U.S. Department of Labor

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Issue Date: 17 November 2011

CASE NO.: 2010-FRS-00025

In the Matter of

DAVID M. HAMILTON
Complainant

v.

CSX TRANSPORTATION, INC.
Respondent

Appearances:

DAVID M. HAMILTON, Pro Se
For the Complainant

JACQUELINE M. HOLMES, Esq.
R. SCOTT MEDSKER, Esq.
For the Respondent

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding involves a complaint filed under the "whistleblower" employee protection provisions of the Federal Railroad Safety Act (FRSA or the "Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. Implementing regulations were published on August 31, 2010. See "Procedures for the Handling of Retaliation Complaints Under the National Transit systems Security Act and the Federal Railroad Safety Act," 75 Fed. Reg. 53,522 (Aug. 31, 2010), to be codified at 29 C.F.R. Part 1982.[1]

[1] Unless otherwise noted, all references to regulations are to Title 29, Code of Federal Regulations (C.F.R.). References to the implementing regulations will cite to the applicable provision in Part 1982, rather than to the Federal Register.

Procedural History

On March 4, 2009, the Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, alleging that the Respondent, his employer, retaliated against him in violation of the FRSA, on December 11, 2008, by giving Complainant a "written record of reprimand." OSHA Complaint.[2] In his formal complaint, the Complainant asserted: "This assessment of discipline was based on management's inaccurate characterization and exaggeration of the circumstances surrounding an alleged incident, and it was evident to me that this action was taken in retaliation for my safety reporting activities." Id.

On May 6, 2010, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor, issued findings (hereinafter, OSHA Findings). The Regional Administrator found the following: the parties are subject to the Act; the Complainant engaged in multiple instances of protected activity, as defined in the Act; the Complainant's complaint was timely; the Informal Corrective Instruction (ICI) issued to the Complainant on December 11, 2008, constitutes discipline; and by a preponderance of the evidence the Complainant established a connection between the ICI and Complainant's protected activity. OSHA Findings at 1-5.

OSHA ordered Respondent to expunge Complainant's disciplinary history of any and all references to the issuance of the ICI on December 11, 2008 and expunge from Complainant's record any derogatory reference to Complainant's exercise of his rights under the jurisdiction of the OSHA. In addition, the Respondent was ordered to pay $5,000 in punitive damages to Complainant.[3] OSHA Findings at 5-6.

On June 1, 2010, through Counsel, the Respondent timely filed an objection to the Secretary's findings and requested a formal hearing before an administrative law judge. A hearing was held before me in Albany, New York on December 8, 2010, at which the parties had full opportunity to present evidence and argument.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. I have considered the entire record, including the parties' briefs, the documentary evidence, and the hearing testimony.

Applicable Law

In pertinent part, the Act provides for relief against railroad carriers who "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee," if such action is due "in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done to provide information … regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law , rule,

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[2] Complainant's complaint was dated February 27, 2009 but was stamped "received" at OSHA on March 4, 2009.

[3] The Respondent was also ordered to permanently post a notice to employees of their rights under the Act in all work locations throughout the organization in areas where employee notices were customarily posted. Additionally, Respondent was ordered to provide all employees a copy of the "FRSA Fact Sheet and Frequently Asked Questions."

or regulation relating to railroad safety or security…." 49 U.S.C. § 20109(a)(1); see also § 1982.102(b)(1). The Act also protects employees who have been discharged, demoted, suspended, reprimanded, or otherwise discriminated against, for reporting hazardous safety conditions or, under certain specific circumstances, for refusing to work in hazardous conditions. 49 U.S.C. § 20109(b).

The Act provides that the burdens of proof set forth at 49 U.S.C. § 42121(b) apply[4] 49 U.S.C. § 20109(d)(2). Under the governing regulation, a complaint must be dismissed unless the complainant is able to make a prima facie case establishing the following elements:

1) The complainant engaged in protected activity, as defined by the Act;
2) The employer knew or suspected that the complainant engaged in the protected activity;
3) The complainant suffered an adverse action from the employer; and
4) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in receiving the adverse action.

§ 1982.104(e)(2).

Even if the complainant establishes all of the elements, the complaint will be dismissed if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity. § 1982.104(e)(4).

Under the Act, a prevailing employee is "entitled to all relief necessary to make the employee whole." 49 U.S.C. § 20109(e)(1). Specific elements of damages listed in the Act include compensatory damages, including compensation for special damages sustained as a result of the discrimination, such as litigation costs. Punitive damages in an amount up to $250,000 may also be awarded. 49 U.S.C. § 20109(d)(2), (3).

The Parties' Contentions

As set forth in their post-hearing briefs, the parties' positions are as follows:

Complainant

- Complainant engaged in conduct that is protected by the Act by submitting formal complaints on safety-related issues. Complainant's Brief at 1.
- By receiving an ICI, Complainant received a reprimand and was subjected to an adverse action as defined in the Act. Complainant's Brief at 2-4.
- Based on the extensive and ongoing nature of Complainant's protected activities, it is reasonable to infer that the Respondent employer was aware of and considered those protected activities when making the decision to reprimand the Complainant. Complainant's Brief at 4-6.

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[4] This is the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).

- There is a discrepancy between the Complainant's and Respondent's version of the events that prompted the ICI. Even if the Complainant's actions were inappropriate (which Complainant disputes), the Respondent failed to show that issuing the ICI was a reasonable management response to the Complainant's actions. Complainant's Brief at 6-8.
- Complainant seeks compensatory damages, and also punitive damages in an amount exceeding those stated in the OSHA Findings. The Complainant also wants the ICI expunged from his record. Additionally, the Complainant requests that the Respondent post notices, as specified in the OSHA Findings. Complainant's Brief at 9-10.

Respondent

- The Complainant failed to prove a prima facie case. Specifically:
  - The Complainant's ICI was not a reprimand or any other kind of adverse action within the meaning of the Act. Respondent's Brief at 10-15.
  - Complainant failed to show that any of his protected activity contributed to his receiving an ICI. Respondent's Brief at 15-23.
- Respondent has proven by clear and convincing evidence that it would have taken the same action against Complainant regardless of the protected activity. Respondent's Brief at 23-25.
- The available damages are limited to compensatory damages. Specifically, the Complainant is not entitled to punitive damages. Respondent's Brief at 26-29.
- Respondent should not be required to post information relating to the Complainant's claim, as this remedy is not authorized by the Act. Respondent's Brief at 29-30.

Issues

The following issues are presented for adjudication:

- Whether Complainant engaged in protected activity under the FRSA;
- Whether Complainant's ICI is considered a reprimand and therefore an adverse action under the Act;
- Whether there is a connection between Complainant's protected activity and his ICI;
- Whether the ICI would have been given to Complainant in absence of his protected activity; and
- In the event the Complainant establishes the Respondent violated the Act, the appropriate remedies.

Stipulated Facts

At the hearing, the parties stipulated to the following facts: T. at 5-6.

1) Complainant is, and has at all relevant times been, a dispatcher working for the Respondent in its Selkirk dispatching office.

2) On or about December 11, 2008 (12/11/2008),[5] the Complainant received an ICI that was placed into his record.
3) Complainant has not applied for any promotion or any other position within the Respondent's employ after 12/11/2008.
4) Complainant engaged in protected activity, including the submission of complaints internally to the Respondent and to the Federal Railroad Administration (FRA) between 03/04/08 and 10/14/08.
5) After 12/11/08, Complainant continued to engage in protected activity, including but not limited to the submitting of complaints with the Respondent and the FRA. These complaints were of the same type, and about the same topics, as those Complainant submitted with the Respondent and FRA prior to 12/11/2008.

The parties also stipulated that the Complainant had incurred costs of $1,050 relating to the litigation of his claim. T. at 33.

I find the evidence of record supports these stipulations.

Documents Submitted by the Parties

The Complainant submitted the following Exhibits:

- Letter from Complainant to Chris Shepherd, Superintendent of Train Operations, CXST Albany Division, dated March 3, 2008 (03/03/2008). Complainant's Exhibit (CX) 1.
- Letter from Shepherd to Complainant, dated 08/17/2008. CX 2.
- Letter from Complainant to Shepherd, dated 0 7/18/2008. CX 3.
- Letter from Shepherd to Complainant, dated 09/05/2008. CX 4.
- Three letters from Complainant to FRA Regional Administrator David Myers, all dated 08/25/2008. CX 5.
- Printed copy of e-mail correspondence between Complainant and Shepherd, dated 10/07/2008. CX 6.
- Printed copy of e-mail correspondence between Complainant and FRA inspector Francis Garrow, dated 11/10/2008. CX 7.
- Letter from Division Manager William Braman to Complainant, dated 12/10/2008. CX 8.
- Printed copy of Complainant's "Employee History" computer screen. CX 9.
- Printed copy of Complainant's "Operating Practices Tracking System" computer screen, covering the period from 01/01/2008 to 12/27/2008. CX 10.
- Printed listing of Respondent's Rule GR-2 violations entered on the disciplinary records of train dispatchers in the Selkirk office, between 03/22/2007 and 12/16/2009, names and identification numbers for employees other than the Complainant redacted. CX 11.
- Letter from Respondent's attorney to OSHA investigator Teri Wigger, dated 05/13/2009. CX 12.
- Memorandum to file, by Wigger, dated 07/20/2009, Subject: Interview of David Kiner. CX 13.

