



**Issue Date: 24 April 2014**

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Case No.: 2009 FRS 15

In the Matter of  
**LAWRENCE J. RUDOLPH**  
Complainant

v.

**NATIONAL RAILROAD PASSENGER CORP.**  
**(Amtrak)**  
Respondents

Appearances: Mr. James C. Zalewski, Attorney  
For the Complainant

Mr. Chad P. Richter, Attorney  
Mr. Susan Schneider, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER ON REMAND –  
PARTIAL APPROVAL OF COMPLAINT**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRS” and “Act”), Title 49 United States Code Section 20109, as amended,<sup>1</sup> and implemented by 29 C.F.R. Part 1982.<sup>2</sup> In general, Section 20109 provides for employee protection from employer discrimination because an employee engaged in a protected activity pertaining to railroad safety or security, requested medical or first aid treatment, or followed orders or a treatment plan of a treating physician.

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<sup>1</sup>Pub. L. 103-272, §(e), July 5, 1994, 108 Stat. 867, and amended Pub. L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, § 419, Oct 16, 2008, 122 Stat. 4892.

<sup>2</sup>75 FR 53527 (Aug. 31, 2010).

## Procedural History

### **Initial Decision and Order – Partial Approval of Complaint & Punitive Damages**

On January 12, 2009, Mr. Rudolph filed a complaint of alleged illegal discrimination by the Respondent, National Railroad Passenger Corporation (“Amtrak”), based on his disqualification as an assistant passenger conductor on November 5, 2008. On July 27, 2009, after an investigation, the Regional Administrator, Occupational Safety and Health Administration (“OSHA”), United States Department of Labor (“DOL”), dismissed Mr. Rudolph’s complaint. On August 14, 2009, Mr. Rudolph appealed the adverse decision to the Office of Administrative Law Judges.

Pursuant to a Third Revised Notice of Hearing dated January 26, 2010 (ALJ IV),<sup>3</sup> I conducted a hearing on April 6 and 7, 2010 in Omaha, Nebraska. At the completion of the proceedings, the evidentiary record consisted of the sworn testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 16 (also RX 1 to RX 16), CX 17 to CX 21, CX 22 (also RX 22), CX 23 to CX 34, CX 35 (also RX 35), CX 36 (also RX 36), CX 38 (also RX 38), CX 39 (also RX 39), CX 40, CX 41 to CX 44 (also RX 41 to RX 44), CX 46 to CX 49 (also RX 46 to RX 49), CX 50, CX 51 (also RX 51), CX 54, CX 55, CX 56 (also RX 56), CX 57, CX 58 (also RX 58), CX 59 (also RX 59), CX 60, CX 61, CX 62 (also RX 62), CX 63 to CX 69, CX 70 (also RX 70), RX 71 to RX 74, RX 77 to RX 92 (audio CD), CX 93, and RX 94.

On March 14, 2011, as set out below, I issued a Decision and Order (“D & O”), evaluating the three requisite elements necessary to establish FRS employment discrimination, adverse action, protected activity, and causation; partially approving Mr. Rudolph’s complaint; and awarding punitive damages.

### Protected Activities

Mr. Rudolph engaged in numerous protected activities under multiple provisions of the FRS. First, in the early morning of July 20, 2008, August 1, 2008, August 7, 2008, August 29, 2008, and September 12, 2008, Mr. Rudolph reported a violation of federal law indicating that he had been forced to violate the hours of service limit (49 U.S.C. § 20109(a)(1)). Second, on July 20, 2008, Mr. Rudolph reported a work-related stress injury (49 U.S.C. § 20109(a)(4)). Third, on August 7, 2008, by filing a complaint, Mr. Rudolph cooperated with a Federal Railway Administration (“FRA”) investigation (49 U.S.C. § 20109(a)(5)). Fourth, on July 20, 2008, Mr. Rudolph accurately reported his hours of service (49 U.S.C. § 20109(a)(7)). And, fifth, on August 25, September 4, and September 18, 2008, Mr. Rudolph attempted to return to work in accordance with physician’s recommendation (49 U.S.C. § 20109(c)(2)).

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<sup>3</sup>The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

### Adverse Actions

Starting on August 7, 2008, Mr. Rudolph experienced several adverse personnel actions. On August 7, 2008, Mr. Rudolph received a warning from his immediate supervisor that if Mr. Rudolph maintained that he actually performed service as shown by his previously completed personal time ticket (“PTT”), the supervisor would have to charge him for exceeding his hours of service without proper authority. On August 8, 2008, Mr. Rudolph received a Notice of Investigation that included a disciplinary charge that Mr. Rudolph had violated his hours of service without authority. Between mid-August 2008 through the beginning of November 2008, Mr. Rudolph did not receive sickness benefits for 79 days. In the fall of 2008, Mr. Rudolph was required to undergo a psychiatric evaluation as a pre-condition for his return to work. On November 5, 2008, Mr. Rudolph was medically disqualified from service as a passenger conductor. And, after November 5, 2008, the Respondent refused to approve Mr. Rudolph’s repeated requests to return to work.

### Causation

Mr. Rudolph’s protected activities of accurately reporting his time on July 20, 2008 and submitting a formal complaint about his hours of service violation were contributing factors in his immediate supervisor’s August 7, 2008 warning. The Respondent was unable to establish by clear and convincing evidence the supervisor would warned Mr. Rudolph absent his protected activities.

In regards to the remaining adverse actions, Mr. Rudolph’s protected activities were not contributing factors.

### Relief

Since Mr. Rudolph established that some of his protected activities contributed to the supervisor’s warning, I approved that portion of his FRS whistleblower complaints. I dismissed the remaining portions of his FRS complaint regarding the disciplinary charge, psychiatric evaluation referral, medical disqualification, and failure to approve his return to work. I also directed the Respondent to pay \$5,000 in punitive damages.

Through counsel, Mr. Rudolph filed a timely appeal.

### **Supplemental Decision and Order – Partial Award of Attorney Fee & Litigation Expenses**

On May 9, 2011, I partially approved Complainant’s counsel’s attorney fee in the total amount of \$2,209.12, representing an attorney fee of \$1,000.00 and litigation expenses in the amount of \$1,209.12.

Again, complainant’s counsel filed a timely appeal.

## **Administrative Review Board Remand**

Upon consideration of the two appeals, the Administrative Review Board (“ARB” and “Board”) remanded both the initial decision and order and the supplemental order.

### Initial Decision and Order – Partial Approval of Complainant & Punitive Damages

On March 29, 2013, since the parties did not challenge my determinations regarding Mr. Rudolph’s protected activities and the adverse actions that he experienced, the ARB affirmed my protected activities and adverse action findings set out in the initial decision and order.

Next, in the absence of a dispute between the parties, the Board also affirmed my determinations that: a) Mr. Rudolph’s protected activities associated with his reporting his hours of service violation were contributing factors to his immediate supervisor’s threat of disciplinary action; b) the Respondent failed to establish by clear and convincing evidence that the threat would have been made absent the protected activities; and, c) Amtrak was liable for the August 7, 2008 threat of disciplinary action in the amount of \$5,000 in punitive damages.

However, finding multiple adjudication errors, including the failure “to consider the totality of the circumstantial evidence of the causal relationship of [Mr.] Rudolph’s protected activities to Amtrak’s actions . . . especially the question of ‘whether knowledge should be imputed to a decision-maker based on knowledge held by other relevant persons,’”<sup>4</sup> the majority of the ARB determined I committed reversible error and remanded this case for “reconsideration of whether [Mr.] Rudolph has met his initial burden of proving that his protected activity was a contributing factor in any or all of the adverse personnel actions . . .” In turn, if causation was established, The Board directed that I also address whether Amtrak can establish by clear and convincing evidence that it would have taken any or all of the adverse personnel action absent any protected activity.

Specifically, the principal issue in the proceeding is whether any protected activity contributed in any way to the adverse action taken by the employer. The Board emphasized that to satisfy the requisite causation element, a complainant “need only establish by a preponderance of the evidence that the protected activity, ‘alone or in combination with other factors,’ tends to affect in any way the employer’s decision or adverse action.” In the Board’s opinion, this contributing factor causation element is “not a demanding standard.” Consequently, “exclusive focus” on whether the final decision maker had knowledge of the protected activity is “error as a matter of law,” because proof that a protected activity was a contributing factor does not “necessarily rest on the decision-maker’s knowledge alone.” Instead, “proof of a contributing factor may be established by evidence demonstrating “that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employer’s protected activity.” The Board noted this “cat’s paw” legal concept of liability had

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<sup>4</sup>In support of its determination, the Board cited *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008 ERA 003 (ARB June 24, 2011), which was decided after my decision and order.

been recognized and applied by the United States Supreme Court.<sup>5</sup> Further, under the contributing factor standard, through consideration of circumstantial evidence, causation may be established if regardless of their motives the individuals advising the final decision maker knew of the protected activity. Applying these principles to Mr. Rudolph's case, the ARB observed that one or more company officials who were aware of his protected activities advised the final decision-maker regarding the medical adverse action. Finally, in terms of intervening events and causation, even if the employer has legitimate reasons for an unfavorable employment action, the contributing factor standard is satisfied if "the protected activity in combination with other factors affected in any way the adverse action at issue."

Regarding the application of 49 U.S.C. § 20109(c)(2), after noting the absence of medical fitness-for-duty standards in evidence, the ARB directed reconsideration of whether Amtrak's refusal to permit Mr. Rudolph to return to work based on a treating physician's certification that he was able to do so constitutes discipline under the subsection. Further, the majority of the three-member ARB interpreted the subsection to provide an exclusive affirmative defense in the event an employee established that his protected activity of attempting to return to work based on a treating physician's medical release was a contributing factor in the employer's refusal to permit his return – "the employer must establish by clear and convincing evidence that its refusal to permit the return to work was based on FRA medical standards for fitness of duty, or absent those, on the employer's fitness-for-duty standards," (emphasis added)"

The dissenting ARB administrative appeals judge agreed that contributing factor should be re-examined regarding the disciplinary charge against Mr. Rudolph. However, the dissenting member did not find reversible error in the remaining causation determinations concerning the "medically-related" adverse personnel actions. In particular, the administrative appeals judge observed that the record supported the determination that "[Mr.] Rudolph's choices and events other than protected activity caused the medically-related employment decisions." He also observed that a decision-maker's knowledge of a protected activity "permits an inference that unlawful discrimination occurred but does not require such an inference" (emphasis in original quote).

And, while agreeing that the 49 U.S.C. § 20109(c)(2) had been wrongly applied in Mr. Rudolph's case due to the absence of fitness-for-duty medical standards in evidence, the dissenting administrative appeals judge disagreed upon consideration of legislative history and statutory construction with the majority's interpretation that this particular subsection established an exclusive affirmative defense. Instead, he opined that the rebuttal provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"), 49 U.S.C. § 42121(b), incorporated by Congress into the FRS whistleblower statute, was applicable, such that even under 49 U.S.C. § 20109(c)(2) an employer may escape liability by proving through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

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<sup>5</sup>The United States Supreme Court recognized this concept in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), which was published on March 1, 2011, thirteen days before my initial decision and order.

Supplemental Decision and Order –  
Partial Award of Attorney Fee & Litigation Expenses

On April 25, 2013, absent a challenge, the ARB affirmed the award of \$1,209.12 in litigation expenses. However, in light of the remand of the initial decision and order, the Board vacated the remaining portions of the Supplement Decision and Order and remanded the attorney fee petition for reconsideration.

**United States Court of Appeals for the Eighth Circuit**

Following the ARB's adverse determination, the Respondent filed with the United States Court of Appeals for the Eight Circuit a motion to stay the proceedings in order to permit an interlocutory appeal of the ARB's decision. On June 24, 2013, absent a final order, the appellate court dismissed the Respondent's petition for review. On July 2, 2013, the court also denied the Respondent's motion for a stay. And, on July 16, 2013, a petition for rehearing by the appellate court panel was denied.

