



**Issue Date: 14 September 2011**

Case No.: **2010-FRS-00020**

In the matter of

JOHN R. HUTTON,  
Complainant

v.

UNION PACIFIC RAILROAD COMPANY,  
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 February 2, 2009 Complainant filed a whistleblower complaint with the Occupational Health and Safety Administration (“OSHA”) contending that Union Pacific 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 7. Complainant appealed the OSHA determination to the Office of Administrative Law Judges (“OALJ”). A hearing was held by the undersigned on May 20, 2011 in Seattle, Washington. At the hearing, Joint Exhibits 1-44, Complainant’s Exhibit 1, and Respondent’s Exhibit 1 were admitted into evidence.<sup>1</sup> TR 5-16. Both parties filed post-hearing briefs.

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<sup>1</sup> The following abbreviations will be used as citations to the record:

JX – Complainant and Respondent’s Joint Exhibits;  
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 began working for Union Pacific on January 26, 2004 as a brakeman and switchman. TR at 195. On July 30, 2008 he reported a work-related injury by filling out Respondent's Report of Personal Injury or Occupational Illness form. JX 1. He reported suffering from "cervical degenerative disk disease" and "spondylosis with left upper extremity radicular synopsis" manifesting itself as "chronic neck and upper back pain with radiating pain to left extremity." JX 1. After turning in the form, Complainant testified he was told to contact Jon Tuttle, a claims representative with Union Pacific. TR at 197. He said Mr. Tuttle then referred him to the Vocational Rehabilitation Program and told him he should comply with the instructions given in the program and aggressively seek employment, whether within Union Pacific or outside. TR at 200-201.

On August 25, 2008 Candace Girard, Director Disability Management for Union Pacific, sent Complainant a letter offering him assistance through the Vocational Rehabilitation Program. The letter directed Complainant to call a phone number to accept the offer and included a brochure. JX 2-3, TR at 201. Complainant called the phone number and was later contacted by Debby Duchan. TR at 202. They met to talk about the program and she had him sign a professional disclosure form. JX 4. Complainant testified he could not return to work as a brakeman/switchman, was not offered any accommodation by Union Pacific to return to work as a conductor, and could not work for Union Pacific as an engineer because no jobs were available with his seniority. TR at 205-206. He testified he applied for between five and ten jobs with Union Pacific and for between ten and fifteen with other companies. He was only hired for one job he applied for, a dispatcher trainee position for the Buckingham Branch Railroad in Stanton, Virginia. TR at 206-207. Ruth Arnush, Union Pacific's Western Region Disability Prevention Manager, testified that employees are not obligated to accept employment through Vocational Rehabilitation. TR at 48. She further explained that Complainant was not afforded job placement services, but only a vocational evaluation according to the disclosure form signed by the Complainant and Ms. Duchan. TR at 46-48.

On September 10, 2008, Complainant went to a Functional Capacity Evaluation. TR at 209. The evaluation's recommendations were that Complainant did not meet the physical work demands of his present job as a trainman/conductor/train engineer and that he was not able to lift/carry up to 83 lbs and not able to hold a radio controlled device around his neck at a constant level. JX 27. Complainant explained that a knuckle weighs approximately 83 pounds and was something he was required to lift as part of his job. TR at 209-210. On October 6, 2008, the Medical Department sent its findings to the Operations Department, listing Claimant's restrictions as:

1. Occasionally (up to 33% of the time) lift/carry up to 40 pounds.
2. Sit/Stand/walk per job requirements with opportunities to change activity/position as needed
3. Climb/stoop/kneel per job requirement; occasionally crawl.

4. Occasionally reach overhead.

JX 5. The correspondence instructed Claimant's supervisor to notify the Medical Department as to whether the department could accommodate the employee in his usual occupation or in a less physically demanding position within his craft. Further, if the department could accommodate the restrictions, the correspondence stated that the supervisor and employee should meet for a job briefing and complete a Return-To-Work form. JX 5. On October 15, the Medical Department sent the Operations Department a clarification adding an additional restriction: "Not able to wear radio controlled device around neck at a constant level." JX 6. Ms. Arnush testified the instructions to the Complainant's supervisor were the standard instructions. TR at 44-45.

