



**Issue Date: 06 May 2010**

In the Matter of

WILLIAM GARY WIGNALL,  
Complainant

v.

UNION PACIFIC RAILROAD COMPANY,  
Respondent

Case No. 2009-FRS-00005

Karl J. Frisinger, Esq.  
Minneapolis, Minnesota  
For the Complainant

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Omaha, Nebraska  
For the Respondent

Before: JEFFREY TURECK  
Administrative Law Judge

### **DECISION AND ORDER<sup>1</sup>**

This case arises out of a complaint of discrimination filed by William Gary Wignall (“Complainant”) against Union Pacific Railroad Company (“Respondent”), pursuant to the employee protection provisions of Section 20109 of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the “Act”).<sup>2</sup> The Act prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because the employee provided information relating to actions the employee reasonably believes violate “[f]ederal law, rule or regulation relating to railroad safety or security . . . .” 49 U.S.C. § 20109(a)(1).

On September 23, 2008, Wignall filed a whistleblower complaint with the Occupational Health and Safety Administration (“OSHA”) contending that his position was abolished because of safety complaints he made to his supervisor. OSHA concluded that the abolishment was a

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<sup>1</sup> Citations to the record of this proceeding are abbreviated as follows: CX – Complainant’s Exhibit; RX – Respondent’s Exhibit; TR – Hearing Transcript.

<sup>2</sup> At this time, the Department of Labor has not promulgated regulations under this provision of the Act.

retaliatory action. *OSHA Final Investigative Report* at 2. Respondent requested a hearing. A formal hearing was held in Iowa City, Iowa on August 4 and 5, 2009. At the hearing, Complainant's Exhibits 1-2, 4-10, 13-20, 22-23, 27-30, 33, 36 and 39 and Respondent's Exhibit E were admitted. Both parties filed post-hearing briefs.

Based on the evidence contained in the record of this proceeding, I conclude that the complainant failed to prove that his position was abolished in violation of the Act.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Complainant is currently employed by Respondent as a welder. He is a member of the International Brotherhood of Blacksmiths and Boilermakers. TR 31, 90. For approximately eight years prior to April 7, 2008, Complainant worked on a two-person welding gang based in Beverly, Iowa, which is 39 miles roundtrip from his home in Marion, Iowa. TR 31; CX 33. For the last five years he worked out of Beverly, Complainant worked with another welder, Les Jacobi. TR 31. On April 7, 2008, Complainant's position in Beverly was abolished, effective April 11, 2008. Due to his union seniority, he transferred to a position with Respondent in Marshalltown, Iowa, which is 169 miles roundtrip from his home, by bumping a lower seniority worker. He worked out of Marshalltown between April and December, 2008, at which time Complainant was bumped out of that position. TR 30-31; CX 8; CX 33. He then bumped another welder to obtain a position in an on-line gang with the Council Bluffs Service Unit, the same service unit that encompassed his position in Beverly, Iowa. He is still employed in that position. As a member of an on-line gang, he receives a per diem allowance in addition to his wages, since on-line gangs have to travel a great deal. CX 8, at 3; CX 16.

#### *Lookouts*

Complainant's primary contention is that, in 2007 and early 2008, he asked his supervisor, Russell Rohlf, the Manager of Track Maintenance ("MTM"), for a "lookout" six or seven times when and Jacobi had to perform thermite welds on an inside rail, and due to these requests his position was abolished. TR 32, 261, 277. Complainant explained that an inside rail is the rail closest to the second track in a pair of double tracks. TR 33. A thermite weld is a molten metal weld that requires two workers in order to unload and properly set the equipment to perform the weld. TR 33-34. To complete a thermite weld requires approximately 90 minutes, and for approximately half that time, two people are necessary. TR 35. The Complaint testified that a "lookout" was a person trained and qualified to alert others of a train's approach. TR 61. When working as a lookout, a person could only perform lookout duties. TR 61.