**Present Proceedings**

On October 29, 2013, Complainant's counsel submitted a June 1, 2012 administrative law judge ("ALJ") decision and order dismissing Dr. Pinsky's whistleblower complaint against Amtrak,<sup>6</sup> and requested that I take judicial notice of the decision in making my determinations in this remand, including the assessment of Dr. Pinsky's testimony in Mr. Rudolph's case. Upon consideration of the request, while the existence of the decision is obvious, I decline to take judicial notice of any of its contents based on due process concerns, the inappropriate application of judicial notice, and consideration that Dr. Pinsky was the complainant in the other proceeding.

On November 26, 2013, Complainant's counsel submitted an October 29, 2013 ALJ decision and order that included a determination under similar facts that Amtrak had no legal defense to its adverse action under 49 U.S.C. § 42121(b). I simply note that I will adjudicate Mr. Rudolph's case on this remand based on the evidence previously specifically identified.

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<sup>6</sup>*Pinsky v. National Railroad Passenger Corp (Amtrak)*, ALJ No. 2011 FRS 028 (June 2, 2012).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Stipulation of Fact

At the hearing, the parties stipulated that on July 19 and 20, 2008, an employee/employer relationship existed between Amtrak and Mr. Rudolph (TR, p. 17).

### Credibility

Since the ARB did not reverse any of my credibility determinations, I adopt in this remand my findings regarding conflicts in testimony and other inconsistencies. In particular, as previously discussed in my initial decision and order, since Dr. Pinsky did not testify, I was unable to assess his credibility in terms of witness demeanor.<sup>7</sup> Nevertheless, I previously concluded that his progress notes, summarizations, and statements were probative based on two factors. First, Dr. Pinsky's explanations, conclusions, and determinations were reasonably supported by other documentary evidence in the record. Second, the accuracy of his progress notes and statements, including his summarization of phone conversations with Dr. Sedlacek and Dr. Wilson were not sufficiently converted by other evidence in the record. Notably absent in the evidentiary record was any statement by either Dr. Sedlacek or Dr. Wilson that Dr. Pinsky's recollections of their discussions were not accurate.

### Specific Findings of Fact<sup>8</sup>

#### 1979 – 1999

In 1979, Mr. Rudolph starts his railroad career.

Sometime later, due to the seasonal nature of his railroad work, Mr. Rudolph takes a four year leave of absence and works as a commercial pilot. When he is able to obtain a full time position, Mr. Rudolph returns to the railroad.

In 1989, Mr. Rudolph transfers to Amtrak, which as a railroad carrier is subject to the FRS.<sup>9</sup>

In 1999, Mr. Rudolph begins working as a conductor and assistant conductor for Amtrak. With an associate degree in mortuary sciences, Mr. Rudolph also works part-time in the funeral business.

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<sup>7</sup>D & O, p. 53.

<sup>8</sup>To facilitate reconsideration, and with a few noted additions, I will repeat the specific findings (minus the discussion portions) that I rendered in my initial decision on March 14, 2011, D & O, pp. 53-71.

<sup>9</sup>49 U.S.C. § 20109 (a) and 29 C.F.R. 1982.101.

2001

Mr. Rudolph is out of work for about 30 days due to stress.

Mr. Rudolph begins counseling for stress.

2003

Mr. Rudolph is out of work for about 30 days due to stress.

August 23, 2006

Dr. Ashley Walters evaluates Mr. Rudolph who presents with stress and declining memory complaints, with symptoms of abdominal and chest pain. His stress had been increasing since 1999 due to personnel reductions at Amtrak. Previously in 2001 and 2003, he was out of work about 30 days due to stress. After an examination, Dr. Walters diagnoses generalized anxiety disorder.

Fall 2007

Stationed in Omaha, Nebraska, Mr. Rudolph works as a conductor and assistant conductor on Amtrak's California Zephyr passenger train on a 500 mile route segment between Omaha and Chicago, Illinois. Mr. Rudolph makes the round trip between Omaha and Chicago twice a week. The train usually leaves Omaha around 5:00 a.m. and arrives in Chicago in the mid-afternoon. Since the tracks between Omaha and Chicago are owned by BNSF, the movement of Amtrak passenger trains over this route is controlled by the BNSF dispatcher. As a passenger conductor, Mr. Rudolph is responsible for the movement and safe operation of the train and the conduct of the operating and on-board crews. He must maintain continual supervision of the crews for compliance with safety requirements, assist passengers boarding and detrainning, and adhere to Amtrak service standards. His position as a passenger conductor also requires the ability to be flexible and the capacity to handle and cope with delayed trains and long hours away from home.

Title 49 U.S.C. § 21103(a)(2)<sup>10</sup> states that a rail carrier and its officers and agents may not require an employee to remain on duty after that employee has been on duty for 12 consecutive hours. According to 49 U.S.C. §§ 21103(b)(1) and (2), time on duty begins when an employee reports to work and ends when the employee is finally released from duty; the time an employee is engaged in, or connected with, the movement of a train is time on duty. Under certain situations, 49 U.S.C. § 21103(b)(7) provides that an interim period of rest of at least four hours at a place with suitable facilities for food and lodging is not time on duty. Finally, 49 U.S.C. § 21103(c) allows a train employee to work up to an additional four hours when an emergency exists.

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<sup>10</sup>I take judicial notice of 49 U.S.C. § 21103.



Amtrak's GCOR (general core operating rules) 1.2.5 requires an employee to immediately report all cases of personal injury while on-duty. Rule 1.7 states that employees must not enter into altercations with each other while on duty or on railroad property. Rule 1.17 requires employees to comply with the federal hours of service law. An employee must notify the train dispatcher or another authority of the time the law requires him to be off-duty with a sufficient amount of time to ensure he may be relieved before exceeding the hours of service. "Employees must not exceed the hours of service law without proper authority." Rule 1.44 indicates that "train dispatchers supervise train movement and any employees connected with that movement." Under Rule 1.47, "the conductor and the engineer are responsible for the safety and protection of their train." The conductor "supervises the operation and administration of the train." When a conductor is not present, "other crew members must obey the instructions of the engineer concerning rules, safety, and protection of the train."

Amtrak's workplace violence policy is zero tolerance for threats and violence. The company expresses a commitment to effectively respond to workplace violence incidents.

Amtrak employee's collective bargaining agreement provides that the minimum crew requirement for a passenger train with two to six revenue passenger cars is a passenger conductor and an assistant passenger conductor.

December 28, 2007

Mr. Rudolph's return trip from Chicago is significantly delayed and he is put on a mandatory four hour rest period. After Mr. Graziosi directs the crew to rest in the terminal lounge, Mr. Rudolph objects on the basis that a four hour "cut" entitles the train crew to hotel accommodations. When Mr. Graziosi disagrees, they engaged in a loud and animated confrontation that moves from the hall into Mr. Graziosi's office. As they enter the office, Mr. Graziosi indicates he wished Mr. Rudolph was not in uniform. Mr. Rudolph then asks the witnesses if they heard Mr. Graziosi threaten him. When Amtrak police arrive, Mr. Rudolph and Mr. Graziosi claim the other person was threatening him. Mr. Rudolph reports the exchange to Amtrak as a workplace violence incident.

January 10, 2008

During an administrative test in Chicago, Mr. Rudolph sits next to Mr. Graziosi who snickers at him. Concerned, Mr. Rudolph leaves and takes the test in another room. He also reports the incident to Amtrak.

January 11, 2008

Mr. Rudolph goes off work due to stress associated with this two confrontations with Mr. Graziosi.

January 14, 2008

Dr. Walters recommends that Mr. Rudolph be off work due to increased anxiety that is impairing his concentration. She opines the December 2007 workplace incident partly exacerbated his condition. Mr. Rudolph sends Dr. Walters' letter to Mr. Israelson.

March 19, 2008

Mr. Rudolph asks Amtrak's Office of Inspector General to conduct a compliance review of workplace violence incidents and harassment. In particular, he highlights the December 2007 and January 2008 incidents with Mr. Graziosi.

March 27, 2008

Mr. Rudolph applies for sickness benefits, effective January 11, 2008, due to being injured or sick on December 28, 2007.

March 28, 2008

Based on four visits, Dr. Walters diagnoses generalized anxiety disorder.

April – May 2008

Mr. Rudolph began the medical paperwork with Dr. Sedlacek to return to work. He advises Dr. Sedlacek of his intention to return to work and Dr. Sedlacek approves a return to work clearance form which Mr. Rudolph submitted to Amtrak.<sup>11</sup>

May 2008

Mr. Rudolph requests ADA accommodations based on his anxiety illness which involved Amtrak's failure to comply with their union agreement to fully staff trains with two conductors, except for three or four sections on the route where he agreed to work by himself (CX 22).

May 24, 2008

Mr. Rudolph sends a letter to Amtrak indicating that he intends to return to work on June 2, 2008. Based on his medical record, he believes that he has a disability covered by the ADA and request several "accommodations," including not being forced to work alone except on a few route segments, compensation for schedule changes to ensure that he is not working alone, pre-approval to mark off ill at anytime due to unanticipated health episodes, and reasonable time to complete red pre-trip duties "without being rushed."

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<sup>11</sup>Mr. Rudolph claims that Dr. Sedlacek imposed some restrictions on his return to work due to stress associated with the incidents with Mr. Graziosi. However, the clearance form for Mr. Rudolph's return to work in June 2008 is not in the record. The first document in the evidentiary record addressing any work restrictions is Dr. Sedlacek's July 22, 2008 regarding the requested accommodations.

June 6, 2008

Mr. Rudolph returns to work as an Amtrak passenger conductor.

July 11, 2008

Amtrak's ADA Panel denies Mr. Rudolph request for accommodations on the basis of inadequate medical information to support the request. The panel also determines that his requested accommodations are incompatible with his duties.

July 19, 2008

Mr. Rudolph sends Mr. Krueger a letter regarding his continued concern about Mr. Graziosi's presence in the Chicago Union Station, CX 23.

Morning: Due to the train running late, Mr. Rudolph's 5:00 a.m. report time is first pushed back to 10:45 a.m. When Mr. Rudolph checks with the Amtrak crew caller, his start time is pushed back further to 1:00 p.m.

11:45 a.m.: Since she was not given a second setback, Ms. Mary Cannon reports to work as the conductor on Train #6. Based on the federal hours of service requirement, Ms. Cannon has to go off-duty 12 hours later at 11:45 p.m.

1:00 p.m.: Mr. Rudolph reports to work as the assistant conductor on Train #6 to Chicago. Based on the federal hours of service requirement, Mr. Rudolph has to go off duty 12 hours later, at 1:00 a.m., July 20th. Usually, the route from Omaha to Chicago takes 10 hours and 40 minutes.

Between 9:00 and 10:00 p.m.: In the middle of Iowa, due to delays associated with rail traffic, Mr. Rudolph concludes that he will not have enough hours of service to reach Chicago. He asks Ms. Cannon whether she has advised the Amtrak crew dispatcher over the company cell phone about his hours of service problem. Ms. Cannon confirms that she contacted the crew dispatcher.

Around 10:55 p.m.: In Galesburg, Mr. Beary notifies the BNSF dispatcher by radio that he and Mr. Rudolph will go dead in Naperville. Just after the train leaves Galesburg, Ms. Cannon contacts CMS and asks whether a relief crew will be available at Naperville since the train is just leaving Galesburg and won't reach Chicago till between 2 and 1/2 and 3 hours later (1:25 to 1:55 a.m., July 20th). CMS contacts the crew dispatcher who indicates no relief conductor is coming. CMS tells Ms. Cannon that they will check with BNSF on what's going on and call back.

Sometime between 10:55 p.m. and 11:45 p.m.: Ms. Cannon tells Mr. Rudolph that no relief crew will be in Naperville and that CNOC has told her to tell him to just take the train into Chicago. Mr. Rudolph objects that the situation will cause him to violate the hours of service.

11:45 p.m.: Ms. Cannon's 12 hours of service expires and she goes dead, riding on the train the rest of the trip off-duty. Mr. Rudolph assumes her passenger conductor responsibilities.