[5] For the sake of consistency, dates will be rendered using the following format: mm/dd/yyyy.

- Memorandum to file, by Wigger, dated 11/23/2009, Subject: Interview of William Smith. CX 14.
- OSHA Final Investigative Report, dated 05/06/2010.[6] CX 15.

The Respondent submitted the following Exhibits:[7]

- Respondent's General Safety Rule GS-1. Respondent's Exhibit (RX) 1.
- Respondent's General Safety Rule GS-8. RX 2.
- Respondent's General Rule GR-2. RX 3.
- Respondent's Individual Development & Personal Accountability Policy (IDPAP). RX 4.
- Complainant's Employee History Screen. RX 5.
- Letter from David Myers (FRA Regional Administrator) to the Complainant, dated 02/08/2008. RX 6.
- Letter from Michael Logue (FRA Deputy Associate Administrator) to the Complainant, dated 02/20/2008. RX 7.
- Letter from Myers to the Complainant, dated 03/26/2008.[8] RX 8.
- Letter from Myers to the Complainant, dated 06/24/2008.[9] RX 9.
- Letter from Janet Lee (FRA Deputy Regional Administrator) to the Complainant, dated 08/04/2009. RX 10.
- Letter from Shepherd to the Complainant, dated 04/08/2008. RX 11.
- Letter from Shepherd to the Complainant, dated 08/17/2008. RX 13.
- Letter from Shepherd to the Complainant, dated 08/29/2008. RX 14.
- Safety and Other Complaints Made by the Complainant to the Respondent in 2009 and 2010. RX 16.
- Respondent's response to Interrogatory No. 3 (Actions taken in response to violations of GS1, GR2, or GS8 with respect to Albany Division dispatchers, 2007 to 2009). RX 17.
- Chart Including other Albany Employees Disciplined For Violations of GS-1,GR-2, or GS-8, 2007 to 2009. RX 18.
- Selkirk Office Dispatching Area Photo. RX 19.
- Selkirk Office Dispatching Area Photo (alternate view). RX 20.
- Selkirk Dispatching Office Photo (stairs leading to ATCD desk). RX 21.
- Selkirk Dispatching Office Photo (stairs leading to ATCD desk and office behind it). RX 22.
- Selkirk Dispatching Office Photo (alternate view, stairs leading to ATCD desk and office behind it). RX 23.
- Selkirk Dispatching Office Photo (stairs leading to ATCD desk). RX 24.

[6] At the hearing, I sustained the Respondent's objection to this exhibit, with regard to statements attributable to witnesses at the hearing. Hearing Transcript (T.) at 14-16.
[7] RX 12 and RX 15 are duplicates of CX 2 and CX 4, respectively, and so are not listed here.
[8] This letter was signed by Janet Lee on Myer's behalf.
[9] This letter was signed by Janet Lee on Myer's behalf.

SUMMARY OF THE TESTIMONIAL EVIDENCE

The Complainant

The Complainant testified under oath. He stated that he had worked full-time for the Respondent and its predecessor company, Conrail, since 1992. He stated that in 2000 he resigned a position as a train master and returned as a train dispatcher, so he could have more time at home with his family. He stated that in February 2008, he was elected local chairman of the American Train Dispatchers Association, a union position. The Complainant stated he had been making safety complaints to management even prior to his election. In March 2008, he testified, he met with Chris Shepherd, superintendent of train operations, to discuss "various issues including [his] previous safety complaints." The Complainant stated that CX 1 is the document outlining all the complaints he submitted at that time, and that CX 2, dated August 17, 2008, is Mr. Shepherd's response. Hearing Transcript (T.) at 35-37.

The Complainant stated that from March 3, 2008 to October 14, 2008, he made various oral complaints on safety-related issues to supervisors, and summarized them in letters to Mr. Shepherd. He commented that when he felt Mr. Shepherd had not adequately addressed the issues, he forwarded the complaints to FRA officials. The Complainant stated that FRA officials met with him on October 14, 2008, and he informed Mr. Shepherd by e-mail of their visit. He remarked that the statements of the FRA officials on that occasion indicated they had discussed his complaints with management officials. T. at 37-38.

After the October 14, 2008 meeting with the FRA, the Complainant stated, he continued to make oral complaints to management, but had not followed these up in writing. He stated that CX 7 is a copy of an e-mail exchange with a FRA inspector regarding his complaints about radios. He also stated that he made another complaint in early December 2008, regarding track worker protection, and that CX 8 is a document sent to him on December 10, 2008, relating to a previous complaint he had made about the same issue to the CSX safety hotline. The Complainant also stated that whenever he sent letters to Mr. Shepherd, he also posted them on the union bulletin board located in the break room in the dispatchers' office. T. at 38-41.

Regarding the incident on December 11, 2008, the Complainant testified that he was working his usual shift (second shift), and on arrival he noticed there were already numerous problems with the trains, including trains without crews and trains blocking the tracks in key positions. He stated that he banged his hands once on his desk, made a loud sound and an "'Arg' sound, sort of akin to Charlie Brown when he's had the football yanked away from him or something," and loudly said: "There's no crews for these trains." The Complainant stated that the banging and the groaning was something that he had occasionally done, and it was a practice in the workplace that was not uncommon. The Complainant stated his action went unremarked by the other dispatchers but that within a few moments Mr. Kiner appeared to ask what was going on. The Complainant remarked that Mr. Kiner seemed less concerned about what was happening with the trains and more interested in telling him his behavior was unacceptable and was disruptive. He was surprised, the Complainant testified, because that type of behavior went on often, and he had never heard of anyone else receiving criticism for it, and he remarked that

as a union representative he had never been notified of any type of disciplinary action being taken for such conduct. T. at 41-43.

The Complainant stated that Mr. Kiner left. About ten minutes later, the Complainant testified, he became aware of a new problem in his territory – a malfunction of the signal system caused by a track defect that needed repair. He said this issue was more serious, because it involved an Amtrak passenger train not being able to be routed to the proper track. He said he needed assistance with this issue and the person responsible for that is the assistant chief train dispatcher. At the dispatching station, the assistant chief dispatcher sat behind him, on a platform elevated above the dispatchers, but face-to-face communication is not possible because of computer screens in the way, so he normally yells or goes over to see him. He stated he heard the assistant chief on the phone, so yelling would not work, so he went up to walk over. The Complainant stated the platform has two steps, and he put his hands on the handrail and stepped up both steps at once. The Complainant also commented that he has a fairly long stride, said it was not uncommon for people to take both steps at one time, and denied that he ran or jumped up the steps. The Complainant said that he may have made a gesture of frustration, and that immediately Mr. Kiner was there and told him to come inside to the supervisor's office, known as the "bubble," which is located on the same level as the assistant chief dispatcher's desk and has a large tinted glass window into the dispatch area. The Complainant commented that there is no clear view of the steps from the bubble and the view is somewhat limited, because of the glass tint. The Complainant also stated that, when he arrived in the office, Mr. Kiner told him he had seen him jump up the steps and was going to write him up for his actions. The Complainant stated that Mr. Cartwright was also present. The Complainant said he related the concerns he had about the track work issues, and Mr. Cartwright told him they were aware of it. T. at 43-47.

Within a half hour, the Complainant testified, the Albany Division manager, Mr. Braman, arrived at his cubicle and asked what was going on. The Complainant commented that he found this very unusual, as this rarely happened during second shift, and also stated he reported the operational problem. Then, the Complainant stated, Mr. Shepherd appeared at the cubicle. He said Mr. Shepherd complained he had been at a retirement party and had to leave because he had received a call about the Complainant's behavior. The Complainant said Mr. Shepherd told him that disruptive behavior was not acceptable, and not to get emotional over situations, and the Complainant said he responded that he did not believe he was being disruptive. The Complainant stated that employees do not have access to the employee record screen on the computers, so it was not until February 2009 that he obtained a printout. The Complainant stated that CX 9 is a copy of what appeared on the screen. T. at 47-49.

The Complainant stated that he believed an ICI (Informal Corrective Instruction) is a type of formal discipline, and he stated that under the IDPAP (Individual Development and Personal Accountability Policy), an ICI is considered a step in the progressive discipline process. He noted that after six months, an ICI no longer is considered a step in the discipline process, but the item remains as a permanent record, and is in fact considered as part of an employee's overall record when determining the need for discipline. The Complainant stated that if an employee is injured or involved in a serious accident, management looks at the discipline record, which includes ICIs. He also commented that some management jobs require a "clean record" of a year or more, and that an employee's record is considered when management determines who to

invite to participate in safety committees and the like. Additionally, the Complainant stated, he understood that when an ICI is entered, a broadcast e-mail is sent to all supervisors in the Albany Division informing them of that fact. The Complainant also remarked that the CSX operating practice tracking system had entries relating to this incident that were entered by Mr. Kiner, and he cited to CX 10. T. at 49-55.