Complainant testified that he believed a lookout was required when performing thermite welds based on Respondent's safety rules for its workers, which were created in order to comply with Federal Railway Administration ("FRA") requirements. TR 40. He cited Respondent's Rule 136 as implementing the On-Track Safety requirements. TR 40. Based on training provided by Respondent, he believed a lookout was required because in the process of performing a thermite weld, the welders could "foul" an adjacent track. TR 46. Complainant explained that "fouling" occurred when a person or equipment was placed such that the person or

equipment could be struck by a train. TR 44. He added that he thought fouling was defined as being within four feet of the nearest rail. TR 44.

Complainant cited other Union Pacific Rules which he believed required a lookout. He cited Rule 121.3.1, "Protection From Trains on the Adjacent Track," (CX 7), as an example of Respondent's requirement that when working on tracks with less than 19 feet centers and a train passes traveling at 40 miles per hour, he and Jacobi could continue to work as long as they kept both feet between the rails or worked on the field side of the track. TR 49-52. Complainant cited Rule 1.2, "Alert to Train Movement," which demands "[e]mployees [to] expect the movement of trains, engines, cars or other movable equipment at any time, on any track and in either direction." TR 53; CX 18. He also cited Supplement 1.1.2, "Alert and Attentive" which requires "[t]he employee in charge [to] take every precaution to ensure employees are warned about approaching trains. Employees must be warned in time for them to reach a safe place." CX 19; TR 54. In addition, Complainant identified Rule 45.1, "Loading/Unloading Precautions",<sup>3</sup> which requires workers to use a tag line to stabilize a load when using a crane to load and unload materials. TR 57; CX 20. Finally, he noted Rule 136.4.4, "Train Approach Warning," which describes the safety function lookouts can play in warning workers who foul a track. TR 58; CX 22.

Complainant testified that when both he and Jacobi were performing thermite welds, they could not adequately be alert to trains. He stated that because their truck would be parked on or near the track, they had limited sight distance. TR 53. When working together, he and Jacobi would alternate functioning as the employee in charge, or the person who ran the work crew. TR 54-55. He believed that when working on thermite welds, they were not able to comply with Supplement 1.1.2 because at times their sight distance was limited; therefore, Complainant asked Rohlfs for a lookout. TR 55. Complainant also stated that when loading and unloading their truck, he and Jacobi used a tag line at times to stabilize their load which could swing toward the adjacent track. TR 57-58.

Bobby Odom, the Director of Rules, Safety and Training for the Engineering Department at Union Pacific, confirmed that Respondent promulgated Rule 136 in response to requirements by the FRA. TR 119, 123. He testified that 49 C.F.R. § 214.301-315 (CX 17) are the regulations that require Respondent to pass rules to be in compliance with FRA standards. TR 146. In his position, Odom updates Respondent's rules as required by changes to federal regulations and provides safety-related training. TR 120. Odom testified that based on Rule 136, one or more on-track safety methods will be provided to warn of an approaching train. A lookout may be one of those methods. TR 127; *see* CX 36. He also noted that based on Rule 121.3.3 (CX 7), when welders are working on one track, they do not need a lookout for trains passing on an adjacent track, unless they are fouling the track. TR 140-143.

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<sup>3</sup> I note that the copy of Rule 136.4.4, "Train Approach Warning," included in the record states that it became effective on November 17, 2008. This date is outside of the time period Complainant alleges that he engaged in protected activity, and he did not provide adequate information to indicate that this rule was effective at the time of his alleged protected activity. Nevertheless, I will presume for purposes of this decision that this Rule, and other Union Pacific Rules contained in the record which also state they became effective on November 17, 2008, were in effect prior to April, 2008.

On cross examination, Odom testified that based on the requirements of 49 C.F.R. § 214.303, workers should not foul a track unnecessarily. TR 149; *see* CX 17 at 3. If the workers do not foul an adjacent track, then a lookout is unnecessary; however, if the workers foul an adjacent track, then some form of train approach warning protection is required. TR 149-51. Odom also verified that if Complainant and Jacobi were working together, it would be permissible for one to serve as a lookout while the other performed welds. TR 152. He also stated that given the task a welder performs, there would be no reason to foul an adjacent track with equipment. The equipment would be loaded and unloaded from the field side of the track or directly out of the back of the truck. TR 152-53.

