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Issue Date: 28 February 2013

CASE NO: 2008-FRS-00004

In the Matter of:

MICHAEL L. MERCIER,
Complainant,

v.

UNION PACIFIC RAILROAD,
Respondent.

APPEARANCES:

Richard A. Williams, Jr., Esq.
Megan A. Spriggs, Esq.
For the Complainant

Rebecca B. Gregory, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA" or "the Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

PROCEDURAL BACKGROUND

Michael L. Mercier ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL") on March 27, 2008, alleging that Union Pacific Railroad ("Respondent") violated the FRSA by terminating him and discriminating against him in retaliation for safety reports he had made.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on June 26, 2008. OSHA determined that there was not reasonable cause to believe Respondent violated the FRSA. On July 24, 2008, Complainant filed his objections to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

On March 26, 2009, Respondent moved for summary judgment on the grounds that Complainant's FRSA claim was barred by his decision to pursue his union grievance and arbitration under the Railway Labor Act (RLA), per the FRSA's election of remedies provision. 49 U.S.C.A. 20109(f). This provision states that an employee may not "seek protection under both [the FRSA] and another provision of law for the same allegedly unlawful act of the railroad carrier." The ALJ denied Respondent's motion for summary judgment, and the ARB affirmed this denial on interlocutory review, saying, "we deem nothing in these whistleblower protection provisions as diminishing Mercier's right to pursue arbitration under the collective bargaining agreement...[and] we hold that by pursuing arbitration Mercier did not waive any rights or remedies that the FRSA affords him, including the right to pursue a whistleblower complaint under its provisions." ARB Case No. 09-121 (September 29, 2011), at 9.

A *de novo* hearing was held in St. Paul, Minnesota on June 5, 6, and 7, 2012. The following exhibits were received into evidence: ALJX 1-2; RX 1-82, 84-118, and 121-128 (with RX 76 admitted under seal); and CX 1-151.[1] Post-hearing briefs were received from Complainant on August 27, 2012 (with errata received on August 24, 2012) and from Respondent on August 30, 2012; and reply briefs were received from Complainant on September 11, 2012 and from Respondent on September 7, 2012.

FINDINGS OF FACT

Summary of Facts

Respondent is the Union Pacific Railroad Company. Complainant had worked for Respondent as a locomotive engineer for nine years at the time he was terminated. He had previously worked for the Chicago Northwestern Railroad for 16 years before its merger with Respondent. (Tr. 74-80).

Complainant was terminated from his position of locomotive engineer by Respondent on October 31, 2007, for violation of a leniency agreement entered into between Complainant and Respondent to resolve an asserted violation by Complainant of Respondent's EEO policy. Complainant asserts in this case that the termination was pretextural, in that Complainant was terminated from his job because he engaged in protected activities, that is, he was fired because of his actions in reporting safety violations to his supervisors and to the Federal Railroad Administration (FRA) (CX 1, 2, 11; RX 84, 88, 89, 92, 104, 112; Tr. 90-91, 566-568). Complainant held various positions with his union, the Brotherhood of Locomotive Engineers and Trainmen (BLET).

[1] References to the record are as follows: Trial Transcript, Tr.__; ALJ Exhibit, AX __; Complainant's Exhibit, CX__; and Respondent's Exhibit, RX__. Additionally, references to the closing briefs are as follows: Complaint's Post-Hearing Brief, CB at __ , and Respondent's Post-Hearing Brief, RB at__.

Safety Reports before First Removal from Service

Complainant's first safety report described in the record took place in March and April of 2006. He had received a call from an engineer saying that Master of Operating Procedures (MOP) Bill Hadley had told the engineer he did not need a track warrant to do a power swap on the main line. Track warrants are particularly essential because they govern directional traffic on a single track. Complainant went to management with this report, but, he said, received no answer, and so he wrote to the FRA for an interpretation on April 3, 2006. The FRA responded in August 2006 (CX 1), and Complainant contacted Superintendent Lance Hardisty with the FRA's response (RX 84). (CX 1; RX 84, 100; Tr. 85-90, 236-240, 545-554).

The second complaint Complainant made was on May 13, 2006, and involved concerns about proper filling of jobs at the Mankato, MN station. However, it appears that this complaint pertained to operational, financial considerations rather than safety. (CX 2; RX 85; Tr. 585-586). The third complaint took place in July of 2006, when Complainant became involved in an incident where a Jason Smith had allegedly failed to compare track warrants, after which he was conferenced and received no discipline. The record is unclear as to Complainant's involvement. (RX 112; Tr. 533-534).

Fourth, on July 18, 2006, Complainant made several complaints about yard masters throwing switches. Yard masters are not supposed to throw switches, two different witnesses testified, because that task is meant to be done by trainmen, and if a yard master does it, it could cause a derailment. Eventually, this complaint was addressed. (RX 88; Tr. 100-101, 541). Fifth, on July 31, 2006, Complainant repeatedly reported a crew alerter defect, then finally reported it to the safety hotline. (RX 89; Tr. 96-97). Sixth, Complainant complained in July 2006 to Manager of Yard Operations for the St. Paul yard, Joseph Caffin, about a crew transport driver talking on his cell phone and speeding while transporting a crew. This e-mail was forwarded to, among others, Master of Operating Procedures Eric Schwendeman. (RX 87).

Seventh, on September 12, 2006, Complainant acted as union representative for Virgil Marlin in an investigation concerning an injury that had happened in the course of Marlin's employment with Respondent. Superintendent Hardisty agreed with Complainant's position and did not assess discipline. (RX 92; Tr. 235-236, 543-544).

Eighth, in September of 2006, Complainant received a complaint from a conductor saying that MOP Hadley had released track warrants too far away from the train for safety, and had run an engine backwards at 49 miles per hour without ditch lights. Complainant passed these complaints along to Superintendent Hardisty on September 25, 2006. Hardisty soon responded, saying that while those actions would have been violations of the safety rules, the reports were incorrect. (CX 11, 12; RX 84, 100; Tr. 91-98, 545-554).

Ninth, on October 19, 2006, Complainant reported several concerns he had about crew transportation, including vehicles without proper luggage racks. (RX 104; Tr. 98-99, 240, 556-561). Hardisty responded on January 17, 2007 addressing each concern. (RX 104). At unspecified times, Complainant also reported concerns over deadhead procedures, a safety and

an operational issue, and a problem regarding a lack of sighting in the time table. (Tr. 90-91, 101).

November 2006 Interactions with MTO Tennessen and Removal from Service for Airbrake Incident

On November 17, 2006, Complainant arrived in Mankato, MN on duty, and was told that Manager of Train Operations Andrew Tennessen was at that moment questioning several employees after their hours of service about a crossing accident that had happened while they were on duty. Because he heard that the engineer in that group was a member of the Brotherhood of Locomotive Engineers and Trainmen, he went to inquire what was going on. When he arrived, he told Tennessen that the engineer should not be held past his hours of service. Tennessen responded that it was no business of Complainant's, and that he did not appreciate Complainant interrupting the questioning. Complainant backed down and informed Tennessen that he still thought it was wrong to hold them past hours of service, and that he would be reporting it elsewhere. Complainant subsequently reported this incident to management as an hours of service violation, which, he said, received no response, then wrote a letter to Bruce MacArthur, General Chairman, BLET, about it. MacArthur sent the letter to the FRA, which responded that there was indeed an hours of service violation. (CX 25-28, 41, 75; RX 98; Tr. 47-48, 102-103, 568-570.)

Early the next morning, at 1:00 or 2:00 a.m. on November 18, 2006, Complainant was instructed to take a Jeep Liberty utility vehicle to the next work site, which would require driving on a highway. However, he refused to ride in it because the seatbelt did not fit over his body, and, as he put it, the "doors were bad, [and] the windows were bad." Thus, even though he had gotten into the jeep for a short trip over surface streets earlier in the evening, he refused to get into it for this highway trip because he considered it unsafe. Tennesson bought a seat belt extension. (RX 58; CX 25; Tr. 105, 279, 570-578).

Shortly thereafter, Complainant was waiting in an engine with the conductor for instructions to move a train out. Tennessen climbed up the engine and entered the cab to ask Complainant about his refusal of the utility vehicle. Tennesson's report to Superintendent Hardisty states that both Complainant and the conductor appeared to be sleeping. The report states that he questioned both men about sleeping, and the conductor answered that he was awake and merely had his head in his hands. Tennessen asked whether Complainant had job-briefed the sleeping policy, to which Complainant answered he had not. (RX 58). Complainant received an FTX, a miner rule infraction, but maintains that he followed the correct procedure for taking a rest under those circumstances. Complainant did not file a grievance. (Tr. 106-8).