On November 12, 2008, Union Pacific sent Complainant a letter stating that he had been medically cleared to return to work with the five restrictions listed above. JX 7. The letter went on to state, "Therefore, based on these restrictions, it has been determined that these restrictions can be accommodated and you may return to work as an engineer." The letter instructed Complainant to contact Jeff Neal to "schedule a return to work conference, which will include completion of a Return to Work form and review the accommodations to be made to facilitate your return to work." The letter stated that Complainant should make arrangements to return to work within five days of receiving the letter. JX 7.

Complainant testified he called Jeff Neal on November 14 and left a message and also called the crew-caller, who is the point of contact to mark-up as an engineer. Complainant said the crew-caller told him a manager would have to call in to mark him up and that he did not have the seniority for an engineer position. TR at 210-211. On November 17, Complainant testified he spoke with Mr. Neal on the phone and they discussed the Return to Work Program, that he would need to do an air-brake test, a GCOR exam, a safety class, and the simulator. Complainant stated that he did not commit to taking the exams on that telephone call because he was already involved in the Vocational Rehabilitation Program and was concerned because he couldn't hold an engineering job given his seniority. TR at 212-213. He said he understood based on the Return to Work Program pamphlet that he had received that the program was voluntary. TR at 213. He said he did not commit to taking the exams on November 20. In a follow-up letter sent to Complainant November 17, Mr. Neal<sup>2</sup> wrote:

Per our phone conversation on November 17<sup>th</sup>, 2008, thank you for contacting me in a timely manner about a Return to Work program.

As per my instructions, you will need to pass an Air Brake Exam and a GCOR Exam. Upon successful completion of the Air Brake Exam, you will take an exam on the GCOR. If you do not successfully complete the Air Brake portion you will be afforded the opportunity to retake the Air Brake Exam. By company policy the retake must be rescheduled another day.

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<sup>2</sup> Although the letter states it is from William P. Meriwether, Mr. Neal testified that was a clerical error and he was the author. TR at 139.

Upon successful completion of both the Air Brake Exam and the GCOR Exam we will schedule a trip in the locomotive simulator at a date mutually agreed upon and TBD.

You will be required to attend a 5 day Safety and Rules Re-Training class scheduled for December 15, 2008, through December 19, 2009, in Portland, Oregon. Please contact M.O.P. Mike Gillson ... to reserve a slot and for further details.

Please report to the SMTO Conference Room, at 0800 hours, on November 20, 2008, for the above mentioned exams.

JX 8. Mr. Neal testified that when an engineer is off work for more than 60 days he is required to take the Air Brake and GCOR exams before returning to work. TR at 96. Complainant said Mr. Neal called him on November 20 to ask where he was. Complainant responded that he had already told him he wouldn't be there. TR at 216. Mr. Neal then suggested another date, but Complainant said he told him again that he wouldn't commit to taking the exams until he had some of his questions answered about his options. TR at 216-217. Mr. Neal said he wasn't involved in the Vocational Rehabilitation Program and his job was to have Complainant take the exams. TR at 218, 109.

On November 20, Mr. Neal sent Complainant another letter, stating:

Our records show that you were released to return to work (RTW) for Union Pacific with specific medical restrictions. Such restrictions preclude you from working as a Trainman. However, by letter dated November 12, 2008, you were advised that you could work in Engine service. Because of seniority rights, you are currently unable to hold a position as an Engineer. While you are unable to hold a position as an Engineer, at some future date, you should be able to work as an Engineer; therefore, we have begun the RTW process.

The letter continued:

My records show you were scheduled for both the Air Brake and GCOR Exams at 0800 hours, on November 20, 2008, for which you failed to show. As a result, per our phone conversation on this same date, you have been instructed of the following:

You will need to report to the SMTO Conference Room, at 0800 hours, on Tuesday, November 25, 2008, for an Air Brake Exam and a GCOR Exam.

In addition, during your RTW process, you volunteered information that you have been offered and accepted a position as a Dispatcher with CSX, Inc., and will begin employment on December 6, 2008. In light of such information, Union Pacific would encourage you to resign from service with Union Pacific, and

preserve your good standing as a former employee. However, should you want to continue your working relationship with Union Pacific, you must comply with the RTW prerequisites and protect your employment, seniority permitting.

The letter concluded that, "Failure to report for the above identified exams may result in discipline." JX 9.

