Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25000
Docket No. 44671
99-1-97-1-E-1272

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

PARTIES TO DISPUTE: (Steve Cusack
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(Econo-Rail Corporation and Sabine
(Contracting Corporation

STATEMENT OF CLAIM:

"Was Mr. Cusack discharged in retaliation for engaging in activity protected by 49 U.S.C. § 20109?

Steve Cusack filed a complaint and brought, or caused to be brought, a proceeding related to the enforcement of the Railroad Safety Act (49 U.S.C. § 20101 et sec.), and refused to work because of hazardous conditions. As a result, he was fired in violation of the Railroad Safety Act Whistleblower provision, 49 U.S.C. § 20109.

Mr. Cusack seeks compensation in an amount yet to be determined by his expert."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the outset, the Board, upon a thorough review of the record and the oral argument presented at the September 15, 1998 hearing, finds that the Claimant was constructively employed by Econo-Rail Corporation as a locomotive engineer at the time of the incidents giving rise to this dispute. The Board finds that the Econo-Rail operations at Seadrift, Texas, Claimant's employment location, are those of a "railroad carrier" as defined by 49 U.S.C. § 20102, and that Econo-Rail Corporation is under the jurisdiction of the Federal Railroad Administration (FRA) and subject to safety inspections by the FRA and other applicable federal regulations and/or law. The claim now pending before this Board has been appropriately filed pursuant to 49 U.S.C. § 20109.

The record of this case reveals that during the Spring and Summer of 1996, the Claimant repeatedly reported the unsafe conditions of Econo-Rail locomotives, as well as other safety-related issues, to his supervisors. When, after several months, Econo-Rail failed to take corrective action regarding his complaints, Claimant reported his concerns to the FRA.

On April 15, 1997, Claimant and his crew were instructed to sign off on safety documents required by Union Carbide, Carrier's major customer at Seadrift. Claimant refused to sign the papers on safety materials because he had not reviewed them. He again complained to Carrier officials about unsafe locomotives. At this point, it appears that the Carrier was "fed up" with Claimant, and the next day took steps to terminate him.

On April 18, 1997, when Claimant went to pick up his pay check, he was told by the Carrier that he was dismissed. The separation notice indicated that Claimant was discourteous, left his job before work was completed, refused directions from his supervisors, used profanity in dealing with his supervisors and fellow employees, and reported false conditions to EPA and FRA. The record, however, reveals that up to this point, Claimant had received only commendations for being an exemplary employee.

In response to the Claimant's complaints, FRA sent an inspection team to Carrier's Seadrift site and after determining that it had jurisdiction over the Carrier, found evidence of Carrier's non-compliance with safety regulations as Claimant had alleged. The FRA is currently working with Carrier to bring its operation into compliance with required regulations.

The Board concludes that Claimant was inappropriately dismissed by the Carrier for his reporting of safety complaints in violation of the whistleblower protection provision of 49 U.S.C. § 20109. The Board will now address the issue of the remedy.

Claimant was an employee at will, and there is no collective bargaining agreement provision in evidence which bears on the matter of the remedy in this case. It is to the statute and applicable case law that the Board looks for guidance in fashioning an appropriate remedy in this case.

Claimant argues that 49 U.S.C. § 20109(c) limits what relief may be awarded in cases where an employee who has reported unsafe working conditions was not discharged. Because this case involves discharge, Claimant believes the § 20109(c) limits on damages do not apply. Claimant then states:

> "'[T]he existence of a statutory right implies the existence of all necessary and appropriate remedies' and, except when expressly delineated by Congress, 'courts may use any available remedy to make good the wrong done.' Franklin v. Gwinnett county Public Schools, 503 U.S. 60, 112 S. Ct. 1028, 1033-34, 117 L.Ed.2d 208 (1992). Thus the full range of remedies are available under the FRSA including back pay, reinstatement or front pay if reinstatement is not feasible, compensatory and punitive damages, and attorney's fees. CSX Trans., Inc. v. Marquar, 980 F.2d 359, 379 (6th Cir. 1992); Riley v. Empire Airlines, Inc., 823 F. Supp. 1016, 1020 (N.D.N.Y. 1993)."