July 20, 2008

12:04 a.m. and 12:08: Mr. Rudolph calls Mr. Krueger to tell that he will run out of hours at Naperville at 1:00 a.m. and while a relief engineer is coming, CNOC has indicated that no relief conductor will be provided and that he should just take the train out of Naperville into Chicago. Mr. Rudolph says if they want him to violate the hours of service, the BNSF dispatcher is going to have to tell him to do that. He asks Mr. Krueger for help in getting a relief conductor. Mr. Krueger advises that he'll check with CMS and get back to Mr. Rudolph.

Around 12:13 a.m., Mr. Krueger calls CMS and notes that Mr. Rudolph says he is going dead at Naperville and they don't have a relief crew. The CMS employee tells Mr. Krueger they have a relief engineer but can't find a conductor. She adds that BNSF indicates the conductor can operate the train from Naperville to Chicago by himself. In response, Mr. Krueger asks about what happens if there's a medical emergency in the back of the train. The CMS employee responds that they were looking for a conductor but have not had any luck. Mr. Krueger states that he'll call back.

12:39 a.m.: Mr. Krueger informs Mr. Savoy by e-mail that Mr. Rudolph is about to go dead at Naperville. Although CMS had Mr. Campbell as a relief engineer, no relief conductor is available. He notes that Mr. Rudolph says he would have to violate the hours of service to leave Naperville. Mr. Krueger doesn't understand "why CMS thought that this was the proper way to protect Train #6 into CHI (Chicago)."

12:50 a.m.: Mr. Rudolph and the BNSF dispatcher have difficulty establishing clear two-way radio communications. Acting as an intermediary, Mr. Beary, the train engineer, relays their exchanges. Mr. Rudolph states that he understands there is no relief conductor and "by ensuring the doors are closed and highballing the train, I will be in violation of the federal hours of service law." Mr. Beary repeats to the BNSF dispatcher, "my conductor, Mr. Rudolph, goes dead at 1 o'clock." Mr. Beary continues, noting that when they get into Naperville, "it's gonna be real close there, and highballing the train and making sure all the passengers detrain and the doors are closed, he believes that he'll be in violation of the hours of service." The BNSF dispatcher replies, "Alright, roger."<sup>12</sup>

12:52:56 a.m.: Mr. Beary radios Mr. Rudolph and says, "Butch, he did say 'alright,' that's all he said." Next, the BNSF dispatcher calls Train #6 and asks, "your conductor's hours of service is 01:00 (1:00 a.m.)?" Mr. Beary responds, "that's correct." Indicating that he can now hear the dispatcher loud and clear, Mr. Rudolph tells the BNSF dispatcher, "I've been told

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<sup>12</sup>Although Mr. Rudolph and Mr. Beary testified that they heard the BNSF dispatcher reply "okay," the taped radio conversations, CX 92, do not contain an "okay" from the BNSF dispatcher. Mr. Rudolph believes the radio tape may have been edited. However, upon listening to the BNSF communications and considering that entire exchanges between the parties, I believe Mr. Rudolph and Mr. Beary are recalling the BNSF dispatcher's actual reply of "alright," as "okay."

to take the train out of Naperville and I want to let it be known that I believe that I will be violating the federal hours of service laws.”

12:53:58 a.m.: Mr. Beary advises Mr. Rudolph that its raining “pretty good” and he may stop short to pick up Mr. Campbell.

12:57 a.m.: Mr. Krueger advises Mr. Rudolph that there is not a relief conductor available. When Mr. Rudolph replies that Mr. Krueger will have to order him to violate his hours of service, Mr. Krueger states that he will not order him to violate his hours of service.

A few minutes past 1:00 a.m.: Mr. Rudolph tells the relief engineer, Mr. Campbell, to pull out of Naperville.

1:03 a.m.: Mr. Krueger provides Mr. Israelson by e-mail, the following hours of service times: Mr. Beary – 01:00 (1:00 a.m.); Mr. Rudolph – 01:00 (1:00 a.m.); and, Ms. Cannon – 23:45 (11:45 p.m.).

1:11 a.m.: Mr. Rudolph places a one minute call to Amtrak station services.

1:13 a.m.: Mr. Krueger calls Mr. Rudolph and tells him that Mr. Israelson has arranged to have a Chicago yard relief crew come out.

1:19 a.m.: Mr. Rudolph places another call to the Chicago station services and asks for assistance unloading the train.

A few minutes before arriving at Union Station, Mr. Rudolph directs Mr. Campbell to stop the train at Union Avenue to pick up a relief conductor. However, no relief conductor is present.

Sometime between 1:30 and 1:43 a.m.: The California Zephyr arrives at Chicago’s Union Station.

About 1:48 a.m.: Mr. Rudolph completes a train delay report, faxes the report to Mr. Krueger and Amtrak. He also completes his Amtrak employee hours of service record and annotates that he began service in Omaha at 13:00 (1:00 p.m.) on July 19, 2008 and ended his service in Chicago at 01:48 (1:48 a.m.) on July 20, 2008 for total of 12 hours and 48 minutes on duty. He then adds, “7/20/2008, Forced to violate FRA Hour of Service Law.”

2:30 a.m.: Mr. Rudolph arrives at his hotel.

Mid-morning: Due to stress associated with the hours of service violation, Mr. Rudolph advises Mr. Krueger that he is going off-duty due to sickness.

Late morning: Mr. Anderson meets Mr. Rudolph at the train station. Mr. Rudolph completes an injury report claiming an accident-related injury associated with his being told the night before by CNOC that no relief crew would be available at Naperville. Being forced to choose between being insubordinate and violating the hours of service rules caused high levels of anxiety and stress. Mr. Anderson conducts a question and answer interview. Mr. Rudolph indicates that due to his stress, his replies may not be reliable. Mr. Anderson then escorts Mr. Rudolph to the hospital for an evaluation. Upon physical examination, a hospital physician diagnoses acute anxiety due to a disagreement with a superior. The physician determines Mr. Rudolph is unable to return to work until evaluated by a primary care physician within two to three days.

#### July 21, 2008

Prior to returning to Omaha, Mr. Rudolph makes an appointment to see his doctor on August 12, 2008.

While waiting to dead-head back to Omaha, Mr. Rudolph encounters Mr. Israelson and they discuss his reported injury/illness. Mr. Israelson states that it would not look good if Mr. Rudolph reported an on-duty injury every time he felt stressed.

#### July 22, 2008

Dr. Sedlacek prepares a letter for Amtrak noting his standing diagnosis of generalized anxiety disorder for Mr. Rudolph which at times can become “quite severe” and interfere with his ability to handle excessive and sudden stress. Dr. Sedlacek noted that as a result Mr. Rudolph had requested several accommodations, including working with a trained associate, having a reasonable amount of time to complete pre-trip duties, and being able to take leave in situations when he can not cope to avoid exacerbation of this condition. While doubting such situations would occur, Dr. Sedlacek agreed the ability to leave would help reduce Mr. Rudolph’s anxiety.

Mr. Rudolph writes a statement about what happened on July 19 and 20, 2008. Mr. Rudolph states that CNOC relayed through Ms. Cannon that a relief conductor would not be provided and he should just take the train into Chicago, which he considered an hour of service violation. When he contacted his supervisor, Mr. Krueger twice told him to take the train into Chicago but refused to order him to violate the hours of service. Mr. Rudolph claims Amtrak forced him to chose between violating the hours of service and insubordination. The incident exacerbated his existing condition.

Sometime after July 22, 2008

Mr. Rudolph appeals the ADA panel's denial of his accommodation requests and submits Dr. Walters' 2006 assessment and Dr. Sedlacek's July 22, 2008 letter in support.

July 28, 2008

Amtrak Health Services directs Mr. Rudolph to provide sufficient medical documentation to support his recent absence from work within 10 days.

August 1, 2008

Mr. Rudolph sends Mr. Krueger his July 22, 2008 statement to report his personal injury and notes that GCOR require him to comply with manager instructions and not be insubordinate, CX 26. He also alleges that Amtrak permits CMS to maintain a substandard system and Amtrak forced him to violate the hours of service.

Mr. Rudolph also applies for sickness benefits.

August 4, 2008

In preparation for an hours of service violation report, Mr. Krueger asks his supervisor, Mr. Israelson, whether the incident with Mr. Rudolph will be considered an hours of service violation. In response, Mr. Israelson asks whether Mr. Rudolph is claiming he violated his hours of service. "If so, we need to charge him because he was never ordered by anyone to violate the hours of service."

August 6, 2008

Since the collective bargaining agreement had a 10 day time period for charging an employee, Mr. Krueger asks Mr. Israelson, "How do we charge him within the time limits?" Mr. Israelson answers, "That would be first knowledge that he claims he performed service." Mr. Krueger responds that he does not understand what Mr. Israelson is saying about first knowledge but "will write up the charges accordingly." Mr. Israelson then asks, "Is he claiming a violation?" Mr. Krueger replies, "He did in his letters or statements." When Mr. Israelson asks, "What did he enter in the PTT?" Mr. Krueger sends an attachment.

August 7, 2008

8:13 a.m.: Mr. Krueger informs Ms. Flinner that Mr. Rudolph violated the hours of service on July 20, 2008 at 0100 (1:00 a.m.) “without being instructed to do so.”

8:37 a.m.: Mr. Israelson asks Mr. Krueger whether Mr. Rudolph was stating he performed service or that he was just on the train.

8:39 a.m.: Mr. Krueger responds that the PTT shows he performed service.

Sometime before 8:45 a.m.: Mr. Israelson directs Mr. Krueger to contact Mr. Rudolph to determine whether he performed service into Chicago after 1:00 a.m.

At 8:45 a.m.: Mr. Krueger telephones Mr. Rudolph and they engage in a 47 minute long conversation about their phone conversation just before 1:00 a.m. on July 20, 2008. Mr. Krueger indicates that he is being directed to prepare charges if Mr. Rudolph performed service from Naperville into Chicago. After indicating that Mr. Krueger did not tell him to violate the hours of service, Mr. Rudolph asserts that Mr. Krueger twice told him to take the train into Chicago. Mr. Krueger asserts that he did not tell Mr. Rudolph to take the train into Chicago from Naperville. They repeatedly assert to each other their respective versions of the July 20th conversation.

At 9:48 a.m.; Mr. Krueger advises Mr. Israelson that he just had a long conversation with Mr. Rudolph. Mr. Rudolph believes Mr. Krueger told him to take the train into Chicago. Mr. Krueger explained that he could not direct Mr. Rudolph to do that without first obtaining permission from Mr. Israelson. Instead, “I told him not to violate the hours of service.” According to Mr. Krueger, Mr. Rudolph agrees that he did not tell him to violate the hours of service but still thinks Mr. Krueger directed him to take the train into Chicago. Mr. Krueger believes someone in CMS or CNOC told him to do that and “he got it mixed up with our conversation.” Mr. Rudolph continued to insist that he performed service.

10:03 a.m.: Mr. Israelson instructs Mr. Krueger to work on charges.

10:05 a.m.: Mr. Krueger responds, “I have already made the request.”

Later in the day: Mr. Rudolph prepares a statement chronicling his conversation with Mr. Krueger. He also sends a complaint to the FRA about his forced hours of service violation.

August 8, 2008

Mr. Krueger finishes preparing, and Mr. Dudley signs, a Notice of Investigation to Mr. Rudolph advising him that an investigation will be conducted into the charge that he violated GCOR Rule 1.17, exceeding the hours of service, by directing a train’s movement to Chicago and performing service after 1:01 a.m. on June 20, 2008, without proper authority. The notice is sent to Mr. Rudolph, who receives the notice a couple days later.



August 11, 2008

Mr. Rudolph sees Dr. Sedlacek one day early. Mr. Rudolph tells Dr. Sedlacek that he didn't feel like returning to work at the time because he thought he was going to be fired. Dr. Sedlacek authorizes some time off.

