U.S. Department of Labor

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Issue Date: 29 November 2011

CASE NO.: 2010-FRS-36

In the Matter of

GERALD MIHM,
Complainant

v.

GRAND TRUNK WESTERN d/b/a
CN RAILROAD,
Respondent

APPEARANCES:

Robert Thompson, Esq.
Robert Harrington III, Esq.
For the Complainant

Noah Lipschultz, Esq.
For the Respondent

BEFORE: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

PROCEDURAL BACKGROUND

Gerald Mihm ("Complainant"), filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor on September 15, 2009, alleging

that Grand Trunk Western ("Respondent") violated Section 20109(a)(4) of FRSA by terminating his employment in retaliation for his reporting of a work-related personal injury.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on August 20, 2010. OSHA determined that Respondent did not violate FRSA. On September 2, 2010, Respondent filed its objections to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

A *de novo* hearing was held in Detroit, Michigan on March 15 and 16, 2011. The following exhibits were received into evidence: Complainant's Exhibits ("CX") 1-8; and Respondent's Exhibits ("RX") 1-14.[1] Post-hearing briefs were received from Respondent on June 13, 2011, and Complainant on June 30, 2011.

FINDINGS OF FACT

Respondent is a rail carrier that operates in interstate commerce. It operates a rail switching yard in Flat Rock, Michigan, where Complainant worked until his termination on May 6, 2009. Complainant worked for Respondent as a locomotive engineer at all times relevant hereto. He started with Respondent's railroad in May, 1995 as a brakeman. (Tr. 46, 47). He subsequently became a conductor, and in 1997 or 1998 took the job of locomotive engineer. (Tr. 47, 48). Complainant's responsibilities as a locomotive engineer included operating locomotive engines to move and switch cars at the Flat Rock rail yard. He worked with a conductor and brakeman to push and pull rail cars onto designated tracks. On April 3, 2009, he was conducting switching operations at a switching location known as the "hump job" at Flat Rock. Complainant explained the process:

> You go in and grab a hold of a train that pulled in and you back all the way out, about a mile, and then you shove it up this hill, and at the top of the hill there's guys up there working. It used to be one guy ran around and threw the switches, but now…there's a remote control board…if he wants a car to go into track 27 he can hit 27 button and it'll do it automatically, and he's in a little shanty there at the top of the hill. And the other guy…grabs the lever and hold it while you kick or accelerate the rapidly, the car, to get it up over that hill and then it'll just roll into them tracks.

(Tr. 51, 52).

The person who was in the shanty controlling the switches so as to route the rail cars was the conductor, and the person who was grabbing, holding and lifting levers allowing the cars to separate was the brakeman. (Tr. 338, 339).

[1] References to the record are as follows: Trial Transcript, Tr.__; Complainant's Exhibit, CX__; and Respondent's Exhibit, RX__. Additionally, references to the closing briefs are as follows: Complaint's Post-Hearing Brief, Comp. brief at __ , and Respondent's Post-Hearing Brief, Resp. brief at__.

On April 3, 2009, Complainant and his crew picked up a "cut" or grouping of cars in "North 1" track, switched them over to other tracks, then went and picked up a cut of cars in "North 5" and did same thing. (Tr. 110). Complainant explained:

> You grab North 1, like you've seen on that map…and you pull it all the way out and then you shove up a different track up that hill where they're switched.

(Tr. 110).

After Complainant completed switching the North 5 cut, he suffered a neck injury. He filed a report of the injury on the same day stating that he suffered neck pain into right shoulder and nausea. The report's description of the injury occurrence was "[s]witching tank cars with mixed freight cars over hump had multiple slack run-ins on engine, hyper extending my neck. Slack hit so hard I saw stars." The report listed the time and date of injury as April 3, 2009, at 2130 hours, and the location as hump lead. (Tr. 60; CX 3). Complainant was taken from the rail yard to Oakwood Southshore Hospital in Trenton, Michigan. (Tr. 64). Complainant testified that he suffered severe neck pain, headaches, dizziness and difficulty walking, and was given a cervical collar. (Tr. 64, 65).

