



Issue Date: 24 May 2012

Case No.: **2010-FRS-00031**

In the matter of

ANTHONY F. HOUSLEY,
Complainant

v.

CSX TRANSPORTATION,
Respondent

DECISION AND ORDER

This case arises out of a complaint of discrimination filed by John R. Hutton (“Complainant”) against Union Pacific Railroad Company (“Respondent”), pursuant to the employee protection provisions of Section 20109 of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the “Act”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53 and as implemented by federal regulations set forth in 29 CFR § 1979.107 and 29 CFR Part 18, Subpart A. The Act prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because of the employee’s “lawful, good faith act done, or perceived by the employer to have been done or about to be done... to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.” 49 U.S.C. § 20109(a)(4).

On April 23, 2009 Complainant filed a whistleblower complaint with the Occupational Health and Safety Administration (“OSHA”) contending that CSX Transportation terminated his employment in retaliation for his notifying the company of a work-related personal injury. OSHA concluded that Complainant engaged in a protected activity, but that activity was not a contributing factor to termination of his employment. OSHA Final Investigation Report at 2-3. Complainant appealed the OSHA determination to the Office of Administrative Law Judges (“OALJ”). A hearing was held by the undersigned on January 10-11, 2012 in Chattanooga, Tennessee. At the hearing, Complainant’s Exhibit 1-13 and Respondent’s Exhibit 1-25 were admitted into evidence.¹ Both parties filed post-hearing briefs.

¹ The following abbreviations will be used as citations to the record:

CX – Complainant’s Exhibits;
RX – Respondent’s Exhibits; and
TR – Transcript of the Hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of Relevant Evidence

Complainant was employed by Respondent as a conductor trainee. He underwent five weeks of training at the Railroad Education Development Institute (“REDI Center”) with other new conductor trainees. (TR 43, 51). After completing the training there he was assigned to work mainly in the Etowah and Knoxville yards of the Huntington Division as a “cub” doing field training. (TR 51-52). As a cub he was assigned to a crew that included a conductor, an engineer, and sometimes a brakeman. (TR 52-53). He was given equipment including a radio, air gauge, and switch key (TR 56-59).

As a trainee, Complainant performed tasks including lining switches, protecting a shove, setting and knocking off hand brakes, and inspecting cars. (TR 60-61). Complainant testified a conductor supervised him while performing tasks. (TR 62). He said the trainmaster, Derik Skeens, typically assigned a conductor to supervise him during the morning safety briefings. (TR 63). As trainmaster, Mr. Skeens was the supervisor of all the employees in his territory. (TR 65).

Cason Chambliss, conductor trainer instructor at the REDI Center, testified that he instructs all classes that “when they leave the REDI Center, that they are not a qualified employee until they are marked up and qualified, so therefore, that they are never to leave the sight of the conductor that they are with. They should be in the hip pocket, in the shadow, never arm’s length away from them at all times.” (TR 278). Mr. Chambliss said the instructions are reiterated throughout the training period. (TR 279). Complainant testified that at the REDI Center he was told a conductor should be no more than three car lengths away from him. (TR 102). He said he did not remember being told he needed to be in the “back pocket” but said that “shadow the conductor” sounded familiar. (TR 102-103). Chance Clair, who was also a trainee in Complainant’s class, testified Mr. Chambliss told the trainees that they needed to “be within arm’s length or in the hip pocket of our conductor who was training us.” (TR 349). Mr. Chambliss also testified trainees were told:

They were not to leave that conductor’s side and not become another crewmember on that job, because they’re not qualified. Therefore, if they deviated from any of that instruction, a conductor was to give them instruction to do otherwise, such as go to the other end of the yard and operate a switch for them or staying at this switch and operating this switch, as I send movements back over to you, that they were not to do that, and they were to either get up on the engine and – for the rest of the day until they could contact their immediate supervisor, mentor, MCT or whatnot, to explain the situation, because it’s not safe for them.

(TR 280-281). Mr. Chambliss and Rodney Brown, director of training at the REDI Center, both testified that a conductor being two and a half to three car lengths away while the trainee was

operating a switch would not be appropriate because the conductor was not close enough to supervise. (TR 281, 301).