Mr. Neal testified that if an employee failed one of the exams it would be recorded in his personnel file and "probably would not look good. TR at 101-102. Mr. Neal further testified that he did not know what seniority was required to work as an engineer in Portland or Eugene, but that Complainant did not have the seniority to work as an engineer in Seattle. TR at 99. He explained that Union Pacific required Complainant to take the exams and training even knowing his seniority would not allow him to work as an engineer so that he would "be ready to return to work." TR at 104. He admitted Complainant would have to retake the exams if he wasn't working as an engineer within 60 days. He said it was a "possibility" that Union Pacific would have had Complainant retake the exams every 60 days until he was able to work as an engineer. He testified it was approximately 6 months later that engineers with Complainant's seniority were working. TR at 105. He said he discussed Complainant's situation with Mr. Bonneville, his supervisor, and Mr. Bonneville told him Complainant needed to comply with taking the exams and training. TR at 111. He did not recall if they discussed whether Complainant could work as an engineer and did not discuss the Vocational Rehabilitation Program Complainant was involved in. TR at 111-112.

Mr. Neal explained the Return to Work program as follows, "The Temporary Productive Work, TPW, is voluntary. What's loosely referred to as Return to Work is a voluntary program set-up by, you know, that department. My specific area of responsibility was to ensure we had locomotive engineers to run trains, which required an air-brake exam, a GCOR exam, check ride in the simulator and the five-day rules class." TR at 113. He stated that the Human Resources Return to Work Program, for which Complainant received a pamphlet, is different than the Operating Department's Return to Work Program. While the former is voluntary, the later is not. TR at 115. Ms. Arnush also testified there is both a Return to Work Program and a separate return to work process. TR 38-39. The later is a process that helps employees go back to work with restrictions with oversight by the associate medical director. TR at 58-61. She stated that she hadn't seen any differences in how Complainant's return to work process was treated compared to other employees she has known to participate in the process. TR at 62.

On November 25, Complainant responded to Mr. Neal in an email. He stated in part regarding their phone call on November 17:

During this conversation we agreed to meet in the Argo conference room at 0800 for the afore mentioned exams, but after further review of my prearranged obligations, I placed calls to your cell again, stated I would not be there on the 18<sup>th</sup>, and could we entertain the Thursday option offered in our earlier conversation. During our return call later that afternoon, I informed you I had accepted a position with another RR back East which obligated me to a December 8<sup>th</sup> start date, and given those parameters, there was no way possible for me to

attend the Dec 15 – 19<sup>th</sup> Safety Class, and being that I could not satisfy all of the RTW prerequisites, for me to oblige any of them was fruitless and a waste of my time as well as yours. I proceeded to relay to you that I would try to contact you on Wednesday the 19<sup>th</sup> if I changed my mind or found that I would be able to accommodate your request but more than likely you could count on me doing the research necessary to find the resignation process and utilizing that venue to terminate my employment with UP. You agreed to my proposal, but did make it clear that you have expectations placed on you as well, so we needed to work together in hopes of a resolution that could satisfy both of our agendas.

JX 39 at 1-2. With regards to Mr. Neal’s request that he take the air brake exam on November 25, Complainant wrote:

“...[P]lease accept this as notification, given the fact that I received your letter today November 24th, 2008, requesting my presence November 25h [sic], 2008 at 0800, I will be unable to acquiesce to your request, account prior commitments to company business and what should be certainly constituted even by the most simplest of minds as “unreasonable notification.”

JX 39 at 2-3.

On December 4, 2008 Mr. Neal sent Complainant a Notice of Investigation. JX 10. The notice states that Complainant should report to a hearing on December 12, 2008 regarding his failure to attend an air brake exam on November 25 as part of his return to work program, a possible violation of Rule 1.13. JX 10. Herb Krohn, local chairman of the United Transportation Union Local 1348, responded to the notice, requesting the hearing be postponed and witnesses and evidence be disclosed. JX 11. His letter stated that the reason for the request for postponement until on or after January 6, 2009 was that Complainant was traveling outside the state and would not be returning until after New Year’s Day. JX 11. On December 23, Mr. Neal sent a letter rescheduling the hearing for December 30. JX 12. Mr. Krohn responded in a December 26 letter, objecting to the hearing date and explaining that he had requested a hearing date after January 6. He wrote:

On the afternoon of December 10, 2008 Charging Officer J.F. Neal informed this organization verbally during a telephone conversation with local Chairman Krohn of a tentative rescheduled hearing date of Tuesday December 30<sup>th</sup>, 2008. Local Chairman Krohn clearly stated his objections to this date as not conforming to the availability of the charged employee who was traveling out of state. Mr. Neal informed Mr. Krohn that he would likely proceed on this date as he did not wish to postpone this into January 2009.