Complainant returned to the rail yard after he was released from the hospital, at about 4:30 a.m. the following morning. He was interviewed and provided a statement to Respondent's risk mitigation officer, William Gaudreau. Complainant told Gaudreau that he was injured due to slack action occurring when tank cars that were heavy with liquid rolled back to his engine as he was switching the North 1 cut of cars. (Tr. 107-110; RX. 12, p. 5-6). Slack action is a term which refers to forces created by the in and out movement of rail car drawbars connecting each car, resulting in the cars pulling away from the locomotive engine, called run out slack, or rolling toward the locomotive, called run in slack. (Tr. 226, 227). Randolph Hempton, Supervisor of Locomotive Engineers for Respondent, testified that slacking, run in and run out, will always occur in railroad switching operations. (Tr. 189).

Respondent placed Complainant on indefinite Family/Medical Leave of Absence by letter dated April 6, 2009. (CX 5). The letter informs: "We have received notice that you reported an alleged On Duty Injury/Illness for which you claim to be unable to work…" The letter explained that Complainant was found to be eligible for 12 workweeks of FMLA leave in calendar year. (*Id*.)

On April 7, 2009, Respondent notified Complainant by certified mail that he was to attend a formal investigation on April 13, 2009, of the April 3, 2009 incident. (CX 4). The notice stated that the investigation was being held to develop facts and determine Complainant's responsibility, if any, in connection with the injury he sustained while switching on the Hump Lead at Flat Rock, Michigan. The notice informed Complainant that he could arrange for representation, without expense to Respondent, as provided in the Collective Bargaining Agreement ("CBA"), and to call witnesses to testify on his behalf.

Respondent has a CBA with the Brotherhood of Locomotive, Engineers and Trainman ("BLET") that includes procedures for formal investigations and discipline. (Tr. 409, 410). The CBA's provisions on investigations provides that a notice of investigation must be issued with 72 hours of the incident, and the investigatory hearing be held within ten days of the incident. (Tr. 410, 411).

Complainant testified that he requested a postponement of the hearing by telephone calls to representatives of the Respondent and his Union, the BLET. Complainant's request to the Respondent was by telephone about four days before the date scheduled for the hearing to a person whom he thought was a superintendent. Complainant testified that the person replied that the matter was out of his hands, that he had nothing to do with it. (Tr. 67, 88). Complainant's contact to the BLET was to Brian Biscikowski, local chairman of the BLET, two or three days prior to the hearing. (Tr. 88-90). The Union representative replied that he could not get the hearing postponed. (Tr. 89). Complainant testified that he wanted a postponement because he was "…in no condition to be able to defend myself or represent myself or give accurate, you know, it may or it may not, I can't remember. I had real severe neck pain, headaches, dizziness, difficulty walking." (Tr. 65).

The hearing was conducted on April 13, 2009. William Noland, General Superintendent of Transportation for Respondent, was the hearing officer. His duties include conducting formal investigations pursuant to the CBA. (Tr. 408). Noland's role as a hearing officer is to ensure that the investigation is held orderly, to develop a transcript that can be read after the investigation, to assure that the hearing is fair and impartial, to rule on objections, and to accept or reject evidence. His role is not to decide fault or to impose disciplinary penalties. (Tr. 412). Noland testified that no person from the BLET ever asked to postpone the hearing. (Tr. 417).

Complainant was represented at the hearing by Biscikowski and John Knaggs, vice-chairman of the BLET. (Tr. 89, 90, 416). At the outset of the hearing Complainant was asked by Noland if he was ready to proceed. Noland testified that the typical response he receives to that question is "no," but here Complainant responded that he did not know how to answer, as he was unsure because of "his diagnosed medical condition." Complainant told Noland that he had requested a postponement through his Union representative. Nolan took a short recess and discussed with Complainant's Union representatives whether they had requested a postponement. Noland testified that he ascertained from the Union representatives that they had not requested a postponement, and further they were not requesting a continuance then or objecting to continuing the proceeding. (Tr. 424; CX 1 at 16). When Noland went back on the record after the recess, he asked Complainant if he had any medical documentation of memory loss or medications that would affect his testimony. (CX 1 at 17). Complainant showed him a medical report diagnosing "concussion with no loss of consciousness." Noland observed that the report did not mention memory loss, and if Complainant wanted a postponement it was his responsibility to produce documents justifying it. (Tr. 426; CX 1 at 17). Consequently, Noland proceeded with the hearing.