The Complainant commented that he routinely observed other dispatchers engaging in behavior that was more disruptive than his, such as banging on desks, using profanity, and waving arms wildly. He stated that GR-2 (General Rule 2) is a rule that requires employees to behave in a civil and non-disruptive manner. He presented CX 11 as evidence that other dispatchers have not received ICIs for similar conduct, and that those dispatchers who did receive ICIs engaged in misconduct that was much more serious. The Complainant stated that CX 12 was an account of the event that, in his view, was a "fairly blatant exaggeration of the incident." The Complainant stated that management initiates the discipline process and in his case the entry on his record was initiated by Mr. Kiner and Mr. Shepherd. The Complainant cited CX 14 as a statement from an official in "Field Administration" regarding the process by which managers recommend discipline. Regarding CX 15, the Complainant requested that the statement of John Schuyler , who was a witness to the incident on December 11, 2008, be considered, and he stated he chose not to call Mr. Schuyler as a witness, because Mr. Schuyler lived some distance away and was having family problems. The Complainant stated he did not wish to inconvenience Mr. Schuyler.[10] T. at 55-61.

On cross-examination, the Complainant confirmed the subject matters of various issues he had raised with the FRA and with the Respondent, and also confirmed that the FRA encouraged him to raise issues with the Respondent before bringing concerns to the FRA. The Complainant agreed that he raised some concerns prior to December 11, 2008, but also raised concerns after that date as well. The Complainant agreed that Mr. Shepherd generally attempted to respond to the issues he had raised. The Complainant also stated that he never had any indication that either Mr. Shepherd or Mr. Kiner had any grudge against him. The Complainant reiterated his concern that supervisors, when reviewing an employee's record, might see an ICI, but admitted he had not observed that happening. The Complainant confirmed he had not applied for a management position since the incident of December 11, 2008, but indicated he could not rule out a future application for a management job. The Complainant stated that it was told to him by other employees that all those who had applied for the Safety Committee "had something on their record." The Complainant identified various Respondent's Exhibits which were copies of letters to him responding to the concerns he had raised. <u>See</u> RX 7, 8, 11, 13, 14; T. at 61-75.

In response to my questioning, the Complainant indicated he normally did not make any distinction between matters he raised himself and matters he was raising on behalf of other union members. Regarding the situation that precipitated the incident on December 11, 2008, he stated that it was about a 7 to 8 or a scale of 1 to 10, with 10 being a serious situation. He stated that the situation would have involved an Amtrak passenger train delay, as well as trains with hazardous materials being delayed in urban areas. In all, he said, there were some safety issues involved but not immediate life or death issues. In response to further cross-examination, the

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[10] Mr. Schuyler's name is misspelled in the hearing transcript as "Skyler."

Complainant stated that the established procedure was for the dispatcher to notify the assistant chief dispatcher of problems, and then it is the assistant chief dispatcher's responsibility to notify a non-union manager. T. at 75-79.

Bruce McCollough

Bruce McCollough testified under oath on behalf of the Complainant. Mr. McCollough testified that he is a train dispatcher at the Selkirk office, and has been working there since 1989. He stated he was present during the incident of December 11, 2008. He stated he heard the Complainant raise his voice, but would not describe it as yelling, and agreed that other dispatchers in that office at that time routinely engaged in such activity. He said he observed the Complainant go to the assistant chief dispatcher's desk, but disagreed that the Complainant was running or jumping; he also remarked he did not recall whether the Complainant used the hand rails but noted he had his hands out so concluded he had used the hand rails. The witness stated he did not believe the Complainant's actions in going to the assistant chief dispatcher's desk constituted a violation of the safety rules, and also agreed that if he himself received an ICI he would consider that to be a form of discipline. Mr. McCullough indicated he was aware of the complaints the Complainant had made to management. T. at 79-84.

On cross-examination, Mr. McCullough conceded that no supervisors or managers had ever told him they had any desire to retaliate against the Complainant. He also agreed that when Mr. Shepherd took over as superintendent of train operations he made efforts to change the culture and bring about a more professional environment. On my questions, Mr. McCullough indicated the distance between where he sat and where the Complainant sat was about six or seven feet, and they were separated by a partition about shoulder-height. He stated he could see the top of the Complainant's head when they were both at their workstations. T. at 84-87.

Joel Solomon

Joel Solomon testified under oath for the Complainant. He stated that he has worked as a train dispatcher in the Selkirk office since 1987, and indicated he was at work on December 11, 2008. He stated his workstation is in the corner, several cubicles away from the Complainant's, and he was at his workstation at the time of the incident. He stated he was busy and did not notice anything out of the ordinary. He stated if something were loud enough to have caught his attention, he would have noticed. The witness agreed that dispatchers make loud comments and he has witnessed other dispatchers banging their fists on their desks. Mr. Solomon stated that he would normally walk fast if he needed to get to the assistant chief dispatcher's desk. He also stated he has been known to throw his hands up in the air. He indicated he has never received any discipline, and agreed that he would consider an ICI to be a form of discipline. Mr. Solomon stated he was aware the Complainant had made complaints about safety issues to the Respondent and the FRA. He indicated he observed the Complainant making complaints to on-duty managers at the Selkirk office, and agreed these were done on an ongoing basis. T. at 87-92.

On cross-examination, Mr. Solomon agreed he had never jumped up both steps in the office without using the handrails. He also stated that Mr. Shepherd tried to make the dispatch office "a more quiet and civil environment." T. at 92-93.

David Kiner

David Kiner testified under oath for the Respondent. He stated that he is currently the superintendent of train operations, Albany Division. He indicated he has worked for the Respondent, CSX, for 12 years, and worked for its predecessor, Conrail, before that. Mr. Kiner stated he managed the train operations at the dispatch center, among other things, and stated approximately 1,500 to 1,600 employees work in the Albany Division. He briefly recounted his career, which included experience as a train dispatcher, and also recounted the duties of the train dispatcher position. He stated that in December 2008, he was a director of train operations, one of three in that position, and he reported to Chris Shepherd, the superintendent of train operations. He stated he generally worked first shift, and arrived in the office about 6:00 am and departed generally between 4:30 and 5:00 pm. He stated he was familiar with the Complainant, who worked as a dispatcher on the second shift (3:00 pm to 11:00 pm). T. at 95-103.

Mr. Kiner identified RX 19 through 22 as photographs of the Selkirk dispatch office, which he had taken, and he described the layout of the office in general. Mr. Kiner described the overall operation of the office as "fairly subdued" but stated there is chatter, as all the dispatchers are on and off the phone or the radio. He described his management style as "strict," "by the book," and "fair." He stated he recalled the incident of December 11, 2008, and stated that when it occurred, he was in the manager's office, or "bubble." He identified RX 24 as a photograph taken from the vantage point in the "bubble" where he was standing at the time of the incident. He stated Mike Cartwright was with him in the bubble. Mr. Kiner stated he heard some "loud banging" and "loud growling." He said he stood up to get a better view, and he saw the Complainant standing up, with his arms waving about, then he "jumped over the steps" and was standing next to the assistant chief, waving his arms. Mr. Kiner said that the Complainant's behavior was not normal for the office, because excessive growling and banging is not normal behavior, nor is jumping up steps. Mr. Kiner stated he had a clear view of the Complainant when he jumped over the steps, and the Complainant did not use the hand rails. Mr. Kiner stated that he rarely closed the door, and he specifically recalled hearing the noise, so he believed the door to the "bubble" was probably open. The witness stated that he immediately walked out of the "bubble" and went over to the Complainant and asked what was wrong. The Complainant said the railroad was tied up. Mr. Kiner stated that he responded, "That's unacceptable behavior," and he brought the Complainant back to the bubble. There, he stated, he explained to the Complainant that such behavior was unacceptable and was disruptive and he would document it. T. at 103-10.

Mr. Kiner testified that after he spoke with the Complainant, he called Mr. Shepherd, the superintendent of train operations, who was his boss. Mr. Kiner stated they discussed whether the Complainant was fit for duty and Mr. Shepherd said he was close by and would stop in. The witness stated that Mr. Shepherd came in, that he believed Mr. Shepherd spoke to the Complainant, and then Mr. Shepherd came to his office and they talked about "putting an assessment in just so it was documented." The witness identified the entry he made into the Complainant's "field administration page" on that date as RX 5. He stated that parts of the system are automatic, and that he input the date and the description of the incident. T. at 110-12.

Referencing RX 2, Mr. Kiner stated that the Complainant's behavior violated GS-1, a general safety rule that mandates civil and courteous conduct in the workplace, because the noise disrupted the office and the banging "was certainly not civil and courteous to the other dispatchers in the office". Mr. Kiner stated the Complainant also violated GS-8, a rule intended to protect against slips, trips, and falls. This rule includes provisions about using handholds where provided and not taking a step unless there is a clear view of where the foot is to be placed. He stated that he witnessed the Complainant not using his hands on the handhold when he jumped over the steps and he obviously did not have a clear view of where to place his feet. Referencing RX 3, Mr. Kiner testified that the Complainant also violated GR-2, which requires behavior in a civil and courteous manner and prohibits boisterous language. Mr. Kiner stated that, in addition to inputting the information into the field administration screen, he also entered the incident into the OPS (operating systems rules) tracking system. T. at 112-15.