Meanwhile, an operational issue had transpired at Mankato, a traffic jam where two or three trains were trying to get through, sparking an e-mail exchange between Tennessen and Hardisty to determine what had happened and how to resolve the situation. This exchange begins with an e-mail from Hardisty to Tennessen with the subject line "Issues at Mankato," which contains text in two different fonts: Hardisty explained during his testimony that the larger font reading "What happened." was his own message to Tennessen, whereas the rest of the text of the e-mail, which describes a delay in moving out the trains at Mankato, was a text message

he was forwarding to Tennessen from the corridor manager. (CX 25; Tr. 570-578). Tennessen responded by explaining the problem, and then Hardisty forwarded another text message from the corridor manager reading "Enginneer *[sic]* Mercier refusing to take a cab this am. Safety belt won't go around his big belly. I had him fired twice, should have never brought him back[…] :)", to which Mr. Tennessen replied:

> "Went to speak to Mercier about seat belt issue and he and conductor were sleeping on power. He states he is using the empowerment policy and will continue to use it to refuse limos due to unsafe conditions, including when seat belts do not fit. He also states that using the U-man and utility vehicle is not correct. I explained that was not true. I will get a seat belt extension for the Mankato utility vehicle but expect Mercier to continue this type of activity. Does he need a fitness for duty evaluation? He appears to be obese."

(CX 25; Tr. 114-117, 576).

Complainant and the conductor were charged with using an improper airbrake test when they finally did get the go-ahead to move the trains out. A set-and-release test, not a class one airbrake test, was used. A class one air brake test is to be used if cars are off air for more than four hours. Complainant was dismissed for 30 days and had his license revoked for 30 days. After investigation, a hearing was conducted by Joseph G. Caffin, manager of yard operations for St. Paul Yard. The utility man, whose responsibility it is to cut the crossing, testified at the hearing that he may have told Complainant and the conductor that they only needed to conduct a set-and-release test, not a class one airbrake test. (CX 29; Tr. 246-247). Caffin recommended that no discipline be assessed to Complainant or to his conductor. (Tr. 108-112, 246).

Complainant explained that the airbrake violation was categorized as a "level four" violation, meaning that "if [he committed another violation at a] disciplinary level…three or a four, [or higher, he] would be terminated." This disciplinary status was to remain in effect throughout the appeals process (which would not be completed until the discipline was revoked in November 2007, well after Complainant signed the waiver agreement). (Tr. 731-732; See *infra*.)

On November 20, 2006, Complainant reported a safety issue regarding walking conditions at Ellendale station: Complainant himself, he said, had no area of footing to deboard and rolled down the ditch, and another engineer was made to walk 1 1/8 miles in the snow in 16-degree weather carrying his luggage in order to relieve a train. Both issues, he said, were eventually addressed. (RX 96; CX 33; Tr. 43-45, 101-102, 578-79). Hardisty testified that he forwarded Complainant's report to Director of Road Operations Steven Foresman for him to get involved and to tell the dispatch center not to follow that practice. (Tr. 578).

On November 23, 2006, Complainant filed a complaint with Respondent's hot line complaining that he was told of comments made by Master of Operating Procedures Hadley and Tennessen to other employees that "there is a local chairman for St. Paul that is telling fellow employees to slow down and not to go past St. James, referring to Complainant. (CX 34). Complainant was disturbed by these comments, as he thought that the comments referred to him and such behavior could lead to dismissal and suit for unauthorized work slowdowns. (CX 34).

Return after Airbrake Suspension

After returning to service, Complainant reported in a January 14, 2007 e-mail to Larry Brennan, who was in charge of engineer licensing in Omaha, that MOP Brian Hadley was not field testing and performing certification rides correctly. He reported that Hadley's certification and check rides had been short; that he had experienced such a check ride personally, and had also received complaints from other employees to the same effect. In the course of this e-mail, he commented multiple times that he felt his recent suspension and license revocation over the airbrake test was unjust. (RX 106). Complainant had also sent a copy of this e-mail to Dennis Duffy, who forwarded it to Randy Blackburn, Larry Breeden, and Jim Bell asking them to investigate the complaint about Hadley. Blackburn, in turn, forwarded the e-mail to Earl Fields, Breeden, Hardisty, and Mitzy Graybeal. Hardisty responded that he had not seen that e-mail yet and that he would work with "Sandy" to make sure this complaint was answered. Hardisty ultimately sent a letter to Complainant on February 5, 2007 telling him that an internal investigation had been conducted and that the allegations against Hadley had been found to be unsubstantiated. (RX 105, 106, 107; Tr. 579-583.)

In February of 2007, Complainant alleges, he was restricted from laying off for Union business, which means, essentially, that he was denied the right typically afforded to Union officers to take an unpaid day off of work for Respondent in order to see to Union business. (CX 40; RX 130). Little evidence was adduced on the subject of this restriction.

On May 10 and June 12, 2007, Complainant also made hotline calls about safety issues on the job. (RX 118; Tr. 583-584). In the May 10 call, Complainant reported noticing an open, and almost emptied, bottle of peppermint liquor in the door handle of the driver's compartment of a crew transport limo. Caffin responded to this complaint later that day, saying that he had contacted the local manager of the transport company, who assured him that the driver would be banned as soon as he was identified. (RX 118). The June 12 call reported excessive brush on a particular track flying into the engine windows and brushing against conductors. In a separate matter, he suggested that Respondent purchase reflectors to place at cars left standing in dark areas so that they can be more easily seen by trains shoving back to a joint. Manager of Mechanical Maintenance Paul F. Ganzar responded to these concerns on June 13, stating that the brush had been cut by the end of the day following Complainant's report, and that his recommendation regarding reflectors "would require review and consideration by the superintendent." (RX 118).

EEO Complaint, Removal from Service, and Waiver Agreement

Deana Symons was hired as a student conductor for Respondent in March of 2007. (Tr. 324). Over the course of the next three or four months, she heard from various engineers and fellow student conductors that Complainant had been speaking to them about her and commenting that she had been having sexual relations with multiple co-workers. Symons did not go to management with these rumors, but they angered her. (Tr. 325-329).

In late June of 2007, Symons was having a post-shift meal with Mike Thomas, an engineer. Symons testified that as she ate dinner with Thomas, he asked her how things were

going, and she complained that she had heard that Complainant was spreading rumors about her. Thomas then told her that he had heard the same thing, and that he actually had some text messages on his phone to the same effect. Symons and Thomas both testified that Symons then "demanded" to see the phone, and Symons said that she grabbed it off of the table and found the messages he was referring to. (Tr. 329-331). The exact text of the messages is not in the record. Symons and Thomas each testified that the exchange began with Complainant asking Thomas "Who's doing the student Dana, I will send them some free holy rollie sex powder," (apparently a reference to an inside joke, see RX 21:96-97), to which he responded that he did not know. They testified that Complainant then said, "I watched a good movie last night, Fatal Attraction," which, given the subject matter of the movie, Thomas took to be a reference to Complainant's belief that Thomas was having an extramarital affair with Symons. Thomas did not respond to this message, and Complainant sent him another message saying "What's wrong, why aren't you texting me back. Everyone at Valley Park says you two are a hot item," to which he also did not respond. (Tr. 330, 392-393). Complainant testified to more or less the same messages being exchanged at that time, except that he claimed that Thomas actually responded to the first message by saying he did not know, and asking whether Complainant thought Symons was a lesbian. (Tr. 144-145). These text messages were sent from Complainant's private cell phone to Thomas' private cell phone, and were sent while Complainant was off duty, although he admitted that he was on company property at the time, as he was sitting in his car in the company parking lot before his shift began. (Tr. 147-148).

At 6:26 p.m. on July 5, 2007, again while off-duty, Complainant started another text message conversation from his personal cell phone to that of Thomas, unaware that at the time these texts were being sent Thomas was with Symons. The exchange went as follows:

> [Complainant]: Their were 2 guys sitting in their car @ VP 1 nite & they saw a women put something in da back of your pick up. When she left they checked out da gift in da pretty little bag. You lucky guy
> [Mr. Thomas]: Who was in my truck
> [Complainant]: It wasn't me I cab in with u
> [Mr. Thomas]: Ok but who was in my truck
> [Mr. Thomas, 9 minutes later]: So u can't answer me?
> [Complainant]: 2 borrow outs seen this women put it I da back of your ride. They were waiting for their buddy 2 show up 2 go drinking They were sitting behind your ride when da gift was left for u. did u loose your work gloves
> [Mr. Thomas]: No why? Who was in my truck tho? As friends I think u should tell me.
> [Complainant]: This mystery women walked right in front of them they didn't go in your truck
> [Mr. Thomas]: I was wondering cause I had a few things taken from my truck when it wasn't locked there
> [Complainant]: Not 2 bright
> [Complainant]: I don't know about things being taken from your truck but u and mystery women aren't very smart
> [Mr. Thomas]: Not me. Someones not for getting in my truck possibly? Ill have to look n see who was @ vp that nite I left it open
> [Mr. Thomas]: U said they got in the back

(RX 3; CX 57). [*Sic* throughout]. At this point, Thomas testified, Symons asked why his phone was going off so much, and he told her, then she demanded Complainant's phone number because she wanted to put an end to this. (Tr. 396-397). Afterwards, Thomas sent another text message to Complainant.

