



Issue Date: 14 March 2011

CASE NO.: 2009 FRS 15

In the Matter of
LAWRENCE J. RUDOLPH
Complainant

v.

NATIONAL RAILROAD PASSENGER CORP.
(AMTRAK)
Respondent

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

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

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –
PARTIAL APPROVAL OF COMPLAINT & PUNITIVE DAMAGES**

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,¹ and implemented by 29 C.F.R. Part 1982. In general, Section 20109 provides for employee protection from employer discrimination because an employee has engaged in a protected activity pertaining to railroad safety or security, has requested medical or first aid treatment, or has followed orders or a treatment plan of a treating physician.

Procedural Background

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.

¹Pub. 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.

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),² I conducted a hearing on April 6 and 7, 2010 in Omaha, Nebraska. My decision in this case is based on 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.

Complainant's Statement of the Case³

Mr. Rudolph has established by a preponderance of the evidence that he engaged in several protected activities, including filing a report with his supervisors that he was forced to violate the federal hours of service law, and that, in violation of the Act, the Employer retaliated through several adverse personnel actions.

On July 19 and 20, 2008, while serving as a assistant conductor on an AMTRAK train from Omaha to Chicago, Mr. Rudolph advised AMTRAK of his hours of service situation and requested a relief crew. Eventually, he was forced to chose between being insubordinate or violating the hours of service limitation. Specifically, when Mr. Rudolph advised his supervisor that he was not going to violate the hours of service with proper authority, the supervisor told him to take the train to Chicago. As a result, to get the train to its destination, Mr. Rudolph violated the hours of service with proper authority. This situation exacerbated Mr. Rudolph's anxiety disorder and he called in sick for the return trip.

In response, Mr. Rudolph suffered multiple adverse personnel actions, including threatened retaliation, a violation charge, unpaid suspension from work, denial of information, a required fitness for duty examination, and medical disqualification. Additionally, despite Mr. Rudolph's continued efforts to return to work, the Employer has refused to let Mr. Rudolph return to work on the purported basis that he was suffering from stress, anxiety and other mental issues; even though his physician indicated after two weeks that he was fine and fit for duty. Subsequently, AMTRAK determined Mr. Rudolph was not fit for duty. Although he has received some disability benefits, Mr. Rudolph has suffered a loss of income of over \$105,000. The testimony of other AMTRAK employees establishes that only Mr. Rudolph has been subjected to such undue scrutiny. Based on AMTRAK's culture of retaliation and collusion among its various departments, Mr. Rudolph also seeks three times his actual damages, \$325,000 in compensatory and punitive damages. Accordingly, due to AMTRAK's violation of employee protection provisions of the Act, Mr. Rudolph seeks reinstatement, back pay, and attorney fees.

²The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

³Opening statement, TR, p. 9-13, and closing brief, June 3, 2010.

Respondent's Statement of the Case⁴

Essentially, the case is straight forward and Mr. Rudolph's complaint should be dismissed. Mr. Rudolph has a history of generalized anxiety disorder. He requested reasonable accommodation. However, AMTRAK could not provide the requested accommodation. The preponderance of the evidence establishes that AMTRAK did not violate the employee protection provision of the FRS when it medically disqualified Mr. Rudolph based on an independent psychiatric evaluation.

Since 2001, Mr. Rudolph has suffered from, and been treated for, a generalized anxiety disorder. From January to May 2008, Mr. Rudolph medically excused himself from work due to this disorder. In May 2008, Mr. Rudolph formally requested accommodation under the American with Disabilities Act ("ADA") for his disorder which included having another qualified conductor with him at all times, allowing him to leave at any time he was unable to cope, and giving him a time extension for pre- and post-trip duties. In the meantime, during the pendency of the ADA proceeding, Mr. Rudolph returned to work. Eventually AMTRAK's ADA panel denied Mr. Rudolph's requested accommodation due to the broad nature of the request and inadequate medical documentation.

For six weeks after returning to work in May 2008, Mr. Rudolph worked as an assistant conductor. On July 19, 2008, while being aware around 10:45 p.m. that the train's delay would cause him to run out of hours before the train reached its destination in Chicago, Mr. Rudolph waited another hour and fifteen minutes before advising his supervisor of the problem. After checking, the supervisor advised Mr. Rudolph that no relief crew was available and refused to direct him to violate his hours of service. However, Mr. Rudolph continued to provide service into Chicago and violated the hours of service. Under these circumstances, Mr. Rudolph did not engage in a protected activity under the Act. AMTRAK did not authorize him to violate the hours of service regulation. Further, AMTRAK has not disciplined him or taken any adverse action for the report. Although he initially received a notice of investigation about his hours of service violation, no proceedings were conducted because Mr. Rudolph took himself out of service for a medical reason.

Mr. Rudolph voluntarily pulled himself out of service on July 20, 2008. Due to vacillation of the opinion of Mr. Rudolph's treating physician, AMTRAK had Mr. Rudolph evaluated by another physician. That physician concluded Mr. Rudolph could not come back to work. As a result, AMTRAK medically disqualified Mr. Rudolph in November 2008. Having chosen not to pursue several options to enable him to return to work, and absent sufficient, objective medical documentation to the contrary, he continues to be medically disqualified.

No causal relationship exists between the alleged protected activity and purported adverse personnel action since the company's medical director made the medical disqualification determination independently of the managers involved in the hours of service situation.

Finally, Mr. Rudolph is unable to establish disparate treatment since the other employees were not similarly situated.

⁴Opening statement, TR, p. 13-16, and closing brief, June 15, 2010.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony

Mr. Lawrence J. Rudolph
(TR, p. 21-225 and 447-450)

[Direct examination – Complainant] Mr. Rudolph started his railroad career with Burlington Northern in 1978 and transferred with seniority to AMTRAK in 1989. Since 1999, he has worked as a conductor and assistant conductor on the route from Omaha to Chicago twice a week on the California Zephyr, with a layover in Chicago for a total of 55 to 62 hours a week. Typically, the train departs Omaha for the 500 mile trip around 5:00 a.m. and arrives in Chicago in mid-afternoon. Burlington Northern Santa Fe Railroad (“BNSF”) owns the tracks and has authority over all employees on the route; BNSF has priority.

In general, as a conductor, Mr. Rudolph was responsible for passenger safety. CX 48, sets out his specific duties. His immediate supervisor was Mr. Jack Krueger, road foreman in Omaha. In his last full year of work, 2007, Mr. Rudolph earned about \$25.00 an hour, for a total of \$73,000.00. Based on his seniority, as of October 1, 2009, he receive about \$30.00 an hour. Mr. Rudolph also received medical, dental, and vision care, sick leave, disability and retirement benefits. The benefits will continue through December 2010.

CMS is the crew management system used by AMTRAK “crew callers,” who are responsible for providing train crews, conductors and engineers, and monitoring train staffing. CNOC is AMTRAK’s Centralized National Operations Center which monitors the operations of its trains.

Mr. Rudolph’s disciplinary records consists of two incidents which involved a whole crew being disciplined for violations of rules. In 1989, he received a written reprimand. In 2004, Mr. Rudolph was off duty two to four weeks.

In 2001, Mr. Rudolph started counseling for stress; he doesn’t recall advising AMTRAK. In December 2007, an incident occurred that exacerbated his stress. During the start of a return trip to Omaha, due to a fatal accident, BNSF shut down the tracks and Mr. Rudolph’s crew was instructed to take a four hour cut in Chicago. Since they were already on duty, and can only work 12 hours, the minimum four hour cut at a lodging facility permits the company to call the crew back to work to finish out the 12 hours of duty. As Mr. Rudolph was departing the train for lodging, the Chicago supervisor, Mr. Graziosi, told him not to go to lodging, yet at the same time, he was to stop performing duties. Mr. Rudolph argued that since they were away from their home terminal, the rules required they be provided lodging. During their conversation, the supervisor raised his arm in a threatening manner and Mr. Rudolph indicated that he was going to report the incident as an episode of workplace violence and started taking witnesses’ names. Eventually, other AMTRAK supervisors told the crew to take their four hour cut in lodging. When the crew was called back, Mr. Rudolph completed his conductor duties. About 10 days later, in January 2008 when Mr. Rudolph was taking a test in Chicago, the same supervisor, Mr. Graziosi, snickered at him and Mr. Rudolph again reported the incident.

On about January 14, 2008, Mr. Rudolph saw a physician who recommended that Mr. Rudolph go off duty due to anxiety from the incidents. Mr. Rudolph then notified his supervisor, Mr. Israelson, and enclosed the physician's recommendation (CX 20).

During February and March 2008, Mr. Rudolph took vacation leave. Then, when his vacation leave ran out and AMTRAK had not conducted an investigation or take action against Mr. Grasiozi, Mr. Rudolph sent a fax in March 2008 to the AMTRAK inspector general (CX 21).

About April or May 2008, Mr. Rudolph began the medical paperwork with Dr. Sedlacek to return to work. He advised Dr. Sedlacek of his intention to return to work and Dr. Sedlacek approved a return to work clearance form which Mr. Rudolph submitted to AMTRAK. He returned to work in June 2008.

In May 2008, Mr. Rudolph also requested 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). Mr. Rudolph didn't mean for his return to work at that time to be contingent on these conditions. Instead, "these requests would help me." Mr. Rudolph did not specifically state in the letter that he'd go back to work even without the requested accommodations.

On July 19, 2008, Mr. Rudolph sent Mr. Krueger a letter regarding his continued concern about Mr. Graziosi's presence in the Chicago Union Station, CX 23.

On July 19, 2008, the train was running late and AMTRAK had deferred his starting time from the usual 5:00 a.m. to 10:45 in the morning. As 10:45 approached, Mr. Rudolph contacted the AMTRAK crew caller and advised that if he didn't get another deferral he wouldn't be able to make it all the way to Chicago. Consequently, his start time was pushed back to 1:00 p.m.

When Mr. Rudolph reported to work at 1:00 p.m., he learned that Ms. Mary Cannon would be the conductor that day. However, she had not received a second starting time deferral. As a result, her 12 hour duty time was going to expire at 10:45 p.m. Ms. Cannon appraised AMTRAK of their hour of service situation and let the company know that Mr. Rudolph would be out of service at 1:00 a.m. During the course of the trip, somewhere in the middle of Iowa, about 4 hours before 1:00 a.m., Mr. Rudolph knew that he didn't have enough hours of service left to get to Chicago. The route usually took 10 hours and 40 minutes. However, freight congestion on the tracks required the passenger train to slow down through Iowa and at times "sit and wait." He asked Ms. Cannon, who had the company issued phone, if she had talked to the crew dispatcher about their hours of service situation and she indicated that she contacted the dispatcher. Since Ms. Cannon had worked for over 30 years, he knew that she gave proper notification.

Somewhere in Illinois, Ms. Cannon reached the 12 hour limit, went "dead," and rode the train to Chicago without performing any additional conductor work. Mr. Rudolph took over as the "conductor of record." Later, Ms. Cannon told him that CNOC called and asked her to inform Mr. Rudolph that he should just take the train to Chicago. In response, around 12:04

a.m., Mr. Rudolph called his supervisor in Omaha, Mr. Krueger, and told him what CNOC had directed (CX 25). He told Mr. Krueger that he'd run out of time at 1:00 a.m. He asked Mr. Krueger for assistance in getting a "re-crew" at Naperville, Illinois, which is about 28 miles south of Chicago, "because I was under the assumption there would be re-crew there." When a crew runs out of hours of service, AMTRAK crew callers are suppose to have another conductor "vanned out" to the point where the old conductor runs out of time and the new conductor takes over. Mr. Krueger told Mr. Rudolph that he'd check and call him back.

Mr. Rudolph then had the train engineer, Mr. Rich Beary, radio the BNSF dispatcher to tell him that Mr. Rudolph would run out of time at Naperville and that performing any service beyond then would be a violation of the hours of service. The dispatcher responded that it wasn't anything.

Upon arrival in Naperville, Mr. Krueger called Mr. Rudolph back and advised there would not be a re-crew and he should take the train into Chicago. Mr. Rudolph responded that Mr. Krueger would have to direct him to violate the hours of service law. Mr. Krueger replied that he wasn't going to do that but again instructed Mr. Rudolph to take the train into Chicago. With that exchange, Mr. Rudolph believed that he was being put a position of either violating the hours of service law or being insubordinate to Mr. Krueger.

At this time, Ms. Cannon was dead-heading into Chicago. If Mr. Rudolph had also dead-headed into Chicago then the train would be without a conductor, yet Mr. Rudolph would still be responsible for the passenger and train operations because he hadn't been relieved. Although a train may proceed without a rested conductor, proper authority is required. Absent such authority, the train has to remain in place until the re-crew arrives.

Mr. Rudolph then called the BNSF dispatcher and indicated that AMTRAK was telling him to take the train into Chicago in violation of the hours of service law. The dispatcher replied "okay," which Mr. Rudolph interpreted as "proper authority" to violate his hours of service. Consequently, Mr. Rudolph continued to work as a conductor and the train departed Naperville.

Five minutes later, Mr. Krueger called Mr. Rudolph and advised him to stop the train a few miles farther at Union Avenue to get a relief conductor. However, when the train stopped at Union Avenue no relief conductor was present. As a result, Mr. Rudolph continued on to Chicago as the train's conductor. When he arrived in Chicago, Mr. Rudolph called station services to ask for additional help unloading the train since both Mr. Rudolph and Ms. Cannon were out of time. Mr. Rudolph then faxed his delay report to Mr. Krueger and AMTRAK. He arrived at his hotel at 2:30 a.m.

When he awoke the next morning, Mr. Rudolph called Mr. Krueger to advise that he needed to be marked off sick for the return trip because of the anxiety due to the trip the day before. Mr. Rudolph "felt that the anxiety from the night before was going to distract me from doing my job on the way back, and it's one of our railroad rules that you cannot be distracted from your duties." At that time, Mr. Rudolph was taking a light dose of anti-anxiety medicine. Mr. Rudolph believed that he'd be ready to return the next day.

Mr. Krueger instructed Mr. Rudolph to report to Mr. John Anderson, an AMTRAK manager. Mr. Rudolph went to the station to meet Mr. Anderson and filled out an on-duty illness report. Mr. Anderson indicated there were other ways to handle the situation other than a reportable injury report. Mr. Rudolph responded that he'd be violating AMTRAK policy if he didn't report the illness and he started filling out the paperwork. In the report, Mr. Rudolph indicated that his anxiety was due to his being forced to violate the hours of service law.

Mr. Anderson then escorted Mr. Rudolph to the hospital for a required examination. At the hospital, Mr. Anderson started to ask questions and eventually filled out a question and answer form (CX 16). Mr. Rudolph did not have an opportunity to review the document. At the time, Mr. Rudolph indicated that due to his anxiety, Mr. Anderson shouldn't take anything he said as reliable. After a brief examination, since Mr. Rudolph was already being treated for anxiety, the examining physician indicated the return to work determination should be made by Mr. Rudolph's physician. The doctor then completed paperwork indicating Mr. Rudolph should see his personal physician before he resumed his job ("mark back up").

The next day, Mr. Rudolph dead-headed back to Omaha. Prior to departing, he attempted to make an appointment with his doctor. However, the physician was on vacation so Mr. Rudolph made an appointment for August 12th. After Mr. Rudolph returned to Omaha on July 22, 2008, he wrote a statement of facts (CX 24). On August 1, 2008, Mr. Rudolph submitted a report of violation to Mr. Krueger about the July 20, 2008 incident (CX 26).

Aware that the process associated with his return to work would take several weeks, Mr. Rudolph applied for sickness benefits with the Railroad Retirement Board.

On August 7, 2008, Mr. Krueger called Mr. Rudolph to review what happened on July 20, 2008. When Mr. Rudolph told him what happened, Mr. Krueger disagreed and they "went back and forth" for most of their 47 minute conversation (CX 28). Near the end, Mr. Krueger threatened to file charges against Mr. Rudolph if he didn't change his story and offered a scenario that would exonerate him. Mr. Krueger said he'd give Mr. Rudolph some time to think and call him back. About 25 minutes, Mr. Krueger called but Mr. Rudolph didn't answer and hasn't talked to Mr. Krueger since that day.

After Mr. Krueger's call, Mr. Rudolph called his union representative, Mr. Jacobs, to report Mr. Krueger's attempt to coerce Mr. Rudolph to change his story. Mr. Rudolph wrote a statement about what happened on August 7, 2008 (CX 27).

A few days later, by overnight Fed Ex, Mr. Rudolph received a Notice of Investigation ("NOI"), dated August 8, 2008, charging him with violating the hours of service law without proper authority (CX 2). Mr. Rudolph considered the NOI direct retaliation for his protected activity. The date of the hearing was noon the same day in Omaha. When Mr. Rudolph called the union representative, Mr. Jacobs, he was advised that the hearing had been postponed.

On August 11, 2008, Mr. Rudolph went to an appointment with his doctor, which had been moved up a day. Based on the incidents that had happened, Mr. Rudolph told the physician

that he didn't feel like returning to work because he thought they were going to fire him. So, the doctor authorized Mr. Rudolph to take some time off for a short period.

When Mr. Rudolph returned to his physician on August 25, 2008, Dr. Sedlacek approved his return to work and sent that to AMTRAK (CX 8). About August 28, 2008, Mr. Rudolph called AMTRAK Health Services about getting a drug and alcohol screening as part of his returning to work process. Mr. Rudolph made additional calls to Health Services (CX 55). Later, at AMTRAK's request, about September 9, 2008, Dr. Sedlacek provided additional information (CX 9).

On August 30, 2008, Mr. Rudolph filed a formal complaint against Mr. Krueger (CX 30). Since AMTRAK continued to hold Mr. Rudolph out of service, he wrote another letter on September 12, 2008 to the dispute resolution section (CX 31). Mr. Rudolph also sent correspondence to the Federal Railroad Administration ("FRA") (CX 32).

On August 25, 2008, when his doctor released him to work, Mr. Rudolph's compensation from the Railroad Retirement Board stopped. He advised the Board of his change in status because he had no reason at that time to believe AMTRAK would not send him back to work.

In October 2008, AMTRAK informed Mr. Rudolph that he would be required to undergo a psychiatric fitness for duty evaluation. At their request, Mr. Rudolph saw Dr. Daniel Wilson, the chairman of Psychiatry at Creighton University in Omaha. Mr. Rudolph did not see Dr. Wilson's report of the evaluation until June 2009.

Mr. Rudolph sent an letter to AMTRAK inquiring about their failure to return his calls or a respond to inquiries from the Railroad Retirement Board, which needed information to keep him eligible for sickness benefits (CX 34). The Railroad Retirement Board had advised that he was ineligible for benefits until the AMTRAK medical department indicated they were still holding him out after the August 25, 2008 release (CX 33). Right after seeing Dr. Wilson, he also asked AMTRAK to address the hostile workplace issues (CX 35).

In a letter dated November 5, 2008, Mr. Rudolph was advised that AMTRAK had disqualified him (CX 36). The letter gave him four options. First, he could send medical documentation to AMTRAK. In February 2009, Mr. Rudolph sent a letter to AMTRAK Health Services providing that information (CX 40). Second, he could apply for permanent disability; however, that option would render him ineligible for return to AMTRAK. Third, he could request accommodation. Mr. Rudolph did not do that since his problem was a retaliatory and hostile workplace. Additionally, he didn't need accommodations. Instead, he just presented requests. Fourth, he could seek an alternative position. Mr. Rudolph did not pursue that option because the hostile workplace issues hadn't been addressed.

After 79 days, the Railroad Retirement Board started providing sickness benefits to Mr. Rudolph (CX 54) in the amount of about \$600 every two weeks. Eventually, Mr. Rudolph was also paid for the 79 days, back to August 2008. Receiving only \$1,200 a month, Mr. Rudolph experienced difficulty paying his bills, even though he had a part-time job. As a result, he borrowed from his retirement account.

Eventually, in response to his August 7, 2008 complaint, the Federal Railroad Administration determined that AMTRAK was in violation of the hours of service law (CX 17).

Due to the absence of any further response from AMTRAK, Mr. Rudolph applied for occupational disability and since May 2009 has received \$2900 a month in disability benefits from the Railroad Retirement Board rather than sickness benefits. Since Mr. Rudolph is only 52, he is not eligible for retirement.

In December 2009, Dr. Sedlacek again informed AMTRAK that Mr. Rudolph was ready, willing, and able to return to work (CX 19). Mr. Krueger is now an engineer and would not be his supervisor. In January 2010, Mr. Rudolph sent a letter to the new supervisor, Mr. Andy Taylor, about returning to work (CX 68). Mr. Rudolph received no response.

Mr. Rudolph has not returned to work with AMTRAK. After subtracting the sickness and disability benefits, he has suffered a loss of pay of about \$105,000 and will lose his other benefits at the end of 2010. His financial situation and personal life have been turned “upside down.” His lack of work contributed his divorce in November 2009. He also had to cash in his 401K account. His situation has disrupted his sleep and eating.

Mr. Rudolph seeks compensatory and punitive damages because multiple AMTRAK departments have ignored his complaints. He also seeks attorney fees.

Mr. Rudolph did not ever intentionally violate the hours of service law. When he violated his hours of service on July 20th, he did so with proper authority.

CX 93 is a transcript of multiple telephone and radio conversations on CX 92 (an audio CD). Mr. Rudolph’s nickname at AMTRAK was “Butch.” The last two recordings are out of order. The last recording is a very brief conversation that actually occurred prior to the second to last recording. Mr. Rudolph also believes the recording is missing the dispatcher’s response of “okay.”

[Cross examination] Besides the operations crew, engineers and conductors, the train has an on-board staff of attendants who provide various services. These employees have the ability to load and unload passengers.

In his May 2008 letter (CX 4), Mr. Rudolph made four requests but he did not consider his return to work contingent upon them. Mr. Rudolph asked for written confirmation of his requests. In response, AMTRAK indicated they needed additional medical information.

Dr. Sedlacek’s July 22, 2008 letter to the ADA panel (CX 5) indicated Mr. Rudolph needed some accommodations.

Mr. Rudolph did not personally notify CMS that he was going to breach his hours of service limitation. Ms. Cannon did that. He did not hear the conversation. He first contacted Mr. Krueger on that trip after midnight. Based on the taped recordings, Mr. Rudolph is aware

that Mr. Krueger attempted to obtain a relief crew from CMS. Mr. Krueger did not ask Mr. Rudolph to violate the hours of service.

The BNSF dispatcher does not work for AMTRAK. Mr. Rudolph arrived in Chicago around 1:43 a.m. Although Mr. Rudolph felt some anxiety during the trip, it did not inhibit him from doing his job. The next morning, he marked off sick. The trip to the hospital was standard procedure.

Mr. Rudolph doesn't trust Mr. Anderson's summary of his statements at the hospital (CX 16) since he hired Mr. Graziosi. He doesn't believe the statement is entirely accurate. For example, he doesn't recall a conversation with Ms. Cannon about whether he was being confronted with violating the hours of service or being insubordinate.

On August 11, 2008, Mr. Rudolph's doctor kept him out of work. So between July 20 and August 11, 2008, AMTRAK did not keep him out of work. On August 22, 2008, Mr. Rudolph returned to the physician. The physician then indicated to AMTRAK that Mr. Rudolph could return to work effective August 21, 2008 with previously listed restrictions (CX 8). However, Mr. Rudolph is not sure what those restrictions were. He believes those restrictions were already in the record on AMTRAK return-to-work forms. Mr. Rudolph believes his physician's assessment that he was very overwhelmed, anxious, fearful, with low stress tolerance was fairly accurate.

Some portions of his August 7, 2008 recorded conversation with Mr. Krueger are missing. Mr. Krueger asked him if he performed service from Naperville to Chicago.

Mr. Rudolph understands the investigative hearing never went forward because he was off work. He has never been issued any discipline regarding the Notice of Investigation.

In September 2008, Mr. Rudolph sent 26 delay reports to the FRA showing other people had breached the hours of service.

The September 9, 2008 physician statement provided to AMTRAK indicates that Mr. Rudolph can return to work restricted to train operations that do not violate FRA regulations or compromise safety (CX 9).

After his examination, Dr. Wilson concluded Mr. Rudolph was unable to work as an assistant conductor at that time (RX 80). Ms. Simmons eventually sent Mr. Rudolph notification that he was medically disqualified and provided four options (CX 13). Regarding the first option, although Mr. Rudolph responded, he acknowledged that he did not submit medical documentation that demonstrated his ability to perform his job safely. He did not apply for permanent disability. He also did not seek accommodations because even if he applied he'd still be subject to a retaliatory and hostile work environment; he wanted those issues resolved. For the same reason, he didn't take the fourth option.