The witness identified CX 10 as a printout of the Complainant's operational practices test history. He noted that the drop-down box requires a notation regarding weather, because most train operations occur outdoors, and there is no designation for an indoor event. He stated that entries in the OPS system can be related to planned tests, but need not be. He stated that he had not witnessed outbursts like the Complainant's in the Selkirk dispatching office. He stated the incident was serious when all the different things the Complainant did – loud noise, banging, jumping over the stairs – were put together. T. at 115-17.

Mr. Kiner stated that after the assessment is put in the system it goes down to the "field administration team" in Jacksonville and that in this instance the Complainant was given an ICI. He stated the purpose of an ICI is to educate an employee on incorrect or unacceptable behavior, and it is not considered to be discipline. Referring to RX 18, the witness identified other ICIs that he had written for other employees, all for walking in an area of low illumination without a flashlight. He stated that after one year, ICIs are not considered when employees are seeking promotion, and that employees must not have had any ICIs within one year of the request for promotion. He also indicated that, after 180 days, an ICI is not counted against an employee for the purpose of future handling of minor events. Mr. Kiner indicated that he was "generally aware" on, December 11, 2008, that the Complainant had raised issues or concerns, but was not aware of the specific nature of those issues. He stated the Complainant did not raise any issues with him directly, indicated he was not impacted by any of the issues the Complainant raised, and denied that the Complainant's history of raising issues was a factor in handling the incident of December 11, 2008. Mr. Kiner stated he would have treated any other dispatcher exactly the same. He denied that anyone at CSX, including Mr. Braman and Mr. Shepherd, suggested that he should attempt to discipline the Complainant in order to build a case against him. Regarding Mr. Solomon's testimony, which he had witnessed, Mr. Kiner stated that he had never seen Mr. Solomon get up from his chair or grunt or bang on the desk. T. at 117-23.

On cross-examination, Mr. Kiner stated the photographs he had taken were e-mailed directly off his camera, and to his knowledge they had not been edited "in Photoshop." He also remarked that he believed the lights in the bubble were on when he took the photograph which is RX 24, because he saw some reflection. In response to my questions, Mr. Kiner clarified that on December 11, 2008 both he and the Complainant reported to Mr. Shepherd as their supervisor. He stated there was a procedure in the event a dispatcher had "some sort of a rule issue" in which

an assistant vice president in Jacksonville would be notified, as well as Mr. Shepherd; he stated he did not recall if this had occurred regarding this incident. He stated that RX 18, a spreadsheet listing events that triggered ICIs or discipline, appeared to be a representative list, rather than a complete list, because in his experience in the division, perhaps two or three ICIs might be issued on any given day. He confirmed that, as a manager, he has access to information about all ICIs, because he can look up every employee's personnel file. In addition, the field administration group in Jacksonville sends out a daily note on any ICIs that occurred. Mr. Kiner commented: "It's a way we can track discipline, if there are any serious violations, major violations, hearings, things of that type." T. at 123-29.

Regarding his own practices, Mr. Kiner stated that it was very common for him to make inputs in connection with operational tests. In addition, he stated, if he personally witnessed an event, he would make the input. He estimated that, excluding operational tests, he would make an input at least once a week, perhaps two times a week. Mr. Kiner stated he told the Complainant at the time of the incident that the incident would be documented, and he remarked that was the terminology he always used. Regarding the issue of whether the Complainant was "fit for duty" at the time of the incident, Mr. Kiner stated he was concerned, based on the Complainant's behavior, but he was satisfied that there was no issue there. T. at 129-33.

Christopher Shepherd

Mr. Shepherd testified under oath on behalf of the Respondent. He stated he worked for the Respondent for 14 years, prior to leaving to pursue job opportunities with another company. He recounted the jobs he held when working for the Respondent, and stated that he was superintendent of train operations at the Selkirk office of the Albany Division from December 2007 to February 2010. In that capacity, he testified, he was responsible for safety and operations of the entire division and his primary function was to manage the dispatch center. He stated that he reported to the division manager, who was Bill Braman at the time of the incident involving the Complainant. When he took the job, he stated, some people approached him and told him of their concerns with the "work environment" and the "culture" at the dispatch center. Their concerns included that the center was micro-managed, with the dispatchers being second-guessed a lot. There was also a perception that cursing and outbursts were accepted. T. at 135-38.

Mr. Shepherd stated that he told the managers he would not tolerate outbursts from them. He stated he also asked the managers to set the expectation to get rid of that type of behavior from the dispatchers, so when there was an outburst, to get involved, defuse the situation, and get the employee back to a calm state. He stated he became aware of the incident involving the Complainant on December 11, 2008, when he received a phone call from David Kiner. He recalled he was driving at the time, and he went back to the office immediately. When he got there, he stated, he spoke with Mr. Kiner and then went and spoke to the Complainant. He said he asked, "Is everything OK? What happened?" and the Complainant responded that some things had gone awry and he had gotten upset because there were not crews on the trains, and he had gotten caught up in the moment. Mr. Shepherd stated he told the Complainant he would not accept that type of outburst, and asked him if he was all right to proceed, and the Complainant

told him yes. He stated that was the end of the conversation and he then left the Complainant's cubicle. T. at 138-41.

As described by Mr. Kiner, the witness stated, Mr. Kiner reported he heard the Complainant bang on the desk, heard some growling, and then observed the Complainant jumping the steps and standing at the chief's position directly in front of the bubble waving his hands above his shoulders. Mr. Shepherd stated the Complainant really did not get into detail about his behavior, rather they talked and Mr. Shepherd reiterated he told the Complainant that outbursts were not acceptable behavior. Mr. Shepherd described the events that precipitated the incident as a mess approaching gridlock, and he commented that the Complainant had his hands full. He commented that incidents like this, where issues were created that needed to be worked around, were where dispatchers "really earn their keep." T. at 141-42.

Mr. Shepherd stated that after he left the Complainant's cubicle he went into the bubble and discussed the situation with Mr. Kiner once again. He stated he told Mr. Kiner to enter an assessment form on the incident and sent it to field administration. He stated that incidents documented in the system are transmitted automatically to Jacksonville and then a manager in the field administration office would call the manager who had reported the incident to discuss it. Identifying RX 4 as the IDPAP for dispatchers, Mr. Shepherd stated it is a way to segregate offenses into three categories: minor, serious, and major. He characterized minor violations as non-safety-related issues that can be handled "in a minor way." Serious incidents were multiple violations and could entail a safety issue. Major incidents are those where the employee caused a train accident or was stealing, or something of that sort. He stated he discussed the incident involving the Complainant with a manager from field administration, and the conversation centered on whether the incident should be classed as serious. But, he said, it was a gray area, and the rules involved were mostly minor rules. Mr. Shepherd stated he and the field administration manager decided together to assess it as a minor incident and went with the ICI. He stated that neither Mr. Braman nor Mr. Kiner were involved at all in this decision. T. at 142-45.

Mr. Shepherd testified that, an ICI is a "tool to keep the behavior from happening again and recurring." He stated it is not considered to be discipline, because there is no loss of money for the employee and no time off. He also stated that an ICI generally does not lead to discipline until after two incidents. He also stated that after six months, an ICI is no longer considered as something that may lead to discipline. He also stated that a "recap report" went to managers giving the details on the ICIs that had been given. Regarding Mr. Solomon, Mr. Shepherd stated he observed him engage in the type of conduct Mr. Solomon testified about. He stated this occurred two or three times, and when it did he would go over to Mr. Solomon and make sure he was okay and engaged in his work, and ensure he was calmed down. In his opinion, the conduct that he saw Mr. Solomon engage in was not the same as the conduct the Complainant engaged in on December 11, 2008, because the Complainant moved rapidly toward the steps and jumped up them, and he had never seen that type of behavior before, especially not from the Complainant. T. at 145-48.

The witness testified that the Complainant had brought numerous safety issues and complaints to him, generally by letter. Mr. Shepherd stated that the Complainant would present him with a batch of letters, usually eight to 12, about every month or two. He described the procedure he used to deal with the letters, and said that some of the letters related to union business but others related to safety issues. Mr. Shepherd stated that most of the issues the Complainant raised were minor, and some he raised repeatedly (such as the two-channel radio issue), but all were investigated, and the Respondent cooperated with the FRA in its investigations. He stated he generally tried to respond in writing to issues the Complainant raised in his letters. Mr. Shepherd stated he had told the Complainant that he was concerned that the Complainant was not bringing up complaints promptly, and remarked it was difficult to investigate incidents that were a month or more old. He also stated that he received complaints and concerns from multiple parties, not just the Complainant. T. at 148-53.

Mr. Shepherd denied that the Complainant's history of raising complaints had any impact on how he responded to the incident on December 11, 2008. He indicated he would have responded in the same manner to the incident had it occurred with regard to any other employee. Mr. Shepherd indicated that, to his knowledge, the manager in field administration with whom he discussed the resolution of the incident was not aware of the Complainant's role in raising complaints. T. at 154-55.

