U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 June 2010

CASE NO: 2009-FRS-9

In the Matter of:

KENNETH G. DEFRANCESCO,
Complainant,

v.

UNION RAILROAD COMPANY,
Respondent.

APPEARANCES:

D. Aaron Rihn, Esq.
For the Complainant

Michael P. Duff, 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

Kenneth G. DeFrancesco ("Complainant"), filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL") on February 11, 2009, alleging that Union Railroad Company ("Respondent") violated Section 20109(a)(4) of

FRSA by assessing against him a 15-day suspension in retaliation for his reporting of a work-related personal injury.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on May 15, 2009. OSHA determined that there is reasonable cause to believe that Respondent violated FRSA and ordered relief for Complainant. On June 23, 2009, Respondent filed its objections to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

A *de novo* hearing was held in Pittsburgh, Pennsylvania, on February 4, 2010. The following exhibits were received into evidence: Joint Exhibit ("JX") 1; Complainant's Exhibits ("CX") 1-5; and Respondent's Exhibits ("RX") 1-8.[1] Post-hearing briefs were received from Respondent on May 10, 2010, and Complainant on May 11, 2010.

FINDINGS OF FACT

Respondent is the Union Railroad Company, a wholly owned subsidiary of United States Steel Corporation.[2] On the date of the incident, Complainant had been employed by Respondent for over 30 years, including a 12-year-period when he was furloughed. (Tr. 18). Complainant's job title was that of a trainman. His work as a trainman involves building trains by putting cars together, coupling air hoses, and coupling brakes. He also worked as a yardmaster, which is a semi-supervisory position with the responsibility of issuing work orders to the yard crew. (Tr. 19).

On December 6, 2008, Complainant was performing his duties as a trainman at the United States Steel Corporation Irvin Works steel mill. (*Id;* RX 1). His shift started at 4 p.m. (Tr. 20). At that time, it was snowing, and snow had accumulated on the ground. (*Id.*). While in the process of directing a railroad car into the mill, Complainant slipped and fell. (Tr. 21-22). The parties dispute whether Complainant slipped on ice or snow. (Tr. 22, 228). It is undisputed that at the time of the accident, Complainant was wearing all of the company-required safety equipment, including shoe grips. (Tr. 164). Union Railroad's rules require its employees to report any work-related injury. (Tr. 22-23, 61). Complainant immediately contacted his supervisor by radio. (Tr. 22-23, 61). He reported that he had fallen and needed medical attention. (Tr. 22). Complainant was examined by a doctor who diagnosed a strained lower back muscle and instructed Complainant to take Ibuprofen for his injury.

Several reports were submitted in connection with the incident. First, Complainant documented his statement of the incident on December 6, 2008. (RX 1). He described the incident as follows:

[1] References to the record are as follows: Trial Transcript, Tr.__; Joint Exhibit, JX __; 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__.

[2] Union Railroad is one of various railroad properties that make up Trans Star Inc., a holding company, which is a direct subsidiary of U.S. Steel. (Tr. 100).

> Walking to south end of car on 17 lead slipped on sheet of ice hidden beneath snow. My feet went out from under me, and I landed flat on my back.

(*Id.*). He stated that his "company issued grips did not grip" and that his injury could have been avoided if the "grounds could be maintained to prevent standing water." (*Id.*).

Two witnesses, W.V. Johnstone ("Johnstone") and K.R. Sullivan ("Sullivan"), also prepared statements on the night of the incident. (RX 1). Johnstone, the locomotive engineer, reported that he was in the process of changing Engine 17 from a leading unit to a trailing unit when he heard on the radio "so much for these grips." When Johnstone looked back about a half a car length, he saw Complainant lying on his back. Similarly, Sullivan, the conductor, reported that he was on the south engine when he heard Complainant say on the radio, "so much for these grips." Upon getting off the engine, Sullivan observed Complainant lying on his back on the ground, then get to his feet and call for medical assistance on his radio. (*Id.*).

Finally, Union Railroad's transportation supervisor, Jason E. Browne ("Browne") also completed an incident report on December 6, 2008, after investigating the incident along with J.J. Kalfas ("Kalfas"), who is Union Railroad's road foreman of engineers. (RX 1, CX 4, Tr. 104-105). Browne described the accident as follows:

> 9B crew coupled onto single car at Irvin works with 3-unit engine consist. Brakeman KG DeFrancesco exited the engine and began walking toward the single car to remove handbrake. While walking, brakeman slipped and fell reporting he had twisted his back awkwardly.