Complainant testified at the hearing here that he could not adequately produce evidence on his behalf in the investigatory hearing because of his medical condition. (Tr. 73). In contrast, Noland testified that he observed Complainant's participation in the hearing and found him to be

capable of answering questions and asking questions of witnesses, as well as listening to testimony and reviewing exhibits. (Tr. 429).

Noland testified that his post-hearing protocol is to put together a summary of the investigation, written at times and verbal at times. In this instance he doesn't recall if his summary was verbal or written. He also does not recall who he submitted it to, it may have been William Albritton, Superintendent of Respondent's Detroit zone, or the assistant superintendent. (Tr. 288, 435, 436).

Randolph Hempton is the Supervisor of Locomotive Engineers for Respondent's southern region. (Tr. 187). His duties include monitoring the performance of the locomotive engineers, including evaluating their performance in the event of an extraordinary occurrence such as a derailment or separation. (Tr. 221). Hempton was asked to review the Complainant's performance surrounding his April 3, 2009 injury by reviewing the event recorder, known as "black box," or "download," on the locomotive. (Tr. 187, 188). Hempton testified that his regular job duties include pulling and interpreting downloads from locomotives, and that he does so quite frequently. (Tr. 229). He looks at the data carried by the download for anything unusual with such features as speed and brake cylinder pressure. (Tr. 229, 230). Hempton found nothing unusual during Complainant's April 3, 2009 shift, except that on a couple of occasions the independent and automatic brakes were used at the same time. This made no sense to him since the automatic brakes would be ineffective except to raise independent air pressure as the practice at Flat Rock was to not put air in cars. (Tr. 203, 232-233, 279). Hempton's review included riding the same locomotive that was used by Complainant at Flat Rock on three occasions over a three day period to check for anything unusual, such as slack, that didn't show on the download. (Tr. 245, 246, 248). Hempton found nothing unusual during the three occasions he rode the locomotive, and he encountered no excessive slack. Hempton testified that he found no slack of the magnitude that would cause Complainant's injury. (Tr. 255).

Hempton's investigation revealed that Complainant's operation of the locomotive violated two of the Respondent's rules regulating the use of brakes on the locomotive, Air Brake Train and Handling Rules 311 and 325. Rule 311 provides in part that "no element of braking can create more severe slack action than the excessive use of the independent brake." It provides further that when using the independent brake, the engineer should "control brake cylinder pressure to prevent excessive slack action and high in-train forces, and to avoid overheating and/or sliding the locomotive wheels." The Rule provides an exception in the event of "emergency braking necessary to protect life or property." In such situations "use of maximum available braking effort may be required." Hempton found that Complainant violated Rule 311 by failing to prevent excessive slack action. He considered the emergency exception, but found that it wouldn't have been necessary because there were no instances when the emergency brake was used. (Tr. 208, 237). Rule 325 provides that "use of the automatic brake to build excessive independent brake cylinder pressure is prohibited." Hempton testified that Complainant violated Rule 325 when he used the independent brake and the automatic brake at the same time, since such usage causes wheel slide which can damage wheels and rails. (Tr. 249, 274, 279, 280; CX 1 at 75, 78, 79).