On cross-examination, Mr. Shepherd indicated that one purpose of his conversations with employees who had engaged in inappropriate behavior was to try to change the culture of the office. He agreed that he occasionally had such conversations with dispatchers, and conceded that generally they were not recorded with an ICI, but also stated that he did not consider those incidents to be as disruptive as the incident involving the Complainant. He confirmed that his understanding of the incident was based on his conversation with Mr. Kiner. In response to my questions, Mr. Shepherd stated that he was involved in all decisions involving whether people who reported to him were to receive an ICI, and he estimated that there were five to 10 ICIs issued per month. He also stated that he recalled that the names of individuals who had received ICIs were included in the reports sent to managers. Mr. Shepherd stated that he and the field administration manager did not discuss any specific incidents in the Complainant's past, but he conceded that the manager had access to the same data systems that he did, so any past history reflected in those systems would also have been known to this manager. He clarified that one ICI is considered as one incident, even though violations of multiple rules may have been involved. T. at 155-62.

Non-Testimonial Evidence

The parties' documentary evidence is listed above. One item requires comment. The Complainant submitted CX 15. Over the Respondent's objection, I admitted those portions of the Exhibit which related to the statement of persons who had not been called as witnesses, so long as a sufficient foundation was laid as to the witness' unavailability. T. at 16. The Complainant indicated he did not call Mr. Schuyler as a witness because Mr. Schuyler had family problems near the time of the hearing. T. at 61.

Included in CX 15 is the summary of an interview between the OSHA investigator and William Schuyler. Mr. Schuyler was the Assistant Chief Train Dispatcher on duty on December 11, 2008, and it was he whom the Complainant went up the stairs to see. In sum, Mr. Schuyler stated that he observed the incident and, in his view, the Complainant's actions were not disruptive. He also commented that Mr. Kiner's office is enclosed in glass and if the door to the office had been shut, Mr. Kiner would have been unable to hear any noise. CX 15 at 12-13.

DISCUSSION

During the course of the hearing, which took place over most of a full day, I had the opportunity to observe the Complainant, as well as all of the witnesses that both parties called. The Complainant is not a lawyer; however, as demonstrated throughout the proceedings, he had a complete grasp of the issues involved. I find that the Complainant was completely credible in his testimony. He was sincere in his assertion that his actions, on December 11, 2008, were neither unusual for the workplace environment nor disruptive. I also note that the Complainant presented his case professionally, and submitted documents and witness testimony in support of his case. He demonstrated his understanding of the legal issues involved, as well as of the relevant facts. In particular, the Complainant was cognizant of his burden to establish the elements of proof.

I also observed the witnesses who were called at the hearing. I found all of them to be credible and sincere in their testimony. In particular, I found Mr. Shepherd to be exceptionally credible. Mr. Shepherd was frank, and he took full responsibility for making the decision to issue the ICI to the Complainant. He freely acknowledged that he had been the recipient of many of the Complainant's incidents of protected activity (safety-related complaints).

The Complainant's Burden

The Act incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR21"), 49 U.S.C. §42121 (2011). See 49 U.S.C. § 20109(d)(2). AIR21, and therefore FRSA, requires a complainant to prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. §42121(b)(2)(B)(2011). A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); see also Barker v. Ameristar Airways, Inc., Case No. 05-058 (ARB Dec. 31, 2007), slip op. at 5; Hafer v. United Airlines, Inc., Case No. 06-017 (ARB Jan. 31, 2008), slip op. at 4; Vernace v. Port Auth. Trans-Hudson Corp. (PATH), Case No. 2010-FRS-00018 (ALJ Sept. 23, 2011), slip op. at 22.

Protected Activity

The parties stipulated that the Complainant engaged in protected activity between March 4, 2008, and October 4, 2008. T. at 6; see also CX 1-8. These instances of protected activity were prior to the incident of December 11, 2008, which formed the basis for the present proceeding. OSHA Complaint.

Based on the foregoing, I find the Complainant has established this element of proof, by a preponderance of the evidence.

Employer's Knowledge of Protected Activity

The Complainant must establish that the decision makers who imposed the purportedly adverse action were aware of his protected activity. See Peck v. Safe Air Int'l, Inc., Case No. 02-00028 (ARB Jan. 30, 2004), slip op. at 16. The record includes multiple documents relating to the Complainant's protected activity (safety-related complaints). Some of these complaints were addressed directly to Mr. Shepherd, who in 2008 was superintendant of train operations. CX 1, 3, 5. The record also establishes that, on multiple occasions, Mr. Shepherd personally responded to the safety-related issues the Complainant had raised. RX 11-15.

At the hearing, Mr. Shepherd confirmed that he was aware of the Complainant's protected activity. T. at 148-55. He also remarked that, to his knowledge, the field administration manager he consulted with before issuing the ICI was not aware of the Complainant's complaints. T. at 155. Mr. Kiner testified that he was "generally aware" of the Complainant's complaints to management, but also indicated he was not aware of the specific nature of the complaints. T. at 120. Both Mr. Shepherd and Mr. Kiner denied that the Complainant's history of making complaints had influenced them with regard to dealing with the incident of December 11, 2008. T. at 154, 121.

The record reflects that Mr. Shepherd made the ultimate decision to issue the ICI to the Complainant, in conjunction with a manager from the field administration. T. at 142-145. According to Mr. Shepherd, he directed Mr. Kiner to enter an assessment form on the incident and transmit it to the field administration. Mr. Shepherd also stated that he and the field administration manager made the decision to classify the incident as "minor."[11] T. at 144. Mr. Shepherd also testified that Mr. Kiner did not play a part in determining how the incident was to be classified. T. at 145.

Based on the foregoing, I find that Mr. Kiner and Mr. Shepherd, two of the three managers most directly involved with issuing the ICI, were aware of the Complainant's protected activity. I also find, based on the record, that Mr. Shepherd was the "moving force" behind the imposition of the ICI. As he testified, he directed Mr. Kiner to transmit the assessment form documenting the incident to the field administration, and he consulted with the field administration manager on the ultimate disposition.

[11] It appears from the context of this testimony that the discussion with the field administration manager centered on whether to classify the event as "minor" or as something more serious. T. at 144.

I find, consequently, that the Complainant has established this element of proof by a preponderance of the evidence.

Unfavorable Personnel Action

The parties stipulated that the Complainant received an ICI on or about December 11, 2008. T. at 5. As the record clearly indicates, the ICI was based on the Complainant's conduct on that date at the dispatch facility. Indeed, the Complainant, Mr. Shepherd, and Mr. Kiner all testified at length regarding the incident and its aftermath. T. at 41-49 (Complainant); 107-12 (Kiner); 139-45 (Shepherd). As the Complainant testified, Mr. Kiner told him at the time of the incident he was going to "write him up" for his actions. T. 46. The Complainant also testified that Mr. Shepherd counseled him about his behavior. T. at 48. Additionally, the Complainant testified that he did not directly receive any written notice that he had been reprimanded, or that action had been taken against him. Rather, he stated, he consulted the "Employee History" screen and found that an ICI had been entered regarding the incident. T. at 47-48. The Complainant is not contending that either Mr. Kiner's or Mr. Shepherd's oral statements to him on the date of the incident constituted an adverse action under the Act, but the issuance of the ICI was adverse.

The parties differ on whether the Complainant's ICI was an adverse action. In the Respondent's view, it was not a reprimand or any sort of adverse action. Respondent's brief at 10-15. Among the factors the Respondent cited for this contention are that the Complainant did not lose any pay or benefits; he did not experience any change in employment status. Respondent's Brief at 10. In addition, the Respondent asserts that in order to constitute an "adverse action" under the FRSA, the Complainant must establish that the ICI was materially adverse – that is, that it was harmful to the point that it could dissuade a reasonable worker from engaging in protected activity. Respondent's Brief at 12, citing Burlington N. Ry. Co. v. White, 548 US. 53, 57 (2006). In contrast, the Complainant asserts that the ICI was a reprimand, citing the following factors: it is a component in the Respondent's formal discipline program; it can be taken into consideration when considering future promotions, as well as disciplinary action; it remains on the employee's permanent record. Complainant's Brief at 2-3. The Complainant also noted that the Act specifically prohibits reprimands in retaliation for engaging in protected activity. Complainant's Brief at 4. Regarding whether the ICI is materially adverse, the Complainant cited the permanent nature of the action, as well as the impact that such an action could have on career prospects. Id.

I am cognizant that the Respondent's position is that an ICI is not a "reprimand" but rather is a record of a corrective action. Hence, I presume, the Respondent's name for the action, "Informal Corrective Instruction," is to emphasize that the matter is being treated informality and is essentially corrective (as opposed to punitive) in nature. However, as the record indicates, the Respondent also considers the ICI to be the first stage in its progressive discipline process. As Mr. Shepherd testified, the IDPAP applies to dispatchers. T. at 143; see RX 4. Under the IDPAP, an ICI is the general response for "the first two minor offenses committed by an employee in a three year period." RX 4 at 1. Minor offenses are defined in the IDPAP as "rule violations that do not result in significant train delay or service disruptions or the compromise of the safety of field personnel or the public". Id. An employee who commits a third minor offense

in a three year period is referred to an "Incident Review Committee"; for the fourth minor offense in the three-year timeframe, the employee is subject to a hearing, and may receive discipline of up to 10 days suspension. Subsequent offenses subject the employee to a longer period of suspension or, for a sixth offense, dismissal. RX 4 at 1-3. The IDPAP also states: "Employees [who] work one hundred eighty days (180) without a minor offense will have one minor offense removed from consideration when determining the application of the policy." RX 4 at 2.