JX 13. Mr. Krohn testified he believed the postponement request to be reasonable and had never had a reasonable request denied before. He noted he almost always requests postponements to allow him time to prepare for the investigation. TR at 174. He said it was also not typical in his experience that Union Pacific insist that an investigation be closed by the end of the calendar year. TR at 176-177.

The Memorandum of Agreement between Union Pacific and United Transportation Union states that “unless postponed for good cause” an investigation should be held no more than ten days after the employee is given the Notice of Investigation and “the parties will exercise reasonable judgment in the postponement of investigations.” JX 26 at 2, TR at 68. The memorandum also states, “An employee failing to appear at a hearing, after having been properly notified in writing, and who makes no effort to secure a postponement, will automatically terminate his services and seniority rights.” JX 26 at 2. A written decision must be issued no later than ten days after completion of the hearing. JX 26 at 3, TR at 70.

On January 8, 2009 Complainant was sent a Notification of Discipline Assessed notifying him that he had been found to be in violation of Rule 1.13<sup>3</sup> for failing to comply with instructions to report for the air brake exam on November 25, 2008. He was assessed at a level 3 violation. JX 17.

On January 19, 2009 Complainant was sent a second letter titled Notification of Discipline Assessed. The notice stated in part:

In reviewing this matter further, it has come to my attention that despite being properly notified in writing of the time and date of this investigation and Hearing, you failed to attend. In view of your failure to attend this hearing, this is to advise that your employment relationship with the Union Pacific Railroad is terminated effective immediately pursuant to Memorandum of Agreement between the Union Pacific Railroad Company and the United Transportation Union (Northwestern District—Portland Hub Zones 1 & 2)...

JX 19. Terrill Maxwell, Director of Labor Relations/Operations for Union Pacific, testified the letter was sent merely as a courtesy because termination of seniority is automatic when an employee fails to show for a hearing. TR at 74-75. Ms. Maxwell stated that she had dealt with at least 16 cases over the course of her career involving the termination of employees who did not attend their disciplinary hearings. TR at 77-78. She could not say definitively whether any of those employees had personal injuries. TR at 88. She stated that based upon her review of Complainant’s case and her handling of his appeal, she saw no indication Complainant had been treated any differently than the employees in other cases she was involved in. TR at 79.

Mr. Krohn testified that based on his knowledge of the seniority roster, Complainant could not have held the position of engineer as of the date of hearing. He could have been used in a rotating training capacity in which trainmen who are qualified as engineers but are cutback are rotated through a training board to keep their qualifications up. TR at 181-182. He said he had never known someone who was cutoff or on furlough status to be asked to take an air brake exam, GCOR exam, or go through the simulator and training unless they had been officially called back to duty after a lengthy period of time. TR at 168-169. Employees on furlough often work for other employers during that time, including out of state positions. TR at 171.

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<sup>3</sup> “Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.” Rule 1.1.3 (JX 25).

### **Stipulations**

The parties entered into the following stipulations:

1. Complainant engaged in activity protected under the Federal Rail Safety Act when he reported his work-related injury on July 30, 2008.
2. Union Pacific was aware of the above-referenced protected activity.
3. Complainant suffered an unfavorable personnel action on January 19, 2009.

Joint Pre-Hearing Statement (May 5, 2011).

I also make the following initial findings as they are contested by neither party.

1. Respondent is a “railroad carrier” within the meaning of 49 U.S.C. § 20102 and § 20109.
2. Complainant is an “employee” within the meaning of 49 U.S.C. § 20109.

### **Contentions of the Parties**

#### **Complainant**

Complainant offered the following time line summary to support his argument that he was terminated as a result of his protected activity:

Specifically, Mr. Hutton: a) filed an injury report, b) was sent to a program designated to fight employee claims, c) was cleared for a job that he could not hold due to his seniority (that the UPRR knew he would not be able to hold for a least several months), d) was hastily assigned to a RTW program without the railroad’s compliance with required procedures, e) ordered to an investigation that the UPRR knew he could not attend because he was following the directives of the Voc. Rehab program, f) disciplined at a Level 3, g) and then terminated by raising level 3 in violation of its own rules.

Complainant argues that Respondent knew Complainant’s seniority did not allow him to work as an engineer and it would be at least several months until he could, yet Respondent still scheduled Complainant to take exams required for an engineer on short notice. By making the Return to Work Program mandatory, Respondent set Complainant up to be fired.