Mr. Brown testified trainees are told they should not perform work as an extra crew member and should contact a manager if the conductor asks them to. (TR 299-300). “[T]he instructors make it clear and instruct the trainees not to perform work – don’t protect shoves, don’t operate switches without the qualified conductor being with you, don’t service industries, you know, the qualified employee has to be right with you while you perform these tasks and ensure that you’re doing it properly.” (TR 300). He stated that a trainee should be within “ten feet or so” of a qualified conductor when performing a task. (TR 318).

The first Monday after he completed training at the REDI Center, Complainant went to Corbin for classroom instruction by local management. (TR 107). Stephen Salyers, trainmaster of the Cincinnati Corbin Subdivision, and Mr. Skeens helped conduct that training. (TR 328, 375). Both testified the trainees were told they needed to be within an arm’s length of their conductor when they were performing tasks. (TR 172, 330, 375). Mr. Salyers explained, “We make it clear to the trainees that this – the instructions that we’re giving them about being within an arm’s length of their conductor is first and foremost for their safety. That will allow the conductor in the event that they put themselves in an unsafe situation, at risk of some sort that they could be there to remove them from that situation, and also be close enough to inspect and observe what – that the trainees actually perform the task directly.” (TR 330).

Mr. Salyers and Mr. Skeens testified that one of the examples given during the training was that the trainee should not operate a switch unless the conductor or brakeman is with them. (TR 331, 376). Mr. Salyers said another example given was that the trainees should be on the same side of the car as the conductor when riding a shove. (TR 332). Mr. Salyers explained that to ensure each trainee understands the instructions, he individually asks each one of them “do you understand” and gets their acknowledgement. (TR 334). Mr. Clair also recalled having to give an individual acknowledgment that he understood that trainees needed to be within arm’s length of a qualified crew member when performing tasks. (TR 350). He also recalled being told that a trainee should be on the same side of the car when riding a shove and that a trainee who violated the arm’s length rule would have his application rejected. (TR 352, 354).

Complainant agreed that he was told that if he didn’t follow instructions his employment application would be terminated. (TR 110, 118, 334). Complainant also agreed that he was told that if a crewmember told him to do something away from him then he should refuse to do it and call the trainmaster. (TR 104, 116, 118, 333). He was also told he could not act as an additional crew member or work on his own and he was told he needed to be close enough so that the conductor or brakeman could keep him from doing something wrong. (TR 111, 115, 330). However, Complainant recalled the instructions given by Mr. Skeens as to how close a crewmember need to be differently. He testified Mr. Skeens told him that while he was performing tasks a conductor or brakeman should be within two and a half to three car lengths from him and a car length is 50 feet. (TR 67, 91).

Mr. Robert Bush, manager of conductor training for the Huntington Division at the time Complainant was a trainee, described the standing instruction as requiring a trainee to be within “ten feet or so” of the conductor. He said the instruction was set by Mr. Skeens as a standing rule for the local area. (TR 219, 235).

All of the CSX employees who testified agreed that although they enumerated numerous rules, none of the training manuals or other rule books state that trainees must stay within arm’s length of the conductor training them in the field. The explicit requirement is not listed in the New Hire Candidate Letter of Understanding (CX 1), the Switching Operations Fatality Analysis in the Huntington Division Industry Maps and Local Reference Guide (CX 2), the Conductor Training Student Workbook, Part 1 or 2 (CX 3 and 4), the CSX Safe Way book of safety rules and company policies and programs (CX 6), or the CSX Operating Rules (CX 12). Lew Bryant, director of conductor field training, suggested that the rule isn’t in writing because it is common sense and the trainees are told it orally numerous times at the REDI Center and during training at their field locations. (TR 415).

As a cub in the field, Complainant testified that a trainmaster watched him performing tasks approximately four times. (TR 150). He admitted that at his deposition he stated that he recalled seeing Mr. Skeens only twice. (TR 152). Once was at a derailment where he was tying handbrakes and once was at the yard in Etowah. (TR 153, 155). He testified that he did not recall how close a conductor was to him when Mr. Skeens observed him, but he was not within arm’s length. (TR 155, 160). Mr. Skeens recalled seeing Complainant at a derailment but said he was not performing any work at the time. (TR 187).