(RX 1). He commented that the ground, which seemed relatively flat, was covered with approximately ½ inch of snow and that maintenance personnel were seen salting and plowing snow in the vicinity. (*Id*.). He noted that Complainant was witnessed wearing all protective equipment, including company-issued shoe grips. (RX 1, CX 4). Listed as the "possible cause" and the "actual cause" of the incident was "ENVIRONMENT," specifically, "WALKING/WORKING SURFACES." (CX 4).

Complainant was not questioned about the accident besides being asked by his supervisor whether he was wearing shoe grips. (Tr. 24). The incident was captured on video by a camera mounted on the rear of the locomotive that Complainant's crew was using to perform their work that evening. (JX 1).

Robert J. Kepic ("Kepic"), Union Railroad's transportation department superintendent, and Ronald A. Sieger ("Sieger"), who serves as Union Railroad's train rules examiner, reviewed the reports prepared by Complainant, Johnstone, and Sullivan and watched the video that recorded the incident, along with Complainant's discipline history and injury history to determine whether there was a pattern of unsafe behavior and whether corrective action needed to be taken. (Tr. 98-108, 111-14, 125, 206).

Kepic and Sieger's review of the video led them to conclude that Complainant was not complying with Respondent's weather hazard rules when he slipped and fell. (Tr. 109, 162-63, 205-06). Specifically, they found that Complainant violated Safety Rules 5.20 and 5.20.1 by the manner in which he was walking because he failed to take "short, deliberate steps" when walking in the snow, exhibiting carelessness. (Tr. 110, 164-65, 230). They also determined that Complainant violated General Rule B of the *Union Railroad Company Book of Rules and Instructions Governing All Employees* because of his conduct on December 6, 2008, in light of his discipline and injury history (Tr. 127-28, 205-06). The evidence relied upon in charging Complainant with a violation under Rule 5.20 was the video. (Tr. 163). The evidence relied upon in charging him with a violation of Rule B was his conduct, and his discipline and injury history. These rules provide as follows:

> **5.20 Weather Hazards**
>
> Employee must take precautions to avoid slipping on snow, ice, wet spots or other hazards caused by inclement weather.
> - Employees must wear company issued non-slip footwear during inclement weather conditions.
>
> **5.20.1**: When hazardous underfoot conditions exist:
> - Keep hands free when walking, and keep them out of pockets for balance.
> - Take short, deliberate steps with toes pointed outward.
> - When steeping over objects, such as rails, be sure your front foot is flat before moving your rear foot.
> - Inspect equipment for icy conditions before mounting or dismounting.

(CX 2).

> **1.2 Rule B**
> - To enter or remain in the service, employees must be of good moral character and must control themselves at all times, whether on or off Company property, in such manner as not to bring discredit upon the Company.
> - Employees who are careless of the safety of themselves or others, insubordinate, disloyal, dishonest, immoral, quarrelsome or otherwise vicious, or who willfully neglect their duty or violate rules, endanger life or property, or who make false statements or conceal facts concerning matters under investigation, or who conduct themselves in a manner which may subject the railroad to criticism and loss of good will, will not be retained in the service.

(CX 3).

Kepic did not inspect the scene of the accident or interview Complainant or any of the other witnesses that were on Complainant's crew. (Tr. 143, 150, 182). Ultimately, Kepic and Sieger decided to bring disciplinary charges against Complainant. (Tr. 150, 228).

Several days after the accident, Complainant was contacted by his union representative, J.J. Tierney ("Tierney"), and was told that Respondent intended to bring discipline charges against him. (Tr. 25.). By "Notice of Investigation" dated December 22, 2008, and signed by Kalfas, Complainant was summoned to attend an investigative hearing to be held in Duquesne, Pennsylvania, on Tuesday, January 6, 2010. (CX 1). The notice stated that the purpose of the investigation would be to determine whether Complainant violated Safety Rule 5.20 (Weather Hazards) and General Rule 1.2 (Rule B) of the *Union Railroad Company Book of Rules and Instructions Governing All Employees*, dated August 1, 2008. The notice quoted these rules as follows:

> **Safety Rule 5.20 Weather Hazards**: Employee must take precautions to avoid slipping on snow, ice, wet spots or other hazards caused by inclement weather.
> - Employees must wear company issued non-slip footwear during inclement weather conditions.
>
> **General Rule 1.2 (Rule B):** Employees who are careless of the safety of themselves or others…will not be retained in the service.