Complainant argues he was unable to attend his disciplinary investigation because he was following the directives of the Vocational Rehabilitation Program in working another job at the time of the investigation. Respondent purposefully rescheduled the investigation for a date when it knew Complainant could not attend.

Finally, Complainant argues he was fired in violation of his union agreement. The agreement states that an employee “who makes no effort to secure postponement” and does not



appear at the investigation will automatically be terminated; however, Complainant notes that he made repeated efforts to secure postponement that were denied by Respondent.

### Respondent

Respondent argues there was no nexus between Complainant's protected activity and his failure to attend his investigative hearing, which was the reason for his termination. Respondent notes the two events occurred six months apart.

Respondent argues that when Complainant received medical clearance to return to work, Respondent took all available steps to assist him with the process and Complainant chose of his own accord to take employment with another railroad and not show up for either of the two scheduled exams or the disciplinary investigation.

Alternatively, Respondent argues that even if Complainant has established that the protected activity was a contributing factor in his termination, Respondent has proven that it would have reached the same decision even in the absence of the protected activity. Respondent notes that Complainant was informed that missing the exams would jeopardize his employment and chose to do so anyway. Finally, Respondent states that Complainant was treated exactly the same as all employees who fail to attend their investigative hearing, regardless of whether they have a pending personal injury claim.

### 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 parties have stipulated and the evidence establishes that Complainant engaged in protected activity under § 20109(a)(4) when he notified Respondent of a work-related injury on July 30, 2008.

#### *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*

The parties have stipulated and the evidence establishes that Complainant was subject to an unfavorable personnel action on January 19, 2009 when he was notified of his termination.

#### *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). 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.

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)).

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).

Complainant reported his injury on July 30, 2008 and his employment was terminated on January 19, 2009, approximately five and a half months later. Complaint contends, however, that Respondent was setting him up to be fired much earlier. On November 12, 2008 Respondent notified Complainant that his medical restrictions could be accommodated by his returning to work as an engineer and shortly thereafter advised Complainant he would need to complete certain exams and training to work as an engineer. Complainant suggests the exams and training were an unnecessary requirement at the time since his seniority at that time didn't allow him to work as an engineer. Complainant chose not to attend the exams, leading Respondent to initiate a disciplinary investigation for failing to comply with instructions. Respondent then declined to reschedule the investigation when Complainant's union representative informed Respondent Complainant would be out of town working another job. When Complainant didn't appear at the investigation, Respondent terminated Complainant under a provision in the collective bargaining

agreement that states that an employee “who makes no effort to secure postponement” and does not appear at the investigation will automatically be terminated.

Complainant is correct that it is likely the entire chain of events would have never occurred had he not been injured. However, that is not the test under the FRSA. The question is whether his reporting of his injury was a contributing cause in Respondent’s decision to terminate him. I do not find that it was.

Complainant could only return to work with restrictions as a result of his injury. Respondent determined it could accommodate Complainant’s restrictions by changing his position to that of an engineer. The uncontroverted testimony is that to hold an engineer position, an employee must have passed an air brake and GCOR exam within 60 days of returning to work as well as have completed a training class and time in a simulator. Mr. Neal requested on the phone and in writing that Complainant complete those tasks. Complainant chose not to do so. He offered several explanations, one that he apparently didn’t judge it necessary to complete the prerequisites since he understood he was not presently able to work as an engineer due to his seniority. Secondly, he suggested he thought the process was voluntary based on his understanding of the Return to Work Program. Finally, he argued he couldn’t make the date of the training class due to his other work obligations, which he attributed to Respondent’s Vocational Rehabilitation Program, and therefore he chose not to pursue any of the requirements, including the exams.

First, I credit Mr. Neal’s explanation that Respondent required Complainant to meet the engineer requirements even knowing he could not presently work as an engineer, at least in Seattle, so that Complainant would be ready to begin working when his seniority allowed. TR at 104. Mr. Neal noted that his job was to make sure there were engineers available to run the trains. TR at 113. If in the Respondent’s business judgment having engineers in the queue ready to work was a good business move, I do not second-guess that decision, nor should the Complainant have done so. I find Mr. Neal’s testimony credible and the requirement a reasonable one, aimed at returning Complainant to work as an engineer in the future, not a hurdle designed to set the Complainant up to be fired. Neither Mr. Neal nor any of Respondent’s other testifying witnesses expressed any animosity toward Claimant due to his having reported an injury. Mr. Neal testified that his actions were not related to Complainant’s personal injury claim with Respondent. TR at 153.