In his physician's April 2009 letter, the doctor keeps Mr. Rudolph out for a specific reason (CX 14). In a September 2009 letter, Mr. Rudolph's doctor does not release him back to work (CX 15).

With Dr. Pinsky's help, Mr. Rudolph was able to recoup the missing 79 days of sickness compensation.

CX 73 is the Railroad Retirement Board document regarding his benefits. CX 74 is the Railroad Retirement Board correspondence concerning his occupational disability annuity.

AMTRAK has paid Mr. Rudolph's medical expenses since July 20, 2008.

[ALJ examination] In August 2006, Mr. Rudolph felt he might need some help with workplace stress.

Mr. Rudolph has an associate degree in mortuary sciences and a commercial pilot's license. In the 1980s, he took a four year leave of absence to work as a commercial pilot since his train work was seasonal. Once he had sufficient seniority to work year round, Mr. Rudolph returned to railroading. Mr. Rudolph has not looked for other work because he wants to return to his railroad job. He worked part-time in the funeral business, earning between \$32,000 and \$34,000 a year. Mr. Rudolph quit the part-time work when his occupational annuity began in May 2009. He has not made any other re-employment efforts.

In considering AMTRAK's first option, Mr. Rudolph did not submit additional medical evidence to support his return to work because he "thought the option was unrealistic." He chose not to comply with any of the four options.

[Re-direct examination] CX 40 is Mr. Rudolph's February 2009 response to AMTRAK's notice of medical disqualification.

The on-board service personnel are not able to stop a train or advise an engineer.

BNSF controls the AMTRAK train while it is on the BNSF tracks.

Based on the anxiety and stress associated with the incident with Mr. Grasiozi, Dr. Sedlacek imposed some restrictions on Mr. Rudolph's return to work.

If Mr. Rudolph had not had proper authority to operate on the train beyond Naperville, then the engineer should also have been charged. The engineer was not charged.

Actually, Mr. Rudolph earned between \$7,000 to \$8,000 in his part-time work during the course of the year. Mr. Rudolph did not subtract that amount from his estimate of pay loss.

[Re-cross examination] Ms. Cannon dead-headed into Chicago and the engineer also had a re-crew engineer.

Mr. Rudolph stopped taking medication for his anxiety around May 2009.

[Re-direct examination] Numerous times, Mr. Rudolph attempted to let people know that he was running up against his hours of service.

In the call just before 1:00 a.m., Mr. Krueger told Mr. Rudolph to take the train into Chicago. When he asked Mr. Krueger about proper authority, Mr. Krueger replied that he had been instructed to tell him to take the train into Chicago. Mr. Krueger also called later on that told him to pick up a relief conductor at Union Avenue. Mr. Krueger stopped the train at Union Avenue.

Mr. Kent W. Fitzgerald
(TR, p. 226-238)

[Direct examination – Complainant] Mr. Fitzgerald is a retired AMTRAK conductor who worked with Mr. Rudolph. Mr. Rudolph was “very thorough” as an assistant conductor. Quite often conductors dead-head to Chicago.

On the tracks, BNSF is the landlord and AMTRAK is the tenant. The BNSF dispatcher is “God” to Mr. Fitzgerald. Consequently, Mr. Fitzgerald would comply with a dispatcher’s instructions. If a BNSF dispatcher indicated it was okay to proceed, that would be proper authority. Mr. Fitzgerald has never had to report an hours of service violation. He has stopped a train due to hours of service. Usually, AMTRAK should be notified of the pending hours of service problem three to four hours in advance, or more if possible.

In 2006, Mr. Fitzgerald was on a train that came to an abrupt halt, causing an injury. The engineer indicated the train hit something on the track. When Mr. Fitzgerald inspected the train, he didn’t see anything. Later, when filling out the incident report, Mr. Krueger told Mr. Fitzgerald to put down that the train hit debris on the track. No investigation was conducted, which he believes was a cover-up.

[Cross examination] Mr. Fitzgerald was not on the train on July 19 and 20, 2008.

Dr. Glen J. Green
(TR, p. 241-279)

[Direct examination – Complainant] Since September 2008, Dr. Green, board certified in occupational medicine, has worked as an independent contractor at AMTRAK Health Services in the capacity of acting corporate medical director. He reviews medical leave of absence cases, return to work applications, and medical disqualification cases.

Around June 2008, CX 4 was forwarded to Dr. Pinsky who had it forwarded to the AMTRAK ADA panel, which consists the Senior Director of AMTRAK Health Services, Ms. Malva Reid, a Law Department representative, and Dr. Green. On July 11, 2008, Mr. Rudolph’s application was denied. RX 84 is Ms. Reid’s letter to Mr. Rudolph requesting additional information on standardized forms. Mr. Rudolph’s physician provided correspondence about his

generalized anxiety disorder CX 5. In CX 7, Dr. Sedlacek indicates Mr. Rudolph is temporarily totally disabled. In CX 9, Dr. Sedlacek released Mr. Rudolph back to work with previously listed restrictions. Previously, Dr. Sedlacek has indicated Mr. Rudolph could not work alone. However, it's not clear in his correspondence what the physician is referring to since he did not include a specific reference. In a subsequent letter, CX 9, Dr. Sedlacek did not reference earlier restrictions; instead he provided a vague statement about train operations that do not compromise safety.

An AMTRAK representative of the company's right to work program sent Mr. Rudolph RX 72.

AMTRAK denied Mr. Rudolph's initial ADA on July 11th and his appeal in September 2008.

Mr. Rudolph's medical file included a 2006 assessment by Dr. Ashley Walter indicating that Mr. Rudolph sometimes worries that he is not safe to operate the train (RX 81).

Based on his review of Dr. Sedlacek's correspondence, which is not consistent, Dr. Green has concern whether Mr. Rudolph would be able to safely operate a train. As a result, he would not bring Mr. Rudolph back to work. Additionally, after a fitness for duty examination, Dr. Wilson did not release Mr. Rudolph back to work. Dr. Pinsky discussed the report with Dr. Wilson who clarified that Mr. Rudolph would not be able to return to work, even if the issue of workplace hostility and job demands had been addressed. Consequently, Dr. Pinsky determined Mr. Rudolph was medically disqualified and notified the Railroad Retirement Board, RX 82. Dr. Pinsky also indicated that Mr. Rudolph's absence since August 11th had been due to the need to clarify his medical capabilities. On the same day, Ms. Simmons informed Mr. Rudolph of his medical disqualification.

Regarding the first option on in Ms. Simmons' letter, the AMTRAK Health Services would need objective documentation from Mr. Rudolph's current health care provider that his condition had sufficiently changed or improved to permit him to return safely to his essential job duties as a conductor. This information goes beyond a "patient's self report." AMTRAK never received such medical documentation in Mr. Rudolph's case.

In a November 20, 2008 letter, CX 39, Dr. Sedlacek indicated that Mr. Rudolph is not disabled. Then, in an April 2009 letter, CX 14, Dr. Sedlacek indicates that Mr. Rudolph should not return to work, which contrary to his previous letter. Dr. Green noted that the November 20, 2008 letter is the latest correspondence in the AMTRAK medical file. Dr. Green was provided additional correspondence in January and February 2010 from Dr. Sedlacek and Mr. Rudolph.

AMTRAK has medically disqualified employees following a fitness for duty examination. RX 89 contains AMTRAK's ADA Panel's procedures.

To date, Dr. Green has not received any medical information from Mr. Rudolph's physician that would enable him to return to work.

[Cross examination] Dr. Green has had no direct contact with Mr. Rudolph. Dr. Green never contacted Dr. Sedlacek. Dr. Pinsky contacted Dr. Sedlacek in September 2008.

In general, Dr. Green would give more weight to the observations of a licensed physician than a railroad supervisor. CX 60 reflects “very close collaboration” between the panel members about having Mr. Rudolph under go a return to work psychiatric examination. One of those panel members was Ms. Karen Rabin from the Law Department. Although Ms. Rabin states that if Mr. Rudolph has any restrictions he will be medically disqualified, only the medical director has the authority to medically disqualify an individual.

CX 61 are Dr. Pinsky’s notes about his conversation with Dr. Sedlacek. Dr. Sedlacek indicates Mr. Rudolph could return to work. However, later Ms. Rabin indicates that based on supervisor comments and Mr. Rudolph’s marking off a train that she wasn’t going to accept Dr. Sedlacek’s recommendation.

In Dr. Green’s opinion, Dr. Wilson did not determine that Mr. Rudolph could return to work. AMTRAK usually does not release fitness for duty examination reports.

[Re-direct examination] In the conversation with Dr. Pinsky, Dr. Sedlacek indicated that he had been writing what Mr. Rudolph requested.

Mr. Richard Beary
(TR, p. 288-317)

[Direct examination – Complainant] Mr. Beary has been an AMTRAK engineer since December 1992. As an engineer, he operates the train under the conductor’s instructions. Mr. Beary is aware that under GCOR (general core operating rules) 1.14, CX 42, AMTRAK employees are under the jurisdiction of supervisors of the railroad track they are operating on. While Mr. Beary operates the train from Ottumwa to Chicago, the ultimate instructions come from the BNSF dispatcher. The operating rules also indicate that an employee must not exceed hours of service without proper authority.

On July 19 and 20, Mr. Beary was the engineer on Train #6. His route was from Ottumwa, Iowa to Chicago. They pulled into Naperville at 12:59 p.m. Mr. Beary went dead the next minute. He was dead at 1:00 a.m. because although the train was late, AMTRAK did not give him a setback and he sat waiting in Ottumwa. In Galesburg, Mr. Beary notified the BNSF dispatcher by radio that he and Mr. Rudolph would go dead at Naperville.

Mr. Beary heard Mr. Rudolph on the radio talking to the BNSF dispatcher. Mr. Rudolph advised that he and Mr. Beary would be going dead in Naperville. He then indicated that he would be in violation of hours of service leaving Naperville and the dispatcher responded okay. Then, Mr. Rudolph told the relief engineer, Mr. Campbell, to leave Naperville. Mr. Beary remained in the engineer cab and dead-headed into Chicago. CX 93 accurately reflects the conversations Mr. Beary had with the BNSF dispatcher on that trip.

Between Naperville and Chicago, Mr. Rudolph called Mr. Campbell and told him to stop at the Union Avenue station to pick up a relief conductor.

In his experience, moving the train into Chicago in violation of hours of service was not unusual. That situation had happened before when he was an engineer. Mr. Beary never turned in an hours of service violation, "but I should have, I guess." Delays between Omaha and Chicago were not unusual and they have even had to use BNSF conductors.

Several years ago, Mr. Beary was out of service due to his blood sugar level exceeding the AMTRAK standard for 54 days. When he returned, he was not required to take a fitness for duty examination.

[Cross examination] Since Mr. Beary was relieved at Naperville, he did not violate the hours of service.

Prior to his return to service after his blood sugar problem, Mr. Beary provided medical documentation showing that his blood level had dropped sufficiently.

GCOR 1.17 establishes the hours of service and requires "roughly two hours" notice prior to reaching the 12 hour limit.

During the radio conversation, after Mr. Rudolph indicated that he'd be violating the hours of service by taking the train out of Naperville, Mr. Beary heard the BNSF dispatcher reply okay.

[ALJ examination] Established by the FRA, the rules about the hours of service indicate a person may work 12 hours. Exceeding that limit subjects a person to a fine. The rule ensures people don't work while fatigued and it relates to federal rail safety.

In the past, Mr. Beary ran out of hours in between towns, the train had to stop until a relief crew was sent out. Mr. Beary has called in an hours of service problem and been given permission from a dispatcher to go on.

While operating an AMTRAK train on BNSF tracks, BNSF is the governing railroad. On the train, the conductor is the chief. Mr. Beary takes instructions from the conductor. Mr. Beary has been on a train where a conductor went dead due to hours of service. The train stopped momentarily but then the crew was instructed by AMTRAK dispatch to move the train to Chicago without a conductor. In that situation, Mr. Beary was in charge.

During his 15 years as an engineer, other than that incident on July 20th, Mr. Beary has not heard a dispatcher authorize a conductor to violate the hours of service.

On this route, operating instructions come from BNSF.

[Re-direct examination] The two hour notification of an hours of service problem is required by BNSF. BNSF would like as much notice as possible. Sometimes, the notice is less than two hours.

When Mr. Beary moved the train to Chicago without a conductor, he was violating the operating rules. He didn't report the violation because he believed he'd be fired.

Mr. Danny W. Meeks
(TR, p. 317-338)

[Direct examination – Complainant] Since 1978, Mr. Meeks has worked as a conductor. He started working for AMTRAK in August 1987. His regular route is twice a week from Omaha to Chicago and return. He has worked with Mr. Rudolph as a conductor. In his opinion, Mr. Rudolph's work and habits are excellent.

In 2003, after attempting to obtain a manifest through normal procedures, Mr. Meeks delayed a train while he continued to try to obtain the train's manifest from alternative means. On the station platform, he was confronted by his immediate supervisor, Mr. Hall, and another supervisor. They yelled at him about the delay. Mr. Meeks felt so threatened and stressed by the incident that when he returned home he pulled himself out of service and went to see a doctor. Mr. Meeks was out a month and a half. Mr. Meeks also wrote a letter about the events and sent it to his immediate supervisor, Mr. Hall, and the superintendent, Mr. Hinton (CX 57). When he returned to work, Mr. Meeks discussed the event with Mr. Hinton. Prior to returning to work, he took a physical examination, but was not required to undergo a psychiatric evaluation.

Mr. Meeks has worked past his hours of service limit. However, he never reported any hours of service violations and he was never charged.

[Cross examination] In 2003, Mr. Krueger was not Mr. Meeks' supervisor. Prior to 2003 event, Mr. Meeks had not reported a history of anxiety.

When confronted by an hours of service problem, AMTRAK advises the person what to do. The rule is that once you reach your hours of service limit, you dead-head for the remaining portion of the trip.

Upon his return to work, Mr. Meeks provided medical documentation which consisted of the AMTRAK physical.

[ALJ examination] When Mr. Meeks was out a month and a half, he was on sick leave. The doctor took him off work due to stress.

On the Omaha to Chicago and return route, while on BNSF rails, Mr. Meeks would contact CNOC and AMTRAK crew callers about hours of service problems. He would not deal with BNSF personnel. Once when he was required to violate the hours of service, he contacted the BNSF help desk and the individual said to follow the instructions from Mr. Meeks' immediate supervisor. In Mr. Meeks' opinion, his supervisor or the AMTRAK crew callers are

authorized to direct him to continue beyond his hours of service. Since 2000, at least once, Mr. Krueger has authorized Mr. Meeks to exceed the hours of service limit. Mr. Meeks was not cited for the violation.

[Re-direct examination] BNSF controls the train while it's on their tracks. The BNSF dispatcher has the authority to move or stop the train. They can dead-head even if there's no other conductor on board. When a person is dead-heading, he is off-duty. In Mr. Meeks' case, when he was in a situation where if he dead-headed the train would be without a conductor, he did not dead-head.

[Re-cross examination] In that situation, which occurred about 2006, Mr. Meeks informed his supervisor, Mr. Krueger, BNSF, and CNOC, who approved Mr. Meeks remaining on-duty. Mr. Meeks would not move the train or take the train in without proper authorization. "You can't do it."

Mr. R. Dennis Jacobs
(TR, p. 338-364)

[Direct examination – Complainant] Mr. Jacobs has been a conductor with AMTRAK since 1988. He has served as the local chairman for the conductors' union since November 2006.

Shortly after the incident on July 19 and 20, Mr. Rudolph called Mr. Jacobs to pursue a report about an hours of service concern. Mr. Jacobs investigated the incident, and in response to the discipline charge, he sent in a letter, CX 29.

About October 2008, in response to his letter, Mr. Jacobs had a conversation with Mr. John Anderson. Mr. Anderson initially indicated that AMTRAK would not release tapes of conversations. However, in November 2008, Mr. Jacobs received some tapes of radio transmissions and some telephone calls.

Mr. Jacobs has been involved in some of the train delay reports and has been in violation of the hours of service limit. Mr. Jacobs did not report the violations because he was concerned that he might be charged. Mr. Jacobs has not been charged for violation the hours of service.

AMTRAK rules require that a person with an hours of service problem notify AMTRAK three hours prior to reaching the limit. Mr. Jacobs believes the GCOR and BNSF have a minimum of two hours. Due to sporadic cell phone service, Mr. Jacobs occasionally has sent in the report to AMTRAK with less than three hours and to BNSF with less than two hours.

A conductor supervises an on-board staff of 10 to 12 people. The conductor is also responsible for monitoring the operation of the train and ensuring the engineer complies with all speed restrictions and operating procedures.

In his experience, Mr. Jacobs has never known anyone who has had to go through Mr. Rudolph's experience in attempting to return to work.

According to the union contract, Mr. Rudolph had two choices on July 20th. He could let the train sit and inconvenience the 200 plus passengers on the train. Or, he could comply with the BNSF instructions, do what he thought was right, and move the train. Mr. Rudolph had no financial gain in choosing the later option.

An engineer can move a train without a conductor's instructions. Although the engineer might be in trouble if he did not receive proper instructions.

In January 2010, Mr. Jacobs sent another letter to AMTRAK, CX 64, and received a response, CX 65. Mr. Jacobs also sent correspondence to an AMTRAK senior analyst in February 2010, asking for clarification of AMTRAK's position on operating a train without a rested conductor. Mr. Jacobs received a response, CX 18. Mr. Jacobs also received a response about his inquiry on why Mr. Rudolph's statement about his return to work was on the back of a fax sheet in the conductors' lounge, CX 69.

Mr. Jacobs has attempted to have the pending disciplinary charge against Mr. Rudolph resolved. Mr. Savoy's response was that the charges are still pending.

Mr. Rudolph's work as a conductor has been professional and exemplary.

Within the last three years, around January 2008, Mr. Jacobs self-reported his hours of service violation when he continued to work. He obtained approval and nothing happened to him but AMTRAK was fined.

[Cross examination] Mr. Jacobs was not on the train July 19th and he was not privy to the communications.

No hearing has been conducted since Mr. Rudolph received the Notice of Investigation because he is on medical leave.

When Mr. Jacobs violated the hours of service, he reported the issue to AMTRAK and BNSF. Mr. Jacobs' supervisor, Mr. Gary Israelson, authorized the violation.

Mr. Jacobs believes Mr. Rudolph complied with the minimum notification requirement.

Mr. Jacobs is aware that no one else from the crew on July 19th violated the hours of service limit.

Mr. Jacobs sent his inquiry to Mr. Allen Lewis, senior analyst, CX 66, because he is the senior instructor for AMTRAK rules. Mr. Jacobs is aware that Mr. Ron Robusto is the corporate rules interpreter. Mr. Allen has been in his current position about a year.

RX 84 is an August 22, 2008 waiver of the right to an investigation for an hours of service violation.

While Mr. Jacobs is aware that Mr. Rudolph is off due an anxiety and stress condition, he has not reviewed the medical information.

Mr. Jack S. Krueger
(TR, p. 368-417)

[Direct examination – Respondent] Mr. Krueger has worked for AMTRAK for 20 years. He left management in November 2008 due to health problems and burn-out. In July 2008, he was a road foreman and first line manager of conductor and engineers. In that capacity, he supervised Mr. Rudolph, whom he has known since 1980.

On July 19, 2008, on Train #6, Mr. Beary was the engineer out of Ottumwa into Chicago. Ms. Mary Canon was the conductor and Mr. Rudolph was the assistant conductor. On that day, Mr. Krueger was home in Lincoln, Nebraska.

On July 20, 2008, around 12:35 a.m., he received a phone call from Mr. Rudolph. Mr. Rudolph stated that he was going dead under the hours of service rule in Naperville, Illinois. He'd been told that a relief engineer would be there to replace him but if they wanted him to violate the hours of service, the BNSF dispatcher was going to have to tell him to do that. Mr. Krueger asked Mr. Rudolph to hold on while he contacted CMS.

When he contacted CMS, Mr. Krueger was advised that a relief engineer, Mr. Campbell, would dog-catch the train in Naperville, that is, relieve the train engineer, Mr. Beary. They did not have relief conductor for Mr. Rudolph, which was a problem if there was a medical emergency on the train.

At that point, Mr. Krueger started calling his supervisors, but without success. So, he emailed the situation to Mr. Gary Israelson, the assistant superintendent, who took over and advised that a Chicago yard crew was going out to relieve Mr. Rudolph. Mr. Krueger told Mr. Rudolph about the Chicago yard relief crew. He did not authorize Mr. Rudolph to violate his hours of service or tell him to take the train into Chicago.

The next morning around 11:30 a.m., Mr. Rudolph called Mr. Krueger from the Chicago crew hotel and advised that he would be filing a personal injury report when he went back on duty. Since Mr. Rudolph indicated that he was going to file a personal injury report, Mr. Krueger arranged to have a supervisor, Mr. John Anderson, meet him and transport him to the hospital for any needed medical additional in accordance with regular procedure. Eventually, Mr. Krueger completed an accident investigation report, RX 83.

Mr. Rudolph has not returned to work since July 20, 2008. He has been on medical leave since July 20, 2008, RX 79.

In August 2008, Mr. Krueger began to prepare a monthly hours of service violation report. He e-mailed Mr. Israelson to ask if the incident with Mr. Rudolph was “determined to be an operating - - or an hours of service violation.” After an exchange of e-mail, Mr. Israelson directed to Mr. Krueger to contact Mr. Rudolph to determine whether he performed service into

Chicago after 1:00 a.m. The normal procedure would have been for Mr. Rudolph to take himself off duty after 1:00 a.m. and ride the train into Chicago without performing any type of service.

As a result, Mr. Krueger called Mr. Rudolph on August 7, 2008. They had a long conversation. Most of their discussion was whether Mr. Krueger told Mr. Rudolph to violate the hours of service. Mr. Rudolph believed Mr. Krueger had told him to violate the hours of service. Mr. Krueger responded that he wouldn't and didn't. They never resolved that dispute. Mr. Rudolph indicated that he had performed service into Chicago. Mr. Krueger taped the conversation.

Mr. Krueger then e-mailed Mr. Israelson about the situation. Since the collective bargaining agreement required an individual to be charged within 10 days of the incident, Mr. Krueger disagreed with issuing a Notice of Investigation. However, a charge was issued to Mr. Rudolph because Mr. Israelson indicated that Mr. Rudolph had violated the hours of service on his own accord. Mr. Krueger wrote up the charge but Mr. Dave Dudley, who wasn't involved in the incident, issued the Notice of Investigation, CX 2. Procedurally, a hearing would then be conducted by a hearing officer and parties would have the opportunity to offer testimony and evidence. A union representative may also be present. The parties may also appeal the hearing officer's decision. No hearing was conducted because Mr. Rudolph was on medical leave.

The only contact Mr. Krueger had about Mr. Rudolph's medical condition was notification that he was being taken out of Mr. Krueger's work area.

[Cross examination] CX 70 is Mr. Krueger's statement about the incident on July 20th. The statement was true and accurate. The statement does not indicate that Mr. Krueger instructed Mr. Rudolph to stop the train or get off if he didn't get relief. Mr. Krueger believes Mr. Rudolph should have stopped the train if he didn't get relief. But, Mr. Krueger didn't specifically tell him to do that.

Mr. Krueger didn't produce the tape containing the August 7, 2008 conversation until the end of March 2010, shortly before the hearing. He didn't produce the tape earlier because it was his "personal information." He never received a request from Mr. Jacobs or anyone else for any taped phone calls related to the event. Mr. Krueger was advised to retain all documents and recordings associated with July 20th. Mr. Krueger taped the call because he didn't feel comfortable with calling Mr. Rudolph as instructed by Mr. Israelson. Although he told the OSHA investigator about the tape, he didn't turn it over to him. Mr. Krueger told Mr. Israelson about the tape. Mr. Krueger did not edit the tape.

Mr. Krueger disagrees with the statement that conductors have to take instructions from CNOC or BNSF regarding hours of service and moving the train. BNSF does control train movement on its tracks. If the dispatcher directs the train to be moved, that instruction must be followed.

On Mr. Rudolph's phone record from July 20th, CX 25, Mr. Krueger sees his telephone number at 12:04 a.m. and 12:57 a.m. He doesn't know why the phone records are different than

his recollection. He agrees that the phone record indicates Mr. Rudolph first called him at 12:04 a.m.

When Mr. Krueger talked to Ms. Cannon upon her return to Omaha, she indicated they had tried to call him many times to let him know about their hours of service problems on July 19th.