Odom also clarified that on a proceeding page to the copy of Rule 121 Complainant provided (CX7), the rule states that it protects large-scale maintenance production gangs. TR 153-54. Rule 121 does not apply to a two person welding gang. TR 154. Odom cited subpart 121.2.1, which lists the types of crews the rule covers. He concluded that, by omission, Rule 121 does not apply to two-person gangs. TR 157-59; *see* RX E. He explained that as a co-author of Rule 121, he believed the Rule only applied to program or production work, out-of-face or large-scale maintenance, and construction work because these types of work require larger numbers of workers and equipment which create distractions. Such conditions do not exist with a small gang. TR 166.

Finally, Odom testified that in his experience with Union Pacific, when a worker challenged the on-track safety measures provided, usually the concern was handled by the employee's supervisor. TR 173-74. However, under federal regulations, the employee has an opportunity, if the employee is not satisfied with the safety measures implemented by his or her supervisor, to refuse to perform the work until the matter is resolved. TR 174. If the supervisor and the employee are unable to resolve the issue, then the concern is referred up the chain of command. TR 174. Once the matter is resolved, if the employee continues to refuse to perform the assigned duty, then refusal may be grounds for discipline. TR 176.

Jim Jensen, a gang foreman supervising a new construction gang for Union Pacific, also testified regarding his experience coordinating on-track safety procedures. New construction gangs average 28 workers, but he has worked with many as 50 workers at a site. TR 226; 230-31. A new construction gang builds new tracks, unlike Complainant's role of repairing existing tracks. TR 227. As a flag foreman for Respondent, Jensen testified that he was responsible for arranging the on-track safety procedures based on the needs of the particular work site. TR 221. He also has experience acting as a lookout. TR 221. In situations where employees are working on one track covered by on-track safety procedures such as track and time, he may use a lookout to warn of approaching trains on an adjacent track not covered by other safety procedures if the crew fouls the adjacent track. TR 222-23. Jensen also testified that the more common scenario would be to have track and time monitoring one track and to use a lookout if the workers foul an adjacent track. TR 226. Jensen also testified that if workers were not fouling a track, then no protection would be set up for a track. TR 230.

### *Requests for Lookouts*

Complainant testified that he asked Rohlfs to provide lookouts six or seven times in 2007, (TR 38), and on at least two, and possibly more, of those times Rohlfs provided a lookout (TR 261). There is no evidence that he asked Rohlfs to provide lookouts in 2008. Complainant stated that he did not make written records of his requests for lookouts, nor did he contact Respondent's internal safety hotline to make an anonymous complaint when a lookout was not provided. TR 266. He also did not raise his concerns with his union representatives. TR 267. Complainant explained that he did not contact the anonymous safety line because those alerts would be returned to the caller's supervisor. In this case, his complaints would be forwarded to Rohlfs. TR 267.

Jacobi recalled Complainant asking Rohlfs to provide a lookout for safety reasons on five or six occasions. He agreed with the requests. TR 188-89. However, Jacobi never asked Rohlfs to provide a lookout. TR 190. He stated that when he and Complainant performed thermite welds, they would both perform work most of the time. TR 189. Jacobi testified about an incident in April, 2008, when he was working on dead tracks, areas of track where trains do not run. There was a lookout, but he could not make radio contact with an oncoming crane. TR 191. The lookout provided a warning to clear the track and the crane went through the dead track, demolishing Jacobi's truck. TR 191-92.

Steve Koeppen, a retired boom truck operator for Respondent, also testified regarding requests he heard Complainant make of Rohlfs. TR 64-65. Koeppen testified that he worked with Complainant on occasion, but was not part of his gang. TR 65. He stated that he overheard Complainant ask Rohlfs to provide a jack so that he could do his work. TR 65. Rohlfs responded with the question, "Do you know how much those things cost?" TR 65. Koeppen did not know if the tool Complainant requested was ever provided. TR 68. He also testified that he was trained as a lookout and had performed that role both at Complainant and Rohlfs' requests. TR 67.