[Mr. Thomas]: I just let mystery women know and shes pissed
[Complainant]: Mike u aren't fooling anyone. I just hope you don't put ryan through what u put me through.. we still remember da sx117 thing[2]
[Complainant]: Why would she be pissed she shouldn't be leaving married men gifts

(RX 3; CX 57). [*Sic* throughout]. At the same time that Complainant sent Thomas that last text message, Ms. Symons began an exchange with him, as follows:

[Ms. Symons]: Mike I know you think this whole thing is funny but this is harassment in its most simplest form. What I do on my free time as an adult is my own business and texting Mike in your own words (which have ALL been saved) asking who is the engineer doing Dana I want to send them some sex powder is outright slander. The numerous jabs and comments since then are way out of line. I feel this matter needs to be addressed via management you have pushed me to far
[Complainant]: Cool
[Complainant]: Who ever ut r Have it
[Ms. Symons]: Who ever u r? This is Deana Symons if that is what u were trying to type
[Complainant]: Who r u & who gave u my number & why r u threatening me

[*Sic* throughout]. Feeling "egged on" by Complainant's responses to her text messages, Symons decided to contact Foresman about the situation. Finding that Foresman was on vacation, she called Schwendeman instead. Schwendeman told her that he was going to talk to Hardisty. (Tr. 334-335, 417). Schwendeman called Hardisty and said that an employee, Symons, had an alleged EEO violation against Complainant, to which Hardisty instructed Schwendeman to have Symons call the EEO hotline and report the violation. (Tr. 597-598). Schwendeman called Symons back the next day and said that he had spoken with Hardisty and that she needed to call the EEO and file a complaint (either with the hotline or with Melissa Schop, the EEO directory. Schwendeman could not remember at the hearing which he had said). (Tr. 334-335, 417). On July 7, 2007, Symons called the EEO hotline and reported the incident. The hotline description reads as follows:

"[I]n 6/2007, date unknown, [Complainant] sent a cell phone text message to Mike THOMAS, Engineer. The message stated, 'who is the Engineer that is doing the student Dana. I want to send them some hollie rollie sex powder'. [Complainant] was referring to SYMONS. THOMAS sent a copy of the message to SYMONS. THOMAS and SYMONS are friends. SYMONS feels that the comment constitutes sexual harassment. She would like to see the matter addressed."

(RX 41). When EEO Director Schop received the hotline report, she contacted Schwendeman, as he was listed as the person to notify when she received a possible EEO complaint. He confirmed that Symons had come to him and reported the violation, that he had already called Hardisty about it, and that Foresman was already beginning to gather facts. (Tr. 642). Shortly thereafter, she spoke with Foresman, who said that he had spoken to Symons and to Thomas, that he had seen the text message, and that the text message accorded with what Symons had reported in the hotline report. (Tr. 645). Schop therefore instructed Foresman that they needed to charge Complainant with an EEO policy violation. (Tr. 645). Schop testified that

[2] Complainant explained at the hearing that this was a reference to an affair he believed Thomas had had before, during which time Thomas had allegedly inconvenienced Complainant by switching his work schedule around in order to work with the woman with whom he was having the affair. (RX 21; Tr. 144-146). Thomas denied ever having had an affair in the first place. (Tr. 409).

this process was in compliance with the procedures outlined in the EEO training manual, which provide that "[l]ocal managers and supervisors will work closely with the EEO department in investigating possible violations of the EEO policy directives." Schop said that it is "absolutely" her practice to rely upon managers in the field to help with such investigations, because she is responsible for such a large territory that she needs help gathering facts and interviewing witnesses. (Tr. 645). EEO violations, she said, are always charged at a level 5, permanent dismissal,[3] but that the EEO department has discretion to offer "some sort of lesser discipline." She emphasized that a local service unit superintendent could not offer something less than a level 5 without consulting with the EEO department, and that Hardisty has always followed her recommendation with regards to EEO matters. (Tr. 649).

On July 9, Foresman called Complainant and told him that he was removed from service pending an investigation on an EEOC violation. (Tr. 136). Complainant received a letter dated July 13, 2007, notifying him of a formal investigation in connection with this incident, to be held on July 19, 2007. This letter informed him that he was being withheld from service pending the results of this investigation, and reminded him that his current disciplinary status was a level 3, while this alleged violation was charged as a level 5. (RX 4).

On July 11, 2007, while Complainant was off duty, he attempted to enter company property in order to represent a Union member, an engineer by the last name of Kennedy, at a disciplinary hearing. Hardisty, however, barred him from entering company property. A Mr. Terry Stone e-mailed Hardisty asking whether there was a good reason not to allow Complainant to represent Kennedy. Hardisty responded the next day that Kennedy was charged with a Level 5, and that Complainant was out on a Level 5, but did not go into further detail. Five days later, on July 16, Katherine Novak, a labor relations attorney with Respondent, e-mailed Hardisty, Stone, and a Mr. Guidry, saying that Kennedy had a right to a fair and impartial investigation with his choice of representation. Novak advised the e-mail's recipients that "the best course of action is to allow [Complainant] to represent Kennedy, but to hold the investigation off property," which is the course of action that was eventually followed. (Tr. 730-733; CX 149, 150).

On July 16, Thomas received a phone call from Foresman asking how Symons was doing, and he said he did not know, but would call her to check on her. Foresman asked to be told what Thomas found out. (Tr. 397). Thomas then called Symons, who said that she was feeling okay but was upset, and she asked about "how investigations go" (presumably because she wanted to be ready for the then-upcoming investigation in her claim against Complainant). He responded that investigations were "not fun" and that he did not know much about them, but asked to come over to her house and talk to her, to which she consented. (Tr. 397). Once he got to her house, they began to speak about the investigation again, but he stopped and said that he needed to call Foresman to say where he was. While Thomas was on the phone with Foresman, he looked out the window of Symons' home and saw a red Volkswagen Beetle being driven by a person who was holding up a camera, which blocked the driver's face. When the camera was moved, Thomas realized that the driver was Complainant, said "Holy shit" and told Foresman he had to go, then hung up. (Tr. 398). At the time, Symons' three years old daughter, Grace, was at home with her. Symons testified that, frightened, unsure of how Complainant got her address,

[3] Schop testified that level 5 means total dismissal and EEO violations are always charged at a level five. (Tr. 648)

and feeling threatened, she called the EEO hotline again, then called the police (Thomas testified that she called Foresman, but not the hotline; however, the hotline report has a record of the call from that day). (RX 41, Tr. 342-344, 398). When Thomas left the house, he called Foresman to let him know he was leaving and to tell him what had happened. He then called the local BLET chairman, Ryan Behne, to tell him what had happened. Behne said that he could not talk to Thomas any further because Behne was going to have to represent Complainant at the investigation. (Tr. 398-399). Complainant testified that he had indeed gone to Symons' house to take pictures, but said he did not pull into her driveway. Symons reported at the time to the EEO hotline that he did, and testified at the hearing that he did. Thomas likewise testified that he saw Complainant's car come down the street and "wheel into her drive." (RX 41; Tr. 212, 398).

The next morning, July 17, around 7:00 or 7:30 a.m., Thomas testified that he received a phone call from Complainant "pleading" for him to drop the charges, saying that he would do anything, that he would tell people it was all his fault, that he was taking multiple medications and didn't know what to do, and that he was desperate. (Tr. 400). Thomas answered that he had no involvement in the case and that it was Symons who had filed the charges. Complainant then asked if Thomas would help him by meeting with Symons and convincing her to drop the charges, but Thomas said "I think you blew that option by going to her home." (Tr. 400-401). Thomas said that during this phone call, he also demanded to know who had broken into his truck, which Complainant then said he would tell him if Thomas agreed to help him in the situation with Symons. Thomas refused to do anything for him unless he said who had broken into his truck, and so Complainant told him. (Tr. 401).

Also on July 17 (the testimony at the hearing said July 18, but Bruce MacArthur's e-mail at RX 121 is a more contemporary recollection and says July 17, which also fits better with the logical flow of events), Hardisty and Bruce MacArthur, General Chairman, BLET, were both in St. Paul attending a meeting for all of the local chairmen who represent employees on the Twin Cities Service Unit. MacArthur approached Hardisty during a free time and asked him whether there was something that could be done to get Complainant, a longstanding employee, back to work. Hardisty testified that he told MacArthur that he would have to check with the EEO department to determine what could be done, but said nothing about whether or when Complainant could return to work. (RX 121; Tr. 598-599). MacArthur testified that Hardisty simply agreed to reinstate Complainant, brought Foresman over, and directed him to put Complainant back to work and have the local chairman, Behne, talk to him. (Tr. 50-51). MacArthur specifically testified that he did not recall any statement that the EEO department's approval would be necessary.[4] (Tr. 69). A more recent record of the meeting is available in the form of an e-mail MacArthur sent Complainant at Complainant's request in April of 2008. In this e-mail, MacArthur said that the meeting took place July 17, that Hardisty had been "cordial and easily agreeable to return [Complainant] to service" (which he confirmed at the hearing, Tr. 69-70), but that Hardisty had also wanted to ensure that Complainant would apologize to Symons, would not contact her otherwise, would not retaliate, and would never again drive by

[4] This testimony is not entirely clear. Respondent's attorney asked, "Was Mr. Mercier present for the negotiations?" MacArthur said, "No, he was not." Respondent's attorney then asked, "Do you recall Mr. Mercier [sic] saying that would have to get approval from the EEO department?", to which MacArthur said, "No." (Tr. 69). It is not clear what MacArthur understood the question to mean, given that Respondent's attorney (ostensibly mistakenly) said Complainant's name instead of Hardisty's.

her residence. (RX 121). In addition, MacArthur mentioned in these e-mails that Hardisty had called Foresman over to join the meeting, "quickly brought him into the loop," and "told him to make arrangements to return [Complainant] to service" via a meeting to be set up between Foresman, Complainant, and Behne. (RX 121).