Mr. Krueger agrees a crew would violate the rules if they operate a train without a rested conductor. Mr. Campbell was not cited for bringing the train to Chicago.

Mr. Krueger did not tell Mr. Rudolph to perform service after the train left Naperville. He did not call Mr. Rudolph at 1:20 a.m. to tell him to stop the train at Union Avenue to pick up personnel. The phone records, CX 25, show a 1:13 a.m. call from Mr. Krueger to Mr. Rudolph. He made that call to let Mr. Rudolph know that Mr. Israelson said a yard crew was coming out from Chicago. But, he did not tell Mr. Rudolph to pick up added crew members. Mr. Krueger did not believe that Mr. Rudolph was performing services by taking his call then since he calls many of his employees off-duty. Mr. Rudolph should still have been in Naperville because he went dead at 1:00 a.m. and the train arrived at 1:01 a.m. Mr. Krueger did not instruct Mr. Rudolph to stop the train. He is not aware of anyone else instructing him to stop the train.

On August 7th, Mr. Krueger told Mr. Rudolph that he had the radio communications tape and they're having problems hearing Mr. Rudolph, who indicates he's going to take the train to Chicago and the dispatcher says okay.

Mr. Krueger did not tell Mr. Rudolph that he would have to write him up if he didn't change his story. Instead, he told Mr. Rudolph that he was being told he'd have to charge him if Mr. Rudolph actually performed services.

Mr. Krueger doesn't remember receiving CX 26.

Mr. Krueger isn't sure about the FRA regulations, but he agrees a train shouldn't be operated without a rested and qualified conductor. A conductor remains responsible for the safe operation of the train until he's relieved or the train reaches its final destination.

In their conversation on July 20th, Mr. Rudolph was concerned about violating his hours of service without proper authority.

Mr. Krueger did not give Mr. Rudolph authority to violate the hours of service by telling Mr. Rudolph to just take the train to Chicago. Mr. Krueger did not tell the AMTRAK counsel that he told Mr. Rudolph to ride the train into Chicago once he exhausted his twelve hours of service.

After Mr. Krueger heard from Mr. Israelson, he called Mr. Rudolph and told him about the relief crew. In his earlier call, he did not tell Mr. Rudolph that no relief crew was coming and he should just take the train into Chicago.

Due to hourly pay to employees, AMTRAK has a financial incentive to get the train to its final destination.

Mr. Rudolph is an experienced conductor and had no financial incentive to work over his hours of service.

Around 12:13 a.m., Mr. Krueger was advised by crew management services that they couldn't find a conductor.

Mr. Krueger doesn't recall talking to Dr. Pinsky.

Mr. Rudolph may have had proper authority if the BNSF dispatcher told him that he had the authority to violate the hours of service. He doesn't know if the actual exchange between Mr. Rudolph and the dispatcher was sufficient.

[ALJ examination] Mr. Krueger did not place Mr. Rudolph on medical leave. He doesn't recall having any discussion with any doctors associated with Mr. Rudolph's medical leave. He did not talk to Dr. Green. He didn't talk to Mr. Rudolph's treating physician.

When Mr. Israelson wanted to know if Mr. Rudolph actually performed service, Mr. Krueger advised that AMTRAK had personal time tickets.

On July 20th, Mr. Krueger did not have any reason to instruct Mr. Rudolph not to violate his hours of service. Likewise, he did not have any reason tell Mr. Rudolph to dead-head after his hours of service were up. He gave neither instruction because under standard procedure "if you went dead under the hours of service . . . you would wait for a relief crew."

[Re-direct examination] No other crew member on July 20th violated their hours of service.

In his mind, the dispatcher's "okay" was an acknowledgment of Mr. Rudolph's statement.

The Notice of Investigation was sent shortly after his August 7, 2008 phone discussion with Mr. Rudolph because Mr. Rudolph confirmed that he performed service.

[Re-cross examination] When Mr. Krueger made his call at 1:13 a.m., he wasn't aware that Mr. Rudolph was actually performing service. He made the call to tell him the Chicago yard crew was coming out to relieve him. Mr. Krueger thought he was still in Naperville.

Mr. Krueger was at home when Mr. Rudolph called him on July 20th.

Mr. John A. Anderson
(TR, p. 420-444)

[Direct examination – Respondent] Mr. Anderson is road foreman in Milwaukee, Wisconsin. He has worked for AMTRAK for 25 years.

On Sunday morning, July 20, 2008, Mr. Anderson received a call from Mr. Israelson who indicated that Mr. Rudolph was going to need medical attention. He instructed Mr. Anderson to take Mr. Rudolph to the hospital under AMTRAK protocol, RX 91.

Mr. Anderson took Mr. Rudolph to the hospital. Based on AMTRAK procedures, he questioned Mr. Rudolph about the incident and prepared a report, CX 16, when he returned to the transportation office in Chicago. Although procedure indicates the questions and answers should be tape-recorded, Mr. Anderson forgot his tape recorder.

Rule 25 of the collective bargaining agreement has procedures regarding charges and an investigation concerning safety rule violations, RX 77. At such a hearing, Mr. Rudolph would have an opportunity to establish that he did not violate the hours of service.

The excerpt from GCOR, CX 42, contains the provisions regarding the hours of service. Generally, two hours notice is required for an hours of service problem.

Having reviewed CX 18, Mr. Anderson believes paragraph number two describes an optimum situation. However, if a conductor is not available, the employee can not arbitrarily determine himself that he can violate the hours of service. Mr. Lewis is a fairly new instructor and senior analyst.

[Cross examination] AMTRAK can withdraw the charge against Mr. Rudolph.

Mr. Anderson did not talk to Dr. Pinsky about Mr. Rudolph's ability to return to work. He did not speak to any doctors or treating physicians.

Mr. Anderson doesn't recall whether Mr. Rudolph indicated that he was not feeling great on July 20th.

Mr. Krueger wrote the charge and Mr. Dudley signed it.

CX 51 is an interview of Mr. Anderson.

Since Mr. Rudolph stated that no one had directed him to violate the hours of service, Mr. Anderson believes he did that on his own volition. Mr. Rudolph did not mention being told by the BNSF to proceed. Mr. Rudolph did not state that Mr. Krueger told him to just ride the train into Chicago. Mr. Anderson did not talk to any other crew members.

Mr. Grasiozi was a friend of Mr. Anderson and hired him. Mr. Anderson doesn't harbor any ill will against Mr. Rudolph for reporting Mr. Grasiozi, who resigned to work with Metra.

An engineer is not required to know other crew members' hours of service.

Since a dispatcher is not a supervisor of AMTRAK personnel, he doesn't have authority to permit an employee to violate the hours of service. Only a BNSF chief dispatcher or some other manager can authorize a violation of the hours of service. The BNSF dispatcher only controls the movement of trains on the BNSF tracks. If the dispatcher is aware that a person will violate the hours of service and tells him, "okay," the dispatcher still doesn't have the authority to approve a violation under the rules.

[ALJ examination] AMTRAK crew member who are running up against their hours of service should contact an AMTRAK supervisor. Mr. Anderson is aware of situation when AMTRAK supervisors have approved violations of the hours of service. He is also aware of situations when BNSF has authorized violations. The later situation may occur during an emergency when an AMTRAK supervisor can not be contacted. Generally, if AMTRAK is unable to re-crew a train, the train either sits or the engineer brings in the train by himself.

Documentary Evidence and Audio Recordings⁵

Notice of Investigation (CX 2, CX 32, and RX 2)

A Notice of Investigation, dated August 8, 2008, advised Mr. Rudolph that an investigation would be conducted into the charge that he violated GCOR Rule 1.17 by exceeding the hours of service without proper authority. Specifically, on June 20, 2008 at 1:01 a.m., Mr. Rudolph allegedly failed to receive proper authority to violate the federal hours of service law and continued to perform services as a conductor on a train, directing its movement to Chicago. Mr. D. Dudley signed the notice.

Employee Personal Statement and Medical Evaluation (CX 3, CX 49, RX 3, and RX 49)

On July 20, 2008, Mr. Rudolph reported an accident-related injury. According to Mr. Rudolph at 9:30 p.m. on July 19, 2008, he was advised by CNOC that no relief crew would be available for him at Naperville. As a result, he was forced to chose between being insubordinate or violating the FRA rules on hours of service. This situation cause high levels of anxiety and stress which in turn "caused high level of biochemicals to be released into his body," causing shortness of breath and chest pain, and diminishing his ability to concentrate, solve problems, and multi-task.

After a physical examination, a hospital physician diagnosed acute anxiety due to a disagreement with a supervisor. The doctor prescribed Ativan and indicated that Mr. Rudolph was unable to return to work until he was evaluated by his primary care physician, which he recommended should occur within two to three days.

⁵Although I have reviewed all the documentary evidence, I have only summarized the relevant portions.

Correspondence – Mr. Rudolph
(CX 4, CX 10, CX 22, RX 4, RX 10, and RX 22)

In a May 24, 2008 letter, Mr. Rudolph informed Mr. Savoy that he intended to return to work on June 2, 2008. Based on his medical record, Mr. Rudolph asserted that his healing status met the criteria of a covered disability under the ADA. In light of his health status, Mr. Rudolph stated, “I am requesting the following accommodations.” First, except for a few route segments, Mr. Rudolph asked not to be requested, or forced, to work as the sole qualified and rested train crew member. Consequently, a train would not depart until another qualified train crew member is provided. Second, Mr. Rudolph requested compensation associated with the schedule changes due to the first accommodation. Third, Mr. Rudolph sought pre-approval, and to be unencumbered by published rules, to mark off ill “at any such time” an unanticipated health episode prevents him from providing for safe operation of the train. Fourth, Mr. Rudolph asked for a reasonable amount of time to comply with required pre-trip duties “without being rushed.” After setting out a sample flow chart, Mr. Rudolph notes “there is too much to do in such little time allotted.” Additionally, due to impact his requested accommodations may have on others, he requested written verification of the accommodations.

Correspondence – Dr. Michael J. Sedlacek
(CX 5, CX 10, RX 5, and RX 10)

On July 22, 2008, Dr. Sedlacek sent a letter to the AMTRAK ADA Panel indicating that Mr. Rudolph had received medical care for his mental condition since April 2006. Dr. Sedlacek had treated Mr. Rudolph since April 10, 2008. The diagnosis was generalized anxiety that at times became “quite severe” and might “interfere with his ability to handle excessive, unexpected stresses.”

Dr. Sedlacek noted that due to his condition, Mr. Rudolph had requested several accommodations. Mr. Rudolph wanted a trained associate with him on the train since being the sole qualified conductor significantly added to his stress and interfered with his ability to perform efficiently. Due to his risk for exacerbation of his anxiety, Mr. Rudolph also requested the ability to take leave in situation with which he can not cope. While Dr. Sedlacek doubted that such episodes would occur, having the ability to leave would greatly reduce his anxiety. Finally, Mr. Rudolph needed a reasonable extension of time to perform pre-trip duties in the manner to which he was accustomed.

Correspondence – AMTRAK Health Services
(CX 6 and RX 6)

On July 28, 2008, AMTRAK Health Services directed Mr. Rudolph to provide within ten days “sufficient medical documentation to support your recent absence from work.”

Statement of Disability
(CX 7 and RX 7)

On August 13, 2008, Dr. Sedlacek completed a Statement of Disability form for Mr. Rudolph. On August 11, 2008, Dr. Sedlacek assessed Mr. Rudolph's mental status and medications during an office visit. Dr. Sedlacek concluded that Mr. Rudolph was disabled from July 20, 2008 to September 2, 2008 due to severe anxiety. Mr. Rudolph was taking three prescribed medications that would not interfere with his work. His current status was "very overwhelmed, anxious, fearful," with "low stress tolerance." Mr. Rudolph was under Dr. Sedlacek's care due to "continued symptoms" which were "exacerbated by recent conflict at work." In Dr. Sedlacek's opinion, 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 determined Mr. Rudolph was totally, but temporarily, disabled, with an anticipated date of recovery of September 2, 2008. Additionally, Dr. Sedlacek commented that Mr. Rudolph "felt he was asked to violate safety rules by being asked to extend hours of service beyond 12 hours."

Statement of Disability
(CX 8, CX 10, RX 8, and RX 10)

On August 25, 2008, after referencing the August 11, 2008 office visit, Dr. Sedlacek indicated that Mr. Rudolph no longer had a mental limitation that would interfere with his work because Mr. Rudolph "appears to have stabilized sufficiently to return to work." Dr. Sedlacek indicated Mr. Rudolph was capable of performing his job with the following restrictions: "with previously listed restrictions." The effective date of "restricted return to work" was August 21, 2008.

Dr. Michael Sedlacek's Note
(CX 9, CX 10, RX 9, and RX 10)

On September 9, 2008, Dr. Sedlacek responded to a clarification request about his "regular duty" annotation on a form. He indicated that Mr. Rudolph was released to "full time" duties, "restricted to train operations that do not violate FRA regulations or compromised safety." Mr. Rudolph's return to work was retroactive to August 21, 2008 "as per previous release."

Dr. Timothy Pinsky's Statement
(CX 10 and RX 10)

In a March 30, 2009 statement, Dr. Pinsky indicated that he was the AMTRAK corporate medical director. In that position, he reviewed medical documentation for fitness for duty and requests for ADA accommodations.

On May 2008, due to a stress-related psychological disorder, Mr. Rudolph requested several ADA accommodations in his job as an assistant conductor, including never working

alone, abandoning his job any time he felt necessary to do so, and having additional time to prepare for trips. AMTRAK denied the request.

Mr. Rudolph appealed and submitted a subsequently 2006 psychiatrist report and a July 22, 2008 letter from his treating psychiatrist.

About August 2008, Mr. Rudolph requested to return from a medical leave of absence and attached a release from his psychiatrist, which indicated Mr. Rudolph could return to work if the previously requested accommodations were granted.

On September 12, 2008, AMTRAK denied Mr. Rudolph's ADA appeal.

Subsequently, AMTRAK received another return to work note from Mr. Rudolph's psychiatrist that "did not specifically reference the earlier restrictions."

Based on documentation submitted by Mr. Rudolph which "suggested that as a result of his disorder, Mr. Rudolph might be unable, at least some of the time, to perform his job safely and properly," and since his doctor submitted "conflicting" notes with a short period of time, Dr. Pinsky order an independent fitness for duty evaluation.

On October 2008, Dr. Daniel Wilson evaluated Mr. Rudolph and concluded that he could not perform all his duties safely and properly. In a subsequent conversation, Dr. Wilson indicated that even if Mr. Rudolph's perceived workplace hostility and increased job demands were addressed, he was not capable of performing his job.

On November 5, 2008, Dr. Pinsky medically disqualified Mr. Rudolph. At the time he made his decision, Dr. Pinsky was not aware that Mr. Rudolph had filed any report with the FRA or AMTRAK about an hours of service violation. Dr. Pinsky did not render his decision in retaliation for Mr. Rudolph filing an hours of service violation report.

Evaluation – Dr. Ashley D. Walters
(CX 10, RX 10, and RX 81)

On August 23, 2006, Mr. Rudolph presented with complaints of stress and decline in memory. Having worked for AMTRAK since 1989, Mr. Rudolph noticed a change in 1999 when a reduction in personnel caused increased stress. Although he enjoyed his work as a conductor, the situation had become overwhelming. Mr. Rudolph felt that he was unable to keep up with the workload and does not concentrate as well. Periodically, since 2000, he has suffered physical symptoms, including chest and abdomen pain. He was anxious all the time, especially at work. Mr. Rudolph also worried about deteriorating memory. Previously in 2001 and 2003, Mr. Rudolph 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 some medication. Dr. Walters also intended to complete paperwork to permit Mr. Rudolph to take intermittent leave.

Evaluation – Dr. Dennis R. Wilson
(CX 10, CX 12, RX 10, RX 12, RX 80)

On October 27, 2008, Dr. Wilson, Professor and Chairman of Department of Psychiatry, Creighton University, Omaha, Nebraska, submitted his return to work assessment of Mr. Rudolph to Dr. Pinsky. While noting that he was sharing his opinion only with Dr. Pinsky, Dr. Wilson stated that he had “no reservations with these findings justifiably communicated to other relevant parties, including the subject himself.”

Based on his review of medical, psychiatric, and work records, as well as a personal assessment of Mr. Rudolph on October 16, 2008, Dr. Wilson concluded that “Mr. Rudolph is presently unable to work as an Assistant Conductor.” Dr. Wilson diagnosed Generalized Anxiety Disorder and Panic Disorder.

During the October 16, 2008 assessment, Mr. Rudolph confirmed the accuracy of his physicians’ case narratives. His symptoms arose eight years ago as physical pain in his chest and abdomen during considerable anxiety. Mr. Rudolph attributed much of his distress to the changes AMTRAK made over the past ten years, including a decrease in the ratio of conductors to passengers and an increase in responsibility. Due to increased hours, more frequent stops, and fewer train team workers, Mr. Rudolph indicated his work was “now unbelievably stressful.” He found the demands overwhelming and was concerned that he might be the cause of a tragic accident during a phase of poor concentration, distraction, or irritability. Mr. Rudolph also highlighted work episodes with Mr. Graziosi and Mr. Krueger in which he felt unduly intimidated and physically threatened. In particular, Mr. Rudolph described an incident with Mr. Graziosi when he was threatened with bodily harm when he refused to violate the federal hours of service regulation. According to Mr. Rudolph, AMTRAK had done little to undo the cause of his anxiety associated with a continued environment of hostility and threat of violence in the workplace. Mr. Rudolph also asserted that Mr. Krueger routinely demanded that time and safety records be falsified. His refusal to violate legal parameters led to his placement on sick leave. On August 7, 2008, Mr. Rudolph also received notice of discipline which may be a first step in termination. Further, although he was okayed to return to work on August 21, 2008, he did not receive any response from AMTRAK until Dr. Wilson’s appointment. Finally, Mr. Rudolph was worried that if he returned to work, he would not only be likely to make mistakes due to his anxiety but also that AMTRAK management would actively target him to fire him.

In his analysis, Dr. Wilson concluded Mr. Rudolph’s situation was a case of “work-place stress that has engendered a mixed syndrome of Generalized Anxiety Disorder and Panic Attacks, with some secondary depressive elements.” However, his symptoms were “fairly well controlled.” At the same time, Mr. Rudolph’s prognosis was “presently poor” because he was “caught between a wish to resume work but a fear of what such a return would entail.” In particular, he would have “quite sensitized reactions to any perceived threat, retaliation, or hostility at work in the absence of any modification of their causes.” Mr. Rudolph was anxious due to both increased demands at work over the past several years as well as hostile, threatening and retaliatory interactions with one or more supervisors. Dr. Wilson indicated that administrative clarification, and if necessary correction, of his “perceived threat, retaliation, and hostility at work” was “an essential step toward his fuller recovery and return to work”

particularly if his anxiety is “magnified by a hostile work environment.” Dr. Wilson observed “Thereafter, and with ongoing psychiatric care, the stage may be sooner set for Mr. Rudolph’s resumption of work as an Assistant Conductor, or if necessary, a vocational assessment to identify alternative work parameters for him.” In a series of questions regarding Mr. Rudolph’s ability to concentrate, work alone, handle stressful events and emergencies, carry out his job responsibilities without presenting a safety and health risk, Dr. Wilson responded, “Yes, assuming needed resolutions” previously noted, “otherwise, no.” Dr. Wilson concluded that Mr. Rudolph’s “condition is under satisfactory control but for unresolved fears engendered by the workplace. Until these issues are resolved, he is not able to perform his duties on a full-time basis without restriction or limitation.”

AMTRAK ADA Panel
(CX 11, RX 11, RX 86, and RX 89)

Following Mr. Rudolph’s May 24, 2008 submission of requested ADA accommodations, an ADA panel representative requested that he fill out an ADA accommodation request form.

On July 11, 2008, the AMTRAK ADA Panel denied Mr. Rudolph’s request for accommodation due to inadequate medical information to support the request.

On September 12, 2008, the AMTRAK ADA Panel denied Mr. Rudolph’s appeal request for reasonable accommodation.

Correspondence – AMTRAK Health Services
(CX 13, CX 36, RX 13, and RX 36)

On November 5, 2008, AMTRAK Health Services advised Mr. Rudolph that upon review of Dr. Wilson’s evaluation, the AMTRAK Medical Director determined he was medically disqualified from his job as a conductor. Mr. Rudolph had four options. First, he could submit medical documentation that “demonstrates your medical condition has sufficiently improved to allow you to perform this job safely.” Second, he could apply for permanent disability. Third, he may seek accommodation through the ADA Panel. Fourth, he could seek an alternative position in AMTRAK.

Correspondence – Dr. Michael Sedlacek
(CX 14, CX 41, RX 14, and RX 41)

On April 14, 2009, Dr. Sedlacek advised an attorney that Mr. Rudolph remained under his care for ongoing anxiety disorder. Contrary to his November 2008 assessment, Dr. Sedlacek concluded that Mr. Rudolph could no longer return to work at AMTRAK due to the amount of elapsed time and his fear of retaliation for his whistleblower activities. Under normal circumstances Mr. Rudolph would be both physically and mentally capable of returning to work. However, in the current environment, “it would be unrealistic to expect Mr. Rudolph to function in his previous capacity due to the excessive emotional stress he has experienced.”

Correspondence – Dr. Michael Sedlacek
(CX 15 and RX 15)

On September 24, 2009, Dr. Sedlacek advised counsel that Mr. Rudolph has reduced his medications and appeared to be “coping quite well.” Dr. Sedlacek believed Mr. Rudolph was capable of returning to work “when his employment issues are resolved.” Nevertheless, Dr Sedlacek believed such a return was not in Mr. Rudolph’s best interest “due to the likelihood that it may further exacerbate his anxiety and sleep issues.”

Interview Notes – Mr. John A. Anderson
(CX 16 and RX 16)

On July 20, 2008, Mr. Anderson summarized his interview with Mr. Rudolph. When Mr. Rudolph reported to duty on July 19, 2008, he felt fine. Around 9:30 p.m., at Galesburg, Ms. Cannon told him that no relief conductor would be available at Naperville and he’d have to take the train into Chicago. In response, he told Ms. Cannon that he’d have to violate his hours of service to do that and didn’t know whether to violate the hours of service or be insubordinate. That was when he started having chest pains, shortness of breath, lightheadedness, and inability to focus. Later, Mr. Krueger indicated that he would contact CMS. At that time, Mr. Krueger did not tell him that he was going to have to violate.⁶ When asked who told him to violate the hours of service, Mr. Rudolph responded that nobody told him to violate his hours of service. During a radio communication, the BNSF dispatcher indicated that he was aware of the situation but didn’t tell him to violate his hours of service. Mr. Rudolph said he was going to have to take the train into Chicago and the dispatcher said ok. Due to stress, Mr. Rudolph believed his judgment and ability to focus had been impaired. Since 2001, Mr. Rudolph has been receiving stress counseling. He had another episode in 2006 when Mr. Graziosi went after him and had to take five months off.

Correspondence – Federal Railroad Administration
(CX 17)

On October 2, 2008, the FRA advised the state director of the United Transportation Union of its determination regarding Mr. Rudolph’s August 7, 2008 charge that AMTRAK had allowed or required an employee to violate 49 USC § 228 and § 21103 and on July 20, 2008. The FRA concluded that the assistant conductor on July 19, 2008 was not provided relief and thus violated the hours of service law on July 20, 2008. Upon review of AMTRAK records, the FRA determined the conductor accurately recorded the excess service on the hours of duty record. The FRA was unable to determine whether: a) a specific manager directed Mr. Rudolph to violate the hours of service law, and b) a manager verbally threatened Mr. Rudolph for reporting the hours of service violation.

⁶“Q-Did he tell you that you were going to have to violate? A-No.”

Correspondence – Mr. Allen Lewis
(CX 18)

On February 19, 2010, Mr. Lewis, an AMTRAK senior analyst, indicated that consistent with FRA regulations and company policy, a conductor should take a train to its final destination without a relief conductor only if ordered to do so. It is not consistent with company policy for the Carrier to instruct the conductor to take the train to its final destination without a relief conductor on the condition that he not perform service because the company requires two on-duty crew members on a passenger train. Such a situation would result in an hours of service violation.

Correspondence – Dr. Michael J. Sedlacek
(CX 19)

On December 3, 2009, following an office visit, Dr. Sedlacek indicated that Mr. Rudolph is willing and able to return to work at AMTRAK. Mr. Rudolph had some anxiety about potential retaliation at work. However, if AMTRAK followed its own policies and regulations, with no threat of retaliation, Mr. Rudolph was ready to work. “He is able to perform the essential functions of his job.”

