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Legal Sidebar

Courts Clarify Federal Railroad Safety Act Employee Protection for "Good Faith" Safety Reports

October 11, 2022

The Federal Railroad Safety Act (FRSA) contains several provisions that prohibit railroads from punishing an employee for engaging in certain protected activities, including reporting safety hazards, cooperating with federal safety investigations, and refusing to violate federal safety rules. The FRSA also creates a private cause of action enabling railroad workers to sue their employers for money damages and other relief for violations of these statuary protections.

One of the FRSA's employee protections—49 U.S.C. § 20109(b)(1)(A)—prohibits railroads from punishing employees for "reporting, in good faith, a hazardous safety or security condition." The statute does not define "good faith," however, leaving the term ambiguous. In particular, courts have grappled with whether Section 20109(b)(1)(A)'s "good faith" element requires only that the employee subjectively believe that a hazardous condition exists (i.e., the employee actually believes the condition is hazardous) or whether the employee's belief must also be objectively reasonable (i.e., a similarly situated employee would reasonably understand the condition to be hazardous). In 2021, two U.S. Courts of Appeals, contrary to earlier district court rulings, adopted the former view and held that Section 20109(b)(1)(A) protects a reporting employee who subjectively believes that a hazardous condition exists, regardless of whether that belief is objectively reasonable. This Legal Sidebar discusses the courts' rulings, potential implications for future FRSA cases, and implications for Congress's use of "good faith" as a statutory term.

Ziparo v. CSX Transportation, Inc.

In *Ziparo v. CSX Transportation, Inc.*, a train conductor, Cody Ziparo, sued his former employer for unlawful retaliation under Section 20109(b)(1)(A). Ziparo had reported to the company that his supervisors created hazardous working conditions by pressuring employees to falsify tracking data to improve performance metrics. Ziparo did not allege that the falsifications themselves posed a safety threat, but that employees' resulting stress and distraction did so. Shortly after this report, a train damaged

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LSB10835

a switch that, according to CSX's reports, Ziparo had left misaligned. CSX terminated Ziparo after a hearing about the switch incident, but also reprimanded his superiors after investigating his complaint.

The district court determined that "good faith" as used in Section 20109(b)(1)(A) contains both subjective and objective components, such that Ziparo needed to show both that he actually believed that the stress and distraction caused by his supervisors was a "hazardous safety or security condition" and that this assessment was objectively reasonable. The district court held that no reasonable jury could find Ziparo's view objectively reasonable. The court also separately held that a hazardous safety or security condition must be a physical condition.

On appeal, the United States Court of Appeals for the Second Circuit disagreed with the district court on both issues. The Second Circuit looked to dictionary definitions of "good faith" and determined that it is a subjective standard concerned only with the actor's state of mind, not with objective reasonableness. The Second Circuit acknowledged that several other district courts had also interpreted Section 20109(b)(1)(A) to contain an objective reasonableness element, but faulted these courts for relying on appellate decisions interpreting other whistleblower statutes that contain language absent from Section 20109(b)(1)(A). For example, some of the district courts relied on decisions interpreting the whistleblower protection provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, but that provision applies where an "employee *reasonably* believes" that conduct would violate federal laws or regulations.

The Second Circuit contended that the omission of any reasonable belief language in Section 20109(b)(1)(A) is particularly telling because other provisions in Section 20109 contain an express reasonableness requirement. Sections 20109(b)(1)(B), (1)(C), and (2) protect employees who refuse to work or to authorize the use of railroad infrastructure because of a hazardous safety or security condition when the refusal is made in good faith, without reasonable alternatives, and "a *reasonable* individual in the circumstances then confronting the employee" would act similarly. Likewise, Section 20109(a)(1) protects employees for "good faith" acts done to assist "any investigation regarding any conduct which the employee *reasonably* believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security" or abuse of related public funds, if the investigation is conducted by certain authorities.

The court also concluded that requiring only a subjective belief under Section 20109(b)(1)(A) is consistent with the overall structure of subsection (b) and with the safety-promoting purpose of the FRSA. Employees merely reporting a safety concern are protected so long as their belief is genuine. This broad protection encourages safety reporting while placing a minimum burden on the railroad. Employees refusing to perform tasks, however, face the higher hurdle of objective reasonableness, reflecting the escalated burden imposed on the railroad.

The Second Circuit therefore determined that Section 20109(b)(1)(A) plaintiffs need not show that their concerns were objectively reasonable, although it explained that the reasonableness of the report may still be circumstantial evidence of the employee's subjective good faith—that is, a factfinder may be more likely to conclude that an employee did not actually believe a condition was hazardous if that belief seems unreasonable. The court also concluded that there is no textual basis to require that a reported "hazardous safety or security condition" be a physical condition. The Second Circuit thus vacated the district court's entry of summary judgment for the railroad and remanded for further proceedings.

Monohon v. BNSF Railway Company

The Eighth Circuit reached a similar result in *Monohon v. BNSF Railway Company*. Daniel Monohon worked as a track inspector for BNSF and used a vehicle called a hy-rail, a pickup truck that can switch to special rail wheels to travel on railroad tracks. BNSF required hy-rail occupants to wear a seatbelt, but did not consistently enforce the rule. After Monohon's supervisors reiterated the rule, Monohon expressed

concern that wearing a seatbelt while on the tracks could inhibit his ability to bail out of the hy-rail if a train appeared, leading to his termination. A jury found in favor of Monohon on his Section 20109(b)(1)(A) claim, but the district court granted judgment as a matter of law to BNSF because it concluded that Monohon's concern was not objectively reasonable.