Superintendent William Albritton's responsibilities in April, 2009 included the Flat Rock yard, and his duties included deciding discipline under the CBA. He was responsible for deciding if any rules were broken and if any discipline should be levied as a result of Complainant's April 3, 2009 injury. (Tr. 291). Albritton decided that Complainant's employment should be terminated. Consequently he issued to Complainant a letter of "Dismissal from Grand Trunk Railroad Company in All Capacities" dated May 6, 2009. Albritton testified that he decided to terminate Complainant's employment as a result of Complainant's violation of the two air brake train handling rules and Complainant's work history. His decision was based on his review of the transcript of the investigatory hearing held by Nolan on April 13, 2009, as well as the exhibits admitted during the proceeding, and his personal knowledge and experience. (Tr. 293, 311, 312, 348.) Albritton's finding that Complainant violated the two train air brake handling rules was based on Complainant's testimony of excessive slack; the testimony of the conductor at the investigatory hearing that he noticed nothing unusual and was not aware of anything wrong with the switching the day of the incident; and Hempton's testimony that the event recorder showed violations of Rules 311 and 325. (Tr. 350-354; CX 1 at 49-52). Albritton's decision to terminate Complainant included consideration of his work history where "[Complainant] had lots of issues throughout his career, and sometimes you just have to say enough's enough, or for the benefit of everything and everyone." (Tr. 359).

DISCUSSION & CONCLUSIONS OF LAW

FRSA prohibits railroad employers from disciplining or otherwise discriminating against employees who engage in certain enumerated protected activities. As stated at 49 U.S.C. §20101, FRSA was enacted for the purpose of promoting safety in every area of railroad operations and reducing railroad-related accidents and incidents.

I. *Election of Remedies*

Respondent contends that Complainant's complaint should be dismissed based on the doctrine of election of remedies. Respondent argues that the doctrine precludes Complainant from challenging the merits of his dismissal under both the employee protection provisions of the Federal Rail Safety Act and under the CBA provisions of the Railway Labor Act.

The Administrative Review Board (Board) recently issued a decision considering this issue. The Board in *Mercer v. Union Pacific Railroad Co*., ARB No. 09-121; ALJ No. 2008-FRS-004 (ARB September 29, 2011) interpreted the employee protection provisions at 49 U.S.C.A. § 20109(f) to permit whistleblower claims to proceed concurrent with collective bargaining grievance procedures. The Board reasoned that allowing the claims to proceed concurrent is consistent with the FRSA's plain meaning and comports with the Supreme Court's tenet that "a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss,* 523 U.S. 26, 36 (1998). The Board concluded that the employee protection provisions of the FRSA reflect Congress' intent that railroad employees not be limited in pursuing their rights under the whistleblower statute despite also enforcing their contractual rights in arbitration.

In light of the Board's decision in *Mercer v. Union Pacific Railroad Co*., *supra,* the Respondent's request that this claim be dismissed based on election of remedies is denied.

II. *Applicable Provisions of FRSA*

Complainant alleges that Respondent violated § 20109(a)(4), which provides:

> A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—
>
> **(4)** 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).

III. *Elements of FRSA Violation & Burdens of Proof*

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) his employer knew that he engaged in the protected activity; (4) he suffered an unfavorable personnel action; and (5) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR- 11, slip opinion at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR 21, and thus FRSA, means to "prove by a preponderance of the evidence." *See Peck v. Safe Air Int'I, Inc.,* ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121 (b)(2)(B)(iii)(iv).

The Secretary's Findings in OSHA's Findings and Order dated August 20, 2010, include a finding that Respondent is a person within the meaning of 49 U.S.C. § 20109, as Respondent is a transportation company that offers integrated transportation services, rail, intermodal, trucking, freight forwarding, warehousing and distribution, with a principal place of business in Quebec and an office in Flat Rock, Michigan. (Tr. 14-15). Also, Albritton testified to Respondent's

traffic in interstate commerce. (Tr. 324, 325). Respondent did not object to OSHA's finding, and no evidence to the contrary was introduced at the hearing. Thus, it is deemed that Respondent is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA.

As outlined in the post-hearing briefs of the parties, the issue to be decided is whether Complainant's reporting of a work-related injury on April 3, 2009, was a contributing factor in Respondent's decision to terminate his employment.

A. Protected Activity

By its terms, FRSA defines protected activities 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 readily establishes that Complainant engaged in protected activity under § 20109(a)(4) by notifying Respondent of the work-related injury that he sustained on April 3, 2009.

B. 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). There is no question that the person responsible for terminating Complainant's employment, Superintendent William Albritton, was aware of Complainant's protected activity. Albritton testified that it was his decision to terminate Complainant's employment, and he reviewed the transcript of the April 13, 2011 formal hearing which included Complainant's testimony about the injury and his reporting of it. (Tr. 291, 292, 311, 312, CX 1 at 89-95). Thus, Respondent had knowledge of Complainant's protected activity.