Correspondence – Dr. Ashley Walters
(CX 20)

On January 14, 2008, Dr. Walters recommended that Mr. Rudolph be off work “for the time being” due increased anxiety which was impairing his concentration. Additionally, she intended to prescribe medication that would make Mr. Rudolph drowsy. In her opinion, Mr. Rudolph’s present exacerbated condition was due “at least in part” to the work incident on December 28, 2007. Dr. Walters intended to see Mr. Rudolph regularly and re-evaluate him.

Correspondence – Mr. Rudolph
(CX 21)

On March 19, 2008, Mr. Rudolph requested AMTRAK’s Office of Inspector General conduct a compliance review of harassment and workplace violence incidents. Mr. Rudolph asserted that he was harassed and threatened with bodily harm by Mr. Graziosi on December 28, 2007 and again taunted by Mr. Graziosi on January 10, 2008. As a result, he marked off on January 12, 2008 and sought medical attention. Despite several reports to various levels of management, he had received no response.

Correspondence – Mr. Rudolph
(CX 23)

On July 19, 2008, Mr. Rudolph advised Mr. Krueger that he felt less secure in the Chicago Union Station due to Mr. Graziosi’s continued presence. He asks whether he can meet with Mr. Graziosi’s new employer to advise the company of his problems.

Statement – Mr. Rudolph
(CX 24)

On July 22, 2008, Mr. Rudolph prepared a statement regarding his “on duty injury/illness incident of July 19, 2008.” At 11:45 p.m., he assumed the position of conductor on Train #6 when Ms. Mary Cannon completed her 12 hours of service. Due to a setback, Mr. Rudolph was able to work until 1:00 a.m. Based on Ms. Cannon’s conversation with CNOc and crew management, Mr. Rudolph became aware that a relief conductor could not be located. “CNOc, through Ms. Cannon,” instructed him to just take the train into Chicago which Mr. Rudolph considered a clear violation of the hours of service law. In response, Mr. Rudolph phoned his supervisor, Mr. Krueger, who also instructed Mr. Rudolph to take the train into Chicago. When Mr. Rudolph indicated that Mr. Krueger would have to order him to violate the hours of service, Mr. Krueger indicated that he couldn’t do that and repeated the instruction to take the train into Chicago.” Between 12:50 p.m. and 1:00 a.m., Mr. Rudolph advised the “main line” dispatcher of his hours of service situation. He performed service until 1:48 a.m. According to Mr. Rudolph, “AMTRAK forced me to choose between insubordination and assuming personal responsibility for violating FRA law and violating company safety policy (and personal liability in the event of an on-board injury, grade crossing incident, rule violation, etc.)” Mr. Rudolph asserted, “this situation exacerbated an existing medical condition.” So, the next morning, Mr. Rudolph took off ill and completed an accident duty form with Mr. John Anderson.

Phone Records
(CX 25, CX 28, CX 50, and CX 55)

Mr. Rudolph’s phone records indicate the following calls between Mr. Rudolph’s phone and Mr. Krueger’s phone: July 19, 2008, 2:56 p.m., outgoing – 12 minutes; July 19, 2008, 4:53 p.m., incoming - 1 minute; July 20, 2008, 12:04 a.m., outgoing – 2 minutes; July 20, 2008, 12:08 a.m., incoming – 5 minutes; July 20, 2008, 12:57 a.m., incoming – 4 minutes; July 20, 1:13 a.m., incoming – 4 minutes; and July 20, 2008, 11:17 a.m., outgoing – 2 minutes.

On July 21, 2008, Mr. Rudolph placed a two minute call to Dr. Sedlacek’s office at 10:48 a.m.

On August 7, 2008, Mr. Rudolph’s phone record shows the following calls between his phone and Mr. Krueger’s phone: 8:45 a.m., incoming – 47 minutes and 9:59 a.m., incoming – missed call.

On August 29, September 4, September 18, 2008, Mr. Rudolph called AMTRAK Health Services in Philadelphia.

Correspondence – Mr. Rudolph
(CX 26)

With a July 31, 2008 cover letter, Mr. Rudolph sent Mr. Krueger his July 22, 2008 statement about the events of July 19, 2008. He provided the report to comply with GCOR 1.13 which requires an employee to report any personal injuries or unusual condition that may affect

the safe operation of a railroad. Mr. Rudolph also noted GCOR 1.6 mandates that employees must not be insubordinate and GCOR 1.13 requires employees to comply with instructions from managers. Finally, in compliance with GCOR 1.4, Mr. Rudolph reported two issues. First, based on his conversation with Crew Management on July 19th, Mr. Rudolph asserted AMTRAK continuously permits Crew Management Center to maintain a substandard system. He noted that early on July 19, the CMS employee indicated that he forgot about a second setback for Mr. Rudolph and that later another crew caller indicated that he was attempting to obtain Mr. Beary to be a relief engineer when Mr. Beary was already on the train working as the engineer. Second, AMTRAK forced him to violate the hours of service on July 19, 2008 and compromised the safety of the train passengers. Mr. Rudolph went on record that he has informed AMTRAK that working short crew is unsafe and unhealthy for him. He notes the pending ADA accommodation request. He also stated that AMTRAK was aware that he was pursuing a workplace violence incident which will not reflect well on AMTRAK management. According to Mr. Rudolph, AMTRAK should have known that forcing him to work alone beyond his 12 hour limit was a violation of federal law and would or could “adversely exacerbate” his existing documented illness.

Statement – Mr. Rudolph
(CX 27)

On August 7, 2008, Mr. Rudolph prepared a statement to chronicle his phone conversation with Mr. Krueger who called at 8:44 a.m. Mr. Krueger asked whether Mr. Rudolph had violate hours of service on July 20, 2008. Mr. Rudolph indicated that he stood by his written statement. Mr. Krueger responded that if he violated the hours of service he would be charged. Mr. Rudolph again stood by his statement and Mr. Krueger repeated his denial of his involvement. Mr. Krueger stated that Mr. Rudolph must have gotten CNOC’s instructions confused with his. Mr. Krueger said he’d give Mr. Rudolph time to think about it. When Mr. Krueger called again (based on caller ID), Mr. Rudolph did not answer. Mr. Rudolph contacted Mr. Jacobs, a local union chairman, about the calls.

Correspondence – Mr. R. Dennis Jacobs
(CX 29)

On August 13, 2008, Mr. R. Jacobs, a union representative for Mr. Rudolph, requested unedited tape and audio recordings of the conversations which occurred on July 19 and 20, 2008.

Correspondence – Mr. Rudolph
(CX 30 and CX 31)

On August 29, 2008, Mr. Rudolph presented a formal complaint to the AMTRAK Dispute Resolution Office. Mr. Rudolph charged that in retaliation for his report of an FRA violation and an on-duty injury, the improper handling of a workplace violence incident, and ADA accommodation request, he was harassed by Mr. Krueger during an August 7, 2008 phone call.

On September 12, 2008, Mr. Rudolph provided a more detailed letter setting out numerous allegations that needed to be investigated by the AMTRAK Dispute Resolution Office and provided several examples of retaliation. In particular, Mr. Rudolph asked the office to examine AMTRAK's handling of his complaint against Mr. Graziosi. He was also critical of Mr. Israelson's role and response. Mr. Rudolph outlined his hours of service situation that arose on July 20th. Mr. Rudolph indicated that he met with Mr. Israelson on the morning of July 21, 2008 before returning home. They discussed the situation and Mr. Rudolph indicated that he reported a related injury. Mr. Israelson responded that it would not look good if Mr. Rudolph reported an injury every time he felt stressed.

Correspondence – Mr. Rudolph
(CX 32)

On September 12, 2008, Mr. Rudolph thanked the FRA for its investigation but expressed a concern that the matter would not go to a formal hearing. He noted that his complaint went beyond his hours of service complaint and involved a more serious pattern of violations. To support his position, Mr. Rudolph attached 26 conductor train delay reports, each indicating a violation of hours of service and reflecting AMTRAK's policy of ordering crews to drag trains into the final destination but not perform services.

Fax Correspondence – Railroad Retirement Board
(CX 33)

On September 18, 2008, a representative of the Railroad Retirement Board indicated that if the Medical Department is holding Mr. Rudolph out of work then a form needs to be completed promptly to permit the continuation of benefits.

Correspondence – Mr. Rudolph
(CX 34)

On October 1, 2008, Mr. Rudolph asked Mr. Pesce and Dr. Pinsky for information on why AMTRAK was preventing his return to work. He noted that his physician had released him to return to work effective August 21, 2008 and that he had become ineligible for Railroad Retirement Board sickness benefits since August 29, 2008.

Correspondence – Mr. Rudolph
(CX 35 and RX 35)

On November 3, 2008, Mr. Rudolph requested the AMTRAK Dispute Resolution Office advise him of the results of their investigations into his multiple allegations against Mr. Krueger, Mr. Anderson, Mr. Israelson, Mr. Pearson, Mr. Savoy, Mr. Pesce, and AMTRAK Health Services. Mr. Rudolph hoped to resolve matters internally but indicated that he'd resort to litigation if he didn't hear from AMTRAK within 15 days.

Correspondence – AMTRAK
(CX 38 and RX 38)

On November 17, 2008, a human resources specialist indicated that based on the advise of the Law Department, AMTRAK would not provide him a copy of Dr. Wilson’s evaluation.

On November 19, 2008, the same human resources specialist indicated to the Railroad Retirement Board that Dr. Pinsky declined to provide the additional information they requested.

Correspondence – Dr. Sedlacek and Dr. Pinsky
(CX 39 and RX 39)

On November 20, 2008, Dr. Sedaleck sent a letter to Dr. Pinsky noting that Dr. Wilson had conducted a psychiatric evaluation on October 16, 2008, which suggested Mr. Rudolph was not fit to return to work at that time. Following a November 12, 2008 appointment, Dr. Sedlacek 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 as his last day of work.”

Because Mr. Rudolph did not meet the “criteria as disabled by any standard,” Dr. Sedlacek did not consider him to be disabled and believed he should not apply for disability with the Railroad Retirement Board. While recognizing Dr. Pinsky’s right to refuse, Dr. Sedlacek indicated that “it would be very beneficial for me to review to Dr. Wilson’s psychiatric evaluation and recommendations to better understand” Dr. Wilson’s conclusions that he obtained “from his one hour assessment.” He also observed that “in all fairness to Mr. Rudolph, he has a right to know what’s on his medical record.” Dr. Sedlacek continued to maintain that Mr. Rudolph was capable of returning to his full-time duties. “If allowed to work within the confines of his assigned hours, he would be able to do his job without difficulty.” Dr. Sedlacek’s release to duty was retroactive to August 21, 2008. Finally, Dr. Sedlacek expressed a willingness to discuss the case further.

On November 20, 2008, based on advice from Law Department, Dr. Pinsky declined to provide Dr. Wilson’s evaluation to Dr. Sedlacek.

Correspondence – Mr. Rudolph
(CX 40)

On February 3, 2009, in response the November 5, 2008 notice of medical disqualification, Mr. Rudolph took exception with AMTRAK Health Services’ option that he could provide medical documentation due to its lack of specificity. He also highlighted that the exacerbation of his medical condition was due to Mr. Graziosi, AMTRAK’s insufficient response to his workplace violence complaint, Mr. Krueger’s falsifications, and AMTRAK’s history of circumventing company policies. According to Mr. Rudolph, “the record clearly demonstrates that AMTRAK management created an environment incompatible with my illness.” Mr. Rudolph sought documentation certifying that factors causing exacerbation of his condition had been corrected “and will forever stay corrected.”

General Code of Operating Rules
(CX 42 and RX 42)

Rules 1.1.3 and 1.2.5 requires an employee to immediately report all cases of personal injury while on-duty.

Rule 1.7 stated 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 them to be off-duty.” An employee must provide such notice “early enough” that he “may be relieved, or transportation provided, before” he exceeds the hours of service. “Employees must not exceed the hours of service law without proper authority.” At the same time, “employees must not leave trains, engines, or cars on the main track without proper protection.” “Except as provided by this paragraph, employees are then relieved of duty.”

Rule 1.44 indicates that “train dispatchers supervise train movement and any employees connected with that movement.”

According to Rule 1.45, “operators are under the direction of the train dispatcher when their duties concern . . . the movement of trains. . .”

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.” If any doubts arise “concerning the authority for proceeding or safety, the conductor must consult with the engineer who will be equally responsible for the safety and proper handling 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 Train and Engine Employee Hours of Service Record⁷
(CX 43 and RX 43)

On July 19, 2008, Mr. Rudolph began his service at 13:00 (1:00 p.m.) and ended his service in Chicago at 01:48 (1:48 a.m.) on July 20, 2008. The remarks section states “7/20/2008 Forced to violate FRA Hour [sic] of Service Law.”

AMTRAK Workplace Violence Policy
(CX 44 and RX 44)

The AMTRAK Workplace Violence Policy document indicates that AMTRAK has “zero tolerance for threats and violence.” AMTRAK indicates a commitment to provide employees a workplace free from acts or threats of violence and “to effectively respond in the event that workplace violence does occur.”

⁷Apparently, the personal time ticket (“PTT”).

AMTRAK Attendance Policy
(CX 46 and RX 46)

Absence approved under the ADA and Family Medical Leave Act are excluded from the AMTRAK attendance policy.

Collective Bargaining Agreement
(CX 47, RX 47, RX 77)

Under Rule 11(b) of the amended Collective Bargaining Agreement, for a passenger trains consisting of two to six revenue passenger cars, the minimum crew is a passenger conductor and an assistant passenger conductor.

Rule 25 establishes the procedures for disciplinary action, which include a “fair and impartial trial.”

Passenger Conductor Position Description
(CX 48 and RX 48)

A passenger conductor is responsible for the movement and safe operation of the train and the conduct of the operating and on-board crew. A conductor has to maintain continual supervision of the crew for compliance with safety requirements, assist passengers boarding and detraining, and adhere to AMTRAK service standards. The conductor “must be flexible and able to handle/cope with delayed trains and long hours away from home.” The assistant conductor works under the direction of the conductor.

Interview – Mr. John Anderson
(CX 51 and RX 51)

On May 26, 2009, an OSHA investigator summarized his interview with Mr. Anderson. At Mr. Israelson’s request, Mr. Anderson escorted Mr. Rudolph to the hospital on July 20, 2008. According to Mr. Anderson, CMS did not properly provide relief for Mr. Rudolph. CMS had responsibility to fill vacancies on the train as needed. Mr. Rudolph indicated that he spoke to Mr. Krueger about the absence of relief and potential hours of service violation on July 19, 2008. In Mr. Anderson’s opinion, Mr. Krueger did not tell Mr. Rudolph to violate the hours of service law. Mr. Rudolph should have reported at least two hours prior to the expiration of his hours of service period. According to Mr. Anderson, Mr. Rudolph reported a job-related illness condition on July 20 and admitted that he took it upon himself to move Train #6 on July 19th. Mr. Rudolph should have notified the engineer to stop the train and wait for proper relief due to being out of hours of service. Mr. Rudolph told him that he violated the hours of service rule on July 19, 2008 because he directed movement of the train without being told by his supervisor or CMS dispatcher. Mr. Anderson was aware of hours of service being violated in emergency situations, such as inclement weather. Mr. Anderson stated that Mr. Rudolph did not have authority to move the train and he had communications with his supervisor, the engineer, and the BNSF dispatcher before he violated the hours of service law. Mr. Rudolph was not charged for

reporting his illness. Mr. Anderson provided no input regarding the medical disqualification of Mr. Rudolph.

Railroad Unemployment Benefits
(CX 54)

From July 28, 2008 through December 29, 2008, Mr. Rudolph received a total of \$6,039.00 in railroad unemployment benefits.

Statement – Mr. Danny W. Meeks
(CX 57)

On July 25, 2003, Mr. Meeks experienced multiple difficulties in obtaining a complete and accurate manifest for a train scheduled to depart at 2:15 p.m. With sleeping passengers still on the platform at 2:15 p.m. Mr. Meeks went to obtain an updated manifest. At that point, he was confronted by two supervisors who yelled at him for getting a manifest at that time. When he returned to the train, he discovered that repairs were just being completed on an engine mirror; Mr. Meeks was never advised that repairs were being made on the engine. Additionally, a crippled elderly man had delayed the boarding in the sleeper car. The train departed at 2:25 p.m. Due to the confrontation, Mr. Meeks was off work on sick leave for seven weeks due to stress and anxiety.

Administrative Action
(CX 59 and RX 59)

A charge specification against an AMTRAK employee indicated that on July 19, 2008, the CMS employee arranged for Engineer Campbell to recrew Train #6 at Naperville. At 12:26 a.m., July 20, 2008, the CMS employee advised Road Foreman Dudley that Mr. Campbell is “patching.” However, she did not provide a relief conductor.

On July 30, 2008, the CMS employee waived her right to an investigation. She was reprimanded for failing to follow instructions from the previous “turn-over” to monitor the delayed Train #6 from Omaha to Chicago. Her failure “resulted in the train crew outlawing en route with no relief conductor ordered to recrew the train” and the train operating between Naperville and Chicago without a properly rested, qualified conductor.

Progress Notes – Dr. Pinsky
(CX 60, CX 61, CX 62 and RX 62)

In a September 9, 2008 progress note, Dr. Pinsky annotated that he discussed Mr. Rudolph’s case with the ADA panel. He noted that according to Ms. Keren Rabin, if Mr. Rudolph requests return to work without any restrictions, he will need a return to work psychiatric examination. If his request has restrictions, then he will be medically disqualified “since it has already been determined (via call with his supervisor from Keren and Malva Reid) that these are not compatible with his job.”

On September 18, 2008, in response to Mr. Rudolph's inquiry of September 13, 2008 regarding his return to work, Dr. Pinsky discussed the situation with Ms. Rubin who reviewed the documentation. Due to the ambiguity of Dr. Sedlacek's correspondence, including his September 10, 2008 note, Ms. Rubin recommended that he contact Dr. Sedlacek.

Later that day, Dr. Pinsky called Dr. Sedlacek who indicated that Mr. Rudolph was cleared to return to work without restrictions except for activities that would violate federal regulations, although he did not know what the regulations were. According to Dr. Sedlacek, 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 volunteered that he had been writing what Mr. Rudolph requested he write in his correspondence to AMTRAK.

In the late afternoon of September 18, 2008, Dr. Pinsky discussed the case again with Ms. Rubin. Ms. Rubin advised that a return to work psychiatric examination was appropriate based on supervisor concerns, his sudden marking off a train, and Dr. Pinsky's discussion with Mr. Israelson who was uncomfortable with permitting Mr. Rudolph back to work without a medical assessment. She also advised not to respond to Mr. Rudolph's inquiry. Dr. Pinsky then directed arrangements be made for the examination.

On November 5, 2008, Dr. Pinsky spoke with Dr. Wilson and asked him to clarify his opinion on Mr. Rudolph's ability to return to work from a medical perspective. Dr. Wilson opined that due to his condition, Mr. Rudolph was 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 concluded that Mr. Rudolph was medically unfit for duty and determined that he was medically disqualified. Dr. Pinsky directed that Mr. Rudolph be notified of his decision. Several phone attempts were made unsuccessfully.

Correspondence – Mr. Rudolph
(CX 63)

In an October 7, 2008 letter, Mr. Rudolph asked AMTRAK Health Services for information about his request and the Railroad Retirement Board's request for his status. Noting that he has been ineligible for sickness benefits since August 21, 2008 when his physician approved his return to work, Mr. Rudolph requested AMTRAK Health Services fax a statement to the Railroad Retirement Board that he was held from returning to work and indicate the authority for that decision.

E-Mail – Dr. Pinsky
(CX 63)

In an October 7, 2008 e-mail, Dr. Pinsky advised Mr. Pesce that he 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 stated they were attempting to schedule an evaluation but the physician was out of town. He asked Superintendent Pesce to let Mr. Rudolph know what is going on and to thank him for his

patience. A handwritten note stated that Ms. Rubin advised not to respond to Mr. Rudolph's most recent letter.

Correspondence – Mr. Jacobs
(CX 64)

In a January 2010 letter to Mr. Morrell Savoy, Acting General Superintendent, Mr. Jacobs inquired whether AMTRAK will pursue the case against Mr. Rudolph. Mr. Jacobs offered to provide medical documentation indicating that Mr. Rudolph's medical condition would not interfere with his ability to defend himself. He also requested the pending charges be dismissed.

Correspondence – Mr. Morrell Savoy
(CX 65)

On January 22, 2010, Mr. Savoy responded to Mr. Jacobs' inquiry and advised that due to pending litigation all correspondence should be sent to AMTRAK counsel.

Correspondence – Mr. Jacobs
(CX 66)

On February 8, 2010, Mr. Jacobs asked Mr. Allen Lewis, senior analyst, about the circumstances under which a conductor who is out of hours may take a train to its final destination without a relief conductor.

Correspondence – Mr. Carl J. Demotes
(CX 67)

On May 27, 2009, Mr. Demotes advised that AMTRAK generally does not proceed with a case if an employee is absent due to medical leave since the condition might interfere with his ability to defend himself.

Correspondence – Mr. Rudolph
(CX 68)

In January 2010, Mr. Rudolph again asked that he be permitted to return to work.

Correspondence – Mr. Darly Pesce
(CX 69)

In a February 17, 2010, Mr. Pesce indicated that an investigation revealed that the unfortunate disclosure of some ADA material from Mr. Rudolph occurred because a copy of his letter had been faxed to supervisors. The managers had been directed to inform employees that such information was confidential.

Statement – Mr. Jack S. Krueger
(CX 70 and RX 70)

In a May 2009 statement, Mr. Krueger indicated that in June/July 2008 he supervised Mr. Rudolph, who was a senior conductor. On July 19, 2008, about half an hour before his hours of service expired, Mr. Rudolph called Mr. Krueger and indicated that he was near Naperville and that an engineer would relieve him. Mr. Krueger responded that he contact the crew caller and ask if a relief crew was available for Mr. Rudolph en route. The crew caller indicated she was unable to replace Mr. Rudolph with a conductor but a relief engineer was being provided.

Having a problem with CMS not making arrangements for a relief for Mr. Rudolph, Mr. Krueger called and emailed supervisors about the lack of relief for Train #6. Mr. Israelson responded and indicated he would contact the crew caller to see if a relief crew could be provided at about 1:25 a.m. Train #6 arrived in Naperville at 1:01 a.m. and Chicago at 1:30 a.m.

The other conductor had called the company earlier about her hours of service expiration. However, Mr. Rudolph didn't call until 30 minutes before his expiration. Mr. Rudolph was aware that he was to provide substantial notice prior to the expiration of hours of service to obtain a sufficient relief crew. CMS is required to notify him of manpower problems. Mr. Krueger was not aware that the senior conductor had advised CMS of Mr. Rudolph's hours of service limitations. Mr. Rudolph relieved the senior conductor at Princeton, Illinois, who then continued on the train (off-duty) to Chicago. Mr. Rudolph was out of hours in Naperville but continued to work as a conductor into Chicago. Mr. Krueger did not authorize Mr. Rudolph to continue to work as a conductor since he was out of service hours in Naperville. Mr. Rudolph directed the engineer to continue on to Chicago after speaking with the dispatcher. Mr. Krueger believed the hours of service violation was initiated by Mr. Rudolph.

On July 20, 2008, Mr. Rudolph was scheduled to report for duty at 1:10 p.m. However, between 7:30 and 9:00 a.m., Mr. Rudolph informed Mr. Krueger that he was going off-duty and reporting a stress-related injury. Mr. John Anderson escorted Mr. Rudolph to the hospital due to the injury.

Mr. Krueger did not provide any written recommendation regarding Mr. Rudolph's employee status prior to November 5, 2009 [sic] when he was medically disqualified. He learned from co-workers that Mr. Rudolph spent some time off in 2007 for stress-related issues. Mr. Krueger stated, "I have not spoken with Mr. Rudolph since July 2008 although we were friends at one time." Mr. Rudolph violated the hours of service without directions from management and "charges were written up."

Mr. Krueger indicated that he reviewed the statement and had an opportunity to correct it. He attested that the statement was true and stated, "I feel that this statement is a snapshot of a full statement."

AMTRAK E-Mails⁸
(RX 71 and RX 85)

At 12:39 a.m., July 20, 2008, Mr. Krueger informed Mr. Savoy that Mr. Rudolph was about to go dead at Naperville. Although CMS had Mr. Campbell as a relief engineer, no conductor relief was available. Mr. Rudolph indicated that he would have to violate the hours of service to leave Naperville. Mr. Krueger didn't understand "why CMS thought that this was the proper way to protect Train #6 into CHI (Chicago)."