August 13, 2008

Based on the August 11, 2008 visit, Dr. Sedlacek completes an Amtrak Health Services,<sup>13</sup> Statement of Disability form for Mr. Rudolph. Dr. Sedlacek indicates that Mr. Rudolph was totally, temporarily, disabled from July 20, 2008 to September 2, 2008 due to severe anxiety. His current status was "very overwhelmed, anxious, fearful," with "low stress tolerance," and exacerbated by recent conflict at work when he was asked to violate safety rules by extending his hours of service beyond 12 hours. Dr. Sedlacek's opines that Mr. Rudolph's mental limitation would interfere with his work because "currently" he was "too anxious and overwhelmed to focus and concentrate sufficiently." Dr. Sedlacek provides an anticipated date of recovery of September 2, 2008.

August 25, 2008

Referencing his August 13, 2008 Statement of Disability, Dr. Sedlacek indicates that Mr. Rudolph has stabilized as of August 21, 2008 to return to work and no longer had a mental limitation that would interfere with his work. Mr. Rudolph was capable of performing his job with previously listed restrictions.

Mr. Rudolph advises the Railroad Retirement Board of his change in status. Consequently, his sickness benefits stop.

August 29, 2008

Mr. Rudolph submits a formal complaint to Amtrak's Dispute Resolution Office regarding in part retaliation for reporting an FRA violation.

Mr. Rudolph calls Amtrak Health Services in Philadelphia about Dr. Sedlacek's recommendation and his return to work.

September 4, 2008

Mr. Rudolph again calls Amtrak Health Services about his return to work.

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<sup>13</sup>Added on remand.

September 9, 2008

Dr. Pinsky discusses Mr. Rudolph's case with the ADA panel. At that time, legal counsel advised that if Mr. Rudolph requests return to work without any restrictions, he would need a return to work psychiatric examination. If his request has restrictions, then he would be medically disqualified since they have previously determined based on conversations with Mr. Rudolph's supervisors that his requests are not compatible with his job.

Early afternoon: Dr. Sedlacek responds to a clarification request from "Ann"<sup>14</sup> about his "regular duty" annotation on a form with a note to indicate that as of August 21, 2008 Mr. Rudolph was released to full time duties, "restricted to train operations that do not violate FRA regulations or compromise safety."

September 12, 2008

Mr. Rudolph sends a more detailed letter to Amtrak's Dispute Resolution Office setting out in part his hours of service situation on July 20th.

Amtrak's ADA Panel denies Mr. Rudolph's appeal of their denial of his request for ADA accommodation.

September 18, 2008

Mr. Rudolph calls Amtrak Health Services about his return to work.

A Railroad Retirement Board representative advises that if the Medical Department is keeping Mr. Rudolph out of work then a form needs to be completed promptly to permit the continuation of benefits.

Mid-afternoon: In response to Mr. Rudolph's inquiry regarding his return to work, and based on the advise of legal counsel and the ambiguity of Dr. Sedlacek's recent correspondence, Dr. Pinsky calls Dr. Sedlacek. Dr. Sedlacek indicates that Mr. Rudolph is cleared to return to work without restrictions except for activities that would violate federal regulations. Mr. Rudolph could work his regular shift, handle job tasks, complete preparation work, and work alone if required, although Mr. Rudolph had told him a second conductor was required by law. Dr. Sedlacek volunteers that he has been writing what Mr. Rudolph requested he write in his correspondence to Amtrak.

Late afternoon: Dr. Pinsky discusses the case again with legal counsel. Counsel advises that a return to work psychiatric examination is appropriate due to supervisor concerns, including Mr. Rudolph's sudden marking off a train, and Mr. Israelson's expression of discomfort to Dr. Pinsky about permitting Mr. Rudolph back to work without a medical assessment. Counsel also advises Dr. Pinsky not to respond to Mr. Rudolph's inquiry.

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<sup>14</sup>Added on remand.

Based on medical documentation, concern that Mr. Rudolph due to his disorder may not be able some of the time to perform his job safely and properly, and Dr. Sedlacek's "conflicting" notes within a short period of time, Dr. Pinsky decides to refer Mr. Rudolph for an independent psychiatric evaluation. He directs that arrangements be made for the examination.

October 1, 2008

Mr. Rudolph sends an inquiry to Dr. Pinsky about his return to work status and notes that his sickness benefits have stopped since August 29, 2008.

October 2, 2008

The FRA advises the state director of the United Transportation Union of its determination that Amtrak had allowed or required an employee to violate 49 USC § 228 and § 21103 by not providing a relief crew on July 19, 2008 which caused the conductor to violate the hours of service. The FRA notes the conductor accurately recorded his excess service on the hours of duty record.

Amtrak advises Mr. Rudolph that he must undergo a return to work psychiatric evaluation by Dr. Wilson.

October 7, 2008

Dr. Pinsky advises Mr. Pesce that he has received a letter from Mr. Rudolph, noting that he had been determined ineligible for sickness benefits and asking for a statement indicating that he was being withheld from work. Dr. Pinsky indicates they are attempting to schedule an evaluation but the physician is out of town. He asks Mr. Pesce to let Mr. Rudolph know what is going on and to thank him for his patience. Subsequently, legal counsel advises not to respond to Mr. Rudolph's letter.

October 16, 2008

Dr. Wilson conducts a personal assessment of Mr. Rudolph. Mr. Rudolph relates an eight year history of developing chest and abdominal pains during periods of increased anxiety due to changes made by Amtrak that increased conductors' workload and responsibility. Citing increased hours, more frequent stops, and fewer train team workers, Mr. Rudolph states his work is "now unbelievably stressful." He finds the demands overwhelming and is concerned that he might be the cause of a tragic accident during a phase of poor concentration, distraction, or irritability. Mr. Rudolph also indicates that intimidation and threats by Mr. Graziosi and Mr. Krueger have contributed to his anxiety and Amtrak has not corrected that situation. He worries that if he returns to work he would not only be likely to make mistakes due to his anxiety but Amtrak management would also likely target him.

October 27, 2008

Dr. Wilson completes a return-to-work assessment of Mr. Rudolph. Based on his review of the medical, psychiatric, and work records, as well as his earlier personal assessment, Dr. Wilson concludes Mr. Rudolph is presently unable to work as an assistant conductor for Amtrak. Dr. Wilson opines that work-place stress caused a mixed syndrome of generalize anxiety disorder and panic attacks. While his symptoms were controlled, Mr. Rudolph's prognosis was poor due to his unresolved fear of what a return to work would entail, involving both increased demands at work and hostile supervisors. Dr. Wilson recommends corrective action in regards to the hostile environment as a step towards recovery. In Dr. Wilson's opinion, until the workplace issues were resolved, Mr. Rudolph is unable to perform his duties on a full time basis without restrictions or limitation.

November 3, 2008

Mr. Rudolph sends inquiry to the Amtrak Dispute Resolution Office requesting the results of their investigation into his complaints. He threatens litigation if he does not receive a response within 15 days.

November 5, 2008

Dr. Pinsky calls Dr. Wilson and asks him to clarify his opinion on Mr. Rudolph's ability to return to work from a medical perspective. Dr. Wilson opines that due to his condition, Mr. Rudolph is not capable of functioning in the workplace, even if the perceived workplace hostility and increased job demand issues were addressed. Based on that opinion, Dr. Pinsky concludes that Mr. Rudolph is medically unfit for duty and determines that he should be medically disqualified. Dr. Pinsky directs that Mr. Rudolph be notified of his decision. Several phone attempts were made unsuccessfully.

Dr. Pinsky also notifies the Railroad Retirement Board that Mr. Rudolph has been found medically unable to work and that his absence since August 11, 2008 was due to the need to clarify his condition.

Amtrak Health Services sends Mr. Rudolph a notice that based on the return to work evaluation, the Medical Director had medically disqualified Mr. Rudolph from his job as a conductor. Mr. Rudolph is given four options. First, he may submit medical documentation establishing that his condition has sufficiently improved to permit him to perform his work safely. Second, he could apply for permanent disability. Third, he could seek ADA accommodation. Fourth, Mr. Rudolph may seek an alternative Amtrak position.

November 8, 2008

Mr. Rudolph receives the notice of medical disqualification.

November 12, 2008

Mr. Rudolph sees Dr. Sedlacek.

November 20, 2008

Dr. Sedlacek sends a letter to Dr. Pinsky. Based on a recent office visit with Mr. Rudolph and being aware that Dr. Wilson opined he was not fit to return to work, Dr. Sedlacek advises that he found “no contraindications to him returning to the same position that he was medically cleared for and performed well at from early June 2008 until July 19, 2008, which was his last day of work.” Additionally, since Mr. Rudolph was not “disabled by any standard,” Dr. Sedlacek believes he should not apply for disability with the Railroad Retirement Board. Dr. Sedlacek requests a copy of Dr. Wilson’s psychiatric evaluation and recommendations to better understand” Dr. Wilson’s conclusions that he obtained “from his one hour assessment.” Dr. Sedlacek continues to maintain that Mr. Rudolph is capable of returning to his full-time duties as of August 21, 2008 provided his work was confined within his assigned hours.

Subsequently, Dr. Pinsky declines to release Dr. Wilson’s report.

January 12, 2009

Mr. Rudolph files a complaint under the FRS.

February 3, 2009

In response to the November 5, 2008 notice of medical disqualification, Mr. Rudolph takes exception to the first option that he provide medical documentation due to the lack of specificity. He notes that the exacerbation of his condition was caused by Mr. Graziosi, the insufficient response to his workplace violence complaint, Mr. Krueger’s falsifications, and Amtrak’s policy of circumventing company policies. Mr. Rudolph sought certification that these issue have been corrected “forever.”

April 14, 2009

Dr. Sedlacek advises that contrary to his November 20, 2008 assessment, Mr. Rudolph is no longer able to return to work for Amtrak due to the elapsed time and fear of retaliation for his whistleblower activities. In his opinion, under the present circumstances, due to his excessive emotional stress, an expectation that Mr. Rudolph could return to work is unrealistic.

June 2009

The Railroad Retirement Board (“RRB”) concludes Mr. Rudolph qualifies for a disability annuity, effective May 1, 2009.

September 25, 2009

While not in Mr. Rudolph's best interests due to the likelihood of exacerbation, Dr. Sedlacek opines that Mr. Rudolph is now capable of returning to work when his employment issue have been resolved.

December 3, 2009

Dr. Sedlacek concludes that Mr. Rudolph is willing and able to return to work.

February 19, 2010

An Amtrak senior analyst indicates that a conductor should take a train to its final destination without a relief conductor only if ordered to do so.

### **Adjudication Principles**

Under 49 U.S.C. § 20109(d)(2)(A)(i), in determining whether an employee is entitled to relief under the whistleblower protection provisions of the FRS, the burdens of proof established under AIR 21 are applicable. Specifically, according to 49 U.S.C. § 42121(b)(2)(B)(ii) and (iv), and 29 C.F.R. § 1982.109(a) and (b), a determination that a violation has occurred may be made only if the complainant establishes by preponderance of the evidence that a protected activity was a contributing factor in the alleged adverse action (emphasis added);<sup>15</sup> however, in that situation, relief may not be granted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

### **Protected Activities**

As previously set out in my initial decision and order, the FRS protects an employee who engages in numerous activities, which fall into three categories. First, the general provisions of 49 U.S.C. § 20109(a) and 29 C.F.R. § 1982.102(b)(1) protect an employee who: (1) provides information to Federal, State, or local regulatory and enforcement agencies, a member of Congress, or a supervisory authority regarding any conduct which he reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, (2) refuses to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security, (3) files an FRS complaint or participates in a FRS proceeding, (4) notifies the railroad carrier or Secretary of Transportation of a work-related personal injury or illness, (5) cooperates with a safety or security investigation, (6) furnishes information to Federal, State, or local authorities relating to any railroad transportation accident resulting in injury or death, or damage to property, and (7) accurately reports hours on duty pursuant to chapter 211.

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<sup>15</sup>Although the ARB indicated that proof of causation, or contributing factor, is "not a demanding standard," I note that the statute nevertheless states the applicable evidentiary burden for a complainant is the preponderance of the evidence.