(CX 1).

In accordance with the provisions of the collective bargaining agreement in place, the notice contained a form entitled "Acknowledgement of Responsibility and Waiver of Investigation" by which Complainant could elect to accept responsibility for the offense as charged and waive a formal investigation. (*Id*., Tr. 129-30). Additionally, the form indicated that the hearing officer assigned to the investigation was Albert Reichle ("Reichle"), who is a retired labor relations manager from Respondent's parent company, Transtar, Inc., and the only hearing officer who is not a member of management of Union Railroad. (CX 1, Tr. 81).

Based on his reading of the notice of investigation, it was Complainant's understanding that he was being charged with not wearing non-slip footwear. (Tr. 30-31). Complainant also believed that if he was found guilty of violating General Rule B that he would be terminated based on the language that is used in the rule. Kepic and Sieger informed Tierney that if Complainant waived his hearing and accepted the charges against him that he would receive a 15-day suspension. (Tr. 207-208). Complainant met with Tierney. Tierney conveyed his opinion to Complainant that Complainant was going to be dismissed if he proceeded with the hearing based on statements made to him by several members of management. (Tr. 36, 38, 75-76).

On January 12, 2009, Complainant signed the acknowledgement and waiver. (RX 4). As a result, by letter dated January 15, 2009, and signed by Sieger, Complainant was found guilty of

violating Safety Rule 5.20 and General Rule B, and was suspended from service without pay for fifteen days from January 24 through February 7, 2009. (RX 5).

CONTENTIONS OF THE PARTIES

The parties agree on many of the underlying facts as narrated *supra*, but they disagree on Respondent's motivation for its discipline of Complainant, with Complainant contending that his protected activity was a contributing factor, as opposed to Respondent, which asserts legitimate reasons for its treatment of Complainant. As set forth in their post-hearing briefs, the parties' positions are as follows:

I. *Complainant's Contentions*

Complainant contends that he was charged, and ultimately disciplined, in an effort to punish him for reporting his injury and to discourage him, and other employees of the Union Railroad, from reporting accidents in the future. (CB at 1).

Complainant asserts that the evidence presented at hearing demonstrates: (i) that he did not violate any of Union Railroad's safety rules in relation to his December 6, 2008 accident; (ii) that Union Railroad's own post-accident investigation exonerated him and found that the sole cause of his accident was the dangerous weather and ground conditions on that day; (iii) that after the initial investigation was concluded, Kepic instituted the disciplinary investigation of Complainant for the sole purpose of retaliating against him for reporting a workplace injury; (iv) that Kepic's investigation was severely flawed and was never intended to produce any result other than charges against Complainant; (v) that Respondent ensured that Complainant would not be able or willing to challenge his discipline by threatening termination; (vi) that Respondent has exhibited a disturbing pattern of retaliation against its employees who report on-the-job injuries; and (vii) that Respondent receives financial benefit from discouraging employees from reporting work-related injuries. (CB at 2).

Complainant seeks a determination that Respondent violated the anti-retaliation provisions of FRSA, an award of back pay for his 15-day suspension, punitive damages up to $250,000, and reasonable attorney's fees and costs. (CB at 1-2).

II. *Respondent's Contentions*

Respondent maintains that it did not suspend Complainant in retaliation for his reporting of his December 6, 2008 injury and did not violate FRSA in any respect. (RB 1). Respondent asserts that the evidence shows: (i) that Complainant was suspended only for violating Respondent's safety rules; (ii) that Complainant voluntarily acknowledged responsibility for his rule violations; (iii) that Complainant's reporting of his injury was not a factor in its decision to pursue or impose discipline; and (iv) that Respondent would have taken the same action against Complainant even if he had not reported his injury. (*Id.*).

GOVERNING LAW

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, FRSA was enacted for the purpose of promoting safety in every area of railroad operations and reducing railroad-related accidents and incidents.

I. *Applicable Provisions*

Complainant alleges that Respondent violated § 20109(a)(4), which provides:

> 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—
>
> **(4)** to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

49 U.S.C. § 20109(a)(4).

II. *Elements of FRSA Violation & Burdens of Proof*

Actions brought under 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

At the hearing, Respondent stipulated that it is a "railroad carrier" within the meaning of 49 U.S.C. § 20102 and § 20109. (Tr. 14-15). As such, Respondent is responsible for compliance with the employee protection provisions of FRSA.