For essentially the same reasons as the Second Circuit, the United States Court of Appeals for the Eighth Circuit held that Section 20109(b)(1)(A) does not require that an employee's report be objectively reasonable. The court relied on a dictionary definition of the term "in good faith," the presence of express reasonableness language elsewhere in the statute, and its interpretation that broad anti-retaliation protection for good faith reports aligns with the FRSA's purpose.

Future FRSA Questions

Although the Second Circuit held in *Ziparo* that "good faith" in Section 20109(b)(1)(A) does not require an objectively reasonable belief about a hazardous condition, the court also suggested that factors other than the employee's subjective belief in a hazardous condition might be relevant to whether the employee acted in good faith. In explaining the meaning of "good faith," the court stated in passing that the employee also must not "make the report for an improper purpose." (The Eighth Circuit made no similar statement in *Monohon*.)

For example, what if an employee reports what they genuinely believe to be a safety hazard, but does so for potentially suspect reasons, such as animosity toward a supervisor? Courts and state legislatures have confronted this question in the context of state whistleblower statutes that protect "good faith" reports. For example, in 2013, the Minnesota legislature amended the Minnesota Whistleblower Act in part to eliminate a judicially created requirement that a whistleblower take action with the purpose of exposing an illegality.

In 2017, the Supreme Court of Louisiana interpreted the Louisiana Environmental Quality Act, which protects employees who, "acting in good faith," report conduct that they reasonably believe violates environmental regulations. The court rejected an argument that an employee's motivation was relevant to whether they acted in good faith, limiting the requirement to the employee's honest belief that a violation occurred.

While the *Ziparo* court suggested that a report is not made in "good faith" under Section 20109 if it is made for an improper purpose, that question was not before either the *Ziparo* or *Monohon* courts. The issue may be contested in future FRSA cases.

The interpretation of "good faith" adopted in *Ziparo* and *Monohon* may also raise questions under Section 20109(a)(2), which protects employees for "lawful, good faith" acts done "to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security." Unlike Section 20109(a)(1)'s protection for assisting an investigation, Section 20109(a)(2) does not contain an express reasonableness requirement. In *Rookaird v. BNSF Railway Company*, a divided Ninth Circuit in 2018 rejected the defendant's argument that the subsection only applies where the refused conduct actually would have violated a rule or regulation. The district court had determined that the employee's subjectively and objectively reasonable good faith belief in a violation was sufficient. The Ninth Circuit majority affirmed but did not clearly adopt an objective component of "good faith." The dissent accused the majority of interjecting a reasonable belief element into the statutory text.

The *Ziparo* and *Monohon* courts' interpretation of "good faith" as not requiring an objectively reasonable belief therefore may be in tension with the *Rookaird* decision. *Rookaird* held that employees need not show that refused conduct would actually have violated a federal safety or security requirement to be protected by Section 20109(a)(2). If that is correct and, following the logic of the *Ziparo* and *Monohon* decision, the "good faith" requirement incorporated in Section 20109(a)(2) does not require an objectively

reasonable belief, then an employee may be protected for refusing to work as long as they had a subjective belief that the refused conduct would have violated a federal law, rule, or regulation. That broad protection for a refusal to act could undermine the structural balance recognized by the *Ziparo* decision in Section 20109(b), where mere reporting enjoys similarly broad protection but an employee must meet objective requirements to be protected for a refusal to perform a task.

Considerations for Congress

The courts' interpretation of "good faith" in *Ziparo* and *Monohon* highlights both the potential utility and ambiguity of that term. One implication is that Congress can use subjective and objective requirements to tailor levels of protection to different types of protected conduct. As the Second Circuit explained in *Ziparo*, Section 20109(b) promotes safety by providing employee protection, but accounts for the potential burden of such protections on railroads by escalating the evidentiary burden on the employee as the burden of the protection action on the railroad escalates.

In situations where Congress seeks to incentivize reporting even further, Congress can protect employees without a subjective requirement. Congress adopted the employee protection provisions of the National Transit Systems Security Act of 2007, 6 U.S.C. § 1142, at the same time as those in the FRSA and followed the same general structure. A "good faith" requirement appears in the equivalent provisions protecting employees who assist an investigation; refuse to take part in a violation of a federal law, rule, or regulation; or refuse to take action because of a hazardous safety or security condition. But unlike the FRSA, the reporting provision in the transit statute does not require public transportation employees who "report[] a hazardous safety or security condition" to do so in "good faith," and it therefore appears to provide broader protections for transit employees making such reports.

Congress can thus employ objective and subjective requirements, or the absence thereof, to balance competing values and adjust employee protections for different types of conduct. The use of the term "good faith," however, may result in ambiguity. If Congress seeks to decrease uncertainty over how courts will interpret statutory provisions that reference "good faith," it may define the term for purposes of those provisions or otherwise clarify in the statutory text what "good faith" requires.

The FRSA's conditioning of some protections on an employee's "good faith" is unusual, but not unique, among federal whistleblower protection statutes aimed at employee protection. One provision of the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. § 299b-22(e), prohibits medical providers from taking adverse employment action against an employee who "in good faith reported information" to a patient safety organization directly or via the provider. The Seaman's Protection Act, 46 U.S.C. § 2114(a)(1)(A), also prohibits any retaliation against a seaman who "in good faith has reported or is about to report" what they believe to be a violation of a maritime safety law or regulation to federal authorities. Beyond employee protection, other types of protected reporting subject to "good faith" requirements include reporting alleged horseracing violations and reporting child abuse.

The *Ziparo* and *Monohon* cases can also inform Congress's possible use of the term "good faith" in other contexts and future legislation. For instance, one version of the proposed American Innovation and Choice Online Act would prohibit certain technology platform operators from retaliating against any user "that raises good-faith concerns" with law enforcement about actual or potential legal violations on the platform or by the operator.

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