C. Unfavorable Personnel Action

By its terms, FRSA explicitly prohibits employers from suspending employees who engage in protected activity. The parties do not dispute and the evidence establishes that Complainant was subjected to adverse employment action when he was dismissed from employment with Respondent by letter dated May 6, 2009. (CX 2).

D. Contributing Factor

Complainant's burden is to prove by a preponderance of the evidence that his reporting of his injury was a contributing factor in Respondent's decision to terminate his employment. 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." *See Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov 30, 2006).

Complainant asserts that he was charged with rules violations and dismissed because he reported his injury. In support of his argument that Respondent acted with retaliatory intent, Complainant contends that: 1) Respondent failed to prove the charges it levied against Complainant but terminated him anyway; 2) Respondent's only explanation for why it terminated Complainant were for rule violations outside the parameters defined in the investigatory hearing; and 3) Respondent denied Claimant's request for a postponement of his investigatory hearing and failed to follow its own protocol in ensuring a fair hearing was completed on April 13, 2009. (Comp. brief, p.2). Conversely, Respondent maintains that Complainant was dismissed because he violated the Respondent's Air Brake and Train Handling Rules, and had a poor work discipline history.

The 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)).

Investigatory Hearing

Complainant submits that the preponderance of the evidence shows that Respondent retaliated against him "by not granting him an investigation continuance which ultimately led to his dismissal from Employer's employment." (Comp. brief p. 31). Complainant argues that due process and fairness required that the investigatory hearing held by Noland be postponed, and the failure to postpone the hearing can only be explained by retaliatory animus. Complainant testified that he desired a postponement because he was in no condition to represent himself because of memory problems stemming from the April 3, 2009 injury. (Tr. 65).

Noland presided over the hearing. He testified that he was not presented with a request for a postponement prior to the hearing, and he was unaware that Complainant wanted a postponement until after the start of the hearing. When Noland asked Complainant if he was ready to proceed, Complainant responded that he did not know how to answer, as he was unsure because of "his diagnosed medical condition." Complainant told Noland that he had requested a postponement through his Union representative. Nolan took a short recess and discussed with Complainant's Union representatives, Brian Biscikowski, local chairman of the BLET, and John Knaggs, vice-chairman of the BLET. Noland learned that the Union representatives had not requested a postponement, and further that they were not requesting a continuance then, and that they did not object to continuing the proceeding. (Tr. 424; CX 1 at 16). When Noland went back on the record after the recess, he asked Complainant if he had any medical documentation of memory loss or of medications that would affect his testimony. (CX 1 at 17). Complainant showed him a medical report diagnosing "concussion with no loss of consciousness." Noland noted that the report did not mention memory loss, and that if Complainant wanted a

postponement it was his responsibility to produce documents justifying it. (Tr. 426; CX 1 at 17). Consequently, Noland proceeded with the hearing. Complainant asserts that he could not adequately produce evidence on his behalf in the investigatory hearing because of his medical condition. (Tr. 73). However, Noland testified that he observed Complainant's participation in the investigatory hearing and found him to be capable of answering questions, asking questions of witnesses, as well as listening to testimony and reviewing exhibits. (Tr. 429).

By letter dated April 6, 2009, Complainant was notified that he was placed on indefinite leave pursuant to the Family/Medical Leave Act (FMLA) as a result of the April 3, 2009 injury. (CX 5). Complainant argues that the hearing should not have proceeded in light of his status on FMLA. Noland agreed during his testimony that one should not have to appear at an investigatory hearing if he is on leave under the FMLA, unless he agrees to appear. (Tr. 434). However, Complainant did not raise the FMLA status at the hearing and Noland was not otherwise aware of it. (*Id.*) Complainant also argues that Noland placed himself in the position of a medical professional when he proceeded with hearing. However, Noland was not informed of Complainant's physical condition. The only information Noland had was the medical report listing a diagnosis of "concussion with no loss of consciousness." Noland observed that the report did not mention memory loss, and instructed Complainant that if he wanted a postponement of the hearing it was his responsibility to produce documents justifying it. Noland testified further that if Complainant had asked for a postponement to retrieve documents supporting a memory loss, he would have granted the request. (Tr. 427).