OSHA found that Complainant is an "employee" within the meaning of 49 U.S.C. § 20109. Respondent did not object to this finding, and no evidence to the contrary was introduced at the hearing; thus, it is deemed to be established by stipulation. As an employee of Respondent, Complainant enjoys the protections of FRSA.

As outlined in Respondent's closing statement, the issue to be decided is whether Complainant's reporting of an injury on December 6, 2008, was a contributing factor in Respondent's decision to suspend him.

DISCUSSION & CONCLUSIONS OF LAW

I. *Protected Activity*

By its terms, FRSA defines protected activities as including acts done "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(4). The evidence readily establishes that Complainant engaged in protected activity under § 20109(a)(4) by notifying Respondent of the work-related injury that he sustained on December 6, 2008.

II. *Knowledge of Protected Activity*

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines,* ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). There is no question that Respondent's disciplinary decisions makers were aware of Complainant's protected activity. Kepic and Sieger both testified that they collaboratively decided to discipline Complainant, and both acknowledged that they were aware that Complainant had reported his injury. (Tr. 103, 150, 205, 228). Thus, Respondent had knowledge of Complainant's protected activity.

III. *Unfavorable Personnel Action*

By its terms, FRSA explicitly prohibits employers from suspending employees who engage in protected activity. The parties do not dispute and the evidence clearly establishes that Complainant was subjected to adverse employment action when he was disciplined in the form of a 15-day suspension. (RX 5).

IV. *Contributing Factor*

Complainant's burden is to prove by a preponderance of the evidence that his reporting of his injury was a contributing factor in Respondent's decision to suspend him. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *See Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov 30, 2006).

A. Retaliatory Animus

Complainant asserts that he was charged with rules violations and suspended because he reported his injury. Conversely, Respondent maintains that Complainant was disciplined because he engaged in unsafe acts in violation of Union Railroad's rules as demonstrated by the video depicting his behavior on the night of December 6, 2008, along with his discipline and injury histories. In support of his argument that Respondent acted with retaliatory intent, Complainant attacks the legitimacy of Respondent's articulated reason for suspending him. Specifically, Complainant argues that Union Railroad's decision to discipline him was "nothing but a poorly disguised effort to retaliate against him for reporting an injury. (CB 6).

The Administrative Review Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14 (ARB Jan. 31, 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *See Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000)).

Video Depicting the Incident

Complainant submits that the video which captured his fall on December 6, 2008, is his strongest evidence of retaliatory intent because it shows that it was "entirely inappropriate for him to be charged." (Tr. 7). Complainant contends that the video shows "an employee, utilizing all of the company required safety equipment, performing his job in a normal and safe manner when he encountered an unavoidable weather condition (a hidden ice patch) and fell." (CB at 4). Complainant argues that "[t]here is simply no way a reasonable, impartial person could view this video and conclude, as Union Railroad did, that this accident occurred as a result of [Complainant's] violation of any safety rules." (CB at 2).

Complainant asserts that his position that the video demonstrates that he was walking carefully is substantiated by the testimony of two witnesses who viewed the video – Tierney, his union representative, and James Keith ("Keith"). Tierney testified that he has worked for Union Railroad for 40 years as a brakeman, conductor, and trainmaster, and is familiar with Respondent's safety rules. (Tr. 74-75, 86). He stated that before he watched the video, it was

portrayed to him by several managers that it showed Complainant "wildly swinging his arms and walking in a nonchalant manner." (Tr. 76). Based on his own viewing of the video, Tierney concluded that the manner in which Complainant was walking prior to his accident did not violate any of the safety rules he was charged with violating. (Tr. 86). Similarly, Keith viewed the video and determined that the manner in which Complainant was walking at the time of his accident was neither careless nor in violation of any safety rule. (Tr. 68). Complainant asserts that Keith's testimony is particularly compelling since he holds a mentor position at Union Railroad, and part of his job duties are to train new employees on safe work practices and to work with older employees to ensure that they are complying with safety rules. (Tr. 59).

Union Railroad's Incident Report

Additionally, Complainant submits that Respondent's own post-accident investigation is evidence that Complainant did not violate Union Railroad's safety rules. As stated previously, the scene of the accident was examined by Browne, who is Union Railroad's transportation supervisor, and Kalfas, who is Union Railroad's road foreman of engineers. (Tr. 104-105). Browne completed an incident report, and he determined that the "possible cause" and the "actual cause" of the incident was "ENVIRONMENT," specifically, "WALKING/WORKING SURFACES." (CX 4). Complainant argues that this report exonerates him as he was not even listed as a possible cause of the accident, and it indicates that the sole cause of his accident was the ground condition.