EEO Director Schop testified that she received a phone call from Hardisty, who said that he had spoken with the general chairman, that Complainant had an important position in the union, and that Hardisty wanted to do the general chairman a favor by getting Complainant back to work. (Tr. 649). Schop said that she responded that she would check with her supervisor, but that any return to work would have to be conditional upon a standard leniency agreement, including some sort of training, a suspension period, and a probationary period. (Tr. 650).

On July 18, 2007, a Wednesday, Complainant received a certified letter stating that the formal investigation originally scheduled for July 19 had been postponed until August 2 at the request of Local Chairman R. L. Behne. This letter noted that "Any discussions regarding this investigation or the option of waiver, or any request for postponement from your representative or the employee, must be made personally to S. L. Foresman." (RX 5). Symons received no such letter, and, still believing the hearing was scheduled for the next day, called Foresman to ask which room it would be in. Foresman informed her that there would be no investigation because Complainant had made a deal and signed a waiver. Symons was upset and asked how a deal could have been made without her participation and without all of the information having come out, to which Foresman responded that such was Complainant's right under the union agreement. Symons expressed her displeasure with what she saw as Respondent's willingness to go out of its way for Complainant at the cost of her own rights: "I was very upset. I felt that I was just basically cut out of it so they could make whatever deal they made without even hearing my side." (Tr. 345).

Complainant testified that MacArthur told him two days later, Friday, July 20, that there would be a waiver agreement (the agreement is referred to in the record at different times as a waiver agreement and a leniency agreement), and that its terms would include that Complainant would not be compensated for the time he had been off work, and that Respondent would put him back to work at the beginning of the following week. (Tr. 137-138). He said that he attempted to call Foresman several times on Monday and Tuesday, but it was not until the following Friday, July 27, that he was allowed to come back in and sign the waiver agreement. (Tr. 138).

The waiver agreement which Complainant found waiting for him to sign on July 27, would allow him to return to work after a 30-day suspension (ending August 8) on several conditions, including waiving an investigation hearing, taking an EEO class, refraining from discussing the complaint with others at work, and not retaliating against those who filed the complaint. (RX 4; RX 6). However, some of these terms were markedly different than those MacArthur had anticipated and described to Complainant. (Tr. 138). In particular, Complainant said he had not expected the 30-day suspension or the requirement that he take an EEO class in Omaha at his own expense (with Respondent paying the tuition but no travel or lodging fees). (Tr. 139). Schop testified that the terms of the waiver agreement in this case were standard for an EEO violation, including the admission of responsibility, the 30-day suspension, the EEO

class, the responsibility to pay travel and lodging for that class, and the 18-month probationary period. Indeed, Schop said that the waiver agreement in this case was actually a template used in the EEO department which she sends to the service unit "when [they] request help in drafting it." (Tr. 650-651). Upon seeing the unexpected terms of the waiver agreement, Complainant left and called MacArthur, who said that they could do nothing about it if Respondent reneged on the agreement that had been made. (Tr. 140). Complainant then went home and, over the next two or three days, spoke to his wife and to Behne, who told him that he would be better off taking a 30-day suspension because he had, at that time, only two and a half years of work left, and because not signing the waiver would put him at risk of a dismissal which could itself last two or three years. (Tr. 141). Complainant therefore went back and signed the waiver agreement; however, because Thomas had not been considered as violating the EEOC in this case and because Complainant had not been given an opportunity to give a statement, Complainant continued to believe that Respondent was "out to get" him and was using this incident as an excuse to fire him. (Tr. 140-141).

Return to Work and EEO Training

Symons heard around the end of July that Complainant was going to come back to work on August 10 (he was actually to come back on August 8), and called the EEO hotline again to update them and say that Complainant was coming back to work, that she did not feel safe working with him, and that there was "every possibility" that they would end up working together at some point because they were part of the same service unit. (Tr. 346). Symons was therefore distressed to see Complainant back at work on August 8 waiting with an apology letter for her. (Tr. 347). She accepted the letter, opened it, and read it, but was "offended" by the brief letter, because, as she put it, "it wasn't an apology," but was rather a statement that Complainant was sorry Thomas had shown Symons his text messages and was sorry if Thomas' actions had offended her. (Tr. 347-348). She said that the letter also said "I'm sorry that you and Mike Thomas took what I said incorrectly." (Tr. 348; RX 41).

On September 14 and 23, 2007, Complainant made safety hotline calls. First, he reported "very bad" footing and weed maintenance at a location where cars were sometimes stored, and recommended that that a switch be taken out of service and locked so that nobody would get hurt. Respondent responded on September 18, "The switch in question has been removed from service." (RX 118). Second, Complainant reported an issue with a crew alerter on September 23, saying, "I've been reporting the engine UP3256 for two weeks now," and that whenever he transmits on the radio in that engine or pushes the button to talk, the crew alert buzzer goes off, and the speedometer begins to bounce back and forth within 10 miles of the actual speed. Two days later, MTO John C. York responded that the engine would be inspected and, if needed, repaired. Subsequently, he updated the response to say that the UP3256 had been removed from service and forwarded to a repair shop because the problems were intermittent. (RX 118).

On September 18, 2007, Complainant posted on the BLET (union) blog, to which Division members including Mike Thomas would have had access, about an unrelated experience being the victim of identity theft. In this blog post, he lamented how soon the identity theft had come after he had "lost $10,000 in earnings because of a so-called friend," referring, ostensibly, to Thomas. (RX 8).

On September 27, 2007, Complainant attended an EEO class in Omaha, Nebraska run by Director of Diversity Yvonne Method-Walker and designed for people who had violated Respondent's EEO policy. (Tr. 222, 657). Complainant testified that, while at the class, he did mention his belief that Thomas should have been held responsible as well. (Tr. 223). He testified that some of the people who were at the class were there for "bizarre" or "silly" reasons, such as a maintenance man who was at the class because, after being called up to throw hard crossovers for two female employees, he had said, "Well, you can't send a woman to do a man's work." (*Id.*). As part of this class, Complainant wrote down the things he had learned during the class. (RX 18). He mentioned that he had learned the history of Title VII, the importance of reporting and educating others, the difference between harassment and discrimination, the EEO policy, professionalism, and the importance of not "personalizing." (RX 18; RX 21:136). On this list, he also mentioned that he still did not understand the rights of the accused, even though this had been one of this goals going into the class. (RX 18). He also said that he felt he was not given a chance to produce the text message Thomas had allegedly sent him asking whether Symons was a lesbian, that his complaint of slander against Thomas was never dealt with, and that he was removed from service without explanation and was treated with disrespect. (RX 18).

Method-Walker e-mailed Foresman on October 1, 2007, saying, "I thought that I would offer you some feedback and observations on Mike Mercier's participation" in the class. She described Complainant as "quite willing to contribute" and said that he "took responsibility for his EEO infraction." However, the focus of her e-mail was her trepidation over Complainant's continued preoccupation with his perceived ill-treatment at Respondent's hands throughout the complaint process. She said that he "spent a preponderant amount of time focusing on what happened to him/or didn't happen to him as the accused," and that he was "very bitter" at the fact that nobody interviewed him to get his side of the story. [*Sic*]. She pointed out that 2/3 of Complainant's written summary had to do with the rights he felt he had been denied, which she found to be "quite disconcerting." She said that Complainant had requested to meet with her one-on-one after the class, and that this meeting had consisted of "that same diatribe," leading her to believe that he had not truly let go or moved on. She recommended that Complainant be "*strongly* counseled to avoid actions…that put him at risk for claims of retaliation," such as visiting Ms. Symons' home, interfering with Thomas' union position, and threatening to "expose" the relationship (if any) between the two. (Emphasis in original). She said that he would have to stop blaming Thomas for his part in the incident and "sitting in moral judgment of others." (RX 55).