I find Complainant was clearly informed that completing the engineer requirements was mandatory, not voluntary, and failure to take the exams would jeopardize his employment. Complainant would have been paid for his time to take the exams and undergo the training. As explained by Mr. Neal and Ms. Arnush, Complainant seems to confuse the Return to Work Program and the return to work process because both use the phrase “return to work.” To the extent that Complainant believed Mr. Neal’s instructions to complete the engineer requirements was not mandatory, I find his belief was not reasonable. Respondent was attempting to accommodate Complainant’s restrictions by returning him to work as an engineer and explained to the Complainant the requirements that must be met to do so. The training and exams were not required only of the Complainant but were required for anybody who would be working as an engineer.

To the extent that Complainant argues he could not comply with taking the exams due to needing to fulfill his obligations through Respondent's Vocational Rehabilitation Program, I find his argument has no merit. Respondent did not force Complainant to take a job with another railroad. The professional disclosure form he signed states that the vocational counselor would be "providing an opinion regarding appropriate alternate employment, your wage earning capacity, return to work barriers, and recommendations to overcome such, if possible." The form notes that the counselor "may be asked to provide vocational services that I might recommend to expedite your return to work." JX 4. The counselor's vocational assessment stated that "vocational activities included telephone contacts and a meeting with Mr. Hutton, obtaining work and education histories, refining his resume, and discussing job options with him within the railroad industry, his sole vocational interest." She noted that she was advised on December 30, 2008 that Complainant had returned to work for a shortline railroad, but that she had no additional information on the job. JX 15. Nothing in the Vocational Rehabilitation Program brochure suggests that employees involved in the program are required to accept a job. Ms. Duchan stated in an April 22, 2009 email that she never told Complainant he had to take a job.<sup>4</sup> JX 38. Ms. Arnush testified that employees are not obligated to accept employment through Vocational Rehabilitation. TR at 48. Complainant himself testified Respondent never told him to take a specific job, only that his understanding was that he should "aggressively seek alternative employment." TR at 259-262. Although Complainant may have preferred to be employed while on unpaid status with the Respondent, the Respondent did not require him through the Vocational Rehabilitation Program to take another job.

To the extent that Complainant's Exhibit 1 shows that one of the goals of Respondent's use of vocational rehabilitation is to avoid an employee getting a lawyer and to defend against Federal Employers' Liability Act claims, I find such evidence does not establish Respondent offered the assistance to Complainant as part of a greater plan to set him up to be fired in violation of the FRSA.

It was Complainant's choices that resulted in his termination. He chose not to take the required exams. He then chose not to attend the investigative hearing after being informed that his request for a postponement was denied. Although there is some evidence that Respondent's decision not to postpone the investigation until after the new year was arbitrary, I do not find it was motivated by Respondent's protected activity. As discussed above, I also find the Respondent did not create the conflict through any requirement of the Vocational Rehabilitation Program.

As I have found none of Respondent's actions up to the date of investigative hearing were part of a scheme to set Complainant up to be fired, I also find his protected activity was not a contributing factor in his termination. Complainant was terminated for failure to attend the investigation. He may have reasonably believed his lack of attendance would not result in his automatic termination since he attempted to have the investigation postponed. However, I find he

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<sup>4</sup> She wrote in part: "I did not tell you that you had to take a job. We did discuss your long range plan of returning to work with UPRR, and I supported you in that. I also supported you in the two part-time jobs you held at the time we met. And I encouraged you to seek full time work that was in keeping with your physical capacities and skill set." JX 38 at 3.

has not shown by a preponderance of the evidence that his protected activity contributed to Respondent's decision to terminate him.

The Memorandum of Agreement between Union Pacific and United Transportation Union states that "unless postponed for good cause" an investigation should be held no more than ten days after the employee is given the Notice of Investigation and "the parties will exercise reasonable judgment in the postponement of investigations." JX 26 at 2. Mr. Neal testified he had been told by his supervisor not to allow investigations to drag out and that he expected employees to be available and ready to be called to duty with 24 hours notice. TR at 146. The memorandum also states, "An employee failing to appear at a hearing, after having been properly notified in writing, and who makes no effort to secure a postponement, will automatically terminate his services and seniority rights." JX 26 at 2. Ms. Maxwell testified she had been involved in at least 16 cases involving the termination of employees who failed to appear at investigative hearings. Although she couldn't say with certainty that none of those employees had also reported personal injuries, she said she did not believe Complainant had been treated any differently than any other employee in the cases she had worked on. TR at 77-79.