Mr. Shepherd, who formerly was a senior manager for the Respondent, testified as to the application of the IDPAP to dispatchers. He confirmed the policy, as applied, as follows: "After six months, it's no longer considered for that step forward, the step up to discipline." T. at 146. Mr. Shepherd also confirmed that reports on the ICIs that were administered were e-mailed to managers on a regular basis. T. at 146. As well, Mr. Shepherd testified that the names of the individuals who had received the ICIs were included. T. at 159-60. The Complainant testified that an employee who wants to apply for a promotion is unable to do so unless he has had a "clean" record for at least a year. T. at 51. Mr. Kiner confirmed the Respondent's policy is that an employee cannot have had an ICI for a year before being promoted. T. at 120.

In determining whether the Complainant's ICI is an adverse action, as defined in the Act, I first look to the language of the provision itself. Notably, 41 U.S.C. § 20109(a) states that an employer may not "discharge, demote, suspend, reprimand, or in any other way discriminate" against an employee based on protected activity. I find that if the ICI issued to the Complainant was in fact a reprimand, then such action constitutes an adverse action under the Act, because the language of the statute specifically prohibits an employer from "reprimanding" an employee.

The FRSA itself does not define "reprimand." Neither does the governing regulation. Notably, the prohibition against reprimanding an employee was added when Congress amended the FRSA in 2007, with the enactment of the Implementing Recommendations of the 9/11 Commission Act of 2007, § 1521 of Public Law 110-53 (Aug. 3, 2007). The legislative history for Public Law 110-53 does not discuss the specific language of § 1521, but does mention that the whistleblower protections are "modified" for rail employees.[12] Conf. Report 110-259, (July 25, 2007), at 348, 340. I infer that Congress's addition of the term "reprimand" among the actions that are prohibited, constitutes a modification of the protections that are available to railway employees.

I am aware of no reported case, either in the federal courts or before the Department of Labor's Administrative Review Board, defining the term "reprimand" in the employment law context. Consequently, I will infer that Congress intended the word to be used in its usual sense.

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[12] The National Transit Systems Security Act, enacted as § 1413 of Public Law 110-53, also prohibits employers from reprimanding employees who engage in protected activity. See Pub. L. 110-53, § 1413(a), codified at 6 U.S.C. § 1142. The legislative history for that section states the Senate bill "modifies existing whistleblower protections for rail employees" and the conference adopts protections for public transportation employee whistleblowers, modeled on the protections for railroad employees as amended in the new legislation. Conf. Report 110-259, (July 25, 2007), at 340. Consequently, it appears that Congress intended to change the language regarding what actions are considered "adverse," to specifically include reprimands.

See Sylvester v. Parexcel Int'l LLC, Case No. 07-123, (ARB May 25, 2011), slip op. at 25. In general usage, a reprimand is issued to an employee when employer concluded that the employee either acted improperly or failed to act when appropriate; a reprimand may be either oral or in writing. A reprimand may include an additional tangible employment action (such as a suspension) but also may be intended to be the sole employment action the employer takes.

Based on the record before me, and considering that the Act specifically includes "reprimand" as a prohibited retaliatory action, I find that the ICI issued to the Complainant constitutes a reprimand within the meaning of the Act. My conclusion is based on the following factors:

- According to the IDPAP, an ICI is issued for minor "rule violations;"
- The ICI issued to the Complainant cited several rules he ostensibly violated;
- According to the IDPAP, an ICI is a step in the progressive discipline process; and
- Multiple minor rule violations, under the IDPAP, can lead to suspension without pay or termination.

Even if the ICI is not considered to be a "reprimand" under FRSA, it is possible that it could constitute some other type of adverse action prohibited under the Act. Under FRSA, an employer is prohibited from discriminating against an employee in any way, in retaliation for engaging in protected activity. I infer this provision of the Act to mean that an employer is prohibited from taking any adverse action against an employee in retaliation for the employee's protected activity.

The Administrative Review Board ("Board") has held whistleblower laws in general should be interpreted expansively, as they have "consistently have been recognized as remedial statutes warranting broad interpretation and application." Menendez v. Halliburton, Case Nos. 09-002 and 09-003, (ARB Sept. 13, 2011), slip op at 15 (Sarbanes-Oxley case). In Menendez, the Board more broadly adopted the standard for determining what constitutes an adverse action, as initially set forth in Williams v. American Airlines, Case No. 09-018 (ARB Dec. 29, 2010), which involved a complaint filed under the AIR21 statute.[13]

At issue in Williams was a written record of counseling that included references to potential discipline. Williams, slip op. at 3. There, the Board held,

> We view the list of prohibited activities . . . as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline. In fact, given this regulation, we believe that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.

Williams, slip op. at 10-11.

[13] I note that neither the AIR21 statute nor its implementing regulation explicitly prohibit employers from reprimanding employees in retaliation for engaging in protected activity. 49 U.S.C. § 42121(a); 49 C.F.R. § 1979.102(b)(1).

The Board has reiterated that, in claims brought under whistleblower statutes, an adverse action is any action that "would dissuade a reasonable employee from engaging in protected activity." Menendez, slip op. at 20. Consequently, even if the ICI issued to the Complainant it is not a "reprimand" under the FRSA, but such action "would dissuade a reasonable employee from engaging in protected activity" then, in accordance with Williams and Menendez, as discussed above, it is an adverse action under the Act.

First, as the record establishes, and as discussed above, an ICI is an initial step in the progressive discipline system. Although a first ICI does not automatically "raise the stakes" for an employee, the issuance of a second ICI does, because a subsequent rules violation subjects the employee to a more formal discipline process, the Incident Review Committee (IRC). RX 4. Second, as the record also establishes through the testimony of Mr. Kiner, an employee who receives an ICI is not eligible for promotion for a period of a year. T. at 120. Third, and not insignificantly, the name of an employee who receives an ICI, as well as a summary of the conduct that prompted the action, is broadcast to all managers. T. at 146-47, 149-50.

I find that an employment action that potentially made later discipline more severe, or made promotion impossible for a significant period, or was broadcast to all managers, would be very likely to dissuade a reasonable employee from engaging in protected activity. Here, the ICI has all three of these features. I also find that the fact that an ICI is disregarded after six months, under the Respondent's progressive discipline scheme, does not ameliorate its adverse nature. Consequently, I find that the ICI issued to the Complainant, even if not considered a reprimand within the meaning of the FRSA, constituted an adverse action under the Act.

Nexus between Protected Activity and Adverse Action

The last element the Complainant must establish, by a preponderance of evidence, is that the Respondent undertook the adverse action, "in whole or in part," because of the Complainant's protected activity. 42 U.S.C. § 20109(a); see also 29 C.F.R. § 1982.109(a). This element may be established either by direct evidence or by circumstantial evidence. Douglas v. Skywest Airlines, Inc., Case Nos. 08-070, 08-074 (ARB Sept. 30, 2009), slip op at 11; Clark v. Pace Airlines, Inc., Case No. 04-150 (ARB Nov. 30, 2006), slip op. at 12; see also 29 C.F.R. § 1982.104(e)(2). Among the factors of circumstantial evidence that may be considered is the temporal connection (or lack thereof) between the Complainant's protected activity and the adverse action. Robinson v. Northwest Airlines, Inc., Case No. 04-041 (ARB Nov. 30, 2005), slip op. at 9.

Both the Complainant and Mr. Kiner testified that, immediately upon the occurrence of the incident, Mr. Kiner told the Complainant that he was going to "write him up" (or, in Mr. Kiner's words, "document his behavior." T. at 46, 110. Mr. Kiner testified that he also called Mr. Shepherd, who was off site, to report the incident, and Mr. Shepherd came in to the dispatch office immediately. T. at 110-11. Mr. Shepherd confirmed Kiner's account involving the telephone call, and also stated that when he came into the dispatch office, he spoke with both the Complainant and Mr. Kiner. T. at 139-40. Mr. Shepherd testified that he discussed the Complainant's actions with him and told him that such behavior was not appropriate. T. at 140-

41. Additionally, Mr. Shepherd stated, he directed Mr. Kiner to record the incident, and send it to field administration. T. at 142-43.