At 1:03 a.m. July 20, 2008, Mr. Krueger provided to Mr. Israelson 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.).

At 10:02 a.m., July 30, 2008, Mr. Krueger advised Mr. Israelson that he looked into the incident and based on the tapes he believed Mr. Beary "was correct in all his actions."

At 10:21 a.m., July 30, 2008, Mr. Israelson indicated that he agreed Mr. Beary did the right thing stopping. His only exception was that Mr. Israelson didn't hear an emergency announcement.

At 11:50 a.m., August 4, 2008, Ms. Sue Flinner requested July hours of service reports by August 8th from several individuals including Mr. Krueger.

At 11:56 a.m., August 4, 2008, Mr. Krueger asked Mr. Israelson whether they are going to report the incident with Mr. Rudolph as an HOS (hours of service) violation.

At 12:01 p.m., August 4, 2008, Mr. Israelson asked Mr. Krueger whether Mr. Rudolph was 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."

At (9:22 a.m.),⁹ on August 6, 2008, Mr. Krueger asked Mr. Israelson, "How do we charge him within the time limits?"

At 9:36 a.m., August 6, 2008, Mr. Israelson answered, "That would be first knowledge that he claims he performed service."

⁸These e-mails contain two types of time stamps. Most e-mails have a time stamp set out in the following format: "9:00 A.M." However, a few e-mails, and some duplicate e-mails, have a different format: "9:00:00." Within the string of e-mails, and among the duplicates, the "9:00:00" time stamp format is exactly one hour greater than the other time stamp format, "9:00 A.M." The different time stamp formats may be due to different e-mail servers. Nevertheless, since the time stamp of "12:39 a.m." on Mr. Krueger first e-mail on July 20, 2008 is consistent with the sequence of events on that morning, I believe the "9:00 A.M." time stamp format reflects local time.

⁹"10:22:44."

At 9:52 a.m., August 6, 2008, Mr. Krueger indicated that he was not understanding what Mr. Israelson was saying about first knowledge. Mr. Krueger then stated, "I will write up the charges accordingly."

At 9:54 a.m., August 6, 2008, Mr. Israelson asked "Is he claiming a violation?"

At (9:56 a.m.),¹⁰ August 6, 2008, Mr. Krueger stated, "He did in his letters or statements."

At 10:00 a.m., August 6, 2008, Mr. Israelson asked, "What did he enter in the PTT ?"

At 10:45 a.m., August 6, 2008, Mr. Krueger responded with an attachment.¹¹

At 8:13 a.m., August 7, 2008, Mr. Krueger informed Ms. Flinner that Mr. Rudolph violated the hours of service on July 20, 2008 at 01:00 (1:00 a.m.) "without being instructed to do so."

At 8:32 a.m., August 7, 2008, Ms. Flinner indicated that she would need more information and was sending a form for completion.

At 8:37 a.m., August 7, 2008, Mr. Israelson asked Mr. Krueger whether Mr. Rudolph was stating he performed service or that he was just on the train.

At 8:39 a.m., August 7, 2008, Mr. Krueger responded that the PTT showed he performed service.

At 9:48 a.m.,¹² August 7, 2008, Mr. Krueger advised Mr. Israelson that he just had a long conversation with Mr. Rudolph. Mr. Rudolph believed 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 I told him not to violate the HOS but still thinks that I told him to take the train into CHI." Mr. Krueger believed someone in CMS or CNOC told Mr. Rudolph to do that and "he got it mixed up with our conversation." Mr. Rudolph continued to insist that he performed service.

At 10:03 a.m., August 7, 2008, Mr. Israelson instructed Mr. Krueger, "well work with Mr. John Anderson on charges then."

At 10:05 a.m., August 7, 2008, Mr. Krueger responded, "I have already made the request."

¹⁰"10:55:47."

¹¹The e-mail copy does not include a copy of the attachment.

¹²On duplicates, "10:47:30."

Railroad Retirement Board
(RX 73, RX 74, RX 78, and RX 82)

On March 27, 2008, Mr. Rudolph applied for sickness benefits, effective January 11, 2008. Mr. Rudolph indicated that he had been injured or become sick on December 28, 2007.

On March 28, 2008, based on four visits from January through March 2008, Dr. Walters diagnosed generalized anxiety disorder.

On November 5, 2008, Dr. Pinsky informed the Railroad Retirement Board that based on a Fitness for Duty evaluation, Mr. Rudolph had been found medically unable to return to work. Dr. Pinsky stated that his absence since August 18, 2008 was due to the need to clarify his medical capabilities.

On November 19, 2008, AMTRAK Health Services declined to provide to the Railroad Retirement Board more information from Dr. Pinsky regarding Mr. Rudolph's fitness for duty evaluation.

From December 2008 through May 24, 2009, the Railroad Retirement Board paid Mr. Rudolph sickness benefits.

On June 3, 2009, the Railroad Retirement Board concluded Mr. Rudolph met the requirements for a disability annuity.

On June 15, 2009, the Railroad Retirement Board determined Mr. Rudolph was to receive a disability annuity of \$3,037.97, effective May 1, 2009.

Personnel Action Request
(RX 79)

On September 24, 2008, Mr. Krueger placed Mr. Rudolph on active leave of absence, effective July 20, 2008, due to medical leave of absence.

Accident Investigation Committee Report
(RX 83)

In an undated report, the Accident Investigation Committee, consisting of Mr. Krueger, Mr. Israelson, and Mr. John Anderson, investigated Mr. Rudolph's allegation of a stress related injury on July 19, 2008. The committee found no evidence of an injury. Based on Mr. Rudolph's history, they concluded the incident involved a pre-existing injury. The committee interviewed one witness, Ms. Mary Cannon.

According to the committee, around 21:30 (9:30 p.m.), while working as a conductor on Train #6, Mr. Rudolph started to feel chest pain, shortness of breath, lightheadedness, general confusion and inability to focus when Ms. Cannon told him that he would have to take over without relief and violate the hours of service into Chicago. When Mr. Rudolph called Mr.

Krueger at 00:35 (12:35 a.m.), July 20, 2008, to indicate that he would be dead around Naperville, he did not report any symptoms. At that time, he stated the BNSF dispatcher would have to tell him to violate the hours of service if they wanted him to violate the hours of service. Mr. Rudolph indicated that at Naperville, he was not told to violate the hours of service but had a conversation with the BNSF dispatcher who was aware of the situation. He told the dispatcher that he'd have to take the train into Chicago and the dispatcher replied ok. The next morning at the 11:17 (11:17 a.m.), Mr. Rudolph called Mr. Krueger to report a stress-related injury. Mr. Anderson transported Mr. Rudolph to the hospital. At the hospital, he was given a provisional diagnosis of anxiety disorder and taken out of work until he was re-evaluated three days later. Prior to his return to service on June 6, 2008, Mr. Rudolph had been off work due to stress-related syndrome since January 11, 2008.

The committee expressed an intention to forward the report to the Medical Department.

Discipline Action
(RX 84)

In August 2008, AMTRAK imposed a suspended five days on an employee who violated his hours of service without authorization and failed to notify his supervisors that he was going to exceed his hours of service.

Correspondence – Associate General Counsel
(RX 88)

On February 3, 2009, an AMTRAK associate general counsel advised Mr. Rudolph's attorney that Mr. Rudolph was not being held out of work by his supervisors. Instead, based on an independent psychiatric evaluation, Mr. Rudolph had been medically disqualified. As a result, only AMTRAK Health Services could determine whether Mr. Rudolph is capable of returning to work based on medical documentation that his condition has sufficiently improved to allow him to perform his job safely.

Mr. Rudolph's Interrogatory Answers
(RX 90)

In his January 5, 2010 interrogatory answers, Mr. Rudolph, through counsel, set out several adverse actions: Mr. Krueger's August 7, 2008 threat of charges; AMTRAK's August 9, 2008 charge of hours of service violation; AMTRAK's refusal to allow a return to work; AMTRAK's failure to respond informational requests; AMTRAK's requirement that he undergo a psychiatric evaluation; AMTRAK's improper disqualification.

In terms of damages, Mr. Rudolph claimed \$109,959.31 in lost wages from June 23, 2008 through December 27 2009 at \$1,391.98 per week. In the event reinstatement is not an option, Mr. Rudolph claimed \$1,293,575.00 for front pay and benefits until he reached retirement age (\$87,700.00 from January 1, 2010 through September 30, 2024). Finally, Mr. Rudolph claimed \$250,000.00 in punitive damages, \$500,000.00 in compensatory damages for physical,

emotional, and mental damages, \$48,707.00 for reimbursement of 401K account, as well as legal expenses.

August 7, 2008 Telephone Call (Audio CD)¹³
(RX 92)

Mr. Krueger (“Jack”) calls Mr. Rudolph (“Butch”) and tells him that he is supposed to verify whether on July 20 Mr. Rudolph violated the hours of service and performed service. Specifically, Mr. Krueger asks whether Mr. Rudolph was just riding the train to Chicago or did he actually perform service. Mr. Krueger advises Mr. Rudolph to wait before he answers the question. However, before Mr. Krueger can provide further explanation, Mr. Rudolph states, “I performed service!” Mr. Krueger responds that he is being told that he has to charge Mr. Rudolph if he performed service. With a rising voice, Mr. Rudolph asks what is going to happen with “this all this kind of stuff where . . .you told me to take the train into Chicago.” Mr. Krueger responds in a steady voice, “I didn’t tell you that Butch.” Sounding incredulous, Mr. Rudolph asks, “You didn’t tell me to take the train into Chicago?!”

Mr. Krueger: “No, I didn’t.”

Mr. Rudolph: “Jack, come on!”

Mr. Krueger: “No, I told you . . .”

Mr. Rudolph: “Jack don’t play this game, you have always been a straight shooter. We’ve had our disagreements but you have never, ever been a liar!”

Mr. Krueger: “And, I’m not now Butch. What I told you 25 minutes before you went dead was that I would call CMS and see if they had anybody on their way out there.”

Mr. Rudolph: “I spoke Jack . . . I spoke to you because I was going to let the train sit. I asked you twice! I said, you’re going to have to order me to violate and you said I’m not going to do that. Your instructions were to take the train into Chicago.”

Mr. Krueger: “No, Butch. If I told you to take the train into Chicago, that’s basically telling you have to violate the hours of service, and I can not do that without Gary Israelson’s approval on that.”

Mr. Rudolph: “That is the exact wording that went on that night between you and me.”

Mr. Krueger: “Butch, it’s not.”

Mr. Rudolph: “It’s exactly what went on Jack and you know that.”

¹³Mr. Krueger recorded this nearly 47 minutes long conversation without Mr. Rudolph’s knowledge. At the hearing, counsel agreed that Nebraska is a single-party consent state.

Mr. Krueger: "It's not, Butch."

Mr. Rudolph: "My letter is absolutely verbatim, correct."

Mr. Krueger: "Well, Butch, I did not do that. What I said was let me get a hold of the crew caller and find out."

Mr. Rudolph: "You may have said that earlier, but I'm talking about when I called you around midnight, not earlier . . . That's why the train didn't sit there, because I was going by exactly what you told me."

For the next couple of minutes, Mr. Rudolph continues to adamantly insist those were Mr. Krueger's exact words and Mr. Krueger persistently responds that he can not give that instruction on his own. Mr. Rudolph insists Mr. Krueger told him and that his letter is verbatim. Mr. Krueger states he didn't. As Mr. Rudolph becomes more agitated, Mr. Krueger states calmly that no one told him to violate the hours of service.

Mr. Rudolph: "You said that and then in the very next breath you said take the train into Chicago."

Mr. Krueger: "No, I wouldn't do that. You called me at about 12:35, is when we talked, and that was about 25 minutes before you went dead. I told you that I'd call CMS and see if they had someone on the way. You said that they had told you they have a BNSF engineer coming out."

Mr. Krueger explains that he tried to get in touch with CMS. When CMS indicated they only had an relief engineer, Mr. Campbell, he told CMS that wasn't going to work. He then called Mr. Israelson.

Mr. Krueger: "By then, it was past 1:00 a.m. where you had already violated."

Mr. Rudolph laughs in response and says a couple of times, "This is really good."

Mr. Rudolph: "Do you have the . . . we were instructed by CNOC to take the train to Chicago."

Mr. Krueger: "CNOC might have said that but I don't do that. I don't do that with anybody."

Mr. Rudolph: "That letter is absolutely verbatim."

Mr. Krueger disagrees. Mr. Rudolph insists. They continue to argue for a couple more minutes.

After Mr. Krueger observes that when the train pulled into Naperville at 1:01 a.m. Mr. Rudolph had already violated the hours of service, Mr. Rudolph responds, "Well, how about

Mary (Ms. Cannon), she did too!” Mr. Krueger points out that Mr. Rudolph had relieved Ms. Cannon. Mr. Rudolph replies, “We were both there!” Mr. Rudolph accuses Mr. Krueger with messing around with the credibility of the company.

Mr. Krueger: “You weren’t told to violate the hours of service unless you were told that by CNOC or CMS or someone like that.”

Mr. Rudolph: “No one told me to violate the hours of service. It’s just you told me to take the train in . . . my instructions were to take the train into Chicago.”

Mr. Krueger: “No.”

Mr. Rudolph: “Those were your exact words, verbatim. . .twice!”

Mr. Krueger: “I would not tell you that . . . I can not tell you that.”

The argument continues and Mr. Rudolph is shocked and attributes Mr. Krueger’s actions to some sort of pressure. Mr. Krueger indicates that Mr. Rudolph may be thinking about something CNOC or CMS might have told him, but Mr. Rudolph rejects that possibility because Mr. Krueger is his boss.

Mr. Krueger: “Yeah, but I remember you saying something about them just telling you to take the train into town and that’s when I said I need to talk to CMS to find out if they got somebody to relieve you.”

Mr. Rudolph: “The statement I gave you, AMTRAK, is exactly what happened.”

For several iterations, Mr. Krueger asserts the statement isn’t accurate; Mr. Rudolph asserts it is accurate. Mr. Krueger then observes that Mr. Rudolph knows he wouldn’t tell a crew to do something unless he feels it’s correct and he did not believe it was correct to have Mr. Rudolph violate the hours of service. Mr. Rudolph responds, “my statement is true.”

Mr. Krueger indicates that they are going to pull the tapes and will hear him tell CMS that their arrangement wasn’t going to work. Mr. Rudolph then maintains that AMTRAK’s practice is to have conductors just take the train into Chicago rather than stop it. Mr. Krueger asks who told the other conductors to do that?

Mr. Rudolph then indicates that if AMTRAK takes out their magnifying glass to find a little something to charge him with, this will turn into a “big deal.”

When Mr. Krueger asserts that the AMTRAK tapes will support his version, Mr. Rudolph observes that their conversation that night was not taped so it will come down to credibility and AMTRAK’s practice. Mr. Krueger points out that the tapes show he told CMS that they couldn’t just send Mr. Campbell out to relieve the train, they also needed a conductor and he complained to Mr. Israelson that CMS was trying to send Mr. Rudolph through Naperville without a relief conductor. Mr. Rudolph notes that was AMTRAK’s’ practice. Mr. Krueger emphasizes that

everything he did after talking to Mr. Rudolph that night supports his position that he was attempting to get a relief conductor and not that he had told Mr. Rudolph to go through.

Again, another exchange of – you did, no I didn't – occurs, with Mr. Rudolph using AMTRAK's practice to support his position. When Mr. Krueger observes that he hasn't gotten reports of conductors violating the hours of service into Chicago, Mr. Rudolph responds that "the books are cooked" and show only 12 hours of service.

In response to Mr. Krueger's specific question on whether Mr. Rudolph performed service past his hours of service, Mr. Rudolph indicates his answer is in his statement. Mr. Krueger says okay; he'll pass that information onto Mr. Israelson and see what he says.

Mr. Rudolph: "It's what happened."

Mr. Krueger: "It isn't."

Mr. Rudolph: "It is."

Mr. Rudolph then charges that Mr. Krueger knows the CMS phone line is recorded. Mr. Krueger responds that he had no reason to falsify. Mr. Rudolph says he also has no motivation to falsify. Mr. Krueger doesn't believe Mr. Rudolph is intentionally falsifying anything, he believes he just heard it from somebody else that night because he had talked to CNOC and CMS.

Mr. Rudolph: "I heard it from . . . Mary (Ms. Cannon) told me, and well CNOC is not my boss so I called you because you're my boss, not CNOC. . . It wasn't surprising what I put down on the paper which is happened if that's the way you told me did not surprise me because of AMTRAK's practice of doing that. AMTRAK's practice is not, oops, conductor's dead, stop the train."

When Mr. Krueger notes that he would never violate the hours of service as a train engineer, Mr. Rudolph indicates that things would be better if Mr. Krueger were managing things out of Chicago, but he believed Mr. Krueger's hands are tied by higher management. Mr. Krueger responds that he does not go against what he believes and does not instruct people to violate the hours of service when he's not instructed to do so from Mr. Israelson.

After indicating he's being truthful, Mr. Rudolph states, "That's what happened." Mr. Krueger replies, "It's not."

Mr. Rudolph: "I did the best job I could that night to the best of my ability. I was put in a terrible position." He wasn't surprised that CMS dropped the ball. Mr. Krueger agrees and called them right away to find out what they were doing that night.

Another iteration of – it's what happened, it isn't – goes on for a couple of minutes. Mr. Krueger indicates that if he had intended for Mr. Rudolph to violate the hours of service, he would have specifically instructed him to violate the hours of service.

Mr. Rudolph then notes that he told the BNSF dispatcher that he was being forced to violate the hours of service. Mr. Krueger responds, "I have the BNSF tape and that's not what was said . . . what was said was that you were going to have to take the train into Chicago and he said alright."

Mr. Krueger indicates Mr. Rudolph must be mixed up and Mr. Rudolph replies that he is not mixed up.

Mr. Rudolph: "When you said you are instructed to take the train on into Chicago, when you said that, that's no different than previous AMTRAK practice . . . it's happened before." Mr. Krueger indicates that's a practice that shouldn't be happening.

Mr. Rudolph indicates that his phone records show when and the amount of time that they spoke that night.

They continue to argue. Mr. Krueger again stresses that his actions demonstrate his intention to get a relief conductor for Mr. Rudolph. Mr. Rudolph responds that he is an experienced conductor who always follows instructions and there was no misunderstanding. And the situation has exacerbated a medical condition.

Mr. Krueger suggests that Mr. Rudolph should think about what happened and talk to Ms. Cannon to ensure he's correct because it's going to make a difference in the end. Mr. Rudolph responds, "it's exactly what happened" but agrees to call Ms. Cannon.

Mr. Krueger states that he will e-mail Mr. Israelson Mr. Rudolph's position that his statement is correct. Both end the conversation with a calm exchange of goodbyes.

Transcripts¹⁴
(CX 93)

CMS Recording #1

CMS employee, "Wanza", receives a call in the morning from Mr. Krueger. Mr. Krueger has just received a call from Mr. Rudolph who indicates that he is going dead at Naperville and they don't have a relief crew. Wanza replies that they got an engineer and she thinks a conductor also. Mr. Krueger asks if the crew will be at Naperville. Wanza replies the relief engineer, Mr. Campbell, will get on at Naperville. Wanza states, "He's able to operate the train from Naperville to Chicago." When Mr. Krueger asks about a conductor, Wanza responds that she has been told by BN that the engineer is able operate the train by himself. Mr. Krueger asks about what happens if there's a medical emergency in the back of the train. Wanza

¹⁴These written transcripts are based on recorded conversations on the audio CD, RX 92. I have listened to each specified recording and confirmed the transcripts as presented are generally accurate. However, based on the voices, context of the conversations, and my interpretation of garbled sections, I have at times corrected the text and identified parties different than those named in the transcripts.

responds that they were looking for conductors but have not had any luck. Mr. Krueger states that he'll call back.

CMS Recordings #2 and #3

Ms. Cannon asks Wanza whether they are sending relief out to them at Naperville. Wanza places Ms. Cannon on hold and calls Ms. Smith and asks about a recrew. Ms. Smith asks when the train is due into Chicago, Wanza indicates Train #6 departed Galesburg at 10:55 p.m., which means "they're looking a 1:30 a.m." Wanza indicates that Conductor Cannon is asking whether a relief crew is coming. Ms. Smith respond, no, and indicates that she'll call "the BN." Wanza then reconnects with Ms. Cannon and tells her they are checking with BN to see what's going on. Ms. Cannon tells Wanza that the train just left Galesburg at 10:55 p.m. and is about 2 1/2 to 3 hours out. Wanza indicates they will have to work on something and she'll call back.

CMS Recording #4

Ms. Cannon advises Wanza that the operating train engineer is Mr. Rick Beary. Having heard someone was trying to call him to be the relief engineer because the Train #6 engineer was going dead, Mr. Beary wanted to let everyone know he's already on the train. When Wanza asks if they can use him, Ms. Cannon responds, no, he's dead at 1 o'clock." Wanza replies she'll try to find someone.

CMS Recording #5

Wanza calls Ms. Cannon to question why Mr. Beary will go dead at 1:00. Ms. Cannon explains that he drove Train #5 down a portion of the route due to the lack of engineers and then boarded Train #6 to go back up the route. He's been on continuous duty. Mr. Beary gets on the radio and explains that he operated Train #5 to Galesberg, switched trains and is operating Train #6 back to Chicago. Ms. Cannon asks Wanza to call her if she hears anything.

CMS Recording #6

Initially, at 12:50 a.m., July 20, 2008, Mr. Rudolph and the BNSF dispatcher have difficulty establishing clear two-way radio communications. As a result, Mr. Beary, the train engineer, acts as an intermediary to relay their exchanges. Mr. Rudolph states that he understands there is no relief conductor and says "by ensuring the doors are closed and highballing¹⁵ the train, I will be in violation of the federal hours of service law." Mr. Beary relays Mr. Rudolph's statement to the BNSF dispatcher, saying, "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 dispatchers replies, "Alright, roger."¹⁶ At 12:52:56 a.m., July 20, 2008, Mr. Beary radios

¹⁵May refer to an old train signal of a pole and ball that indicated the track was clear and the train could depart.

¹⁶The engineer's response was transcribed as "Nah, it ain't much." However, upon listening to the actual recording, while the transmission is slurred at the beginning and clipped, I heard, "Alright, roger." This interpretation is

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 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." At 12:53:58, July 20, 2008, Mr. Beary advises Mr. Rudolph that it's raining pretty good and he may stop short to pick up Mr. Campbell.

Workplace Violence Report
(RX 94)

On January 1, 2008, Mr. Israelson completed an AMTRAK workplace violence form involving Mr. Rudolph's complaint against Mr. Graziosi. On December 28, 2007, Mr. Rudolph and Mr. Graziosi had confrontation. According to witnesses, Mr. Rudolph became upset when he was told outside an AMTRAK office in Chicago that the crew would be taking a respite (cut in hours of service) due a rail disruption in the terminal lounge rather than being provided a hotel. Mr. Rudolph and Mr. Graziosi engage in a heated argument over whether lodging had to be provided and then Mr. Rudolph followed Mr. Graziosi into his office. As they were entering the office, Mr. Graziosi said that he wished Mr. Rudolph was not in uniform which Mr. Rudolph interpreted as a threat. Mr. Graziosi indicated his statement meant that since Mr. Rudolph was acting like a child, he shouldn't be in uniform. According to witnesses, right after Mr. Graziosi's comment, Mr. Rudolph started canvassing the room, asking everyone if they had heard Mr. Graziosi threaten him. Mr. Graziosi called for the AMTRAK police. The consensus of the witnesses that was that both Mr. Rudolph and Mr. Graziosi were animated but there was no imminent threat of violence. Since Mr. Graziosi indicated that he was leaving AMTRAK in two weeks for a job with Metra, Mr. Israelson did not believe there would be an intimidating environment in Chicago.

supported by, and consistent with, Mr. Beary's subsequent clear transmission to Mr. Rudolph indicating that all the dispatcher said was "alright."

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

While most of the witnesses were generally believable and provided credible testimony, some conflicts in testimony and inconsistencies require a detailed assessment which will appear in *italics*.

In regards to Dr. Pinsky, since he did not testify, I was unable to assess his credibility in terms of witness demeanor. However, as to the probative value of his progress notes, summarizations, and statements, two factors stand out. First, as later discussed in detail, Dr. Pinsky's explanations, conclusions, and determinations are 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 have not been directly converted by other evidence in the record. Notably absent in the record is any subsequent statement by either Dr. Sedlacek or Dr. Wilson that Dr. Pinsky's recollection of their discussions was not accurate. Consequently, I find Dr. Pinsky's documentation probative.