On the day of his injury report, Complainant was working on a crew with an engineer, brakeman, and conductor. Their job was to drop off cars. (TR 70). Complainant operated a switch that day. (TR 71). While he was operating the switch, the closest crew member was two and a half to three car lengths away. (TR 120).

After operating the switch, Complainant said the brakeman then told him to ride on the car and protect the shove. (TR 71). He was alone in the car on the leading edge of the shove. (TR 121). The brakeman was walking beside the train during the maneuver, on the opposite side of the train from the Complainant. (TR 71, 78, 126). Complainant estimated the conductor was ten to twelve cars away, ahead of the shove. (TR 78, 128). Mr. Skeens testified that the conductor was also in a position to protect the shove. The brakeman was walking in the direction of the shove, but not protecting it. (TR 183).

Complainant said as the train came around the building he saw a truck on the tracks. He told the engineer over the radio to stop the train, but he didn’t have time. (TR 71). Prior to the collision, Complainant jumped off the train. (TR 72). His right hip and left knee started feeling tight. He testified that when he told the other men on the crew that he wanted to go see a doctor, they told him “they’ll fire your ass if you do.” (TR 79). Complainant admitted he did not recount those words when asked about the conversation in his deposition or by the OSHA investigator but believed he conveyed the gist of the conversation. (TR 131). Complainant reported the injury and was taken to the hospital by Mr. Skeens. (TR 79). He was x-rayed and prescribed pain medication. (TR 80-81).

Complainant then filled out an Employee's Incident Report that he gave to Mr. Skeens. (TR 81-83). He wrote:

I was protecting a shove at an industry riding on the end car, when I noticed a transfer truck approaching. The truck just slowed down, did not come to a full stop. I radioed my engineer to stop but it was too late. I saw we were going to collide, so I had no other choice than to make an emergency dismount. We struck the truck and came to a stop. One hour later I started feeling discomfort in my hip and knee.

(RX 5). Mr. Skeens then asked him to complete another statement. (TR 84). He wrote:

On Wed. 01/07/09 I was working the 739 Local. I was the fourth crew member. One engineer, one brakeman, one conductor, and I was the cub. We were switching at Lowes Industry in Vonore, TN. I was at a switch, the brakeman was at the cut of cars no more than 2 ½ to 3 car lengths away from me. I was in his visual sight distance at all times. After 2 or 3 moves of me lining the switch, I was instructed to ride the car and protect the shove. As I was doing this myself the brakeman and the conductor were also watching and protecting the shove. The brakeman was walking the shove and the conductor was watching. I came around the curve into the straight and noticed a transfer truck slowing down, but 2 ½ car lengths away. Seconds later I saw the truck wasn't going to stop. We the train were going about 4 mph. All I had time to do was call stop twice and make an emergency dismount. Then our train struck the trucks trailer. About an hour later I started feeling discomfort in my knee and hip. Derik Skeens took me to the E.R. and I had xrays and check up. I have light strain/sprain in hip.

(RX 6). Complainant said Mr. Skeens didn't say anything to him immediately after he gave him the statement. (TR 85-86). He was told the company would do an investigation and then he would be told if he could return to work. (TR 91). A day or two later Mr. Skeens called and told him his application had been rejected. (TR 92). For a trainee, a rejected application is the termination of their employment.

Mr. Skeens said the investigation of the collision included looking at information downloaded from the train, including speed, and reviewing statements from all of the employees involved, including Complainant, the conductor, the brakeman, and the engineer. (TR 385). Mr. Skeens said two items concerned him in Complainant's written statement, leading him to conclude that Complainant had not followed instructions regarding not working alone. (TR 387). One was that Complainant stated he was at a switch while the brakeman was two and a half to three cars away. Mr. Skeens said the conductor had reported he was spotting cars at the time

Complainant was at the switch, so neither man was next to the Complainant at the switch. The second item was that Complainant said he was riding the car by himself. (TR 386).

Mr. Salyers helped investigate the scene of the incident on January 7. (TR 335). He said Mr. Skeens showed him Complainant's statement and after reading it he told Mr. Skeens that Complainant had not complied with instructions when he acted as an additional crew member. (TR 337). Mr. Salyers said that outside of that conversation with Mr. Skeens he had no involvement in terminating Complainant. (TR 337).

