

flights posed by the project and (2) to perform an environmental review under the National Environmental Policy Act (NEPA).

The court first addressed the issue of whether the FAA failed to analyze the safety risks posed to VFR flights by the project. According to § 6-3-3, “[a] structure is considered to have an adverse effect if it first exceeds the obstruction standards of part 77, and/or is found to have physical or electromagnetic radiation effect on the operation of air navigation facilities.” The court agreed with the FAA’s interpretation that § 6-3-3 is a threshold requirement, and if a structure does not meet either condition, then no further study is needed. Because the proposed structures did not violate an obstruction standard in part 77 and would not have a physical or electromagnetic effect on an air navigation facility, the FAA had no obligation to evaluate the effect of the project on VFR flights.

The court then addressed the issue of whether the FAA was required to perform an environmental impact analysis of the project under NEPA. Although Cape Wind was required to obtain a no hazard determination from the FAA, the determination is not legally binding. NEPA’s “rule of reason” does not require the FAA to prepare an environmental impact statement (EIS) if it would not serve a purpose. Here, there is no purpose for an EIS because the determination is not binding and the Department of Interior had already prepared an EIS that was being challenged in another proceeding.

Accordingly, the court upheld the FAA’s no hazard determination and denied the petition for review.

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Almendarez v. BNSF Ry. Co., No. C13-0086-MAT, 2014 WL 931530, at *1 (W.D. Wash. Mar. 10, 2014) (holding that the motion for partial summary judgment on the issue of whether BNSF Railway Company violated the Federal Railway Safety Act is denied on the basis of genuine dispute as to the material facts, and declining to reach a determination on the request for an order determining undisputed facts.)

Plaintiffs, members of a BNSF construction group, alleged that BNSF Railway Company violated the Federal Rail Safety Act (FRSA) by threatening to terminate their employment if the group suffered anymore occupational injuries. Plaintiffs claimed that their supervisor, the group’s construction roadmaster, indicated during a January meeting that the group’s injury record was excessive in comparison to other construction groups, and advised the group of its termination if additional injuries oc-

curred. As a result, plaintiffs filed a complaint with the United States Department of Labor alleging violations of the FRSA. Under the FRSA, a railroad carrier may not terminate an employee for following injury-reporting procedures.

The Plaintiffs' complaint asserted that the construction roadmaster made threats of repercussion in response to the protected activity of reporting injuries. BNSF issued a position statement asserting that the plaintiffs' work group had an injury rate three times as high as other groups, that it was known the group would be eliminated after its current project, and that the construction roadmaster had merely engaged in an employee discussion about unsafe behaviors.

The Court first examined whether Plaintiffs' claims under the FRSA qualified for summary judgment. It indicated that summary judgment would only be appropriate if Plaintiffs could show that there was no genuine dispute as to the material facts of the claim. The disputed portion of Plaintiffs' claim involved two elements: (1) that Plaintiffs had suffered adverse action and (2) the protected activity of reporting injuries was a contributing factor in the adverse action.

The Plaintiffs' FRSA claim relied entirely on the statements made by the construction roadmaster at the January meeting. BNSF disputes the version and implications of the statements. The Court stated that it could not determine the credibility of these versions, or whether BNSF intended to threaten or intimidate the Plaintiffs, because this was the rightful function of a jury. The Court was also required to view the evidence in the light most favorable to the non-moving party. Thus, the Court found genuine issues of material fact as to the statements of the construction roadmaster and declined to determine whether the protected activity was a contributing factor in any adverse action.

The Court next considered the Plaintiffs' alternative request for an order establishing undisputed material facts. The Court declined to enter the order, stating that Plaintiffs had failed to identify the facts they sought to establish as undisputed. Because the request lacked specificity and the Court found the material facts to be in dispute, it declined to enter the requested order.

Accordingly, the Court denied Plaintiffs' request for partial summary judgment on their FRSA claim and declined to enter an order regarding any established facts of the case.

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