Specific Findings

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.¹⁷

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.

¹⁷49 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 detraining, 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)¹⁸ 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.

¹⁸I take judicial notice of 49 U.S.C. § 21103.

AMTRAK's GCOR 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

[In his recollection of the confrontation with Mr. Graziosi about hotel accommodations during a four hour "cut," Mr. Rudolph presents Mr. Graziosi as the aggressor. However, the witnesses who observed the exchange considered both Mr. Rudolph and Mr. Graziosi to be very animated in their disagreement (RX 94). Additionally, whether Mr. Graziosi's reference to Mr. Rudolph being out of uniform was a threat or a statement of contempt appears to depend on the participants' perspectives. When the AMTRAK police were called, Mr. Rudolph and Mr. Graziosi both claimed the other person was threatening him. Consequently, while not an adverse reflection on Mr. Rudolph's credibility, I conclude their exchange was mutually intense.]

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.¹⁹

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

¹⁹Mr. 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.

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."

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 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 relief 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."²⁰

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 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.

[A stark testimonial dispute exists between Mr. Rudolph and Mr. Krueger regarding their second telephone conversation just before 1:00 a.m. on July 20th.

Mr. Rudolph testified that Mr. Krueger told him that there was no relief conductor and that he should just take the train into Chicago. When Mr. Rudolph responded that Mr. Krueger would have to direct him to violate the hours of service, Mr. Krueger said he was not going to do that and again told Mr. Rudolph to take the train into Chicago.

Mr. Krueger presented two comments about their discussion. First, he agreed with Mr. Rudolph's recollection that he told Mr. Rudolph that he was not going to order him to violate his hours of service. Second, he did not tell Mr. Rudolph to take the train into Chicago.

Due to the obvious conflict about whether Mr. Krueger directed Mr. Rudolph take the train into Chicago, I must determine which recollection is more credible. As an initial step, I note that during the hearing, based on their demeanor and straightforward answers without evasion or equivocation, I considered both Mr. Rudolph and Mr. Krueger generally credible witnesses. Consequently, since I am unable to resolve the conflict based on the hearing testimony and witness demeanor, I will next consider the extent to which their respective versions of that phone conversation are consistent with other evidence in the record.

The evidentiary records supports Mr. Rudolph's recollection in two ways. First, Mr. Rudolph's incredulous disbelief during the recorded August 7, 2008 phone call of Mr. Krueger's denials clearly reflects an adamant belief that Mr. Krueger twice told him to take the train into Chicago. Mr. Rudolph's seeming sincere, emotional reaction is particularly notable considering that unlike Mr. Krueger he had no idea their conversation, and his reactions, were being recorded. Second, two days after the incident, on July 22, 2008, Mr. Rudolph prepared a statement indicating Mr. Krueger twice repeated to Mr. Rudolph CNOC's instructions to take the train into Chicago.

²⁰Although 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."

At the same time, other evidence undermines my confidence in the accuracy of Mr. Rudolph's version of his second phone conversation with Mr. Krueger. Both parties in that phone call agree that Mr. Krueger stated that he would not order Mr. Rudolph to violate his hours of service. As a result, Mr. Rudolph's additional assertion that Mr. Krueger nevertheless instructed him to take the train into Chicago renders Mr. Rudolph's version of their exchange internally inconsistent because if Mr. Krueger instructed Mr. Rudolph to take the train into Chicago after his hours of service had expired, then he would effectively be ordering Mr. Rudolph to violate his hours of service, which is contrary to Mr. Krueger's established refusal to do so. Next, on July 20, 2008, when he filled out his personal statement for his work-related injury Mr. Rudolph: a) only mentioned CNOC as the source of the information that no relief conductor would be provided which led to his being forced to chose between being insubordinate or violating FRA rules, which in turn caused high levels of stress and anxiety, and b) only listed four witnesses: Ms. Cannon, the main line train dispatcher, Mr. Campbell and Mr. Beary. Significantly absent from that witness list was Mr. Krueger. Additionally, during his interview with Mr. Anderson, Mr. Rudolph said that after Ms. Cannon told him that there was no relief crew and he'd have to take the train into Chicago, he started to experience several stress-related symptoms, including general confusion and inability to focus. Finally, during his July 20th interview with Mr. Anderson, and consistent with his injury personal statement, having recalled both that he had spoken with Mr. Krueger about the absence of a relief conductor and his potential hours of service violation and Mr. Krueger did not order him to violate the hours of service, Mr. Rudolph stated that he ordered the movement of Train #6 without being told to do so by a supervisor.

Regarding these last two factors, I have considered Mr. Rudolph's challenges to Mr. Anderson's impartiality and the accuracy of his statement and report. In terms of bias, after indicating that he did not know Mr. Rudolph personally, Mr. Anderson readily acknowledged that Mr. Graziosi is his friend, and he hired him at AMTRAK. However, Mr. Anderson also testified that he had no animosity toward Mr. Rudolph for the complaint he filed against Mr. Graziosi and he presented these statements with credible hearing demeanor. In addition, the absence of basis in Mr. Anderson's question and answer summary and personal statement is supported by their consistency with the contents of the personal injury statement that Mr. Rudolph completed himself on July 20, 2008, which did not include any reference to Mr. Krueger or indicate that he had been directed to take the train into Chicago by any supervisor.

Mr. Rudolph also did not believe the Mr. Anderson's report and summarization of his statements were entirely accurate and observed that he told Mr. Anderson on July 20th that due to his stress-related condition his answers may not be reliable. However, at the hearing, Mr. Anderson attested to the accuracy of both his statement, CX 51, and question and answer summary, CX 16. Further, the only specific example of a possible inaccuracy Mr. Rudolph highlighted at the hearing was his inability to recall saying anything to Mr. Anderson about expressing his hours of service violation concern to Ms. Cannon. Finally, I do not believe that Mr. Rudolph's stress-induced condition in the late morning and early afternoon of July 20, 2008, about 12 hours after leaving Naperville, would cause him to inaccurately tell Mr. Anderson that he moved Train #6 without being told to do so by a supervisor if his supervisor, Mr. Krueger, had actually directed him to take the train to Chicago.

Turning Mr. Krueger's testimony, the strongest evidence supporting his version of the exchange is actually Mr. Rudolph's injury personal statement and statements to Mr. Anderson on July 20, 2008, as just discussed. Additionally, Mr. Krueger's challenge to BNSF's assertion that the relief engineer could bring the train into Chicago without a rested conductor and his attempts to find a relief conductor for Mr. Rudolph in the early morning of July 20th seem inconsistent with his purported decision to direct Mr. Rudolph work past his 12 hour limit by taking the train into Chicago. Additionally, Mr. Meeks' testimony that on one occasion Mr. Krueger authorized him to violate his hours of service is supportive of Mr. Krueger's position that if he been given the authority to have Mr. Rudolph work beyond his 12 hours on July 20th, he would have specifically told Mr. Rudolph that he was authorized to violate his hours of service.

At the same time, Mr. Krueger's production of the recorded August 7, 2008 conversation only shortly before April 6, 2010 hearing, his knowledge that his denials were being documented in the recorded phone call, and the Respondent's February 26, 2010 summary decision motion which states Mr. Krueger told Mr. Rudolph to take the train into Chicago certainly call into question the accuracy of Mr. Krueger's recollection about the contents of the July 20th conversation. However, for several reasons, the adverse inferences associated with these considerations are diminished. While the August 7, 2008 taped phone conversation contains Mr. Krueger's calm, steadfast denials, supporting his version of their phone exchange on July 20th, the recording also clearly demonstrates that Mr. Rudolph held a strong belief that Mr. Krueger directed him to take the train into Chicago during that phone call. As such, the recording conversation is also supportive of Mr. Rudolph's version of their exchange on July 20th, and yet, Mr. Krueger did not destroy the tape. Mr. Krueger also did not actually keep the recording a secret until just before the hearing since he had previously informed both Mr. Israelson and the OSHA investigator of its existence. And, at the hearing, when questioned about his purported statement in the Respondent's summary decision motion, Mr. Krueger denied that he made such a statement to Mr. Rudolph and that denial is essentially consistent with his position from at least August 7, 2008.

In summary, in assessing which version of the 12:57 a.m., July 20, 2008, phone conversation is more accurate, I find the supportive force of Mr. Rudolph's emotional reaction and vehement objection in the August 7, 2008 phone call to Mr. Krueger's denial that he told Mr. Rudolph to take the train into Chicago is significantly diminished by his earlier, and essentially contrary, personal injury statement and presentation to Mr. Anderson on July 20, 2008, which contained no reference to Mr. Krueger and included an acknowledgment that he took the train into Chicago without any direction from a supervisor. Whereas, the evidentiary record does not sufficiently undermine Mr. Krueger's testimony that he did not tell Mr. Rudolph to take the train into Chicago.]

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.²¹

[Another testimonial dispute exists between Mr. Rudolph and Mr. Krueger regarding their third telephone conversation in the early morning of July 20th at 1:13 a.m. According to Mr. Rudolph, Mr. Krueger told him that a relief conductor would be at Union Avenue.²² As a result, Mr. Rudolph had Mr. Campbell stop the train at Union Avenue. Mr. Krueger indicates that he told Mr. Rudolph that Mr. Israelson advised that a Chicago yard relief crew was coming out; however, he did not say anything about Union Avenue or tell Mr. Rudolph to stop there.

Rather than representing conflicting recollections, I believe this dispute involves different interpretations of what Mr. Krueger actually told Mr. Rudolph. At the time of this conversation, Train #6 was well beyond Naperville and Mr. Rudolph had continued working as a passenger conductor beyond his hours of service. Consequently, he may have interpreted Mr. Krueger's statement about a Chicago yard relief crew coming out to mean that he needed to stop the train at Union Avenue to pick them up. On the other hand, since Mr. Krueger thought Mr. Rudolph and the train were still at Naperville, he may have believed Mr. Israelson had arranged for a Chicago yard crew to go out to Naperville to relieve Mr. Rudolph and consequently did not provide any further detail.]

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.

²¹According to Mr. Rudolph, when he arrived in Chicago, he called station services for assistance. Since in his phone record, CX 25, the last early-morning phone call placed by Mr. Rudolph was at 1:19 a.m., I believe that phone number was station services. Mr. Rudolph called that same phone number at 1:11 am.

²²I take judicial notice that the Union Avenue rail junction (Halstead Station) is slightly more than two miles south of 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 as Naperville. Being forced to chose 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.²³ 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.

[In a September 12, 2008 letter, Mr. Rudolph indicated that he encountered Mr. Israelson on July 21, 2008 at the train station prior to returning to Omaha. Mr. Rudolph recalled they "talked about the incident" but did not specify what aspects of "the incident" were discussed beyond his reporting a work-related injury. Based on the contents of Mr. Israelson's subsequent e-mails with Mr. Krueger on August 4 and 6, 2008, I do not believe that during this July 21, 2008 exchange, Mr. Rudolph told Mr. Israelson that he had violated his hours of service by performing service into Chicago.]

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

²³Since Mr. Anderson didn't recall whether Mr. Rudolph made this statement, I will rely on Mr. Rudolph's uncontested recollection.

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 injury²⁴ 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."

²⁴Although Mr. Krueger didn't recall receiving this letter, he did not deny its receipt and his subsequent e-mail correspondence refers a statement by Mr. Rudolph.

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. Krueger 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 a 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.²⁵

September 4, 2008

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

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 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.

²⁵See CX 55, which shows three phone calls to a Philadelphia phone number on August 29, September 4, and September 18, 2008.

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.

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 generalized 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 recommended 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 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.

Case in Chief

According to 49 U.S.C. § 20109(d)(2)(A)(i), which specifically incorporates the burdens of proof in 49 U.S.C. § 42121(b) of Aviation Investment and Reform Act for the 21st Century (“AIR 21”), and 20 C.F.R. § 1982.109(a),²⁶ to obtain relief under the employee protection provisions of the FRS, a complainant must demonstrate by a preponderance of the evidence that an activity protected under the general provisions of Section 20109(a), the hazardous safety or security conditions provision, Section 20109(b), or the prompt medical attention provisions of Section 20109(c) was a contributing factor in an alleged adverse personnel action.

Consequently, to establish an FRS employment discrimination violation, a complainant must prove three elements: 1) he engaged in a protected activity; 2) he was subjected to an adverse personnel action; and 3) his protected activity was a contributing cause for the unfavorable personnel action.²⁷ A complainant’s failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint.²⁸

Title 49 U.S.C. § 42121(b) of AIR 21 and 20 C.F.R. § 1982.109(b) also provide that even if the complainant satisfies his burden of proof on all three elements, 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.

²⁶Interim Final Rule, 75 Fed. Reg. 53522-53333 (Aug. 31, 2010).

²⁷*Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

²⁸*Robinson v. Northwest Airlines, Inc.* ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

Issues

1. Whether Mr. Rudolph engaged in a protected activity under the Act.²⁹
2. Whether Mr. Rudolph suffered an adverse personnel action.
3. If Mr. Rudolph engaged in a protected activity and suffered an adverse personnel action, whether the protected activity was a contributing factor in the adverse personnel action.
4. If Mr. Rudolph's protected activity was a contributing factor in an adverse personnel action, whether AMTRAK has established by clear and convincing evidence that AMTRAK would have taken the adverse personnel action in the absence of the protected activity.
5. Damages.

Issue # 1 – Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, (“Secretary”) has broadly defined “protected activity” as a report of an act which the complainant reasonably believes is a violation of the subject statute. The alleged act must implicate safety (and security) definitively and specifically,³⁰ and at least “touch on” the subject matter of the related statute.³¹ The complainant must actually believe a violation has occurred and his belief must be objectively reasonable.³² The subjective belief of the complainant is not sufficient.³³ While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.”³⁴ The reasonableness of the complainant's belief regarding statutory violations by an employer is to be determined on the

²⁹The Employer asserts that whether Mr. Rudolph violated hours of service on July 20, 2008 is not an issue in this case and will instead be resolved through a procedure established by the collective bargaining agreement. However, I consider the events of July 19 and 20, 2008 and Mr. Rudolph's actions regarding his hours of service clearly relevant on the issue of whether Mr. Rudolph engaged in a protected activity under the Act. Although 49 U.S.C. § 20109(g) states that the FRS does not diminish an employee's rights under a collective bargaining agreement, the same provision also indicates that the rights and remedies under the Act may not be waived by any agreement.

³⁰*American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995).

³¹*Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-002 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polysar Latex*, 1988-SWD-4 (Sec'y Sept. 22, 1994).

³²*Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. 25 (ARB July 14, 2000).

³³*Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-00012 (ARB Apr. 8, 1997).

³⁴*Minard v. Nerco Delamar Co.*, 1992-SWD-001, slip op. at 8 (Sec'y Jan. 25, 1995).

basis of the knowledge available to a reasonable person in the same circumstances with the complainant's training and experience.³⁵

The FRS protected activities fall into three categories. First, the general provision 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.

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.

In his January 12, 2009 FRS complaint, and based on the evidence presented regarding actions and events that occurred up to the filing date, Mr. Rudolph claims that he engaged in the following activities protected under the FRS: reporting to his supervisor, AMTRAK, and the FRA that he was forced to violate the federal hours of service law, § 20109(a)(1); refusing to violate the federal hours of service law, § 20109(a)(2); notifying AMTRAK of a work-related illness, § 20109(a)(4); cooperating with a safety investigation by the Secretary of Transportation (Federal Railroad Administration), § 20109(a)(5); accurately reporting his hours on duty, § 20109(a)(7); and attempting to return to work based on a treating physician's recommendation, § 20109(c)(2).³⁶

³⁵*Melendez*, ARB No. 96-051, slip op. at 27.

³⁶In his closing brief, Complainant's counsel also claims that Mr. Rudolph engaged in protected activities under § 20109(a)(3), filing a FRS complaint, and § 20109(a)(1)(6), reporting an injury arising out of an accident. Regarding the first assertion, absent any formal amendment or revision of his FRS complaint during the proceedings, my decision is limited to the protected activities and adverse personnel actions that were alleged in Mr. Rudolph's January 12, 2009 FRS complaint. As a result, whether Mr. Rudolph suffered an adverse personnel action due to his filing the FRS complaint itself is not before me. As for the second assertion, Mr. Rudolph's case does not involve a report of an injury associated with an accident.

Violation of Federal Hours of Service Law

Considering the general requirements for a protected activity under the Act, although Mr. Rudolph raised concerns to Ms. Cannon, the BNSF dispatcher and Mr. Krueger between 10:55 p.m., July 19th, and 12:57 a.m., July 20th, that the absence of a relief conductor in Naperville and CNOC's instructions to take the train into Chicago would create an hours of service issue, no actual violation occurred until Mr. Rudolph departed Naperville after 1:00 a.m., while continuing to serve as a passenger conductor. Consequently, Mr. Rudolph's first report that he had been forced to violate the federal hours of service law, 49 U.S.C. § 21103(a)(2), occurred at approximately 1:48 a.m., on July 20, 2008 when he completed his PTT, CX 43, showing that he went on duty at 1:00 p.m., July 19, 2008, and went off duty at 1:48 a.m., July 20, 2008, and annotated that he was forced to violate the federal hours of service law.

Next, his July 20, 2008 complaint clearly involves a violation of the provision of the FRS, 49 U.S.C. § 21193(a)(2), that ensures railroad employees don't work fatigued, and consequently relates to federal rail safety.

Finally, although Mr. Rudolph clearly held a sincere belief that he had been forced to violate his hours of service, I must also determine whether his complaint was objectively reasonable, which requires consideration of several factors that confronted Mr. Rudolph in Naperville in the early morning of July 20, 2008. First, through Ms. Cannon, Mr. Rudolph received instructions from CNOC to just take the train the last 28 miles into Chicago since there was no relief conductor for him in Naperville. Second, at the time Mr. Rudolph was having to decide whether to comply with CNOC's instruction to continue to perform service as a conductor beyond Naperville or stop the train in Naperville due to the expiration of his hours of service, the California Zephyr was already at least eight hours behind schedule.³⁷ Third, having previously relieved Ms. Cannon due to the expiration of her hours of service, Mr. Rudolph was the sole conductor on the train responsible for ensuring the safety of 200+ passengers as the train approached Naperville and remained so until he was relieved. If Mr. Rudolph went dead in Naperville and train engineer, Mr. Campbell, nevertheless drove the train into Chicago, the California Zephyr passengers would have been effectively abandoned during the last half hour of their trip. Fourth, due to CMS' failure to properly monitor the crew status of the delayed train,³⁸ and even though he had advised his supervisor, Mr. Krueger, of his situation nearly an hour earlier, no relief conductor was present when the train arrived in Naperville to relieve Mr. Rudolph of his conductor duties and responsibilities. Fifth, in their 12:57 a.m. phone conversation, just a few minutes before Mr. Rudolph's hours of service expired, although he refused to tell Mr. Rudolph to violate his hours of service, Mr. Krueger at the same time did not specifically direct Mr. Rudolph to go dead and stop the significantly delayed train at Naperville, just 28 miles short of its final destination.

³⁷On July 19, 2008, due to the train's delay, Mr. Rudolph's normal reporting time of 5:00 a.m. was set back to 1:00 p.m.

³⁸See CX 59.

Regarding this last factor, I understand that Mr. Krueger may have believed that since he refused to order Mr. Rudolph to violate his hours of service, Mr. Rudolph would comply with hours of service law without specific instructions to do so. However, based on the timing of Mr. Rudolph's first phone call seeking help in obtaining a relief conductor, Mr. Krueger was well aware that the California Zephyr was several hours late. He also understood that CNOC had directed Mr. Rudolph to take the train in to Chicago. And, at the time of the 12:57 a.m. phone call, Mr. Krueger believed no relief conductor had been found which would mean the train's lengthy delay would be extended even further by an indefinite amount if Mr. Rudolph halted the train in Naperville due to the expiration of his hours of service. In that light, the absence of an instruction from Mr. Krueger to Mr. Rudolph to obey the hours of service law and stop the train at Naperville within the next few minutes was significant factor.

Under these circumstances, the failure of CNOC to provide a relief conductor and its instruction to take the train into Chicago, the extensive delay already incurred by the train passengers, his responsibility for passenger safety as the sole acting conductor until relieved, and the absence of a definitive instruction from his immediate supervisor not to proceed out of Naperville, Mr. Rudolph's conclusion that he was being forced to violate his hours of service limit at Naperville in the early morning of July 20, 2008 was objectively reasonable.

Consequently, in the early morning of July 20, 2008, by annotating his PTT, Mr. Rudolph engaged in a protected activity under § 20109(a)(1) by notifying AMTRAK that he had been forced to violate his hours of service.

Mr. Rudolph also engaged in the same protected activity on several other occasions. In the late morning and early afternoon of July 20, 2008, as part of his interview for a work-related injury/illness, Mr. Rudolph informed Mr. Anderson, an AMTRAK supervisor, that his stress-related illness was a reaction to being told that no relief conductor would be provided and he'd be forced to violate his hours of service. On August 1, 2008, Mr. Rudolph sent Mr. Krueger his July 31, 2008 complaint, CX 26, with an attached July 22, 2008 statement, CX 24, asserting that he had been forced to violate his hours of service on July 20, 2008. On August 7, 2008, Mr. Rudolph submitted a complaint to the FRA about his forced hours of service violation. And, on August 29 and September 12, 2008, Mr. Rudolph sent his complaint to the AMTRAK Dispute Resolution Office.

Refusal

Mr. Rudolph objected to the developing situation regarding his hours of service on July 19, 2008, and advised the BNSF dispatcher and Mr. Krueger that by proceeding past Naperville he'd be violating his hours of service. Nevertheless, at 1:00 a.m., Mr. Rudolph did not refuse to violate the Federal hours of service law and stop working as a conductor. Instead, he served as a passenger conductor for another 48 minutes past the expiration of his 12 hours on duty on July 20, 2008. Consequently, he did not engage in the protected activity of refusing to violate a Federal law relating to railroad safety on July 20, 2008 under § 20109(a)(2).

Notification of a Work-Related Illness

On morning of July 20, 2008, by marking off from work with Mr. Krueger and presenting his claim to Mr. Anderson of a stress-related illness due to being forced to violate his hours of service, Mr. Rudolph engaged in a protected activity under § 20109(a)(4).

Cooperation with FRA

By submitting his August 7, 2008 complaint about his forced hours of service violation, Mr. Rudolph to some extent cooperated with an investigation by the FRA, which is a protected activity under § 20109(a)(5).

Accurate Reporting

On July 20, 2008, Mr. Rudolph accurately reported his hours of service to AMTRAK on his PTT, which is also protected under § 20109(a)(7).

Attempt to Return to Work

In an August 25, 2008 Statement of Disability, on Mr. Rudolph's behalf, his treating physician, Dr. Sedlacek, opined that Mr. Rudolph's mental condition would no longer interfered with his work and he was capable of a "restricted return to work" as of August 21, 2008. On September 9, 2008, Dr. Sedlacek indicated to AMTRAK Health Services that Mr. Rudolph was released to full time duties restricted to train operations that did not violate FRS regulations or compromise safety. Consistent with Dr. Sedlacek's recommendations, Mr. Rudolph asked AMTRAK Health Services on August 25, September 4, and September 18, 2008 about his return to work.

Under these circumstances, I find Mr. Rudolph engaged in a protected activity by attempting to return to work on August 25, September 4, and September 18, 2008 in accordance with Dr. Sedlacek's treatment plan under § 20109(c)(2).

Summary

Between 1:48 a.m., July 20, 2008 and August 7, 2008, Mr. Rudolph engaged in several activities protected under 49 U.S.C. §§ 20109(a)(1) (reporting a violation of a Federal law), (4) (providing notification of a work-related injury), (5) (cooperating with the FRA), (7) (accurately reporting his hours of duty). In addition on August 25, September 4, and September 18, 2008, Mr. Rudolph engaged in an activity protected under 49 U.S.C. § 20109(c)(2) (attempting to return to work based on a treating physician's recommendation).

Issue #2 – Adverse Personnel Action

In regards to the general protected activities and activities associated with hazardous safety or security conditions, § 20109(a) specifically prohibits adverse personnel actions of discharge, demotion, suspension, reprimand, or any other discriminatory action. Concerning the protected activity of following a medical treatment plan, § 20109(c)(2) prohibits discipline and threat of discipline, with “discipline” under this subsection specifically defined as disciplinary charge, suspension, termination, probation, or reprimand. Section 20109(c)(2) also indicates that a railroad carrier’s refusal to permit an employee to return to work following medical treatment is not a violation of the subsection if the refusal is pursuant to FRA medical standards for fitness for duty or a railroad carrier’s medical standards for fitness for duty.