Rohlfs, Complainant's supervisor, was an MTM for Respondent based in Cedar Rapids, Iowa from 2006 to 2008. He currently works as a Manager of Track Projects ("MTP") for the Council Bluffs Service Unit. TR 292. Rohlfs explained that an MTM oversees a portion of track approximately 100 miles in length, has a smaller work crew and more limited resources than an MTP. TR 293. As an MTP, he supervises a service unit, which involves more employees and larger projects. TR 293. As an MTM, he supervised welders, who were asked to perform thermite welds approximately once a week. The remainder of the time, the welders would perform other tasks. TR 294. Rohlfs served as MTM of Cedar Rapids for approximately 23 months. During this time, none of his workers suffered a physical injury. TR 299. He was also awarded the Service Unit Manager of the Year award in 2007 based on his safety record. TR 298.

Rohlfs testified that Complainant never specifically asked him for a lookout. TR 295. He testified that Complainant asked for tools, equipment and section help. TR 296. Section help included a foreman, an assistant foreman and another person who repaired tracks and installed ties. TR 296. All of the section workers reporting to Rohlfs were qualified to serve as lookouts.

TR 296. Rohlfs stated that it would be unnecessary for Complainant to request a lookout from him because he could ask Jacobi or one of the other section workers directly to function as a lookout. TR 296-97. If Complainant had asked him for a lookout, Rohlfs would have assigned someone on the gang to perform the duty. TR 297.

Rohlfs testified that Complainant had come to him with safety complaints on behalf of others, but did not make any safety complaints of his own. TR 301. He asked for tools on his own behalf, but those tools were to make the job easier. Complainant did not indicate that he needed the tools for safety purposes. TR 301. He testified that when workers would ask for tools, he would say, "Do you know how much that costs?" in order to emphasize taking care of the tools and that replacing tools was not without cost. TR 302. When workers asked for tools, sometimes he granted the requests and other times he denied them, but he stated that he would not compromise safety by not buying tools. TR 302.

Finally, Karolyn Burchfield, General Superintendent for the Council Bluffs Service Unit, testified regarding a source of funds provided each service unit to purchase tools. She stated that the unit received \$25,000 in January, 2008 that was used to order tools. However, the delivery of the tools was delayed until the spring of 2008. She did not know when the tools were distributed to the work crews. TR 408-09. Jacobi testified that within month after Complainant's job was abolished, Rohlfs asked him what tools he needed and the tools were provided. TR 198-99.

#### *Abolishment of Complainant's Position*

On April 7, 2008, Complainant testified that Rohlfs approached him at the end of the work day and handed him a letter informing Complainant that his position was abolished as of April 11, 2008. TR 79-80; *see* CX 27. Complainant testified that when Rohlfs handed him the letter, Rohlfs said that "he was tired of me [Complainant] bitching about making field welds, I've decided to go with a welder helper." TR 79. Complainant testified that Rohlfs did not mention budgetary reasons for eliminating his position or structuring the gang to conform to other gangs in the area. TR 79-80. The letter he received informing him of the abolishment of his position did not provide a reason for the action. *See* CX 27.

The International Brotherhood of Blacksmiths and Boilermakers has a seniority roster listing federated welders, the positions held by Complainant and Jacobi. TR 90; *see* CX 2. At the time Complainant's position was abolished, Jacobi was fourth in seniority and Complainant was fifth, meaning that of the two, it was Complainant's job which had to be abolished. TR 90. Claimant testified that under the union's seniority system, reductions of force are governed by seniority. TR 104. Further, a more senior member can bump a less senior member from a position. TR 91. When Complainant's position was abolished, Jacobi offered to have his position abolished instead. TR 91, 194. But Rohlfs believed that, since everything was based on seniority, he could not abolish a more senior worker. TR 308. Moreover, Jacobi would have remained senior to Complainant, and could have elected to bump Complainant at any time to get his position at Beverly back. This could, in turn, have led to an additional round of bumping, causing a further displacement of personnel. TR 104.