Kepic's Investigation of the Incident

Complainant attacks the investigation performed by Kepic and his credibility in support of his argument that Respondent's decision to discipline was motivated, not by any alleged safety rule violation, but Complainant's reporting of his injury.

Kepic testified that any time that an employee of Union Railroad reports an injury, an investigation takes place to determine the underlying, "root cause" of the incident and assess whether corrective or disciplinary action needs to be taken in order to prevent or deter such an occurrence in the future. (Tr. 103, 125). Kepic explained that the investigation is conducted in a way that every factor that could be a cause is considered, and "no stone goes unturned." (Tr. 125). Complainant contends that Kepic's actions "belie this assertion and reveal that his investigation was nothing more than a farce." (CB at 7).

Complainant maintains that Kepic's investigation was "severely flawed" in a number of ways and "was never intended to produce any result other than charges" against him. (CB at 2). Specifically, Complainant asserts that the legitimacy of Kepic's investigation is called into doubt by the fact that Kepic never personally questioned Complainant about the accident; he never interviewed any of the other witnesses to the event; and he failed to inspect the scene of the accident or attempt to determine whether there was a physical defect on the property which caused ice to form at the spot where Complainant slipped. (Tr. 143-45, 150, 193).

Disciplinary Charges & Hearing Officer Appointment

Lastly, Complainant asserts that Respondent's conduct after Kepic decided to discipline him is further evidence of its motive to punish him for reporting his injury, not a safety rule violation. As stated previously, Union Railroad sent Complainant a letter on December 22, 2008, in which it listed the rules that he was alleged to have violated. (CX 1). These included Safety Rule 5.20 and General Rule B. The letter quoted these rules as follows:

> **Safety Rule 5.20 Weather Hazards**: Employee must take precautions to avoid slipping on snow, ice, wet spots or other hazards caused by inclement weather.
> - Employees must wear company issued non-slip footwear during inclement weather conditions.
>
> **General Rule 1.2 (Rule B):** Employees who are careless of the safety of themselves or others…will not be retained in the service.

(CX 1). Based on his reading of these charges, it was Complainant's understanding that he was being charged with not wearing non-slip footwear. (Tr. 30-31). At the hearing, however, Kepic testified that, despite what was stated in the letter, Complainant was charged with failing to take precautions to avoid slipping on snow, ice, and wet spots caused by inclement weather as required by Rule 5.20, as well as a provision of Rule 5.20.1, which requires that short, deliberate steps with toes pointed outward are taken when walking in hazardous conditions. (Tr. 110, 164-65).

Complainant suggests that Kepic's testimony is evidence of retaliatory animus since it is unbelievable that these were the charges that were legitimately intended based on the fact that Kepic acknowledged that Complainant was wearing shoe grips; Rule 5.20.1 is not even mentioned in the letter; and Kepic testified that the video was "not clear" on whether Complainant's toes were pointed outward when he was walking. (Tr. 110, 164-65). Additionally, Complainant suggests that Kepic's characterization of the video as showing that Complainant was engaging in conduct exhibiting "definitely a high degree of carelessness" severely undermines his credibility because "no rationale man without an agenda could possibly view that video and each this particular conclusion." (Tr. 163; CB at 10).

Finally, Complainant argues that Respondent's appointment of Reichle as his hearing officer is further evidence of retaliatory intent. Complainant testified that Reichle has a reputation of being a "hanging judge" and that as far as he knows, in every case that Reichle has presided, at least one person has been dismissed. (Tr. 38). Similarly, Keith testified that Reichle has a reputation for being "the worst" of the hearing officers because "he rephrases questions to get the answers he wants," and if you go before him, "you're usually going to get fired." (Tr. 66-67). Keith stated that the union has expressed its concerns about Reichle to management. (Tr. 66). Likewise, Tierney stated that he has expressed the union's concerns with Reichle to management, and that he personally considers Reichle to be a "hired gun" because "his mission is to come in and skewer the direction of the investigation to the company's advantage." (Tr. 79).