It is determined that Noland's decision to proceed with the hearing was not out of any retaliatory intent toward Complainant but rather because he did not credit Complainant's assertion that he was unable to proceed. Noland told Complainant during the investigatory hearing that he was wary of continuing with the hearing in light of Complainant's claim of memory loss, and he took a recess to consider the matter. He took into consideration that he received no requests for postponement prior to the hearing, and no requests from Complainant's representatives during the hearing. He asked for documentation of Complainant's condition, and when the documentation did not mention memory loss, he decided to proceed with the hearing. (Tr. 419-429; CX1 at 11, 12). As the hearing progressed Noland observed Complainant's participation in the hearing and found him to be capable of answering questions, asking questions of witnesses, as well as listening to testimony and reviewing exhibits. (Tr. 429).

Complainant also contends that Albritton should have rejected the transcript of the investigatory hearing, and conducted another hearing at later date to ensure fairness. Albritton's decision to dismiss Complainant was based to a large extent on the testimony at the investigatory hearing. Albritton testified that if he had presided over the hearing, he might not have proceeded after listening to Complainant's assertion of memory problems, but that after a review of the transcript he concluded that all the proper procedures were followed by the hearing officer, and that Complainant had been given a full, fair and impartial hearing. (Tr. 301, 368). He also relied on Noland's judgment in continuing with the hearing. Specifically, as he read through the transcript, he found significant detail present, and he agreed with Noland that it was incumbent on Complainant to bring forth documentation to the hearing to substantiate a claim of memory loss. (Tr. 305).

Complainant offered the testimony of David Hiatt. Hiatt is retired from the positions of vice chairman and later general chairman of the local switchman's union, the UTU. (Tr. 150). The UTU represents primarily trainman, conductors, brakemen and switchman, and it represented locomotive engineers prior to 2002. (Tr. 151). Hiatt's duties included representing employees represented by the UTU in discipline proceedings. (Tr. 152). Hiatt testified that in his experience requests for postponements of these types of investigatory hearings are granted 99% of the time. Hiatt's opinion is entitled to little weight as he offered no documentary or statistical support. Further, he did not know the hearing officer's reasons for denying the postponement in this case.

Noland decided to proceed with the hearing after taking a short recess and reviewing the information before him, which included no request for postponement prior to hearing, no request for postponement at the hearing by Complainant's representative, and no documentation to support Complainant's claimed condition. There is nothing of record to indicate that Noland lacked a genuine belief that Complainant was competent to proceed. Whether he was correct or incorrect in his decision to proceed, or whether another person would have made a different decision is not determinative. The sole issue is whether Noland continued with the hearing as retaliation for Complainant's reporting of the April 3, 2009 injury. See *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir.1994) (internal citation omitted) ("…at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"). Complainant has not shown such discriminatory intent.

Rule Violations

Albritton based his dismissal of Complainant on the violation of two of the railroad's rules regulating use of brakes on the locomotive, Air Brake Train and Handling Rules 311 and 325. His finding that those rules were violated resulted primarily from his review of the testimony by Randolph Hempton, the Supervisor of Locomotive Engineers, at the investigatory hearing. Hempton testified that his investigation, which included review of the locomotive's black box, and him riding in the locomotive, revealed that Complainant violated Rules 311 and 325 in his operation of the locomotive. Rule 311 provides in part that "no element of braking can create more severe slack action than the excessive use of the independent brake." It provides further that when using the independent brake, the engineer shall "control brake cylinder pressure to prevent excessive slack action and high in-train forces, and to avoid overheating and/or sliding the locomotive wheels." Hempton found that Complainant violated Rule 311 by failing to prevent excessive slack action, and that the emergency exception to Rule 311 providing an exception in the event of "emergency braking necessary to protect life or property" didn't apply because there were no instances when the emergency brake was used. (Tr. 208, 237). Rule 325 provides that "use of the automatic brake to build excessive independent brake cylinder pressure is prohibited." Hempton testified that Complainant violated the Rule when he used the independent brake and the automatic brake at the same time as such use causes wheel slide which can damage wheels and rails. (Tr. 249, 274, 279, 280; CX 1 at 75, 78, 79).

