misclassification of Fricka's injury as non-work related were not adverse action, and we **REMAND** to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado, concurring:

I concur that this matter must be remanded because the ALJ decided incorrectly that no adverse action occurred in this case. I write only to briefly explain a different perspective and reserve full discussion for another day, as it is not necessary at this point. First, I agree with the majority that substantial evidence supports the ALJ's finding that the injury Fricka reported was a "work-related" personal injury as that term is used in FRSA. Appropriately, the ALJ started with the text of the statute to determine what Congress meant by the phrase "worked-related" injury.⁵⁵ Unfortunately, neither FRSA nor its implementing regulations define this term. Given

⁵⁴ See *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015).

⁵⁵ D. & O. at 21.

the specific facts of this case, I agree with the ALJ that “work-related” in the remedial whistleblower provisions of FRSA includes Fricka’s injuries, as he was driving to another work duty location at the direction of the employer.⁵⁶ More importantly, Amtrak provided virtually no legal argument to the contrary in the two-page argument it provided the Board.

With respect to determining what qualifies as an “unfavorable action” under FRSA, I do not see the need to look to or discuss the law under Title VII. As the majority points out, Congress went further under FRSA than Title VII in defining unfavorable employment action by expressly mentioning the “threat” to discipline as unfavorable.⁵⁷ In addition to the statute, the implementing regulations further define unfavorable discrimination by expressly including “intimidating, threatening, restraining, coercing, blacklisting or disciplining an employee.”⁵⁸ I do not find it necessary or persuasive to look to the standard in *Burlington Northern* regarding actions that “would dissuade a reasonable employee from reporting” an injury. Under FRSA, the statute and the regulations provide ample guidance to analyze whether an unfavorable employment action occurred.

I agree that refusing to pay for medical bills is an adverse action in this case. The thorny causation issue the ALJ will face as to the refusal to pay medical bills, among others, will be deciding (1) whether Amtrak truly believed that Fricka’s injury was nonwork related and, if so, (2) how such belief plays into the question of contributing factor. In the end, the ALJ must be convinced that Fricka’s act of *reporting* his work-related injury (as defined by FRSA) was in fact a reason that Amtrak refused to pay his medical bills. Stated differently, despite the fact that Amtrak’s decision for medical benefits could only have occurred because of Fricka’s reporting, can the ALJ find that a good faith belief that the injury was not work related was the sole cause of the refusal to pay medical benefits?

LUIS A. CORCHADO
Administrative Appeals Judge

⁵⁶ *Id.* at 22.

⁵⁷ See 29 U.S.C.A. § 20109(c)(2).

⁵⁸ 29 C.F.R. § 1982.102(b)(1).