Complainant's argument that these several factors establish retaliatory intent is not persuasive. It has been consistently held that courts should not second guess an employer's exercise of its business judgment in making personnel decisions, as long as such decisions are not discriminatory or retaliatory. To discredit an employer's proffered reason for taking an adverse personnel action, the complainant "cannot simply show that the employer's decision was wrong or mistaken since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir.1994) (citations omitted). As pointed out by Respondent, a court's inquiry is limited to whether the employer gave an honest explanation of its behavior. It does not "sit as a super-personnel department that reexamines the merits or even the rationality of an entity's business decisions." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 332 (3d Cir. 1995) (citations omitted); *Dister v. Continental Group, Inc.*, *Mesnick v. Gen. Elec. Co.*, 57 FEP Cases 822 (1st Cir. 1991).

Thus, it is irrelevant whether Complainant believes that his conduct violated the safety rules, or whether Tierney or Keith viewed the video and also concluded the same, or even whether Browne's incident report concluded that the ground conditions caused Complainant to slip and fall. The key inquiry is whether Complainant can establish that Kepic and Sieger, Respondent's decision makers, were motivated by retaliatory animus.

To successfully establish retaliatory intent circumstantially by attacking an employer's asserted justification, the complainant must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason for its action that a reasonable fact finder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Fuentes*, 32 F.3d at 765.

Here, there is insufficient evidence to establish that the decision to commence disciplinary charges against Complainant was motivated by Complainant's reporting of his injury. First, Kepic and Sieger each testified that the fact that Complainant suffered an injury on December 6th and reported his injury was not a factor in the decision to discipline him. (Tr. 140, 210-11). Additionally, both testified that they did not personally take any issue or exception to the fact that Complainant reported his injury. (*Id.*). Second, Complainant's allegation that Kepic's investigation was incomplete and was never intended to produce any result other than charges against him is unsubstantiated in light of Sieger's unrebutted testimony that at the time the decision was made to discipline Complainant, he had reviewed enough information to reach such a decision. (Tr. 228). Third, the alleged inconsistency between the charges set forth in the December 22, 2008 letter and Kepic's testimony that Complainant was charged, not with failing to wear shoe grips under Rule 5.20, but rather failure to take short, deliberate steps under Rule 5.20.1, is unpersuasive evidence of retaliatory intent in light of Respondent's assertion that Rule 5.20.1 is regarded as an ancillary subpart of General Rule 5.20. (Tr. 29). Finally, Complainant's allegation that Reichle was selected "because if you go before him you're usually going to get fired," is not supported by the record. Kepic provided unrebutted testimony that Reichle is only selected to preside over a hearing if the other officers who work for Union Railroad are unavailable, and more importantly, that the hearing officer does not have the ability to determine what, if any, disciplined will be imposed. (Tr. 137).

B. Pattern of Retaliation

Complainant also asserts that his claim that he was retaliated against for reporting an injury is supported by evidence of Respondent's recent practices which have "exhibited a disturbing pattern of retaliation against employees who report on-the-job injuries." (CB at 2, 15). To establish a pattern or practice requires the complainant to establish that an employer's discriminatory and/or retaliatory conduct was "standard operating procedure." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, (1977). In other words, a complainant must prove more than the "mere occurrence of isolated or accidental or sporadic discriminatory acts." *Id.* He must show that discrimination was "the regular, rather than the unusual practice." *Id.*

Testimonial Evidence

Complainant testified that he has worked for Union Railroad for over 30 years and that at the beginning of his career, reporting an injury was not a problem – "You reported it. And if it was a problem that could be fixed, it was fixed." (Tr. 40). He stated that things began to change a few years ago, around the time that Mr. James Nice ("Nice") became superintendent/general manager of Union Railroad. (Tr. 40-41). Since then, a "general pattern" has emerged such that, "everyone that reports an injury is brought up on charges after reporting injuries." (Tr. 40). According to Complainant, in recent years, "the number of people that are being charged has escalated, and the punishment that goes along with it has escalated with it." (Tr. 41). Since he started working for Union Railroad in the 1970s, Complainant has reported between 20 and 30 injuries, but he has only been charged with rule violations following his reporting of his three most recent injuries which have occurred in the last eight years. (Tr. 41-42). Complainant testified that in the past eight years he has never seen a fellow employee slip on ice and report an injury and not be brought up on disciplinary charges. (Tr. 42). Complainant stated that at recent union meetings employees have voiced their concerns about being afraid to report an injury, and there is a "general feeling on the property amongst the workers" that it is the intention of Union Railroad to issue discipline to discourage employees from reporting injuries. (Tr. 42-43, 53).