Complainant does not deny that he used the independent and automatic brakes at the same time. (Tr. 75). Rather, he contends that his use of the brakes falls within the exception permitting the use of maximum braking if necessary to protect life or property. He testified that

he needed to use the emergency braking because his conductor had given him a "short car count," that is, the conductor initially told him he had ten cars to drop but then quickly changed it to three cars, which required a stop much quicker than anticipated. (Comp. brief p. 18; Tr. 75). However, Arbritton's review of the brakeman's testimony showed that a short car count was not a reason to use emergency braking, but rather the brakeman, Kline, gave a shorter car count because Complainant wasn't reacting to the count he was given. Kline explained:

> Actually, one, one or two times I did. When you're shoving over the top of a hill and you're going down into the bowl, you give him car counts. And then it's a speed that you're going. You give him like, say, 20, and if he doesn't react, you know, within half where, you know, within, let's say, if I've got a 20-car count, if he doesn't react in, let's say, eight or nine, then I shorten them up to ease it up because I don't want to go through the other end. I need to get the speed slower.
>
> I'm getting to the point where I'm getting nervous. I don't know if he has control over it or not, so I will shorten them up at that time.

(Tr. 376). Thus, Arbritton considered that the brakeman was talking Complainant down with car counts because he was not getting any reaction. Arbritton also considered the conductor and brakeman's testimony during the investigatory hearing that there was nothing out of the usual that occurred that shift. (Tr. 350). Albritton's finding that Complainant violated the Air Brake Train and Handling Rules is supported by the record, as is his finding that the use of the brakes was not an emergency action that falls within the exception to Rule 325.

Nevertheless, Complainant contends that Respondent's finding of rule violations was pretextual, as he argues the finding was a pretext to allow Respondent to justify its retaliation against Claimant for filing the injury report. Complainant points to pretext by observing that Respondent's notice of investigation letter did not reference any rule violations and Respondent failed to show that the rule violations were the cause of the excessive slack.

The notice instructs Complainant that he is to attend a formal investigation on April 13, 2009, and informs him that "[t]he investigation is being held to develop the facts and to determine your responsibility, if any, in connection with the personal injury you sustained at about 2130 hours, April 3, 2009 while switching on the Hump Lead at Flat Rock, Michigan." (CX 4). Complainant argues that since the notice of investigation did not provide notice that violations of Rules 311 and 325 would be considered in the investigation, the sole purpose of finding such violations could only be to,

> improperly boot-strap the alleged stand alone violations to the injury case so it could terminate Complainant. It investigated Complainant for his 'responsibility in connection' to an injury, then fires him for violation of company rules unrelated to the injury.

(Comp. brief p. 25).

Complainant's argument is not persuasive. Initially, Complainant is correct that the stated purpose of the investigation was to determine the cause of the injury. However, that does not preclude the stated purpose being satisfied by a finding that Complainant's control of the brake system violated Respondent's braking rules and caused excessive slack. Also, Complainant is correct that Albrittron could not determine whether excessive slack action occurred at the time Complainant violated the braking rules, and could not determine whether Complainant's injury occurred at the time Complainant violated those rules by his use of the brakes. However, Albritton considered that both rules were designed to prevent excessive slack action, the condition to which Complainant attributed his injury. Complainant's argument demands too much from Respondent. Complainant's suggestion that Respondent's investigation was pretextural because it failed to tie the precise moment when Complainant wrongly used the brakes to the moment when he was injured is rejected.