Second, 49 U.S.C. § 20109(b) and 29 C.F.R. § 1982.102(b)(2) provide protection for an employee who reasonably refuses to work when confronted with hazardous safety or security conditions related to the performance of his duties or refuses to authorize use of equipment, track or structures in hazardous safety or security conditions. Under this provision, railroad security personnel are also protected when reporting a hazardous safety or security condition.

Third, 49 U.S.C. § 20109(c)(2) and 29 C.F.R. § 1982.102(b)(3) protect an employee who requests medical or first aid treatment or follows orders or a treatment plan of a treating physician. However, a railroad carrier's refusal to permit an employee to return to work following medical treatment is not considered a violation of this provision if the refusal is based on FRA's or a railroad carrier's medical standards for fitness for duty.

As previously noted the ARB affirmed my determination that Mr. Rudolph engaged in numerous FRS protected activities. In the early morning of July 20, 2008, August 1, 2008, August 7, 2008, August 29, 2008, and September 12, 2008, Mr. Rudolph reported a violation of federal law indicating that he had been forced to violate the hours of service limit (49 U.S.C. § 20109(a)(1)). On July 20, 2008, Mr. Rudolph also reported a work-related stress injury (49 U.S.C. § 20109(a)(4)). On August 7, 2008, by filing a complaint, Mr. Rudolph cooperated with a Federal Railway Administration ("FRA") investigation (49 U.S.C. § 20109(a)(5)). On July 20, 2008, Mr. Rudolph accurately reported his hours of service (49 U.S.C. § 20109(a)(7)). And, on August 25, September 4, and September 18, 2008, Mr. Rudolph attempted to return to work in accordance with a treatment plan (49 U.S.C. § 20109(c)(2)).

### **Adverse Actions**

The Board also affirmed my conclusions that Mr. Rudolph suffered several adverse actions. On August 7, 2008, Mr. Rudolph received a warning from his immediate supervisor that if Mr. Rudolph maintained that he actually performed service as shown by his previously completed personal time ticket ("PTT"), the supervisor would have to charge him for exceeding his hours of service without proper authority. On August 8, 2008, Mr. Rudolph received a Notice of Investigation that included a disciplinary charge that Mr. Rudolph had violated his hours of service. Between mid-August 2008 through the beginning of November 2009, Mr. Rudolph did not receive sickness benefits for 79 days. In the fall of 2008, Mr. Rudolph was required to undergo a psychiatric evaluation as a pre-condition for his return to work. On November 5, 2008, Mr. Rudolph was medically disqualified from service as a passenger conductor. And, after November 5, 2008, the Respondent refused to approve Mr. Rudolph's repeated requests to return to work.

### **Contributing Factor**

The ARB's central critique of my initial decision and order related to the requisite connective element between Mr. Rudolph's protected activities and the respondent's adverse actions. That is, whether Mr. Rudolph has proven that any of his protected activities was a contributing factor to any of the adverse actions.

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. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (Nov. 30 2006). This standard was intended to overrule prior case law which required a whistleblower to prove that his protected activity was a “significant, motivating, substantial, or predominant” factor in the adverse personnel action. *Allen v. Stewart Enterprises*, ARB No. 06-081, ALJ Nos. 2004-SOX-60, 2004-SOX-061, and 2004-SOX-062, slip op. at 17 (July 27, 2006). The complainant may meet this burden through the use of direct evidence which conclusively links the protected activity and adverse personnel action and does not rely on inference. *Speegle v. Stone & Webster Construction, Inc.* ARB No. 06-041, 2005-ERA-006, slip op. at 9 (Sept. 24, 2009); *see also Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4-5, (Jan. 20, 2008). Animus or anger towards the employee for engaging in a protected activity may constitute such direct evidence of discriminatory motive. *See Pillow v. Bechtel Constructions, Inc.*, 1987-ERA-035 (Sec’y July 19, 1993).

The complainant may also establish that his protected activity was contributing factor, indirectly through “circumstantial evidence.” *Speegle*, ARB No. 06-041, slip op. at 9. Circumstantial evidence of causation may be established if the employer’s stated reason for the action is determined to be pretext. *Id.*<sup>16</sup> In other words, it is proper to examine the legitimacy of an employer’s reasons for taking adverse personnel action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (Jan. 31, 2006). 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. *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (May 21, 2009). Such pretext may be shown through an employer’s shifting or contradictory explanations for the adverse personnel action. *Negron v. Viegues Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (Dec. 30, 2004), and *Hobby v. Georgia Power Co.* 1990-ERA-030, slip op. at 9 (Sec’y Aug. 4, 1995).

Other examples of circumstantial evidence which may demonstrate pretext or that a protected activity was a contributing factor include: temporary proximity between the protected activity and adverse personnel action, *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997); the magnitude of controversy leading up to the adverse personnel action generated by the protected activity, *Seater v. So. Cal. Edison Co.*, ARB No. 96-013, ALJ No. 1995-ERA-013, slip op. at 4 (Sept. 27, 1996); a supervisor’s disregard for safety procedures, *Nichols v. Bechtel Const. Co.* 1987-ERA-044, slip op. at 11 (Sec’y Oct. 26, 1992), *aff’d sub nom. Bechtel, supra*, 50 F.3d 926 (11th Cir. 1995); the disproportionate harshness of the unfavorable personnel action considering employee’s work record, *Overall v. TVA*, ARB Nos. 98-111 and 128, ALJ No. 1997-ERA-053, slip op. at 16-17 (Apr. 30, 2001), *aff’d TVA v. DOL*, 2003 WL 932433 (6th Cir. 2003); and disparate treatment between complainant and similarly situated employees who did not engage in protected activity, *Speegle*, ARB. No. 06-041, slip op. at 13.<sup>17</sup>

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<sup>16</sup>*See also Zinn v. University of Missouri*, 1993-ERA-34 and 36 (Sec’y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc.*, 1987-ERA-027 (Sec’y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 1986-ERA-032 (Sec’y Jun. 28, 1991); and *Darty v. Zack Co.*, 1980-ERA-002 (Sec’y Apr. 25, 1983).

<sup>17</sup>According to the ARB to satisfy the “similarly situated” requirement, a complainant must establish that the complainant and other employees are similarly situated in all relevant aspects.



Finally, as emphasized by the majority in this present remand, proof of motivation is not required. As a result, since a complainant need only establish that a protected activity either alone, “or in combination with other factors” affected “in anyway the employer’s decision or adverse action taken,” a complainant may still prevail even if the respondent also had a valid or legitimate reason for the adverse personnel action. Further, the ultimate decision-maker need not know of the protected activity “if it can be established that those advising the decision-maker” knew of the complainant’s protected activity.

### **Affirmative Defense**

In the event Mr. Rudolph satisfies his burden of proof in regards to the adverse personnel actions subject to reassessment (disciplinary charge, temporary loss of sick leave, psychiatric evaluation referral, medical discharge, and medical disqualification), I must also address the applicable affirmative defense. That is, whether Amtrak can demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

Further, regarding the third category of protected activity – requesting a return to work following a treatment plan of a treating physician – all three Board members agreed that I must reconsider whether the Respondent’s refusal to permit Mr. Rudolph’s return to work constituted discipline under 49 U.S.C. § 20109(c)(2). And, in the event the refusal constituted discipline, according to the majority of the ARB, I must consider the Respondent’s affirmative defense under the special rebuttal provision of 49 U.S.C. § 20109(c)(2).

## Causation and Affirmative Defense

With the above principles in mind, I will address the issues presented by the ARB's remand in three sections. I will first reconsider whether Mr. Rudolph has proven by a preponderance of the evidence that a protected activity was a contributing factor in the disciplinary charge; and if so, whether the Respondent is able to establish an affirmative defense. Next, I will similarly evaluate whether any or all of Mr. Rudolph's protected activities, other than his request to return to work, was a contributing factor in an adverse action; and, again if warranted, whether an affirmative defense is established. Finally, I will assess whether: a) Mr. Rudolph's request to return to work was a contributing factor in the adverse actions, b) Amtrak's refusal to permit his return to work was discipline, and c) the Respondent can establish an affirmative defense under 49 U.S.C. § 20109(c)(2).

### **Disciplinary Charge – August 7, 2008**

During the relevant time frame, Mr. Rudolph had engaged in the following protected activities: a) reporting on July 20, 2008 and August 1, 2008 a violation of federal law because he had been forced to violation the federal hours of service limits (49 U.S.C. § 20109(a)(1)); b) reporting on July 20, 2008 a work-related stress injury (49 U.S.C. § 20109(a)(4)); and c) accurately reporting his hours of service on July 20, 2008 (49 U.S.C. § 20109(a)(7)).

Around mid-morning, August 7, 2008, Mr. Israelson directed Mr. Krueger to prepare a disciplinary charge against Mr. Rudolph for violation of GCOR Rule 1.17 by exceeding the federal hours of service without proper authority.

### Contributing Factor

At a minimum, in light of the e-mail exchanges between Mr. Kruegar and Mr. Israelson on August 4, 2008, which included an attached copy of Mr. Rudolph's PTT for July 19-20, 2008, Mr. Israelson was aware that Mr. Rudolph had accurately reported his hours of service as from 1:00 p.m., July 19 to 01:48 a.m., July 20; and that he claimed he was forced to violate his hours of service. Additionally, on July 21, 2008, Mr. Israelson discussed with Mr. Rudolph the reported injury and indicated that it would not look good if Mr. Rudolph reported an on-duty injury every time he experienced stress.

While over the course of the next few days Mr. Israelson clearly focused on confirming whether Mr. Rudolph had performed service on the train past 1:00 a.m. and thus violated the federal hours of service,<sup>18</sup> he nevertheless was responding to Mr. Rudolph's protected activities on July 20, 2008 in regards to his hours of service report. As a result, I find Mr. Rudolph's

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<sup>18</sup>An investigation of an hours of service violation which begins with a disciplinary charge does not necessarily appear to be precluded by the FRS because 49 U.S.C. § 20109(a) requires that the complainant's protected action must be lawful and done in good faith. Although I have previously determined that Mr. Rudolph's hours of service complaint was objectively reasonable as a protected activity, D & O, p. 76, I note Mr. Israelson also had some evidence before him that Mr. Rudolph did not have authority to violate the hours of service on July 20, 2008, which in turn would warrant an investigation.

protected activities under 49 U.S.C. § 20109(a)(1) and (7) were contributing factors in Mr. Israelson's decision to direct a disciplinary charge be levied against Mr. Rudolph.

In regards to work-injury report, in considering the relevant probative weight of circumstantial evidence based on temporal proximity and Mr. Israelson's July 21, 2008 comment to Mr. Rudolph about his report of injury, with the specificity of the subsequent e-mail exchanges between Mr. Kruegar and Mr. Israelson which addressed only the hours of service violation report on July 20, 2008, I find Mr. Rudolph has not established by a preponderance of the probative evidence that his report of a work-related injury on July 20, 2008 was also a contributing factor in the subsequent disciplinary charge.

#### Affirmative Defense

Absent Mr. Rudolph's accurate log entry that he performed service 48 minutes beyond the federal hours of service limit on July 20, 2008 and his assertion that he had been forced to do so, Mr. Israelson would have had no need to confirm such a violation and there obviously would not have been a disciplinary charge alleging an hours of service violation. Consequently, Amtrak is unable to establish that in the absence Mr. Rudolph's hours of service protected activities Mr. Israelson still would have initiated a disciplinary charge.

#### Conclusion

Accordingly, Mr. Rudolph has proven that the disciplinary charge was a violation of the FRS whistleblower provisions.

#### **Hours of Service Protected Activities & Report of Work-Related Protected Activity**

From July 20 to August 7, 2008, Mr. Rudolph engaged in three protected activities related to his hours of service on July 20, 2008,<sup>19</sup> and reported a work-related injury, which is also a protected activity.

Between August and November 2008, Dr. Pinsky did not provide information from the Railroad Retirement Board regarding Mr. Rudolph's medical status which resulted in Mr. Rudolph's temporary loss of sick leave benefits for 79 days. On September 18, 2008, Dr. Pinsky directed that Mr. Rudolph be referred for a psychiatric examination. On November 5, 2008, Dr. Pinsky medically disqualified Mr. Rudolph. And, since November 5, 2008, Amtrak has refused to rehire Mr. Rudolph.