Similarly, Keith testified that during the course of his 37 years with Union Railroad, he had observed a change in the manner in which management responds to employee reports of injuries. (Tr. 61). He explained that previously, reported injuries were merely documented; however, in the past five years, nearly every employee who reports an injury is drug tested and required to attend a hearing. (Tr. 62). Keith stated that "the general feeling is guys are afraid to report injuries." (*Id.*). Keith testified that he has personally observed a Union Railroad employee be disciplined following an injury where he does not believe that the employee violated any safety rules. (*Id.*). Additionally, he testified that he is not aware of any Union Railroad employee who reported a slip-and-fall on ice in the last five years who was not brought up on disciplinary charges. (Tr. 63).

Likewise, Tierney testified that he believes that Union Railroad retaliates against employees who report injuries. (Tr. 81). He explained that, "With rare exception, every employee who has reported an injury in the past eight or nine years has been brought up on charges for something." (Tr. 82). Tierney testified that he has been with Union Railroad for 40 years, and that there was a "dramatic change" in the past eight or nine years since Nice was

hired. (Tr. 82). Tierney explained that, "From that point on, Mr. Nice seems to have torn a page from a play book of some of these other railroads that discourage employees from reporting injuries. And he began this disciplinary action against everyone who reported an injury." (*Id.*).

Additionally, Tierney testified to his opinion of what Union Railroad's motivations might be for discouraging employees from reporting injuries. (Tr. 83). These include the Harriman Award, which is a safety award issued to railroads based on its reportable injuries, as well as the financial benefit from limiting liability on any kind of medical treatment for injured employees. (Tr. 84-85). Tierney testified that he has witnessed at least two employees not report an injury out of fear of being retaliated against. (Tr. 84). In addition, Tierney stated that there have been constant complaints by the union membership to him as their representative about the "atmosphere of intimidation and retaliation" toward employees who report injuries. (Tr. 85). He explained that, "In fact, last night at our union meeting, we had about 25 members in attendance and I asked for a show of hands and I asked the question, 'How many of you are reluctant to report injuries for fear of harassment or discipline,' and every man in that room raised his hand." (Tr. 85).

Statistical Evidence

Complainant asserts that the alleged recent trend of increased retaliatory disciplinary action is also demonstrated by Union Railroad's own statistics. Complainant introduced a table showing the number of disciplinary investigations scheduled for the years 2006, 2007, and 2008. (referred to as "investigation summary table") (CX 5). In 2006, there were a total of 26 investigations scheduled, in 2007, this increased to 42, and in 2008, it increased against to 52. As pointed out by Complainant, this indicates that that number of disciplinary investigations doubled in this two-year period. (CB at 17).

Complainant also asserts that the statistical evidence introduced by Respondent reveals "a number of interesting trends" that support its assertion that Respondent retaliates against its employees who report injuries. (CB at 19). Respondent introduced three exhibits that contain statistical evidence. The first is a chart of all on-the-job injuries and illnesses that were reported in 2008 (referred to as "2008 injury chart"). (RX 6). The second is a chart of all on-the-job injuries and illnesses that were reported in 2007 (referred to as "2007 injury chart"). (RX 7). Finally, the third is a chart of all of the investigations that were commenced by Union Railroad in 2008 against employees for rule violations (referred to as "2008 investigation chart"). (RX 8).

The 2008 injury chart shows that there were eight injuries reported in the transportation department. (RX 6). Sieger, as the individual at Union Railroad responsible for developing this chart, testified that of the eight employees who reported injuries in 2008, only Complainant was disciplined for a safety rule violation in connection with his injury. (Tr. 212-14).[3] The 2007 injury chart shows that there were fourteen injuries reported in the transportation department. (RX 7). Sieger testified that six employees were charged and five were disciplined that year. (Tr. 218). Finally, the 2008 investigation chart shows that 28 transportation department employees were charged with and disciplined for violations of safety or operating rules. (RX 8). Sieger

[3] Sieger explained that one other employee who reported an injury, G.G. Wilcox, was also disciplined; however, his discipline was not in response to a safety rule violation, but rather false reporting regarding this injury. (Tr. 214).

testified that Complainant was the only one of these 28 employees who had reported an injury. (Tr. 226-27).

Complainant contends that the 2007 and 2008 injury charts shows a decrease in the number of injuries reported in the transportation department from fourteen to eight, suggesting that Union Railroad "might be at least having some success discouraging its employees from reporting injuries." (Tr. 19). Additionally, Complainant asserts that Respondent's pattern of retaliatory discipline can be inferred from the fact that in 2007 there were five transportation employees who reported injuries from slipping, tripping, or falling, and according to Sieger's testimony, only one of the five was not disciplined. (RX 7; Tr. 231-32).