Rohlfs testified that Respondent implemented a cost-cutting program called Project 75 or “P75.” TR 299. The goal of the program was to reduce costs without compromising safety. TR 300. Project 75 was introduced in 2007. TR 323. Rohlfs testified that he decided to abolish a welder position on a ten person gang in April, 2008 for budgetary reasons. TR 302-03. Project 75 prompted Rohlfs to review his territory’s budget. TR 304. He consulted other MTMs in the Council Bluffs Service Unit, and his gang was the only one with two welders instead of a welder and a welder-helper. TR 304-05; 335. This Service Unit was the Boilermakers Section. TR 305. He also consulted his supervisor, Steve Hoerstkamp, the Director of Track Maintenance. TR 306-07. Rohlfs testified that before and after April, 2008, he abolished eight to ten other positions, including a foreman, assistant foreman, laborer and machine operators. TR 308-09. He testified that he abolished these jobs because he could consolidate the jobs and complete the same work. TR 309. He testified that he also employed other cost savings measures when ordering supplies and making equipment repairs. TR 309-10.

Rohlfs testified that he abolished a welder position on Complainant’s and Jacobi’s gang; he did not specifically abolish Complainant’s job. TR 307. He acknowledged that Jacobi offered to have his position abolished, but the positions are based on seniority, and if he abolished Jacobi’s position he would be abolishing the senior position. TR 308. By abolishing the welder position and replacing it with welder-helper, it saved \$2.83 per hour. TR 308. Rohlfs testified that when he gave Complainant the abolishment letter, he explained that he was replacing the position with a welder-helper for budgetary reasons; he did not make any statements regarding Complainant’s safety complaints. TR 311.

Complainant provided a list of welding gangs composed of two welders. Rohlfs stated that this list was comprised of gangs in Illinois, which was outside of his service unit. TR 337-38; *See* CX 29. Rohlfs confirmed that the makeup of the service unit was completely reviewed in February, 2009. TR 345. He received an email from Burchfield, the General Superintendent of the Council Bluffs Service Unit, summarizing the review of the gang structure. TR 344-47; 385. In the email dated February 23, 2009, Burchfield stated that on federated welder gangs, each two-person gang was comprised of one welder and one welder helper. *See* CX 16. The email also stated that they “desire consistency and cost savings created by downgrading [a three person gang consisting of two welders and a welder helper] to one welder and two welder’s helpers . . . .” CX 16.

Steven Hoerstkamp, who in April, 2008 was Director of Track Maintenance for Council Bluffs and Rohlfs’ former supervisor, testified that Rohlfs contacted him regarding abolishing a welder position. Hoerstkamp testified that Rohlfs telephoned him to ask why he had two welders in his unit. TR 369-70. He testified that in his position he looked at overall numbers, not individual positions, so he was not aware that there were two welders. TR 370. However, when Rohlfs brought the situation to his attention, he gave Rohlfs permission to abolish the extra welder position. TR 370. At the time of the conversation, Hoerstkamp did not know about Complainant’s alleged safety concerns. He also testified that Complainant’s name was not mentioned in his conversation with Rohlfs. After Hoerstkamp talked with Rohlfs, he telephoned the other MTMs and learned that their two person gangs were composed of a welder and a welder helper. TR 372.

Burchfield was alerted to the abolishment of Complainant's job on June 4, 2008. TR 388-89. As General Superintendent, Burchfield is responsible for safety and transportation services within a particular geographic region. She supervises the Director of Track Maintenance and is the second level supervisor for MTMs and MTPs. TR 386-87. On June 4, 2008, Burchfield met with Andrea Gansen, an employee with Union Pacific's labor relations department, and two representatives from the Boilermakers Union, Danny Hamilton and Frank May. TR 388. She took notes during the meeting. *See* CX 28. During the meeting, the union representatives relayed Complainant's concerns regarding the abolishment of his job, and the MTM "made statements that he was complaining too much." TR 390. The representatives asked that the welder position be re-bid in Cedar Rapids. TR 391.