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<sup>19</sup>Mr. Rudolph reported a violation of federal law indicating that he had been forced to violate the hours of service limit (49 U.S.C. § 20109(a)(1)); filed a FRA complaint which initiated an investigation into the violation (49 U.S.C. § 20109(a)(5)); and accurately reported his hours of service (49 U.S.C. § 20109(a)(7)).

### Contributing Factor

As directed by two ARB members, I return to consideration of multiple factors in determining whether any of these four protected activities was a contributing factor in the adverse personnel actions.

Turning first to knowledge, Dr. Pinsky was obviously aware of Mr. Rudolph's reporting a work related injury. In terms of the other protected activities, as I previously determined, Dr. Pinsky was not actually aware of Mr. Rudolph's hours of service violations. Further, while the Amtrak legal department and legal counsel for the ADA panel, Ms. Rabin, provided advice to Dr. Pinsky's during this period, I find the record contains little, if any, probative evidence that they were actually aware of Mr. Rudolph's hours of service protected activities. On the other hand, at the beginning of September 2008, Dr. Pinsky had a conversation with Mr. Israelson, CX 61, who expressed concerns about Mr. Rudolph's suitability to work as a conductor. Since Mr. Israelson was clearly aware of Mr. Rudolph's hours of service violations, his knowledge is imputed to Dr. Pinsky. At the same time, imputed and direct knowledge of a protected activity does not standing alone establish that a protected activity was actually a contributing factor.

Next, as discussed in detail in the initial D & O, the preponderance of the evidence contains little probative evidence of Dr. Pinsky's hostility towards Mr. Rudolph or disparate treatment.

Finally, the close temporal proximity between Mr. Rudolph's four protected activities and the adverse actions provides some circumstantial evidence that a protected activity by Mr. Rudolph was a contributing factor. Yet, as set out below, the actual sequence of events that occurred significantly diminishes the probative force of such circumstantial evidence.

In August 2006, Dr. Walter evaluated Mr. Rudolph who presented with stress and declining memory complaints, and symptoms of abdominal and chest pain. During the evaluation, Mr. Rudolph reported that due to an overwhelming increase in workload, he had experienced increased stress which caused difficulty in keeping up with his work and ability to concentrate. His stress had been increasing since 1999 due to personnel reductions at Amtrak. Previously in 2001 and 2003, he was out of work about 30 days due to stress. Following an examination and some testing, Dr. Walters diagnosed generalized anxiety disorder. In addition to seeing a therapist for stress management and relaxation techniques, Mr. Rudolph agreed to medication. Dr. Walters also intended to complete paperwork to permit Mr. Rudolph to take intermittent leave.

In January 2008, due to work-related confrontations, Mr. Rudolph voluntarily left work and returned to Dr. Walters who recommended that Mr. Rudolph be off work due to increased and exacerbated anxiety that was impairing his concentration.

In March 2008, Mr. Rudolph applied for sickness benefits, effective January 11, 2008. In the same month, after four visits, Dr. Walters again diagnosed generalized anxiety disorder.

In May 2008, Mr. Rudolph advised Dr. Sedlacek of his intention to return to work and Dr. Sedlacek approved a return to work clearance form which Mr. Rudolph subsequently submitted to Amtrak. Mr. Rudolph also requested ADA accommodations based on his anxiety illness. Towards the end of the month, Mr. Rudolph sent a letter to Amtrak, indicating that he intended to return to work on June 2, 2008. He also stated that based on his medical record he had a disability covered by the ADA and request several "accommodations," including not being forced to work alone except on a few route segments, compensation for schedule changes to ensure that he is not working alone, pre-approval to mark off ill at anytime due to unanticipated health episodes, and reasonable time to complete pre-trip duties.

At the beginning of June 2008, Mr. Rudolph returned to work as an Amtrak passenger conductor.

On July 11, 2008, Amtrak's ADA Panel denied Mr. Rudolph request for accommodations on the basis of inadequate medical information to support the request. The panel also determined that his requested accommodations were incompatible with his duties.

On July 22, 2008, in support of Mr. Rudolph's request for ADA accommodations, Dr. Sedlacek prepared a letter for Amtrak indicating that his standing diagnosis was generalized anxiety disorder which at times could become "quite severe" and interfere with Mr. Rudolph's ability to handle excessive and sudden stress. Dr. Sedlacek noted that as a result Mr. Rudolph had requested several accommodations, including working with a trained associate, having a reasonable amount of time to complete pre-trip duties, and being able to take leave in situations when he can not cope to avoid exacerbation of this condition. While doubting such situations would occur, Dr. Sedlacek agreed the ability to leave would help reduce Mr. Rudolph's anxiety

Sometime after July 22, 2008, Mr. Rudolph appealed the denial of his ADA accommodation request and submitted Dr. Walters' August 2006 assessment and Dr. Sedlacek's July 22, 2008 letter supporting Mr. Rudolph's requested ADA accommodations.

On July 28, 2008, Amtrak Health Services requested sufficient medical documentation to support his voluntary absence from work.

On August 13, 2008, after Mr. Rudolph informed him two days earlier that he did not feel like returning to work, Dr. Sedlacek completed an Amtrak Health Services Statement of Disability, indicating Mr. Rudolph was totally, temporarily, disabled through September 2, 2008 due to severe anxiety. Dr. Sedlacek specifically noted that Mr. Rudolph was "too anxious and overwhelmed to focus and concentrate sufficiently," such that his mental limitations would interfere with his work.

On August 25, 2008, Dr. Sedlacek advised that as of August 21, 2008, Mr. Rudolph had stabilized and was capable of performing his job "with previously listed restrictions." As a result, Mr. Rudolph advises the Railroad Retirement Board of his change in status, which causes his sickness benefits to stop.

On August 29, 2008 Mr. Rudolph called Amtrak Health Services about Dr. Sedlacek's recommendation.

This sequence of events demonstrates that prior to any of the four protected activities Mr. Rudolph periodically had significant difficulty in regards to his ability to handle the increasing stresses associated with his job as an Amtrak conductor. Then, starting in the late spring of 2008 and into July and early August 2008, Mr. Rudolph initiated the personnel actions which directly involved his longstanding struggle with significant stress as an Amtrak conductor, and directly led to Dr. Pinsky's actions: he applied for ADA accommodation, appealed the denial of his ADA accommodation request, and requested sickness benefits after voluntarily leaving service. In support of these actions, Mr. Rudolph provided Dr. Walter's 2006 assessment and documentation from Dr. Sedlacek which established a diagnosis of generalized anxiety stress disorder which at times caused Mr. Rudolph to be unable to perform his duties. Further, as discussed in great detail in the initial decision and order, Dr. Sedlacek's conflicting notes and statements, as well as his admission that he was writing what Mr. Rudolph wanted him to write, raised significant questions about the reliability of Dr. Sedlacek's medical opinion. As a result, as stated by Dr. Pinsky, the medical documentation that Mr. Rudolph submitted led Dr. Pinsky to take actions causing a temporary loss of sickness benefits, refer Mr. Rudolph for a psychiatric evaluation, medically disqualify Mr. Rudolph based on Dr. Wilson's determination, and subsequently refuse his return to work.

In summary, Dr. Pinsky had actual and imputed knowledge of Mr. Rudolph's hours of service protected activities and his report of a work-related injury. Circumstantial evidence of causation based on temporal proximity is also present. However, the record contains significantly probative evidence that Mr. Rudolph's hours of service protected activities and his report of a work-related injury did not influence Dr. Pinsky's subsequent medical responses. That is, prior to any of these protected activities, Mr. Rudolph requested ADA accommodations due to a stress-related psychological disorder. Deeming the requested accommodations incompatible with Mr. Rudolph's train conductor duties, the ADA panel denied his request, and Mr. Rudolph appealed. In support of his appeal of the ADA panel's adverse decision, and also his request for sickness benefits, Mr. Rudolph submitted medical documentation which Dr. Pinsky concluded raised serious questions about Mr. Rudolph's ability to consistently handle his work-related stress, and warranted an independent psychiatric evaluation that eventually led to Mr. Rudolph's medical disqualification as Amtrak train conductor. Consequently, upon consideration of the sequence of events, and the medical documentation Mr. Rudolph submitted as part of the ADA proceedings, and for his sickness benefits, I find the preponderance of the probative evidence fails to establish that any of Mr. Rudolph's hours of service protected activities or his report of a work-related injury was not contributing factors in the adverse actions that he suffered.<sup>20</sup>

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<sup>20</sup>Since Mr. Rudolph has failed to meet his burden of proof, I need not address the affirmative defense regarding these four protected activities.

## **Return to Work Request Protected Activity**

By August 29, 2008,<sup>21</sup> Mr. Rudolph also engaged in a protected activity by attempting to return to work based on a physician's recommendation.

Once again, between August and November 2008, Dr. Pinsky did not provide information to the RRB regarding Mr. Rudolph's medical status which resulted in Mr. Rudolph's temporary loss of sick leave benefits for 79 days. On September 18, 2008, Dr. Pinsky directed that Mr. Rudolph be referred for a psychiatric examination. On November 5, 2008, Dr. Pinsky medically disqualified Mr. Rudolph. And, since November 5, 2008, Amtrak has refused to rehire Mr. Rudolph.

### Contributing Factor

As just discussed, in response to Mr. Rudolph's ADA accommodation request and appeal, as well as his application for sickness benefits, Dr. Pinsky was addressing significant health issues concerning Mr. Rudolph, making rational determinations, and taking reasonable medical measures to ensure Mr. Rudolph was medically fit to serve as an Amtrak conductor. Nevertheless, for several reasons, I find Mr. Rudolph's protected activity under 49 U.S.C. § 20109(c)(2) - requesting to return to work based on a physician's recommendation - was a contributing factor in Dr. Pinsky's determinations and subsequent actions.

First, Dr. Pinsky had actual knowledge of Mr. Rudolph's return to work request.

Second, the sequence of events in August and September 2008 demonstrates that while not the initial impetus for Dr. Pinsky's actions, Mr. Rudolph's request to return to work based on Dr. Sedlacek's recommendation became intertwined in Dr. Pinsky's process of deciding how to address the medical issues associated with Mr. Rudolph. Specifically, in support of Mr. Rudolph's effort to go back to work, Dr. Sedlacek indicated on August 25, 2008 that Mr. Rudolph had stabilized as of August 21, 2008, could return to work, and no longer had a mental limitation that would interfere with his work. On August 29 and September 4, 2008, Mr. Rudolph called Amtrak Health Services about Dr. Sedlacek's recommendation and his return to work. Then, significantly, during an ADA panel discussion on September 9, 2008, Dr. Pinsky discussed Mr. Rudolph's case and legal counsel opined that if Mr. Rudolph was seeking a return to work without restrictions, he needed a psychiatric examination. On September 18, 2008, Mr. Rudolph called Amtrak Health Services about his return to work. On the same day, Dr. Pinsky and legal counsel discussed whether a return to work psychiatric examination was appropriate. After that conversation, Dr. Pinsky referred Mr. Rudolph for a psychiatric examination.

Third, the immediate – same day – temporal proximity between Dr. Pinsky's second conversation with legal counsel about Mr. Rudolph's request to return to work and his decision to refer Mr. Rudolph for a psychiatric exam is particularly probative.

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<sup>21</sup>Mr. Rudolph contacted Amtrak Health Services about Dr. Sedlacek's recommendation and his return to work.

### Affirmative Defense

Due to the specific nature of the adverse actions that were caused in part by Mr. Rudolph's protected activity of requesting return to work based on a physician's recommendation, analysis of any applicable affirmative defense must be separate into two parts.