Mr. Skeens testified Claimant was terminated for operating track switches while not within arms' reach of the conductor or brakeman and for riding the car alone while he believed he was protecting the shove. (TR 174-175). Scott Conner, assistant division manager of the Huntington Division, testified that Mr. Skeens called him about the January 7 incident. (TR 357). Mr. Skeens told him that Complainant had failed to follow instructions by performing the duties of an additional crew member. (TR 359). Mr. Conner said he reviewed Complainant's handwritten statement and found it to confirm what Mr. Skeens had told him. He then recommended to Mr. Bush that Complainant's application be terminated. (TR 360).

Mr. Bush called Mr. Bryant twice. The first time he told him there had been an accident involving a trainee. The second time he told him the trainee had been injured, and Mr. Bryant asked him to send him the reports. (TR 418). On January 8, 2009 Mr. Bush wrote an email to Mr. Bryant, stating:

Conductor Trainee A.W. Housely #231853 was not performing his duties as instructed by the Trainmaster during his first meeting upon arriving to Etowah, TN on 12/22/2008. During his orientation on this day, he was instructed not to be an additional crew member during his training and he was to stay with the conductor or brakeman at all times.

Trainee Housley had been acting as an additional crew member when he performed switching moves by himself while working the C739. While he was within only a few car lengths of the Brakeman and the Conductor, Trainee Housley failed to comply with the Trainmaster's instructions. The above expectations were reinforced during the employees' first bi-weekly meeting conducted 01/06/2009.

Trainee Housley failed to follow these very important instructions after being told what is expected on two separate occasions. I would like to reject his application for employment because of this, effective immediately. He was hired for Etowah KD. His class number is DH0823.

(RX 9). Mr. Bryant forwarded the message to John Johnson requesting he "initiate a rejection per request of the division." Mr. Bryant testified his request was based primarily on Complainant's

written statement. (TR 409). He stated that trainees are instructed that a conductor must be present whenever they are performing a task so the conductor can instruct him if he's doing something improperly and make sure he's safe. That requires the conductor to be within arm's length. (TR 414).

Mr. Bush testified that Complainant was terminated for violating the standing instruction of not acting as an additional crewmember, performing work on his own. (TR 217). Mr. Bush explained that Complainant violated the standing instruction because "he was operating switches away from the conductor and he was protecting the shove in this incident while away from the conductor." (TR 223). Mr. Bush testified he initiated Complainant's termination based on what Mr. Skeens had told him and what he saw in the report. (TR 236). "Because of – per my conversation with Trainmaster Skeens and, you know, which he had after the investigation was done about the incident and it was found that Mr. Housley was acting as a crewmember, and – or performing function as an additional crewmember, and was away from the conductor, also in the report under Mr. Housley's own handwritten statement, I suggested that his application would be rejected." (TR 248). Mr. Bush agreed that he did not know whether Complainant was instructed by the conductor to perform work on his own and did not speak to Complainant himself. (TR 237, 255).

As a trainee, the Individual Development and Personal Accountability Policy did not apply to the Complainant. Unlike qualified conductors covered under the collective bargaining agreement, trainees can be terminated without the disciplinary steps required for union members. (365-366).

Testifying CSX employees agreed a conductor is responsible for a trainee and has a duty to stop a crewmember from doing something they should not do. (TR 176, 224-225). If a conductor does not take action then he can be charged with a rule violation. (TR 181). The conductor supervising Complainant on the day of the injury, Mr. King, was not charged with a rule violation nor was any other crewmember disciplined in connection with the incident. (TR 182-183). Mr. Skeens also never spoke to Mr. King or the brakeman about the fact that Complainant was working as an additional crewmember that day and should not have been. (TR 182). Mr. Skeens and Mr. Bush agreed that Mr. King should have reported to him if Complainant was doing anything in the field that he should not have been doing. (TR 186, 225).