In addressing adverse employment actions, in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 2008), setting aside its precedent of requiring an adverse personnel action to have a tangible employment consequence in terms of compensation and condition of employment,³⁹ and in light of the standard established by *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-57 (2006),⁴⁰ the Administrative Review Board determined that to constitute an unfavorable personnel action, the employment action must be “materially adverse” such that it is harmful to a point that it might dissuade a reasonable employee from making or supporting a charge of discrimination.⁴¹ One of the considerations of whether an action is materially adverse is its affect on pay, terms, and privileges of employment. Significantly, other considerations include the permanency of the action, other consequences, and the context within which the action arises.⁴² Additionally, an unpaid suspension which is later revoked with restored pay may still be considered an adverse personnel action.⁴³ Finally, in light of the potential consequences, making a psychological evaluation a condition of employment constitutes an adverse employment action.⁴⁴

With these principles in mind, I turn to the multiple adverse personnel actions alleged by Mr. Rudolph.

³⁹See *Jenkins v. U.S. Environmental Protection Agency*, 1992-CAA-006 (Sec’y May 18, 1994) citing *DeFord v. Secretary of Labor*, 700 F.2d 281, 283, 287 (6th Cir. 1983).

⁴⁰In *Burlington Northern*, the Supreme Court concluded that a change in work assignment without a change in pay and restored 37 days of unpaid suspension constituted adverse personnel actions.

⁴¹Applying these principles in *Mellon*, the Administrative Review Board determined that a warning letter admonishing an employee not to use fatigue as a subterfuge to avoid work was not materially adverse because it did not affect pay, terms or privileges of employment, did not lead to discipline, and was removed without consequences.

⁴²*Burlington Northern & Santa Fe Railway Co.*, 548 US at 69, (“the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters”).

⁴³*Id.* at 71-72.

⁴⁴See *Diaz-Robainas v. Florida Power & Light Co.*, 1992-ERA-010 (Sec’y Jan. 19, 1996).

Threat/Warning⁴⁵

Mr. Rudolph alleges that during their August 7, 2008 phone conversation, Mr. Krueger threatened to charge him with violating his hours of service if he didn't change his position that he performed service after the expiration of his hours of service. Mr. Krueger maintains that he didn't threaten Mr. Rudolph if he didn't change his story; instead, he was advising him that he'd have to charge Mr. Rudolph if he actually performed service into Chicago.

As beginning of their taped conversation demonstrates, Mr. Krueger's version is a reasonable interpretation; that is, he was actually trying to warn Mr. Rudolph of the situation he was confronting. So after asking the question Mr. Krueger had been directed to ask – did Mr. Rudolph perform service into Chicago? – Mr. Krueger asked Mr. Rudolph to hold off answering and attempted to continue to explain that he was suppose to charge Mr. Rudolph if he claimed that he performed service. But Mr. Rudolph quickly interrupted and said he performed service. In other words, the actual sequence of their exchange supports Mr. Krueger's position that he was attempting to warn, rather than threaten, Mr. Rudolph about claiming that he performed service past the expiration of his hours of service. Further, in addition to not being a clear threat, their phone conversation itself had no direct impact on Mr. Rudolph's pay, privileges or conditions of employment since he was already on sick leave.

Nevertheless, at the time of the phone call, Mr. Krueger was Mr. Rudolph's immediate supervisor and his warning about the question he had been directed to ask – whether Mr. Rudolph actually performed service past his hours of service –directly relates to the core of Mr. Rudolph's protected activities of accurately reporting his duty hours on July 20th and complaining that he had been forced to violate his hours of duty, and essentially represents an attempt to determine whether Mr. Rudolph would continue to persist with his protected activities. Within that context, even if meant to be a helpful, cautionary warning and not a threat, a supervisor's direct admonition that he will have to take action against an employee if he continues with his protected activities is materially adverse standing alone to deter a reasonable person from engaging in such activity and represents employer inference with an employee's rights protected under the FRS. Consequently, even if not meant to be threat, Mr. Krueger's warning that he will have to charge Mr. Rudolph if he maintains that he actually performed service as shown by his protected activity of accurately reporting his hours and annotating the PTT and demonstrated by his hours of service complaint is an adverse personnel action.

⁴⁵Since Mr. Krueger's August 7, 2008 phone call occurred prior to Mr. Rudolph's attempt to return to work based on Dr. Sedlacek's recommendation, the disciplinary threat prohibition in § 20109(c)(2) is not applicable. As a result, I will consider whether the alleged threat also represents an adverse action under in § 20109(a).

Charge⁴⁶

On August 8, 2008, Mr. Dudley signed a Notice of Investigation, which included a charge that Mr. Rudolph violated GCOR 1.17 by exceeding his hours of service without proper authority. However, since Mr. Rudolph was not on active service as of July 20, 2008, no proceedings were conducted and no employment actions were taken in response to the charge.

As an initial consideration, absent an investigation and adverse determination, the charge itself had no effect on Mr. Rudolph's pay, privileges, or condition of employment, and under the old standard may not have constituted an adverse personnel action. However, the presentation of a formal charge of a violation of company's operating regulations and expressed intention to conduct an investigation into the charge certainly goes beyond the "trivial harms, ordinary tribulations," and "petty sights and minor annoyances" that the Supreme Court opined did not reach the level of material adversity under its standard in *Burlington Northern*.⁴⁷ Instead, the AMTRAK charge was a formal adversarial allegation severe enough under the collective bargaining agreement to warrant union representation. Within that context, even absent any further action or employment consequence, a reasonable employee would consider the charge materially adverse standing alone that it might deter a reasonable person from engaging in protected activity. As a result, the August 8, 2008 charge itself represents an adverse personnel action.

Loss of Sickness Benefits

Around mid-August 2008 through the beginning of November 2008, Mr. Rudolph did not receive sick leave benefits because the AMTRAK Medical Department and Dr. Pinsky did not provide documentation to the Railroad Retirement Board regarding his employment status, despite requests from Mr. Rudolph and the Railroad Retirement Board for such information. As previously discussed, even though Dr. Pinsky later provided the requested information which led to Mr. Rudolph being compensated, his initial loss of sickness benefits for 79 days represents an adverse personnel action.

Psychiatric Evaluation

As a pre-condition to Mr. Rudolph's return to service, Dr. Pinsky required Mr. Rudolph to undergo a psychiatric evaluation by Dr. Wilson. As set out above in the general principles, such an action is considered to be an adverse personnel action.

⁴⁶The August 8, 2008 disciplinary charge occurred prior to Mr. Rudolph's attempt to return to work, so again the prohibition in § 20109(c)(2) is not applicable. However, I will still consider whether the disciplinary charge represents an adverse action under in § 20109(a).

⁴⁷*Burlington Northern & Santa Fe Railway Co.*, 548 US at 69.

Medical Disqualification

On November 5, 2008, Dr. Pinsky medically disqualified Mr. Rudolph from service as a passenger conductor and assistant passenger conductor. Since this action clearly had a material adverse impact on Mr. Rudolph's ability to earn his salary as a conductor, the November 5, 2008 medical disqualification is an adverse personnel action.

Refusal to Approve Return to Work

Following Dr. Sedlacek's August 25, 2008 recommendation and Mr. Rudolph's repeated requests through September 18, 2008 to return to work, Dr. Pinsky and AMTRAK refused to approve his return to work. Having a material adverse affect on Mr. Rudolph's earning capacity, this denial is an adverse personnel action.

Summary

From August 7, 2008 through the submission of his January 12, 2009 FRS complaint, Mr. Rudolph experienced several adverse personnel actions, including Mr. Krueger's August 7, 2008 warning, an August 8, 2008 disciplinary charge, and unpaid sick leave. He was also required to undergo a psychiatric evaluation as a pre-condition of his return to work and been medically disqualified. Finally, Mr. Rudolph's request to return to work was denied.

Issue # 3 – Contributing Factor

Having established that Mr. Rudolph engaged in protected activities and also suffered multiple adverse personnel actions, I next turn to the principle issue in this case, whether any of his protected activities were a contributing factor in any of the adverse personnel actions.

To obtain relief under the employee protection provisions of the Act, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action.

Preliminarily, an implicit component of this element, contributing factor, is knowledge of the protected activity. Generally, demonstrating that an employer, as an entity, was aware of the protected activity is insufficient. Instead, the complainant must establish that the decision makers who subjected him to the alleged adverse action were aware of the protected activity.⁴⁸

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.”⁴⁹ This standard was intended to overrule prior case law which required a whistleblower to prove that his protected activity was a

⁴⁸See *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038 (Jan. 31, 2006) and *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (Jan. 30, 2004).

⁴⁹*Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (Nov. 30 2006).

“significant, motivating, substantial, or predominant” factor in the adverse personnel factor.⁵⁰ 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.⁵¹ Animus or anger towards the employee for engaging in a protected activity may constitute such direct evidence of discriminatory motive.⁵² At the same time, an employer may take action against an employee for improper conduct in raising an otherwise protected activity.⁵³

The complainant may also establish that his protected activity was contributing factor, indirectly through “circumstantial evidence.”⁵⁴ Circumstantial evidence of causation may be established if the employer’s stated reason for the action is determined to be pretext.⁵⁵ In other words, it is proper to examine the legitimacy of an employer’s reasons for taking adverse personnel action.⁵⁶ 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.⁵⁷ Such pretext may be shown through an employer’s shifting or contradictory explanations for the adverse personnel action.⁵⁸

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;⁵⁹ the magnitude of controversy leading up to the adverse personnel action generated by the protected activity;⁶⁰ a supervisor’s disregard for safety

⁵⁰*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).

⁵¹*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).

⁵²*See Pillow v. Bechtel Constructions, Inc.*, 1987-ERA-035 (Sec’y July 19, 1993).

⁵³*Oliver v. Hydro-Vac Services, Inc.*, 1991-SWD-001, slip op. at 10 (Sec’y Nov. 1, 1995).

⁵⁴*Speegle*, ARB No. 06-041, slip op. at 9.

⁵⁵*Id.*; *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).

⁵⁶*Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (Jan. 31, 2006).

⁵⁷*Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (May 21, 2009).

⁵⁸*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).

⁵⁹*Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997).

⁶⁰*Seater v. So. Cal. Edison Co.*, ARB No. 96-013, ALJ No. 1995-ERA-013, slip op. at 4 (Sept. 27, 1996).

procedures;⁶¹ the disproportionate harshness of the unfavorable personnel action considering employee's work record;⁶² and disparate treatment between complainant and similarly situated employees who did not engage in protected activity.⁶³

Having established the general principles regarding causation, I return to each of the adverse personnel actions to determine whether any protected activity was a contributing factor.

Threat/Warning

At the time Mr. Krueger called Mr. Rudolph on August 7, 2008, he was aware of the four following protected activities: a) Mr. Rudolph accurately reported his hours on July 20, 2008 on his PTT, showing 48 minutes on duty beyond the expiration of his hours of service, b) he also annotated on the PTT that he was forced to violate his hours of service, c) Mr. Rudolph marked off ill mid-morning on July 20, 2008, and d) Mr. Rudolph submitted a written complaint on July 31, 2008 that he had been forced to violate his hours of service. While temporal proximity and the contents of the phone conversation provide evidence that these protected activities were contributing factors in Mr. Krueger's call, a review of the events leading up to the phone call provides some conflicting evidence.

First, while Mr. Israelson was aware that Mr. Rudolph had marked off ill based on his conversation with him on July 21st, his electronic correspondence with Mr. Krueger and subsequent instruction to Mr. Krueger to call Mr. Rudolph contained no reference to Mr. Rudolph's sick leave. Likewise, the resulting phone conversation with Mr. Rudolph did not include any discussion about his sick leave. Consequently, I find Mr. Rudolph's protected activity of marking off on July 20th was not a contributing factor in Mr. Krueger's August 7, 2008 phone call to Mr. Rudolph.

Next, the sequence of events leading up to Mr. Krueger's August 7, 2008 phone call shows that Mr. Rudolph's other two protected activities concerning his hours of service were not the triggering events. Instead, Ms. Flinner's August 4, 2008 e-mail request for the July hours of service violation report initiated a series of e-mails between Mr. Krueger and Mr. Israelson that eventually lead to Mr. Krueger's phone call three days later. Significantly, up until Ms. Flinner's e-mail, while clearly aware of the collective bargaining agreement's 10 day period for taking disciplinary action, Mr. Krueger had taken no action regarding Mr. Rudolph's July 20 PTT time entry and annotation and his July 31, 2008 complaint of being forced to violate the hours of service.

⁶¹*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).

⁶²*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).

⁶³*Speegle*, ARB. No. 06-041, slip op. at 13 (according to the Administrative Review Board to satisfy the "similarly situated" requirement, a complainant must establish that the complainant and other employees are similarly situated in all relevant aspects).

Further, during their August 4, 2008 e-mails, Mr. Israelson asked Mr. Krueger whether Mr. Rudolph was claiming an hours of service violation and stated that if so they would have to charge him since no one ordered him to do that. This e-mail exchange demonstrates Mr. Israelson's lack of knowledge of Mr. Rudolph's protected activities at that time, his belief Mr. Rudolph was not authorized to violate his hours of service, and his focus on responding to possible improper conduct of Mr. Rudolph in violating his hours of service without authority rather than his protected activities.⁶⁴ Consequently, based on sequence of e-mail, and Mr. Israelson's initial response, even though Mr. Krueger later advised that Mr. Rudolph had indicated he violated hours of service, Mr. Israelson's subsequent action in directing Mr. Krueger to contact Mr. Rudolph reflects an effort to have Mr. Krueger confirm that Mr. Rudolph actually performed service beyond his hours of service prior to initiating a charge for doing so without authority.⁶⁵

On the other hand, as their additional e-mails demonstrate, Mr. Krueger was well aware of Mr. Rudolph's protected activities when the request came in for the July 2008 hours of service report. In light of his observation about the about the 10 day requirement, Mr. Krueger was placed in a predicament by Mr. Israelson's response because he hadn't taken any disciplinary action up until then even though he had been aware of Mr. Rudolph's hour of service violation assertions. Consequently, in addition to possibly trying the help Mr. Rudolph avoid a disciplinary charge, Mr. Krueger may have had other reasons for advising Mr. Rudolph of the consequences of his protected activities. Regardless of the motivation, Mr. Krueger made Mr. Rudolph's protected activities a central point of the August 7, 2008 phone call when, rather than just asking Mr. Rudolph to confirm that he performed service into Chicago as directed by Mr. Israelson, he decided to also explain what the consequences would be if Mr. Rudolph continued to assert that he performed service into Chicago.

Upon considering the conflicting evidence, I first find that in directing Mr. Krueger to contact Mr. Rudolph, Mr. Israelson was not responding to Mr. Krueger's protected activities; rather, he was attempting to determine whether Mr. Rudolph engaged in improper conduct on July 20, 2008 by actually performing service into Chicago in the absence of authority to do so. However, I further find that the preponderance of the probative evidence, represented primarily by Mr. Krueger's introduction into the August 7, 2008 phone conversation of the adverse consequences if Mr. Rudolph continued to maintain that he performed service beyond his hours of service, establishes that Mr. Rudolph's protected activities of accurately reporting his time on July 20, 2008 with an annotation and submitting a formal complaint about his hours of service violation were contributing factors to Mr. Krueger's warning, or threat, which represents a supervisor's impermissible interference with Mr. Rudolph's rights under § 20109(a) of the FRS.

⁶⁴Such a distinction is important in a situation where the complainant's protected activity is related to, or directly involved with, his own violation of a Federal law, rule or regulation related to railroad safety.

⁶⁵The circumstances on July 20, 2008 placed Mr. Rudolph in a position where he reasonably felt that he was forced to violate his hours of service, and he may have believed that he was authorized to violate his hours of service by the BNSF dispatcher. While those factors may relate to mitigation and exoneration, Mr. Rudolph still bears responsibility for choosing to continue to perform service past the 12 hour limit set by the Federal hours of service regulation.

Charge

In determining whether Mr. Rudolph's protected activities as of August 8, 2008 led to the issuance of the disciplinary charge against Mr. Rudolph, I note that circumstantial evidence of causation is present based on the temporal proximity between his protected activities from July 20 to August 1, 2008, as well as the subject matter of the charge itself – Mr. Rudolph's violation of his hours of service on July 20, 2008.

However, although Mr. Krueger was involved in the preparation of the disciplinary charge, the e-mail correspondence clearly establishes that Mr. Israelson, and not Mr. Krueger, was the supervisor that directed imposition of the charge. In considering Mr. Israelson's reason for directing imposition of the disciplinary charge, his initial round of e-mails with Mr. Krueger on August 4, 2008, and subsequent e-mails on August 6 and 7, 2008, as well as his instruction to Mr. Krueger to confirm that Mr. Rudolph had actually performed service into Chicago establish that his focus was Mr. Rudolph's possible improper conduct in taking that action without proper authority, rather than Mr. Rudolph's protected activities themselves.

In weighing the e-mail documentation with the circumstantial evidence of causation, I find the preponderance of the probative evidence does not establish that Mr. Rudolph's protected activities from July 20 through August 1, 2008 were contributing factors in Mr. Israelson's decision to have a charge preferred against Mr. Rudolph on August 8, 2008 for performing service past his hours of service without proper authority.

Loss of Sickness Benefits

Between September and the beginning of November 2008,⁶⁶ the AMTRAK Medical Department and Dr. Pinsky specifically declined to provide information to Mr. Rudolph and the Railroad Retirement Board about his employment status which lead to Mr. Rudolph's loss of sickness benefits for 79 days. Prior to, and during that time, Mr. Rudolph engaged in all five of his protected activities.

Initially, based the statutory language, I believe the denial of information and related subsequently reimbursed loss of sickness benefits are not encompassed within the types of discipline specifically prohibited under § 20109(c)(2) in relation to Mr. Rudolph's protected activity of attempting to return to work based on a physician's treatment plan.⁶⁷

Next, I find that the three protected activities associated with his hours of service were not contributing factors in the denial of information and loss of sickness benefits since as later

⁶⁶CX 33, CX 34, and CX 63.

⁶⁷Although § 20109(a) proscribes any discrimination, or adverse personnel action, § 20109(c)(2) only prohibits discipline or threat of discipline and then specifically defines "discipline" as "bringing charges against a person in a disciplinary hearing, suspend, terminate, place on probation, or make note of reprimand on employee's record."

discussed in detail, I conclude that Dr. Pinsky was not aware of these specific protected activities.⁶⁸

Finally, for essentially that same reasons as also discussed extensively in the next section, I conclude that intervening events establish that Mr. Rudolph's marking off ill on July 20, 2008 was not a contributing factor in Dr. Pinsky's delay in reporting his employment status to the Railroad Retirement Board. Additionally, the record establishes that a portion of the delay in providing the requested information was directly attributable to the non-availability of Dr. Wilson.

Psychiatric Evaluation

On September 18, 2008, Dr. Pinsky decided that to refer Mr. Rudolph for an independent psychiatric evaluation as a pre-condition to his return to work.⁶⁹ By that time, Mr. Rudolph had engaged in all five of his protected activities. The assessment whether Mr. Rudolph's protected activities were a contributing factor in Dr. Pinsky's decision is facilitated by considering the specific protected activities in three categories: a) attempting to return to work, b) protected activities associated with Mr. Rudolph's hours of service on July 20th (violation complaint, accurate time reporting and cooperation with FRA), and c) reporting a work-related injury.

Return to Work

Similar to the denial of information and corresponding temporary loss of sickness benefits, Dr. Pinsky's psychiatric referral does not fall within the definition of "discipline" in § 20109(c)(2).

Hours of Service

Again preliminarily, I must determine whether Dr. Pinsky had knowledge of Mr. Rudolph's protected activities related to his hours of service on July 20, 2008, and thus may have acted in part on that basis when he set up a psychiatric evaluation. On this issue, I will first consider circumstantial evidence associated with temporal proximity, possible hostility, and disparate treatment and then address evidence indicative of an absence of knowledge by Dr. Pinsky about the hours of service protected activities.

About two months after Mr. Rudolph submitted his hours of service violation complaints to AMTRAK and the FRA, the AMTRAK medical director decided to send Mr. Rudolph to a psychiatric assessment. This close temporal proximity certainly suggests that Dr. Pinsky may have been aware of Mr. Rudolph's hours of service violation complaints. However, two other actions by Mr. Rudolph lessens the probative force of temporal proximity – he marked off ill due

⁶⁸The record contains no evidence that either Mr. Israelson or Mr. Krueger were involved in the denial of information regarding Mr. Rudolph's employment status.

⁶⁹Several individuals discussed Mr. Rudolph's return to work request and offered recommendations, including a representative from the AMTRAK law department and Mr. Israelson. Nevertheless, Dr. Pinsky's March 10, 2009 statement, as supported by Dr. Green's testimony establishes that Dr. Pinsky, as AMTRAK medical director, made the final decision regarding the psychiatric referral.

to stress in the mid-morning of July 20, 2008 and then in late August 2008 requested to return to work based on his psychiatrist's recommendation. These two actions caused Dr. Pinsky to become involved in Mr. Rudolph's case and required his response, separate and apart from Mr. Rudolph's hours of service violation protected activities.

Although Mr. Rudolph may review Dr. Pinsky's referral and eventual medical disqualification as a hostile act, the record contains some examples of Dr. Pinsky being supportive of, rather than hostile toward, Mr. Rudolph. On October 7, 2008, Dr. Pinsky wanted to respond to Mr. Rudolph's request for information about his status, advise him that the reason for the delay was the non-availability of the doctor who would conduct the evaluation, and thank him for his patience. The subsequent decision to not respond was based on legal advice. And, on November 5, 2008, once he had made the medical disqualification determination, Dr. Pinsky promptly advised the Railroad Retirement Board of Mr. Rudolph's status and explained the basis for the delay which enabled Mr. Rudolph to recoup his 79 days of sickness compensation. Additionally, Dr. Pinsky's subsequent refusal on November 20, 2008 to release Dr. Wilson's evaluation to Dr. Sedlacek appears to be based on legal advice as he stated rather than hostility.

In terms of disparate treatment as being possible evidence that Dr. Pinsky's knowledge of Mr. Rudolph's hours of service protected activities prompted him to levy a psychiatric evaluation prerequisite on Mr. Rudolph for his return to work, I have considered the evidence regarding Mr. Beary and Mr. Meeks. While Mr. Beary was out of work about two months and returned to work without a psychiatric evaluation, he was not similarly situated. Mr. Beary had a blood sugar level issue, rather than a diagnosed mental disorder. Once he established through objective medical evidence that his blood sugar level was under control, he was reasonably permitted to return to work without a psychiatric assessment. Although Mr. Meeks' situation is obviously closer to Mr. Rudolph's case since he went out on sick leave for a month and a half due to stress, he still was not similarly situated because he was not diagnosed by a psychiatrist with generalized anxiety disorder and he had no history of an extensive absence due to stress. Consequently, since neither Mr. Beary nor Mr. Meeks were similarly situated, AMTRAK's different response to their cases provides little probative evidence that Dr. Pinsky was responding uncharacteristically or disproportionately in requiring a psychiatric evaluation for Mr. Rudolph.

Next, turning to supportive evidence, Dr. Pinsky stated that he was unaware of Mr. Rudolph's protected activities regarding the hours of service violation. The testimony of both Mr. Krueger and Mr. Anderson that they had no contact with Dr. Pinsky partially supports his statement. Further, Mr. Israelson's sole input to Dr. Pinsky related to his concern about Mr. Rudolph's ability to handle the stress of being a conductor.⁷⁰ Although the medical documentation regarding Mr. Rudolph's sick leave indicated that the exacerbation of his general

⁷⁰Mr. Rudolph has challenged Mr. Israelson's impartiality in his actions due to his purported friendship with Mr. Graziosi and lack of response to his workplace violence complaints. In that regard, I note that Mr. Israelson was not completely passive regarding Mr. Rudolph's confrontation with Mr. Graziosi. On January 1, 2008, he completed a work place violence report, RX 94, which indicated that witnesses stated the exchange between Mr. Rudolph and Mr. Graziosi was mutually assertive. Further, in the report, Mr. Israelson noted that since Mr. Graziosi was leaving AMTRAK in two weeks for a job with Metra, he did not believe there would be an intimidating environment in Chicago. Shortly thereafter Mr. Graziosi left AMTRAK and Mr. Israelson's supervision.

anxiety disorder occurred because he was concerned about safety due to having to work beyond his 12 hours of service, neither Mr. Rudolph nor Dr. Sedlacek specifically indicated that Mr. Rudolph had filed complaints in response. The progress notes also indicate that Dr. Pinsky made the decision to refer Mr. Rudolph for an evaluation in mid-September 2008, well before the FRA provided its October 2, 2008 determination to the union representative that a violation had occurred.