#### Loss of Sickness Benefits and Psychiatric Referral

In regards to the temporary loss of sick leave benefits and the psychiatric referral, according to 49 U.S.C. § 20109(d)(2)(A)(i), the AIR 21 affirmative defense is applicable. And, because of the apparent close relationship between Mr. Rudolph's multiple requests to return to work and Dr. Pinsky's process in addressing Mr. Rudolph's health issues and referring him for an evaluation, the Respondent is unable to demonstrate that absent Mr. Rudolph's requests to return to work that he would still have temporarily lost 79 days of sickness benefit and been referred for a psychiatric evaluation.

#### Medical Disqualification and Refusal to Return to Work

Because Mr. Rudolph's protected activity of requesting a return to work based on a physician's recommendation arises under 49 U.S.C. § 20109(c)(2), Amtrak has two available defenses to liability for its November 5, 2008 medical disqualification of Mr. Rudolph, which was essentially a denial of his August and September 2008 requests to return to work, and Amtrak's subsequent refusals to return him to work. These two defenses are a statutory exemption, and, according to the ARB majority, a unique affirmative defense under 49 U.S.C. § 20109(c)(2) instead of the AIR 21 affirmative defense.<sup>22</sup>

#### Statutory Exemption

According to 49 U.S.C. § 20109(c)(2), a respondent's refusal to permit an employee to return to work is not a violation of the FRS whistleblower provisions if the refusal is "pursuant to Federal Railroad Administration medical standards for fitness for duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty."

In my initial decision and order, after acknowledging the absence in the evidentiary record of applicable FRS or Amtrak fitness for duty standards, I nevertheless determined based on Mr. Rudolph's description of his job responsibilities, the Amtrak train conductor job position description, and the analyses of Dr. Walters and Dr. Wilson, that the Respondent's refusal to permit Mr. Rudolph to return to work based on Dr. Sedlacek's recommendation did not constitute a violation under 49 U.S.C. § 20109(c)(2). However, as previously noted, all three ARB members concluded that I misapplied the statutory exemption because the evidentiary record did not actually contain either the FRA medical standards for fitness for duty or, secondarily, Amtrak's medical standards for fitness for duty for Mr. Rudolph's job as a train conductor/assistant train conductor. Consequently, upon reconsideration, in the absence of the

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<sup>22</sup>The dissenting administrative appeals judge opined that the AIR 21 affirmative defense was applicable.



specific applicable fitness for duty standards in the evidentiary record, Amtrak's medical disqualification of Mr. Rudolph and its refusal to permit Mr. Rudolph to return to work in response to his request based on a physician's recommendation were violations of the FRS.

#### Affirmative Defense

According to the majority of the ARB, 49 U.S.C. § 20109(c)(2) also provides a special affirmative defense for refusing to permit a worker to return to work following medical treatment. Specifically, "[t]he employer must establish by clear and convincing evidence that its refusal to permit the return to work was based on the FRA medical standards for fitness of duty, or, absent those, the employer's fitness-for-duty standards." Again, under the majority's statutory interpretation, and due to the lack of fitness for duty standards in the record, Amtrak is unable to establish the special affirmation defense to a 49 U.S.C. § 20109(c)(2) violation.

#### Conclusion

Accordingly, Mr. Rudolph has proven that the temporary loss of sick leave benefits, psychiatric referral, his medical disqualification, and Amtrak's refusal to permit his return to work in response to his request based on Dr. Sedlacek's medical clearance were violations of the FRS whistleblower provisions.

#### Conclusions

Upon remand, I find:

a) In the absence of an effective affirmative defense, Mr. Rudolph's protected activities under 49 U.S.C. §§ 20109(a)(1) and (7) were contributing factors in Mr. Israelson's August 7, 2008 decision to direct a disciplinary charge be levied against Mr. Rudolph, which constitutes a violation of the FRS whistleblower provisions;

b) Mr. Rudolph's protected activities under 49 U.S.C. §§ 20109(a)(1), (4), (5), and (7) were not contributing factors in Mr. Rudolph's temporary loss of sick leave benefits, the psychiatric referral, his medical disqualification, and Amtrak's refusal to rehire him;

c) In the absence of an effective affirmative defense, Mr. Rudolph's protected activity under 49 U.S.C. § 20109(c)(2) was a contributing factor in the temporary loss of sickness benefits and his referral for a psychiatric evaluation, which constitute violations of the FRS whistleblower provisions; and,

d) In the absence of a statutory exemption, or an effective special affirmative defense, Mr. Rudolph's protected activity under 49 U.S.C. § 20109(c)(2) was a contributing factor in his medical disqualification, and Amtrak's refusal to rehire him, which constitute violations of the FRS whistleblower provisions.

## Remedies

Under 49 U.S.C. § 20109(d) and 29 C.F.R. § 1982.109(d)(1), an employee who prevails in an enforcement action under the FRS whistleblower protection provisions is entitled to all relief and affirmative action necessary to make the employee whole. These potential remedies include an order for the respondent to abate any violation, reinstatement with the same seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages the employee may have sustained, including litigation costs, expert witness fees, and reasonable attorney fees. Additional relief may include punitive damages up to \$250,000.

According to 29 C.F.R. § 1982.109(e), an order of reinstatement is effective immediately upon receipt of the order by the respondent. All other portions of an administrative law judge's decision shall be effective 10 business days after the date of the decision unless a timely petition for review is filed with the ARB.

## **Abatement**

Since a protected activity was a contributing factor in Mr. Israelson's decision to present a disciplinary charge against Mr. Rudolph, any pending proceedings regarding the August 7, 2008 disciplinary charge shall be terminated and the disciplinary charge shall be removed from Mr. Rudolph's employment record.

## **Reinstatement**

Reinstatement is considered to be the default or presumptive remedy under the Act. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990 ERA 30 (ARB Feb. 9, 2001). In the event reinstatement is not a viable remedy, then front pay may be warranted. *Id.*, ARB No. 98-166 at 8.

Since Amtrak was unable to provide a legal defense to its refusal to return Mr. Rudolph to work, Amtrak shall return Mr. Rudolph to work as an **employee** of Amtrak at his home station with the seniority status and pay that he would have had absent the FRS violations. Amtrak shall also restore all service months for retirement purposes, as well as associated company retirement contributions, that Mr. Rudolph would have accrued but for the FRS violations.

However, considering the extensive duration of this litigation and that Mr. Rudolph last worked as a train conductor in July 2008, Mr. Rudolph may not resume his duties as an Amtrak **train conductor/assistant train conductor** until the Amtrak Medical Department renders a determination that he meets the applicable physical and mental FRA medical standards for fitness of duty, or, absent those, Amtrak's fitness-for-duty standards for a train conductor/assistant train conductor. In order to partially effectuate that determination, within 60 days of this order, in addition to a physical examination, Amtrak shall provide an independent psychiatric evaluation which specifically addresses Mr. Rudolph's suitability for service as an Amtrak train conductor under the applicable FRA medical standards for fitness of duty, or, absent those, Amtrak's fitness-for-duty standards. In addition, Amtrak shall provide the same

FRA medical standards for fitness of duty, or, absent those, Amtrak's fitness-for-duty standards, to a mental health provider of Mr. Rudolph's choice for an assessment which Mr. Rudolph may present to the Amtrak Medical Department also within 60 days of this order for consideration.

Further, no earlier than 61 days, and no later than 90 days, of this order the Amtrak Medical Department shall render a fitness for duty determination. In the event Mr. Rudolph is deemed by the Amtrak Medical Department to be mentally and physically fit under FRA medical standards for fitness of duty, or, absent those, Amtrak's fitness-for-duty standards, he shall immediately be returned to duty as an Amtrak train conductor/assistant train conductor. In the event, Mr. Rudolph is unable to meet the applicable physical and mental FRA medical standards for fitness of duty, or, absent those, Amtrak's fitness-for-duty standards for an Amtrak train conductor/assistant train conductor, the reinstatement order shall terminate, Mr. Rudolph may be removed from service as an Amtrak employee, and the restorative relief on this remand will be limited to the other remedies set out below.<sup>23</sup>

### **Back Pay**

The purpose of back pay is to make a prevailing complainant whole by restoring the earnings he would have received but for the impermissible discrimination. *Blackburn v. Metric Constructors, Inc.*, 86 ERA 4 (Sec'y Oct. 30, 1991). Such an award should include associated losses such as interest, overtime, and increases in wages. *See Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002 ERA 30 (ARB Sept. 29, 2006); *Pillow v. Bechtel Constr. Inc.*, 87 ERA 35, slip op. at 14, (Sec'y July 19, 1993). In computing back pay, unrealistic accuracy is not required. *Johnson v. Bechtel Constr. Co.*, 95 ERA 11, slip op. at 2 (Sec'y Sept. 11, 1995). Any uncertainty should be resolved in favor of the complainant. *See Tipton*, ARB No. 04-147 at 9.

A respondent's liability ends when the employee's employment would have ended for reasons independent of any violation found. *Artrip v. EBASCO Ser., Inc.*, 89 ERA 23, slip op. at 4 (ARB Sept. 27, 1996). Unemployment compensation from a state agency is not deducted from a back pay award. *Williams v. TIW Fabrication & Machining, Inc.*, 88 SWD 3 (Sec'y June 24, 1992). However, if not based on a permanent disability, workers' compensation benefit payments covering lost wages may be deducted from a back pay award. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004 AIR 11 (ARB May 26, 2010).

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<sup>23</sup>In his January 2010 interrogatory answers, Mr. Rudolph claimed nearly \$1.3 million in front pay for lost wages through his retirement age (September 2024) in the event reinstatement is not an option. However, if Mr. Rudolph is no longer physically and mentally qualified to work as an Amtrak train conductor/assistant train conductor under the FRA medical standards for fitness of duty, or, absent those, Amtrak's fitness-for-duty standards, he is not eligible for front pay. *See Pope v. Transportation Service, Inc.*, 88-STA-8 (ALJ May 19, 1988), adopted (Sec'y Sept. 13, 1988) (complainant who is no longer qualified to work is not entitled to reinstatement; complainant had lost his driver's license).

Evidence that a complainant failed to mitigate his damages will reduce the amount of back pay. *West v. Systems Applications International*, 94 CAA 15 (Sec'y Apr. 19, 1995). At the same time, the respondent bears the burden of establishing a mitigation failure by showing substantially equivalent positions were available and the complainant failed to use reasonable diligence in seeking such positions. *Timmons v. Franklin Electric Corp.*, 1997 SWD 2 (ARB Dec. 1, 1998).

Finally, in order to make a complainant whole, prejudgment interest on back pay is awarded based on the interest rate for the underpayment of federal taxes, set out in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly. *Doyle v. Hydro Nuclear Servc.*, ARB Nos. 99-041, 99-042, and 00-12, ALJ No. 1989 ERA 22, slip op at 18-19 (ARB May 17, 2000).

In the absence of an effective definitional, or affirmative, defense, Mr. Rudolph's protected activity under 49 U.S.C. § 20109(c)(2) was a contributing factor in the temporary loss of sick leave benefits, psychiatric referral, medical disqualification, and Amtrak's refusal to rehire him. Since the later three adverse actions essentially lead to Mr. Rudolph being removed from his job as an Amtrak train conductor on November 5, 2008, restorative relief in the terms of back pay is warranted.<sup>24</sup> In determining back pay, I will use August 29, 2008 as the starting date for the calculation of back since that is when Mr. Rudolph first called Amtrak Health Services about his return to work based on Dr. Sedlacek's August 25, 2008 recommendation.

In his January 2010 interrogatory answers, Mr. Rudolph claimed lost wages from June 23, 2008 through December 27, 2009 in that amount of \$109,959.31. At the April 2010 hearing and in his closing brief, Complainant's counsel's asserted that Mr. Rudolph had so far suffered a loss of income of over \$105,000 due to the loss of his job as an Amtrak train conductor.

The calculation of the appropriate back pay in this case is at best an approximation due to the dearth of documentation concerning the actual loss of income due to these adverse actions.<sup>25</sup> In assessing the appropriate amount of back pay, I will consider the following factors.

According to Mr. Rudolph in his last full year of employment as an Amtrak train conductor, he earned \$73,000 based on an hourly rate of \$25.00. He would have continued earn that hourly rate through October 1, 2009, when his wages increased to \$30.00 an hour, which represents a 20% increase, and produces an annual income of \$87,600.