The record establishes that Mr. Shepherd is the official who made the ultimate decision to issue the ICI. T. at 144. Although Mr. Shepherd testified that he consulted with a manager from the field operations division, he affirmed that he made the final determination that the Complainant's actions were to be recorded in an ICI. Id. Mr. Shepherd also stated unequivocally that Mr. Kiner did not play a role in the ultimate decision that the Complainant be issued the ICI. T. at 145. From the context of Mr. Shepherd 's testimony, it appears that he and the field operations manager were considering action that was even more severe, but decided not to do so, and so "only" the ICI was issued. See T. at 144, 155. Additionally, Mr. Shepherd indicated that, to his knowledge, the field operations manager was not aware of the Complainant's protected activity. T. at 155. However, Mr. Shepherd also conceded that the field administration manager had access to the same employee history data that he did, and that at the time of the incident the Complainant's employee history reflected that he had, at one time, been dismissed from employment. T. at 160; see also CX 9. I find that, on its face, the incident that precipitated the Complainant's former discharge from employment does not appear to relate to protected activity. Consequently, I find there is no evidence of record to indicate that the field administration manager was aware of the Complainant's history of protected activity.

Notwithstanding Mr. Shepherd's testimony that he was the decision maker, it is clear from the record that Mr. Kiner's response to the incident was the precipitating factor in the issuance of the ICI. Mr. Kiner, after all, told the Complainant he would "write him up" and Mr. Kiner called Mr. Shepherd immediately to report the incident. Mr. Shepherd acknowledged that he did not observe the incident directly, but rather relied on Mr. Kiner's account of the event. T. at 157. Implicit in Mr. Shepherd's directive to have Mr. Kiner record the incident, and later to his decision to issue the ICI, is a conclusion that Mr. Shepherd believed Mr. Kiner's account of the incident.

Based on the record, I find that Mr. Kiner's event differed from the Complainant's in at least two aspects. First, Mr. Kiner testified that the Complainant's "growling" and banging on his desk was behavior that was not acceptable in the dispatch area. T. at 108-110. The Complainant fully acknowledged that he "growled" and banged on the desk. T. at 42. In contrast to Mr. Kiner, however, the Complainant testified that it was not unusual behavior. T. at 42. Mr. Solomon, who was on duty on the date of the incident, testified he did not notice any unusual behavior, and also remarked that if something were loud enough to catch his attention, he would have noticed it. T. at 89. Mr. McCollough, who also was on duty that day, stated he heard the Complainant raise his voice but also said he would not describe it as yelling. T. at 81. Mr. McCullough also indicated he did not consider the Complainant's actions to be unusual. Id. In his interview, Mr. Schuyler indicated he did not find the Complainant's behavior disruptive. CX 15 at 13.

Second, Mr. Kiner stated that he observed the Complainant jump up the steps, without using the handrails. T. at 108, 109. The Complainant conceded that he took the two steps at one time, but insisted he used the handrails when he did so. T. at 45. Mr. McCollough was unsure whether the Complainant used handrails. T. at 82. Mr. Solomon did not address the issue.

Because of the discrepancies as to these two aspects. I conclude I must assess the evidence to determine its credibility. As to the first issue (acceptability of growling and banging), I note that, at least in December 2008, when the incident occurred, Mr. Kiner and the Complainant did not normally work the same shift. The Complainant stated he normally worked the afternoon (second) shift; Mr. Kiner normally worked the day shift, but commented that he often stayed a bit later. T. at 41, 101-02. The exact time of the incident is not certain. Mr. Kiner testified that it occurred in the "early afternoon" and the Complainant's testimony seems to suggest it occurred right at the start of his shift. T. at 108, 41-42. The time the event occurred suggests Mr. Kiner would likely be in the area if he had extended his workday for some reason. There is also some evidence in the record that it is possible that managers were working longer shifts in December 2008, because of holiday traffic demands. T. at 124. In light of the evidence that Mr. Kiner did not normally work the shift the Complainant worked, I find that it is possible that the expectations of employee behavior for the two shifts may have been different, with looser standards prevailing on the second shift. This conclusion is also consistent with the testimony of Mr. Solomon, who indicated he engaged in behavior that was somewhat similar to the Complainant's; and with the interview of Mr. Schuyler, who indicated that he did not find the Complainant's conduct disruptive. T. at 90; CX 15 at 13. This finding is not intended as a judgment on the acceptability of the Complainant's behavior, but merely to explain the discrepancy between the Complainant's testimony that his behavior was not out of the ordinary and Mr. Kiner's comment that it was not acceptable conduct. This also may explain why Mr. Kiner may have reacted in the way he did to the Complainant's actions. I also find Mr. Kiner's testimony that the door to the "bubble" was likely open to be credible, in light of his comment that he rarely closed his door.[14] See T. at 108.

As to the second aspect (not using the handrails), Mr. Kiner testified that he directly observed the Complainant come up the steps, and he saw that the Complainant did not use the handrails. T. at 109. He also provided a photograph showing the vantage point from which he observed the Complainant. RX 24; see also T. at 108-09. This photograph shows that at least one handrail, the one to the left of a person climbing the stairs, is visible. I find that the photograph contradicts the Complainant's assertion that, if the lights are on in the "bubble," one cannot see outside very well. See T. at 46. Indeed, on cross-examination Mr. Kiner stated that the lights were on when he took the photograph in RX 24, because of reflection. T. at 125. In his testimony, the Complainant conceded that he went to the assistant chief dispatcher's station (up the steps) because he was disturbed about the emerging situation on the trains for which he was responsible, a situation that included possibly delaying an Amtrak passenger train. T. at 43-45. He also conceded he was in a hurry, and that he took both steps at a single bound. T. at 45. I find that Mr. Kiner's vantage point, based on his testimony and on the photographs in the record, indicated that Mr. Kiner was able to see whether the Complainant was grasping the stair handrails. I observed Mr. Kiner during his testimony, and I find that Mr. Kiner was quite sure about what he observed. I also observed the Complainant, who was just as sure that he did use the handrails. I find that both of these witnesses were sincere and forthcoming in their testimony.

[14] If the door was open, as I find to be probable, then Mr. Schuyler's comment that nothing could be heard with the door shut is of no consequence. See CX 15 at 13.

Considering all of the circumstances, I find that Mr. Kiner's testimony is more likely to be accurate. Notably, the Complainant was rushed; he also was somewhat agitated about the circumstances that were unfolding with regard to the trains for which he was responsible. Under such circumstances, it is conceivable that the Complainant would not take the time to grasp the handrails. It is also reasonable to conclude that the Complainant's recollection of how he placed his hands might not be accurate, as his concern at the time was on the trains and not on his own locomotion.[15]

The ICI issued to the Complainant, which was drafted by Mr. Kiner at Mr. Shepherd's direction, cited violations of three rules. GS-1 and GS-8 are general safety rules that appear to be applicable to all employees. See RX 1, 2. The Complainant was cited for violating GS-1 (as well as GR-2), by acting in a "non civil and disruptive manner" by "banging his fists on his desk and growling very loudly in such a way as to disrupt the entire dispatching facility." GR-2 is a general rule that also appears to be applicable to all employees. RX 3. The ICI states that the Complainant violated GS-8 when he ran to the assistant chief train dispatcher's station, "jumping the stairs while enroute."

The Respondent introduced into evidence the various rules that the Complainant was determined to have violated, as set forth in the ICI. RX 1-3. GS-1 mandates that behavior in the workplace be "civil and courteous." RX 1. GR-2 requires employees to behave "in a civil and courteous manner" in the workplace. It prohibits, among other things, "boisterous, profane, or vulgar language."[16] RX 3. GS-8, titled "Protection Against Slips, Trips, and Falls," requires (among other things) that handrails, when available, be used.[17] RX 2. There was no direct testimony that these rules applied to the Complainant as a dispatcher; however, from the text of the rules, which are quite general, I find no evidence that they are intended to be limited only to a specific type of employee (e.g., rail yard workers). The IDPAP, that Mr. Shepherd testified applies to the Complainant, indicates that offenses relate to "rule violations." RX 4; see T. at 143.

The Complainant asserts that, in being issued an ICI, he was treated more severely than other employees. Complainant's Brief at 8; see T. at 55-56. Evidence of disparate treatment, where a complainant is disciplined more harshly than other employees for similar infractions, can constitute circumstantial evidence of a causal relationship between protected activity and an adverse action. Sylvester v. Parexcel Int'l LLC, Case No. 07-123, (ARB May 25, 2011), slip

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[15] I also have considered the probability that the Complainant could leap both steps at a single bound without using his hands for support. The evidence indicates the steps are relatively low (about 6 inches high), and the Complainant is tall (about 6'1"). T. at 45, 87. I find it is possible that the Complainant may have jumped both steps without support, particularly if he were hurrying. Alternatively, it is possible that the Complainant placed his hands on the top of the half-walls enclosing the stairs (similar to the person in RX 24), which the Complainant could have recalled as placing his hands on the rails.

[16] I find that the remaining provisions of GR-2 (prohibiting, for example, playing practical jokes, willfully neglecting duties, or endangering life or property) are not at issue in this case, and so I do not discuss them.

[17] Notably, it does not specifically prohibit running, or jumping up steps. The ICI cites these actions, and not the Complainant's supposed failure to use handrails. However, Mr. Kiner testified that the action that prompted the citation of GS-8 in the ICI was the Complainant's failure to use the handrails. T. at 113-14.

op. at 27; Trancanna v. Arctic Slope Insp. Svc., Case No. 98-168 (ARB July 31, 2001), slip op. at 8-9. However, any comparison made must be between employees who are similarly situated. Sasse v. Office of the U.S. Atty., Case Nos. 02-077. 02-078, 03-044 (ARB Jan. 30, 2004).