The Board believes the above cited dicta fairly summarizes our authority to employ relatively broad remedial power in fashioning the relief in this rather unique case. We think the remedy must serve two basic purposes -- to make the Claimant reasonably whole for his losses and to protect the important railroad safety objectives of 49 U.S.C. § 20101 et. sec. Therefore, the Claimant shall be reinstated to service and made whole for all lost wages. The amount of lost wages due Claimant is $34,763.58 through February 2, 1999. After February 2, 1999, that amount shall be increased $365.57 per week until Claimant's reinstatement is effected. In addition, 6% interest per annum shall accrue on the entire amount due Claimant beginning 30 days after the date this Award is adopted until Claimant receives payment from the Carrier.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 2nd day of June 1999.

CONCURRING AND DISSENTING OPINION OF THE LABOR MEMBERS TO AWARD NO. 25000 - DOCKET NO. 44671

Referee Rodney E. Dennis

The Claimant in this case, Mr. Steve Cusack, was an exemplary employee whose only "misconduct" was to report violations of railroad safety regulations to the Federal Railroad Administration (FRA). After FRA acted upon Mr. Cusack's complaints and found substance to them, he was discharged in retaliation for having been responsible for subjecting his employer to FRA's scrutiny. Mr. Cusack felt that his discharge was unjustified in that the reporting of safety problems is protected under 49 U.S.C. § 20109 (Railroad Safety Act, Whistleblower provision). Because Mr. Cusack was an "at-will" employee and the employer a non-unionized carrier, Claimant obtained legal counsel to help him progress his claim to this Board since he was without local union representation to assist him.

Without doubt, the Majority has correctly determined that this Board had jurisdiction over the case, and that Mr. Cusack was impermissibly terminated for making safety-related complaints to FRA. The problem now is with the remedy, which awarded only reinstatement with pay for time lost. For the reasons which follow, we believe this remedy fails to satisfy the objectives of either the claim or the Railroad Safety Act, especially in the rather unique circumstances of this case.

Following his dismissal, Mr. Cusack had no choice but to relocate several hundred miles from his home in order to obtain employment. Mr. Cusack incurred significant expense in doing this, and would not have had such expenses but for his wrongful termination by the carrier. Accordingly, we think that the remedy should have included a compensatory damage component to reimburse Mr. Cusack these costs.

As we indicated above, Mr. Cusack had no union representation and had to retain counsel to progress his claim. Over the protracted course of the handling of the case, Mr. Cusack incurred many thousands of dollars in attorney's fees and costs; more, in fact, than the total of the back pay he has been awarded. The Board's remedy, without any explanation and despite citing it had authority to do so, neglected to award attorney's fees and costs. This leaves Mr. Cusack in the unenviable position that he will be forced to pay thousands of additional dollars for the privilege of returning to the service of the employer who illegally dismissed him. Mr. Cusack must really be wondering what he won for all his worry and effort.

Not only does this make no sense whatsoever from Mr. Cusack's personal perspective, but the remedy fails to effect the purpose of the Railroad Safety Act. Without an award of attorney's

fees, who would be able to afford the cost of representation? Who would be able to challenge a retaliatory discharge as Mr. Cusack has tried to do? Who would ever again report a safety violation to the FRA? What good, then, is the Whistleblower provision if to rely upon it merely makes financial recovery a virtual impossibility? Obviously, the public interest in enhancing railroad safety is frustrated if unsafe conditions go unreported because the person to report them faces certain ruin. We seriously doubt that Congress intended this result in enacting the statute.

Finally, Mr. Cusack's attorney argued for an award of front pay in this case. In the ordinary case coming before this Board, granting such relief might be beyond the scope of the Board's authority. This was not an ordinary case. There was no collective bargaining agreement provision to consider with respect to the fashioning of a remedy. It was from the statute that this Board derived its jurisdiction, and the statute (for the reasons stated in the Award) empowers the Board with broad enough remedial power to have awarded Mr. Cusack front pay. We believe that front pay should have been awarded in light of the fact that Mr. Cusack would (ostensibly) return to employee-at-will status. We believe that his position would be too tenuous given the recent history of his employment relationship to permit him to feel very secure in that employment. Front pay would, at least, have allowed Mr. Cusack some continuity in the flow of the recovery of his life. We believe that to have been richly warranted.

For the reasons set forth above, even though the Board began from the correct conclusion that Mr. Cusack was illegally terminated, we do not think that the remedy satisfies the claim Mr. Cusack placed before this Board, nor is the remedy consistent with the purposes of the Railroad Safety Act, especially with respect to the absence of an award for attorney's fees and costs.

Richard K. Radek

Richard K. Radek, Labor Member

Marcus J. Ruef

Marcus J. Ruef, Labor Member