In terms of any offset, from August 29, 2008 through April 2009, Mr. Rudolph received approximately \$1,200 a month in sickness benefits, which I will treat as workers' compensation. Starting on May 1, 2009, he began to receive \$3,307.97 in disability benefits.<sup>26</sup> Also, after his

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<sup>24</sup>I will address any remedy for the temporary loss of sickness benefits in the compensatory/special damages discussion.

<sup>25</sup>At the same time, Mr. Rudolph's credible, and essentially un-refuted, testimony certainly provides some basis for a determination of back pay.

<sup>26</sup>The record does not establish that the payments were based on a permanent disability.

medical disqualification, Mr. Rudolph earned \$7,000 to \$8,000 through part-time work in about half of 2008 and part of 2009 until he quit the beginning of May 2009.

Mr. Rudolph also stated that his benefits, including disability benefits, would continue through December 2010. Yet, the record does not indicate whether Mr. Rudolph's disability benefits actually ceased at that time. As a result, the award of back pay beyond January 2011 will include a provision that Amtrak's yearly back pay liability will be offset by any non-permanent disability payments Mr. Rudolph received each year after December 2010.

Finally, Mr. Rudolph's testimony establishes that: a) he had the capacity to mitigate his damages by working part-time; and b) actually did so through the end of April 2009, earning between \$7,000 and \$8,000. However, Mr. Rudolph voluntarily stopped working part-time on May 1, 2009 when he started to receive disability benefits, which essentially represents a failure to mitigate his damages. Accordingly, Mr. Rudolph's back pay award will be offset by at least \$7,000 a year which represents the part-time employment income that he voluntarily relinquished.

In light of these factors, a separation of back pay into several time periods is necessary.

August 29, 2008 to September 30, 2009: During this period, Mr. Rudolph was expected to have earned about \$73,000 as a train conductor. At the same time, he received about eight months of sickness benefits at the rate of about \$1,200 a month, for a total of \$9,600. For the remaining four months, he received \$3,307.97 a month in disability benefits, or about \$13,231. And, through May 2009, he earned at least \$7,000 working part-time. These offsets total \$29,831.<sup>27</sup> Accordingly, the back pay award for this period is \$43,169.<sup>28</sup>

October 1, 2009 to December 31, 2009: Mr. Rudolph's annual earnings as a train conductor would have become \$87,600 at the start of this period, such that over the course of these three months he would have earned about \$21,900. As offset, he received three months of disability benefits, about \$9,912. And, about a fourth of his potential part-time earning capacity of \$7,000, or \$1,750, needs to be deducted. As a result, his back pay award for this three month period is \$10,238.<sup>29</sup>

2010: Mr. Rudolph's anticipated yearly wages are \$87,600. The applicable offsets are \$39,695 in disability benefits and \$7,000 in potential part-time earnings. The back pay award for this year is \$40,905.<sup>30</sup>

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<sup>27</sup>\$9,600 + \$13,231 + \$7,000.

<sup>28</sup>\$73,000 – (\$9,600 + \$13,231 + \$7,000).

<sup>29</sup>\$21,900 – (\$9,912 + \$1,750).

<sup>30</sup>\$87,600 – (\$39,695 + \$7,000).

January 2011, and continuing through reinstatement: Mr. Rudolph's yearly back pay award, after being offset by \$7,000 in potential part-time earnings, is \$80,600,<sup>31</sup> minus the amount of non-permanent disability benefits Mr. Rudolph may have received each year. Absent such disability benefits, his yearly back pay award is \$80,600.

In summary, Mr. Rudolph's back pay award is \$94,312,<sup>32</sup> plus the appropriate yearly amount for 2011, 2012, and 2013, at the yearly rate of \$80,600, minus the amount of non-permanent disability benefits he may have received each respective year, plus a pro-rated back pay award for 2014 till the date of reinstatement, based on a yearly rate of \$80,600, minus the amount of non-permanent disability benefits for this period.

### **Compensatory/Special Damages**

An employer who violates the FRS employee protection provision may also be held liable for compensatory damages associated with mental and emotional distress. To receive compensatory damages, a complainant must demonstrate both: 1) objective manifestation of distress, such as sleeplessness, anxiety, embarrassment, and depression, and b) a causal connection between a violation of the Act and the distress. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993 SWD 001, slip op. at 17 (ARB July 30, 199).

In the absence of an effective definitional, or affirmative, defense, Mr. Rudolph's protected activities under 49 U.S.C. §§ 20109(a)(1) and (7) were contributing factors to Mr. Kruegar's threat and the disciplinary charge. Similarly, his 49 U.S.C. § 20109(c)(2) protected activity was a contributing factor in the temporary loss of sick leave benefits, psychiatric referral, medical disqualification, and Amtrak's refusal to rehire him.

In his January 2010 interrogatory answers, Mr. Rudolph claimed \$500,000 in compensatory damages for emotional and mental damages. At the April 2010 hearing and in his closing brief, Complainant's counsel's requested \$325,000 in compensatory and punitive damages.

At the April 2010 hearing, due to the adverse actions which included a threat, disciplinary charge, loss of his regular income as a train conductor, temporary loss of sickness benefits, and a psychiatric evaluation referral, which caused his financial and personal life to be "turned upside down," Mr. Rudolph presented credible testimony that he suffered emotional distress, anxiety. His situation disrupted his sleep, interfered with his ability to eat, and eventually contributed to his divorce in November 2009. Such turmoil associated with the adverse actions in the case warrants a compensatory award. However, Mr. Rudolph did not present sufficient probative evidence to demonstrate that duration and severity of the mental anguish warranted his claimed compensatory damages of \$325,000 to \$500,000. Consequently, I approve an award of

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<sup>31</sup>\$87,600 - \$7,000.

<sup>32</sup>\$43,169 + \$10,239 + 40,905.

compensatory damages in the amount of \$25,000 for Mr. Rudolph's mental and emotional distress associated with the adverse actions in this case.

Regarding the temporary loss of sickness benefits for 79 days, Amtrak eventually paid Mr. Rudolph for those 79 days, and the above approved award of compensatory damages in part includes compensation for the stress he suffered until his sickness benefits were finally approved.

Finally, Mr. Rudolph seeks special damages in the amount of approximately \$48,000 for reimbursement of his 401K account upon which he had withdraw funds due to his loss of income as a train conductor. Since Mr. Rudolph will receive back pay for that lost income, he may restore his account with those proceeds.

### **Punitive Damages**

Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, 86-CAA-3/4/5 (Sec'y May 29, 1991). In determining whether punitive damages should be awarded, the supervisor's state of mind should be considered, as well as whether the employer acted with deliberate and reckless disregard for the complainant's rights. *Collins v. Village of Lynchburg, Ohio*, 2006-SDW-003 (ALJ May 8, 2007). On the other hand, since the decision to award punitive damages involves a discretionary moral judgment, mere indifference to the purposes of the employee protection provisions is not sufficient to establish the requisite state of mind. *Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-003 (ARB Sept. 29, 1998).

Based on the ARB's affirmation, the award of punitive damages in the amount of \$5,000 set out in the initial decision and order remains effective.

In January 2010 interrogatory answers, Mr. Rudolph indicated that he was seeking \$250,000 in punitive damage. At the April 2010 hearing and in his closing brief, Complainant's counsel's requested \$325,000 in compensatory and punitive damages based on "Amtrak's culture of retaliation and collusion among its various departments."

In regards to the FRS violations established in this remand, I do not find a sufficient basis for any additional award of punitive damages. As set out above, Mr. Rudolph's protected activities were a contributing factor in Mr. Israelson's decision to present a disciplinary charge regarding Mr. Rudolph's violation of his hours of service on July 20, 2008. Yet, Mr. Israelson also had a legitimate reason to present the charge and conduct an investigation because while Mr. Rudolph asserted he was forced to violate his hours of service, Mr. Kruegar maintained that Mr. Rudolph had proceeded past his hours of service without authority or permission. Consequently, within that context, I find Mr. Israelson's action in directing a disciplinary charge and investigation did not represent a wanton disregard for FRS employee protection rights.

Similarly, in assessing conflicting medical opinions and attempting to determine whether Mr. Rudolph retained the capacity to handle the significant stress associated with his work as an Amtrak train conductor, Dr. Pinsky's actions and final decision did not rise to the level of wanton disregard. Notably, Dr. Pinsky considered the assessments of Dr. Walters, Dr. Sedlacek,

and Dr. Wilson and specifically discussed Mr. Rudolph's case with Dr. Sedlacek and Dr. Wilson. His reliance on Dr. Wilson's well documented and reasoned medical opinion over Dr. Sedlacek's conflicting recommendations over a short period of time and Dr. Sedlacek's acknowledgement that he was writing what Mr. Rudolph requested, did not reflect reckless disregard for the FRS employee protection provisions.<sup>33</sup>

### **Attorney Fees and Litigation Costs**

Since I have determined an issue in favor of Mr. Rudolph, his counsel is entitled to attorney fees and the recoupment of litigation costs.

On June 19, 2013, Complainant's counsel submitted a motion for renewed consideration of attorney fees in the total amount of \$80,000, which reflected \$28,290.34 in attorneys fees associated with the remand, plus the \$57,440.00 incurred during the initial adjudication, minus \$5,730.00 due to duplication of effort. The attached petition also included an additional \$7.84 in litigation costs beyond the \$1,209.12 in litigation expenses which I approved in the May 11, 2009 supplemental decision and order, and the ARB affirmed in its April 25, 2013 remand of my supplemental decision and order.

Upon review of the renewed attorney fee petition, I noted numerous time charges for the period March 15, 2010 through April 25, 2013, while the Mr. Rudolph's case was before the ARB. Since I only have jurisdiction to address attorney fees incurred while a case is pending with the Office of Administrative Law Judges, Complainant's counsel may submit a revised attorney fee within 30 calendar days of this decision. Employer's counsel has 30 calendar days from receipt of such revised attorney fee petition to respond.

In light of the additional relief Mr. Rudolph has obtained during this remand, counsel should consider re-addressing the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

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<sup>33</sup>In their majority opinion, the ARB board members specifically criticized my failure to address Dr. Pinsky's refusal to share Dr. Wilson's report with Dr. Sedlacek, "making it virtually impossible for Dr. Sedlacek to provide a meaningful rebuttal to Dr. Wilson's evaluation . . ." Although a better practice for Dr. Pinsky may have been to let Dr. Sedlacek review Dr. Wilson's assessment, Dr. Pinsky's inaction did not diminish Dr. Wilson's well documented and reasoned analysis and findings. Likewise, it did not alter the nature of Dr. Sedlacek's previous terse and conflicting recommendations, or reduce the impact of his acknowledgment to Dr. Pinsky that he was presenting what Mr. Rudolph requested.



## **ORDER**

The FRS whistleblower complaint of Mr. Lawrence J. Rudolph is partially **APPROVED**.

In addition to the \$5,000 in punitive damages previously awarded and affirmed, the Respondent, National Railroad Passenger Corporation (Amtrak), shall:

- a) Terminate the investigative proceedings regarding the August 7, 2008 disciplinary charge, and remove the disciplinary charge from Mr. Rudolph's employment record;
- b) Reinstate Mr. Rudolph as previously specified;
- c) Pay back pay for the period August 29, 2008 through December 31, 2010 in amount of \$94,312.00, plus prejudgment interest based on the interest rate for the underpayment of federal taxes, set out in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly;
- d) Pay back pay for the period January 1, 2011 through the date of Mr. Rudolph's reinstatement, at a yearly rate of \$80,600 for 2011, 2012, and 2013, and a pro-rated rate for 2014 based on a yearly rate of \$80,600, minus the amount of non-permanent disability benefits Mr. Rudolph may have received each respective year, plus prejudgment interest based on the interest rate for the underpayment of federal taxes, set out in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly; and,
- e) Pay compensatory damages in the amount of \$25,000.

**SO ORDERED:**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: April 24, 2014  
Washington, DC

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).