Based on this conversation, Burchfield interviewed Rohlfs and Jacobi. TR 393. On June 21, 2008, she sent an email to Gansen, Hoerstkamp, and Rohlfs summarizing her investigation. *See* CX 9. In the email, she explained that Rohlfs told her that he abolished the welder position in order to be consistent with other welding gangs in the service unit and as a cost savings measure. CX 9. Burchfield also stated that Jacobi did not hear Rohlfs say that he abolished Complainant's position for raising safety concerns. She wrote that Jacobi said that Complainant did not like that Rohlfs demanded that they perform one weld per week, and that they did not have proper equipment to safely perform the work. However, Rohlfs provided the equipment needed. *Id.* She stated that Jacobi credited Rohlfs' high safety performance, and believed there may be a personality conflict underlying Rohlfs' decision to abolish Complainant's job. *Id.* She also states that Jacobi said that Rohlfs should have chewed them out instead of abolishing the job. *Id.*

Burchfield also testified regarding changes to the structures of gangs in the service unit. She explained that on February 23, 2009, she abolished an arc welder position in the service unit only five days after it was filled, replacing the welder with a welder helper. TR 400-02; *see* EX 29 at 3. Burchfield testified that she took this action after she reviewed the welding gangs in the service unit and abolished positions to save costs. TR 401-02.

In addition, Burchfield testified regarding the February, 2009 review of the staffing of the welding crews. She explained that Hoerstkamp reviewed the staffing during the summer of 2008 and that in February, 2009 she wanted to assess the staffing again in greater detail. TR 403. She stated that the February, 2009 review was the first time she evaluated the staffing at such detail. TR 404. Based on the review, she asked that the three person gangs be staffed with a welder and two welder helpers. TR 404. In the course of the staffing evaluation, she did not compare her service unit to others; her focus was to control costs within her own unit. TR 405. Similar labor cost-saving measures were implemented for workers in other crafts. TR 407.

Complainant presented a copy of a letter sent by Andrea Gansen to Frank May, one of the union representatives who attended the June 4, 2008 meeting with Burchfield. In the letter, Gansen described Rohlfs' statements that he abolished the welder position in order to save costs and to staff his gangs consistent with other gangs in the Council Bluffs Service Unit. CX 10. The letter also states that Jacobi agreed that there were no safety issues concerning Rohlfs. Jacobi stated that Rohlfs provided the equipment needed when requested. *Id.* She also states



that Jacobi credited Rohlfs' high safety standards and that he did not believe that Complainant's job was abolished due to safety concerns. *Id.*

Jacobi testified that the letter's characterization of his statements to Burchfield regarding Complainant's abolishment were inaccurate. TR 194-95. In response, he wrote an email to Frank May explaining his perspective. TR 195; *see* CX 13. Jacobi's email states that Complainant and Rohlfs "did not always see eye to eye at times." CX 13. He stated that Complainant's questions about safety and equipment would anger Rohlfs. The email explains that some of the equipment Complainant asked for was provided after the abolishment. Finally, the Jacobi email stated that he thought Rohlfs should have "chewed them out" if he thought they were not doing a good job. *Id.* Jacobi concludes that he "felt that Ms. [Burchfield] was a little more favorable to [Rohlfs'] view of a budget savings as opposed to something on a more personal note."

#### *Standards for Whistleblower Protection*

The Act prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because the employee provided information relating to actions the employee reasonably believes violate "[f]ederal law, rule or regulation relating to railroad safety or security . . . ." 49 U.S.C. § 20109(a)(1). The whistleblower provision incorporates by reference the burden shifting framework under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(c)(2)(A).

The complainant carries the initial burden of establishing the elements of his claim by a preponderance of the evidence. To establish his burden, the complainant must show the following elements by superior evidentiary weight:

- (i) The employee engaged in a protected activity or conduct;
- (ii) The [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity;
- (iii) The employee suffered an unfavorable personnel action; and
- (iv) The circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(a)(b)(1)(i) – (iv); *see also* *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 at 13 (ARB Jan. 31, 2006)(defining preponderance of the evidence as "superior evidentiary weight").