Complainant's contention that the testimonial and statistical evidence shows a pattern of retaliation is not persuasive based on several weaknesses and flaws that presented.

Although Complainant testified that the "general feeling" among the workers was it was Union Railroad's intent to discipline employees in order to discourage them from reporting injuries, he later acknowledged that he has "no idea" what their reasoning would be for doing so because he was never been told by someone in management of Respondent's intent. (Tr. 52-53). Similarly, Keith testified that he did not have any evidence that the company's intent in issuing charges for rule violations is to discourage employees from reporting injuries. (Tr. 71). Likewise, Tierney only cited Respondent's "track record" when asked what evidence he had that it was Union Railroad's intent to issue discipline following an injury to discourage employees from reporting injuries. (Tr. 93). In sum, the testimony suggests a generalized fear of retaliation. Without evidence that such fear is rationally based on a statement, representation, or credible threat of retaliatory intent which Respondent actually made, the testimony on this point is not convincing.

Similarly, Complainant's discussion of the statistical evidence is not compelling. First, Complainant's assertion that the investigation summary table shows an increased trend of disciplinary violations fails to establish retaliatory intent with regard to injury reporting. Kepic testified that this chart includes, not only investigations of safety rule violations, but also investigations related to work record rule violations, such as failing to report for a shift. (Tr. 175-176). Thus, it does not show the correlation that Complainant alleges. Second, Complainant's contention that the 2007 and 2008 injury charts, which show a decrease in the number of injuries reported from fourteen to eight, suggests that Respondent is succeeding in discouraging its employees from reporting injuries is far too speculative to establish retaliatory intent. Finally, Complainant asserts that Respondent's pattern of retaliatory discipline can be inferred from the fact that there were five transportation employees who reported injuries from slipping, tripping, or falling in 2007, and only one was not disciplined. But without evidence directed to the circumstances of such injuries and discipline, Complainant's assertion is not sufficient to support an argument of retaliation.

In contrast, Respondent references the statistical evidence to show that when employees commit safety violations, appropriate discipline is imposed when deemed necessary, regardless of whether such employee reported an injury. (RB at 16-17). In support, Respondent notes that the statistical evidence shows that in 2008 there were 28 employees who were charged with and

disciplined for safety violations, but only one of these employees, *i.e.*, Complainant, had reported an injury. (RX 8; Tr. 225-26). Kepic testified that even if Complainant had not suffered an injury or reported an injury, he would have taken the same action that he did in investigating the incident and pursuing disciplinary charges based on the conduct he saw on the video. (Tr. 140-141). Respondent's argument on this point is accepted.

Moreover, Complainant's argument that Respondent's explanation is pretextural is not persuasive. The "Notice of Investigation" which summoned Complainant to attend the investigative hearing to determine whether Complainant violated Safety Rule 5.20 and Rule B was issued after Kepic and Sieger reviewed the reports prepared by Complainant, Johnstone, and Sullivan, and watched the video that recorded the incident. (Tr. 103-108, 111). They also reviewed records of Complainant's discipline history and injury history to determining whether there was a pattern of unsafe behavior and whether corrective action needed to be taken. (Tr. 113-14, 125, 206). Complainant's discipline record contains documentation of 46 disciplinary actions from July 2, 1977 through March 28, 2008, ranging from demerits and warning letters to suspensions of up to 30 days for various rules violations, including violations of several safety rules, which, on one occasion, resulted in a derailment and a personal injury to the train's engineer. (RX 2; Tr. 120-121). Complainant's injury record includes 23 injuries sustained over the period May 20, 1976 through March 19, 2007, including several injuries that occurred as a result of slipping. (RX 3). Kepic and Sieger determined that these records indicated a pattern of unsafe acts and lack of focus on safety which required that strong corrective actions be taken. (Tr. 126, 206). It is outside the purview of this proceeding to question the soundness of their judgment in issuing the Notice; however, there is nothing to show that the Notice was not warranted. Nor does the record show that the Notice was motivated by an intent to discourage employees from reporting injuries.

Complainant reported to his supervisor that he had slipped and fallen and needed medical attention. Consequently, he was charged with and voluntarily acknowledged responsibility for violating Safety Rule 5.20 and Rule B, and he accepted a fifteen day suspension. He has failed to establish by a preponderance of the evidence that his reporting of the injury that he sustained was a contributing factor in Respondent's decision to discipline him with a 15-day suspension.

ORDER

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

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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.