Mr. Skeens explained that there is no formal training for conductors in which they are told that trainees must stay within an arm's length from them when performing tasks. (TR 206). Mr. Skeens stated that the responsibility is on the trainee to tell the conductor that. (TR 207). Mr. Bush testified he was not aware whether conductors knew of the instruction that trainees must be within 10 feet of them while performing tasks. (TR 225). He noted he had prepared a presentation for conductor mentors and trainmasters that included the following items on a slide titled "Standing Instructions."

- Trainees are not to be used as a crew member
- The conductor trainer must be with and oversee every task performed by trainee

- The trainees are under direct supervision of the conductor trainer
- Trainees instructed to do otherwise must immediately contact the trainmaster

(RX 1).

Mr. Bush suggested that for a trainee to comply with the standing instruction regarding distance from the conductor while protecting the shove, either the trainee or conductor could walk next to the car while the other rode or one could ride on one side of the car and one on the other. (TR 223). Mr. Chambliss and Mr. Skeens stated that the conductor and trainee should be riding on opposite sides of the car. (TR 282, 395). Mr. Brown agreed that the conductor and trainee should be on opposite sides of the lead car, noting that a conductor who was walking would ultimately not be able to keep pace with the train, or suggested that both could walk. (TR 302-303).

Mr. Skeens admitted that reportable injuries are a “small piece” of what is considered in a trainmaster’s performance review. (TR 168-169).

Mr. Skeens testified that in his jurisdiction any trainee caught performing a job function of a conductor more than an arm’s length away from the training conductor would have his employment terminated, but he had never seen a trainee do so before. (TR 200, 208, 388). “[W]e’re not willing to take the risk and let these guys get out there and try to be something they’re not, until they’re qualified and, you know, get themselves killed or tear up the equipment. We’re not going to let that happen.” (TR 201). He stated that he always tells trainees that if they work more than an arm’s length away from a field supervisor they will be sent home. (TR 201-202). Mr. Bush also testified he had never fired another trainee for violating the standing instruction that a trainee not be more than ten feet away from a conductor, nor was he aware of any other trainee who had been fired for that reason. (TR 242). He said in the one day a week he observed trainees in the field during his year and a half as manager of conductor training he never saw another trainee line a switch while their supervising conductor was two and a half to three car lengths away or ride the leading edge of a shove without the conductor nearby or riding it with him. (TR 250). Finally, Mr. Salyers also testified that he is regularly in the field and had never seen a trainee perform work on their own without a crewmember at arm’s length and if he had he would recommend their application be rejected. (TR 337-341). Mr. Conner also said he had never seen a trainee operate independently in the field. (TR 364-365). If he was aware of one who had done so, he said that trainee’s application would be rejected. (TR 370).

Mr. Skeens, Mr. Bush, Mr. Conner, and Mr. Bryant maintained that Complainant’s injury report was not part of the reason he was terminated. (TR 205, 242, 362, 411).

On January 8, 2009, the day after Complainant’s injury, Mr. Bush forwarded a message from Scott Conner that included a list of all of the new hires in the Huntington Division and a note that “everyone must be contacted by Monday and the following expectations discussed.”

1. They are not to be used as a member of the crew.

2. The Conductor must be with and oversee every task they perform.
3. They are under the direct supervision of the Conductor.
4. If they are instructed to do otherwise, by any member of the crew, they are to contact to you Immediately.

(RX 8). Mr. Bush and Mr. Conner testified that the email was sent to reemphasize the instructions. (TR 262, 363). Mr. Conner said it was typical for an email to be sent when there was something that needed to be reinforced to employees. (TR 363).

Stipulations

The parties entered into the following stipulations:

1. Respondent is a “railroad carrier” within the meaning of 49 U.S.C. § 20102 and § 20109.
2. Respondent is engaged in interstate commerce within the meaning of 49 U.S.C. §20109.
3. Complainant was employed by Respondent as a conductor trainee candidate when he suffered a work-related injury on January 7, 2009 at Lowe’s Distribution Center in Lenoir, Tennessee.
4. Complainant reported the work-related injury on January 7, 2009.
5. Respondent was aware of the Complainant’s report of his work-related injury.
6. Complainant’s employment application was rejected and he was orally informed of his termination on January 9, 2009.
7. Complainant filed a timely complaint with the Secretary of Labor.
8. On July 29, 2010 the Area Director of the Occupational Safety and Health Administration dismissed the complaints.
9. Complainant filed a timely request for hearing on August 25, 2010.