Upon returning from the EEO class, on October 7, 2007, Complainant met with Foresman. (Tr. 139-140, 150-153; RX 56). At this meeting, they discussed the class, and Complainant was given a document that listed steps to follow, including being more vigilant about his own actions, and educating co-workers on the EEOC and on how to be more responsible for what they say and do to other people. (Tr. 139-140). He said that this list was something he had to copy down by hand in front of Foresman, and consisted of "five reasons you could be in trouble for the EEOC," which he had to recognize and educate others about. (Tr. 155). The way he was to educate others, as he understood it, was to explain to others that he had been in trouble for an EEO violation, that they had to be careful what they say and do around co-workers, whether on or off the company property, and that the company was serious about this policy. (Tr. 156). He also said that it was made clear to him that he would be dismissed if he

discussed it. (Tr. 140). During this conversation, Foresman also discussed the system of reporting engine defects with Complainant: typically, when tying up, an engineer inputs the results of the daily engine inspection into a computer, including whether there are any defects in the engine, and then prints a copy of the report to keep for his own records. Foresman told Complainant, however, to report this sort of information orally to Foresman in the future rather than making these electronic reports. (Tr. 151-152). Complainant testified that Foresman assured him that the defects would be taken care of, but that he refused to stop making the electronic reports because engineers can get in trouble for not reporting a defect if a defect is not fixed and later causes trouble, and there is no record that the engineer responsible ever reported it. (Tr. 151-153). Complainant testified that the FRA has access to the electronic records when the reports are made electronically. (Tr. 152). Complainant said that they also discussed a new safety program which had not yet been adopted by the division and which the division never did adopt, called "Total Safety Culture," a program which Complainant did not support. (Tr. 154-155). Finally, Complainant was asked to answer a few questions to demonstrate what he had learned. He answered that he had learned professionalism, what protected classes are, and respect; that one thing he would do to demonstrate a daily commitment to EEO policies would be to "teach others to respect everybody,"; that one way to make positive contributions to his work environment would be to "be professional"; and that a way to "ensure that [his] on-the-job behavior is consistent with compliance requirements of UP's EEO Policy Guidelines" was "isolate myself." (RX 17).

Foresman e-mailed Method-Walker later that day and described the contents of his conversation with Complainant, then indicated that "There is still animosity towards Mr. Thomas and Ms. Symons," and that he shared the concerns she had articulated in her October 1 e-mail. (RX 56). He also told her that Complainant had not completed the required paperwork before the meeting, and that he had watched him do so on the spot instead. (RX 56). Method-Walker responded the following day, asking "Where do you think his head is right now and has he 'gotten on board'?" (RX 56). Foresman responded that Complainant claimed to be fully aware of the consequences of retaliation, and that Complainant had said he would not talk to anyone about the incident; however, he said, "Personally, I don't think he will remain quiet." (RX 56).

Schop testified that Method-Walker also spoke with her about her concerns, but it is not clear what the date was. Schop said that Method-Walker told her that she was concerned that Complainant had not taken responsibility during the class, continued to blame Thomas for turning him in, and blamed Respondent for not speaking with him personally before charging him with the EEO violation. (Tr. 659). Schop said that she, too, had concerns about Complainant's ability to refrain from retaliatory behavior. (Tr. 661). She said that Method-Walker had shown her RX 17, and that they had discussed Complainant's statement that one way to ensure compliance with EEO standards while on the job was to "isolate [him]self," leading Schop to conclude that Complainant "really didn't get where the problem lied [sic]," and that he erroneously believed he could not "engage with employees without violating EEO policy." (Tr. 661-662). She testified that RX 18 raised similar concerns for her when she saw it, because "it didn't seem to take responsibility, and seems to be blaming others in the UP and created himself as a victim." (Tr. 663) [*sic*].

There is a good deal of conflict in the record about the details of what happened on October 8 and on October 16, 2007 with regard to communications between Complainant, Ms. Symons, and Matthew Vossen, but the general story is consistent: on October 8, 2007, Complainant was riding with a new employee, Vossen, and said something about the fact that he had just returned from suspension, and, either at Vossen's prompting or not, explained that the suspension had been the result of an EEO violation. Eight days later, Vossen rode with Symons and another employee named Richard Scholz, Complainant's name came up as someone Vossen had recently ridden with, and Symons began speaking about the EEO claim in detail. (CX 53, 54; Tr. 118-126; Tr. 126-135; Tr. 351-353, Tr. 671-673; RX 21.). Complainant gave no detailed testimony at all about these incidents, but Vossen, Scholz, and Symons all did.

Vossen's November 7, 2007 statement indicates that he had prompted Complainant to say the reason he had been suspended. He also testified that Complainant advised him only "to be careful of what you say and how you treat other people." (CX 53). At the hearing, Vossen could not recall whether Complainant mentioned Symons' name. (Tr. 121-126). Scholz's account of Vossen's contribution to the October 16 conversation is consistent with this statement. According to Scholz, Vossen said only "that he had worked with [Complainant] at some point in the last few days," and that Complainant had just returned to work after "being on the discipline system." (CX 54). However, Symons' version is radically different. She said that she and Scholz got into a conversation about her complaint against Complainant, then she turned to fill the newly-hired Vossen in on the background of the conversation, saying, "You don't really know what we're talking about":

> "And that's when Matt Vossen had said, well, actually I do, that he had just ridden with Mike Mercier a day or so prior and Mercier had talked about both Mike Thomas and myself to him stating that we had lied and that I had gotten him fired and that because of that he had to go to charm school in Omaha, which I'm sure he's referring to as EEO. And he was telling Matt Vossen, you know, you need to make sure and be careful who you trust because you'll get stabbed in the back."

(Tr. 352). Whichever of these stories is true, Symons' is the one that Schop heard several days later on October 24, and she testified that Vossen confirmed Symons' version of events in a telephone conversation with Schop shortly thereafter. (See *infra*; RX 44; Tr. 673).

On October 16, the same day that Vossen rode with Symons, Complainant went to a supervisor, Schwendeman, to get the phone number of someone who could be of assistance to a colleague defending an EEO complaint, and in the course of the conversation, told Schwendeman that Thomas was still speaking about Symons' complaint against Complainant, and that Mr. Thomas had gone so far as to show Complainant Symons' red panties. Schwenden reported about the incident in an email to Schop dated December 4, 2007. The email states that Complainant came into his office asking for Lori Scharff's phone number. The e-mail continued

> I asked him how everything else was going and it seemed as if he was just waiting for that question. Mr. Mercier started in about how he was not talking about Deena Symmons or Mike Thomas but in fact they were talking about him. I told

> Mr. Mercier that he just needed to "let it go" and drop it. At some point in our conversation I mentioned how it would be nice if we could all become friends again as we were 4-5 years ago. Mr. Mercier would not get off the subject of Mike Thomas. He then said, "If he's (Mike Thomas) not supposed to talk about it ask him why he showed me her (Deena Symmons) panties." At that statement I was taken back a bit. I said what!?" (Mr. Mercier) "Oh yeah, they were talking about this f… big (holding his hands about 18-22 inches apart) and red." I then told him I didn't want to hear it and for him to, again, "stop talking about it." (Mr. Mercier) "Yeah, you ask him about that!"

(RX 122; Tr. 156, 157, 414, 664). After this meeting, Schwendeman called Thomas, who denied ever having done such a thing (as he also did at the hearing, Tr. 405), and then contacted Hardisty, who advised him to contact Schop, which he did. (Tr. 421-22). Schop believed that this incident constituted retaliation, but she did not file charges against Complainant immediately because she felt that she did not have "enough…to demonstrate that he had violated his [leniency agreement.]" (Tr. 666-7).

Beginning on October 24, 2007, Schop received "a series of phone calls and e-mails" from Symons, apparently prompted by the incident with Matt Vossen, reporting that Symons had been experiencing "many instances of retaliation." Schop advised her that the EEO department needed her help in documenting any action they would take, to which Symons responded with a list of detailed descriptions of alleged incidents of retaliation, all but two of which (the Matt Vossen and "panties" incidents) occurred *before* the waiver agreement was signed. (RX 43; RX 44). Schop proceeded to contact Vossen and Thomas to get further information about the instances of retaliation Symons had alleged in her e-mail. (Tr. 672-675). After getting this information, which, Schop testified, corroborated Symons' account, Schop called labor relations, discussed what she knew, and said that she wanted to terminate Complainant. She then called Hardisty and told him the same thing, on October 29 or 30. (Tr. 675-6). Neither Schop nor Hardisty testified as to Hardisty's response during this phone call, but Schop testified that she believed she did not speak with him until after the decision had been made, and that the EEO Department is solely responsible for deciding what level of discipline to assess against an employee for an EEO violation. (Tr. 599-600, 681-2, 716-17). Hardisty similarly testified that he did not investigate the alleged violation, because it was not his place as superintendent to do so, but that he had the EEO department investigate it, and that he "had Foresman remove Mercier from service" on October 31. (Tr. 600).

On November 5, 2007, Complainant was dismissed, with the reason given being that he had violated the terms of this waiver agreement by "creat[ing] a hostile work environment for Deana Symons by making inappropriate statements concerning her and…act[ing] in an intimidating and retaliatory manner towards both her and Mike Thomas." (RX 11).

Post-Dismissal Events[5]

After he was dismissed, Complainant moved temporarily to Chicago, living away from his life and family in his deceased parents' townhome, and worked various railroad jobs for a few years. (CX 59; Tr. 164-166). In December 2009, the parties engaged in arbitration, in which Respondent was represented by Novak, and which resulted in Complainant receiving a February 18, 2010 letter telling him to contact his supervisor to return to work. (Tr. 164, 230-232; RX 16). He did so, underwent a physical from engineering licensing and a return-to-work physical, and, after an unexplained delay during which Complainant contacted MacArthur repeatedly to ask why he had yet to be contacted to return to work, he returned to work on April 1, 2010. (Tr. 269-272).