It was Complainant's choice not to attend the investigation and it was within Respondent's prerogative, and according to Ms. Maxwell, usual course of business, to terminate an employee who failed to attend his investigation as per the collective bargaining agreement. Respondent granted Complainant one extension of time, moving the hearing from December 12 to December 31. Complainant chose not to change his travel plans so he could attend the hearing.

I find Complainant has not shown that any of Respondent's actions, including its final termination of Complainant, were contributed to by Complainant's reporting his injury. Complainant has not met his burden in this case.

#### Election of Remedies

Respondent argues that Complainant is barred from seeing relief under the FRSA by the election remedies provision of the FRSA because he pursued Railway Labor Act remedies by filing a grievance appealing his discipline under his union's collective bargaining agreement. The FRSA election of remedies provision, 49 U.S.C. § 20109(f), states the following:

Election of remedies—An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

Respondent cites to *Koger v. Norfolk Southern Railway Company*, 2008-FRS-00003 (May 29, 2009), in which the administrative law judge (ALJ) interpreted the election of remedies provision to bar a complainant from proceeding under the FRSA when he had previously elected to pursue redress under RLA arbitration procedures. However, Respondent failed to mention three other decisions at the ALJ level that concluded that the FRSA permits a complainant to pursue both a collective bargaining appeal and a whistleblower complaint under the FRSA. See *Mercier v. Union Pacific Railroad*, 2008-FRS-00004 (June 3, 2009); *Newman v. Union Railroad*, 2010-

FRS-00001 (April 26, 2010); *Thompson v. Norfolk Southern Railway Corp.*, 2011-FRS-00015 (Aug. 9, 2011).<sup>5</sup> Although the issue is before the Administrative Review Board on appeal<sup>6</sup>, a decision has not yet been issued.

In amendments made in 2007 as part of the 9/11 Commission Act, subsections (g) and (h) were added to the FRSA, while subsection (f) remained substantively intact. Congress' intent in making the amendments was to both to broaden what is considered protected conduct and to enhance the civil and administrative remedies available to aggrieved employees. H.R. No. 110-259 (July 25, 2007), 2007 USCCAN 119. The added subsections provide the following:

(g) No preemption— Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(h) Rights retained by employee— Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

I find that reading subsections (g) and (h) in conjunction with subsection (f) shows an intent to prevent complainants from pursuing duplicative whistleblower complaints. Subsection (f) addresses the concern that complainants could fall under other employee protection statutes in addition to the FRSA. Subsections (g) and (h) recognize that an employee may seek redress using other channels that will not risk duplicative results. Specifically, subsection (h) states that “nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement.” Thus, I find that the FRSA as currently written does not prevent an individual who has appealed discipline pursuant to a collective bargaining agreement from pursuing a complaint under the FRSA.<sup>7</sup> Therefore, I find Complainant is not precluded from litigating this claim under the FRSA through the Department of Labor due to the fact that through his union he earlier exercised his grievance appeal rights under his collective bargaining agreement.

## ORDER

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<sup>5</sup> Also, *Milton v. Norfolk Southern Railway Corp.*, 2011-FRS-00004 (June 24, 2011; July 11, 2011), decided by the undersigned. See also *Powers v. Union Pacific Railroad*, 2010-FRS-00030 (May 17, 2011) (holding that the election to pursue redress under a collective bargaining agreement was not the complainant's election under the FRSA because the union, not the complainant, pursued the grievance, and that the election of remedies provision does not apply where the remedies provided under a collective bargaining agreement are less than those available under FRSA).

<sup>6</sup> The Administrative Review Board granted interlocutory review of the summary disposition decisions in *Koger v. Norfolk Southern Ry.*, 2008-FRS-00003, ARB Case No. 09-101 and *Mercier v. Union Pacific R.R.*, 2008-FRS-00004, ARB Case No. 09-121 and consolidated the cases on September 16, 2009.

<sup>7</sup> The provision would, however, preclude a complainant from pursuing a claim under certain other overlapping laws, for example the National Transit Systems Security Act

It is ORDERED that this case is DISMISSED.

**A**

RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/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](mailto: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).