The Complainant submitted, in support of this contention, a spreadsheet chart showing dispatch employees who had been charged with violations of rule GR-2 in the time period from March 2007 and December 2009.[18] CX 11. The spreadsheet shows three instances, including the instance involving the Complainant on December 11, 2008 that is at issue in this case, in which Mr. Kiner was the initiating manager. The other two instances involved employees who "delayed a premium train" and who notified other employees "of an upcoming banner test." However, at least one of these other instances also involved violations of additional rules (e.g., GR-17, which is not of record). Both of these incidents resulted in ICIs. The two instances on the spreadsheet that reflect conduct most similar to the Complainant's involved an incident where a dispatcher "became loud and argumentative" when questioned about train operations, and another incident where a dispatcher "became loud and belligerent and used profane and derogatory language at a company provided hotel" in the presence of other employees, hotel employees, and the public. These two incidents, however, resulted in more severe sanctions against the employees.

The Respondent also submitted a spreadsheet with disciplinary data. RX 18. This spreadsheet, according to the Respondent, shows actions taken in response to violations of GS-1, GR-2, or GS-8 with regard to employees in the Albany Division, in the time period from January 2007 to December 2009. In most of these cases, the disciplinary result was an ICI. A few of these instances involved failure to use handrails; at least one also involved failing to "act in a civil manner." The other violations included such items as walking with hands in pockets; failing to use illumination when walking in areas of low lighting; walking when talking on a cell phone; not looking in the direction where one was walking; failing to scan ground before dismounting equipment. Many, but not all of these violations, were "OTest Failure" events. The evidence indicates these were "Operational Tests," observed and evaluated by managers. See T. at 117. Mr. Kiner instituted ICIs on three separate employees, all on the same date, for "OTest Failure" involving failure to use illumination when walking in areas of low lighting.

Based on the foregoing, I find that the issue of the relevant group of employees to whom the Complainant should be compared is relevant. The Complainant asserts that the relevant group is dispatchers; the Respondent asserts that the relevant group is Albany Division employees. The Complainant's group, at CX 11, includes only cases involving violation of GR-2 (as well, in some instances, additional rules as well). However, in the Complainant's case, he was cited for violation of two other rules, GS-1 and GS-8, in addition to GR-2. Because CX 11 relates to dispatchers who were not cited for violating all the same rules as the Complainant, I find that the group in CX 11 is not similarly situated to the Complainant.[19]

[18] The characterization of the data is drawn from the Complainant's index of exhibits, as well as his testimony. See T. at 55-57.
[19] Indeed, the only individual in CX 11 who was cited for violating GS-1, GR-2, and GS-8 is the Complainant.

The Employer asserts that the relevant group should be all Albany Division employees, and submitted RX 18 in support of its position. In this instance, employees were cited for violating a number of different rules, including GS-8. Once again, the only individual who was cited for violating GS-1, GR-2, and GS-8 was the Complainant. Based on the descriptions of the conduct, some violations appear to be relatively minor; some appear to be much more serious. I note, however, that violations that appear to be minor were dealt with using an ICI.[20] I also note that Mr. Kiner also cited other employees, not just dispatchers. RX 18 at 1. I infer, therefore, that a complete discussion of whether the Complainant received disparate treatment must address all instances in which Mr. Kiner cited any employee for a violation of the rules, and should not be limited to instances involving dispatchers. I find, therefore, that there is no factual basis supporting the Complainant's contention that he was treated disparately, and more harshly, than other employees.

However, I also find that the offenses for which Mr. Kiner determined it was necessary to "write up" the Complainant were quite minor. The Complainant asserted that the type of behavior that he had engaged in was not uncommon in second shift workers, and in particular he cited Mr. Solomon as someone who would yell, wave his arms, and walk rapidly up the steps. T. at 55-56. Mr. Kiner, however, stated he never witnessed Mr. Solomon banging on the desk or "grunting." T. at 123. Mr. Shepherd stated that when he saw Mr. Solomon engage in inappropriate behavior, he would go over to him and discuss the conduct. He also commented, however, based on what Mr. Kiner had reported about the Complainant's conduct, the Complainant's conduct was not like Mr. Solomon's.[21] T. at 147-48.

The evidence also indicates that a decision as to when to record an employee's violation was, in essence, a matter of management prerogative. As Mr. Shepherd testified, he asked managers to discuss unacceptable behavior with the offending employee at the time an incident occurred. T. at 139. As the testimony establishes, both Mr. Kiner and Mr. Shepherd discussed the Complainant's conduct with him immediately. T. at 140, 142. However, as noted earlier, it was Mr. Kiner, and not Mr. Shepherd, who made the initial decision to "write up" the Complainant. Mr. Shepherd validated Mr. Kiner's decision when he instructed Mr. Kiner to place a report of the incident on the automated system.[22] See T. at 143.

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[20] I have considered that employees working on or near trains appear to have committed many of the violations listed in RX 18. The record establishes that GS-8 is a safety rule. It appears, however, by its terms, to apply to all of the Respondent's employees, not just employees who work on or near trains.

[21] The witnesses were not sequestered at the hearing, and so both Mr. Kiner and Mr. Shepherd heard Mr. Solomon's testimony. See T. at 33-34.

[22] Mr. Kiner testified that when he called Mr. Shepherd, he was concerned whether the Complainant was fit for duty. T. at 110-11. Mr. Kiner stated that, after speaking with the Complainant, he was satisfied that the Complainant was fully fit for duty. T. at 133-34. Mr. Shepherd also stated he was satisfied the Complainant was fit for duty, after observing him and discussing the incident with him. T. at 140-41. Based on the evidence before me, and mindful that railroad dispatch responsibilities require one's complete possession of faculties and judgment, I find that it was reasonable for Mr. Kiner, presuming he had any concern about the Complainant's ability to function, to call in Mr. Shepherd.

Temporal proximity between protected activity and the adverse action may also lead to an inference of a nexus between the two. As the evidence clearly shows, the Complainant engaged in protected activity (making safety-related complaints) on a regular basis, prior to December 11, 2008. See, e.g., CX 1, 3, 5. The record also indicates that, the day before the incident, Mr. Braman (the Albany Division Manager) wrote to the Complainant about his protected activity. CX 8. This could suggest that the issue of the Complainant's protected activity was in Mr. Braman's mind, when the incident occurred. Although the Complainant testified that Mr. Braman arrived at his work station to discuss the incident with him, Mr. Shepherd's uncontradicted testimony was that Mr. Braman did not play any role in the decision to issue the ICI to the Complainant. T. at 144.

The record establishes that Mr. Shepherd was well aware of the Complainant's protected activity. See, e.g., CX 2, 4, 6. Indeed, Mr. Shepherd was the official to whom the Complainant directed most of his safety-related concerns. See, e.g., CX 1, 3, 5. Mr. Braman was also aware of the Complainant's protected activity. See, e.g., CX 8.

On review of the entire record, notwithstanding that the official who made the decision to issue the ICI was well aware of the Complainant's protected activity, I find there is no evidence to establish any link between the Complainant's protected activity and the ICI. My conclusion is based on the following factors: Mr. Kiner, not Mr. Shepherd, made the initial decision to "write up" the Complainant; Mr. Kiner testified that he had only a vague idea of the Complainant's protected activity; there is no evidence contradicting Mr. Kiner's testimony about his knowledge of the Complainant's protected activity; the ICI issued to the Complainant, though it admittedly addressed minor violations of rules, was not inconsistent with ICIs issued to other personnel in the Albany Division; Mr. Kiner issued ICIs to other personnel for minor violations of rules; the Complainant conceded that at least some aspects of his behavior were described accurately in the ICI; although there is conflicting evidence regarding the level of decorum that was acceptable during the Complainant's shift, Mr. Kiner unequivocally stated that behavior such as that the Complainant engaged in on December 11, 2008 was unacceptable; although the evidence as to whether the Complainant did nor did not use the handrails is in conflict, Mr. Kiner's observation is more credible than the Complainant's testimony on this point; the evidence indicates the Complainant engaged in protected activity frequently, but there is no evidence that Mr. Braman, who wrote a letter to the Complainant about his protected activity on December 10, 2008 (the day before the incident), was involved in the issuance of the ICI.

In sum, I find that the Complainant is unable to establish, by a preponderance of the evidence, that his protected activity was a contributing factor to the adverse action (here, the ICI). See 29 C.F.R. § 1982.109(a).

Employer's Action in the Absence of Protected Activity

Because I find that the Complainant is unable to establish all of the elements of proof, as is required for him to prevail under the Act, I conclude that it is not necessary for me to address the issue of whether the Employer would have taken the same action, notwithstanding the Complainant's protected activity.

CONCLUSION

As set forth above, I have found that the Complainant is unable to establish all of the elements of proof, as is required for him to establish that a violation under the Act occurred. 29 C.F.R. § 1982.109(a). Consequently, I also must conclude that the Complainant is not entitled to any remedies.

As set forth under the governing regulation, the Complainant's complaint is DISMISSED. See 29 C.F.R. § 1982.109(a).

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Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

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).

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).