GOVERNING LAW

The FRSA prohibits railroad employers from disciplining or otherwise discriminating against employees who engage in certain enumerated protected activities. As stated at 49 U.S.C. §20101, the FRSA was enacted for the purpose of promoting safety in every area of railroad operations and reducing railroad-related accidents and incidents.

The FRSA provides in pertinent part:

> **(a) In General.—** A **railroad carrier** engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, **or an officer or employee of such a railroad carrier**, may not **discharge**, demote, **suspend**, **reprimand**, 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 done, or perceived by the employer to have been done or about to be done—
>
> > **(1)** to **provide information**, directly cause information to be provided, or otherwise directly assist in 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 gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
> >
> > > **(A)** a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95–452); […]
>
> **(b) Hazardous Safety or Security Conditions.—**
>
> > **(1)** A **railroad carrier** engaged in interstate or foreign commerce, **or an officer or employee of such a railroad carrier**, shall not **discharge**, demote, **suspend**, **reprimand**, or in any other way **discriminate against** an employee for—
> >
> > > **(A)** reporting, in good faith, a hazardous safety or security condition;
> > >
> > > **(B)** refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; […]
> >
> > **(2)** A refusal is protected under paragraph (1)(B) and (C) if—
> >
> > > **(A)** the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
> > >
> > > **(B)** a reasonable individual in the circumstances then confronting the employee would conclude that—

[5] Fact-finding is excluded regarding the copious documentation of damages Complainant submitted, including checks, receipts, and testimony by himself and his family (CX 59; Tr. 161-209, 286-322). As Complainant's claim, is denied, the issue of damages is irrelevant. (See *infra*.)

> **(i)** the hazardous condition presents an imminent danger of death or serious injury; and
> **(ii)** the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
> **(C)** the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(Emphases added).

49 U.S.C. § 20109 (2008)

Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) his employer knew that he engaged in the protected activity; (4) he suffered an unfavorable personnel action; and (5) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR- 11, slip opinion at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR 21, and thus FRSA, means to "prove by a preponderance of the evidence." *See* Peck v. Safe Air Int'I, Inc., ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121 (b)(2)(B)(iii)(iv).

STIPULATIONS & ISSUES PRESENTED

OSHA found that Complainant is an "employee" and Respondent is a "railroad carrier" within the meaning of 49 U.S.C. § 20102 and §20109. Respondent did not object to these findings, and no evidence to the contrary was introduced at the hearing. Thus, it is deemed to be established by stipulation. As a railroad carrier, Respondent is responsible for compliance with the employee protection provisions of FRSA. As an employee of Respondent, Complainant enjoys the protections of FRSA.

At issue here is whether Complainant met his burden of showing that his safety-related reports over the course of his employment, which constituted protected activity under the FRSA, contributed to the adverse employment actions he suffered.

DISCUSSION & CONCLUSIONS OF LAW

Protected Activity

Complainant's actions during three separate periods of time are considered to determine whether he engaged in "protected activity" under the FRSA: the period before he was suspended for the airbrakes incident; the period after the airbrakes suspension and before the initial EEO complaint; and finally the brief period between his EEO suspension and his October 2007 termination.

Protected Activities before Suspension for Airbrakes Incident: April through November, 2006

The evidence readily establishes that Complainant engaged in protected activity before being suspended for the airbrakes incident. Complainant engaged in protected activity on many occasions between 2006 and 2007. He reported a complaint regarding Hadley's track warrant instructions to "management" and then to Hardisty; he made complaints in July 2006 about yard masters throwing switches; he reported a crew alerter defect on July 31, 2006 to management and to the safety hotline; and he complained about a crew transport driver's unsafe behavior in July 2006. In addition, Complainant's participation in the September 2006 investigation of Virgil Marlin by Respondent constitutes protected activity under this section because, as part of his representation of Marlin, Complainant alerted Respondent to the unsafe conditions in which Marlin had been working, which ultimately absolved Marlin of culpability for the injury he suffered while on the job. In other words, his representation included a report of a hazardous condition. Next, Complainant passed complaints about Hadley's track warrants and unsafe engine operation along to Hardisty again in September 2006. He reported more crew transportation concerns in October 2006 which Hardisty responded to in January 2007; and he complained to Hardisty about the absence of pilots for new engineers in fall 2006. His statement to Tennessen that he was going to report him for interrogating employees past the end of their hours of service is also protected activity as under the FRSA, the employee need not actually show that he engaged in the protected activity as long as the employer believes the employee is going to do so. Section 20109(a) provides that "the employee's lawful, good faith act done, *or perceived by the employer to have been done or about to be done*" [emphasis added] for protected purposes, is protected. (See Appendix A). Finally, Complainant engaged in protected activity by reporting hazardous walking conditions at Ellendale on November 20, 2006. All of these reports (or threatened reports) are instances of protected activity under § 20109(b)(1)(A).

The second applicable section of the FRSA in this time period is § 20109(a)(1)(A), which protects providing information to a Federal, state, or local regulatory law enforcement agency regarding conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation regarding railroad safety. This section protects Complainant's communication with the FRA in March and April 2006 regarding Complainant's concerns about Mr. Hadley's track warrant instructions.

The final sections of the FRSA applicable to Complainant's pre-airbrake-suspension activity are §§ 20109(b)(1)(B) and 20109(b)(2), which protect a refusal to work when confronted

by a hazardous safety or security condition related to the performance of one's duties, if the refusal is made in good faith, no reasonable alternative to the refusal is available, a reasonable individual would conclude that the hazardous condition presents an imminent danger of death or serious injury, the refusal is necessary to allow sufficient time to eliminate the danger, and the employee (where possible) has notified the railroad carrier of the existence of the hazardous condition and the refusal to work until it is rectified. Complainant's refusal to ride in the jeep without a seatbelt at Mankato therefore constituted protected activity under §§ 20109(b)(1)(B) and 20109(b)(2): the lack of a functional seatbelt constituted a hazardous safety condition related to the performance of Complainant's duties, to wit, his duty to go to the other train the crew was instructed to begin working on. There was no evidence of a safe alternative that involved riding in that jeep, so there was no reasonable alternative to the refusal available. A reasonable individual getting into a vehicle without a working seatbelt and knowing it was about to operate on a highway would conclude that the lack of a working seatbelt presented a danger of death or serious injury, as it is common knowledge that seatbelts reduce the risk of serious injury in the event of a car crash. It is inferable from the circumstances that the seatbelt could not be fixed on the spot, and so a refusal was necessary to allow sufficient time to eliminate the hazardous condition. Finally, Complainant satisfied the final requirement of these sections by notifying the dispatcher, Respondent's employee, that he was not getting into the jeep because it was unsafe due to the lack of seatbelt extension. (Tr. 105).

There were two actions which Complainant took in this time period which he has alleged to be protected activity: the May 2006 complaint regarding improper filling of jobs at Mankato, and the July 2006 involvement with the investigation of Jason Smith. However, neither of these has been shown to constitute protected activity. First, it is entirely unclear whether the former has anything to do with safety. Complainant did not offer any testimony about it, and Hardisty testified that the concern had to do with compliance with the agreement between Respondent and the Union. (CX 2; RX 85; Tr. 585-586). Second, Complainant's involvement with the investigation of Jason Smith was never explained, detailed, or proven. Smith's discipline record contains no mention of Complainant, and Hardisty gave no details about the investigation or Complainant's involvement, if any, therewith, in his testimony. (RX 21, 112; Tr. 533-534). Accordingly these two incidents are not included in the discussion of Complainant's protected activities.

Protected Activities after Airbrake Suspension and Before EEO Suspension: January through June, 2007

After returning from his suspension for airbrakes incident and before being removed from duty initially for the EEO complaint, Complainant engaged in § 20109(b)(1)(A) activity again by reporting complaints to Foresman and Hardisty about Hadley's certification and check rides being cursory, reporting the same complaints about Hadley to Brennan, an employee of Respondent responsible for engineer licensing, and making hotline reports regarding alcohol in a crew transport limo and excessive brush along a track in May and June of 2007.

Protected Activities between Return to Work and Final Termination: August through October, 2007

Finally, between Complainant's return to service after signing the waiver agreement and his removal from service for allegedly violating the waiver agreement, Complainant made two complaints to the safety hotline, one reporting dangerous conditions at a switch and recommending that the switch be taken out of service and locked, and one about a defective crew alerter buzzer on his engine. These constitute protected activity under § 20109(b)(1)(A), as they are examples of Complainant reporting, in good faith, a hazardous safety/security condition.

There is one other action Complainant took that appears to pertain to safety during that time period, but which, on closer inspection, is not protected activity. When Foresman instructed Complainant to make oral reports of engine defects instead of electronic, Complainant refused and continued to make the electronic reports. However, Complainant said that his reason for doing this was to have a record of his reports in order to protect against later allegations, in the event of an accident, that he had not reported an engine defect. (Tr. 151-153). This electronic reporting, then, was not related to a desire to ensure that the defects be addressed, but was rather motivated by Complainant's attention to his own disciplinary interests.

Conclusion

Complainant has clearly shown that he engaged in protected activity on the 17 occasions listed above.