TR 6-10.

Contentions of the Parties

Complainant

Complainant contends his employment was terminated as a result of his filing an injury report. He argues that the Respondent only investigated the incident and his written report after he reported he had been injured. He was terminated within 48 hours of filing his injury report and was the only employee involved in the incident to suffer any adverse consequences.

Complainant contends the supposed rule violation the Respondent claims is the reason his employment was terminated is merely pretextual. Complainant notes that the rule Respondent contends Complainant violated is not in writing. Further, the conductors and others directly supervising trainees on the job are not told about the rule. Complainant also notes Respondent presented no evidence that any other employee had ever been terminated for violating the supposed rule.

Respondent

Respondent contends Complainant's application was rejected not because he reported an injury but because he failed to follow an instruction by performing work alone. Specifically, he operated a switch alone and rode the leading care of a shoving movement alone. Respondent notes that it has rejected the applications of other trainees who failed to follow instructions but did not report injuries. Complainant's termination based on a legitimate, non-retaliatory reasons.

Respondent identified 11 trainees who did not report injuries but whose applications had been rejected since 2005 because they failed to follow rules or instructions. Respondent also pointed to six trainees who had reported injuries but who went on to fulltime employment, including a trainee who was injured in similar circumstances but who was near another crewmember when he was injured.

With regards to the other employees involved in the incident in which Complainant was injured, Respondent argues that the fact that they were not disciplined is irrelevant to Complainant's claim because they were not similarly situated to Complainant in that they were not trainees.

Discussion

The FRSA prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because he engaged in protected activity. The whistleblower provision incorporates by reference the burden shifting framework under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2)(A).

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

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

29 C.F.R. § 1979.104(b)(1)(i) – (iv); *see also Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as "superior evidentiary weight"), *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007), *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (Jan. 30, 2004). A complainant's failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint. 29 C.F.R. § 1982.104(e)(1).

If a complainant establishes all of the elements, the burden then shifts to the employer to rebut the elements of the claim by demonstrating through clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.104(c). If the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity, then relief may not be granted the employee. 29 C.F.R. § 1982.104(e)(4); *see also Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

Claimant's Case

Protected Activity

The FRSA defines a protected activity as including acts done “to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.” 49 U.S.C. § 20109(a)(4). The evidence establishes that on January 7, 2009 the Complainant notified Respondent of a work-related injury. Therefore I find Complainant has engaged in protected activity under § 20109(a)(4).

Knowledge of Protected Activity

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines*, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). The parties have stipulated and the evidence establishes that Respondent was aware of Complainant's protected activity.

Unfavorable Personnel Action

As a trainee, Complainant's employment application was rejected, terminating his employment, on January 9, 2009. Complainant's termination constitutes an unfavorable personnel action.

Contributing Factor

The sole remaining issue to be decided is whether Complainant's protected activity of reporting his injury was a contributing factor in Respondent's decision to terminate his employment. Complainant must prove that it was a contributing factor by a preponderance of the evidence. 29 C.F.R. § 1982.104. A contributing factor is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993), *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n. 3 (5th Cir. 2008).

A complainant is not required to provide direct evidence of discriminatory intent; he may satisfy his burden through circumstantial evidence. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. See, e.g., *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-33, slip op. at 13 & n.69 (ARB Sept. 30, 2011) (citing *Sylvester v. Parexel Int'l. LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39, -42, slip op. at 27 (ARB May 25, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3, slip op at 13 (ARB June 24, 2011). In circumstantially-based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider "a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on the temporal proximity of the protected act and the adverse action. See *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

The temporal proximity of Claimant's injury report and the termination of his employment in this case supports an inference of retaliation. Claimant reported his injury on January 7, was told not to return to work pending an investigation, and was informed he was being terminated on January 9.

Those involved in deciding to terminate Complainant were certainly aware of his injury report at the time they made their decision. Mr. Skeens was the one who took Complainant to the hospital and others in CSX management involved in the decision testified they were told of the injury. However, all testified that Complainant's injury was not a factor in their decision. (TR 205, 242, 362, 411).