As previously stated herein, Respondent's determination that Complainant violated the braking rules is supported by the record. Further, it was reasonable for Respondent's investigation to focus on whether Complainant's actions caused or contributed to the excessive slack action and his injury, and to focus on whether violations of rules designed to preclude excessive slack action occurred. To discredit an employer's proffered reason for taking an adverse personnel action, the complainant "cannot simply show that the employer's decision was wrong or mistaken since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Fuentes*, 32 F.3d at 765 (3d Cir.1994). Rather, the inquiry here is limited to whether Respondent gave an honest explanation of its behavior. It does not "sit as a super-personnel department that reexamines the merits or even the rationality of an entity's business decisions." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 332 (3d Cir. 1995) (citations omitted); *Dister v. Continental Group, Inc.*, *Mesnick v. Gen. Elec. Co.*, 57 FEP Cases 822 (1st Cir. 1991).

Respondent's notice of dismissal stated that Complainant's dismissal was based not only on the rule violations but also on his past discipline record. Albrittron was asked during his testimony why Complainant was dismissed rather than suspended, a lesser discipline. He answered: "I was going by his work history. He's had lots of issues throughout his career, and sometimes you have to say enough's enough, or for the benefit of everything and everybody." (Tr. 358, 359). Albrittron's testimony referenced an incident where Complainant received a six month suspension for "[m]aking false entries on your timeslip and being dishonest while working as a crew member on assignment…on January 6, 2005." (RX 6). Albritton testified:

> Well, thinking about dishonest and falsifying a time slip. I mean to me that's a serious, well, all rule violations are serious, but I mean, dishonest, it's hard to get trust when you know that someone is dishonest.

(Tr. 359).

Albritton also considered five other incidents where Complainant was subject of discipline for rule violations in his decision to dismiss Complainant. (Tr. 86, 87, 94-106, 358, 359; RX 1, 2, 4-11).

Complainant also supports his contention that Respondent's notice of dismissal was retaliatory by arguing that "[s]ubsequent to 2002, a clear change occurred with respect to the practices of the Respondent wherein if an injury occurred it nearly always resulted in an investigation hearing and a change of a rule violation relating to the injury." (Comp. brief p. 17). In support of his argument, Complainant offers the testimony of David Hiatt that within the last five or six years Respondent has more aggressively pursued investigations and discipline in cases where injuries occurred and formal hearings were held. (Tr. 162, 163). Initially, Hiatt's testimony that Respondent's discipline policy has changed is speculative as he offers no foundation for the testimony. Secondly, a policy of aggressively pursuing discipline where an injury occurs is not essentially retaliatory. In fact, there could be good business reasons to aggressively pursue discipline where violations occur and injuries result. Hiatt also testified that "the general consensus [of employees at Respondent's railroad] seems to be that if an employee is injured and reports that injury, they are going to be subject to at least some discipline even up to dismissal." (Tr. 171). Hiatt's testimony as to his perception of the general consensus of the employees is rejected as having no value in determining Respondent's intent, as his perception is irrelevant and completely without any basis. Even if Hiatt's perception of a general consensus is accurate, there is no support for a finding that any general consensus was based on a credible threat of retaliatory intent. In contrast, Albritton testified that Respondent does not treat rule breakers who report injuries any differently from rule breakers who do not report an injury. (Tr. 363). He testified to the occurrences of incidents where employees reported injuries but did not become subject to a formal investigation. (Tr. at 363, 364).

In sum, Complainant's argument that Respondent's notice of dismissal was based on retaliatory intent is not persuasive. The evidence does not show that the decision to dismiss Complainant was motivated by Complainant's reporting of his injury. First, Albritton testified that Complainant's suffering an injury on April 3, 2009, and reporting the injury was not a factor in the decision to dismiss him. (Tr. 360). Second, Complainant's allegation that the fact that the investigatory hearing was not postponed is evidence of retaliatory intent is rejected because the hearing officer's reasons for proceeding were reasonable under the circumstances, that is, he considered Complainant capable of proceeding with the hearing. Third, it was reasonable for Albritton to find that the investigatory hearing established violations of the Train Handling Brake Rules. Finally, there is no support in the record whatsoever for Complainant's allegation that Respondent's discipline policy changed in recent years to retaliate against and discipline employees who report on the job injuries.

ORDER

Complainant has failed to establish the required elements of his claim. Accordingly, the relief sought by Complainant is DENIED.

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THOMAS M. BURKE
Administrative Law Judge

NOTICE OF REVIEW: Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.