Finally, although he had contact with the legal department representative who recommended an evaluation, Dr. Pinsky's subsequent explanation indicated that he based his referral decision on Dr. Walters' 2006 assessment which Mr. Rudolph submitted in his ADA appeal, as well as Dr. Sedlacek's reports and associated, varied pre-conditions for Mr. Rudolph's return to work over a short period of time. These documents support a finding that Dr. Pinsky reached a conclusion to get a second opinion independent from, and without knowledge of, Mr. Rudolph's hours of service protected activities.

In summary, upon consideration of circumstantial, testimonial, and documentary evidence, I conclude that in mid-September 2008, when he decided to send Mr. Rudolph for an independent psychiatric evaluation, Dr. Pinsky did not know about Mr. Rudolph's hours of service protected activities. Accordingly, Mr. Rudolph's hours of service protected activities were not contributing factors to Dr. Pinsky's decision to refer Mr. Rudolph for an independent psychiatric evaluation.

Work-Related Injury

Having become involved in Mr. Rudolph's request to return to work, Dr. Pinsky was well aware of his protected activity of reporting a work-related injury on July 20, 2008. Upon initial consideration, both subject matter and temporal proximity provide circumstantial evidence that Mr. Rudolph's marking off due to work-related stress on July 20, 2008 was a contributing factor to Dr. Pinsky's decision to refer Mr. Rudolph to Dr. Wilson prior to approving his return to work. In addition, a representative from the AMTRAK law department based her recommendation for a psychiatric evaluation in part on Mr. Rudolph's sudden marking off. However, Dr. Pinsky's March 30, 2009 statement indicating that his decision was based on a series of events that occurred after Mr. Rudolph's protected activity, as well as AMTRAK's handling of Mr. Rudolph's previous long absence due to stress and subsequent return to service, provide significant contrary evidence.

Although he noted the AMTRAK attorney's recommendation in his progress notes, Dr. Pinsky presented only two specific reasons in his March 2009 statement for his decision to direct an independent psychiatric evaluation. First, the documentation Mr. Rudolph submitted in the late summer, after July 22, 2008, as medical justification for his previously denied requested ADA accommodations suggested that as a result of his condition he might be unable at times to perform his work as conductor safely and properly. Second, after Mr. Rudolph left work on July 20, 2008, Dr. Sedlacek submitted conflicting notes and statements regarding Mr. Rudolph's condition over a short period of time. In other words, rather than Mr. Rudolph's sudden marking off on July 20th, Dr. Pinsky's decision was driven by two intervening events between that protected activity and the referral decision.

Specifically, as part of his appeal of the ADA panel's denial of his accommodation request due to insufficient medical evidence that he sent AMTRAK sometime after July 22, 2008, Mr. Rudolph included Dr. Walters' detailed 2006 evaluation and Dr. Sedlacek's July 22, 2008 recommendation that his ADA request be approved. After a detailed assessment, Dr. Walters' diagnosed Mr. Rudolph with general anxiety disorder.⁷¹ Dr. Sedlacek continued to diagnose generalized anxiety disorder which could become "quite severe" to the extent that it might "interfere with his ability to handle excessive, unexpected stresses." He concurred with Mr. Rudolph's requested accommodations, which principally related to stress generated by the increased responsibilities and time pressures associated with his job as conductor.⁷² In particular, Dr. Sedlacek noted that giving Mr. Rudolph the ability to take leave in situations with which he felt he could not cope would be a means to "greatly reduce" his anxiety. Coupled with the July 11, 2008 ADA panel's determination that Mr. Rudolph's requested accommodations were incompatible with his duties as an AMTRAK conductor, these two reports provided reasonable support for Dr. Pinsky's stated concern in his March 2009 statement "that as a result of his disorder, Mr. Rudolph might be unable, at least some of the time, to perform his job safely and properly," absent significant accommodations that were incompatible with his job, including as Dr. Pinsky put it, abandoning his job any time he felt necessary to do so.⁷³

Next, on August 13, 2008, Dr. Sedlacek submitted a statement of disability indicating that Mr. Rudolph was temporarily, totally disabled through possibly September 2, 2008 due to overwhelming anxiety and mental "limitations" that would interfere with ability to focus and concentrate properly to do his job. Less than two weeks later, on August 25, 2008, Dr. Sedlacek submitted another statement of disability stating that Mr. Rudolph had sufficiently stabilized and could return to work as of August 21, 2008 with the previously listed restrictions, reasonably interpreted to mean the requested accommodations which again had already been initially determined to be incompatible with Mr. Rudolph's work by the ADA panel. When understandably asked for clarification, Dr. Sedlacek completed a terse handwritten note on September 9, 2008 again indicating that as of August 21, 2008 Mr. Rudolph was released to full time duties "restricted to train operations that do not violate the FRA regulations or compromise safety." Notably, Dr. Sedlacek dropped any reference to the previous accommodations that he had supported just about a month earlier on July 22, 2008 because they would greatly reduce Mr. Rudolph's anxiety and had included as restrictions on August 25, 2008 return to work recommendation and instead pre-conditioned Mr. Rudolph's return on AMTRAK's compliance with safety standards.

⁷¹When Dr. Walters recommended to AMTRAK that Mr. Rudolph go off duty in January 2008 for exacerbation of stress, she did not include a diagnosis of general anxiety disorder, CX 20. Although Dr. Walters subsequently submitted a diagnosis of generalized anxiety disorder to the Railroad Retirement Board in March 2008 to support Mr. Rudolph's request for sickness benefits, RX 73, the record does not establish that AMTRAK and Dr. Pinsky received a copy.

⁷²Dr. Sedlacek identified the following accommodations requested by Mr. Rudolph: a) not being the sole conductor, b) having the ability to take leave in situations with which he could not cope, and c) being provided an extension of time for pre-trip duties.

⁷³The documentation also reasonably supported Ms. Rubin's legal advice that even if Mr. Rudolph requested to return to work without any restriction, he would still need to be evaluated.

On their face, Dr. Sedlacek's opinions and statements regarding the extent of Mr. Rudolph's general anxiety disorder and its effect on his capability to return to his work as a train conductor varied widely from a) a stress disorder that could be "quite severe" at times and interfere with his ability to work safely such that his return to work was conditioned upon specific accommodations, to b) a diagnosed generalized anxiety disorder that would not be factor if AMTRAK complied with safety standards. When Dr. Pinsky called Dr. Sedlacek on September 18, 2008 to discuss these variations, after confirming that Mr. Rudolph was cleared to return to work without restrictions except for activities that would violate Federal regulations, Dr. Sedlacek volunteered that he was writing what Mr. Rudolph requested. This acknowledgment, coupled with the sequence and contents of Dr. Sedlacek's assessments and conclusions from July 22 to September 9, 2008 provided a rational basis unrelated to Mr. Rudolph's marking off ill on July 20, 2008 for Dr. Pinsky's September 18, 2008 decision to refer Mr. Rudolph for an independent second opinion prior to approving his return to work.

Finally, consideration of the situation surrounding Mr. Rudolph's prior experience with returning to work in June 2008 after a long period of absence due work-related stress provides some evidence that his July 20, 2008 marking off was not a contributing factor in Dr. Pinsky's referral decision. After going out sick in January 2008 due to stress from his confrontation with Mr. Graziosi, Mr. Rudolph requested on May 24, 2008 return to work, supported by a return to work clearance form from Dr. Sedlacek. At that time, although Mr. Rudolph had submitted his ADA accommodation request, Dr. Sedlacek had expressed no opinion on how Mr. Rudolph's stress-related issues affected his work or his requested accommodations. Consequently, the only issue facing the AMTRAK Medical Department and Dr. Pinsky when Mr. Rudolph requested to return to work in June 2008 was that he had stayed out sick for several weeks due to work-related stress. Significantly, that situation did not trigger a psychiatric evaluation as a return to work pre-condition and supports Dr. Pinsky's March 2009 statement that the ADA medical documentation and Dr. Sedlacek's conflicting notes prompted his referral decision, rather than Mr. Rudolph being out ill due to a work-related stress.⁷⁴

In summary, sometime after Mr. Rudolph went out sick due to stress on July 22, 2008, Dr. Pinsky was placed on notice by Dr. Walters that Mr. Rudolph suffered generalized anxiety disorder and by Dr. Sedlacek initially that the condition could be quite severe at times and warranted accommodations which were actually incompatible with his train conductor duties, and then that the condition only required compliance to Federal regulations. That is, unlike the prior situation when Mr. Rudolph was permitted to return to work in June 2008 after being off sick for several months due to a stress-related illness without a psychiatric evaluation, the medical information provided by Mr. Rudolph after marking off on July 20, 2008 presented a more complex case for Dr. Pinsky to assess and provides sufficient evidence to outweigh the circumstantial evidence of contributing factor based on temporal proximity and subject matter.

⁷⁴Of course, from Mr. Rudolph's perspective, a notable distinction between the two situations in January and July 2008 when he left work due to stress was that the second time he engaged in protected activities concerning his hours of service. However, as I have previously discussed, the evidentiary record does not establish that Dr. Pinsky was aware of Mr. Rudolph's hours of service protected activities when he decided to refer Mr. Rudolph for a psychiatric evaluation.

Consequently, I find the preponderance of the probative evidence establishes that Mr. Rudolph's marking off ill on July 20, 2008, was not a contributing factor in Dr. Pinsky's decision to seek an independent evaluation prior to deciding whether Mr. Rudolph could return to work as an AMTRAK conductor.

Medical Disqualification

On November 5, 2008, Dr. Pinsky medically disqualified Mr. Rudolph from his job as an AMTRAK train conductor. Again, at that time, Mr. Rudolph had engaged in all five of his protected activities. As previously discussed, Dr. Pinsky was not aware of the Mr. Rudolph's protected activities related to his hours of service violation. However, at the time he made his decision, Dr. Pinsky was certainly aware of Mr. Rudolph's protected activities of reporting a work-related injury and requesting a return to work.⁷⁵

In considering circumstantial evidence that Mr. Rudolph's two protected activities were contributing factors in Dr. Pinsky's determination to medically disqualify him from train conductor duties, I have previously discussed possible hostility and disparate treatment and continue to find those aspects have little probative value. In terms of temporal proximity, Mr. Rudolph's medical disqualification occurred less than four months after he reported his work-related injury and a few weeks later requested to return to work, certainly provide some evidence of causation. However, once again, an intervening event, this time, Dr. Wilson's October 27, 2008 psychiatric evaluation report, significantly diminishes the probative force of temporal proximity.

Upon initial consideration of Dr. Wilson's report, I note that as a professor and chairman of the Department of Psychiatry at Creighton University, he is clearly well qualified to assess Mr. Rudolph's general anxiety disorder. Second, the record contains no evidence that Dr. Wilson has any connection or affiliation with AMTRAK or Dr. Pinsky. Also, while Mr. Rudolph explained his situation of being placed on sick leave due to his refusal to violate legal parameters, insufficient evidence exists to demonstrate that Dr. Wilson's opinion was influenced by Mr. Rudolph's protected activities. In other words, I conclude that Dr. Wilson developed and presented an independent psychiatric evaluation that was not affected by Mr. Rudolph's protected activities.

Further, despite Dr. Sedlacek's off-handed comment about Dr. Wilson's "one hour" assessment,⁷⁶ I consider Dr. Wilson's medical opinion well documented and reasoned. In addition to his detailed assessment of Mr. Rudolph on October 16, 2008, Dr. Wilson also reviewed Mr. Rudolph's medical, psychiatric, and work records.⁷⁷ In a detailed analysis, Dr. Wilson provided numerous reasons for his conclusion that Mr. Rudolph suffers from a "significant" mixed syndrome of generalized anxiety disorder and panic attacks. In Dr. Wilson's

⁷⁵Since Mr. Rudolph remained "active" but medically disqualified, *see* RX 79, Dr. Pinsky's medical disqualification essentially represented a suspension, which is considered a "discipline" under § 20109(c)(2).

⁷⁶*See* CX 39.

⁷⁷Dr. Wilson specifically referenced records from Psychiatric Services, Inc., and discussed the assessments by Dr. Walters and Dr. Sedlacek.

opinion, Dr. Rudolph's prognosis was poor due to an inherent dilemma: a return to work desire versus fear of what such a return will entail. Mr. Rudolph was anxious due to increased work demands associated with changes AMTRAK made in staffing that caused a decrease in the ratio of conductors and a corresponding increase in responsibility, such that the demands were overwhelming; he worried that his stress might cause an accident due to poor concentration and distraction. Work confrontation with, and threats from, supervisors also compounded his stress. According to Dr. Wilson, with the amelioration of the hostile work environment issues, and "ongoing psychiatric care, the stage may be sooner set" for his return to duty. However, his final conclusion was that Mr. Rudolph was presently unable to work as an AMTRAK assistant conductor. In a November 5, 2008 phone conversation with Dr. Pinsky, Dr. Wilson opined that due to his condition, Mr. Rudolph was not presently capable of functioning in the workplace, even if the perceived workplace hostility and increased job demand issues were addressed.

Having received contrary opinions from Dr. Sedlacek and Dr. Wilson on Mr. Rudolph's fitness for duty, Dr. Pinsky chose the later opinion in medically disqualifying Mr. Rudolph. In considering whether non-medical considerations, such as Mr. Rudolph's marking off sick or requesting to return to work, influenced that decision, I recognize that as a treating psychiatrist, Dr. Sedlacek was well positioned to provide an exceptionally well informed opinion. However, the information Dr. Sedlacek presented to AMTRAK and Dr. Pinsky contained little analysis and at times consisted of terse conclusions. In contrast, Dr. Wilson provided a detailed analysis and explanation for his assessment, diagnosis, and recommendations. Additionally, Dr. Sedlacek's acknowledgement that he was writing what Mr. Rudolph requested provided another basis for Dr. Pinsky's preference to rely on Dr. Wilson's independent assessment. In that light, I find Dr. Pinsky's decision to rely on Dr. Wilson's opinion rather than Dr. Sedlacek to be reasonable and not affected by Mr. Rudolph's protected activities.

Accordingly, I find the preponderance of the probative evidence establishes that Mr. Rudolph's protected activities were not contributing factors in Dr. Pinsky's decision to medically disqualify Mr. Rudolph on November 5, 2008.

Refusal to Approve Return to Work

Between August 21, 2008, the date Dr. Sedlacek determined Mr. Rudolph was capable of returning to work and January 12, 2009, when Mr. Rudolph filed his FRS complaint, AMTRAK refused to approve his request to return to work. By this time, Mr. Rudolph had engaged in all of his protected activities. However, since Mr. Rudolph's protected activities were not contributing factors to his medical disqualification, Dr. Pinsky's refusal to permit his return to work from August 21, 2008 through November 5, 2008 was likewise not influenced by Mr. Rudolph's protected activities. As a result, I will focus on the period from November 5, 2008 through January 12, 2009.

As a preliminary matter, the medical disqualification notice contain four options for Mr. Rudolph. At the hearing, for diverse reasons, Mr. Rudolph indicated that he did not apply for permanent disability, apply again for ADA accommodation, or seek an alternate AMTRAK position. As a result, under the remaining option, his return to service would be predicated on

providing medical documentation that his condition had sufficiently improved to permit him to perform his work as a train conductor.

Following Mr. Rudolph's visit, on November 20, 2008, Dr. Sedlacek sent Dr. Pinsky a letter disagreeing with Dr. Wilson's conclusion. Observing that Mr. Rudolph had performed well from June 2008 until July 19, 2008, Dr. Sedlacek maintained that Mr. Rudolph was not disabled and remained capable as of August 21, 2008 to return to his full time duties provided his work was confined within his assigned hours. In evaluating Dr. Pinsky's apparent decision not to return Mr. Rudolph to work after Dr. Sedlacek's November 20, 2008 recommendation, I again note that the AMTRAK medical director was aware of only two protected activities: reporting a work-related injury and requesting a return to work. For the reasons previously discussed regarding the medical disqualification, I find neither protected activity was a contributing factor when Dr. Pinsky decided not to return Mr. Rudolph to work after receiving Dr. Sedlacek's November 20, 2008 letter. Notably, Dr. Sedlacek provided no additional new medical evidence to indicate that Mr. Rudolph had improved since Dr. Wilson's October 16, 2008 examination; instead, he just disagreed with Dr. Wilson's opinion. Again, for the reasons previously discussed, Dr. Pinsky's continued reliance on Dr. Wilson's opinion rather than Dr. Sedlacek's conclusion was neither unreasonable nor influenced by the protected activities.⁷⁸

Finally, § Section 20109(c)(2) states that a railroad carrier's refusal to permit an employee to return to work following medical treatment is not considered a violation of the section if the refusal is pursuant to FRA's medical standards for fitness for duty or if there are no pertinent FRA standards, the railroad carrier's medical standards for fitness for duty. Neither the FRS nor the AMTRAK medical standards for fitness for duty were offered into evidence in this case. Nevertheless, while those medical standards haven't been formally presented, Mr. Rudolph's testimony about his job responsibilities, the position description for an AMTRAK train conductor, CX 48 , as well as the analyses of Dr. Walters and Dr. Wilson about Mr. Rudolph's ability to handle the stress associated with his work as a train conductor provide sufficient evidence of the medical standards for a train conductor's fitness for duty. Accordingly, AMTRAK did not commit a violation of § 20109(c)(2) when Dr. Pinsky refused to permit Mr. Rudolph's return to work following Dr. Sedlacek's recommendation since Dr. Wilson's evaluation demonstrated that Mr. Rudolph's generalized anxiety disorder had not improved or stabilized such that he could safely and properly perform his assistant conductor duties.

⁷⁸For the same of completeness, I note that on February 3, 2009, Mr. Rudolph asserted that he was unable to provide the medical documentation required by the first option due to the lack of specificity. On April 14, 2009, Dr. Sedlacek concluded Mr. Rudolph could no longer work for AMTRAK due in part to excessive emotional stress associated with his whistleblower activities. On September 25, 2009, Dr. Sedlacek opined Mr. Rudolph was capable of returning to work although not in his best interests due to the likelihood of exacerbation. Finally, on December 3, 2009, Dr. Sedlacek stated Mr. Rudolph was willing and able to work. Significantly lacking in these representations is sufficient discussion on how Dr. Sedlacek medically determined that Mr. Rudolph's generalized anxiety disorder has improved and stabilized since Dr. Wilson's October 2008 evaluation.

Issue #4 – Affirmative Defense

As previously discussed, under 49 U.S.C. § 42121(b) of AIR 21 and 20 C.F.R. § 1982.109(b), even if the complainant establishes that an activity protected under the Act was a contributing factor in an adverse personnel action, relief may not be granted if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

I have determined that Mr. Rudolph's PTT annotation and complaint of being forced to violate the hours of service, and accurately reporting his hours of service on July 20, 2008 were contributing factors to Mr. Krueger's warning to Mr. Rudolph during their August 7, 2008 phone conversation. Considering the nature, content, and context of Mr. Krueger's caution to Mr. Rudolph that he had been directed to charge him if he maintained that he performed service into Chicago, I find that AMTRAK is unable to establish that Mr. Krueger would have made that comment absent Mr. Rudolph's protected activities.

Issue #5 – Damages

After evaluation of all the evidence in the record, I have determined that Mr. Rudolph has proven that Mr. Krueger's warning on August 7, 2008 was a violation of the employee protection provisions for the FRS. However, while § 20109(e)(2) of the Act attempts to restore an aggrieved complainant through reinstatement, back pay with interest, and compensatory damages, Mr. Rudolph's employment and financial losses actually stem from the portions of his FRS complaint involving the unpaid sickness benefits, psychiatric evaluation referral, medical disqualification and AMTRAK's refusal to approve his return to work, and I have determined that his protected activities were not contributing factors in those actions. That is, Mr. Rudolph has failed to prove the portions of his FRS complaint that would lead to reinstatement, recoupment of lost wages and recovery of compensatory damages.

Focusing on the loss attributable Mr. Krueger's August 7, 2008 telephone warning, although Mr. Rudolph's stress associated with the events of July 19 and 20, 2008 was hardly helped by their conversation, Mr. Rudolph was already out on sick leave at the time and receiving sickness benefits attributable to his marking off on July 20th due to work-related stress. While it's possible the duration of his sick leave may have been less absent the aggravation Mr. Krueger's phone call clearly caused, the record does not provide a basis for assigning a proportion of the sick leave to the August 7, 2008 to the phone call. Further, the record provides little basis for an award of compensatory damages based on Mr. Krueger's call.

Section 20109(e)(3) also adds punitive damages as possible relief. 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.⁷⁹ On the other hand, since the decision to award punitive damages

⁷⁹See *Collins v. Village of Lynchburg, Ohio*, 2006-SDW-003 (ALJ May 8, 2007).

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.⁸⁰

Mr. Krueger credibly testified that he was reluctant to place the August 7, 2008 phone call as directed by Mr. Israelson. And, the first couple minutes of their conversation show that Mr. Krueger was trying to warn Mr. Rudolph of the consequences of his position, rather than threaten him. However, Mr. Israelson only asked Mr. Krueger to confirm with Mr. Rudolph that he performed service into Chicago on July 20, 2008. He did not tell Mr. Krueger to also warn Mr. Rudolph what would happen. Mr. Krueger made the decision to add the additional comment about the disciplinary charge even though he was Mr. Rudolph's immediate supervisor. Based on the context of the events leading up to the phone call and the phone exchange itself, despite his intentions, I find that Mr. Krueger's decision to warn his subordinate that he will be charged if he continues to pursue a position directly tied to his protected activities represents sufficient deliberate and reckless disregard of Mr. Rudolph's rights under the FRS to warrant an award of punitive damages.

In setting the amount of the punitive damages, I am nevertheless influenced by Mr. Krueger's at least partial motive of trying to help Mr. Rudolph as a former friend to avoid significant consequences if he persisted to claim that he performed service into Chicago. Under these circumstances, I find punitive damages in the amount of \$5,000 to be sufficient.

Conclusion

Mr. Rudolph engaged in the following protected activities under the Act: notified supervisors, AMTRAK, and the FRA that he had been forced to violate the hours of service, § 20109(a)(1); reported a work-related injury, § 20109(a)(4), cooperated with the FRA, § 20109(a)(5), accurately reported his hours of duty, § 20109(a)(7), and requested to return to work, § 20109(c)(2). He also was subjected to the following adverse personnel actions: threat of discipline, disciplinary charge, unpaid sickness benefits, psychiatric evaluation referral, medical disqualification, and refusal to approve return to work.

Mr. Rudolph has proven through the preponderance of the probative evidence that his protected activities of reporting that he had been forced to violate the hours of service and accurately reporting his hours of duty on July 20, 2008 were contributing factors to the threat of disciplinary action that he received on August 7, 2008. And, AMTRAK had failed to establish by clear and convincing evidence that Mr. Krueger would have made the threat absent the protected activity. As a result, that portion of his FRA complaint is approved.

However, in regards to the remaining adverse actions, Mr. Rudolph has failed to prove by the preponderance of the evidence that any of his protected activities were contributing factors in the disciplinary charge, unpaid sickness benefits, psychiatric evaluation referral, medical disqualification, and refusal to approve return to work. As a result, the remaining portions of his FRS complaint related to those adverse personnel actions must be dismissed.

⁸⁰*Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-003 (ARB Sept. 29, 1998).

Attorney Fee and Litigation Expenses

Since I have determined an issue in favor of Mr. Rudolph, his counsel is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law Judges within 30 days of receipt of this Decision and Order. Employer's counsel has 30 days from receipt of such attorney fee petition to respond.

Since Mr. Rudolph was only marginally successful in his case,⁸¹ both parties must address the application of the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

ORDER

The portion of the FRS complaint by Mr. LAWRENCE J. RUDOLPH concerning a supervisor's threat on August 7, 2008 is **APPROVED**. The Respondent, NATIONAL RAILROAD PASSENGER CORPORATION, shall pay Mr. LAWRENCE J. RUDOLPH \$5,000 in punitive damages.

The remaining portions of the FRS complaint by Mr. LAWRENCE J. RUDOLPH regarding the adverse personnel actions consisting of disciplinary charge, psychiatric evaluation referral, medical disqualification, and failure to approve return to work are **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: March 11, 2011
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).

⁸¹Mr. Rudolph has been awarded \$5,000 in punitive damages. If he had proven his entire complaint and reinstatement were not possible, Mr. Rudolph's claimed damages were in an amount exceeding \$1.5 million.

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.

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, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1982.110(a).

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).