If established, the burden shifts to the employer to rebut the elements of the claim by demonstrating through clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity. 49 U.S.C. § 42121(c); *see also* 29.C.F.R. § 1979.104(c). If the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity, then relief may not be granted. *Id.*

Assuming *arguendo* that Complainant established the first three elements, I will address the final element – that his position was abolished due to his protected activity.

To prove the final element of his claim the complainant must show that “the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.” 29 C.F.R. § 1979.104(b)(1)(iv). The Board defines a contributing factor as “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Allen v. Stewart Enterprises, Inc.*, ARM No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is “intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” *Id.*

I find that the preponderance of the evidence does not support that Complainant’s position was abolished, even in part, as a result of his requests for lookouts. First, Complainant does not contend that he requested a lookout at any time in 2008 through the abolishment of his position on April 7th. He presented no evidence of why Rohlfs would suddenly abolish his position due to his requests for lookouts when he had not made such a request in several months. Rather, he ignores this point, leaving a gaping hole in his case.

Second, to support his argument that requesting a lookout contributed to the abolishment of his position, Complainant primarily cites his own testimony. He states that when Rohlfs gave him the notice informing him of the abolishment, Rohlfs stated, “I’m tired of you bitching about making field welds.” TR 76. Further, he cites Jacobi’s statements that Rohlfs would not respond or would act annoyed when Rohlfs asked for lookouts. However, Rohlfs testified that when he gave Complainant the abolishment letter, he explained the decision was a result of budgetary cuts. He did not make statements that the decision was based on Complainant’s requests for a lookout. In addition, even if Rohlfs made the statement quoted above, the statement does not refer to safety concerns.

Further, I find that Rohlfs was a credible witness, and I believe his testimony that Complainant’s job was abolished solely in response to Project 75, as a cost-cutting measure. Accordingly, I find that Complainant has failed to prove that his position was abolished due to his requests for lookouts or any other safety concerns he may have raised.

#### *Employer’s Response*

If a complainant establishes the elements of his case, an employer may demonstrate by clear and convincing evidence that it would have taken the same adverse employment action regardless of his protected activity. If the employer makes such a showing, the complainant cannot recover. 29 C.F.R. § 1979.104(c). Although Complainant has not established the elements of his case, out of an abundance of caution I will discuss whether Respondent has proven that it would have taken the same action regardless of Complainant’s protected activity.

Respondent argues that Complainant’s job was abolished as a result of budgetary constraints and to make the staffing of welding gangs within the service unit consistent.

Burchfield testified that in 2007 Respondent implemented a budget savings effort referred to as P75. However, this initiative was not pursued at the expense of safety requirements. In response to P75, Rohlfs testified that he began reviewing the structure of the welding gangs within his service unit. He realized that Complainant's gang was the only gang in the service unit staffed by two welders, instead of a welder and welder helper. Rohlfs determined that a welder helper was paid \$2.83 per hour less than a welder, with a cost savings of approximately \$5,000 per year. Rohlfs contacted Hoerstkamp, his direct supervisor, to inform him of this situation, and to ask permission to abolish a welder position. Hoerstkamp testified that he supported the decision and the decision was based on budgetary constraints. Further, Rohlfs and Burchfield testified that subsequent to the abolishment of Complainant's welder position, similar staffing cuts were made to other parts of the service unit.

I find that the testimony supports by clear and convincing evidence that Respondent would have taken the same unfavorable personnel action regardless of Complainant's requests for a lookout.

*Conclusion*

I find that Complainant has not established by a preponderance of the evidence that his position in Beverly was abolished due to protected activity. Further, I find that the Respondent has shown by clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity. Therefore, this case is dismissed.

**ORDER**

***IT IS ORDERED*** that this case is dismissed.

**A**

JEFFREY TURECK  
Administrative Law Judge

**NOTICE OF REVIEW:** Review of this Decision and Order is by the Administrative Review Board pursuant to ¶ 5.c.15. of Secretary's Order, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.