Respondent argues instead that there was a legitimate reason for Claimant's termination because also on January 7, unrelated to his injury, he failed to follow instructions. Specifically, he performed work on his own, without a qualified crew member close enough to him to supervise, generally within arm's length. Complainant expresses some doubt as to the existence of an "arm's length" rule at all, noting it is not written down. If there is such a rule, Complainant argues that it had not been previously enforced.

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

Although it is undisputed that the requirement that a trainee be within arm's length of a supervising conductor while performing work is not written in any CSX manuals or materials given to trainees, the credible testimony of multiple witnesses supports a finding that the instruction was verbally given on multiple occasions to the trainees. Complainant admits he was told in training at the REDI Center and at the Corbin classroom instruction that a crew member must supervise his work. (TR 111, 115, 330). One of the REDI training instructors, Mr. Chambliss, testified he told the trainees that they must be in the "be "hip pocket, in the shadow, never arm's length away from [a qualified crew member] at all times." (TR 278). Another trainee in the class, Mr. Clair, confirmed that account, testifying that he recalled being told to "be within arm's length or in the hip pocket of our conductor who was training us." (TR 349). However, Complainant recounted the instructions differently. He testified that he didn't recall being told he had to stay in the "back pocket" of the conductor, but said that being in the "shadow" sounded familiar. He said the specific instruction was to be within three car lengths. (TR 102-103).

The trainmasters who conducted the classroom instruction in Corbin before Complainant began his field training, Mr. Salyers and Mr. Skeens, both testified they told trainees to stay within arm's reach of a conductor. (TR 172, 330, 375). Mr. Clair also confirmed that account. (TR 350). Claimant maintained he was told the distance was three car lengths, although he conceded that he was told he needed to be close enough so that the conductor or brakeman watching him could keep him from doing something wrong. (67, 91, 115).

I do not find Complainant's testimony that he was instructed to be within at least three car lengths of a conductor when performing a task to be credible. A REDI instructor², two trainmasters who conducted training, and another trainee in Complainant's class all testified that the instruction was to be within "arm's length" or a similar descriptor, none of which involved car lengths or suggested 150 feet³ would be an acceptable distance. I find the testimony of Mr. Chambliss, Mr. Salyers, Mr. Skeens, and Mr. Clair to be consistent and credible.

Further, Mr. Salyers and Mr. Skeens testified that they used operating a switch and protecting a shove as examples of performing work under supervision during their training. Trainees were told they should not operate a switch unless the conductor or brakeman is with

² Although he didn't directly instruct Complainant's class, Mr. Brown, director of training at the REDI center, testified that trainees are told they should be within "ten feet or so" of a qualified conductor.

³ Complainant testified a car is approximately 50 feet long, so three car lengths would be approximately 150 feet.

them and when protecting a shove they should ride on the same side of the car as the conductor. (TR 331-332, 376).

Complainant agreed that he was told that if a crewmember told him to do something away from him then he should refuse to do it and call the trainmaster. (TR 104, 116, 118, 333).

Based on the foregoing, I find there was a standing instruction given to trainees that they should not perform work outside of the direct supervision of a qualified conductor or brakeman who was roughly within arm's reach away.

The Respondent contends that Complainant was terminated for disobeying that instruction. Specifically, he operated a switch and rode a car to protect a shove while not within arm's reach of the conductor or brakeman. Respondent became aware of Complainant's conduct after the collision on January 7 that resulted in Complainant's injury. As a result of the incident that day, Complainant submitted a statement to Respondent in which he volunteered that, "I was at a switch, the brakeman was at the cut of cars no more than 2 ½ to 3 car lengths away from me. I was in his visual sight distance at all times. After 2 or 3 moves of me lining the switch, I was instructed to ride the car and protect the shove. As I was doing this myself the brakeman and the conductor were also watching and protecting the shove. The brakeman was walking the shove and the conductor was watching." (RX 6). Mr. Skeens explained that as part of his investigation into the incident he spoke with the conductor and brakeman and the conductor reported he was spotting cars at the time Complainant was at the switch and was ahead of the train while the shove was occurring. Therefore, Mr. Skeens testified that he concluded that Complainant was performing work on his own despite being instructed not to do so. (TR 385-387). He sent the Complainant's statement to the assistant division manager, Mr. Conner, who concurred and recommended to Mr. Bush, manager of conductor training for the Huntington Division, that Complainant be terminated. Mr. Bush also agreed and made the same recommendation to Mr. Bryant, director of conductor field training, who made the final request that Complainant be terminated.