Unfavorable Personnel Action

The FRSA explicitly prohibits employers from discharging, suspending, reprimanding, or discriminating against employees who engage in protected activity. 49 U.S.C. §20109. "Discriminating" is meant to be interpreted broadly, in order to protect employees from the myriad forms of retaliation that may be less formal than discharge, suspension, or reprimand, and which the drafters did not list. *Vernace v. Port Authority Trans-Hudson Corporation*, 2010-FRS-00018, aff'd on appeal, ARB 12-003; *citing Menendez v. Halliburton*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-2005 (ARB Sept. 13, 2011). "An adverse action is any action that would dissuade a reasonable employee from engaging in protected activity." *Id.*

Complainant's argument concerns whether his termination was contributed to by his protective activities. His testimony about other instances of discharge, suspension and reprimand, some contested and some uncontested, are barred by the FRSA's statute of limitations. Section 20109(d)(2)(ii) of the FRSA provides that an action thereunder "shall be commenced not later than 180 days after the date on which the alleged violation" occurs. Since Complainant's claim was filed, and his action thereby commenced, on March 27, 2008, any alleged adverse employment actions occurring before September 29, 2007 are barred by the statute of limitations.

Time-Barred Allegations

Therefore, the following alleged adverse employment actions, whether they have been proven or not, are time-barred: the reprimand and FTX for sleeping issued by Tennessen in November 2006; the suspension and license revocation following the airbrakes incident, also in November 2006; the allegations that Complainant was deliberately causing a slowdown in the trains in November 2006 (See CX 34, 35, 72, 129, 136; RX 97, 125); the asserted restriction from laying off for union business in February 2007 (See CX 40; RX 130; Tr. 243-246); and Hardisty's refusal to allow Complainant on company property while he was suspended in July 2007.

Timely Allegations

Thus, the adverse employment action alleged which is not time-barred is Complainant's termination in the end of October 2007, which undisputedly occurred and is undisputedly an adverse employment action. Complainant argues that his termination was pretextural, that is, he was fired because of his protected activity not because he violated Respondent's EEO policy.

Decision Made by Service Unit

Complainant contends that the decision to terminate him was not made by the EEO unit but was a collaborative effort in which the wishes of his supervising service unit were decisive.

In support for his argument that the service unit was making the decisions rather than the EEO department, Complainant points to evidence showing that it was Superintendent Hardisty who made the decision to return Complainant to work about one week after he was removed from service, and that his decision was contrary to Respondent's discipline and EEO policy. Complainant points to the testimony of General Chair MacArthur that he and Hardisty negotiated Complainant's return to work, without any person from EEO being present. MacArthur described the circumstances surrounding his meeting with Hardisty. MacArthur testified that shortly after Complainant was removed from service, he was in the Twin City area for a meeting that was being put on by the superintendent. While at the meeting he pulled Hardisty aside, they went outside to a parking lot, and he asked Hardisty to reinstate Complainant. According to MacArthur, Hardisty agreed in a conversation that lasted about five minutes, called over Director of Road Operations Foresman and directed him to make arrangements for Complainant to return to work. (Tr. 49). MacArthur testified that no one from EEO was present at the conversation. In a later e-mail from MacArthur to Complainant dated April 12, 2008, MacArthur described Hardisty as cordial and easily agreeable to returning Complainant to work. (Tr. 69; RX 121). According to the e-mail, Hardisty insisted that Complainant was to have no contact with Symons and there was to be no retaliation and no drivebys of her residence.

Hardisty disagrees with MacArthur's depiction of the discussion. Hardisty agreed that he was approached at the meeting in St. Paul by MacArthur to discuss whether anything could be done to get Complainant back to work, but he disagreed about his response. Hardisty testified that he told MacArthur that he had "to check with EEO department to determine if there was anything we could do to bring him back to work." (Tr. 599).

MacArthur's depiction of the meeting tends to show that Superintendent Hardisty disregarded Respondent's discipline and EEO policies. Nevertheless, neither MacArthur's version nor Hardisty's version helps Claimant's argument. Hardisty's willingness to reinstate Complainant is inconsistent with Complainant's argument that Respondent was using the EEO policy as a pretext to get rid of him.

Complainant also contends that pretext is demonstrated through MacArthur's testimony of a conversation he had with Katherine Novak of Respondent's Labor Relations Department. MacArthur was involved in appealing Complainant's termination for violation of the waiver. MacArthur testified that while preparing for the arbitration hearing he spoke with Novak who expressed the feeling that she had no confidence in Respondent's case on Complainant's dismissal. Novak disagrees with MacArthur's testimony somewhat. She testified that she did not tell MacArthur that she did not have confidence in the case; but, she agrees that she told MacArthur that she was concerned with her case. Novak explained that one of her duties was to represent the company at arbitration hearings and to investigate and analyze cases to present a risk benefit analysis to managers, whether leniency should be offered, and what is best interest of company. After being assigned Complainant's case she discussed the matter with Melissa Schop of the EEO Department to obtain documentation supporting the case. She ultimately came to the conclusion that the company would lose the case. She testified to her concerns: the Complainant was an employee with near thirty years of service and arbitrators are very reluctant to uphold a dismissal of an employee near retirement; the case was an EEO case, and thus unusual and "soft"; there was lack of written statements as Schop's case consisted of oral interviews, and in arbitration proceedings under the union contract, the case is submitted on the record with no new evidence. Novac put her prediction of a high probability that Complainant would be returned to service by arbitration in writing in a memorandum marked confidential to Superintendent Hardisty. (RX 76). Novac's memorandum states that after discussion with Kathleen Vance, Schop and Hardisty, the proposed plan was to pursue the case to arbitration. (*Id*.).

Complainant's argument is largely based on the fact that Respondent continued with the case notwithstanding Novac's stated concerns. Novac's testimony presented three reasons why Respondent continued to defend the case: they continued to believe that Complainant engaged in retaliation in violation of policy; they wanted to support the EEO policy, i.e. "…we don't have very many female workers in the field, and we want to make sure that if something happens that's in violation of the policy, we support the policy;" they were concerned that Symons would file either a government charge or pursue litigation against the company. (Tr. 461). Novac testified that subsequent research was convincing to her that they had a very good shot at being successful in defending the case, particularly considering the exhibits attached to her brief. (*Id.*)

Complainant's argument that Novac's testimony supports a finding that Respondent's termination of Complainant and Respondent's continuing to defend the termination for violation of the waiver was pretextural is rejected. Initially, Novac was not involved in the decision to dismiss Complainant. Further, her testimony about the reasons for continuing to defend is credible as the record supports her testimony that she and Schop believed Symons was the subject of an EEO violation, and they were concerned that Symons was going to file a discrimination lawsuit against Respondent because Symons felt that Respondent was not doing enough to protect her.

Schop's concerns are revealed vividly in her testimony about whether to terminate Complainant's employment. A concern was the work environment for Thomas and Symons, as "I absolutely felt that he was retaliating against them, and he was creating a hostile work environment for them." A second was that Symons "had indicated many times through e-mails and conversations that she intended to get a lawyer, and that she was going to sue the company." (Tr. 676). Schop stressed that Symons had responded angrily when Schop told her that she did not feel that she had enough to file against Complainant for violation of the leniency agreement after the "red panties" incident. Schop testified that Symons was "extremely angry with Union Pacific and with me that we weren't doing anything to protect her in her work environment. That the harassment was getting untenable, and she didn't feel like she could work safely." (Tr. 667).

Symons frustrations were expressed in an e-mail to Schop on October 24, 2007. The email read in part:

> This is Deana Symons, I left you a voicemail today regarding getting a copy of my EEO report and all the additions to it. I would like to have this emailed to my residence as soon as possible. Also I received a call today from Eric Schwendeman. I had left him a message as well about the report he was going to make to the EEO hotline about Mike Mercier talking about seeing my underwear. This was said in Erics office on Tuesday 10/16/2007. He left a massage to me saying that he had spoken to you and was advised that you will not be going forward with this as you think he was just trying to get fired. Either way I need to have some sort of documentation. I can make a separate report myself with EEO even if you don't want to do anything or you can send me something stating you/UP do not want to handle this latest harassment. Please email me back or call my phone and let me know what you are planning to do. I need to get the first report and all additions and something on this latest incident as soon as you can please.

(RX 44).

Again, on December 27, 2007, Symons emailed Schop expressing her frustration and stressing that she was upset enough to take action on her own. The email was sent apparently in response to Schop's request for a statement to be used at hearing. The e-mail stated in part;

> You told me on the phone that you are frustrated with this case. If only you can step into my work boots for a day. Mike Thomas and I are the only ones dealing with the backlash here at work every single time we come in to the yard office. We are the ones getting the dirty looks, the whispers and the out right comments to my face from employees I don't even know. I am the one that had to check what train I had and when and where it might possible interact with Merciers. Checking if his vehicle was in the yard yet so I could hurry and get my paperwork finished and hide in the taxi asap, and it seems from talking with you that I will be doing all of this again when he returns. This case may seem annoying and a bit trivial from the outside but it is something Mike Thomas and I deal with

> everytime we go to work. During the months of July through August I dreaded having to go to work, the thought of having to go into the yard office makes me sick with anxiety. You made an analogy to me one time about how in cases such as this it is the accuser who is looked down upon and ignored and the accussee who is met with pity and protected within the union. This is the case here. I made a decision that enough was enough in July and called EEO and I have paid the price since them. Whats (sic) worse I brought Mike Thomas down with me and he has been ridiculed as well. Again I know none of this matters (sic) to UP but it matters to me.
>
> I want it known that I am very uncomfortable and worried about my personal safety in regards to Mike Mercier returning to work. I have stated this before in the EEO reports I made. I will be making an addition to the original EEO report if and when Mike Mercier returns to work. UP may not be considering his past history of actions but he has shown over and over that he cannot and will not stop harassing (sic) me. As in my conversations with you, Steve Forsman and the EEO report I am scared of the unpridictable (sic) actions of Mike Mercier. His coming to my home, joking about people following me while I am on duty at work, and his phone conversation with Mike Thomas in which he stated he didn't know why he does the things he does and that he was desperate and on medication **concern me a great deal**. I hope that in your meeting today some of this is taken into consideration, if not at least my concerns have been documented to you and UP. (Emphasis in original).