Mr. Skeens, Mr. Conner, Mr. Bush, and Mr. Bryant all testified their decision was based entirely on Complainant's failure to follow instructions, as admitted in his written statement. (TR 205, 242, 362, 411). Mr. Bush's email to Mr. Bryant at the time gave the same reason, explaining that Complainant was told during orientation to stay with the conductor or brakeman and the expectation was reinforced during a bi-weekly meeting January 6. (RX 9).

Thus, there is ample evidence that there was an arm's length instruction given, that Complainant did not follow that instruction, and that he was terminated for not following the instruction.

Complainant contends that the rule had not previously been enforced, pointing to data from 2005 through 2008 listing conductor trainees who had been terminated. None of the 11 were terminated specifically for violating the arm's length rule. It is worth noting, however, that some terminations were a result of a failure to follow other instructions. (RX 15). Testimony from Mr. Skeens, Mr. Bush, Mr. Salyers, and Mr. Conner was that they had never witnessed a trainee performing work on their own, and if they had, they would have terminated that trainee.

(TR 200-201, 242, 337-341, 364-365, 370). I credit their testimony and find it plausible that another trainee had not performed work while not within arm's reach of a certified conductor or brakeman (or at least not to the knowledge of management), explaining any lack of record of discipline for such an offense. Although Complainant suggested in his testimony that a trainmaster had previously seen him working outside of arm's reach of a conductor and had not taken any disciplinary action at that time, I do not find his testimony credible given that he recalled such an occurrence only twice at his deposition but four times at the hearing. (TR 150-155). Also, Mr. Skeens recalled seeing him only once but said he was not performing work at that time. (TR 187).

Complainant also notes that neither the conductor nor brakeman working with the Complainant on the day of the incident, who did not report injuries, were disciplined or otherwise counseled regarding allowing Complainant to perform work on his own. While arguably this does not seem sensible, such a determination does not aid the Complainant's case. Testimony from CSX managers was consistent that the company holds the trainee responsible for not performing work on his own, not the conductor or brakeman who failed to supervise or even asked that the Complainant do so. Thus, the Complainant as a trainee is not similarly situated to the conductor and brakeman, so the Respondent's decision to discipline only him does not suggest a retaliatory animus. Whether holding only the trainees responsible and not counseling the conductor or brakeman in this case is the most sensible management decision is beyond the purview of this ruling.

I find the Respondent's explanation of the reason for Complainant's termination, as supported by the evidence, to be credible. Although temporal proximity would suggest retaliation, the timing is also explained by the Complainant's unrelated, but nearly contemporaneous, actions in performing work alone in violation of the instructions given to him as a trainee.

Complainant contends his injury report was a contributing factor in the decision because if he had not reported the injury, CSX never would have investigated the incident and never would have looked at his injury report to determine if any corrective action needed to be taken. However, the uncontroverted testimony was that CSX investigates all incidents in which there is a collision. In fact, it wasn't until after Mr. Skeens arrived on scene to begin an investigation that Complainant first reported his injury. It was as part of that investigation into the incident that Complainant's conduct in performing work alone came to light. The discovery of that violation did not arise as part of a separate investigation into only the Complainant's conduct due to his injury report. Unlike *DeFrancesco v. Union Railroad*, ARB Case No. 10-114 (Feb.29, 2012), the injury report did not trigger an evaluation solely of the Complainant's past conduct to ferret out any violations. Rather, the Complainant's own statement of his actions that day essentially admitted that he failed to follow instructions, and faced with that admission Respondent took disciplinary action.

I find Complainant has not shown by a preponderance of the evidence that his protected activity of reporting his injury was a contributing factor in Respondent's decision to terminate his employment.

ORDER

It is ORDERED that this case is DISMISSED.

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DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS, JR./amc
Newport News, Virginia

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).