(C-47)

Thus, the record supports Respondent's reasons for proceeding with the case against Complainant. Further, the record does not support Complainant's argument that Hardisty was involved in the decision to terminate Complainant. Schop testified repeatedly and clearly that she was the ultimate decision maker, and Hardisty testified to the same. Schop testified that her job responsibilities in 2007 were to "manage and oversee complaints that come into the internal EEO hotline…[and to] consult and advise the field managers on how to handle EEO issues." She testified that she did not contact Hardisty to tell him about her recommendation that Complainant be terminated "until the decision had been made." (Tr. 717). Hardisty testified that in October, "Melissa Schop told me that we had another EEO violation called in by Ms. Symons against Mr. Mercier. And that he violated his leniency agreement, and we need to remove Mr. Mercier from service." He testified that he did not personally investigate this, and instead "had the EEO department" do so, because it would not have been his place to do so as the superintendent. (Tr. 599-600).

Thus, Hardisty is found to have had no involvement in the process of deciding to terminate Complainant. When Schwendeman called him to report that Complainant had said Thomas had shown him Symons' panties, he told Schwendeman to call Schop. Schwendeman did so. Schop did not decide to terminate Complainant until approximately two weeks later, after receiving a statement and a detailed list of inappropriate behavior from Symons, and after

investigating further by interviewing Vossen and Thomas. Schop spoke with Hardisty on the phone on October 29 or 30. However, by that time, Schop had already made the decision to terminate Complainant and was telephoning Hardisty to inform him that "we needed to terminate Mr. Mercier," which was ultimately what was done. Finally, Hardisty instructed Foresman to remove Complainant from service. Again, at this point, the decision to terminate him had already been made, and there is no evidence that Hardisty asked Foresman to do anything other than carry out Schop's instructions to effectuate her decision. He did not influence the situation.

The evidence shows that Hardisty had no influence on the decision to terminate Complainant as Schop was the decision maker in the choice to terminate Complainant in October 2007, even if Foresman is the one who removed him from service and Hardisty is the one who signed the notice of termination. (RX 11).

Disparate Treatment in Relative to Thomas in Original Complaint

Complainant offers additional instances where he believes he was treated in disparate fashion as evidence that his dismissal was pretextural. First, he contends that he was treated different from Thomas, as Thomas also should have been the subject of an EEO complaint. Complainant is apparently arguing that Thomas should have been disciplined for providing to Symons Complainant's comments about her shortly after she was hired. He reasons that Thomas was the person who brought Complainant's comments to Symons' attention and into the work place. Complainant's argument is rejected. Thomas was responding to Symons' concerns that she had heard that Complainant was spreading rumors about her. He told her that he had heard the same thing, and that he actually had some text messages on his phone to the same effect. The record does not show that Thomas spread rumors or sent sexually suggestive emails about Symons. Rather, his activity was in alerting Symons about Complainant's actions in response to a query from Symons. Complainant fails to recognize the difference between spreading rumors and alerting the target of them.

Disparate Treatment Relative to Thomas in October 2007 Termination

Complainant alleges he was treated in a desperate fashion involving the October 2007 termination. He contends that Respondent treated him differently than Thomas and Symons as they also should have been disciplined because they discussed Symons' EEO complaint contrary to instructions not to. Complainant submits that if Schop investigated him for talking about the EEO complaint, she should have also investigated, and perhaps terminated, Thomas and Symons, as there was evidence that they had been instructed not to discuss the issue (Tr. 709), and that both of them had been doing so.

A specific instance raised by Complainant where a discussion about the EEO occurred that included Symons was during a conversation in a locomotive between Symons, student conductor Vossen, and Engineer Richard Scholz on October 16. Symons reported to Schop that during this conversation between her and Scholz about her complaint against Complainant, she turned to fill the newly-hired student conductor Vossen in on the background of the conversation, and Vossen replied that he knew about the EEO complaint as he had ridden with Complainant eight days earlier and Complainant had told him that she and Thomas had lied and

had gotten him fired. (Tr. 352). Schop was asked on cross-examination whether this conversation was contrary to Symons' instruction not to discuss the issue. Schop answered no; Symons was defending herself. In light of the information Schop's investigation had uncovered about Symon's complaints, Schop's answer on cross-examination was appropriate. The testimony is uncontradicted that Symons was merely attempting to counter negative reaction from fellow workers by explaining her EEO complaint. There was no reason for the EEO department to bring a complaint against Symons.

A second instance where Complainant contends that he was treated differently also occurred on October 16, and involved Schwendeman's report to Hardisty and then to Schop about Complainant telling him that Thomas continued to speak about Symons' complaint against Complainant, and that Thomas had gone so far as to show Complainant Symons' red panties. (RX 122; Tr. 414; Tr. 664). Schwendeman was instructed to report the incident to EEO and EEO was concerned about it in light of the leniency agreement signed by Complainant. Complainant is turning the tables by arguing that EEO's concern should have been directed toward Thomas for showing the panties to Complainant. The answer to why EEO didn't direct an investigation toward Thomas was that they did not believe Complainant. Neither Schop nor Schwendeman believed him. (Tr. 420, 421, 666, 667). Schop testified that she interpreted Complainant's accusation as a retaliation against Thomas; an attempt to get Thomas in trouble. Schwendeman did not believe Complainant because he had known Thomas since 1998 and knew it was not something Thomas would do. (*Id.*). EEO did not file a complaint against Thomas because it did not believe it had a basis for a complaint not because of intent to discriminate against Complainant.

Complainant final argument of discriminatory action also derives from the October 6 conversation between Schwendeman and Complainant. In addition to arguing that the conversation showed that Thomas should have been prosecuted, Complainant argues that Schwendeman was at fault for failing to follow EEO procedure when he contacted Thomas about Complainant's accusation before contacting EEO. He argues that Schwendeman's contact with Thomas "published the comment to the field," because "Thomas would tell others and UP would no longer have control over the dissemination of the information," and, that in fact, Schwendeman's contact with Thomas resulted in Symons becoming aware of the conversation. (Tr. 372). Complainant's argument is circuitous. If Thomas had told Complainant about the panties, Schwendeman's checking with Thomas to confirm Complainant's story would not be a publication to the field, as Thomas, of course, would have known, being the source of the story. Only if Thomas had not made the red panties comment would there be a publication of the story.

Complainant also argues that when Schwendeman telephoned Thomas he breeched EEO protocol as the appropriate protocol was for Schwendeman to contact his immediate supervisor and the EEO department not Thomas. Complainant argues that under the EEO protocol, "managers should not investigate an EEO violation, unless they are trying to make a determination of whether it is an EEO issue." However, this is exactly what Schwendeman was doing, checking with Thomas to see if Thomas had made the statement about the red panties. If Thomas had not, the EEO violation was by Complainant, which is where the evidence pointed. Schop confirmed this approach when she was asked about whether Schwendeman's call to

Thomas was a breach of EEO policy. She answered no; if Schwendeman had called her, she would have requested that he call Thomas to see if allegation was true. (Tr. 665).

Thus, Complainant's argument of disperate treatment during the October 2007 termination is rejected. Schop concluded after Schwendeman's report and Symons' complaints as well as her follow-up investigation that Complainant had retaliated against Symons and violated his leniency agreement. She testified to the specific reasons: Symons' verbal statements and written emails; Complainant's red panty statement in Schwendeman's office; Vossen's verbal statement about derogatory comments; Thomas' verbal statements about derogatory statements; Complainant's performance in the EEO training session; Complainant's insincere apology; and Complainant's blog post regarding Thomas; (Tr. 682– 683; 659–662). Schop's filing of an EEO complaint against Complainant or causing him to be dismissed from his job because of a violation of the leniency agreement was not in retaliation for safety reports or any other adverse employment action.

CONCLUSION

Accordingly, Complainant has failed to show by a preponderance of the evidence that his protected activities were a contributing factor in this adverse employment action.

ORDER

Complainant has failed to establish the required elements of his claim. Accordingly, the relief sought by Complainant is DENIED.

Digitally signed by Thomas Burke
DN: CN=Thomas Burke, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

THOMAS M. BURKE
Administrative Law Judge

NOTICE OF REVIEW: Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.